NORTH CAROLINA REPORTS

VOLUME 370

SUPREME COURT OF NORTH CAROLINA

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CITE THIS VOLUME

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THE SUPREME COURT

OF

NORTH CAROLINA

Chief Justice

MARK D. MARTIN

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BARBARA A. JACKSON
CHERI BEASLEY
SAMUEL J. ERVIN, IV
MICHAEL R. MORGAN

Former Chief Justices

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I. BEVERLY LAKE, JR.
SARAH PARKER

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G. K. BUTTERFIELD, JR.
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GEORGE L. WAINWRIGHT, JR.
EDWARD THOMAS BRADY
PATRICIA TIMMONS-GOODSON
ROBERT N. HUNTER, JR.
ROBERT H. EDMUNDS, JR.

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J. Bryan Boyd[1]
Amy L. Funderburk[2]

Interim Clerk

Christie S. Cameron Roeder[3]

Librarian

Thomas P. Davis

[1] Resigned 13 October 2017. [2] Sworn in 1 March 2018. [3] Sworn in 16 October 2017. Resigned 28 February 2018.

ADMINISTRATIVE OFFICE OF THE COURTS

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Assistant Director

DAVID F. HOKE

OFFICE OF APPELLATE DIVISION REPORTER

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KIMBERLY WOODELL SIEREDZKI

JENNIFER C. PETERSON

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
1	Jerry R. Tillett	Manteo
	J. Carlton Cole	Hertford
2	Wayland Sermons	Washington
3A	Marvin K. Blount, III	Greenville
	Jeffery B. Foster	Greenville
6A	Alma L. Hinton	Roanoke Rapids
6B	Cy A. Grant, Sr.	Ahoskie
7A	Quentin T. Sumner	Rocky Mount
7BC	Milton F. Fitch, Jr.	Wilson
	Walter H. Godwin, Jr.	Tarboro
	Second Division	
3B	Benjamin G. Alford	New Bern
	John E. Nobles, Jr.	Morehead City
	Joshua W. Wiley[1]	New Bern
4A	W. Douglas Parsons[2]	Clinton
4B	Charles H. Henry	Jacksonville
5	Jay D. Hockenbury	Wilmington
	Phyllis M. Gorham	Wilmington
	R. Kent Harrell[3]	Burgaw
8A	Paul L. Jones[4]	Kinston
	Imelda J. Pate[5]	Kinston
8B	Arnold O. Jones, III[6]	Fremont
	William W. Bland[7]	Goldsboro
	Third Division	
9	Robert H. Hobgood	Louisburg
	Henry W. Hight, Jr.	Henderson
9A	W. Osmond Smith, III	Semora
10	Donald W. Stephens[8]	Raleigh
	Howard E. Manning, Jr.[9]	Raleigh
	Michael R. Morgan[10]	Raleigh
	Paul C. Gessner[11]	Raleigh
	Paul C. Ridgeway[12]	Raleigh
	G. Bryan Collins, Jr.	Raleigh
	A. Graham Shirley	Raleigh
	Rebecca W. Holt[13]	Raleigh
	Vinston M. Rozier[14]	Raleigh
14	Orlando F. Hudson, Jr.	Durham
	James E. Hardin, Jr.	Hillsborough

DISTRICT	JUDGES	ADDRESS
	Elaine M. O'Neal	Durham
	Michael O'Foghludha	Durham
15A	Wayne Abernathy[15]	Burlington
	James Roberson[16]	Burlington
	D. Thomas Lambeth[17]	Burlington
15B	Carl R. Fox	Chapel Hill
	R. Allen Baddour	Chapel Hill
	Fourth Division	
11A	C. Winston Gilchrist	Lillington
11B	Thomas H. Lock	Smithfield
12	James F. Ammons, Jr.	Fayetteville
	Claire Hill	Fayetteville
	Gale M. Adams	Fayetteville
	Mary Ann Tally	Fayetteville
13A	Douglas B. Sasser	Whiteville
13B	Ola M. Lewis	Southport
16A	Richard T. Brown	Laurinburg
	Tanya T. Wallace	Rockingham
16B	Robert F. Floyd, Jr.	Fairmont
	James Gregory Bell	Lumberton
19D	James M. Webb	Southern Pines
	Fifth Division	
17A	Edwin Graves Wilson, Jr.	Eden
	Stanley L. Allen	Sandy Ridge
17B	A. Moses Massey[18]	Mount Airy
	Andy Cromer[19]	King
	Angela B. Puckett[20]	Westfield
18	Lindsay R. Davis, Jr.	Greensboro
	John O. Craig, III	High Point
	R. Stuart Albright	Greensboro
	Susan Bray	Greensboro
	Patrice A. Hinnant	Greensboro
19B	Vance Bradford Long	Asheboro
21	L. Todd Burke	Winston-Salem
	David L. Hall	Winston-Salem
	Eric C. Morgan	Kernersville
	Richard S. Gottlieb	Winston-Salem
23	Michael Duncan	Wilkesboro
	Sixth Division	
19A	Martin B. McGee	Concord
19C	Anna Mills Wagoner	Salisbury
20A	Kevin M. Bridges	Oakboro
20B	Christopher W. Bragg	Monroe
	Jeffery K. Carpenter	Wadesboro
22A	Joseph Crosswhite	Statesville
	Julia Lynn Gullett	Statesville

DISTRICT	JUDGES	ADDRESS
22B	Mark E. Klass	Lexington
	Theodore S. Royster, Jr.[21]	Lexington
	Lori Hamilton[22]	Mocksville
	Seventh Division	
25A	Robert C. Ervin	Morganton
	Daniel A. Kuehnert	Morganton
25B	Nathaniel J. Poovey	Newton
	Gregory R. Hayes	Hickory
26	W. Robert Bell	Charlotte
	Yvonne Mims Evans[23]	Charlotte
	Linwood O. Foust[24]	Charlotte
	Eric L. Levinson	Charlotte
	Hugh Lewis	Charlotte
	Lisa C. Bell	Charlotte
	Carla Archie	Charlotte
27A	Jesse B. Caldwell, III	Gastonia
	Robert T. Sumner	Gastonia
27B	Forrest Donald Bridges	Shelby
	W. Todd Pomeroy	Lincolnton
	Eighth Division	
24	Gary Gavenus	Burnsville
	R. Gregory Horne	Boone
28	Alan Z. Thornburg	Asheville
	Marvin Pope	Asheville
29A	J. Thomas Davis	Forest City
29B	Mark E. Powell	Hendersonville
30A	William H. Coward	Highlands
30B	Bradley B. Letts	Hazelwood

SPECIAL JUDGES

Louis A. Bledsoe, III	Charlotte
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James L. Gale[26]	Greensboro
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Kendra D. Hill[28]	Raleigh
Jeffrey P. Hunt	Brevard
Gregory P. McGuire	Raleigh
Michael L. Robinson	Winston-Salem
Casey M. Viser	Charlotte
Ebern T. Watson, III	Wilmington
Reuben F. Young[29]	Raleigh

JUDGES	ADDRESS

EMERGENCY JUDGES

Sharon T. Barrett	Asheville
Beverly T. Beal	Lenoir
Michael E. Beale	Rockingham
Richard D. Boner[30]	Charlotte
C. Preston Cornelius	Mooresville
W. Russell Duke[31]	Greenville
James L. Gale[32]	Greensboro
Thomas D. Haigwood	Greenville
A. Robinson Hassell	Greensboro
Clarence E. Horton, Jr.	Kannapolis
Robert F. Johnson	Burlington
Paul L. Jones[33]	Kinston
Timothy S. Kincaid	Newton
Charles C. Lamm, Jr.[34]	Terrell
Russell J. Lanier, Jr.[35]	Wallace
W. David Lee	Monroe
A. Moses Massey[36]	Mount Airy
Jerry Cash Martin	Pilot Mountain
James W. Morgan	Shelby
Calvin Murphy	Charlotte
J. Richard Parker	Manteo
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John W. Smith	Raleigh
Ronald E. Spivey	Winston-Salem
Ronald L. Stephens	Durham
Kenneth C. Titus	Durham
Gary E. Trawick, Jr.[37]	Burgaw
Joseph E. Turner	Greensboro
William Z. Wood, Jr.	Lewisville

RETIRED/RECALLED JUDGES

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J. B. Allen, Jr.[38]	Burlington
Henry V. Barnette, Jr.	Raleigh
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Frank R. Brown	Tarboro
Stafford G. Bullock	Raleigh
H. William Constangy	Charlotte
B. Craig Ellis	Laurinburg
Larry G. Ford	Salisbury
Marvin K. Gray[39]	Charlotte
Zoro J. Guice, Jr.	Hendersonville
Knox V. Jenkins[40]	Four Oaks
John R. Jolly, Jr.[41]	Raleigh

JUDGES	ADDRESS
Robert D. Lewis	Asheville
Howard E. Manning, Jr.	Raleigh
Julius A. Rousseau, Jr.	Wilkesboro
Thomas W. Seay	Spencer
W. Ervin Spainhour	Concord
James C. Spencer	Burlington
Jack A. Thompson[42]	Fayetteville
Ralph A. Walker, Jr.	Raleigh

[1] Sworn in 1 January 2017. [2] Deceased 24 September 2017. [3] Sworn in 11 December 2017. [4] Retired on 31 December 2016.
[5] Sworn in 1 January 2017. [6] Resigned 31 December 2016. [7] Sworn in 1 January 2017. [8] Retired on 31 October 2017. [9] Retired on 25 July 2015.
[10] Resigned on 31 December 2017. [11] Retired on 31 December 2015. [12] Became Senior Resident on 1 November 2017.
[13] Sworn in 1 January 2017. [14] Sworn in 24 February 2017. [15] Retired on 30 June 2017. [16] Became Senior Resident on 1 July 2017.
[17] Sworn in 14 July 2017. [18] Retired on 31 December 2017. [19] Became Senior Resident on 1 January 2017. [20] Sworn in 1 January 2017.
[21] Retired on 31 December 2017. [22] Sworn in 1 January 2017. [23] Retired on 31 December 2017. [24] Retired on 31 October 2017.
[25] Sworn in 23 December 2016. [26] Retired on 30 September 2016. [27] Sworn in 30 December 2016. [28] Resigned on 31 December 2017.
[29] Resigned on 28 December 2017. [30] Resigned on 22 September 2017. [31] Resigned on 27 July 2017. [32] Sworn in 4 October 2016.
[33] Sworn in 24 April 2017. [34] Deceased 27 March 2016. [35] Deceased 30 June 2017. [36] Sworn in 11 April 2017. [37] Retired on 20 October 2015.
[38] Deceased 27 November 2016. [39] Deceased 7 November 2017. [40] Deceased 9 November 2016. [41] Resigned on 31 December 2017.
[42] Resigned on 24 April 2017.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	Edgar L. Barnes (Chief)	Manteo
	Amber Davis	Wanchese
	Eula E. Reid	Elizabeth City
	Robert P. Trivette	Kitty Hawk
	Meader W. Harris, III	Edenton
2	Michael A. Paul (Chief)	Washington
	Regina Rogers Parker	Williamston
	Christopher B. McLendon	Williamston
	Darrell B. Cayton, Jr.	Washington
3A	David A. Leech (Chief)[1]	Greenville
	Patricia Gwynett Hilburn[2]	Greenville
	G. Galen Braddy	Grimesland
	Brian DeSoto	Greenville
	Lee F. Teague	Greenville
	Wendy S. Hazelton[3]	Greenville
3B	L. Walter Mills (Chief)	New Bern
	Paul M. Quinn	Atlantic Beach
	Karen A. Alexander	New Bern
	Peter Mack, Jr.	New Bern
	W. David McFadyen, III	New Bern
	Clinton Rowe	New Bern
4	Paul A. Hardison (Chief)	Jacksonville
	William M. Cameron, III	Richlands
	Sarah Cowen Seaton	Jacksonville
	Carol Jones Wilson	Kenansville
	Henry L. Stevens, IV	Warsaw
	James L. Moore	Jacksonville
	William B. Sutton	Clinton
	Michael C. Surles[4]	Jacksonville
5	J. H. Corpening, II (Chief)	Wilmington
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	Jeffrey Evan Noecker	Wilmington
	Chad Hogston	Wilmington
	Robin W. Robinson	Wilmington
	Lindsey L. McKee	Wilmington
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	W. Turner Stephenson, III	Roanoke Rapids
	Teresa R. Freeman	Roanoke Rapids
	Vershenia B. Moody	Windsor
7	William Charles Farris (Chief)	Wilson
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	Pell C. Cooper	Rocky Mount
	John J. Covolo	Rocky Mount
	Anthony W. Brown	Spring Hope
	Wayne S. Boyette	Tarboro
	Elizabeth Freshwater Smith	Wilson

DISTRICT	JUDGES	ADDRESS
8	David B. Brantley (Chief)	Goldsboro
	R. Leslie Turner	Pink Hall
	Elizabeth A. Heath	Kinston
	Charles P. Gaylor, III	Goldsboro
	Ericka Y. James	Goldsboro
	Annette W. Turik[5]	Kinston
	Curtis Stackhouse[6]	Goldsboro
9	J. Henry Banks[7]	Henderson
	John W. Davis (Chief)[8]	Louisburg
	Carolyn J. Yancey	Creedmoor
	Amanda Stevenson	Oxford
	Adam S. Keith	Louisburg
	Caroline S. Burnette[9]	Henderson
	Benjamin S. Hunter[10]	Louisburg
9A	Mark E. Galloway (Chief)	Roxboro
	L. Michael Gentry[11]	Pelham
	John H. Stultz, III[12]	Roxboro
10	Robert Blackwell Rader (Chief)	Raleigh
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	Craig Croom	Raleigh
	Debra Ann Smith Sasser	Raleigh
	Vinston M. Rozier, Jr.[13]	Raleigh
	Kris D. Bailey	Cary
	Lori G. Christian	Raleigh
	Christine M. Walczyk	Raleigh
	Eric Craig Chasse	Raleigh
	Jacqueline L. Brewer[14]	Apex
	Anna Elena Worley	Raleigh
	Ned Wilson Mangum	Raleigh
	Margaret Eagles	Raleigh
	Keith O. Gregory	Raleigh
	Michael J. Denning	Raleigh
	Louis B. Meyer, III	Raleigh
	Daniel J. Nagle	Raleigh
	Vartan A. Davidian	Raleigh
	Jefferson G. Griffin	Raleigh
	Sam S. Hamadani[15]	Raleigh
	Ashleigh P. Dunston[16]	Raleigh
11	Jacquelyn L. Lee (Chief)	Smithfield
	Jimmy L. Love, Jr.	Sanford
	O Henry Willis, Jr.	Dunn
	Addie M. Harris-Rawls	Clayton
	Resson O. Faircloth, II	Erwin
	Robert W. Bryant, Jr.	Selma
	R. Dale Stubbs[17]	Clayton
	Paul A. Holcombe	Smithfield
	Caron H. Stewart	Smithfield
	Mary H. Wells	Smithfield
	Joy A. Jones	Smithfield
	Jerry F. Wood[18]	Selma
12	Robert J. Stiehl, III (Chief)	Fayetteville
	Edward A. Pone	Parkton

DISTRICT	JUDGES	ADDRESS
	Talmage Baggett	Fayetteville
	David H. Hasty	Fayetteville
	Laura A. Devan[19]	Fayetteville
	Toni S. King	Fayetteville
	Lou Oliveria	Fayetteville
	Cheri Siler-Mack	Fayetteville
	Stephen C. Stokes	Fayetteville
	April M. Smith	Fayetteville
	Tiffany M. Whitfield[20]	Fayetteville
13	Jerry A. Jolly[21]	Tabor City
	Marion R. Warren[22]	Ash
	William F. Fairley	Southport
	Scott Ussery (Chief)[23]	Elizabethtown
	Pauline Hankins	Tabor City
	Willie Fred Gore	Whiteville
	Jason C. Disbrow	Southport
	C. Ashley Gore[24]	Whiteville
14	Marcia H. Morey[25]	Durham
	James T. Hill (Chief)[26]	Durham
	William Andrew Marsh III[27]	Durham
	Brian C. Wilks	Durham
	Patricia D. Evans	Durham
	Doretta Walker	Durham
	Fred Battaglia, Jr.	Durham
	Shamieka L. Rhinehart[28]	Durham
	Amanda L. Maris[29]	Durham
15A	Bradley Reid Allen, Sr. (Chief)	Burlington
	David Thomas Lambeth, Jr.[30]	Burlington
	Kathryn W. Overby	Burlington
	Steven H. Messick	Burlington
	Larry D. Brown[31]	Graham
15B	Joseph M. Buckner (Chief)	Chapel Hill
	Charles T. Anderson[32]	Chapel Hill
	Beverly A. Scarlett	Durham
	Lunsford Long[33]	Chapel Hill
	James T. Bryan	Hillsborough
	Samantha Cabe[34]	Chapel Hill
	Sherri T. Murrell[35]	Chapel Hill
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	Lisa D. Thacker	Polkton
	Regina M. Joe	Raeford
	Amanda L. Wilson	Rockingham
	Michael A. Stone	Laurinburg
	Christopher W. Rhue	Laurinburg
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	Herbert L. Richardson	Lumberton
	Judith Milsap Daniels	Lumberton
	William J. Moore	Maxton
	Dale G. Desse	Maxton
17A	James A. Grogan (Chief)	Reidsville
	Chris Freeman	Wentworth
	Christine F. Strader	Reidsville

DISTRICT	JUDGES	ADDRESS
17B	Charles Mitchell Neaves, Jr.[36]	Elkin
	Spencer Gray Key, Jr.	Elkin
	Angela B. Puckett[37]	Westfield
	William F. Southern III (Chief)[38]	King
	Marion M. Boone[39]	Dobson
18	H. Thomas Jarrell, Jr. (Chief)	High Point
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	Theresa H. Vincent	Summerfield
	Kimberly Michelle Fletcher	Greensboro
	Angela C. Foster	Greensboro
	Avery Michelle Crump	Browns Summit
	Betty J. Brown	Greensboro
	Jan H. Samet[40]	Greensboro
	Angela B. Fox	Greensboro
	Tabatha Holliday	Greensboro
	David Sherrill[41]	Greensboro
	Randle L. Jones[42]	High Point
	Jonathan G. Kreider[43]	Greensboro
	Lora C. Cubbage[44]	Greensboro
	Mark Cummings[45]	Greensboro
	Tonia A. Cutchin[46]	Greensboro
	William B. Davis [47]	Greensboro
19A	William G. Hamby, Jr. (Chief)	Kannapolis
	Donna G. Hedgepeth Johnson	Concord
	Brent Cloninger	Mount Pleasant
	Christy E. Wilhelm	Concord
	Nathaniel E. Wilhelm[48]	Concord
19B	Jayrene Russell Maness (Chief)	Carthage
	Lee W. Gavin	Asheboro
	Scott C. Etheridge	Asheboro
	James P. Hill, Jr.	Asheboro
	Donald W. Creed, Jr.	Asheboro
	Robert M. Wilkins	Asheboro
	Steve Bibey	Carthage
19C	Charles E. Brown (Chief)	Salisbury
	Beth Spencer Dixon	Salisbury
	Kevin G. Eddinger	Salisbury
	Roy Marshall Bickett, Jr.	Salisbury
	James Randolph	Salisbury
20A	William Tucker (Chief)	Albemarle
	John R. Nance	Albemarle
20B	N. Hunt Gwyn (Chief)	Monroe
	Joseph J. Williams	Monroe
	William F. Helms	Matthews
	Stephen V. Higdon	Monroe
21	Lisa V. L. Menefee (Chief)	Winston-Salem
	William Thomas Graham, Jr.[49]	Kernersville
	Victoria Lane Roemer	Winston-Salem
	Laurie L. Hutchins	Winston-Salem
	Lawrence J. Fine	Clemmons
	Denise S. Hartsfield	Winston-Salem
	George Bedsworth	Winston-Salem
	Camille D. Banks-Payne	Winston-Salem

DISTRICT	JUDGES	ADDRESS
	David Sipprell	Winston-Salem
	Gordon A. Miller	Winston-Salem
	Theodore Kazakos	Winston-Salem
	Carrie F. Vickery[50]	Winston-Salem
22A	L. Dale Graham (Chief)	Taylorsville
	H. Thomas Church	Statesville
	Deborah Brown	Mooresville
	Edward L. Hendrick, IV	Taylorsville
	Christine Underwood	Olin
22B	Wayne L. Michael (Chief)	Lexington
	Jimmy L. Myers	Advance
	April C. Wood	Lexington
	Mary C. Paul	Thomasville
	Carlton Terry	Advance
	J. Rodwell Penry[51]	Lexington
23	David V. Byrd (Chief)	Wilkesboro
	Jeanie Reavis Houston	Yadkinville
	William Finley Brooks	Wilkesboro
	Robert Crumpton	Wilkesboro
24	Theodore Wright McEntire (Chief)	Spruce Pine
	F. Warren Hughes[52]	Burnsville
	Hal Gene Harrison	Spruce Pine
	Rebecca E. Eggers-Gryder[53]	Boone
	Larry B. Leake[54]	Marshall
25	Buford A. Cherry (Chief)	Hickory
	Sherrie Wilson Elliott	Newton
	Amy Sigmon Walker	Newton
	Robert A. Mullinax, Jr.	Newton
	Mark L. Killian	Hickory
	Clifton H. Smith	Hickory
	David W. Aycock	Hickory
	Wesley W. Barkley	Newton
	Richard S. Holloway	Lenoir
26	Regan A. Miller (Chief)	Charlotte
	Louis A. Trosch, Jr.	Charlotte
	Rickye McKoy-Mitchell	Charlotte
	Becky Thorne Tin	Charlotte
	Christy Townley Mann	Charlotte
	Ronald C. Chapman	Charlotte
	Donnie Hoover	Charlotte
	Paige B. McThenia	Charlotte
	Kimberly Y. Best-Staton	Charlotte
	Charlotte Brown-Williams[55]	Cornelius
	Elizabeth Thornton Trosch	Charlotte
	Jena P. Culler	Charlotte
	Tyyawdi M. Hands	Charlotte
	Karen Eady-Williams	Charlotte
	Donald Cureton, Jr.	Charlotte
	Sean Smith	Charlotte
	Matt Osman	Charlotte
	Gary Henderson	Charlotte
	David Strickland	Charlotte
	Alicia D. Brooks	Charlotte

DISTRICT	JUDGES	ADDRESS
	Yolanda M. Trotman[56]	Charlotte
	Aretha V. Blake[57]	Charlotte
	Tracy H. Hewett[58]	Charlotte
27A	John K. Greenlee (Chief)	Gastonia
	Angela G. Hoyle	Belmont
	James A. Jackson	Gastonia
	Michael K. Lands	Gastonia
	Richard Abernethy	Gastonia
	Pennie M. Thrower	Gastonia
	Craig R. Collins	Gastonia
27B	Larry James Wilson (Chief)	Shelby
	K. Dean Black	Denver
	Ali B. Paksoy, Jr.	Shelby
	Meredith A. Shuford	Lincolnton
	Jeanette R. Reeves	Shelby
	Justin K. Brackett[59]	
28	J. Calvin Hill (Chief)	Asheville
	Patricia Kaufmann Young	Asheville
	Julie M. Kepple	Asheville
	Andrea Dray	Asheville
	Ward D. Scott	Asheville
	Edwin D. Clontz	Candler
	Susan Marie Dotson-Smith	Asheville
29A	C. Randy Pool (Chief)	Marion
	Laura Anne Powell	Rutherfordton
	Robert K. Martelle	Rutherfordton
29B	Athena F. Brooks (Chief)	Fletcher
	Thomas M. Brittain, Jr.	Mills River
	Peter Knight	Hendersonville
	Emily Cowan	Hendersonville
30	Richard K. Walker (Chief)	Hayesville
	Monica Hayes Leslie	Waynesville
	Donna Forga	Clyde
	Roy Wijewickrama	Waynesville
	Kristina L. Earwood	Waynesville
	Tessa S. Sellers	Murphy

EMERGENCY JUDGES

Thomas V. Aldridge, Jr.[60]	Ocean Isle Beach
Sherry Fowler Alloway	Greensboro
Charles T. L. Anderson[61]	Chapel Hill
Kyle D. Austin[62]	Pineola
C. Christopher Bean	Edenton
Rebecca W. Blackmore	Wilmington
Joseph A. Blick	Greenville
Robert M. Brady	Lenoir
Jacqueline L. Brewer[63]	Apex
Charlotte Brown-Williams[64]	Cornelius
John B. Carter, Jr.[65]	Lumberton

JUDGES	ADDRESS
Samuel Cathey	Charlotte
Albert A. Corbett, Jr.	Smithfield
Shelly H. Desvousges	Raleigh
Thomas G. Foster, Jr.	Pleasant Green
David K. Fox	Hendersonville
George J. Franks[66]	Fayetteville
Nancy E. Gordon	Durham
Jane Powell Gray	Raleigh
Joyce A. Hamilton	Raleigh
Richlyn D. Holt	Waynesville
Shelly S. Holt	Wilmington
James M. Honeycutt	Lexington
F. Warren Hughes[67]	Burnsville
Jerry A. Jolly[68]	Tabor City
A. Elizabeth Keever	Fayetteville
Wayne G. Kimble[69]	Jacksonville
David Q. LaBarre[70]	Durham
William C. Lawton	Raleigh
David A. Leech[71]	Greenville
William L. Long[72]	Chapel Hill
William A. Marsh[73]	Durham
Harold Paul McCoy, Jr.	Halifax
William G. McIlwain[74]	Wagram
Lawrence McSwain	Greensboro
Charles M. Neaves[75]	Elkin
Thomas R.J. Newbern	Aulander
Theofanis X. Nixon[76]	Charlotte
L. Suzanne Owsley	Hickory
Dennis J. Redwing	Gastonia
Anne B. Salisbury	Cary
J. Larry Senter	Raleigh
Joseph E. Setzer, Jr.	Franklinton
Russell Sherrill III[77]	Raleigh
Catherine C. Stevens[78]	Chapel Hill
William G. Stewart	Wilson
Robert D. Stubbs[79]	Clayton
Leonard W. Thagard	Clinton
Jerry Waddell	Bryson City
Fredrick B. Wilkins, Jr.	Reidsville

RETIRED/RECALLED JUDGES

Claude W. Allen, Jr.	Oxford
Grafton G. Beaman	Elizabeth City
Sarah P. Bailey	Rocky Mount
Chester C. Davis	Winston-Salem
M. Patricia DeVine	Hillsborough
Daniel Fredrick Finch	Oxford
Louis F. Foy, Jr.	Pollocksville
James R. Fullwood	Raleigh
Samuel G. Grimes	Washington

JUDGES	ADDRESS
Lawrence Hammond, Jr.	Asheboro
Jane V. Harper	Charlotte
Joesph J. Harper	Tarboro
John H. Horne, Jr.	Laurinburg
Philip F. Howerton, Jr.	Charlotte
William K. Hunter	High Point
Lillian B. Jordan	Randleman
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[1] Retired on 31 December 2016. [2] Became Chief District Court Judge on 1 January 2017. [3] Sworn in 1 January 2017. [4] Sworn in 1 January 2017. [5] Resigned 31 December 2016. [6] Sworn in 1 January 2017. [7] Retired on 31 January 2017. [8] Became Chief District Court Judge on 1 February 2017. [9] Sworn in 1 January 2017. [10] Sworn in 13 June 2017. [11] Retired on 31 December 2016. [12] Sworn in 1 January 2017. [13] Resigned on 24 February 2017. [14] Retired on 31 July 2017. [15] Sworn in 9 June 2017. [16] Sworn in 17 November 2017. [17] Retired on 31 December 2016. [18] Sworn in 1 January 2017. [19] Retired on 31 December 2016. [20] Sworn in 1 January 2016. [21] Retired 31 December 2016. [22] Resigned on 31 March 2015. [23] Became Chief District Court Judge on 1 January 2017. [24] Sworn in 1 January 2017. [25] Retired on 5 April 2017. [26] Became Chief District Court Judge on 6 April 2017. [27] Resigned on 31 December 2017. [28] Sworn in 1 January 2017. [29] Sworn in 22 August 2017. [30] Resigned on 30 June 2017. [31] Sworn in 27 October 2017. [32] Retired on 31 December 2016. [33] Retired on 31 December 2016. [34] Sworn in 1 January 2017. [35] Sworn in 1 January 2017. [36] Retired on 1 September 2017. [37] Resigned on 31 December 2016. [38] Became District Court Judge on 1 May 2017. [39] Sworn in 27 February 2017. [40] Retired on 31 December 2016. [41] Sworn in 17 July 2015 and resigned 31 December 2016. [42] Resigned on 31 December 2016. [43] Resigned on 31 December 2016. [44] Sworn in 1 January 2017. [45] Sworn in 1 January 2017. [46] Sworn in 1 January 2017. [47] Sworn in 1 January 2017. [48] Sworn in on 5 December 2016. [49] Retired on 31 December 2016. [50] Sworn in on 1 January 2017. [51] Retired on 31 December 2016. [52] Retired on 31 December 2016. [53] Sworn in 13 February 2015. [54] Sworn in 5 March 2017. [55] Retired on 31 December 2016. [56] Resigned on 31 December 2016. [57] Sworn in 1 January 2017. [58] Sworn in 28 April 2017. [59] Sworn in 13 December 2016. [60] Resigned on 10 August 2017. [61] Sworn in 30 March 2017. [62] Resigned on 6 February 2017. [63] Sworn in 27 October 2017. [64] Sworn in 7 March 2017 and resigned on 2 July 2017. [65] Sworn in 3 March 2017. [66] Sworn in 23 July 2015 and resigned on 12 October 2017. [67] Sworn in 1 February 2017. [68] Sworn in 6 April 2017. [69] Resigned on 17 July 2017. [70] Resigned on 5 May 2017. [71] Sworn 3 April 2017. [72] Sworn in 31 March 2017. [73] Sworn in 27 March 2017 and resigned 28 July 2017. [74] Resigned on 19 June 2017. [75] Sworn in 12 October 2017. [76] Died on 10 May 2017. [77] Resigned on 20 July 2015. [78] Resigned on 5 December 2017. [79] Sworn in 6 March 2017. [80] Resigned on 21 March 2016. [81] Sworn in 11 August 2017. [82] Sworn in 10 April 2017. [83] Sworn in on 30 October 2015.

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CASES REPORTED

ORDERS

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

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

CHRISTENBURY EYE CENTER, P.A.
v.
MEDFLOW, INC. AND DOMINIC JAMES RIGGI

No. 141PA16

Filed 18 August 2017

Statutes of Limitation and Repose—breach of contract—unified consideration—not an installment contract

An action involving an unfulfilled business agreement was properly dismissed for violating the statute of limitations where the claim was filed 14 years after plaintiff had notice of the breach of the agreement but plaintiff argued that the agreement was an installment contract, with royalty payments being due within three years of the filing of the complaint. The agreement was not an installment contract because its terms demonstrated a mutual dependency between the promised performance by plaintiff and the promised performances by defendants. The consideration supporting the agreement was unified and incapable of apportionment.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered on 23 June 2015 by Judge James L. Gale, Chief Special Superior Court Judge for Complex Business Cases appointed by the Chief Justice under N.C.G.S. § 7A-45.4, in Superior Court, Mecklenburg County, dismissing plaintiff's complaint. Heard in the Supreme Court on 21 March 2017.

Shumaker, Loop & Kendrick, LLP, by Frederick M. Thurman, Jr., for plaintiff-appellant.

Robinson, Bradshaw & Hinson, P.A., by Douglas M. Jarrell and Fitz E. Barringer, for defendant-appellee Medflow. Inc.

Moore & Van Allen PLLC, by Benjamin P. Fryer and Nader S. Raja, for defendant-appellee Dominic James Riggi.

NEWBY, Justice.

North Carolina law has long recognized the principle that a party must timely bring an action upon discovery of an injury to avoid dismissal of the claim. Statutes of limitations require the pursuit of claims to occur within a certain period after discovery, thereby striking the balance between one's right to assert a claim and another's right to be free from a stale claim. Here plaintiff's action arises from an unfulfilled business agreement. Plaintiff's complaint reveals, however, that plaintiff had notice of the breach of the agreement and its resulting injuries fourteen years before commencing the current action. Because plaintiff failed to pursue its claims within the statute of limitations period, plaintiff's claims are time barred. Accordingly, we affirm the trial court's order dismissing plaintiff's claims.

Jonathan D. Christenbury, M.D. founded plaintiff Christenbury Eye Center, P.A., a professional association that offers ophthalmology services. In 1998 or 1999, Dr. Christenbury approached defendant Dominic James Riggi, a consultant, about developing a software management package for plaintiff. Upon Riggi's recommendation, plaintiff purchased a generalized software platform, with the idea that Riggi and plaintiff would later customize and enhance the platform for plaintiff's practice needs and for possible sale to other physician practices and customers. Around the same time, Riggi formed defendant Medflow, Inc., a medical record software development company.

In October 1999, plaintiff and defendants entered into an "Agreement Regarding Enhancements" to the original software platform (the Agreement). The Enhancements are improvements to the software platform such as "customized screens, interfaces, forms, [and] procedures." Under the Agreement, plaintiff assigned its rights in the Enhancements to defendants. "As consideration for the assignment of rights . . . [defendants] agree[d] to pay [plaintiff] a royalty of ten percent (10%) of the gross amount of all fees . . . received" from any sales of the Enhancements made "on or after October 1, 1999" and to "provide [plaintiff] with a written report on a monthly basis . . . includ[ing] a detailed description of the fees received from [defendants'] Customers

during the prior month, along with payment to [plaintiff] of all corresponding fees due with respect to such charges for that prior month." The Agreement also required defendants to pay plaintiff "a minimum royalty in the amount of Five Hundred Dollars ($500.00) each year for the first five years after [20 October 1999]" and restricted defendants from selling the Enhancements to customers within North Carolina and South Carolina without first obtaining plaintiff's written consent.

Defendants never performed any of their obligations under the Agreement. Defendants never provided plaintiff with a single monthly report detailing the fees received from defendants' customers nor paid any corresponding fees. Defendants failed to make the first $500 minimum royalty payment, which became due on 20 October 2000, and never paid any royalties thereafter. Defendants also allegedly sold the Enhancements to other practice groups and customers in the restricted areas of North Carolina and South Carolina without plaintiff's express consent as early as 1999.

For the next ten years, defendants allegedly continued to be in breach of the Agreement, never providing plaintiff a written sales report, never making any royalty payments, and never obtaining plaintiff's consent for restricted sales. Plaintiff, however, continued to use the software platform and received periodic software updates from Medflow affiliated service providers. During this time, plaintiff did not raise any question or concern regarding its rights to receive written reports and royalty payments, nor did it inquire about restricted sales.

Despite having never received the benefit of its bargain, plaintiff waited fourteen years before filing this action on 22 September 2014. Plaintiff's complaint asserts four claims against defendants: breach of contract, fraud, unfair and deceptive trade practices, and unjust enrichment.[1] Plaintiff alleges that "since October 1999, [defendants have] . . . sold the Enhancements, and derivatives thereof, to other ophthalmologic practices, both inside and outside the restricted territory of North Carolina and South Carolina, without paying royalties to [plaintiff]," and that "[a]t no time did [defendants] . . . inform [plaintiff] that [defendants] had sold further developments or modifications to the Enhancements . . . . [or] paid to [plaintiff] or accounted for any royalties due under the Agreement."

1. On 27 October 2014, the Chief Justice designated this case as a mandatory complex business case.

Defendants moved to dismiss all claims under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, asserting that North Carolina's statutes of limitations barred plaintiff's action. N.C.G.S. §§ 1-52, 75-16.2 (2015). In response, plaintiff essentially argued that the Agreement should be treated as an installment contract for limitations purposes, with a new limitations period beginning upon the failure to make each payment, thus enabling plaintiff to seek recovery on royalty payments due within the three years before the filing of its complaint. *See Martin v. Ray Lackey Enters.*, 100 N.C. App. 349, 357, 396 S.E.2d 327, 332 (1990) ("[W]here obligations are payable in installments, the statute of limitations runs against each installment independently as it becomes due."). Defendants asserted that under North Carolina law the Agreement should not be considered an installment contract.

Following a hearing, the trial court granted defendants' motions to dismiss. *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, No. 14 CVS 17400, 2015 WL 3823817, at *8 (N.C. Super. Ct. Mecklenburg County (Bus. Ct.) June 19, 2015). The trial court determined that the allegations of plaintiff's complaint "reveal that [defendants] did not perform [their] reporting and payment obligations at least as early as October 20, 2000, when the first minimum royalty payment was due and substantially more than three years prior to when the Verified Complaint was filed." *Christenbury Eye Ctr.*, 2015 WL 3823817, at *4. Regardless of whether the Agreement was an installment contract, the trial court found that plaintiff's complaint revealed that "[d]efendants clearly repudiated the contract by their consistent and repeated failure to perform, placing [p]laintiff on notice that future reports and payments would not be made." *Id.* at *5. As a result, the trial court concluded that North Carolina's statutes of limitations barred all of plaintiff's claims. *Id.* at *5-8; *see Teachey v. Gurley*, 214 N.C. 288, 293, 199 S.E. 83, 87 (1938) (noting that the statute of limitations begins to run when a party repudiates "in such manner that [the adverse party] is called upon to assert his rights").[2]

Plaintiff thereafter improperly noticed appeal to the Court of Appeals, which dismissed the case for lack of jurisdiction. *See* N.C.G.S. § 7A-27(a)(2) (2015) (providing a direct right of appeal to the Supreme Court from a final judgment of the Business Court). We allowed plaintiff's petition for writ of certiorari to review the trial court's dismissal order.

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2. Alternatively, the trial court concluded that, "by declining to take action in regard to [d]efendants' failure to submit reports or make royalty payments, [plaintiff] waived any right to future payments to the extent that the Agreement could appropriately be considered an installment contract." *Christenbury Eye Ctr.*, 2015 WL 3823817, at *5.

We review a dismissal under Rule 12(b)(6) de novo, "view[ing] the allegations as true and . . . in the light most favorable to the non-moving party." *Kirby v. N.C. DOT*, 368 N.C. 847, 852, 786 S.E.2d 919, 923 (2016) (quoting *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008)). Dismissal is proper when the complaint "fail[s] to state a claim upon which relief can be granted." *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 7 (2015) (alteration in original) (quoting N.C.G.S. § 1A-1, Rule 12(b)(6) (2013)). "When the complaint on its face reveals that no law supports the claim . . . or discloses facts that necessarily defeat the claim, dismissal is proper." *Id.* at 448, 781 S.E.2d at 8 (citing *Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)).

Plaintiff premises each of its claims on allegations that defendants breached the Agreement by failing to provide written sales reports or pay royalties and by conducting unauthorized sales.[3] We conclude that plaintiff's own allegations, taken as true, establish that its claims accrued at the earliest on 20 November 1999 and at the latest by 20 October 2000. Because plaintiff had notice of its injury but did not initiate its current action for almost fourteen years, all of its claims are time barred.

We have long recognized that a party must initiate an action within a certain statutorily prescribed period after discovering its injury to avoid dismissal of a claim. *See Shearin v. Lloyd*, 246 N.C. 363, 370, 98 S.E.2d 508, 514 (1957) ("Statutes of limitations . . . require that litigation be initiated within the prescribed time or not at all."), *superseded by statute*, N.C.G.S. § 1-15(b) (1971), *on other grounds as recognized in Black v. Littlejohn*, 312 N.C. 626, 630-31, 325 S.E.2d 469, 473 (1985). "The purpose of a statute of limitations is to afford security against stale

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3. Specifically, the verified complaint alleges various claims that are all based on defendants' nonperformance:

(1) Plaintiff's breach of contract claim relies on defendants' "fail[ure] to pay royalties under the Agreement and perform other obligations required by the Agreement."

(2) Plaintiff's fraudulent concealment claim relies on defendants' "contractual duty under the Agreement to [report] to the Practice any fees received by Medflow related to the Enhancement."

(3) Plaintiff's unfair and deceptive trade practices claim relies on defendants' failure to report and pay royalties under the Agreement.

(4) Plaintiff's unjust enrichment claim relies on defendants' failing to pay royalties and conducting unauthorized sales, alleging that defendants "retained certain royalties due to [plaintiff] and received certain disallowed fees related to impermissible sales in the restricted territories."

demands, not to deprive anyone of his just rights by lapse of time." *Id.* at 371, 98 S.E.2d at 514. This security must be jealously guarded, for "[w]ith the passage of time, memories fade or fail altogether, witnesses die or move away, [and] evidence is lost or destroyed." *Estrada v. Burnham*, 316 N.C. 318, 327, 341 S.E.2d 538, 544 (1986), *superseded by statute*, N.C.G.S. § 1A-1, Rule 11(a) (Cum. Supp. 1988), *on other grounds as stated in Turner v. Duke Univ.*, 325 N.C. 152, 163-64, 381 S.E.2d 706, 712-13 (1989). "[I]t is for these reasons, and others, that statutes of limitations are inflexible and unyielding and operate without regard to the merits of a cause of action." *Id.* at 327, 341 S.E.2d at 544 (citing *Shearin*, 246 N.C. at 370, 98 S.E.2d at 514).

It is well settled that "where the right of a party is once violated the injury immediately ensues and the cause of action arises." *Sloan v. Hart*, 150 N.C. 269, 274, 63 S.E. 1037, 1039 (1909). A cause of action is complete and the statute of limitations begins to run upon the inception of the loss from the contract, generally the date the promise is broken. *See Jewell v. Price*, 264 N.C. 459, 461, 142 S.E.2d 1, 3 (1965) ("Where there is . . . a breach of an agreement . . . the statute of limitations immediately begins to run against the party aggrieved . . . ." (citing, *inter alia*, *Shearin*, 246 N.C. 363, 98 S.E.2d 508)).

Here plaintiff's complaint reveals that it had notice of its injury as early as 20 November 1999, when defendants failed to provide the first monthly report, and certainly by 20 October 2000, when defendants failed to pay the first $500 minimum royalty payment. *See Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 493, 329 S.E.2d 350, 354 (1985) (concluding that the statutes of limitations at issue in that case began to run "as soon as the injury [became] apparent to the claimant or should reasonably [have] become apparent"). The complaint further alleges that, despite such payments being due, defendants persisted in their breach and "*[a]t no time* . . . paid . . . or accounted for any royalties due under the Agreement." (Emphasis added.) For fourteen years, however, plaintiff did not raise any question or concern regarding its rights to receive written reports and minimum annual royalty payments, nor did it inquire about restricted sales. Any increase in plaintiff's injury therefore represents the "continual ill effects from an original violation," *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 179, 581 S.E.2d 415, 423 (2003) (quoting *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981)), and "aggravation of the original [breach]," *Pembee Mfg.*, 313 N.C. at 493, 329 S.E.2d at 354 (citing *Matthieu v. Piedmont Nat. Gas Co.*, 269 N.C. 212, 215, 152 S.E.2d 336, 339-40 (1967)). Because plaintiff had

notice of its injury yet failed to assert its rights, all of plaintiff's claims are time barred.[4]

Plaintiff contends, however, that the Agreement should be treated as an installment contract for limitations purposes and that each overdue sales report, unauthorized sale, and delinquent royalty payment is a separate breach of contract claim, thus allowing plaintiff to pursue any claims arising within three years before filing suit. Because the terms of the Agreement demonstrate a mutual dependency between the promised performance by plaintiff and the promised performances by defendants, the consideration supporting the Agreement is unified and incapable of apportionment. As such, the Agreement is not an installment contract.

"In interpreting contracts, we construe them as a whole." *Ussery v. Branch Banking & Tr.*, 368 N.C. 325, 335, 777 S.E.2d 272, 279 (2015) (citing *Singleton v. Haywood Elec. Membership Corp.*, 357 N.C. 623, 629, 588 S.E.2d 871, 875 (2003)). "Each clause and word is considered with reference to each other and is given effect by reasonable construction." *Id.* at 336, 777 S.E.2d at 279 (citing *Sec. Nat'l Bank of Greensboro v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 93, 143 S.E.2d 270, 275 (1965)). We determine the intent of the parties and the nature of an agreement "by the plain meaning of the written terms." *RL REGI N.C., LLC v. Lighthouse Cove, LLC*, 367 N.C. 425, 428, 762 S.E.2d 188, 190 (2014) (citing *Powers v. Travelers Ins. Co.*, 186 N.C. 336, 338, 119 S.E. 481, 482 (1923)).

"An 'installment contract' is one which requires or authorizes the delivery of goods in separate lots to be separately accepted." N.C.G.S. § 25-2-612(1) (2015). In such cases the statute of limitations runs against each installment as it becomes due, *see Shoenterprise Corp. v. Willingham*, 258 N.C. 36, 39, 127 S.E.2d 767, 770 (1962), thus permitting actions falling within the limitations period while precluding those that fall outside of it. Though the term "installment contract" technically applies to contracts for the sale of goods, for limitations purposes this principle has been extended to some agreements falling outside the technical definition. *See, e.g.*, *Martin*, 100 N.C. App. at 357, 396 S.E.2d at 332 (lessee's obligation to pay all real estate taxes levied on the leased premises).

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4. Plaintiff's claims for breach of contract, fraudulent concealment, and unjust enrichment are subject to a three-year statute of limitations. N.C.G.S. § 1-52(1), (9). Plaintiff's unfair and deceptive trade practices claim is subject to a four-year statute of limitations. *Id.* § 75-16.2. Based upon the purported claims having arisen at the latest by October 2000, the three-year statute of limitations would have run in October 2003, and the four-year statute of limitations would have run in October 2004.

Whether an agreement should be treated as an installment contract "depends not on the number of promises [on either or both sides] . . . but on whether there has been a single expression of mutual assent to all the promises as a unit." 15 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 45:3, at 320 (4th ed. 2014) [hereinafter *Williston on Contracts*]. "A contract is entire, and not severable, when by its terms, nature and purpose it contemplates . . . that each and all of its parts, material provisions, and the consideration, are common each to the other and interdependent." *Wooten v. Walters*, 110 N.C. 251, 254, 14 S.E. 734, 735 (1892). Conversely, the hallmark of an installment contract is that its terms contain "two or more distinct items, both in the agreement to perform and in the promise of compensation, capable of 'apportionment' or separate allocation the one to the other, as indicated in the contract itself." *Neal v. Wachovia Bank & Tr.*, 224 N.C. 103, 107, 29 S.E.2d 206, 208 (1944).

Here a fair construction of the terms of the Agreement compels the conclusion that the Agreement is not an installment contract. The Agreement sets out that, in a one-time assignment, plaintiff conveyed its rights in the Enhancements in exchange for defendants' various promises to provide monthly sales reports, refrain from selling the Enhancements in North Carolina and South Carolina absent plaintiff's express consent, and pay royalties. The terms of the Agreement, therefore, demonstrate a mutual dependency between the promises provided by the parties as consideration to support the Agreement, inextricably tying plaintiff's assignment of rights in the Enhancements to defendants' promised performance. Moreover, the Agreement lacks any indication that the parties intended their promises to be divisible, severable, or otherwise capable of apportionment. *See Williston on Contracts* § 45:4, at 321 ("There is a presumption against finding a contract divisible unless divisibility is expressly stated in the contract itself, or the intent of the parties to treat the contract as divisible is otherwise clearly manifested." (footnotes omitted)). Accordingly, the consideration supporting the Agreement is unified and incapable of apportionment. As such, the Agreement is not an installment contract.[5]

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5. Moreover, as the trial court correctly concluded, defendants' immediate and repeated failure to perform effected a clear repudiation of the entire Agreement. *See Edwards v. Proctor*, 173 N.C. 41, 44, 91 S.E. 584, 585 (1917) (noting that a party's refusal to perform results in a breach of contract when "the refusal to perform [is] of the whole contract or of a covenant going to the whole consideration"). Because plaintiff was on notice by at least 20 October 2000 that future reports and payments would not be made, the statute of limitations began to run on plaintiff's claims regardless of whether the Agreement was an installment contract. *See Teachey*, 214 N.C. at 293, 199 S.E. at 87 (stating, *inter alia*, that the statute of limitations begins to run from the time the non-breaching party learned of the repudiation).

Furthermore, unlike an installment contract, in which specified installment payments are due at scheduled times, the terms of the Agreement contain no fixed time or schedule for any payments beyond the first five years. *See, e.g.*, *Vreede v. Koch*, 94 N.C. App. 524, 380 S.E.2d 615 (1989) (interpreting installment contract that required, *inter alia*, payments in *monthly* installments until all principal and interest were paid in full). The payments on which plaintiff seeks recovery are well beyond that five-year period. Instead, the decision to sell the Enhancements and thus trigger the royalty provision rested entirely in defendants' hands. Plaintiff's installment contract argument therefore fails.

While a party is duty bound to honor its contractual obligations, statutes of limitation operate inexorably without reference to the merits of a cause of action, thereby "preventing surprises through the revival of claims that have been allowed to slumber." *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49, 64 S. Ct. 582, 586, 88 L. Ed. 788, 792 (1944). Plaintiff's complaint reveals that plaintiff had notice of its injury over fourteen years ago, well before commencing its current action. Whatever rights existed, plaintiff's fourteen-year slumber resulted in their becoming stale. Because plaintiff failed to timely pursue its claims within the statute of limitations periods, plaintiff's claims are time barred. Accordingly, we affirm the trial court's decision to dismiss plaintiff's complaint.

AFFIRMED.

THE FIDELITY BANK, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF REVENUE, RESPONDENT

Nos. 392A16 and 393PA16

Filed 18 August 2017

1. Civil Procedure—Rule 12(b)(6) dismissal on remand—underlying decision void

In a case concerning the N.C. tax deduction from corporate income for the purchase of discounted U.S. obligations (Market Discount Income), the Business Court erred by dismissing petitioner's second petition for judicial review pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). The Department of Revenue did not have the authority to revisit the issue on remand. The Department's findings and conclusions with respect to that issue were therefore void, and the Business Court should have vacated the challenged order.

2. Taxation—N.C. corporate income tax—deductions—market discount income—definition of interest

In a case concerning the N.C. tax deduction from corporate income for the purchase of discounted U.S. obligations (Market Discount Income), the Business Court correctly concluded that the Market Discount Income that Fidelity Bank received on the discounted bonds was not deductible for North Carolina corporate income tax purposes. There was no statutory definition of the word "interest" as used in the applicable statue, N.C.G.S. § 105-130.5(b)(1). The term "interest," not defined in the statute, was unambiguous and should have been understood in accordance with its plain meaning as involving "periodic payments received by the holder of a bond." The General Assembly had not adopted the definitions set out in the Internal Revenue Code into the North Carolina Revenue Act on any sort of wholesale basis.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of an opinion and order dated 3 May 2013 entered by Judge John R. Jolly, Jr., Chief Special Superior Court Judge for Complex Business Cases, in the Superior Court, Wake County, and appeal pursuant to N.C.G.S. § 7A-27(a) from a final judgment and order entered on 23 June 2016 entered by Judge Louis A. Bledsoe, III, Special Superior Court Judge for Complex Business Cases, in the Superior Court, Wake County. Heard in the Supreme Court on 13 June 2017.

Ward and Smith, P.A., by Alexander C. Dale, Donalt J. Eglinton, and Amy P. Wang, for petitioner-appellant.

Joshua H. Stein, Attorney General, by Matthew W. Sawchak, Solicitor General, and Perry J. Pelaez, Assistant Attorney General, for respondent-appellee North Carolina Department of Revenue.

ERVIN, Justice.

The principal issue before this Court in these consolidated appeals is whether the North Carolina Business Court correctly interpreted N.C.G.S. § 105-130.5(b)(1) so as to preclude The Fidelity Bank from deducting "Market Discount Income" relating to discounted United States obligations for North Carolina corporate income taxation purposes. In view of the fact that the relevant portions of N.C.G.S. § 105-130.5(b)(1) clearly and unambiguously preclude the proposed deduction, we affirm the Business Court's substantive decision with respect to this issue while reversing the Business Court's decision to dismiss the second of the two judicial review petitions that Fidelity Bank filed in these cases and remanding that matter to the Business Court for further remand to the North Carolina Department of Revenue with instructions to vacate that portion of the Department's Second Amended Final Agency Decision relating to the deductibility issue for lack of subject matter jurisdiction.

Fidelity Bank, a C corporation, is a wholly owned subsidiary of Fidelity Bancshares, Inc. Fidelity Bank acquired United States government bonds at a discount to face value and held those discounted bonds until maturity, thereby earning income, generally referred to as Market Discount Income, consisting of the difference between the amount that Fidelity Bank initially paid for the bonds and the amount that it received relating to those discounted bonds at maturity. As a result of the fact that five of these discounted bonds matured during the 2001 tax year, Fidelity earned $724,098.00 in Market Discount Income related to the securities in question during that period. On its 2001 North Carolina corporate income tax return, Fidelity treated this Market Discount Income as taxable income and then deducted this Market Discount Income as interest earned on United States government obligations for the purposes of determining its net taxable income.

On 8 July 2002, the Department issued a Notice of Corporate Income Tax Assessment to Fidelity Bank assessing additional North Carolina income taxes of $49,963.00 and associated interest in the amount of $1132.63 against Fidelity Bank based upon a determination that Fidelity

Bank was not entitled to deduct this Market Discount Income for the 2001 tax year. On 31 July 2002, Fidelity Bank sent a protest letter to the Department objecting to the Notice of Assessment. On 17 May 2006, the Department sent a letter to Fidelity Bank imposing additional income taxes and associated interest based upon the rejection of Fidelity Bank's assertion that it was entitled to deduct the Market Discount Income that Fidelity Bank had earned on the bonds. On 12 September 2008, following further negotiations between the parties, the Department issued a Notice of Final Determination reiterating its decision to reject Fidelity Bank's attempt to deduct the Market Discount Income for state corporate income taxation purposes and seeking the payment of additional taxes plus associated interest.

On 11 November 2008, Fidelity Bank filed a Petition for a Contested Case Hearing challenging the Department's decision with respect to the deductibility of the Market Discount Income that Fidelity Bank had earned on the discounted bonds and requesting relief from the Department's claim for interest on the additional income tax amount that had been assessed against Fidelity Bank. On 30 June 2009, the Administrative Law Judge entered an order granting partial summary judgment in favor of the Department on the grounds that the Market Discount Income relating to the discounted bonds was not deductible for North Carolina corporate income tax purposes.[1] On 16 November 2009, the Administrative Law Judge granted partial summary judgment in Fidelity Bank's favor with respect to the Department's attempt to collect interest on the amount of unpaid taxes that the Department claimed that Fidelity Bank owed. On 25 November 2009, the Administrative Law Judge's decision was submitted to the Department for the purpose of allowing the Department to make a final decision.[2] On 22 January 2010, the Department issued a Final Agency Decision in which it adopted the Administrative Law Judge's decision with respect to the deductibility issue and remanded the case to the Administrative Law Judge for the making of further findings of fact relating to the interest abatement issue.[3]

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1. The parties agreed that there were no disputed issues of material fact, so that this case could be appropriately resolved at the summary judgment stage of this contested case proceeding.

2. According to the statutory provisions governing administrative proceedings in effect at the time, the Administrative Law Judge submitted a recommended decision to the Department, which made the final decision. *See* N.C.G.S. § 150B-34 (2009), amended by Act of June 18, 2011, ch. 398, sec. 18, 2011 N.C. Sess. Laws 1678, 1686.

3. No proceedings on remand appear to have been conducted before the Administrative Law Judge as a result of the Department's initial final agency decision.

On 24 February 2010, Fidelity Bank filed a petition for judicial review in the Superior Court, Wake County, for the purpose of challenging the Department's initial final agency decision. The case stemming from the filing of Fidelity Bank's first judicial review petition was designated a mandatory complex business case and submitted to the Business Court for decision. On 3 May 2013, the Business Court entered an order in which it affirmed the Department's final decision with respect to the deductibility issue and remanded the case to the Department for the making of additional findings of fact with respect to the interest abatement issue.[4]

On 10 December 2013, the Department issued an Amended Final Agency Decision in which it adopted the Administrative Law Judge's decision with respect to the deductibility decision as its own and remanded Fidelity Bank's request for abatement of the interest assessment to the Administrative Law Judge for further proceedings. On 23 April 2015, the Administrative Law Judge entered an Amended Decision concluding that Fidelity Bank should be required to pay interest on the amount of any unpaid 2001 taxes. On 24 July 2015, the Department entered a Second Amended Final Agency Decision determining that Fidelity Bank was not entitled to deduct the Market Discount Income for purposes of its 2001 corporate income tax return and requiring Fidelity Bank to pay additional taxes and related interest in light of the Department's rejection of Fidelity Bank's assertion that the Market Discount Income that it earned during the 2001 tax year was deductible for North Carolina corporate income taxation purposes.

On 19 August 2015, Fidelity filed a petition seeking judicial review of the Department's second amended final agency decision in the Superior Court, Wake County. In its petition, Fidelity Bank requested that the Department's decision with respect to the deductibility issue in the second amended final agency decision be overturned without advancing any challenge to the Department's decision with respect to the interest abatement issue. On 20 August 2015, the proceeding resulting from the filing of Fidelity Bank's second judicial review petition was designated a mandatory complex business case and referred to the Business Court for decision. On 15 January 2016, the Department filed motions seeking the entry of orders dismissing Fidelity Bank's second judicial review petition for failure to state a claim upon which relief could be granted

4. Although Fidelity Bank sought appellate review of the Business Court's initial decision, the Court of Appeals dismissed Fidelity Bank's appeal as having been taken from an unappealable interlocutory order.

pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), and entering final judgment with respect to the deductibility issue in accordance with the decision made in response to Fidelity Bank's first judicial review petition. On 23 June 2016, the Business Court entered a final judgment and order granting the Department's motions to dismiss the second judicial review petition and entering final judgment with respect to the deductibility issue consistent with the court's determination in the proceeding stemming from the first judicial review petition. *Fidelity Bank v. N.C. Dep't of Revenue*, Nos. 10 CVS 3405, 15 CVS 11311, 2016 WL 3917735 (N.C. Super. Ct. Wake County (Bus. Ct.) June 20, 2016).

On 14 July 2016, Fidelity Bank noted an appeal to the Court of Appeals from the Business Court's decision with respect to the deductibility issue in the proceeding stemming from the first judicial review proceeding and an appeal to this Court from the Business Court's decision to dismiss the second judicial review petition for failure to state a claim upon which relief could be granted. On 20 October 2016, Fidelity Bank filed a petition with this Court seeking discretionary review of the deductibility decision prior to a determination by the Court of Appeals in the case stemming from the first judicial review proceeding. This Court allowed Fidelity Bank's discretionary review petition on 8 December 2016, heard consolidated oral argument in both cases on 13 June 2017, and now consolidates these cases for purposes of decision.

[1] As an initial matter, we must address the correctness of the Business Court's decision to dismiss Fidelity Bank's second judicial review petition pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). In making this determination, the Business Court noted that, "although [the Business Court] did not remand the Deductibility Issue to the Department, the Department elected to include findings and conclusions on that issue in its Second Amended Final Agency decision." *Fidelity Bank*, 2016 WL 3917735, at *4. As the Business Court also noted,

> North Carolina law is clear, however, that when an appellate court (i.e., [the Business Court's] capacity here) remands a case to the trial court (i.e., the Department's capacity here), any judgments of the trial court "which were inconsistent and at variance with, contrary to, and modified, corrected, altered or reversed prior mandates of the [appellate court]" are "unauthorized and void."

Id. (second alteration in original) (quoting *Lea Co. v. N.C. Bd. of Transp.*, 323 N.C. 697, 699, 374 S.E.2d 866, 868 (1989) (emphasis omitted) (quoting *Collins v. Simms*, 257 N.C. 1, 8, 125 S.E.2d 298, 303 (1962))). For that

reason, the Business Court concluded that "the Department did not have authority to make any findings of fact or conclusions of law concerning the Deductibility Issue in its Second Amended Final Agency Decision," rendering "the findings and conclusions in the Second Amended Final Agency Decision concerning the Deductibility Issue void and without legal effect," so as to preclude the Department's decision with respect to the deductibility issue as set out in the second amended final agency decision from being "the proper subject of judicial review." *Id.* at *5. As a result, the Business Court granted the Department's dismissal motion. *Id.* at *5, 6.

On appeal, Fidelity Bank contends that the Business Court erred by dismissing the second judicial review petition on the grounds that, given the Business Court's determination that the Department's decision with respect to the deductibility issue on remand had been made "without authority and [was] void," the Business Court should have invalidated, rather than ignored, the Department's decision to reiterate its earlier decision concerning the deductibility issue in the second amended final agency decision. On the other hand, the Department asserts that, "[b]ecause the [second judicial review proceeding] raised the same deductibility issue that the [Business Court's order in the first judicial review proceeding] had already decided, [the Business Court] was right to hold that Fidelity's petition in the [second judicial review proceeding] failed to state a claim." We agree with Fidelity Bank that the Business Court erred by dismissing that portion of its second petition for judicial review challenging that portion of the Department's second amended final agency decision addressing the deductibility issue for failing to state a claim upon which relief can be granted.

As the Business Court concluded, the Department lacked the authority to revisit the deductibility issue on remand from the Business Court's decision in the first judicial review proceeding, making its findings and conclusions with respect to that issue void. "A void judgment . . . binds no one." *E. Carolina Lumber Co. v. West*, 247 N.C. 699, 701, 102 S.E.2d 248, 249 (1958). The "invalidity" of a void order "may be asserted at any time and in any action where some benefit or right is asserted thereunder," *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 677, 360 S.E.2d 772, 777 (1987) (quoting *E. Carolina Lumber Co.*, 247 N.C. at 701, 102 S.E.2d at 249), rendering any failure on Fidelity Bank's part to raise this issue before the Business Court and the fact that the order entered by the Business Court in the first judicial review proceeding was binding upon the Business Court in the second judicial review proceeding insufficient to justify dismissal of the second judicial review petition.

Moreover, the fact that the Business Court did, in fact, determine that the relevant portion of the Department's second final agency decision was "void" and the absence of any specific showing of prejudice in addition to the risk of confusion arising from the existence of multiple orders addressing the same issue on the same facts do not support a decision to refrain from vacating a void administrative decision either. In view of the fact that "an appeal from a void order cannot be frivolous," this Court reversed an "order . . . dismissing the appeal." *In re Foreclosure of Sharpe*, 230 N.C. 412, 418, 53 S.E.2d 302, 306 (1949). For similar reasons, we have no hesitancy in determining that a litigant is entitled to assert, in a proceeding seeking judicial review of an administrative decision, that the decision in question is void. In the event that this assertion is well founded, the reviewing court should vacate the challenged order rather than dismiss the request for judicial review for failure to state a claim. As a result, since the Department lacked the authority to address the deductibility decision on remand, the Business Court's order relating to the deductibility decision in the proceeding stemming from the second judicial review proceeding should be reversed and this case should be remanded to the Business Court for further remand to the Department with instructions to vacate that portion of the second amended final agency decision addressing the deductibility issue.

[2] The principal substantive issue before us in this case, which is properly before this Court in connection with Fidelity Bank's appeal from the Business Court's decision to enter a final judgment upholding the Department's deductibility decision in connection with the first judicial review proceeding, is whether the Business Court erred by affirming that portion of the Department's final agency decision in which the Department determined that Fidelity Bank was not entitled to deduct the Market Discount Income that it earned during the 2001 tax year as interest on United States obligations for North Carolina corporate income taxation purposes pursuant to N.C.G.S. § 105-130.5(b)(1). In seeking relief from the Business Court's decision, Fidelity Bank asserts that the plain and unambiguous language contained in N.C.G.S. § 105-130.5(b)(1) and 26 U.S.C. § 1276(a)(4) renders Market Discount Income deductible interest upon United States obligations for North Carolina corporate income taxation purposes. According to Fidelity Bank, the General Assembly intended to adopt the definition of "interest" contained in 26 U.S.C. § 1276(a)(4) given that the taxpayer's federal taxable income is the "baseline starting point" for determining a taxpayer's state net taxable income, *see* N.C.G.S. § 105-130.2 (2015), and that Market Discount Income is treated as interest for purposes of determining

federal taxable income. More specifically, given that 26 U.S.C. § 1276(a)(4) states that Market Discount Income "shall be treated as interest for purposes of [the Code]," 26 U.S.C. § 1276(a)(4) (2012), and given that the General Assembly has adopted the Code for the purpose of determining a taxpayer's state income tax liability, *see* N.C.G.S. § 105-130.2(15), Fidelity Bank contends that the General Assembly intended that Market Discount Income should be treated as deductible interest upon United States obligations for state corporate income taxation purposes. As a result, given that the Business Court ignored the plain language of the relevant provisions of state law in upholding the Department's decision with respect to the deductibility issue, Fidelity Bank contends that the Business Court's decision with respect to that issue should be reversed.

The Department, on the other hand, contends that the Business Court properly determined that Market Discount Income does not constitute deductible "interest" for North Carolina income taxation purposes. According to the Department, the term "interest" as used in N.C.G.S. § 105-130.5 should be understood, in accordance with its plain meaning, as "periodic payments received by the holder of a bond," citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998), *cert. denied*, 526 U.S. 1090 (1999), *abrogated on other grounds by Lenox, Inc. v. Tolson*, 353 N.C. 659, 663, 548 S.E.2d 513, 517 (2001). Even though N.C.G.S. § 105-130.2(15) provides that a taxpayer's income for state taxation purposes is determined on the basis of the taxpayer's federal taxable income, the statutory provisions governing North Carolina income taxation do not adopt the definitions contained in the Internal Revenue Code on a wholesale basis. Instead, the Department asserts that the General Assembly has adopted Internal Revenue Code provisions for use in determining a taxpayer's obligation to pay North Carolina income taxes on a selective basis, so that, for example, N.C.G.S. § 105-130.5(b) incorporates Internal Revenue Code provisions in only twelve of its twenty-one subsections. "[W]hen no such reference appears—as here—words used in the Revenue Act do not take on any specialized meaning they might have under the Code." The Department claims that, had the General Assembly intended to incorporate the Internal Revenue Code's definitions into N.C.G.S. § 105-130.5(b)(1), it would have done so expressly. In addition, the Department contends that 26 U.S.C. § 1276 of the Code has no application outside the context of federal tax law given its statement that Market Discount Income "shall be treated as interest for purposes of [the Code]," quoting 26 U.S.C. § 1276(a)(4). As a result, the Department contends that the Business Court's decision with respect to the deductibility issue should be affirmed.

According to N.C.G.S. § 105-130.2(15), a taxpayer's "State net income" is "[t]he taxpayer's federal taxable income as determined under the Code,[5] adjusted as provided in G.S. 105-130.5." N.C.G.S. § 105-130.2(15). N.C.G.S. § 105-130.5(b) allows a taxpayer to take certain "deductions from federal taxable income" "in determining State net income." *Id.* § 105-130.5(b) (2015). Among the deductions allowed in N.C.G.S. § 105-130.5(b) is one for "[i]nterest upon the obligations of the United States or its possessions, to the extent included in federal taxable income," provided that "interest upon the obligations of the United States shall not be an allowable deduction unless interest upon obligations of the State of North Carolina or any of its political subdivisions is exempt from income taxes imposed by the United States."[6] *Id.* § 105-130.5(b)(1). As a result, as both parties appear to agree, the proper resolution of the substantive issue that is before us in this case hinges upon the meaning of the term "interest" as used in N.C.G.S. § 105-130.5(b)(1).

"In resolving issues of statutory construction, we look first to the language of the statute itself." *Walker v. Bd. of Trs. of the N.C. Local Gov'tal Emps. Ret. Sys.*, 348 N.C. 63, 65, 499 S.E.2d 429, 430 (1998) (quoting *Hieb v. Lowery*, 344 N.C. 403, 409, 474 S.E.2d 323, 327 (1996)).

> When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. *See Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment. *See Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 620, 629, 265 S.E.2d 379,

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5. According to N.C.G.S. § 105-130.2(2), which incorporates a definitions set out in N.C.G.S. § 105-228.90, "Code" is defined as "[t]he Internal Revenue Code as enacted as of January 1, 2017, including any provisions enacted as of that date that become effective either before or after that date," N.C.G.S. § 105-228.90(b)(1b).

6. In addition to its decision that the Department had correctly determined that Market Discount Income on the discounted bonds that matured in 2001 was not 'interest," the Business Court also concluded that the deduction that Fidelity Bank had attempted to take was barred by the reciprocity provision contained in N.C.G.S. § 105-130.5(b)(1). In view of our decision that Market Discount Income is not "interest" for purposes of N.C.G.S. § 105-130.5(b)(1), we need not address the issue of whether the deduction in question was barred by the reciprocity provision contained in N.C.G.S. § 105-130.5(b)(1) and express no opinion as to the correctness of the interpretation of that statutory provision adopted by the Department and the Business Court.

> 385 (1980) ("The best indicia of that intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish.").

Diaz v. Div. of Soc. Servs., 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006). Thus, the initial issue that must be addressed in construing the relevant statutory language requires a determination of whether the language in question is ambiguous or unambiguous.

An unambiguous word has a "definite and well known sense in the law." *C.T.H. Corp. v. Maxwell*, 212 N.C. 803, 810, 195 S.E. 36, 40 (1938); *see also State Highway Comm'n v. Hemphill*, 269 N.C. 535, 539, 153 S.E.2d 22, 26 (1967) (stating that language in a statute is unambiguous when it "express[es] a single, definite and sensible meaning") (quoting *State ex rel. Long v. Smitherman*, 251 N.C. 682, 684, 111 S.E.2d 834, 836 (1960)). In the event that the General Assembly uses an unambiguous word without providing an explicit statutory definition, that word will be accorded its plain meaning. *See Walker*, 348 N.C. at 66, 499 S.E.2d at 431 (stating that, although "[t]he word 'terminate' is undefined in chapter 128 of the North Carolina General Statutes," "[a]s this word is unambiguous, . . . we accord it its plain meaning"); *see also Poole v. Miller*, 342 N.C. 349, 352, 464 S.E.2d 409, 411 (1995) (stating that, although "[t]he word 'judgment' is undefined in Rule 68," "[a]s this word is unambiguous, we shall accord it its plain meaning"); *In re Appeal of Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202-03 (1974) (stating that, "[i]n the construction of any statute, including a tax statute, words must be given their common and ordinary meaning, nothing else appearing," and "[w]here, however, the statute, itself, contains a definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be" (citations omitted)). On the other hand, in the event that the relevant statutory provision is ambiguous, its meaning must be determined utilizing the ordinary rules of statutory construction.

"The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Burgess*, 326 N.C. at 209, 388 S.E.2d at 137 (citation omitted). As we have already noted, "[t]he best indicia of that intent are the language of the statute . . . , the spirit of the act and what the act seeks to accomplish." *Coastal Ready-Mix Concrete*, 299 N.C. at 629, 265 S.E.2d at 385 (citations omitted). As a general proposition, when the General Assembly intends to adopt provisions or definitions from other sources of law into a statute, it does so "by clear and specific reference." *See Lutz Indus. v. Dixie Home Stores*, 242 N.C. 332, 340, 88 S.E.2d 333, 339 (1955) (stating that "[t]he 1941 Act ratified and adopted the North

Carolina Building Code published in 1936 by clear and specific reference"). "Special canons of statutory construction apply when the term under consideration is one concerning taxation." *In re Estate of Kapoor*, 303 N.C. 102, 106, 277 S.E.2d 403, 407 (1981). "[W]hen the statute provides for an *exemption* from taxation . . . any ambiguities are resolved in favor of taxation." *Id.* at 106, 277 S.E.2d at 407 (citing *In re Clayton-Marcus*, 286 N.C. 215, 210 S.E.2d 199 (1974)).

As both parties have observed, there is no statutory definition of the word "interest" as used in N.C.G.S. § 105-130.5(b)(1). The Business Court, however, defined the term in question in the context of bonds as "periodic payments received by the holder of a bond."[7] *Fidelity Bank v. N.C. Dep't of Revenue*, No. 10 CVS 3405, 2013 WL 1896987, at *5 (N.C. Super. Ct. Wake County (Bus. Ct.) May 3, 2013). In view of the fact that the term "interest" has a "definite and well-known sense in the law," *C.T.H. Corp.*, 212 N.C. at 810, 195 S.E. at 40, and that this "plain meaning" definition is consistent with the manner in which "interest" is used in other statutory provisions and judicial decisions, *see e.g.*, N.C.G.S. § 143-134.1(a) (2015) (stating that "the prime contractor shall be paid interest . . . at the rate of one percent (1%) per month"); *Knight v. Braswell*, 70 N.C. 708, 711-12 (1874) (enforcing a contract requiring that interest owed on a bond be paid annually), we conclude, as did the Business Court, that the undefined term "interest" as used in N.C.G.S. § 105-130.5(b)(1) is unambiguous and should be understood in accordance with its plain meaning as involving "periodic payments received by the holder of a bond," *Fidelity Bank*, 2013 WL 1896987, at *5, and that, had the General Assembly intended for the term "interest" as used in N.C.G.S. § 105-130.5(b)(1) to be defined in accordance with 26 U.S.C. § 1276(a)(4), it would have incorporated that definition into N.C.G.S. § 105-130.5(b)(1) "by clear and specific reference," *see Lutz Indus.*, 242 N.C. at 340, 88 S.E.2d at 339. Since the validity of Fidelity Bank's challenge to the Business Court's decision hinges upon the extent to which the Business Court correctly interpreted the meaning of the term "interest" as that term is used in N.C.G.S. § 105-130.5(b)(1) and since the Business Court did not err by defining the term "interest" for purposes of N.C.G.S. § 105-130.5(b)(1) as "periodic payments received by the holder of a bond," we hold that the Business Court correctly concluded that the Market Discount Income that Fidelity Bank received on the discounted bonds that matured during 2001 was not deductible for North Carolina corporate income tax purposes.

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7. Fidelity Bank does not appear to dispute that this is a proper "plain meaning" definition of "interest," assuming that the use of such a definition is appropriate.

Although Fidelity Bank has vigorously asserted that the plain language of the relevant provisions of Chapter 105 of the General Statutes unambiguously indicates that the General Assembly intended that the term "interest" as used in N.C.G.S. § 105-130.5(b)(1) be understood to include Market Discount Income given that Market Discount Income is treated as "interest" for purposes of federal corporate income taxation, we do not find this argument persuasive. To be sure, 26 U.S.C. § 1276(a)(1) states that, "[e]xcept as otherwise provided in this section, gain on the disposition of any market discount bond shall be treated as ordinary income to the extent it does not exceed the accrued market discount on such bond" and 26 U.S.C. § 1276(a)(4) provides that "any amount treated as ordinary income under [26 U.S.C. § 1276(a)(1)] shall be treated as interest for purposes of this title." 26 U.S.C. § 1276(a)(1), (a)(4) (2012). For that reason, Market Discount Income is certainly treated as interest income for the purpose of determining the taxpayer's federal taxable income. *See* 26 U.S.C. § 860C(b)(1)(B) (2012). However, the fact that Market Discount Income is treated as interest for purposes of determining federal taxable income does not, Fidelity Bank's argument to the contrary notwithstanding, mean that Market Discount Income should be treated as "interest" for all purposes under the North Carolina Revenue Act.

As a general proposition, there is nothing illogical about including Market Discount Income, along with all other revenue derived from a discounted bond, as interest for the purpose of calculating federal taxable income while refusing to treat Market Discount Income as interest for purposes of the deduction for interest upon United States obligations allowed by N.C.G.S. § 105-130.5(b)(1). Instead, any decision to require that Market Discount Income be treated as interest for the purpose of both calculating federal taxable income and the deduction from federal taxable income authorized by N.C.G.S. § 105-130.5(b)(1) requires specific support in the relevant statutory language. We are unable to read the relevant provisions of the North Carolina Revenue Act to require the consistency of treatment for which Fidelity Bank contends.

A careful review of the provisions of Chapter 105 of the General Statutes demonstrates, as the Department notes, that the General Assembly has not adopted the definitions set out in the Internal Revenue Code into the North Carolina Revenue Act on any sort of wholesale basis. Instead, the General Assembly has selectively incorporated certain of the definitions contained in the Internal Revenue Code into the North Carolina Revenue Act. Although a number of the deductions from federal taxable income for purposes of calculating North Carolina net taxable income incorporate various provisions of the Internal Revenue

Code, no such reference to any provision of the Code appears in N.C.G.S. § 105-130.5(b)(1). In the event that the provisions of the Internal Revenue Code were binding throughout the North Carolina Revenue Act, these references to the Code in other portions of N.C.G.S. § 105-130.5(b) would be superfluous. *State v. Buckner*, 351 N.C. 401, 408, 527 S.E.2d 307, 311 (2000) (stating that, "[i]f possible, a statute must be interpreted so as to give meaning to all of its provisions"); *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981) (stating that "a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant"). As a result, the essential argument advanced in order to justify the construction of N.C.G.S. § 105-130.5(b)(1) advocated for by Fidelity Bank lacks support in the overall structure and literal language of the North Carolina Revenue Act.

Although Fidelity Bank has directed our attention to the provision in N.C.G.S. § 105-130.5(b)(1) making "[i]nterest upon the obligations of the United States or its possessions" deductible "to the extent included in federal taxable income," we are unable to read this language as requiring that Market Discount Income be treated as "interest" for purposes of the deduction authorized by N.C.G.S. § 105-130.5(b)(1). Instead of shedding light on the definition of "interest," the language in question, when read literally, simply indicates that anything that qualifies as "interest" for purposes of N.C.G.S. § 105-130.5(b)(1) is only deductible to the extent that it is "included in federal taxable income." Thus, we are unable to construe N.C.G.S. § 105-130.5(b)(1) in the manner contended for by Fidelity Bank.

As a result, for all of these reasons, we conclude that the Business Court's decision concerning the deductibility issue in its order resolving the issues raised in the first judicial review petition and rendered final in the orders addressing the second judicial review petition should be affirmed. However, we further conclude that the Business Court's decision to dismiss the portions of the second judicial review petition challenging the Department's decision concerning the deductibility issue in the second amended final agency decision was erroneous. For that reason, we conclude that the Business Court's dismissal decision should be reversed and that the case arising from Fidelity Bank's second judicial review proceeding should be remanded to the Business Court for further remand to the Department for the sole purpose of entering an order vacating its remand decision with respect to the deductibility issue.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

KORNEGAY FAMILY FARMS LLC
v.
CROSS CREEK SEED, INC.

No. 187PA16

Filed 18 August 2017

Agriculture—mislabeled seed—remedies

Defendant's limitation of remedies clauses were unenforceable against plaintiffs in a case involving mislabeled seed on appeal from the denial of partial summary judgment by the Business Court. Plaintiffs fell squarely within the protection afforded by the Seed Law policy recognized in *Gore v. George J. Ball, Inc.*, 279 N.C. 192 (1971). It is the policy of the State to protect farmers from the potentially devastating consequences of planting mislabeled seed.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order and opinion dated 20 April 2016 entered by Judge James L. Gale, Chief Special Superior Court Judge for Complex Business Cases appointed by the Chief Justice pursuant to N.C.G.S. § 7A-45.4, in Superior Court, Johnston County, denying defendant's motions for partial summary judgment. Heard in the Supreme Court on 10 April 2017.

Ellis & Parker PLLC, by L. Neal Ellis, Jr.; and Jolly Williamson & Williamson, by John P. Williamson, Jr., for plaintiff-appellees.

Poyner Spruill LLP, by Steven B. Epstein, Andrew H. Erteschik, and Saad Gul, for defendant-appellant.

Pinto Coates Kyre & Bowers, PLLC, by Jon Ward; and Michael W. Patrick for North Carolina Advocates for Justice, amicus curiae.

Smith Moore Leatherwood LLP, by Matthew Nis Leerberg and Kip D. Nelson, for North Carolina Association of Defense Attorneys, amicus curiae.

H. Julian Philpott, Jr. and Phillip J. Parker, Jr. for North Carolina Farm Bureau Federation, Inc., Tobacco Growers Association of North Carolina, Inc., North Carolina Soybean Producers Association, North Carolina Peanut Growers Association, and Carolinas Cotton Growers Cooperative, Inc., amici curiae.

JACKSON, Justice.

In this case we consider whether defendant Cross Creek Seed, Inc. may enforce several limitation of remedies clauses pursuant to Article 2 of the Uniform Commercial Code (UCC) as codified in N.C.G.S. § 25-2-719(1)(a) against Kornegay Family Farms, LLC and a number of other commercial farmers (plaintiffs) in defense of lawsuits premised on defendant's distribution of allegedly mislabeled tobacco seed. Because it is the policy of this State, as expressed by the General Assembly in the North Carolina Seed Law of 1963 (Seed Law), *see* N.C.G.S. §§ 106-277 to -277.34 (2015), to protect farmers from the potentially devastating consequences of planting mislabeled seed, we conclude that defendant's limitation of remedies clauses are unenforceable against plaintiffs. Accordingly, we affirm the North Carolina Business Court's 20 April 2016 order and opinion denying defendant's motions for partial summary judgment.

Defendant is headquartered in Raeford, North Carolina, and is in the business of breeding, developing, and producing tobacco seeds. The eight plaintiffs in this case all are commercial farmers in North Carolina who had purchased one or more of four varieties of defendant's tobacco seed between January and February 2014. Between June and August 2015, each plaintiff filed a separate suit against defendant alleging that defendant had sold them mislabeled, certified tobacco seed for planting. The complaints were filed in the superior courts of six different counties across North Carolina. Plaintiffs complained that "[c]ontrary to the order and the labeling on the containers delivered to [them], a substantial portion of the seed was of an unknown variety" and not the type or types of certified seed each plaintiff contracted to receive from defendant. Plaintiffs learned that they had not received the correct types of seed after the seeds had been planted and consequently produced "plants which were defective, disease prone, inferior, and unmarketable." Several plaintiffs subsequently filed complaints with the North Carolina Seed Board pursuant to relevant provisions of the Seed Law. *See* N.C.G.S. §§ 106-277.30, -277.34. The Seed Board investigated these complaints and determined that the yields of what it described as "off-type" plants were "consistent with the presence of genetic abnormalities" in the seed. The Seed Board also determined that the yields of "off-type" plants were not "consistent with nutritional deficiencies" nor were they responses to "environmental or agronomic factors" such as chemical injury. Defendant denied selling unknown varieties of tobacco seed to plaintiffs—and most relevant to our review of this case—argued that in accord with the limitation of remedies clause on each container

of seed, plaintiffs' alleged damages were "limited to repayment of the purchase price of the seed."

On 7 July 2015, the Chief Justice of the Supreme Court of North Carolina designated the suit by Kornegay Family Farms—the named plaintiff—as a mandatory complex business case, and the matter was subsequently assigned to Chief Special Superior Court Judge for Complex Business Cases James L. Gale. By a consent order signed by Judge Gale on 15 October 2015, the other seven cases were consolidated in a "Master File" established in conjunction with the case filed by the named plaintiff.

In October and November 2015, defendant filed motions for partial summary judgment against all eight plaintiffs seeking to bar recovery of any damages exceeding the purchase price of the seed. The Business Court heard the motions on 4 February 2016. At the hearing, defendant reiterated its argument that any damages sustained by plaintiffs were limited to the purchase price of the seeds as stated in the limitation of remedies clause printed on the labels affixed to each container of seed. Defendant argued that these limitation of remedies clauses governed the transactions with plaintiffs pursuant to the provision of UCC Article 2 codified at N.C.G.S. § 25-2-719.[1]

On 20 April 2016, the Business Court issued an order and opinion denying all of defendant's motions for partial summary judgment on the grounds that limitation of remedies clauses appearing on the labels of mislabeled seed must fail by virtue of the public policy central to the Seed Law as interpreted and applied by this Court. The Business Court observed that, faced with a set of facts similar to those presented in the instant case, this Court held that a limitation of remedies clause was unenforceable after determining that the Seed Law "has declared the policy of North Carolina to be one of protecting the farmer from the disastrous consequences of planting seed of one kind, believing he is planting another." *Kornegay Family Farms, LLC v. Cross Creek Seed, Inc.*, No. 15 CVS 1646, 2016 WL 1618272, at *4 (N.C. Super. Ct. Johnston Cty. (Bus. Ct.) Apr. 20, 2016) (quoting *Gore v. George J. Ball, Inc.*, 279 N.C. 192, 208, 182 S.E.2d 389, 398 (1971)). In *Gore* we also referred to a packaging disclaimer similar to the one at issue in this case as a "skeleton warranty." 279 N.C. at 208, 182 S.E.2d at 398. Finding no definitive renunciation of *Gore* by either this Court or the General Assembly,

1. Section 25-2-719 states that "[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable." N.C.G.S. § 25-2-719(3) (2015).

the Business Court "decline[d] to infer a legislative intent for the UCC to supersede the public policy of the Seed Law in cases involving the sale of mislabeled seed." *Kornegay Family Farms*, 2016 WL 1618272, at *8. Consequently, the Business Court ruled that this Court's decision in *Gore* did not allow defendant to enforce its limitation of remedies clauses against plaintiffs. *Id.* at *9. At the same time, the Business Court recognized that this Court "has not squarely confronted whether a limitation of remedies in a mislabeled-seed case governed by the UCC is enforceable," *id.* at *7, and agreed with all parties that guidance from this Court is needed, *id.* at *8.

On interlocutory appeal from the order of the Business Court denying defendant's motions for partial summary judgment, defendant argues that its limitation of remedies clauses are enforceable pursuant to the UCC and that this Court's prior analysis of the public policy underlying the Seed Law does not apply in this case. We disagree.

The stated purpose of the Seed Law, codified in Chapter 106, Article 31 of the General Statutes, is "to regulate the labeling, possessing for sale, sale and offering or exposing for sale or otherwise providing for planting purposes of agricultural seeds and vegetable seeds; to prevent misrepresentation thereof; and for other purposes." N.C.G.S. § 106-277. Accordingly, the Seed Law makes it unlawful "[t]o transport, to offer for transportation, to sell, distribute, offer for sale or expose for sale within this State agricultural or vegetable seeds for seeding purposes" if those seeds, *inter alia*, are "[n]ot labeled in accordance with the provisions of this Article," present a "false or misleading labeling or claim," or have "affixed names or terms that create a misleading impression as to the kind, kind and variety, history, productivity, quality or origin of the seeds." *Id.* § 106-277.9(1).

In 1971 we first were confronted with determining whether and how the Seed Law affects private, civil litigation premised on allegations of mislabeled seed. *See generally Gore*, 279 N.C. 192, 182 S.E.2d 389. In *Gore* the plaintiff ordered a particular type of tomato seed from the defendant. *Id.* at 195, 182 S.E.2d at 390. The seed was delivered to the plaintiff in several packets that each bore the following limitation of remedies clause:

> LIMITATION OF WARRANTY: Geo. J. Ball, Inc. warrants, to the extent of the purchase price, that seeds, plants, bulbs, growers supplies and other materials sold are as described on the container, within recognized tolerances. We give no other or further warranty, express or implied.

Id. at 195, 182 S.E.2d at 390. The plaintiff planted the seed and the seed produced tomato plants. *Id.* at 195, 182 S.E.2d at 390. It was not until the young tomatoes first appeared, however, that the plaintiff realized that they were not of the type that he had ordered. *See id.* at 195, 182 S.E.2d at 390. Instead of producing tomatoes that were "slightly flattened, uniform and free of cracks" and of "excellent size," the plants produced tomatoes of an "unusual shape" that "were a variety of tomato wholly unsuited for sale for table use." *Id.* at 194-95, 182 S.E.2d at 390. On the basis of these facts, the plaintiff sued the defendant for negligence in mislabeling the seed and for what this Court construed as "a breach of [ ] contract by failure to deliver the seed ordered, a breach of warranty of fitness of the seed for the purpose for which the plaintiff intended to use them and a failure of consideration." *Id.* at 198-99, 182 S.E.2d at 392. The plaintiff sought consequential damages totaling $9966.00, although he had paid only $5.00 for the seed. *Id.* at 195, 199, 182 S.E.2d at 390, 392. The trial court granted the defendant's motion for a directed verdict and dismissed the action. *Id.* at 197, 182 S.E.2d at 391.

On appeal from the trial court, the Court of Appeals held the trial court had erred in part in granting a directed verdict for the defendant and remanded the case to the trial court on the breach of contract claim on the grounds that a jury could award nominal damages on the plaintiff's contract claim. *Id.* at 197, 182 S.E.2d at 391-92. On appeal to this Court, we held the judgment of the Court of Appeals to be correct except as to its statement concerning the damages recoverable by the plaintiff. *Id.* at 211, 182 S.E.2d at 400. We began our analysis of recoverable damages by observing:

> Even though the jury should find that the provision entitled 'Limitation of Warranty' was so located and printed in the catalogue and other documents relied upon by the defendant as to bring it to the plaintiff's attention and so make it a part of the contract, it will not avail the defendant if it is contrary to the public policy of this State. A provision in a contract which is against public policy will not be enforced.

Id. at 203, 182 S.E.2d at 395 (citing *In re Receivership of Port Publ'g Co.*, 231 N.C. 395, 397, 57 S.E.2d 366, 367 (1950); *Glover v. Rowan Mut. Fire Ins. Co.*, 228 N.C. 195, 198, 45 S.E.2d 45, 47 (1947); *Cauble v. Trexler*, 227 N.C. 307, 311, 42 S.E.2d 77, 80 (1947); *Seminole Phosphate Co. v. Johnson*, 188 N.C. 419, 428, 124 S.E. 859, 862 (1924); *Miller v. Howell*, 184 N.C. 119, 122, 113 S.E. 621, 622-23 (1922); and *Standard Fashion Co. v. Grant*, 165 N.C. 453, 456, 81 S.E. 606, 607-08 (1914)). Given the

underlying facts of *Gore*, this Court looked to the Seed Law for guidance. After considering the stated purpose of the Seed Law and the provisions regulating labeling of seed, we concluded:

> [T]he statute has declared the policy of North Carolina to be one of protecting the farmer from the disastrous consequences of planting seed of one kind, believing he is planting another. To permit the supplier of seed to escape all real responsibility for its breach of contract by inserting therein a skeleton warranty, such as was here used, would be to leave the farmer without any substantial recourse for his loss.

Id. at 208, 182 S.E.2d at 398. According to this Court, such a result is necessary because "the breach of the contract of sale of seed . . . . *always* causes disaster. Loss of the intended crop is inevitable. The extent of the disaster is measured only by the size of the farmer's planting." *Id.* at 208, 182 S.E.2d at 398. Accordingly, the Court concluded that "the phrase, 'to the extent of the purchase price,' as used in the 'Limitation of Warranty' relied upon by the defendant, is contrary to the public policy of this State as declared in the North Carolina Seed Law . . . and is invalid." *Id.* at 208, 182 S.E.2d at 398 (citation omitted).

In the present case we consider facts that are nearly identical to those in *Gore*: plaintiffs purchased particular types of seed, received packages of the wrong seed mislabeled as the type or types ordered, and only discovered the mistake after the planted seeds yielded crops different from those anticipated. Furthermore, both cases involve contract clauses that purport to limit recoverable damages to the purchase price of the seed in any action potentially arising from the seed purchase transaction. Despite these nearly identical facts, defendant contends that our reasoning in *Gore* should not be applied in the present case because the transaction at issue in *Gore* predated the effective date of the UCC in North Carolina. Defendant contends that although the Court in *Gore* may have accurately described and applied the law in seed mislabeling cases in a pre-UCC world, the reasoning in *Gore* no longer remains correct in view of current North Carolina law on the subject. We do not agree with this argument.

Article 2 of the UCC, which was enacted in North Carolina in 1965, states that a seller's warranty "may limit or alter the measure of damages recoverable under this article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts." N.C.G.S. § 25-2-719(1)(a).

If a limited remedy "is expressly agreed to be exclusive," then "it is the sole remedy," *id.* § 25-2-719(1)(b), and "[c]onsequential damages may be limited or excluded unless the limitation or exclusion is unconscionable," *id.* § 25-2-719(3); however, Article 2 also provides for exceptions to these general rules. Critical to this case, Article 2 does not "impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers." *Id.* § 25-2-102 (2015). The Seed Law expressly regulates sale of seed to farmers and therefore, falls squarely within the section 25-2-102 exception. As such, the labeling provisions of the Seed Law considered by this Court in *Gore* were not "impair[ed] or repeal[ed]" by enactment of the UCC. *Id.* Consequently, we conclude that this Court's reasoning in *Gore* regarding the public policy underlying the mislabeling provisions was not limited solely to the facts of that case, and the analysis employed in *Gore* remains intact.

In addition, since our decision in *Gore* the General Assembly has taken no steps to repudiate our construction and application of the Seed Law. "[T]he legislature is always presumed to act with full knowledge of prior and existing law and [ ] where it chooses not to amend a statutory provision that has been interpreted in a specific way, we may assume that it is satisfied with that interpretation." *Polaroid Corp. v. Offerman*, 349 N.C. 290, 303, 507 S.E.2d 284, 294 (1998) (citation omitted), *cert. denied*, 526 U.S. 1098 (1999), *abrogated on other grounds by Lenox, Inc. v. Tolson*, 353 N.C. 659, 663, 548 S.E.2d 513, 517 (2001); *see also Hewett v. Garrett*, 274 N.C. 356, 361, 163 S.E.2d 372, 375 (1968) (determining that when the General Assembly had convened in seventeen regular sessions and several special sessions without changing a particular statute, this Court could "assume [that] the law-making body [was] satisfied with the interpretation this Court has placed upon [it]"). We also have found the law on a particular point settled when the General Assembly chose not to change a statute following a decision rendered by this Court only a year before. *City of Raleigh v. Mechs. & Farmers Bank*, 223 N.C. 286, 292, 26 S.E.2d 573, 576 (1943). Relevant to this case, since their enactment in 1965, the General Assembly has not altered section 25-2-102 or section 25-2-719 to provide expressly for enforcement of limitation of remedies clauses in mislabeled seed cases. *See* N.C.G.S. §§ 25-2-102, -719. Neither has the General Assembly made any change to the Seed Law that repudiates our understanding in *Gore* of the Seed Law's underlying policy and purpose. Such "[l]ong acquiescence in the practical interpretation of a statute is entitled to great weight in arriving at its meaning." *Polaroid Corp.*, 349 N.C. at 303, 507 S.E.2d at 294 (quoting *State v. Emery*, 224 N.C. 581, 587, 31 S.E.2d 858, 862 (1944)).

Defendant next argues that, in accord with the opinion of the Court of Appeals in *Billings v. Joseph Harris Co.*, which was affirmed by this Court, limitation of remedies clauses such as the one at issue here are enforceable pursuant to Article 2 of the UCC. The plaintiff in *Billings* purchased cabbage seed that was infected with a seed borne disease that caused the plants to rot in the field. In *Billings* the plaintiff argued before the Court of Appeals that its case was not governed by Article 2 of the UCC but by the Seed Law and this Court's decision in *Gore*. *Billings*, 27 N.C. App. 689, 696, 220 S.E.2d 361, 367 (1975), *aff'd*, 290 N.C. 502, 226 S.E.2d 321 (1976). As defendant notes in support of its position here, the Court of Appeals rejected the plaintiff's argument in *Billings* and held that the disclaimers of warranties used by the defendant were "beyond the parameters of the Seed Law." *Id.* at 696, 220 S.E.2d at 367. The Court of Appeals distinguished *Gore* on several grounds, including that the defendant in *Billings* "shipped the precise seed ordered by [the] plaintiff." *Id.* at 697, 220 S.E.2d at 367.

We do not agree that the decision of the Court of Appeals in *Billings* is determinative in the present case. When this Court considered *Billings* on appeal, we distinguished it from our preceding decision in *Gore*. *Billings*, 290 N.C. at 507, 226 S.E.2d at 324. We noted that in *Gore* "the defendant delivered the wrong kind of seed, whereas, in [*Billings*], the plaintiff admit[ted] that he received the exact kind of seed he ordered." *Id.* at 507, 226 S.E.2d at 324. Therefore, we concluded that in *Billings* "there was no violation of the North Carolina Seed Law through false labeling" or mislabeling of seed. *Id.* at 507, 226 S.E.2d at 324. Because the present case clearly involves mislabeled seed, it is clear that the reasoning of this Court in *Gore*, not *Billings*, is controlling. Since there was no mislabeling issue in *Billings*, the Court expressed "no opinion as to whether, where there has been such a breach, a limitation of the buyer to the recovery of the purchase price is 'reasonable in the light of the anticipated or actual harm caused by the breach.' " *Id.* at 510, 226 S.E.2d at 325 (quoting N.C.G.S. § 25-2-718). In contrast to the actual question in *Billings*, the hypothetical issue referenced by the Court is the one we address in this case.

Defendant also argues that the legislature "did not intend for the Seed Law to prevent a seller from enforcing its limitation of remedies in private litigation." In support of this position, defendant contends that the Seed Law is a regulatory statute that does not create a private right of action by which an injured party may seek damages for a violation. Defendant further contends that the Seed Law explicitly affects private, civil litigation in only two ways: first, factual evidence and scientific

opinions contained in a report of the Seed Board may be introduced in court proceedings pursuant to subsection 106-277.34(a), and second, subsection 106-277.34(b) limits damages in private actions in which the buyer did not make a sworn complaint against the dealer pursuant to the Seed Law to the "expenses incurred in connection with the cultivation of the seed alleged to be defective." N.C.G.S. § 106-277.34. Applying the doctrine of *expressio unius est exclusio alterius*—"[w]here a statute . . . sets forth the instances of its application or coverage, other methods or coverage are necessarily excluded," *State ex rel. Hunt v. N.C. Reinsurance Facil.*, 302 N.C. 274, 290, 275 S.E.2d 399, 407 (1981) (quoting 12 Strong's North Carolina Index 3d: *Statutes* § 5.10 (1978))—to these provisions, defendant argues that the Seed Law cannot be construed to otherwise affect private, civil actions. Specifically, defendant maintains that the underlying policy of the Seed Law as expressed in *Gore* cannot be applied to prevent enforcement of a limitation of remedies clause in a private, civil action.

Although the Seed Law is regulatory in nature, it does not bar aggrieved parties from pursuing private, civil litigation for damages resulting from mislabeled seed. In fact, certain provisions of the Seed Law clearly demonstrate that the General Assembly contemplated such recourse. As defendant observes, the 1998 amendments to the Seed Law provide for certain evidentiary constraints in "any court action involving a complaint that has been the subject of an investigation under G.S. 106-277.32," quoting N.C.G.S. § 106-277.34(a), and outline recovery limitations in "any court action where a buyer alleges that he or she suffered damages due to the failure of agricultural or vegetable seed to produce or perform as labeled . . . and the buyer failed to make a sworn complaint against the dealer as set forth in G.S. 106-277.30," quoting *id.* § 106-277.34(b). At the same time, although these two provisions do explicitly regulate private actions involving mislabeled seeds, their existence does not abrogate our reasoning in *Gore*. Again, because "the legislature is always presumed to act with full knowledge of prior and existing law" and it has taken no action over the last forty years to invalidate our interpretation in *Gore* of the policy of the Seed Law regarding limitation of remedies, "we may assume that [the General Assembly] is satisfied with that interpretation." *Polaroid Corp.*, 349 N.C. at 303, 507 S.E.2d at 294. Defendant's reliance on the doctrine of *expressio unius est exclusio alterius* is inapposite.

In *Gore* we interpreted the Seed Law to invalidate enforcement of limitation of remedies clauses in private, civil actions based on mislabeled seed. 279 N.C. at 208, 182 S.E.2d at 398. For the reasons stated

above, we apply our decision in *Gore* to the present case and reaffirm our previous conclusion that it is the public policy of North Carolina, as expressed by the General Assembly in the Seed Law, to protect farmers from "the disastrous consequences of planting seed of one kind, believing [they are] planting another." *Id.* at 208, 182 S.E.2d at 398. For the purpose of resolving the issue before us, we accept plaintiffs' contentions that they were sold mislabeled tobacco seed and could only recognize the mistake after planting the seeds and witnessing yields of "off-type" plants that were "defective, disease prone, inferior, and unmarketable." In light of these facts, plaintiffs here fall squarely within the protection afforded by the policy we recognized in *Gore*. Enforcing defendant's limitation of remedies clauses pursuant to Article 2 of the UCC in this case would foreclose the possibility of plaintiffs' recovering consequential damages for the mislabeled seed and would, therefore, violate that policy. Accordingly, we hold that defendant's limitation of remedies clauses are unenforceable against plaintiffs, and we affirm the opinion and order of the North Carolina Business Court denying defendant's motions for partial summary judgment against all plaintiffs.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
JAMES L. JOHNSON

No. 151PA16

Filed 18 August 2017

Search and Seizure—traffic stops—reasonable suspicion—too fast for conditions

An officer had reasonable suspicion to initiate a traffic stop, so that the stop was constitutional and the superior court correctly denied defendant's motion to suppress evidence of driving while impaired. The evidence supported the findings that the officer saw defendant make a sharp left turn and fishtail in snowy conditions and he then stopped defendant for driving too fast for conditions. The reasonable suspicion standard, which is less demanding than probable cause, applies to all traffic stops. Just because defendant did not leave the lane in which he was traveling or hit the curb did not mean that he was driving safely.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 784 S.E.2d 633 (2016), reversing a judgment entered on 3 March 2015 by Judge Mark E. Powell in Superior Court, Henderson County, and remanding for further proceedings. Heard in the Supreme Court on 21 March 2017.

Joshua H. Stein, Attorney General, by J. Joy Strickland and J. Rick Brown, Assistant Attorneys General, for the State-appellant.

Jeffrey William Gillette for defendant-appellee.

MARTIN, Chief Justice.

Defendant was stopped at a red light on a snowy evening. When the light turned green, defendant's truck abruptly accelerated, turned sharply left, and fishtailed, all in front of a police officer in his patrol car. The officer pulled defendant over for driving at an unsafe speed given the road conditions. Defendant argues that this stop was unconstitutional and seeks to suppress all of the evidence arising from it. Because we find that the officer had reasonable suspicion to stop defendant's truck, we hold that the stop was constitutional and reverse the decision of the Court of Appeals.

Defendant was cited for driving while impaired. In district court, defendant filed a motion to suppress the evidence of his impairment, and the district court granted the motion. The State appealed the district court's order to superior court for de novo review. The superior court denied the motion and remanded the case to the district court for further proceedings.

After the case was remanded, defendant pleaded guilty to driving while impaired. Defendant appealed the district court's judgment to the superior court, where he refiled his motion to suppress. The motion came before the same superior court judge who previously heard the motion. After finding that there was "no reason to hear [the motion] again," the superior court judge indicated that, to the extent that the motion needed to be denied a second time, he was denying it. Defendant then pleaded guilty to driving while impaired in superior court while preserving his right to appeal the superior court's denial of his motion to suppress.

Defendant appealed to the Court of Appeals, which determined that the traffic stop was unconstitutional. *State v. Johnson*, ___ N.C. App. ___, ___, 784 S.E.2d 633, 636 (2016). The Court of Appeals stated that

"there was nothing illegal about Defendant's left-hand turn" and held that the police officer who pulled defendant over therefore did not have reasonable suspicion to do so. *Id.* at ___, 784 S.E.2d at 636. We allowed the State's petition for discretionary review.

The Fourth Amendment to the United States Constitution states that "[t]he right of the people to be secure . . . , against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Although "Article I, Section 20 of the North Carolina Constitution contains different language [than the Fourth Amendment], it provides the same protection against unreasonable searches and seizures." *State v. Elder*, 368 N.C. 70, 73, 773 S.E.2d 51, 53 (2015). "A traffic stop is a seizure 'even though the purpose of the stop is limited and the resulting detention quite brief.' " *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (quoting *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)).

"Traffic stops have 'been historically reviewed under the investigatory detention framework first articulated in *Terry v. Ohio*.' " *Id.* at 414, 665 S.E.2d at 439 (citation omitted) (quoting *United States v. Delfin-Colina*, 464 F.3d 392, 396 (3d Cir. 2006)). In *Terry*, the Supreme Court of the United States held that an officer may make a brief investigatory stop of suspects walking on the street if the officer has a reasonable, articulable suspicion that "criminal activity may be afoot." 392 U.S. 1, 21, 30 (1968). Soon after, the Supreme Court applied the reasonable suspicion standard established in *Terry* to investigatory stops of vehicles near the international border. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975). Several years later, the Court extended the application of the reasonable suspicion standard to traffic stops more generally. *Prouse*, 440 U.S. at 663. In *State v. Styles*, we held that the reasonable suspicion standard applies to all traffic stops for traffic violations, "whether the traffic violation was readily observed or merely suspected." 362 N.C. at 415, 665 S.E.2d at 440.

The reasonable suspicion standard is "less demanding . . . than probable cause and requires a showing considerably less than preponderance of the evidence." *Id.* at 414, 665 S.E.2d at 439 (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000)). Police officers must simply be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion." *Terry*, 392 U.S. at 21. The reasonable suspicion standard is therefore satisfied if an officer has "some minimal level of objective justification" for making the stop. *Styles*, 362 N.C. at 414, 665 S.E.2d at 439 (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)). To determine whether reasonable suspicion exists, courts must look at "the totality of

the circumstances," *United States v. Cortez*, 449 U.S. 411, 417 (1981), as "viewed from the standpoint of an objectively reasonable police officer," *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

When reviewing a ruling on a motion to suppress, we analyze whether the trial court's "underlying findings of fact are supported by competent evidence . . . and whether those factual findings in turn support the [trial court's] ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). We address only the superior court's ruling, as we do not need to address the district court's prior proceedings. *Cf. State v. Sparrow*, 276 N.C. 499, 507, 173 S.E.2d 897, 902 (1970) ("When an appeal of right is taken to the Superior Court, in contemplation of law it is as if the case had been brought there originally and there had been no previous trial. The judgment appealed from is completely annulled and is not thereafter available for any purpose.").

We first review the superior court's findings of fact to determine if they are supported by competent evidence.[1] In summary, the superior court found the following facts. Snow had started falling on the night in question, and slush had begun to accumulate on the roads. Defendant was stopped at a red light. Officer Garrett Gardin of the Hendersonville Police Department was stopped in the lane next to defendant's truck. When the light turned green, defendant "abruptly accelerated" his truck and turned left. The truck fishtailed, but defendant regained control of the truck and stayed in his lane. Officer Gardin pulled defendant over because, in Officer Gardin's opinion, defendant was driving unsafely for the road conditions.

Officer Gardin's testimony at the suppression hearing in superior court supports these findings of fact. The officer testified that "snowfall was going to the ground," that snow was "starting to hold on to the ground," and that he had to switch to an "older model" marked police car that "had snow tires on it." Defendant's truck "approached [the] left-hand side of [his] car," Officer Gardin testified, and, "right when the light turned green[,] [defendant] immediately took a left turn . . . , screeching

1. In November 2014, when this case was first before the superior court, that court issued an Order on Motion to Suppress, which contained its findings of fact and conclusions of law. As we have already noted, after defendant pleaded guilty in district court, appealed the judgment to superior court, and renewed his motion to suppress in superior court, the motion came before the same superior court judge who had issued the November 2014 Order. Because the superior court judge found that there was "no reason to hear [the motion] again" and did not issue new findings of fact or conclusions of law, we review the findings of fact and conclusions of law that the superior court made in its November 2014 Order.

[his] tires." In response to a question at the suppression hearing, Officer Gardin agreed that defendant's truck had "jackknifed." According to Officer Gardin, "the tail end" of the truck "was headed toward the . . . corner w[h]ere there was a sidewalk next to [some] tennis courts . . . but [the truck] never actually ma[d]e it on to the sidewalk." Officer Gardin testified that, in his opinion, defendant was driving "too fast for what was going on at the time as far as [the] weather was concerned."

We next review whether the superior court's findings of fact support its ultimate conclusion of law that the stop was constitutional.[2] As we have said, the reasonable suspicion standard applies to traffic stops "whether the traffic violation was readily observed or merely suspected." *Styles*, 362 N.C. at 415, 665 S.E.2d at 440. In making this determination, our opinion in *Styles* cited—among other opinions from federal circuit courts—both *United States v. Delfin-Colina*, 464 F.3d at 396-97, and *United States v. Chanthasouxat*, 342 F.3d 1271, 1275-76 (11th Cir. 2003). *See Styles*, 362 N.C. at 415-16, 665 S.E.2d at 440-41. While these opinions are, of course, not binding on this Court, they can help us understand how the reasonable suspicion standard applies when a police officer allegedly observes a traffic violation instead of just suspecting one. In *Delfin-Colina*, the Third Circuit stated that "an officer need not be factually accurate in her belief that a traffic law had been violated but, instead, need only produce facts establishing that she reasonably believed that a violation had taken place." 464 F.3d at 398. And in *Chanthasouxat*, the Eleventh Circuit explained that the important question when determining the constitutionality of a traffic stop after an allegedly observed violation is not "whether [the defendant is] actually guilty of committing a traffic offense," but "whether it was reasonable for [the officer] to *believe* that [a traffic offense had been committed]." 342 F.3d at 1277 (alterations in original) (quoting *United States v. Cashman*, 216 F.3d 582, 587 (7th Cir. 2000)).[3]

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2. In its analysis, the superior court incorrectly used probable cause, not reasonable suspicion, as the standard to determine the constitutionality of this stop. As we have already explained, however, reasonable suspicion is the proper standard here. *See Styles*, 362 N.C. at 415, 665 S.E.2d at 440.

3. Although *Chanthasouxat* itself took no position on whether the reasonable suspicion standard or the probable cause standard applied in this context, *see* 342 F.3d at 1275 & n.2, 1280, the language from *Chanthasouxat* that we have quoted comes from *United States v. Cashman*, which used a probable cause standard, *see* 216 F.3d at 587. The common thread among all of these cases, however, is best summed up in *Cashman*, which states that "the Fourth Amendment requires only a reasonable assessment of the facts, not a perfectly accurate one." *Id.* at 587, *quoted in Chanthasouxat*, 342 F.3d. at 1277. It may be that the facts necessary to make a belief reasonable can be fewer or less significant when the reasonable suspicion standard, rather than the probable cause standard, applies. But

Here, Officer Gardin thought that defendant was driving at an unsafe speed given the weather and the conditions of the road. Under N.C.G.S. § 20-141(a), "[n]o person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing." N.C.G.S. § 20-141(a) (2015). As long as Officer Gardin reasonably believed, and had some "minimal level of objective justification" to believe, *Styles*, 362 N.C. at 414, 665 S.E.2d at 439 (quoting *Sokolow*, 490 U.S. at 7), that defendant had just driven at a speed that was greater than was reasonable and prudent for the snowy and slushy conditions that Officer Gardin was observing, then the reasonable suspicion standard was met.

As the trial court's findings of fact show, Officer Gardin was stopped at the same intersection as defendant before defendant took his sharp left turn. Officer Gardin was there when defendant's truck abruptly accelerated, turned, and fishtailed. The trial court, moreover, found that defendant "regained control" of his truck after it fishtailed, which indicates that defendant *lost* control of his truck when it fishtailed. All of these facts show that it was reasonable for Officer Gardin to believe that defendant's truck had fishtailed, and that defendant had lost control of his truck, because of defendant's abrupt acceleration while turning in the snow. It is common knowledge that drivers must drive more slowly when it is snowing, because it is easier to lose control of a vehicle on snowy roads than on clear ones. And any time that a driver loses control of his vehicle, he is in danger of damaging that vehicle or other vehicles, and of injuring himself or others. So, under the totality of these circumstances, it was reasonable for Officer Gardin to believe that defendant had violated N.C.G.S. § 20-141(a) by driving too quickly given the conditions of the road.

The Court of Appeals' decision suggests that an officer can initiate a traffic stop based on the officer's belief that he or she has just observed a traffic violation only if the officer *actually* observed a traffic violation. *See Johnson*, ___ N.C. App. at ___, 784 S.E.2d at 636. The Court of Appeals reasoned, among others things, that defendant did not commit any violation because his truck did not leave its lane or hit the curb when it fishtailed. *Id.* at ___, 784 S.E.2d at 636.

But again, in order to have reasonable suspicion to conduct a traffic stop based on a violation that an officer allegedly observed, the officer

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whichever standard applies, the underlying point—that an officer need not observe an actual offense as long as the officer can point to facts that give him or her a reasonable belief that an offense has been committed—is the same.

does not need to observe an actual traffic violation. To be sure, when a defendant does in fact commit a traffic violation, it is constitutional for the police to pull the defendant over. *See, e.g.*, *Illinois v. Caballes*, 543 U.S. 405, 407 (2005). But while an actual violation is sufficient, it is not necessary. To meet the reasonable suspicion standard, it is enough for the officer to *reasonably believe* that a driver has violated the law. *See Styles*, 362 N.C. at 415-16, 665 S.E.2d at 440-41; *accord Delfin-Colina*, 464 F.3d at 398; *Chanthasouxat*, 342 F.3d at 1277 (quoting *Cashman*, 216 F.3d at 587). In other words, even if defendant could show—had he been charged with violating subsection 20-141(a)—that he had not in fact violated that subsection, the traffic stop in this case was still constitutional as long as it was reasonable for Officer Gardin to believe that he saw defendant violate that subsection. Reasonable belief is a less stringent standard than legal certainty.

The fact that defendant stayed in his lane and did not hit the curb, moreover, does not necessarily mean that he was driving at a safe speed given the road conditions. After all, a driver may be traveling at an unsafe speed but be able to avoid accident or injury through sheer good fortune—as indeed may have happened here when defendant lost control of his truck in a snowy intersection and fishtailed toward a sidewalk before managing to regain control. By the same token, just because defendant did not leave the lane that he was traveling in or hit the curb does not mean that he was driving safely.

Officer Gardin had reasonable suspicion to initiate the traffic stop here, so the stop was constitutional. As a result, the superior court correctly denied defendant's motion to suppress. We therefore reverse the decision of the Court of Appeals.

REVERSED.

STATE OF NORTH CAROLINA
v.
CALVIN SHERWOOD WATTS

No. 132A16

Filed 18 August 2017

Criminal Law—request for limiting instruction—sufficiently clear

In a prosecution arising from defendant's alleged sexual assault on an eleven-year-old girl, defendant's convictions were reversed where the trial court did not give defendant's requested limiting instruction about the testimony of a witness who testified about an alleged prior rape. Contrary to the State's contention, defense counsel's motion, viewed in context, was plainly a request for a Rule 404(b) limiting instruction, although not as explicitly worded as would be the better practice.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 783 S.E.2d 266 (2016), reversing judgments entered on 31 October 2014 by Judge James Gregory Bell in Superior Court, Columbus County, and granting defendant a new trial. After hearing oral argument on 15 February 2017, the Court ordered the parties on 3 March 2017 to submit supplemental briefs. Additional issues raised in the supplemental briefs were determined without oral argument pursuant to N.C. R. App. P. 30(f)(1).

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

John Keating Wiles for defendant-appellee.

PER CURIAM.

In October 2014, defendant Calvin Sherwood Watts was tried in the Superior Court in Columbus County on one count of first-degree rape, three counts of first-degree sexual offense with a child, and one count of kidnapping. The charges arose from defendant's alleged sexual assault on an eleven-year-old girl to whom defendant was like a "grandpa." Before presenting the case to the jury, the State filed a notice of its intent to offer evidence pursuant to Rule of Evidence 404(b). *See* N.C.G.S. § 8C-1, Rule 404(b) (2015) ("Evidence of other crimes, wrongs,

or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident."). A proposed State's witness planned to testify that defendant had forced his way into her apartment and raped her in 2003. Those alleged events resulted in the return of indictments for rape and for breaking or entering against defendant, but those charges were dismissed in 2005. Defendant filed a pretrial motion *in limine* seeking to prevent the admission of Rule 404(b) evidence in the present case.

Following arguments on the Rule 404(b) motions and a voir dire hearing, the trial court ruled that the challenged evidence was admissible under Rule 404(b) to show opportunity and plan, thereby permitting the witness to testify before the jury over defense counsel's repeated objections. At the conclusion of the witness's testimony, defense counsel "move[d] to strike the testimony . . . and ask[ed] for an instruction and in the alternative ask[ed] for a mistrial." The trial court denied defendant's motions and did not give the requested instruction to the jury. At the conclusion of the State's case-in-chief, the trial court dismissed the charge of first-degree rape and allowed the case to go forward on the lesser included offense of attempted first-degree rape. The jury ultimately returned guilty verdicts on all four charges against defendant that were submitted to the jury.

Defendant asserts that his motion "for an instruction" was clearly a request for a limiting instruction regarding the Rule 404(b) evidence that had just been presented by the State's witness. The State, in contrast, contends that defendant's request was unclear and that he has thus waived the issue on appeal. We conclude that, viewed in context,[1] defense counsel's motion, while not as explicitly worded as would be the better practice, nonetheless was plainly a request for a Rule 404(b) limiting instruction. *See* N.C. R. App. P. 10(a)(1) ("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*." (emphasis added)).

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1. Specifically, the motion followed the State's notice of intent to introduce Rule 404(b) evidence from its witness, defendant's motion *in limine* to exclude that evidence, the arguments of counsel and the voir dire hearing on the issue, and defense counsel's repeated objections to the witness's testimony.

Our General Statutes provide that "[w]hen evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, *shall* restrict the evidence to its proper scope and instruct the jury accordingly." N.C.G.S. § 8C-1, Rule 105 (2015) (emphasis added). "Failure to give the requested instruction must be held prejudicial error for which [a] defendant is entitled to a new trial." *State v. Norkett*, 269 N.C. 679, 681, 153 S.E.2d 362, 363 (1967); *cf. State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991) (failure to give a limiting instruction not requested by a defendant is not reviewable on appeal); *State v. Jones*, 322 N.C. 406, 368 S.E.2d 844 (1988) (same). Accordingly, because defendant was prejudiced by the trial court's failure to give the requested limiting instruction, we affirm, as modified herein, the opinion of the Court of Appeals that reversed defendant's convictions and remanded the matter to the trial court for a new trial.

MODIFIED IN PART AND AFFIRMED.

DAVID WRAY
v.
CITY OF GREENSBORO

No. 255A16

Filed 18 August 2017

Immunity—sovereign—contract actions

The averments in plaintiff's first amended complaint were sufficient to allege a waiver of governmental immunity due to a city's failure to honor contractual obligations to plaintiff as an employee. In contract actions, the doctrine of sovereign immunity will not be a defense; a waiver of governmental immunity is implied and effectively alleged when the plaintiff pleads a contract claim. In the context of a contract action, rather than a tort action, N.C.G.S. § 160A-485 has no application and does not limit how governmental immunity may be waived.

Justice ERVIN dissenting.

Justice BEASLEY 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, ___ N.C. App. ___, 787 S.E.2d 433 (2016), reversing an order entered on 13 May 2015 by Judge James C. Spencer, Jr. in Superior Court, Guilford County, and remanding the case for further proceedings. Heard in the Supreme Court on 9 May 2017 in session in the Old Chowan County Courthouse (1767) in the Town of Edenton pursuant to N.C.G.S. § 7A-10(a).

Carruthers & Roth, P.A., by Kenneth R. Keller and Mark K. York, for plaintiff-appellee.

Mullins Duncan Harrell & Russell PLLC, by Alan W. Duncan and Stephen M. Russell, Jr.; and Smith Moore Leatherwood LLP, by Patrick M. Kane, for defendant-appellant.

Wilson & Helms LLP, by Lorin J. Lapidus; and Kimberly S. Hibbard, General Counsel, and Gregory F. Schwitzgebel, III, Associate General Counsel, for North Carolina League of Municipalities, amicus curiae.

HUDSON, Justice.

This case involves attempts by plaintiff, David Wray, a former Chief of Police for defendant, the City of Greensboro, to obtain reimbursement from the City for costs incurred by plaintiff in defending lawsuits brought against him for events that occurred during his tenure as Chief of Police. Because we conclude that plaintiff has sufficiently pleaded waiver of governmental immunity by alleging the essence of a contract claim, we affirm the decision of the Court of Appeals reversing the trial court's order of dismissal and remanding the matter for further proceedings.

On 2 January 2009, plaintiff filed a complaint in the Superior Court in Guilford County, seeking, *inter alia*, a judgment declaring that he is entitled to indemnification and reimbursement from the City for all legal expenses incurred by him in connection with two lawsuits naming him as a defendant. In his complaint plaintiff stated that he began employment with defendant as a police officer in March 1981 and rose through the ranks to be named Chief of Police in July 2003. According to plaintiff, he was told that he "would need to take appropriate steps to restore the integrity and high standards" of the police department that had deteriorated under his predecessor. Plaintiff instituted measures that were unpopular with some officers, and he was ultimately forced to resign from his position in January 2006.

In 2007 and 2008, respectively, two police officers sued plaintiff and other individuals, as well as the City, seeking damages for various wrongs alleged to have been inflicted on them during plaintiff's tenure. In his complaint plaintiff states that he requested that the City provide him with a defense in both suits, which "contain[ed] allegations that David Wray was acting within the course and scope of his employment with the City"; however, the City refused to do so.

Plaintiff asserted that in November 1980, long before either suit was filed, "the City passed a Resolution which provided that if a City officer or an employee were sued in either their individual or official capacities, the City would provide for the defense of said employee or individual and pay any judgment resulting from said suit against the employee or official." Plaintiff stated that "[t]he Resolution provided for defense and indemnification if the employee or official were acting in the scope and course of their employment or duty, unless the employee or official: 1) acted with fraud, corruption or actual malice, or 2) acted or failed to act in a wanton or oppressive manner." The 1980 Resolution reads that, as authorized by the General Assembly in 1977 in section 160A-167 of the North Carolina General Statutes,[1] "it is . . . the policy of the City of Greensboro to provide for the defense of its officers and employees against civil claims and judgments and to satisfy the same, either through insurance or otherwise, when resulting from any act done . . . in the scope and course of their employment," with the exceptions stated above. The policy authorizes the City Manager to determine whether a claim filed against an officer meets the standards set forth in the policy and states that the City Council "shall determine . . . whether" to provide

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1. Section 160A-167 of the North Carolina General Statutes, titled "Defense of employees and officers; payment of judgments," reads in pertinent part:

> Upon request made by . . . any . . . former employee or officer, . . . any city . . . may provide for the defense of any civil or criminal action or proceeding brought against him either in his official or in his individual capacity, or both, on account of any act done or omission made, or any act allegedly done or omission allegedly made, in the scope and course of his employment or duty as an employee or officer of the city . . . . The defense may be provided by the city . . . by its own counsel, or by employing other counsel, or by purchasing insurance which requires that the insurer provide the defense. Providing for a defense pursuant to this section is hereby declared to be for a public purpose, and the expenditure of funds therefor is hereby declared to be a necessary expense. Nothing in this section shall be deemed to require any city . . . to provide for the defense of any action or proceeding of any nature.

N.C.G.S. § 160A-167(a) (2015).

for payment of any such claim made or judgment entered against an officer.

Plaintiff asked the court to "enter a declaratory judgment requiring the City to defend and indemnify him in connection with [both lawsuits]" and to pay his costs for defending those suits.

The case was removed to federal court to address a companion federal claim asserted by plaintiff. That claim was dismissed, and in August 2013, the state-law claim was remanded to the Superior Court in Guilford County.

On 20 October 2014, plaintiff filed an amended complaint reflecting dismissal of the federal claim and adding details to his remaining claim seeking indemnification and reimbursement from the City. Specifically, plaintiff stated that a third lawsuit was filed against him, the City, and other individuals in January 2009, and that he also had to pay his own defense costs for that action. Plaintiff reiterated that "[a]s an employee of the City acting within the course and scope of his employment, and pursuant to the provisions of the City Policy, [he] is entitled to indemnification and reimbursement for the expenses he has incurred as a result of the allegations by and position taken by the City, as well as costs he has incurred in connection with his defense" in all three lawsuits "in the amount of $220,593.71."

On 24 November 2014, the City filed a motion to dismiss under Civil Procedure Rules 12(b)(1), 12(b)(2), and 12(b)(6). Defendant asserted that the complaint should be dismissed for "lack of a justiciable controversy, lack of personal and subject matter jurisdiction, and for failure to state a claim." Defendant argued, *inter alia*, that the claims asserted by plaintiff in his first amended complaint, including his "newly-added claims for reimbursement of legal expenses," "are barred by the doctrine of governmental immunity, and accordingly Plaintiff has failed to state a claim on which relief can be granted."

On 13 May 2015, Judge James C. Spencer, Jr. entered an order dismissing plaintiff's first amended complaint with prejudice. The trial court ruled that defendant is "shielded by the doctrine of governmental immunity, which immunity has not been waived." The court added, "Neither the institution of a plan adopted pursuant to N.C.G.S. § 160A-167, under which a city may pay all or part of some claims against employees of the city, nor action taken by the city under N.C.G.S. § 160A-167, waives governmental immunity." Plaintiff appealed to the Court of Appeals.

On 7 June 2016, a divided panel of the Court of Appeals reversed the trial court's order dismissing plaintiff's claim and remanded the matter

for further proceedings. *Wray v. City of Greensboro*, ___ N.C. App. ___, 787 S.E.2d 433 (2016). The majority held that plaintiff "has, in fact, set forth allegations that the City has waived governmental immunity . . . based on the City's act of entering into an employment agreement with Plaintiff." *Id.* at ___, 787 S.E.2d at 435.

The majority explained, "Specifically, Plaintiff has made a breach of contract claim, essentially alleging that he had a contract with the City to work for the City and that pursuant to the City's contractual obligations, the City is required to pay for his litigation expenses." *Id.* at ___, 787 S.E.2d at 435 (emphasis omitted). The majority added, "Importantly, the City is authorized to enter into employment contracts with its police officers, and the City is authorized by N.C.[G.S.] § 160A-167 to enact a policy by which it may contractually obligate itself to pay for certain legal expenses incurred by these officers." *Id.* at ___, 787 S.E.2d at 435-36.

The majority reiterated throughout its opinion that this appeal is not about the merits of plaintiff's contract claim. *Id.* at ___, 787 S.E.2d at 436-37. Rather, the issue to be resolved is whether the trial court erred in dismissing the complaint "based on the doctrine of governmental immunity, the only basis of its order." *Id.* at ___, 787 S.E.2d at 436 (emphasis omitted). The majority reviewed plaintiff's amended complaint and determined that plaintiff sufficiently alleged waiver. *Id.* at ___, 787 S.E.2d at 437. Specifically, the majority determined that plaintiff alleged "that he was employed by the City's Police Department as the Chief of Police, that he was acting within the 'course and scope of his employment' at all times material to his claim, that pursuant to the provisions of the City Policy he is entitled to reimbursement for his legal expenses and fees, and that the City failed to honor the City Policy." *Id.* at ___, 787 S.E.2d at 437. Therefore, the majority held that plaintiff "establish[ed] waiver through a breach of Plaintiff's contractual relationship as an employee of the City." *Id.* at ___, 787 S.E.2d at 437. The majority further held that "the City is not shielded by the doctrine of governmental immunity to the extent that Plaintiff's action is based in contract." *Id.* at ___, 787 S.E.2d at 438. Accordingly, the majority reversed the trial court's order and remanded the case for further proceedings. *Id.* at ___, 787 S.E.2d at 438.

The dissent would conclude that the trial court properly granted defendant's motion to dismiss. *Id.* at ___, 787 S.E.2d at 438 (Bryant, J., dissenting). The dissent would characterize the City's policy, as declared in the 1980 Resolution, as "prescrib[ing] an intent to provide for the defense of officers and employees," which, according to the dissent, does not equate to "provid[ing] substantive rights or procedural steps."

Id. at ___, 787 S.E.2d at 439 (citations and emphasis omitted). The dissent "would hold that the Resolution is not a contractual provision upon which plaintiff can compel defendant's performance." *Id.* at ___, 787 S.E.2d at 439.

While acknowledging that "there is plenary support for the proposition that an employer-employee relationship is essentially contractual and such a relationship often waives immunity from suit on the contract," the dissent would nonetheless affirm the trial court. *Id.* at ___, 787 S.E.2d at 439 (citations omitted). The dissent would conclude "that the record before the trial court was sufficient to determine that plaintiff could not establish a valid contractual agreement with defendant City of Greensboro on the issue central to this action, the provision of a legal defense as a condition of employment." *Id.* at ___, 787 S.E.2d at 439-40. Accordingly, the dissent would "hold the trial court was correct in concluding that defendant . . . did not waive its governmental immunity to plaintiff's suit." *Id.* at ___, 787 S.E.2d at 440. Therefore, the dissent would affirm the trial court's order dismissing plaintiff's complaint. *Id.* at ___, 787 S.E.2d at 440. Defendant filed its appeal based on the dissenting opinion.

Because we agree that plaintiff has sufficiently pleaded waiver of governmental immunity by alleging a contract claim, we affirm the decision of the Court of Appeals reversing the trial court's order of dismissal and remanding the matter for further proceedings.

"Dismissal of an action under Rule 12(b)(6) is appropriate when the complaint 'fail[s] to state a claim upon which relief can be granted.' " *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 7 (2015) (alteration in original) (quoting N.C. R. Civ. P. 12(b)(6)). "[T]he well-pleaded material allegations of the complaint are taken as [admitted]; but conclusions of law or unwarranted deductions of fact are not admitted." *Id.* at 448, 781 S.E.2d at 7 (first alteration in original) (quoting *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970)). "The system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss." *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 334 S.E.2d 751, 755 (1985). "A complaint should not be dismissed under Rule 12(b)(6) '. . . unless it affirmatively appears that plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim.' " *Id.* at 481, 334 S.E.2d at 755 (quoting *Presnell v. Pell*, 298 N.C. 715, 719, 260 S.E.2d 611, 613 (1979)). "We review appeals from dismissals under Rule 12(b)(6) de novo." *Arnesen*, 368 N.C. at 448, 781 S.E.2d at 8 (citing *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013)).

Additionally, "[q]uestions of law regarding the applicability of sovereign or governmental immunity are reviewed de novo." *Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611, 781 S.E.2d 282, 284 (2016) (citations omitted).

As a general rule, "[u]nder the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity." *Evans ex rel. Horton v. Hous. Auth.*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004) (quoting *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997)); *see also Smith v. State*, 289 N.C. 303, 309, 222 S.E.2d 412, 417 (1976). Specifically, "[t]he doctrine has proscribed both contract and tort actions against the [S]tate and its administrative agencies, as well as suits to prevent a State officer or Commission from performing official duties or to control the exercise of judgment on the part of State officers or agencies." *Smith*, 289 N.C. at 309-10, 222 S.E.2d at 417 (citations omitted). Governmental immunity is that portion of the State's sovereign immunity which extends to local governments. *See, e.g.*, *Evans*, 359 N.C. at 53, 602 S.E.2d at 670; *Meyer*, 347 N.C. at 104, 489 S.E.2d at 884.

A State or local government, however, waives that immunity when it enters into a valid contract, to the extent of that contract. *Whitfield v. Gilchrist*, 348 N.C. 39, 42-43, 497 S.E.2d 412, 414 (1998); *Smith*, 289 N.C. at 320, 222 S.E.2d at 423-24. Specifically, this Court has held "that whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." *Smith*, 289 N.C. at 320, 222 S.E.2d at 423-24. Thus, "in causes of action on contract . . . , the doctrine of sovereign immunity will not be a defense to the State. The State will occupy the same position as any other litigant." *Id.* at 320, 222 S.E.2d at 424 (citation omitted). "Likewise, a city or county waives immunity when it 'enters into a valid contract.' " *Wray*, ___ N.C. App. at ___, 787 S.E.2d at 436 (majority opinion) (emphasis omitted) (quoting *M Series Rebuild, LLC v. Town of Mount Pleasant*, 222 N.C. App. 59, 65, 730 S.E.2d 254, 259, *disc. rev. denied*, 366 N.C. 413, 735 S.E.2d 190 (2012)).

"In order to overcome a defense of governmental immunity, the complaint must specifically allege a waiver of governmental immunity. Absent such an allegation, the complaint fails to state a cause of action." *Fabrikant v. Currituck County*, 174 N.C. App. 30, 38, 621 S.E.2d 19, 25 (2005) (quoting *Paquette v. County of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002) (citations omitted), *disc. rev. denied*, 357 N.C. 165, 580 S.E.2d 695 (2003)); *accord Hinson v. City of Greensboro*, 232

N.C. App. 204, 210, 753 S.E.2d 822, 827 (2014). "This requirement does not, however, mandate that a complaint use any particular language. Instead, consistent with the concept of notice pleading, a complaint need only allege facts that, if taken as true, are *sufficient to establish* a waiver . . . [of] immunity." *Fabrikant*, 174 N.C. App. at 38, 621 S.E.2d at 25 (emphasis added) (citation omitted). Because in contract actions "the doctrine of sovereign immunity will not be a defense," a waiver of governmental immunity is implied, and effectively alleged, when the plaintiff pleads a contract claim. *See Smith*, 289 N.C. at 320, 222 S.E.2d at 423-24 ("[W]henever the State of North Carolina . . . enters into a valid contract, *the State implicitly consents to be sued* for damages on the contract in the event it breaches the contract." (emphasis added)). Thus, an allegation of a valid contract is an allegation of waiver of governmental immunity.

Here plaintiff adequately pleaded a contract action: that he had an employment relationship with the City that included the obligation on the part of the City to pay for his defense and that the City failed to do so. Specifically, in his first amended complaint plaintiff alleged, in pertinent part, as follows:

> 2. The plaintiff . . . was formerly Chief of Police of the Greensboro Police Department.
>
> . . . .
>
> 4. David Wray began employment with the Police Department of the City of Greensboro as a police officer in March of 1981.
>
> 5[.] Through the years, David Wray was promoted to Sergeant, Lieutenant, Assistant Chief, and ultimately was promoted . . . to the position of Chief of Police in July of 2003.
>
> . . . .
>
> 25. Mitchell Johnson's actions in locking David Wray from his office effectively ended David Wray's ability to serve as Chief and as a practical matter terminated David Wray's employment with the City.
>
> 26. David Wray submitted his resignation as Chief on January 9, 2006.
>
> . . . .

35[.] At all times material hereto . . . David Wray acted in the scope and course of his employment with the City, and not because of actual fraud, corruption, actual malice, or in a wanton or oppressive manner.

. . . .

38[.] By letter dated June 5, 2007, counsel for David Wray wrote to counsel representing the City, pointing out that the Fulmore complaint pertained to "official capacity" conduct on the part of David Wray and requested that the City indemnify David Wray and provide him with a defense in the action. . . .

39. By letter dated July 3, 2007, counsel for the City responded to the request that the City provide David Wray with representation by providing a copy of the City Policy dated 13 November 1980 and 18 November 1980 ("City Policy") and denied the request for representation, based "on current information." . . .

40. Upon information and belief, the City paid for representation of Randy Gerringer, Brian Bissett and Craig McMinn in the Fulmore Suit.

. . . .

46. David Wray also requested that the City provide him with a defense in connection with the Hinson Suits.

47. The City did not defend David Wray or provide David Wray with a defense in the Hinson Suits.

. . . .

51. David Wray requested that the City provide him with a defense and indemnification in the Alexander Suit.

52. The City did not defend David Wray or provide David Wray with a defense in the Alexander Suit.

. . . .

62. At all times material hereto, David Wray was acting within the course and scope of his employment with the City of Greensboro, in the good faith discharge of his duties.

. . . .

> 64. At all times material to the allegations contained in the Fulmore Suit, the Hinson Suits, and the Alexander Suit, David Wray acted within the course and scope of his employment as the Chief of the Greensboro Police Department and is entitled to reimbursement for costs he incurred to defend himself in connection with the statements made by the City, as well as costs incurred in connection with his defense in the Fulmore Suit, the Hinson Suits, and the Alexander Suit.
>
> 65[.] The City has refused and continues to refuse to reimburse David Wray for his legal expenses.
>
> 66. As an employee of the City acting within the course and scope of his employment, and pursuant to the provisions of the City Policy, David Wray is entitled to indemnification and reimbursement for the expenses he has incurred as a result of the allegations by and position taken by the City, as well as costs he has incurred in connection with his defense in the Fulmore Suit, the Hinson Suits, and the Alexander Suit in the amount of $220,593.71.

In sum, plaintiff alleged that he was an "employee of" defendant, that he "acted within the course and scope of his employment as the Chief of the Greensboro Police Department," that "pursuant to the provisions of the City Policy, [he] is entitled to indemnification and reimbursement for the . . . costs he has incurred in connection with his defense" in various lawsuits, and that defendant "has refused and continues to refuse to reimburse" him.

In light of the low bar for notice pleading under Rule 12(b)(6), as well as the waiver of governmental immunity that is inferred from the pleading of a contract claim, we conclude that the averments in plaintiff's first amended complaint are sufficient to allege a waiver of governmental immunity due to the City's failure to honor contractual obligations to plaintiff as an employee. Although we hold that dismissal of the complaint was not warranted, like the Court of Appeals, we express no opinion on the merits of plaintiff's contract action. We simply conclude, as we did in *Smith*, that "plaintiff is not to be denied his day in court because his contract was with" the City. *Smith*, 289 N.C. at 322, 222 S.E.2d at 424.

Moreover, the trial court erroneously concluded that the City was "shielded by the doctrine of governmental immunity" based on this Court's decision in *Blackwelder v. City of Winston-Salem*, 332 N.C. 319,

420 S.E.2d 432 (1992). Citing *Blackwelder*, the trial court stated: "Neither the institution of a plan adopted pursuant to N.C.G.S. § 160A-167, under which a city may pay all or part of some claims against employees of the city, nor action taken by the city under N.C.G.S. § 160A-167, waives governmental immunity." *Blackwelder*, however, does not control here. In *Blackwelder* this Court stated that "[a]ction by the City under N.C.G.S. § 160A-167 does not waive immunity" in the context of a tort action, noting that "N.C.G.S. § 160A-485 provides that the *only way* a city may waive its governmental immunity is by the purchase of liability insurance." 332 N.C. at 324, 420 S.E.2d at 436 (emphasis added). Section 160A-485 of the North Carolina General Statutes specifically addresses waiver of immunity from civil liability in tort. N.C.G.S. § 160A-485(a) (2015) ("Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance."). Here, in the context of a contract action, rather than a tort action, section 160A-485 has no application and does not limit how governmental immunity may be waived. Because there is no analogous statute limiting mechanisms for waiver of governmental immunity in the context of contract actions, the reasoning in *Blackwelder* does not control here.

We conclude that plaintiff's first amended complaint sufficiently presents allegations of a claim sounding in contract. As such, we further conclude that the complaint sufficiently alleges that the City has consented to be sued to the extent of any such contract. These allegations are adequate to raise a waiver of governmental immunity, and thus, to survive the City's motion to dismiss. For these reasons, we affirm the decision of the Court of Appeals reversing the trial court's order of dismissal and remanding the matter for further proceedings.

AFFIRMED.

Justice ERVIN dissenting.

As a result of its reliance upon what I believe to be an excessively "low bar for notice pleading under [N.C.G.S. § 1A-1,] Rule 12(b)(6)," the Court has determined that plaintiff "adequately pleaded a contract action: that he had an employment relationship with the City that included the obligation on the part of the City to pay for his defense and that the City failed to do so." In view of my belief that plaintiff did not sufficiently allege the existence of a contractual relationship between himself and the City that encompassed a right to obtain reimbursement for the costs of defending the civil actions brought against him in the Alexander, Fulmore, and Hinson suits, I am unable to agree with

the Court's conclusion that plaintiff's amended complaint adequately alleged the necessary waiver of governmental immunity. As a result, I respectfully dissent from the Court's decision to affirm the Court of Appeals' opinion in this case.

The trial court dismissed plaintiff's first amended complaint on the grounds that the City had not waived its right to assert governmental immunity in this case, with "[n]either the institution of a plan adopted pursuant to N.C.G.S. § 160A-167, under which a city may pay all or part of some claims against employees of the city, nor action taken by the city under N.C.G.S. § 160A-167" sufficing to work such a waiver. In reversing the trial court's order, the Court of Appeals determined that plaintiff "has essentially pleaded that he had an employment relationship with the City and that the City has contractually obligated itself to pay for his defense as a benefit of his contract," with the issue of "[w]hether the City is, in fact, obligated to *pay contractually* by virtue of its passage of the City Policy [going] to the merits" rather than being "the subject of this appeal." *Wray v. City of Greensboro*, ___ N.C. App. ___, ____, 787 S.E.2d 433, 437 (2016). In upholding this determination, this Court has held that "plaintiff's first amended complaint sufficiently presents allegations of a claim sounding in contract" and "sufficiently alleges that the City consents to be sued to the extent of any such contract." As a result, the ultimate issue before the Court in this case is the extent, if any, to which plaintiff's first amended complaint adequately alleges that the City breached a contract with plaintiff under which plaintiff was entitled to obtain reimbursement for the cost of defending civil actions brought against him in connection with actions that he had taken in the course and scope of his employment by the City.

According to Rule 12(b)(6) of our Rules of Civil Procedure, a complaint is subject to dismissal in the event that it fails "to state a claim upon which relief can be granted." N.C.G.S. § 1A-1, Rule 12(b)(6) (2015). "When the complaint on its face reveals that no law supports the claim, reveals an absence of facts sufficient to make a valid claim, or discloses facts that necessarily defeat the claim, dismissal is proper." *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 8 (2015) (citing *Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)). In determining whether a motion to dismiss for failure to state a claim for relief should be allowed or denied, "the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not." *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (quoting 2A James Wm. Moore et al., *Moore's Federal Practice* ¶ 12.08 (2d ed. 1968)).

Rule 8(a)(1) of our Rules of Civil Procedure requires civil complaints to include "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief." N.C.G.S. § 1A-1, Rule 8(a)(1) (2015). Thus, pursuant to Rule 8(a)(1), a complaint is sufficient to state a claim upon which relief can be granted in the event that

> "it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and by using the rules provided for obtaining pretrial discovery to get any additional information he may need to prepare for trial." Nevertheless, the plaintiff's complaint must allege enough "to give the substantive elements of his claim."

RGK, Inc. v. U.S. Fid. & Guar. Co., 292 N.C. 668, 674, 235 S.E.2d 234, 238 (1977) (quoting *Sutton*, 277 N.C. at 104-05, 176 S.E.2d at 167); *see also United Leasing Corp. v. Miller*, 45 N.C. App. 400, 405, 263 S.E.2d 313, 317 (stating that "[a] claim for relief must still satisfy the requirements of the substantive law which gave rise to the pleadings, and no amount of liberalization should seduce the pleader into failing to state enough to give the substantive elements of his claim"), *disc. rev. denied*, 300 N.C. 374, 267 S.E.2d 685 (1980). As this Court stated shortly after the enactment of the North Carolina Rules of Civil Procedure, "the additional requirements in our Rule 8(a)(1) manifest the legislative intent to require a more specific statement, or notice in more detail, than Federal Rule 8(a)(2) requires." *Sutton*, 277 N.C. at 100, 176 S.E.2d at 164.

Governmental immunity[1] "shields a defendant entirely from having to answer for its conduct at all in a civil suit for damages." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citation omitted). "Under the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity." *Evans ex rel. Horton v. Hous. Auth.*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004) (quoting *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997)). A

1. Although "[t]he State's sovereign immunity applies to both its governmental and proprietary functions, while the more limited governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions," *Evans ex rel. Horton v. Hous. Auth.*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004) (citations omitted), "[i]n application here, the distinction is immaterial," *Craig*, 363 N.C. at 335 n.3, 678 S.E.2d at 353 n.3, given the obviously governmental nature of the law enforcement function.

"complaint [against a local governmental entity] does not state a cause of action" unless it alleges a waiver of governmental immunity. *Fields v. Durham City Bd. of Educ.*, 251 N.C. 699, 701, 111 S.E.2d 910, 912 (1960).

As the Court acknowledges, a municipality can waive governmental immunity by entering into a valid express contract. *See Whitfield v. Gilchrist*, 348 N.C. 39, 42-43, 497 S.E.2d 412, 414 (1998) (citing *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976) (holding that, "whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract")). For that reason, the Court correctly notes that "a waiver of governmental immunity is implied, and effectively alleged, when the plaintiff pleads a contract claim," so that, in other words, "an allegation of a valid contract is an allegation of waiver of governmental immunity." On the other hand, in the absence of allegations that the parties entered into "both an express contract and a valid contract, the State has not waived its sovereign immunity." *Eastway Wrecker Serv., Inc. v. City of Charlotte*, 165 N.C. App. 639, 644, 599 S.E.2d 410, 413 (2004), *aff'd per curium*, 360 N.C. 167, 622 S.E.2d 495 (2005); *see also Whitfield*, 348 N.C. at 42-43, 497 S.E.2d at 415 (stating that, "[c]onsistent with the reasoning of *Smith*, we will not first imply a contract in law where none exists in fact, then use that implication to support the further implication that the [governmental entity] has intentionally waived its [governmental immunity] and consented to be sued for damages for breach of the contract it never entered in fact").

In order to state a valid express contract claim, the plaintiff "must allege the existence of a contract between plaintiff and defendant, the specific provisions breached, the facts constituting the breach, and the amount of damages resulting to plaintiff from such breach." *RGK*, 292 N.C. at 675, 235 S.E.2d at 238 (emphasis omitted) (quoting *Cantrell v. Woodhill Enters., Inc.* 273 N.C. 490, 497, 160 S.E.2d 476, 481 (1968)). Admittedly, "[t]here is no rule which requires a plaintiff to set forth in his complaint the full contents of the contract which is the subject matter of his action or to incorporate the same in the complaint by reference to a copy thereof attached as an exhibit" as long as the complaint "allege[s] in a plain and concise manner the material, ultimate facts which constitute his cause of action." *Id.* at 675, 235 S.E.2d at 238 (quoting *City of Wilmington v. Schutt*, 228 N.C. 285, 286, 45 S.E.2d 364, 366 (1947)). At a minimum, however, a complaint must "allege such a state of facts as would put defendants . . . on legal notice of the existence of the contract." *Eller v. Arnold*, 230 N.C. 418, 422, 53 S.E.2d 266, 269 (1949).

In his amended complaint, plaintiff alleged that he "began employment with the Police Department of the City of Greensboro as a police officer in March of 1981" and was, "[t]hrough the years, . . . promoted to Sergeant, Lieutenant, Assistant Chief, and[,] ultimately[,] . . . to the position of Chief of Police in July of 2003." According to a City Policy adopted on 13 and 17 November 1980,[2] a copy of which is attached to plaintiff's amended complaint and incorporated in plaintiff's complaint by reference:

> 1. [I]t is hereby declared to be the policy of the City of Greensboro to provide for the defense of its officers and employees against civil claims and judgments and to satisfy the same, either through insurance or otherwise,, when resulting from any act done or omission made, or any act allegedly done or omission allegedly made, in the scope and course of their employment or duty as employees or officers of the City, except and unless it is determined that an officer or employee (1) acted or failed to act because of actual fraud, corruption or actual malice or (2) acted or failed to act in a wanton or oppressive manner.
>
> 2. The City Manager or his designee shall determine whether or not a claim or suit filed against an officer or employee, either in his official or his individual capacity, or both, meets the standards set forth herein and the standards set forth in the aforementioned statute as specified herein for providing a defense for such officer or employee.
>
> . . . .

2. The City's Policy, upon which plaintiff's claim rests, was founded, in turn, upon N.C.G.S. § 160A-167(a), which currently provides, in pertinent part, that, "[u]pon request made by . . . any . . . employee or officer, or former employee or officer, . . . any city . . . may provide for the defense of any civil or criminal action or proceeding brought against him either in his official or in his individual capacity, or both, on account of any act done or omission made, or any act allegedly done or omission allegedly made, in the scope and course of his employment or duty as an employee or officer of the city," with "[n]othing in this section [to] be deemed to require any city . . . to provide for the defense of any action or proceeding of any nature." N.C.G.S. § 160A-167(a) (2015). The payment of any judgments entered against such municipal employees or officers, which is a subject beyond the scope of the present action given that plaintiff was not held to be liable in the Alexander, Fulmore, or Hinson suits, is governed by the provisions of N.C.G.S. § 160A-167(b) and (c).

4. The terms "officer" and "employee" as used herein shall mean present or past officers or employees who might hereafter have claims or judgments entered against them.

5. This resolution shall not be interpreted in any way to relieve any insurance company of its obligation under any insurance policy to protect the interest of any insured under said policy, or to reduce or eliminate the rights of any officer or any employee of the City against any other party. Further, except as expressly stated herein, this resolution is not to be interpreted as an [sic] waiver of any rights the City has against any party.

6. The terms of this resolution shall include all pending claims and litigation, as well as any future claims and litigation which may arise from the date of adoption of this resolution. Further, this resolution shall constitute the uniform standards under which claims made or civil judgments entered against officers or employees or former officers or employees of the City shall be paid, and a copy of this resolution shall be maintained in the office of the City Clerk for public inspection.

According to plaintiff, the actions of City Manager Mitchell Johnson in changing the locks on plaintiff's office on 6 January 2006 "effectively ended [plaintiff's] ability to serve as Chief and[,] as a practical matter[,] terminated [plaintiff's] employment with the City." Although plaintiff requested the City to pay for his defense in the Alexander, Fulmore, and Hinson suits, the City declined to do so. As a result, plaintiff claimed to be entitled to recover "indemnity and reimbursement of fees incurred by [him] as a result of failure by the [City] to honor the provisions of the" City's legal fee and judgment payment reimbursement policy given that, "[a]t all times material to the allegations contained in the Fulmore Suit, the Hinson Suits, and the Alexander Suit, [plaintiff] acted within the course and scope of his employment as the Chief of the Greensboro Police Department"; "[t]he City has refused and continues to refuse to reimburse [plaintiff] for his legal expenses"; and "[a]s an employee of the City acting within the course and scope of his employment, and pursuant to the provisions of the City Policy, [plaintiff] is entitled to indemnification and reimbursement for the expenses he has incurred as a result of the allegations by and position taken by the City, as well as costs he

has incurred in connection with his defense in the Fulmore Suit, the Hinson Suits, and the Alexander Suit in the amount of $220,593.71."

A careful review of the allegations contained in the amended complaint discloses that plaintiff never alleged that the City had a contractual obligation to provide, or reimburse him for the cost of, his defense in the Alexander, Fulmore, and Hinson suits. Aside from the fact that the word "contract" is nowhere to be found in the amended complaint, plaintiff simply never alleged that the protections available under the City's defense cost reimbursement and judgment payment policy constituted any part of the consideration that plaintiff received in return for his service as a City employee. Although there is no "mandate that a complaint use any particular language" and although a complaint "need only allege facts that, if taken as true, are sufficient to establish a waiver . . . of . . . immunity," *Fabrikant v. Currituck County*, 174 N.C. App. 30, 38, 621 S.E.2d 19, 25 (2005), plaintiff has completely failed to allege any basis for a finding that the provisions of the City's defense cost reimbursement and judgment payment policy have been incorporated into plaintiff's employment contract with the City, such as, for instance, by alleging that the Policy was a component of his contract of employment with the City or that he had a vested contractual right to be reimbursed for the cost of defending the Alexander, Fulmore, and Hinson suits in accordance with the Policy. On the contrary, plaintiff has simply alleged that he was a City employee and that the Policy exists, without making an effort to establish any nexus between these two facts. I simply do not believe that these allegations suffice to work a waiver of governmental immunity on the basis of a valid, express contract.

The ordinary sense of the language utilized in plaintiff's amended complaint indicates that, instead of attempting to allege an action for breach of his contract of employment with the City, plaintiff is attempting to bring a direct action to enforce a freestanding City policy separate and apart from his contract of employment. Such a reading of plaintiff's complaint is bolstered by plaintiff's repeated references to having "requested" the City to provide him with a defense or to reimburse him for the cost of his defense in the Alexander, Fulmore, and Hinson suits without making any reference to his employment contract with the City. Assuming that I have correctly interpreted plaintiff's complaint as asserting a direct claim against the City under the Policy rather than as asserting a claim for breach of plaintiff's contract of employment with the City, it is clear that plaintiff has failed to adequately allege any basis for a waiver of the City's governmental immunity defense.

Finally, even if plaintiff has alleged that the Policy was a portion of his contract of employment with the City, or even if plaintiff is entitled to bring a direct claim against the City on the basis of the Policy, he still cannot properly plead the requisite waiver of governmental immunity. As the Policy clearly states, "this resolution is not to be interpreted as [a] waiver of any rights the City has against any party."[3] When read in accordance with its plain meaning, the Policy itself clearly states that it should not be understood as creating any sort of enforceable contractual right or operating to work a waiver of any claim of governmental immunity that the City might otherwise be entitled to make. As a result, for all of these reasons, I respectfully dissent from my colleagues' decision and would reverse, rather than affirm, the Court of Appeals' decision to overturn the trial court's order dismissing plaintiff's complaint.[4]

Justice BEASLEY joins in this dissenting opinion.

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3. The Policy provision quoted in the text is fully consistent with, and possibly mandated by, the provision in N.C.G.S. § 160A-167(a) that states that "[n]othing in this section shall be deemed to require any city . . . to provide for the defense of any action or proceeding of any nature." In light of this provision, one could argue that a municipality lacks the necessary statutory authority to contractually obligate itself to reimburse an officer's or employee's defense costs. However, we need not decide that issue given the fact that plaintiff has, for the reasons discussed in the text, failed to adequately allege the waiver of governmental immunity necessary to support the claim that he has attempted to assert against the City in the amended complaint.

4. Although I am not certain that the proper interpretation of our prior decision in *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 420 S.E.2d 432 (1992), is directly relevant given the manner in which the Court has resolved this case, I disagree with the manner in which my colleagues have read our statement in *Blackwelder* to the effect that "[a]ction by the City under N.C.G.S. § 160A-167 does not waive immunity." *Id.*, at 324, 420 S.E.2d at 436. Although *Blackwelder* was, in fact, decided in the context of a tort action, I see no reason to believe that the statement quoted earlier in this footnote has no bearing on claims other than those sounding in tort, such as contract actions, and do not wish to be understood as having agreed with the Court's contrary view.

COOPER v. BERGER

[370 N.C. 59 (2017)]

ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA	)	
v.	)	From Wake County
PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; AND THE STATE OF NORTH CAROLINA	)	

No. 52PA17-2

ORDER

Plaintiff-Petitioner Governor Roy A. Cooper, III's Motion for Temporary Stay is dismissed as moot. Plaintiff-Petitioner Governor Roy A. Cooper, III's Petition for Writ of Supersedeas is decided as follows:

Under the authority granted to this Court pursuant to Article IV, Sections 1 and 12 of the North Carolina Constitution, and for the purpose of preserving the status quo during the expedited consideration of this case by the Court, the Court orders that:

1. The status quo as of the date of this order is to be maintained. Therefore, until further order of this Court, the parties are prohibited from taking further action regarding the unimplemented portions of the act that establishes a new "Bipartisan State Board of Elections and Ethics Enforcement." Act of Apr. 11, 2017, ch. 6, 2017 N.C. Sess. Laws ___, ___ (the Act). Likewise, the parties should not seek further enforcement of the order entered on 1 June 2017 by the three judge panel convened pursuant to N.C.G.S. § 1-267.1.

2. During the consideration of this case by this Court, the parties have no duty to take action to implement further the provisions of the Act providing for the establishment, qualification, or organization of the Bipartisan State Board of Elections and Ethics Enforcement and, furthermore, may not proceed in any manner to make any appointments to, or to provide for, the reestablishment, re-qualification, re-organization, or re-constitution of the former North Carolina State Board of Elections or the North Carolina State Ethics Commission.

3. The parties may petition the Court for the purpose of obtaining any modifications to this order that they deem necessary to preserve the status quo and to ensure the orderly and lawful conducting of local and other elections during the consideration of this case by this Court.

By order of the Court, this the 20th day of July, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 20th day of July, 2017.

s/J. Bryan Boyd

J. BRYAN BOYD
Clerk of the Supreme Court

COOPER v. BERGER

[370 N.C. 61 (2017)]

ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA	)	
v.	)	From Wake County
PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; AND THE STATE OF NORTH CAROLINA	)	

No. 52PA17-2

SPECIAL ORDER

The Court, on its own motion, orders the State to make a filing no later than 2:00 p.m. on Monday, 21 August 2017 containing the following information:

1) the identity of each county board of elections which currently lacks a quorum;

2) the extent, if any, to which any affected county board of elections would be unable to act even if the consent order which has been proposed by the parties is entered;

3) the nature and extent of any pending, unresolved complaints which affect the manner in which any election to be held on or before 12 September 2017 in any of those counties is to be conducted;

4) the date or dates upon which the ballots associated with any election affected by those complaints have to be made available for absentee or early voting purposes;

5) the date or dates upon which absentee or early voting must begin in any election affected by those complaints;

6) and any other relevant information that the State believes would be helpful to the Court.

The other parties are ordered to advise the Court of the extent, if any, to which they wish to supplement or comment upon any of the information provided by the State in response to this order no later than 5:00 p.m. on Monday, 21 August 2017 and the date and time at which

any such supplemental information or comments can be filed with the Court. In the event that the parties cannot, with reasonable effort, make the filings required by this order, they should notify the Court of the time and date upon which they reasonably believe that the required filing can be made.

By order of the Court in Conference, this the 17th day of August, 2017.

s/Ervin, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of August, 2017.

s/J. Bryan Boyd

J. BRYAN BOYD
Clerk of the Supreme Court

PEOPLES v. TUCK

[370 N.C. 63 (2017)]

CECELIA W. PEOPLES AND ERNEST A. ROBINSON, JR.	)	
v.	)	From Vance County
THOMAS H. TUCK	)	

No. 423PA16

ORDER

Defendant's petition for discretionary review is allowed for the limited purpose of remanding to the Court of Appeals to reconsider its holding in light of *United Community Bank (G.A.) v. Wolfe*, ___ N.C. ___, 799 S.E.2d 269 (2017). *See United Cmty. Bank*, ___ N.C. at ___, 799 S.E.2d at 272 (recognizing that, under N.C.G.S. § 1A-1, Rule 56(e), a party may not rest upon an affidavit containing merely "conclusory statement[s] without any supporting facts" to create a genuine issue of material fact).

By Order of the Court in Conference, this 17th day of August, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of August, 2017.

J. BRYAN BOYD
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

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

17 AUGUST 2017

001PA17	Doss, et al. v. Adams, et al.	Joint Motion to Dismiss Petition and Appeal	Allowed **07/21/2017**
002P17	State v. Juan Antonia Miller	1. State's Motion for Temporary Stay (COA16-424) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/04/2017** 2. Allowed 3. Allowed
007PA17	In the Matter of J.A.M.	Guardian ad Litem's Motion to Withdraw and Substitute Counsel	Allowed **07/07/2017**
012PA17	Eli Global, LLC, et al. v. Heavner	Plts' Motion to Dismiss Appeal	Denied **06/14/2017**
026P17	David Wichnoski, O.D., P.A. d/b/a Spectrum Eye Care and Wichnoski RE, LLC v. Piedmont Fire Protection Systems, LLC and Shipp's Fire Extinguisher Sales and Services, Inc. ——————— Shipp's Fire Extinguisher Sales and Services, Inc., Third-Party Plaintiff v. Andujar Construction, Inc., Colony Investors, LLC, Custom Security, Inc., and Electrical Contracting Services, Inc., Third-Party Defendants	Plts' PDR Under N.C.G.S. § 7A-31 (COA16-759)	Allowed
045A17	North Carolina Farm Bureau Mutual Insurance Company v. Lillian Dianne Hull and Annitta B. Crook	1. Plt's Notice of Appeal Based Upon a Dissent (COA16-522) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. --- 2. Denied

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

17 AUGUST 2017

046P17	Peter Buffa and Wife, Stacy Buffa v. Cygnature Construction and Development, Inc.; Granite Hardwoods, Inc.; The Hardwood Company; Windsor Window Company d/b/a Windsor Windows and Doors; Christopher Wotell; and Gary Sovel	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA16-237) 2. Plts' Motion to Amend Petition to Add Additional Authority	1. Denied 2. Dismissed
052P17-2	Roy A. Cooper, III, in his official capacity as Governor of the State of North Carolina v. Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives	1. Plt's Motion for Temporary Stay (COAP17-412, 17-694) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's PDR Prior to a Decision of the COA	1. Dismissed as moot **07/20/2017** 2. Allowed 0**7/20/2017** 3. Special Order **07/19/2017**
052PA17-2	Cooper v. Berger, et al.	1. The Honorable James B. Hunt, Jr. and the Honorable Burley B. Mitchell, Jr.'s Motion for Leave to File Amicus Brief 2. Defs' Motion for Extension of Time to File Brief	1. Allowed **08/14/2017** 2. Allowed **08/14/2017**
052PA17-2	Cooper v. Berger, et al.	Honorable James B. Hunt, Jr. and Honorable Burley B. Mitchell's Motion for Extension of Time to File Amicus Brief	Allowed **08/02/2017**
052PA17-2	Cooper v. Berger, et al.	1. Brennan Center for Justice at N.Y.U. School of Law and Democracy North Carolina's Motion for Leave to File Amicus Brief 2. County Board Members Ms. Stella Anderson and Mr. Courtney Patterson's Motion for Leave to File Amicus Brief	1. Allowed **08/08/2017** 2. Denied **08/08/2017**

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

17 AUGUST 2017

070P17	Francisco Fagundes and Desiree Fagundes v. Ammons Development Group, Inc.; East Coast Drilling & Blasting, Inc.; Scott Carle; and Juan Albino	Plt's (Francisco Fagundes) PDR Under N.C.G.S. § 7A-31 (COA16-776)	Denied
072P17-2	State v. Lequan Fox	Def's *Pro Se* Motion for Petition for Prohibition	Dismissed **06/26/2017**
075P17-2	Ocwen Loan Servicing v. Margaret Ann Reaves	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Wake County 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Wake County 3. Def's *Pro Se* Motion for Temporary Stay 4. Def's *Pro Se* Petition for *Writ of Supersedeas*	1. Dismissed **08/14/2017** 2. Dismissed **08/14/2017** 3. Denied **08/14/2017** 4. Denied **08/14/2017**
077P17	Bassem Sam Abdin d/b/a The Car Company of Boone and Ramsey William Abdin, Plaintiffs v. CCC-Boone, LLC and Blythe Development Co., Defendants ——————— Blythe Development Co., Third-Party Plaintiff v. Brooks Engineering Associates, P.A., Third-Party Defendant	Plts' PDR Under N.C.G.S. § 7A-31 (COA16-17)	Denied
097P17	Town of Belville v. Urban Smart Growth, LLC and Michael White	Plt's PDR Under N.C.G.S. § 7A-31 (COA16-817)	Denied

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

17 AUGUST 2017

102P17	State v. Teddy Jabar Hargett	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-452) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. Def's Motion to Amend PDR and Notice of Appeal 5. Def's Motion to Supplement Motion to Amend PDR and Notice of Appeal	1. --- 2. Denied 3. Allowed 4. Allowed 5. Allowed
122P17	State v. Talib Ali Muhammad	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-306) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
123P17	State v. Michael Lee Williams	Def's PDR Under N.C.G.S. § 7A-31 (COA16-855)	Denied
129P17	Cynthia Ann Strickland v. Stephen Glenn Hood	Plt's Petition for *Writ of Certiorari* to Review Order of COA (COA16-1041)	Dismissed
130A03-2	State v. Quintel Martinez Augustine (DEATH)	State's Motion for Extension of Time to File Response to Petition for *Writ of Certiorari*	Allowed **06/30/2017** **Ervin, J., recused**
131P01-14	Anthony Dove v. Faye E. Daniels, Superintendent of Pamlico Corrections	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **07/25/2017**
135P17	Celia A. Bell, Employee v. Goodyear Tire and Rubber Company, Employer, Liberty Mutual Insurance Company, Carrier	1. Defs' Motion for Temporary Stay (COA15-1299) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Defs' Motion to Amend PDR	1. Allowed **04/26/2017** Dissolved **08/17/2017** 2. Denied 3. Denied 4. Dismissed as moot
136P17	Jennifer Rittelmeyer v. University of North Carolina at Chapel Hill	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA15-1228)	Denied

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

17 AUGUST 2017

137P17	Jennifer Anne Wolski v. North Carolina Division of Motor Vehicles and the Commissioner of Motor Vehicles	Respondents' PDR Under N.C.G.S. § 7A-31 (COA16-702)	Denied
139P17-2	Mohammed Nasser Jilani v. Donnie Harrison, Sheriff Wake County Detention Center	Petitioner's *Pro Se* Motion for Application for Enforcement of Writ § 17-16 Attachment for Failure to Obey	Denied **07/06/2017**
139P17-3	Jilani v. Harrison	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **07/11/2017**
147P17-2	State v. Salim A. Gould	Def's *Pro Se* Motion for Appeal of Order Motion for Appropriate Relief	Dismissed
148P17	State v. Montier Lopez Jackson	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP17-260)	Dismissed **Jackson, J., recused**
148P17-2	Montier Lopez Jackson v. John Herring, Superintendent, Lanesboro Correctional Institution	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **08/16/2017** **Jackson, J., recuse**d
151P17	State v. Donald Burchett	Def's *Pro Se* Motion for Review	Dismissed
154P17-2	State v. Jermaine D. Carson, Jr.	Def's *Pro Se* Motion for *Writ En Banc*	Denied **06/09/2017** **Ervin, J., recused**
155P17	State v. Joe Roberts Reynolds	1. Def's Motion for Temporary Stay (COA16-149) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Withdraw PDR and Petition for *Writ of Supersedeas* and to Dissolve Temporary Stay	1. Allowed **05/19/2017** 2. --- 3. --- 4. Allowed

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

17 AUGUST 2017

156P10-2	Stacey McCoy Brooks v. Erik A. Hooks, Secretary of NCDPS; Katy Poole, Superintendent of Scotland Correctional Institution	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **06/16/2017** **Ervin, J., recused**
158P06-14	State v. Derrick D. Boger	1. Def's *Pro Se* Petition for *Writ of Mandamus* 2. Def's *Pro Se* Motion for Civil Tort Claim	1. Denied 2. Dismissed
158P17	State v. Henry Calvin Jones	1. Def's Notice of Appeal Based Upon a Constitutional Question Pursuant to N.C.G.S. § 7A-30 (COA16-842) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
160P17	State v. Derrick A. Rogers	1. Def's *Pro Se* Motion for PDR (COAP17-200) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA 3. Def's *Pro Se* Motion for Preparation of Stenographic Transcript 4. Def's *Pro Se* Motion to Amend Petition	1. Dismissed 2. Dismissed 3. Dismissed as moot 4. Allowed
161P17	David Felton v. Paul G. Butler; James L. Forte; Willis J. Fowler; Danny G. Moody; Pat McCrory; and Roy Cooper	1. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP17-219) 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Plt's *Pro Se* Motion to Appoint Counsel	1. Denied 2. Allowed 3. Dismissed as moot
163P17	James Arnold and Leah Metcalf individually, and on behalf of all others similarly situated v. The University of North Carolina at Chapel Hill	Plts' PDR Under N.C.G.S. § 7A-31 (COA16-573)	Denied **Ervin, J., recused**
165P17	State v. Daniel Mylett	Def's PDR Under N.C.G.S. § 7A-31 (COA16-816)	Denied
166P17	State v. John Allen Hill, IV	Def's PDR Under N.C.G.S. § 7A-31 (COA16-744)	Denied

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

17 AUGUST 2017

167P17	State v. Tekenya Boyd	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-715) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
169P17	Jeffrey Blake St. John v. Kelly J. Thomas, Commissioner, North Carolina Division of Motor Vehicles, Department of Transportation	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA16-847) 2. Petitioner's Motion to Withdraw PDR	1. --- 2. Allowed **07/13/2017**
170P15-2	State v. Patrick Shane Williams	Def's *Pro Se* Motion for Notice of Appeal (COAP17-384)	Dismissed **Ervin, J., recused**
171A17	State v. Daryl Williams	1. State's Motion for Temporary Stay (COA16-684) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent 4. State's PDR as to Additional Issues	1. Allowed **06/01/2017** 2. Allowed 3. --- 4. Allowed
172P17	Dwain Cornelius Ferrell v. State of North Carolina, et al.	Plt's *Pro Se* Motion for Complaint Civil Action (COAP17-254)	Dismissed
174P17	State v. Jerome Harris	Def's PDR Under N.C.G.S. § 7A-31 (COA16-874)	Denied **Morgan, J., recused**
179P17	Kevin Bray and The Kernersville Professional Fire Fighters Association v. Curtis L. Swisher, in his capacity as Town Manager of the Town of Kernersville	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-928) 2. Def's Conditional Motion to Amend the Record on Appeal	1. Denied 2. Dismissed as moot
180A17	Kim and Barry Lippard v. Larry Holleman and Alan Hix	Defs' Notice of Appeal Based Upon a Constitutional Question (COA16-886)	Dismissed *ex mero motu*

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

17 AUGUST 2017

181P17	Edward J. Austin v. State of North Carolina	Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Stanly County	Denied **07/07/2017**
182P17	Randall Cole v. N.C. Department of Public Safety	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA16-340	Denied
183P17	William Barry Freedman and Freedman Farms, Inc. v. Wayne James Payne and Michael R. Ramos	Plt's (William Barry Freedman) PDR Under N.C.G.S. § 7A-31 (COA16-969)	Denied
184P17	State v. Eric Jonathan Cox	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1068)	Denied
185P17	State v. John Arthur Stroud	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-989) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. ---- 2. Denied 3. Allowed
186P17	State v. Lenwood Lee Paige	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COA06-3) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed **Hudson, J., recused**
187P17	State v. Devrie Leran Burris	Def's PDR Under N.C.G.S. § 7A-31 (COA16-238)	Denied
189P17	State v. Robert A.D. Waldrup	1. Def's *Pro Se* Motion for Notice of Appeal 2. Def's *Pro Se* Motion for Trial Transcript to be Used as an Exhibit	1. Dismissed 2. Dismissed
190P17	Brandon Lee v. James Freeman, Assistant Public Defender	Plt's *Pro Se* Motion for Appeal of Decision of The North Carolina State Bar	Dismissed
191P17	Department of Transportation v. Joseph P. Riddle, III, and wife, Trina T. Riddle	Def's PDR Under N.C.G.S. § 7A-31 (COA16-445)	Denied

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

17 AUGUST 2017

192P17	In the Matter of the Foreclosure of a Deed of Trust Executed by Holly B. Rankin and Darrin L. Rankin (Present Record Owners(s): Mozijah Bailey and Wendy Carolina Lopez) and (Darrin L. Rankin, as to Life Estate Only) in the Original Amount of $307,920.00 Dated October 4, 2006, Recorded in Book 21173, Page 276, Mecklenburg County Registry Substitute Trustee Services, Inc., Substitute Trustee	1. Respondent's (Mozijah Bailey) Motion for Temporary Stay (COA16-771) 2. Respondent's (Mozijah Bailey) Petition for *Writ of Supersedeas*	1. Allowed **6/16/2017** 2.
193P17	State v. David Charles Lane	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-764) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
194P17	State v. Taylor Pruitt Roberson	Def's PDR Under N.C.G.S. § 7A-31 (COA16-939)	Denied
195P17	Chelsea Doolittle v. Robert M. George, in his Individual Capacity as an Officer of the Hickory Police Department; Vidal A. Sipe, in his Individual Capacity as an Officer of the Hickory Police Department; Frank C. Pain, in his Individual Capacity as an Officer of the Hickory Police Department; and The City of Hickory, a North Carolina Municipality	1. Def's (Robert M. George) Motion for Temporary Stay 2. Def's (Robert M. George) Petition for *Writ of Supersedeas* 3. Def's (Robert M. George) Petition for *Writ of Certiorari* to Review Order of COA 4. Def's (Robert M. George) Motion to Amend or Supplement Petition for *Writ of Certiorari*, Petition for *Writ of Supersedeas*, and Motion for Temporary Stay 5. Def's (Robert M. George) Motion for Leave to File Reply to Response to Petition for *Writ of Certiorari*, Petition for *Writ of Supersedeas*, and Motion for Temporary Stay	1. Allowed **06/16/2017** 2. 3. 4. 5. Allowed **07/13/2017**

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

17 AUGUST 2017

196P17	Maeghan Richmond v. Robert M. George, in his Individual Capacity as an Officer of the Hickory Police Department; Vidal A. Sipe, in his Individual Capacity as an Officer of the Hickory Police Department; Frank C. Pain, in his Individual Capacity as an Officer of the Hickory Police Department; and The City of Hickory, a North Carolina Municipality	1. Def's (Robert M. George) Motion for Temporary Stay (COAP17-350) 2. Def's (Robert M. George) Petition for *Writ of Supersedeas* 3. Def's (Robert M. George) Petition for *Writ of Certiorari* to Review Order of COA 4. Def's (Robert M. George) Motion for Leave to Amend or Supplement Petition for *Writ of Certiorari*, Petition for *Writ of Supersedeas*, and Motion for Temporary Stay 5. Def's (Robert M. George) Motion for Leave to File Reply to Response to Petition for *Writ of Certiorari*, Petition for *Writ of Supersedeas*, and Motion for Temporary Stay	1. Allowed **06/19/2017** 2. 3. 4. 5. Allowed **07/28/17**
197P17	State v. Brian Keith Blackwell	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COA16-737) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Amend Petition for *Writ of Certiorari* 4. Def's *Pro Se* Motion to Dismiss	1. Dismissed 2. Allowed 3. Allowed 4. Dismissed **Ervin, J., recused**
198P17	State v. Susan Marie Maloney	Def's PDR Under N.C.G.S. § 7A-31 (COA16-851)	Denied
199A17	State of NC v. Seid Michael Mostafavi	1. State's Motion for Temporary Stay (COA16-1233) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **06/20/2017** 2. Allowed **07/13/2017** 3. ---
200P07-6	State v. Kenneth Earl Robinson	1. Def's *Pro Se* Motion for Notice of Appeal (COAP17-283) 2. Def's *Pro Se* Motion for PDR	1. Dismissed 2. Dismissed

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

17 AUGUST 2017

200P17	Barry D. Edwards, XMC Films, Incorporated, Aegis Films, Inc., and David E. Anthony v. Clyde M. Foley, Ronald M. Foley, Lavonda S. Foley, Samuel L. Scott, CRS Trading Co. LLC, Brown Burton, Ronald Jed Meadows, and American Solar Kontrol, LLC	1. Defs' Motion for Temporary Stay (COA16-1060) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Motion to Admit Bryan M. Knight *Pro Hac Vice*	1. Allowed **06/20/2017**
201P17	In re Matter of Foreclosure of a Deed of Trust Executed by Sheila McLean Dated June 2, 2005, and Recorded in Book 1477, Page 417 *et seq.*, of Franklin County, Registrar of Deeds	Respondent's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-1173)	Denied
202A17	Locklear v. Cummings, et al.	Defs' Attorney Bingham Hinch's Motion to Withdraw as Counsel	Allowed **06/30/2017**
204P17	State v. Elias Antwan Collins	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-901) 2. Def's Motion to Deem Petition Timely Filed	1. Denied 2. Denied
205P17	Antwone Archie v. Johnney Hawkins/ Jose Stein	1. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Forsyth County 2. Defs' *Pro Se* Motion for Notice of Appeal	1. Dismissed 2. Dismissed *ex mero motu* **Hudson, J., recused**

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

17 AUGUST 2017

206P17	Norman Alan Kerr v. Clerk of Superior Court of Forsyth County	1. Petitioner's *Pro Se* Petition for *Writ of Mandamus* 2. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
207P08-2	State v. Ernest Drayton, Jr.	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, New Hanover County	Dismissed
207P17	State v. Michael Anthony Scaturro, Jr.	1. State's Motion for Temporary Stay (COA16-1026) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/23/2017** 2. Allowed 3. Allowed
208A17	State v. Justin Deandre Bass	1. State's Motion for Temporary Stay (COA16-421) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **06/23/2017** 2. Allowed **06/23/2017** 3. ---
211P17	Christopher Buckner, Employee v. United Parcel Service, Employer, Liberty Mutual Insurance Company, Carrier	1. Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA16-1110) 2. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
212P17	State v. Calvin Steven Brooks	1. Def's *Pro Se* Motion for Notice of PDR (COA17-38) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
215P17	State v. Khaliq Adeeb Ishrat	Def's *Pro Se* Petition for *Writ of Mandamus* (COAP17-338)	Dismissed
216P17	State v. Tyrone D. Sanders	Petitioner's *Pro Se* Motion for Immediate Release	Dismissed
217P17	State v. Marvin Everette Miller, Jr.	1. State's Motion for Temporary Stay (COA16-1206) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **07/03/2017** 2. Allowed 3. Allowed 4. Allowed

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

17 AUGUST 2017

219P17	Courtney NC, LLC DBA Oakwood Raleigh at Brier Creek v. Monette Baldwin AKA Nell Monette Baldwin	1. Def's *Pro Se* Motion for Temporary Stay (COAP17-459) 2. Def's *Pro Se* Petition for *Writ of Supersedeas* 3. Def's *Pro Se* Motion for Notice of Appeal	1. Denied **07/07/2017** 2. 3.
221P17	State v. Willie James Langley	1. State's Motion for Temporary Stay (COA16-1107) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **07/06/2017** 2.
222A17	State v. Sam Babb Clonts, III	1. State's Motion for Temporary Stay (COA16-566) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **07/07/2017** 2.
223P17	Darryl Ray Smith, Employee v. Michael W. Young d/b/a Camaro Specialty Co., Employer, Noninsured, and Michael W. Young, Individually	Plt's *Pro Se* Motion for Review	Dismissed
224A17	Kevin Posey v. Wayne Memorial Hospital, Inc. and Wayne Health Corporation	1. Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA16-1218) 2. Plt's *Pro Se* Amended Notice of Appeal Based Upon a Constitutional Question	1. Dismissed as moot 2. Dismissed e*x mero motu*
225P17	Adam L. Perry v. William Earl Britt	1. Plt's *Pro Se* Motion for Application for Preliminary and/or Permanent Injunction 2. Plt's *Pro Se* Motion to Strike and Dismiss Defendant's Insufficient Defense Claim	1. Dismissed 2. Dismissed
229P17	State v. Samuel Sylvester Simmons	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-975) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed

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230P17	State v. Anthony Lee McNair	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COA16-707) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* Motion to Amend PDR	1. Denied 2. Dismissed 3. Allowed
231P17	State v. Antwone Archie	Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Forsyth County	Dismissed
232P17	State v. Anthony Bernard Bowden	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1074)	Denied
235P17	Peter Jaeger Dillon v. Mecklenburg County Family Court, the Honorable Regan A. Miller (Chief Judge), the Honorable Rickye McKoy-Mitchell, the Honorable Christy T. Mann, et al.	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied
236P17	State v. Delgen Foye	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-675)	Denied
237P17	State v. Victor Olandus Moultry	Def's *Pro Se* Motion for PDR (COAP17-211)	Dismissed
240P17	In re Bruce Bunting	1. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP17-441) 2. Petitioner's *Pro Se* Petition for *Writ of Mandamus*	1. Dismissed 2. Dismissed
242P09-2	State v. Roger Blackstock	1. Def's *Pro Se* Motion for PDR (COAP17-266) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot **Ervin, J., recused**
243P17	State v. Pierre Je Bron Moore	1. Def's Petition for *Writ of Mandamus* (COA16-999) 2. Def's Petition for Writ of Prohibition 3. Def's Motion for Temporary Stay 4. Def's Petition for *Writ of Supersedeas*	1. 2. 3. Denied **07/28/2017** 4.

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244P17	In the Matter of J.L.T. and S.R.J.T.	1. Petitioner's Motion for Temporary Stay (COA16-1242) 2. Petitioner's Petition for *Writ of Supersedeas* 3. Petitioner's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/24/2017** 2. 3.
245P17	Bank of America, N.A. v. Angel L. Rivera and wife, Jennifer L. Wilson a/k/a Jennifer Wilson	1. Def's (Jennifer L. Wilson) *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA16-166) 2. Def's (Jennifer L. Wilson) *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's (Jennifer L. Wilson) *Pro Se* Motion to Withdraw Notice of Appeal and PDR	1. --- 2. --- 3. Allowed **Ervin, J., recused**
249P17	Columbus County Department of Social Services ex rel. Tiffanee A. Moore v. Calvin T. Norton	1. Def's *Pro Se* Motion for Temporary Stay (COA16-735) 2. Def's *Pro Se* Petition for *Writ of Supersedeas* 3. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question 4. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Denied **08/02/2017** 2. 3. 4.
265P17	State v. Shannon Dale Isom	1. Def's Motion for Temporary Stay (COA16-1052) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/04/2017** 2. 3.
266P17	State v. Jawanz Bacon	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/04/2017** 2.
271PA15-2	State v. Felix Ricardo Saldierna	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/03/2017** 2.
272P17	State v. Clarence Joseph Trent	1. Def's Motion for Temporary Stay (COA16-839) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **08/11/2017** 2. **Morgan, J., recused**

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277P17	Casey Rafeal Tyler v. North Carolina Department of Public Safety	Petitioner's *Pro Se* Motion for PDR	Denied **08/16/2017**
282P16-4	Jeremy Bruns and Jenny Bruns v. Rhonda Bryant, Dalton Bryant, Sr., Dalton Bryant, Jr., Pat McCrory, as Governor of North Carolina, Frank Perry, as Secretary of the North Carolina Department of Public Safety, Anthony Tata, as Secretary of the North Carolina Department of Transportation, Veronica McClain, USAA, and State of North Carolina	Plts' *Pro Se* Motion for Reconsideration of Denied Motion to Reject, Dismiss, and Strike Response to Notice of Appeal by Attorney General, Dismissing the Appeal as Moot, Dismissing the Notice of Appeal, and Denying Our Petition for Discretionary Review of the Decision of the North Carolina Court of Appeals Arising from the Supreme Court North Carolina's Orders Issued 15 June 2017	Dismissed
295P12-3	State v. Lawrence Donell Flood, Sr.	Def's PDR Under N.C.G.S. § 7A-31 (COA16-252)	Denied
309P15-3	State v. Reginald Underwood Fullard	1. Def's *Pro Se* Motion for Appeal 2. Def's *Pro Se* Motion for Appeal for Order Entry	1. Denied **06/27/2017** 2. Denied **06/27/2017**
314P08-2	John Joseph Zinkand v. State of North Carolina, et al.	1. Petitioner's *Pro Se* Motion for *De Novo* Review and Injunctive Relief 2. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* 3. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis* 4. Petitioner's *Pro Se* Motion for Petition for an Order for Default Judgment	1. Dismissed **07/07/2017** 2. Denied **07/07/2017** 3. Allowed **07/07/2017** 4. Dismissed **07/07/2017**

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355P16	Rodney K. Adams, Elizabeth I. Allen, Joseph J. Bateman, William Paul Bateman, Gilbert A. Breedlove, Debra D. Carswell, Jason Gray Cheek, Christopher E. Duckworth, Bryan G. Farley, Melissa Ferrel, James Robert Freeman, Joshua Phillip Grant, Wanda M. Hammock, Marlene Hammond, Thomas Murphy Harris, Ronald E. Hodges, Thomas W. Holland, Gary H. Littleton, Linda B. Long, Pansy K. Martin, Sharon S. McLaurin, Bruce A. McPherson, Thomas G. Miller, Jeffrey Mitchell, Donald D. Paschall, Sr., Robert Warren Pearce, Connie C. Peele, Julian R. Poteat, Margaret L. Rathbone, Ronald Raymond Roberts, Jr., Rae Renee Rothrock, Suzanne Sheehan, Susan B. Smevog, Kenneth Spears, Steven R. Storch, Cecil Lynn Webb, Emily Alicia Westover, William Eric Whitten, and William T. Winslow, individually and on behalf of a class of similarly situated persons v. The State of North Carolina, Patrick L. McCrory, Governor of the State of North Carolina, in his official capacity, Lee Harris Roberts, State Budget Director, in his official capacity, and Dr. Linda Morrison Combs, State Controller, in her official capacity	Plts' PDR Under N.C.G.S. § 7A-31 (COA15-1275)	Denied

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382PA16	King v. Albemarle Hospital Authority, et al.	Motion to Admit Wayne M. Mansulla *Pro Hac Vice*	Allowed **06/29/2017**
411A94-6	State v. Marcus Reymond Robinson (DEATH)	State's Motion for Extension of Time to File Response to Petition for *Writ of Certiorari*	Allowed **06/30/2017**
421P10-6	Robert Alan Lillie v. Mark Carver, Superintendent of Caswell Correctional Center	1. Petitioner's *Pro Se* Motion for PDR (COAP17-154) 2. Petitioner's *Pro Se* Motion to Supplement 3. Petitioner's *Pro Se* Motion for Judgment on the Pleading	1. Denied 2. Dismissed as moot 3. Dismissed
423P16	Cecelia W. Peoples and Ernest A. Robinson, Jr. v. Thomas H. Tuck	Def's PDR Under N.C.G.S. § 7A-31 (COA16-293)	Special Order
425P15-2	State v. Dawayne David Knolton	Def's PDR Under N.C.G.S. § 7A-31 (COA16-671)	Denied
441A98-4	State v. Timon Charles Golphin (DEATH)	State's Motion for Extension of Time to File Response to Petition for *Writ of Certiorari*	Allowed **06/30/2017** **Beasley, J., recused**
459P00-7	State v. William M. Huggins	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COA98-236)	Denied
505P96-3	State of N.C. v. Melvin Lee White, Jr. (DEATH)	Def's Motion for Extension of Time to File Petition for *Writ of Certiorari*	Allowed **06/15/2017**
548A00-2	State v. Christina Shea Walters (DEATH)	State's Motion for Extension of Time to File Response to Petition for *Writ of Certiorari*	Allowed **06/30/2017**

COLLEEN BLONDELL
v.
SHAKIL AHMED, SHABANA AHMED, MICHAEL FEKETE, AND
SUSAN ELIZABETH FEKETE

No. 275A16

Filed 29 September 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 786 S.E.2d 405 (2016), reversing and remanding an order allowing summary judgment entered on 12 January 2015 by Judge Howard E. Manning, Jr. in Superior Court, Wake County. Heard in the Supreme Court on 30 August 2017.

Martin & Gifford, PLLC, by William H. Gifford, Jr., for plaintiff-appellee.

Jordan Price Wall Gray Jones & Carlton, PLLC, by J. Matthew Waters and Lori P. Jones, for defendant-appellants Shakil and Shabana Ahmed.

PER CURIAM.

AFFIRMED.

CATAWBA COUNTY, BY AND THROUGH ITS CHILD SUPPORT AGENCY,
EX REL. SHAWNA RACKLEY
v.
JASON LOGGINS

No. 152PA16

Filed 29 September 2017

1. Child Custody and Support—voluntary support agreement and order—jurisdiction to change

The Catawba County district court maintained continuing jurisdiction to modify a Voluntary Support Agreement and Order (VSA) where it had ruled on the original VSA and there were no circumstances that would divest the district court of its jurisdiction.

2. Child Custody and Support—voluntary support agreement and order—continuing jurisdiction

Rules of statutory construction confirmed the district court's continuing jurisdiction over a Voluntary Support Agreement and Order (VSA) where the plain language of N.C.G.S. § 50-13.7(a) was clear and unambiguous and imposed no jurisdictional prerequisites.

3. Child Custody and Support—voluntary support agreement—jurisdiction to modify—legislative history

Although the plain meaning of N.C.G.S. § 50-13.7(a) was sufficient to determine that the district court had jurisdiction to modify a Voluntary Support Agreement and Order, the legislative history indicated that the legislature did not intend for the statute to create a jurisdictional prerequisite to modify child support orders.

4. Child Custody and Support—voluntary support agreement—modification—directory rather than mandatory statute

The provision of N.C.G.S. § 50-13.7(a) requiring that a motion to modify a Voluntary Support Agreement and Order be filed was directory rather than mandatory, so that the absence of a motion to modify a child support order did not divest the district court of jurisdiction to act under the statute. The provision concerned a matter of form, rather than a matter of substance and merely addressed the procedural aspects of modifying a child support order.

5. Child Custody and Support—voluntary support agreement—jurisdiction to modify—alignment with a change in circumstances

A North Carolina Supreme Court decision, that N.C.G.S. § 50-13.7(a) did not create a jurisdictional prerequisite and did not contain a mandatory requirement that a party or interested person file a motion for child support modification in order for a district court to exercise jurisdiction, harmoniously aligned with the statutory provision requiring a showing of a change in circumstances for a child support order to be modified.

Chief Justice MARTIN concurring in the result only.

Justice ERVIN joins in this concurring opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 784 S.E.2d 620 (2016), affirming an order entered on 29 December 2014 by Judge Gregory R. Hayes in District Court, Catawba County. Heard in the Supreme Court on (11 April 2017).

David W. Hood for plaintiff-appellant.

Blair E. Cody, III for defendant-appellee.

Joshua H. Stein, Attorney General, by John F. Maddrey, Solicitor General, Gerald K. Robbins, Special Deputy Attorney General, and Benjamin Kull, Assistant Attorney General, for North Carolina Department of Health and Human Services, amicus curiae.

MORGAN, Justice.

I. Background and Procedural History

In this appeal we consider whether a district court has jurisdiction to modify a child support order without a party filing a motion to modify asserting that there is a change in circumstances. The Court of Appeals concluded that the district court did not have jurisdiction because Catawba County, by and through its Child Support Agency, *ex rel.* Shawna Rackley (plaintiff) failed to comply with procedural mandates to file a motion to modify the child support order at issue as required by N.C.G.S. § 50-13.7(a) (2015). We hold that the district court maintained

continuing jurisdiction to modify the child support order and that plaintiff's failure to file a motion to modify the child support order did not divest the district court of jurisdiction. Accordingly, we reverse and remand the Court of Appeals decision.

On 15 February 1999, the District Court in Catawba County entered a Voluntary Support Agreement and Order (VSA) under which Jason Loggins (defendant) agreed to pay "$0.00" in child support for his two children with Shawna Rackley (Ms. Rackley). Additionally, starting 1 March 1999, defendant was to reimburse the State $1,996.00 for public assistance paid on behalf of his children. Defendant was also required to provide health insurance for the minor children through his employer or when it was available at a reasonable cost.

Defendant failed to reimburse the State as required, and on 19 October 2000 plaintiff filed a motion to show cause. The district court ordered defendant to appear, but he failed to do so. Defendant was arrested and later released on a $500.00 cash bond that was allocated to his arrearage. After hearing the matter in January 2001, the district court found that defendant was employed at Carolina Hardwoods earning $9.95 per hour, and was able to comply with the 1999 VSA. The court ordered defendant to make $50.00 monthly payments towards his then-arrearages of $1,165.12.

Subsequently, a second VSA titled "Modified Voluntary Support Agreement and Order" was signed by defendant on 25 June 2001. This agreement did not reference the original VSA or the 1999 order, nor did it show that the district court established defendant's paternity in 1999. The parties did attach a child support worksheet stating defendant had a monthly gross income of $1,724.66 and recommending $419.00 for his monthly child support obligation.[1] The 2001 VSA was approved by the court and entered on 28 June 2001. This order is the basis of all controversy on appeal. In the 2001 VSA, defendant agreed to pay $419.00 per month in child support starting 1 July 2001 and to reimburse the State $422.78 for public assistance given to his children. In addition, defendant agreed to provide health insurance to his children through his then-employer, Crown Heritage, Inc. Unlike the 1999 VSA, the 2001 VSA contains no modification provision.

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1. The parties attached "Work Sheet A," Form "AOC-CV-627 Rev. 10/98" of the North Carolina Child Support Guidelines. This is the form used to calculate child support when one parent (or a third party) has sole physical custody of all children for whom support is being determined. This form does not contain a provision referencing a change in circumstances. Thus, in the 2001 Order, the trial court did not find that there were changed circumstances.

Throughout the following years, defendant failed to comply with the 2001 VSA. Accordingly, the trial court entered consent contempt orders on 20 November 2003, 21 July 2005 and 25 January 2007. Each time defendant admitted to being in civil contempt for his failure to pay amounts due under the 2001 VSA. By 2007, the amount defendant owed totaled $16,422.28. In the 2007 consent order, the trial court ordered defendant to make monthly child support payments totaling $479.00 with $60.00 going towards arrears. On 5 April 2007, the district court concluded defendant was in compliance with the 25 January 2007 order and determined that his arrearages were $15,572.80. The district court ordered defendant to continue his monthly child support payments of $419.00 plus $60.00 towards arrears. Eventually, defendant again failed to pay the child support ordered by the court.

On 7 April 2011, defendant filed, *pro se*, a motion to modify the 2007 consent order. Defendant stated there was a change in circumstances because he "draw[s] unemployment, [and his] kids [ages 17 and 18] have quit school." The district court heard the matter on 11 August 2011. Ms. Rackley failed to appear. On 15 September 2011 the district court found a change in circumstances, noting that "[d]efendant was drawing unemployment benefits, since has obtained fulltime employment. Oldest child . . . has emancipated according to [N.C.G.S. § 50-13.4(c)]." Based on the child support guidelines, the district court reduced defendant's monthly child support obligation to $247.00 and found his arrears to be $6,640.75.

On 13 March 2014, defendant, now represented by counsel, moved the district court pursuant to N.C.G.S. § 1A-1, Rule 60, to set aside the 2001 VSA as void. Defendant contended that "prior to June 28, 2001 there was [sic] not any motions filed by [Ms. Rackley] or on her behalf to modify the 'then' existing child support obligation [of $0.00 under the 1999 VSA]." A hearing was held on 31 July 2014, during which defendant asserted that the 1999 VSA was a permanent order and that the trial court did not have jurisdiction to modify it without a motion in the cause by plaintiff and a showing of a change in circumstances. He argued that the 2001 VSA was void and, as a result, unenforceable. Plaintiff's counsel conceded, "There's no indication that [the 1999 VSA] was a temporary order. We use the colloquial term 'permanent' although every order can be modified, but I would agree that that's what we normally refer to as a permanent order rather than a temporary order." Following the hearing, defense counsel tendered a draft order to the district court without serving it upon plaintiff's counsel. The district court entered an order on 18 December 2014 granting defendant's motion but a few days later set aside that order because it contained "errors and was not presented

following approved procedure" in that defendant did not serve the proposed order on plaintiff before tendering it to the court.

On 29 December 2014, the district court entered a second order granting defendant's Rule 60 Motion. The district court found that it did not have jurisdiction to enter the 2001 VSA because there was no precipitating motion filed by plaintiff or on her behalf, nor was there any proof of a change in circumstances; therefore, the order resulting from the 2001 VSA was void. Plaintiff filed a timely notice of appeal.

In the Court of Appeals, plaintiff argued, in pertinent part, that the district court erroneously concluded that a motion to modify a child support obligation must precede a modification order. The Court of Appeals reasoned that the plain language of N.C.G.S. § 50-13.7(a) "requires a 'motion in the cause and a showing of changed circumstances' as a necessary condition for the [district] court to modify an existing support order." *Catawba County ex rel. Rackley v. Loggins*, ___ N.C. App. ___, ___, 784 S.E.2d 620, 625-26 (2016) (quoting N.C.G.S. § 50-13.7(a) (2015)). The Court of Appeals recognized that a district court is without authority to sua sponte modify an existing support order. *Id.* at ___, 784 S.E.2d at 626 (quoting *Royall v. Sawyer*, 120 N.C. App. 880, 882, 463 S.E.2d 578, 580 (1995)). Therefore, according to the Court of Appeals, it was "impossible to enforce the second [VSA] and order because the trial court did not have jurisdiction to accept the second [VSA] and enter the modified order." *Id.* at ___, 784 S.E.2d at 626 (citation omitted).

II. Standard of Review

Rule 12(b)(1) of the Rules of Civil Procedure allows for dismissal based upon a trial court's lack of jurisdiction over the subject matter of the claim. N.C.G.S. § 1A-1, Rule 12(b)(1) (2015). We review the decision of a trial court to dismiss an action for lack of subject matter jurisdiction de novo. *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007); *see Baumann-Chacon v. Baumann*, 212 N.C. App. 137, 139, 710 S.E.2d 431, 433 (2011) (applying a de novo standard of review to a district court's decision to dismiss a plaintiff's claims for child support for lack of subject matter jurisdiction).

III. Analysis

Plaintiff contends in the instant case that the trial court retained jurisdiction to modify the VSA notwithstanding plaintiff's failure to file a motion to modify the VSA as addressed in N.C.G.S. § 50-13.7(a). We agree that the trial court retained jurisdiction to modify the VSA because: (1) the court maintained continuing jurisdiction over the child support

issue; (2) the plain language of N.C.G.S. § 50-13.7(a) does not create a jurisdictional prerequisite that would divest the district court of jurisdiction; (3) the legislative history of this statutory provision suggests that the General Assembly did not intend to create a jurisdictional prerequisite; (4) the provision requiring a motion to modify a child support order to be filed so as to prompt a district court's review of an existing child support order is directory rather than mandatory, and therefore did not deprive the district court of jurisdiction; and (5) the VSA filed by plaintiff satisfied the purpose of N.C.G.S. § 50-13.7(a).

A. District Court Maintained Continuing Jurisdiction

[1] The district court maintained continuing jurisdiction to modify the VSA. "Jurisdiction is '[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it.' " *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 789-90 (2006) (quoting *Black's Law Dictionary* 856 (7th ed. 1999)). The court must have personal jurisdiction and, relevant here, subject matter jurisdiction "or '[j]urisdiction over the nature of the case and the type of relief sought,' in order to decide a case." *Id.* at 590, 636 S.E.2d at 790 (quoting *Black's Law Dictionary* at 596). "The legislature, within constitutional limitations, can fix and circumscribe the jurisdiction of the courts of this State." *Bullington v. Angel*, 220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941). "Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975) (citations omitted), *overruled on other grounds by Quick v. Quick*, 305 N.C. 446, 457-58, 290 S.E.2d 653, 661 (1982).

Without regard to the amount in controversy, the district court conducts "the trial of civil actions and proceedings for annulment, divorce, equitable distribution of property, alimony, child support, child custody and the enforcement of separation or property settlement agreements between spouses, or recovery for the breach thereof." N.C.G.S. § 7A-244 (2015). Subdivision 50-13.7(a) permits a child support order to be "modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party." *Id.* § 50-13.7(a) (2015). Additionally, "[a] judicial decree in a child custody and support matter is subject to alteration upon a change of circumstances affecting the welfare of the child and, therefore, is not final in nature." *Stanback v. Stanback (Stanback II)*, 287 N.C. 448, 456, 215 S.E.2d 30, 36 (1975).

As a result, "the jurisdiction of the court entering such a decree continues as long as the minor child whose custody is the subject of the decree remains within its jurisdiction." *Id.* at 456, 215 S.E.2d at 36 (citing *Spence v. Durham*, 283 N.C. 671, 198 S.E.2d 537 (1973), *cert. denied*, 415 U.S. 918 (1974), and *Stanback v. Stanback*, 266 N.C. 72, 145 S.E.2d 332 (1965)); *see also* N.C.G.S. § 50-13.5(f) (2015) ("An action or proceeding in the courts of this State for custody and support of a minor child may be maintained in the county where the child resides or is physically present or in a county where a parent resides . . . .").

Here, the district court in Catawba County ruled on the original VSA in this action. According to the principles specified above, the district court thereafter retained jurisdiction over further proceedings, including modifications to the VSA. As reasoned by this Court in *Stanback II*, unless the district court "was somehow divested of its continuing jurisdiction, it was the only court which could modify the earlier judgment upon a motion in the cause and a showing of a change of circumstances." 287 N.C. at 456, 215 S.E.2d at 36 (citations omitted). At the time the 2001 VSA was approved, all parties resided in North Carolina. As a result, "the jurisdiction of the [district court] continue[d] as long as the minor child whose custody is the subject of the decree remain[ed] within its jurisdiction." *Id.* at 456, 215 S.E. 2d at 36. No circumstances are present here that would divest the district court of its jurisdiction to modify the VSA. *See id.* at 456, 215 S.E. 2d at 36; *Story v. Story*, 221 N.C. 114, 115-16, 19 S.E.2d 136, 137-38 (1942) (concluding that while an order requiring the husband to make monthly payments for child support was a consent judgment, the court had jurisdiction to hear the wife's subsequent motion for modification of the order, thereby allowing the court to award permanent custody of the child to the wife and to increase the husband's monthly payments); *Massey v. Massey*, 121 N.C. App. 263, 273, 465 S.E.2d 313, 319 (1996) ("In view of our holding affirming the trial court's voiding of the parties' Stipulation of Dismissal and because of the court's continuing jurisdiction acquired in consequence of its rendering the original child custody and support order, . . . we discern no abuse of discretion on the part of the trial court in its order of consolidation and no injury or prejudice suffered by [the] defendant."); *Jackson v. Jackson*, 68 N.C. App. 499, 501-02, 315 S.E.2d 90, 91 (1984) (holding that because the district court originally had jurisdiction over the child custody and support dispute, it had continuing jurisdiction to rule on a subsequent motion filed by the defendant for custody and support and sequestration of the marital home for the children's use and benefit). Thus, the district court maintained continuing jurisdiction to modify the 2001 VSA.

B. Plain Meaning of the Statute Does Not Impose a Jurisdictional Prerequisite

[2] Rules of statutory construction confirm the district court's jurisdiction. "It is well settled that '[w]here the language of a **statute** is **clear** and unambiguous, there is no room for judicial construction and the courts must construe the **statute** using its **plain meaning**.' " *In re Estate of Lunsford*, 359 N.C. 382, 391-92, 610 S.E.2d 366, 372 (2005) (emphases added) (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)).

In *In re D.S.*, 364 N.C. 184, 185, 694 S.E.2d 758, 759 (2010) the defendant, a fifth-grade student, was charged as a juvenile for touching a classmate "multiple times on her buttocks and between her legs with a straw-like candy, known as Pixy Stix." A juvenile court counselor filed a juvenile delinquency petition against the defendant alleging simple assault. *Id.* at 185, 694 S.E.2d at 759. Over a month later, the juvenile court counselor filed a second petition alleging that the defendant had also committed sexual battery during the same incident. *Id.* at 185-86, 694 S.E.2d at 759. On appeal the defendant argued, and the Court of Appeals agreed, that the second petition was not filed within the time period mandated by N.C.G.S. § 7B-1703, the pertinent statute, and therefore the district court lacked subject matter jurisdiction over the sexual battery allegation. *Id.* at 186, 694 S.E.2d at 759-60. In reversing the decision of the Court of Appeals, this Court reasoned that

> [o]n its face section 7B-1703 does not mention jurisdiction, nor does it indicate that a [juvenile court counselor's] failure to meet the timing requirements contained therein divests the district court of subject matter jurisdiction. We believe that had the legislature intended section 7B-1703 to implicate subject matter jurisdiction, the legislature would have either included these requirements in Chapter 7B, Article 16 or expressly stated so in section 7B-1703 itself. Because the legislature did neither, we conclude that it did not intend for the section 7B-1703 timelines to function as prerequisites for district court jurisdiction over allegedly delinquent juveniles. We note that this decision is consistent with the conclusions reached in prior North Carolina appellate decisions that have addressed Chapter 7B timeline requirements and jurisdiction, particularly in the contexts of abuse, neglect, and dependency and termination of parental rights.

Id. at 193-94, 694 S.E.2d at 764 (internal citation omitted).

While the subject matter of *In re D.S.* is distinguishable, the essence of this Court's reasoning is applicable in the case *sub judice*. Subsection 50-13.7(a) states that a child support order can be "modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party." N.C.G.S. § 50-13.7(a). Just as with the controlling statute in *In re D.S.*, subsection 50-13.7(a) does not indicate that a party's failure to file a motion divests the court of jurisdiction. There is no language in either law establishing jurisdictional consequences for failure to follow the statutory provisions; the statutory language is clear and unambiguous and the plain meaning of each statute imposes no jurisdictional prerequisites. As we reasoned in *In re D.S.* regarding the statute at issue there, the legislature here could have set forth requirements that would affect jurisdiction in N.C.G.S. § 50-13.7(a). *Compare In re A.R.G.*, 361 N.C. 392, 398-99, 646 S.E.2d 349, 353 (2007) (holding that while the county department of social services failed to comply with the applicable statute requiring a juvenile's address to be included in a petition alleging that a child was a neglected and dependent juvenile, "[n]othing in the statute suggests that the information required is jurisdictional" and stating that to hold otherwise "would elevate form over substance"), *with In re T.R.P.*, 360 N.C. at 591, 636 S.E.2d at 790-91 (concluding that a petition filed by the county department of social services alleging that a child was a neglected juvenile was not verified as required by statute and therefore, rendered the judgment void because "verification of the petition in an abuse, neglect, or dependency action . . . is a vital link in the chain of proceedings carefully designed to protect children at risk on one hand while avoiding undue interference with family rights on the other"). We decline to create a jurisdictional prerequisite in this statute where one cannot be originally found. Thus, the district court had jurisdiction to modify the child support order.[2]

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2. Defendant also argues that a district court's jurisdiction "is limited to the specific issues properly raised by a party or interested person in their motion in the cause." Defendant cites Court of Appeals case law suggesting that it is improper for courts to address issues other than those properly raised, namely, *Van Nynatten v. Van Nynatten*, 113 N.C. App. 142, 147, 438 S.E.2d 417, 419 (1993), and *Smith v. Smith*, 15 N.C. App. 180, 183, 189 S.E.2d 525, 526 (1972). Here the only issue addressed by the district court was modification of the VSA, a child support issue over which the court had continuing jurisdiction; therefore, this case is distinguished from the cases cited above in which the district court addressed child support when the only issue before the court was alimony and vice versa. *Van Nynatten*, 113 N.C. App. at 147, 438 S.E.2d at 419; *Smith*, 15 N.C. App. at 183, 189 S.E.2d at 526.

C. The Legislative History Suggests that the General Assembly Did Not Intend to Create a Jurisdictional Prerequisite

[3] While the plain meaning of N.C.G.S. § 50-13.7(a) is sufficient for us to determine that the district court had jurisdiction to modify the VSA, the legislative history of the statute indicates that the legislature did not intend for the statute to create a jurisdictional prerequisite to modify child support orders. To determine legislative intent, this Court can also consider "the legislative history of an act and the circumstances surrounding its adoption." *In re Banks*, 295 N.C. 236, 239-40, 244 S.E.2d 386, 389 (1978) (citation omitted). The legislative history of N.C.G.S. § 50-13.7(a) and other domestic relations statutes yields critical insight regarding the General Assembly's intent here.

As early as 1859, judges had statutory authority in certain cases to "make all needful rules and orders concerning [child] custody, as shall best promote the welfare of the children." Act of Feb. 15, 1859, ch. 53, sec. 1, 1858-59 N.C. Sess. Laws 91, 92. Dissatisfied parties could appeal to the Supreme Court. *Id.*, sec. 2, at 92. In 1872, the General Assembly enacted a law regarding child support and custody in divorce actions:

> After the filing of a complaint in any proceeding for divorce, whether from the bonds of matrimony, or from bed and board, both before and after final judgment therein, it shall be lawful for the judge of the court, in which such application is or was pending, to make such orders respecting the care, custody, tuition and maintenance of the children of the marriage as may be proper, and from time to time to modify or vacate such orders: *Provided*, [sic] That no order respecting the children, shall be made on the application of either party without five, [sic] days notice to the other party, unless it shall appear that the party having the possession or control of such children, [sic] has removed or is about to remove the children or himself, beyond the jurisdiction of the court.

Act of Feb. 12, 1872, ch. 193, sec. 46, 1871-72 N.C. Sess. Laws 328, 343 (consequences of divorce upon the right to custody of the children). Unlike the current statute, in the original version of the law the legislature restricted the court's authority by expressly stating that, except in exigent circumstances, an order to vacate or modify could not be entered if the other party was not given five days notice. The same language regarding the establishment and modification of support orders—including the mandatory five-day notice requirement—survived various

revisions of the law. *See* 1 N.C. Cons. Stat. § 1664 (1919); 1 N.C. Rev. § 1570 (1905); 1 N.C. Code § 1296 (1883). The same language was later incorporated in N.C.G.S. § 50-13 (1943) along with additional provisions regarding custody; however, in 1967 N.C.G.S. § 50-13 (1943) was repealed and replaced with the original version of the current statute, N.C.G.S. § 50-13.7(a) (1967). Act of July 6, 1967, ch. 1153, secs. 1, 2, 1967 N.C. Sess. Laws 1772-73, 1777. The five-day notice requirement was conspicuously removed from the latest version of the law.

Likewise, our alimony statutes are derived from the same Act of 1872 that originated the child support and custody statute under present review. Two of these alimony laws are relevant here. The first of them allowed alimony *pendente lite*. The language in this alimony enactment is similar to that used to establish and modify child support and custody orders, stating that "such order may be modified or vacated at any time, on the application of either party or of any one [sic] interested: *Provided*, That no order allowing alimony *pendente lite* shall be made unless the husband shall have had five days' notice thereof." Ch. 193, sec. 38, 1871-72 N.C. Sess. Laws at 340 (alimony *pendente lite*). The laws were later codified, with the modification and mandatory notice provisions surviving in subsequent versions of the *pendente lite* alimony law. *See* 1 N.C. Code § 1291 (1883); 1 N.C. Cons. Stat. § 1666 (1919); N.C.G.S. § 50-15 (1943). The second of the alimony laws allowed alimony without divorce. While this edict did not originally have the language concerning modifications or notice, such wording was later added in 1919 and survived several revisions of the law. *See* Ch. 193, sec. 39, 1871-72 N.C. Sess. Laws at 341; 1 N.C. Cons. Stat. § 1667 (1919); N.C.G.S. § 50-16 (1943).

Later, this Court addressed whether the five-day notice provision was jurisdictional with respect to the alimony laws. *Barnwell v. Barnwell*, 241 N.C. 565, 566, 85 S.E.2d 916, 916-17 (1955), involved a civil action for alimony without divorce under N.C.G.S. § 50-16 in which a district court entered an order for alimony *pendente lite* without notice to the defendant. This Court determined that the failure to comply with the five-day notice requirement in N.C.G.S. § 50-16 rendered the order void.[3] *Id.* at 567-68, 85 S.E.2d at 918. In 1967 both alimony statutes were

3. The Court did not expressly use the term "jurisdictional prerequisite," but after stating that the order was "void," the Court cited *Collins v. N.C. State Highway & Pub. Works Comm'n*, 237 N.C. 277, 281, 74 S.E.2d 709, 713 (1953), in which this Court stated that a lack of jurisdiction renders a judgment "void." Moreover, we have consistently used the terms "void" and "nullity" to describe a lack of jurisdiction. *See In re T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 790 ("A judgment is void, when there is a want of jurisdiction by the court over the subject matter . . . ." (quoting *Hart v. Thomasville Motors, Inc.*,

repealed and the statutory framework that exists today was enacted as evidenced in N.C.G.S. §§ 50-16.1A through 50-16.10. The notice provision remained intact until it was repealed in 1995. Act of June 21 1995, ch. 319, sec. 6, 1995 N.C. Sess. Laws 641, 646-47 (changing the laws pertaining to alimony) (codified at N.C.G.S. § 50-16.8 (1995)). In its present form, the relevant alimony statute includes the same language as appears in N.C.G.S. § 50-13.7(a) and which is at issue here: "An order of a court . . . for alimony . . . may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." N.C.G.S. § 50-16.9(a) (2015). Moreover, both the child support modification statute at issue here and the alimony statute cited for purposes of instructive comparison were enacted by the General Assembly on the same day in successive acts. Act of July 6, 1967, ch. 1152, 1967 N.C. Sess. Laws 1766 (alimony); Ch. 1153, 1967 N.C. Sess. Laws 1772 (child custody and support). As stated above, the notice provision was removed from the child support statute in 1967, but remained in the alimony statute until 1995. This comprehensive analysis of the legislative history of N.C.G.S. § 50-13.7(a), the governing statute in the case at bar, establishes that the legislature did not intend that subsection 50-13.7(a) create a jurisdictional prerequisite.

D. The Provision in N.C.G.S. § 50-13.7(a) Is Directory Rather than Mandatory

[4] The provision of N.C.G.S. § 50-13.7(a) requiring a motion to be filed is directory rather than mandatory; consequently, the absence of a motion to modify a child support order does not divest the district court of jurisdiction to act under the purview of the statute. With the empirical subject of jurisdiction substantively questioned, defendant argues that "a motion in the cause by an interested party pursuant to N.C.G.S. § 50-13.7(a) [must be filed]. Without a motion in the cause the trial court is without authority/jurisdiction to modify the existing order." This Court

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244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956))); *Ridge Cmty. Inv'rs, Inc. v. Berry*, 293 N.C. 688, 696, 239 S.E.2d 566, 571 (1977) ("[T]he clerk having undertaken to enter a kind of judgment which she had no jurisdiction to enter [,] the judgment so entered is void and is a nullity, and may be so treated at all times." (quoting *Moore v. Moore*, 224 N.C. 552, 555, 31 S.E.2d 690, 692 (1944))); *Ellis v. Ellis*, 190 N.C. 418, 421, 130 S.E. 7, 9 (1925) ("If a judgment is void, it must be from one or more of the following causes: 1. Want of jurisdiction over the subject-matter; 2. Want of jurisdiction over the parties to the action, or some of them; or 3. Want of power to grant the relief contained in the judgment. In pronouncing judgments of the first and second classes, the court acts without jurisdiction, while in those of the third class it acts in excess of jurisdiction." (quoting 1 A.C. Freeman, *A Treatise on the Law of Judgments* § 116 at 176 (4th ed. 1892))).

has previously held that a provision in a statute that is directory rather than mandatory is not jurisdictional. *See In re D.S.*, 364 N.C. at 193-94, 694 S.E.2d at 763-64 (citing *In re C.L.C.*, 171 N.C. App. 438, 443-45, 615 S.E.2d 704, 707-08 (2005)) (concluding that various statutory timelines governing the filing of a petition to terminate parental rights, the scheduling of the initial post-disposition custody review hearing and the filing of permanency planning orders under cited provisions of the juvenile code are "directory, rather than mandatory and thus, not jurisdictional" (quoting *In re B.M.*, 168 N.C. App. 350, 354, 607 S.E.2d 698, 701 (2005)), *aff'd per curiam in part and disc. rev. improvidently allowed*, 360 N.C. 475, 628 S.E.2d 760 (2006)). " 'Directory' has been defined in *Black's Law Dictionary* as '[a] provision in a statute, rule of procedure, or the like, which is a mere direction or instruction of no obligatory force, and involving no invalidating consequence for its disregard, as opposed to an imperative or mandatory provision, which must be followed.' " *State v. Fulp*, 355 N.C. 171, 176, 558 S.E.2d 156, 159 (2002) (quoting *Black's Law Dictionary* 460 (6th ed. 1990)). We have reasoned that:

> In determining the mandatory or directory nature of a statute, the importance of the provision involved may be taken into consideration. Generally speaking, those provisions which are a mere matter of form, or which are not material, do not affect any substantial right, and do not relate to the essence of the thing to be done so that compliance is a matter of convenience rather than substance, are considered to be directory.

State v. House, 295 N.C. 189, 203, 244 S.E.2d 654, 661-62 (1978) (quoting 73 Am. Jur. 2d, stat. § 19, at 280 (1974) (footnote call numbers omitted)). This Court has determined that "[t]he meaning and intention of the Legislature must govern; and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it in the one way or the other." *Spruill v. Davenport*, 178 N.C. 364, 368-69, 100 S.E. 527, 530 (1919) (citation omitted).

We conclude that failure to follow the directory requirements of N.C.G.S. § 50-13.7(a) regarding the filing of a motion in the cause does not divest the district court of jurisdiction. The provision requiring a motion to be filed for a child support order to be modified is directory, not mandatory, in nature. The provision concerns a matter of form, rather than a matter of substance as defendant contends, and merely addresses the procedural aspects of modifying a child support order. This Court has issued consistent determinations to this effect, even under varying

circumstances. *See House*, 295 N.C. at 200-03, 244 S.E.2d at 660-62 (concluding that while a grand jury foreman signed an indictment that failed to explicitly indicate that at least twelve jurors concurred in the finding but stated that the jury found the indictment to be a true bill, such omission violated only a directory provision); *State v. Rogers*, 275 N.C. 411, 422-23, 168 S.E.2d 345, 351-52 (1969) (concluding that statutory provisions requiring county commissioners making up a jury list to use, in addition to a tax list, "a list of names of persons who do not appear upon the tax list," are "directory and not mandatory in the absence of bad faith or corruption"), *cert. denied*, 396 U.S. 1024 (1970); *N.C. State Art Soc'y., Inc. v. Bridges*, 235 N.C. 125, 130, 69 S.E.2d 1, 4-5 (1952) (concluding that a statute requiring one of two particular individuals to appraise art selected to be purchased by the State Art Commission was directory and the decision to have a different qualified person to appraise the art constituted substantial compliance with the statute). Thus, the provision stating that a child support order may be modified "upon" a motion in the cause is merely directory; therefore, plaintiff's failure to do so does not divest the district court of jurisdiction.

E. The VSA Satisfied the Purposes of the Provisions in N.C.G.S. § 50-13.7(a)

[5] While N.C.G.S. § 50-13.7(a) does not create a jurisdictional prerequisite and does not contain a mandatory requirement that a party or interested person file a motion for child support modification in order for a district court to exercise jurisdiction over such a matter, defendant nonetheless asserts that a trial court must construe the statute in such a fashion to abide by the procedural requirements of N.C.G.S. § 50-13.7(a). According to defendant, to hold otherwise will encourage parties to disregard other procedural requirements such as filing complaints, issuing summonses and observing other mandatory provisions. This Court is not persuaded by defendant's "snowball effect" argument. Here, plaintiff filed a VSA, which was sufficient to satisfy the purposes of N.C.G.S. § 50-13.7(a). A primary purpose of a requirement to file a motion in order to modify child support is to make the court aware of "important new facts unknown to the court at the time of the prior custody decree." *Tank v. Tank*, 2004 ND 15, ¶ 10, 673 N.W.2d 622, 626 (2004) (citations omitted). When a VSA is filed to modify an earlier court order on child support, the VSA is customarily a request to modify the child support order because circumstances have changed. Thus, a VSA submitted to the district court without such a motion still serves the purpose highlighted in *Tank*, a case from the State of North Dakota that is instructive for this analysis. Thus, our decision also harmoniously aligns with the

statutory provision requiring a showing of a change in circumstances in order for a child support order to be modified.

IV. Conclusion

In light of a VSA's inherent satisfaction of the purposes of N.C.G.S. § 50-13.7(a), coupled with the analysis employed regarding statutory construction, previous case law application and legislative history review, this Court concludes that plaintiff's failure to file a motion to modify defendant's child support obligation did not divest the district court of jurisdiction to modify the VSA at issue here under N.C.G.S. § 50-13.7(a). Accordingly, we reverse the decision of the COA affirming the trial court's order declaring the 2001 VSA void and remand this case to that court for further remand to the District Court, Catawba County for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Chief Justice MARTIN concurring in the result only.

In this case, we must decide whether the district court had the power to modify a child support order even though no party had filed a motion in the cause. Under subsection 50-13.7(a) of our General Statutes, "an order of a court of this State for support of a minor child may be modified or vacated at any time, *upon motion in the cause* and a showing of changed circumstances." N.C.G.S. § 50-13.7(a) (2015) (emphasis added). Here, the district court acted only after defendant had entered into a proposed Modified Voluntary Support Agreement and Order (the consent order), which the parties then submitted to the district court for approval. Because the consent order served as the functional equivalent of a joint motion, I concur in the result that the majority opinion reaches.

But I do not concur in the majority's reasoning, as the majority's rationale seems to extend much further than the context of this case. Because it holds that the "motion in the cause" language of subsection 50-13.7(a) is directory rather than mandatory, the majority seems to allow a district court to modify a child support order—and thus to alter the legal rights and duties of the parties involved—sua sponte, without any party invoking the court's power. This rule, if the majority is indeed establishing it, ignores the plain language of the very statutory provision that gives district courts the power to modify these kinds of orders. It also potentially subverts the customary role that courts play in our adversarial system: to rule on the issues actually raised and argued by the parties. This seems imprudent at best, and may raise serious jurisdictional

concerns as well. I therefore write separately to express my opinion that the majority's reasoning should be read narrowly.

This Court said in *State v. House* that, "[i]n determining the mandatory or directory nature of a statute, the importance of the provision involved may be taken into consideration." 295 N.C. 189, 203, 244 S.E.2d 654, 661 (1978) (quoting 73 Am. Jur. 2d *Statutes* § 19, at 280 (1974)). "Generally speaking, those provisions which are a mere matter of form, or which are not material, do not affect any substantial right, and do not relate to the essence of the thing to be done so that compliance is a matter of convenience rather than substance, are considered to be directory." *Id.* at 203, 244 S.E.2d at 661-62 (quoting 73 Am. Jur. 2d *Statutes* § 19, at 280). Under this standard, a provision that requires a motion in order for a district court to modify an existing support order should be viewed as mandatory for several reasons.

First of all, the motion requirement in subsection 50-13.7(a) is not "a mere matter of form." It defines both the role of the parties and the role of the court in child support proceedings. If a party wishes to have a child support order modified, that party must file a motion in the cause *and* serve it on the opposing party. That gives the opposing party notice of the motion and the chance to present arguments opposing it. And that is how our adversarial system normally operates. But parties have no opportunity to contest a potential modification when a court acts sua sponte. Granting a court the power to act sua sponte in this context, as the majority appears to do, both destabilizes already concluded agreements and affects the substantial rights of parties who rely on those agreements. Parties also have an interest in the finality of judgments and the repose that they provide. Under the majority's apparent rationale, though, cases once resolved could be reopened even though neither party wants to continue litigating.

In re T.R.P. is an analogous case. There, we held that a statutory provision requiring a verification signature on a juvenile petition—the lack of which would in many cases be a simple oversight—was mandatory. 360 N.C. 588, 598, 636 S.E.2d 787, 794-95 (2006). Requiring the verification procedure "respect[ed] both the right to family autonomy and the needs of the child." *Id.* at 598, 636 S.E.2d at 794. A similar logic motivates the language of subsection 50-13.7(a). A district court can always modify a support order on request of a party who shows a change in circumstances and good reason to modify the order. But if the majority ruling is read to permit even sua sponte modifications, it would disturb several decades of Court of Appeals precedent that domestic relations parties and social services agencies throughout North Carolina have

presumably come to rely on. *See Royall v. Sawyer*, 120 N.C. App. 880, 882, 463 S.E.2d 578, 580 (1995) (concluding that a child support agreement could not be modified without a motion to modify the agreement); *Kennedy v. Kennedy*, 107 N.C. App. 695, 703, 421 S.E.2d 795, 799 (1992) (noting that a district court may modify a custody order only upon a motion by either party or by anyone interested); *Smith v. Smith*, 15 N.C. App. 180, 182-83, 189 S.E.2d 525, 526 (1972) (holding that it was error for the trial court to modify a custody and support order when the only question before the trial court at the time was alimony).

I would also observe that the General Assembly has not amended the motion requirement in subsection 50-13.7(a) in response to this longstanding Court of Appeals precedent. That suggests that the Court of Appeals correctly understood the General Assembly's intent, or, at a minimum, that the General Assembly has acquiesced to the Court of Appeals' reading. "The legislature's inactivity in the face of the [judiciary's] repeated pronouncements [on this issue] can only be interpreted as acquiescence by, and implicit approval from, that body." *In re T.R.P.*, 360 N.C. at 594, 636 S.E.2d at 792 (alterations in original) (quoting *Rowan Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 9, 418 S.E.2d 648, 654 (1992)).

The majority holds that a district court's failure to observe subsection 50-13.7(a)'s motion requirement is not jurisdictional, but I believe that it may very well be. At the very least, the majority does not establish that it is not. The majority's discussion of jurisdiction establishes only that the district court here had continuing jurisdiction over this case and these parties. That is clear. But by focusing on continuing jurisdiction, the majority ducks the real issue: whether, in the absence of a motion or its functional equivalent, a district court has the power to modify a child support order, or instead lacks the power to do so unless and until it receives a request from an interested party to modify the order.

The term "[j]urisdiction" refers to "[a] court's power to decide a case *or issue a decree*." *In re M.I.W.*, 365 N.C. 374, 379, 722 S.E.2d 469, 473 (2012) (second set of brackets in original) (emphasis added) (quoting *Black's Law Dictionary* 927 (9th ed. 2009)). "[H]aving jurisdiction is simply a state of being that requires, and in some cases allows, no substantive action from the court." *Id.* at 379, 722 S.E.2d at 473. Put another way, in our adversarial system of justice, a court with jurisdiction sometimes *cannot* act—at least not until a party has asked it to. A court that has subject-matter jurisdiction over a case and personal jurisdiction over the parties may thus still lack the "power to grant the relief contained in [its] judgment." *Ellis v. Ellis*, 190 N.C. 418, 421, 130 S.E. 7, 9

(1925) (quoting 1 A. C. Freeman, *Freeman on Judgments* § 116 (4th ed. 1892)). And a court that enters a judgment without the power to do so "acts in excess of jurisdiction." *Id.* (quoting 1 A. C. Freeman, *Freeman on Judgments* § 116 (4th ed. 1892)). That judgment is therefore void and "may be impeached collaterally or by direct attack." *Id.* at 421-22, 130 S.E. at 9; *see also State ex rel. Hanson v. Yandle*, 235 N.C. 532, 535, 70 S.E.2d 565, 568 (1952) ("If the court was without authority, its judgment . . . is void and of no effect. A lack of jurisdiction or power in the court entering a judgment always avoids the judgment . . . ."). Hence the concern here: a district court that ignores a mandatory motion requirement in issuing an order may well be acting in excess of its jurisdiction, and its order may well be void.

Defending its position, the majority notes that "the jurisdiction of the court entering . . . a [child support] decree continues as long as the minor child whose custody is the subject of the decree remains within its jurisdiction," quoting *Stanback v. Stanback*, 287 N.C. 448, 456, 215 S.E.2d 30, 36 (1975). But again, the issue here is not whether the district court had continuing jurisdiction, but whether the district court exceeded the scope of its jurisdiction.

A court can, of course, dismiss a case sua sponte for lack of subject-matter jurisdiction, *see* N.C. R. Civ. P. 12(h)(3); *accord* Fed. R. Civ. P. 12(h)(3), but that is one of the few exceptions that proves the rule. Many other things, including personal jurisdiction, are waivable and should not be raised sua sponte. *See* N.C. R. Civ. P. 12(h)(1); *accord* Fed. R. Civ. P. 12(h)(1). Courts always have jurisdiction to determine subject-matter jurisdiction, but they do not always have—in fact, they usually do not have—the power to determine other matters unless asked to do so by a party.

By ignoring the possibility that a district court that modified a support order sua sponte may be acting in excess of its jurisdiction, and by reading the standard for directory versus mandatory statutes in a way that strongly favors the "directory" label, the majority raises several troubling questions. What must the General Assembly do to make a procedural rule actually binding on the courts? Does the magic word "jurisdictional" now have to be in the statute's text? Would a court with both subject-matter and personal jurisdiction have the power to issue a summary judgment order when no party had moved for summary judgment? Would a court be able to issue a final judgment in a case that had disputed material facts in the absence of settlement or trial? These last two questions show the error in the majority's thinking, and the inconsistency of its reasoning with foundational principles of our adversarial

system: a district court can plainly have jurisdiction over a case but lack the power to issue a certain decree.

The consent order satisfied subsection 50-13.7(a)'s motion requirement, so the district court here did not act sua sponte. We therefore do not have to decide whether a district court that did act sua sponte in this context would be exceeding its jurisdiction. It is important, however, that we distinguish in future cases between a court's jurisdiction over a case, on the one hand, and a court's power to issue a particular order or remedy, on the other. Those two things are not the same. Accordingly, I concur in the result only.

Justice ERVIN joins in this concurring opinion.

DEPARTMENT OF TRANSPORTATION
v.
ADAMS OUTDOOR ADVERTISING OF CHARLOTTE LIMITED PARTNERSHIP

No. 206PA16

Filed 29 September 2017

1. Eminent Domain—condemnation of billboard leasehold—valuation—value of physical structure not recoverable

In a case involving the condemnation of land which contained a billboard, evidence concerning the value that the billboard added to the leasehold interest held by an outdoor advertising company was admissible to help the trier of fact determine the fair market value of that interest. The value of the physical structure, which was the personal property of the advertising company, was not recoverable.

2. Eminent Domain—condemnation of billboard leasehold—valuation—rental income

The rental income from a billboard was admissible in determining the fair market value of the advertising company's leasehold interest in a condemnation action where the advertising company would enter into long-term contracts that gave advertisers the right to occupy and use billboard space on its property. Care must be taken to distinguish between income from the property and income from the business conducted on the property.

3. Eminent Domain—condemnation of billboard leasehold—valuation—permits—nonconforming use

Evidence of a billboard company's permits that permitted nonconforming use was admissible to help the trier of fact determine the fair market value of the company's condemned leasehold interest.

4. Eminent Domain—condemnation of billboard leasehold—valuation—lease extensions

A Department of Transportation appraiser incorrectly valued a leasehold interest held by a billboard company where the lease included an automatic ten-year extension followed by optional renewal periods. Under the automatic extension, the advertising company essentially had a contractual right to possess the leased property for twenty years and it was a proper factor for the trier of fact to consider. However, the optional ten-year lease extensions should not have been considered.

5. Eminent Domain—condemnation of billboard leasehold—valuation—specific billboard—not considered properly

A Department of Transportation appraiser incorrectly applied the bonus value method of valuing a condemned leasehold interest held by a billboard interest where, in part, he did not account for the value of the specific nonconforming billboard, in its specific location, and the enhanced rental income that it generated, along with the permits that permitted a continuing nonconforming use.

Justice HUDSON concurring in part and dissenting in part.

Justices BEASLEY and MORGAN join in this concurring and dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 785 S.E.2d 151 (2016), reversing an order entered on 27 August 2014 by Judge Lisa C. Bell in Superior Court, Mecklenburg County. Heard in the Supreme Court on 21 March 2017.

Joshua H. Stein, Attorney General, by Kenneth A. Sack, Assistant Attorney General, for plaintiff-appellee.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Craig D. Justus, for defendant-appellant.

MARTIN, Chief Justice.

In this appeal, we consider whether the Court of Appeals erred in reversing the trial court's order addressing the appropriate measure of damages in a condemnation action. The North Carolina Department of Transportation (DOT) condemned a leasehold interest held by Adams Outdoor Advertising of Charlotte Limited Partnership (Adams Outdoor). Adams Outdoor owned a billboard situated on the leasehold and rented out space on the billboard to advertisers. At the time of the taking, the billboard did not conform to city or state regulations, but Adams Outdoor held permits that allowed for the billboard's continued use. We must address which Article of Chapter 136 of our General Statutes applies to this condemnation proceeding and which evidence is admissible to help the trier of fact determine the fair market value of Adams Outdoor's condemned leasehold interest. We affirm the decision of the Court of Appeals in part and reverse it in part.

I. Background

Defendant Adams Outdoor is an outdoor advertising company that rents out advertising space on billboards. In October 2001, Adams Outdoor acquired a billboard at the corner of Sharon Amity Road and Independence Boulevard in Charlotte, North Carolina. Approximately 85,000 vehicles drove by this location each day. Adams Outdoor rented out advertising space on the billboard and collected payments from the advertisers.

The billboard, which was constructed in 1981, was 65 feet tall and had two back-to-back sign face displays of approximately 14 feet by 48 feet each, or 672 square feet of advertising space per face. The billboard weighed approximately 30,000 pounds, had a steel monopole support, and was attached to the land by a foundation that was dug 18 feet into the ground, 6 feet around, and backfilled with concrete. The billboard was a legal height when it was built, but by the time Adams Outdoor acquired it, it no longer conformed to revised DOT height regulations. Because the billboard already existed when the regulations changed, Adams Outdoor received a permit that allowed it to continue to use the billboard even though it was nonconforming.

At the same time that it acquired the billboard, Adams Outdoor acquired the lease for the lot on which the billboard was located. When Adams Outdoor acquired the lease, the lease was operating on a year-to-year basis. In 2006, Adams Outdoor negotiated a new lease with the landowner. The new lease term started in August 2007 and ran for ten

years, and the lease also provided that this term would be automatically extended for another ten years. After the automatically extended term, the parties had the option to let the lease continue to automatically renew for successive ten-year terms, but either party could decline to renew the lease with ninety days' notice before any given renewal. The lease permitted Adams Outdoor to use the lot for outdoor advertising purposes only and provided that Adams Outdoor could remove the billboard either before or within a reasonable time after the lease expired or was terminated. During the existence of the lease, Adams Outdoor, but not the landlord, could cancel the lease at any time if one of a small number of specific circumstances arose.

This lease was recorded in the Mecklenburg County Register of Deeds Office. While the recorded lease was in effect, the City of Charlotte also changed its regulations in a way that made the billboard nonconforming. As with the change in DOT's regulations, the billboard was grandfathered in as a nonconforming billboard, and Adams Outdoor received a permit for its continued use.

Plaintiff DOT purchased the fee simple interest in the parcel of land on which Adams Outdoor's billboard stood. In December 2011, DOT filed a civil action and declaration of taking of Adams Outdoor's interest in the property "for public use in the construction of [a] . . . highway project." DOT hired an appraiser to estimate the value of the leasehold interest. To estimate this value, the appraiser used the "bonus value" approach, which compares the rent stipulated in the lease to the fair market rental value of that lease. The appraiser concluded that, because Adams Outdoor was paying a higher rent for this property than it paid in what the appraiser considered to be reasonably similar leases, the lease had negative value and just compensation was zero. Adams Outdoor did not agree with this assessment, and both parties moved for a section 108 hearing to determine the issues raised by the pleadings, including whether a taking had occurred and, if so, the extent of that taking; the proper classification of the billboard; the proper way to determine the amount of compensation due to Adams Outdoor; and whether certain evidence was admissible to help determine the fair market value of the leasehold interest.[1] The trial court granted these motions and held the section 108 hearing.

1. The purpose of a section 108 hearing is to allow a judge to "hear and determine any and all issues raised by the pleadings other than the issue of damages." N.C.G.S. § 136-108 (2015).

The trial court's findings of fact after the hearing included, among other things, that "[b]ecause of the nonconforming nature of the Billboard, and as a consequence of the highly restrictive requirements for new billboard locations, the Billboard could not be moved in its entirety and relocated"; that Adams Outdoor "earned substantial rental income from leasing space on the Billboard to advertisers"; that "[t]he Billboard and its outdoor advertising use is essentially self-operating as rental property for advertisers to display their messages to the intended viewing audience"; that "[b]ecause Adams possessed a valid State permit for the Billboard, neither the City of Charlotte nor any other local regulatory authority could require its removal by way of regulations . . . without paying just compensation"; and that "DOT's expert . . . was directed by the DOT to specifically exclude the value of the outdoor advertising in determining his opinion on just compensation."

The trial court then concluded that, "[b]ecause the DOT caused the removal of Adams' nonconforming outdoor advertising property interests . . . by way of condemnation, [Article 11 of Chapter 136] is applicable and controlling in setting the conditions of measuring just compensation." The trial court therefore ordered that the monies that DOT owed to Adams "must include the value of the outdoor advertising, taking into account the lease portfolio (including any reasonable expectation of renewal), the physical structure, and the accompanying permits." The trial court also concluded that DOT's bonus value method was "improper" and should be excluded.

DOT appealed, and the Court of Appeals reversed. *Dep't of Transp. v. Adams Outdoor Advert. of Charlotte Ltd. P'ship*, ___ N.C. App. ___, ___, 785 S.E.2d 151, 161 (2016). The Court of Appeals determined that the controlling statutory framework was Article 9 rather than Article 11 of Chapter 136 of the North Carolina General Statutes. *Id.* at ___, 785 S.E.2d at 155. The Court of Appeals also held that the billboard was noncompensable personal property, and that the alleged loss of revenue from renting advertising space, the permits issued to defendant, and the option to renew the lease were not compensable property interests. *Id.* at ___, 785 S.E.2d at 157 60. Finally, the Court of Appeals reversed the trial court's order excluding bonus value method evidence because, it said, that part of the order was based on the "erroneous premise" that the billboard was "a permanent leasehold improvement" instead of personal property. *Id.* at ___, 785 S.E.2d at 160 61.

Adams Outdoor petitioned this Court for discretionary review, and we granted its petition. We must decide (1) whether the Court of Appeals erred in its conclusion that the fair market value provision

in Article 9, not Article 11, governs this condemnation proceeding; (2) whether the value that the billboard added to that of the leasehold interest should be considered in determining the fair market value of that interest; (3) whether the income derived from renting out advertising space should be considered in determining the fair market value of the leasehold interest; (4) whether the fact that permits had been issued to Adams Outdoor for continued use of the billboard should be considered in determining the fair market value of the leasehold interest; (5) whether the automatic renewal of the lease and the options to renew the lease should be considered in determining the fair market value of the leasehold interest; and (6) whether DOT's bonus value method evidence should be considered in determining the fair market value of the leasehold interest.

This Court reviews a trial court's findings of fact to determine whether they are supported by competent evidence and "whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). This Court reviews conclusions of law de novo. *E.g.*, *id.* at 168, 712 S.E.2d at 878. It also reviews questions of statutory interpretation de novo. *E.g.*, *Hammond v. Saini*, 367 N.C. 607, 609, 766 S.E.2d 590, 592 (2014).

II. Analysis

1. The controlling statutory scheme

[1] Using its power of eminent domain, the government may take private property for public use. *State v. Core Banks Club Props., Inc.*, 275 N.C. 328, 334, 167 S.E.2d 385, 388 (1969). When the State takes private property for public use, "the owner must be justly compensated." *Dep't of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 4, 637 S.E.2d 885, 889 (2006). The possessor of a recorded leasehold interest is likewise entitled to just compensation when the State takes that interest. *See Givens v. Sellars*, 273 N.C. 44, 50, 159 S.E.2d 530, 536 (1968) (citing 26 Am. Jur. 2d *Eminent Domain* § 79 (1966)); *see also* 26 Am. Jur. 2d *Eminent Domain* § 138 (2014) ("A leasehold may be classified as 'property' subject to the Takings Clause of the U.S. Constitution's Fifth Amendment.").

Under the eminent domain power set forth in Article 2 of Chapter 136, DOT has the right to "acquire by gift, purchase, or otherwise . . . any road or highway, or tract of land or other property whatsoever that may be necessary for a State transportation system and adjacent utility rights-of-way." N.C.G.S. § 136-18(2)(e) (Supp. 2016). When DOT acquires property by condemnation, Article 9 of Chapter 136 sets out the appropriate measure of damages to which the owner of condemned property

is entitled. *Id.* § 136-112(2) (2015). Under this Article, the measure of damages when DOT takes an entire tract of land is "the fair market value of the property at the time of taking." *Id.*

Under the eminent domain power set forth in Article 11 of Chapter 136, titled "Outdoor Advertising Control Act," DOT also has the power "to acquire by . . . condemnation all outdoor advertising and all property rights pertaining thereto which are prohibited under the provisions of G.S. 136-129, 136-129.1 or 136-129.2, provided such outdoor advertising is in lawful existence on the effective date of this Article." *Id.* § 136-131 (2015). Under Article 11, however, the measure of damages when the outdoor advertising owner does not own the underlying fee interest in the property is "limited to the fair market value . . . of the outdoor advertising owner's interest in the real property on which the outdoor advertising is located *and such value shall include the value of the outdoor advertising.*" *Id.* (emphasis added).

Adams Outdoor argues, and the trial court agreed, that compensation for the leasehold interest should be measured according to Article 11, not Article 9. If section 136-131 of Article 11 controls in this case, then the fair market value of the leasehold interest would necessarily include the value of the outdoor advertising.

In statutory interpretation, we first look at the statute's plain meaning. "When the language of a statute is plain and free from ambiguity, expressing a single, definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended, and the statute must be interpreted accordingly." *State Highway Comm'n v. Hemphill*, 269 N.C. 535, 539, 153 S.E.2d 22, 26 (1967) (quoting *State ex rel. Long v. Smitherman*, 251 N.C. 682, 684, 111 S.E.2d 834, 836 (1960)); *accord Falk v. Fannie Mae*, 367 N.C. 594, 602, 766 S.E.2d 271, 277 (2014). Here, the statute gives DOT the power "to acquire by purchase, gift, or condemnation all outdoor advertising and all property rights pertaining thereto *which are prohibited under the provisions of G.S. 136-129, 136-129.1 or 136-129.2*." N.C.G.S. § 136-131 (emphasis added). These provisions all provide limitations on the construction or maintenance of an outdoor advertising device. *Id.* §§ 136-129, -129.1, -129.2 (2015). The explicit reason for enacting the Outdoor Advertising Control Act, moreover, was "to provide and declare . . . a . . . statutory basis for the regulation and control of outdoor advertising." *Id.* § 136-127 (2015). Thus, Article 11 does not give DOT the power to condemn any billboard (along with its related property rights) for any reason. It gives DOT the power to condemn a billboard specifically when DOT is condemning the billboard because it is prohibited by Article 11.

Here, though, DOT condemned the leasehold interest to widen a highway, not because the billboard that sat on the fee was nonconforming. DOT's authority to do this is found in N.C.G.S. § 136-18(2)(e), which gives DOT the power to condemn property when condemnation of that property is necessary for a state road or highway. DOT therefore was not exercising its authority under Article 11 to acquire prohibited outdoor advertising and all related property rights by condemnation; it was exercising its authority under N.C.G.S. § 136-18(2)(e) to condemn property in order to widen a highway. After all, even if the billboard had been conforming, DOT *still* would have condemned the leasehold interest because it needed the property for its highway-widening project. So the fair market valuation provision specific to Article 11 does not govern this condemnation proceeding; the general fair market valuation provision in Article 9 does instead.[2] But because Article 9 still requires compensation for the fair market value of the property interest taken, DOT has to compensate Adams Outdoor for the fair market value of its leasehold interest.

2. The outdoor advertising structure (the billboard)

In a proceeding to determine the fair market value of property under Article 9, "[a]ll factors pertinent to a determination of what a buyer, willing to buy but not under compulsion to do so, would pay and what a seller, willing to sell but not under compulsion to do so, would take for the property must be considered." *M.M. Fowler*, 361 N.C. at 17, 637 S.E.2d at 896 (alteration in original) (quoting *City of Charlotte v. Charlotte Park & Recreation Comm'n*, 278 N.C. 26, 34, 178 S.E.2d 601, 606 (1971)). In other words, the fair market value is the price to which a willing buyer and a willing seller would agree. So the question here is whether a billboard owned by Adams Outdoor, and situated on the site of Adams Outdoor's leasehold interest, would be a factor that a willing buyer and a willing seller would consider when agreeing on the price of that leasehold interest. We are not considering the fair market value of the physical billboard structure as compensable property; we are considering only whether any value that the presence of the billboard

2. Article 9 does not specify the measure of damages where, as here, DOT purchases a tract of land and then condemns a leasehold interest in that land. Section 136-112 is the only provision in Article 9 specifying the measure of damages when DOT condemns property. This provision discusses the appropriate measure of damages when DOT condemns a partial tract of land versus an entire tract of land. *See* N.C.G.S. § 136-112(1), (2). Because DOT condemned Adams Outdoor's entire property interest—that is to say, because it condemned Adams Outdoor's leasehold interest in an entire tract of land—subsection 136-112(2) applies here.

adds to the value of Adams Outdoor's leasehold interest should be a factor in determining the fair market value of that interest.

The lease here permitted Adams Outdoor to use the property only "for the purpose of erecting, operating, maintaining, repairing, modifying and reconstructing outdoor advertising structures." And, although Adams Outdoor could cancel the lease during the first twenty years of the lease term only under limited circumstances, these circumstances included if the view of the billboard was obstructed, if the property was no longer suitable for the billboard, or if the value of the billboard was substantially diminished. These facts show that the value of the leasehold interest was inextricably tied to the value that the billboard added to it.

The value that the billboard added to the leasehold would not just come from rental income, which we discuss separately below. It would also come from the inherent value of the billboard's presence on the property: that is, from the potential to rent it out to advertisers even if it is not currently being used in that way, and from the ability to use the billboard to communicate messages to an audience of approximately 85,000 vehicles per day. Certainly a willing buyer who is purchasing a leasehold that can be used only for outdoor advertising purposes would consider whether the property actually had a billboard on it in determining the price that he or she was willing to pay for the leasehold interest. And certainly a seller who owns a grandfathered-in nonconforming billboard on a leasehold that can be used only for outdoor advertising purposes would consider the presence of that billboard on it in determining the price for which he or she was willing to sell the leasehold interest. We therefore hold that evidence concerning the value that the billboard added to the leasehold interest is admissible to help the trier of fact determine the fair market value of that interest.

The Court of Appeals concluded that the billboard cannot be considered in this condemnation action because, as a trade fixture, it is noncompensable personal property. A trade fixture is a fixture that is attached to land by agreement between a landlord and tenant for use in exercising a trade. *Stephens v. Carter*, 246 N.C. 318, 320-21, 98 S.E.2d 311, 312-13 (1957). It may be removed after the tenancy and belongs to the tenant as personal property. *Id.* Here, Adams Outdoor's billboard was attached to the land for the purpose of conducting an outdoor advertising business, and Adams Outdoor's lease states that "[a]ll Structures erected by or for the Lessee . . . shall at all times be and remain the property of the Lessee and may be removed by the Lessee . . . , notwithstanding that such Structures are intended . . . to be permanently affixed to the

Property." This language clearly indicates that the parties agreed the billboard would be treated as a trade fixture that would remain the personal property of Adams Outdoor. So we agree with the Court of Appeals that this billboard was a trade fixture, and thus was Adams Outdoor's personal property.

As a general rule, the value of personal property cannot be recovered in a condemnation action. *Lyerly v. N.C. State Highway Comm'n*, 264 N.C. 649, 649-50, 142 S.E.2d 658, 658 (1965) (per curiam). And our holding is consistent with this rule. To be clear, we do not hold that Adams Outdoor has the right to recover the value of the physical billboard structure—that is, the value of its personal property—in this condemnation action. It does not. So we are not saying that the trier of fact should add the fair market value of the physical billboard structure to the amount that it determines to be the fair market value of the leasehold interest. But the fact that the billboard, as a trade fixture, was Adams Outdoor's personal property does not preclude the trier of fact from considering the presence of the billboard on the leased property in determining the fair market value of the leasehold interest. Again, a willing buyer and a willing seller would consider the billboard's presence in agreeing on a price for the leasehold interest itself. We hold only that the trier of fact may therefore consider the value that the billboard's presence adds to the value of that leasehold interest.

3. The payments from advertisers

[2] "Injury to a business, including lost profits, is [a] noncompensable loss." *M.M. Fowler*, 361 N.C. at 7, 637 S.E.2d at 890. "[R]evenue derived directly from the condemned property itself, such as rental income," however, is a proper consideration in determining the fair market value of condemned property. *Id.* at 7, 637 S.E.2d at 890.[3] Adams Outdoor argues that the lease payments made by advertisers to display their messages on the billboard should be considered rental income and should therefore be admissible to help determine the fair market value of the leasehold interest here. In deciding this question, "care must be taken to distinguish between income from the property and income from the business conducted on the property." *Id.* at 7, 637 S.E.2d at 890 (quoting 4 Julius L. Sackman et al., *Nichols on Eminent Domain* § 12B.09, at 12B-56 to -59 (rev. 3d ed. 2006)).

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3. The majority and dissenting opinions in *Department of Transportation v. M.M. Fowler, Inc.* agreed that it is proper to consider rental income in determining fair market value of condemned property. *Compare* 361 N.C. at 7, 637 S.E.2d at 890 (majority opinion), *with id.* at 18, 637 S.E.2d at 897 (Martin, J., dissenting).

Rental income would obviously include, at the very least, payments received by a landlord who is renting out residential space in a house or apartment building or commercial space in an office building. Here, as in those scenarios, Adams Outdoor was renting out space from its structure—that is, space from its billboard. As with many residential or commercial leases, moreover, Adams Outdoor would enter into long-term contracts with particular parties that would give those parties the right to occupy and use space located on real property—which here meant giving advertisers the right to occupy and use billboard space on its property. As the trial court found, Adams Outdoor was therefore earning "substantial rental income from leasing space on the [b]illboard to advertisers," and the billboard was "essentially self-operating . . . rental property." This rental income is admissible to help the trier of fact determine the fair market value of Adams Outdoor's leasehold interest.

4. The permits

[3] "A permit grants a privilege. It does not convey either a constitutional right or a property right." *Hursey v. Town of Gibsonville*, 284 N.C. 522, 529, 202 S.E.2d 161, 166 (1974). The question here, however, is not whether the possession of a permit confers a compensable property right. Instead, the question is whether evidence of permits that Adams Outdoor possessed—and that allowed Adams Outdoor to continue using a nonconforming billboard that had been grandfathered in—is admissible to help the trier of fact determine the fair market value of the leasehold interest to which the permits pertained.

"The jury should take into consideration, in arriving at the fair market value of the [property] taken, all the capabilities of the property, and all the uses to which it could have been applied or for which it was adapted, which affected its value in the market at the time of the taking . . . ." *Barnes v. N.C. State Highway Comm'n*, 250 N.C. 378, 387, 109 S.E.2d 219, 227 (1959). We have stated that a jury may consider "the reasonable probability of a change in the zoning ordinance or of a permit for a non-conforming use." *Northgate Shopping Ctr., Inc. v. State Highway Comm'n*, 265 N.C. 209, 212-13, 143 S.E.2d 244, 246 (1965) (citing *Barnes*, 250 N.C. at 391, 109 S.E.2d at 229-30).

If the reasonable probability of obtaining a permit is admissible, then the existence of already-issued permits should likewise be admissible. Here, taking Adams Outdoor's permits into account makes particular sense given that Adams Outdoor's lease permitted it to cancel the lease or to seek rent abatement if Adams Outdoor was unable to maintain its permits. Evidence of these permits would certainly help inform the trier of fact about the value of a leasehold interest that exists solely

to maintain and use the very billboard whose use is sanctioned by the permits. So, for all of these reasons, we hold that evidence of Adams Outdoor's permits is admissible to help the trier of fact determine the fair market value of Adams Outdoor's leasehold interest.

5. The automatic extension and the options to renew

[4] As we have already noted, Adams Outdoor's ten-year lease granted an automatic ten year extension followed by optional ten year renewal periods. We need to determine whether either of these provisions should be considered by the trier of fact in assessing the fair market value of the leasehold interest. We will address each provision separately.

A. The automatic ten-year extension

In *United States v. Petty Motor Co.*, the Supreme Court of the United States held that, when a tenant has a contractual right to renew its lease, "[t]he measure of damages" includes "the value of the right to renew" the lease. 327 U.S. 372, 381 (1946); *accord Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 304 (1976).

Here the automatic ten-year extension provision in Adams Outdoor's lease was an even stronger provision than one that guarantees a contractual right to renew. Under the terms of the automatic extension provision, the lease extension would occur without Adams Outdoor taking any action—Adams Outdoor did not even need to exercise a right to renew—and the landlord could not cancel or decline the extension. Thus, Adams Outdoor essentially had a contractual right to possess the leased property for twenty years (the initial ten-year term plus the automatic ten-year extension). The fact that the lease allowed Adams Outdoor to cancel the lease if one of a small set of specific circumstances arose does not change our analysis. After all, even if one of those circumstances arose, Adams Outdoor did not have to cancel the lease; it could choose not to cancel it and continue to possess the leasehold for the full twenty-year term.

Because, under *Petty Motor*, a provision that guarantees a contractual right to renew is a proper factor for the trier of fact to consider in determining the fair market value of the leasehold interest, it follows that this automatic extension provision, which is even stronger in substance, is also a proper factor for the trier of fact to consider.

B. The optional ten-year renewals

The Supreme Court of the United States has drawn a distinction between a contractual right to renew, which is compensable, and a mere

expectancy in the renewal of a lease, which is not. *See Petty Motor*, 327 U.S. at 380 n.9 ("The fact that some tenants had occupied their leaseholds by mutual consent for long periods of years does not add to their rights."). In other words, the mere fact that a tenant had previously renewed its lease and expected to keep renewing its lease does not create a compensable property interest in the tenant's expectation that it would be able to keep renewing. This expectation "add[s] nothing to the . . . legal rights" of a tenant, "and legal rights are all that must be paid for." *Id.* (quoting *Emery v. Boston Terminal Co.*, 178 Mass. 172, 185, 59 N.E. 763, 765 (1901)).

As a result, it is not proper for the trier of fact to consider the optional ten-year lease extensions, as distinct from the first automatic lease extension, in determining the fair market value of Adams Outdoor's leasehold interest. Unlike the automatic extension, any of these optional extensions could be cancelled at will by either Adams Outdoor or the landlord, as long as the cancelling party gave the notice specified in the lease. The lease provision concerning these optional extensions did not give Adams Outdoor a *right* to renew the lease, since the landlord could choose not to go forward with a renewal; the provision created only an *expectancy* in the renewal of the lease.

Adams Outdoor argues that, under *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973), its renewal expectancy should be a factor in determining the fair market value of its leasehold interest. But *Almota* dealt with a different issue than the one that we consider here. In *Almota*, the Supreme Court addressed whether the likelihood that a lease would be renewed may be factored into the fair market value of *structural improvements* built on the leased land. *See id.* at 473-78. Here, though, the question is whether the mere expectancy of a lease's renewal can be factored into the fair market value of *the leasehold interest itself*. Under *Petty Motor*, it is clear that it cannot be. Adams Outdoor's expectation that it would continue to possess the leased land and rent space on its billboard on that land, despite *either party's* ability to cancel the optional lease renewals at will, is a mere expectancy that may not be considered in determining the fair market value of Adams Outdoor's leasehold interest.

6. The bonus value method

[5] As we have already discussed, just compensation for a property interest is the fair market value of that interest—that is, the price that a willing buyer and a willing seller would agree on for the sale of that interest. This Court noted in *Ross v. Perry* that the typical

measure of damages for the taking of a leasehold interest is "the difference between the rental value of the unexpired term and the rent reserved in the lease." 281 N.C. at 576, 189 S.E.2d at 229. The Supreme Court of the United States adopted a similar calculation in *Petty Motor*, holding that this calculation should also include the value of any right to renew the lease. 327 U.S. at 381; *accord Alamo Land*, 424 U.S. at 304.

At first glance, the bonus value calculations in *Ross* and *Petty Motor* may seem to conflict with the willing buyer, willing seller approach. On closer inspection, though, the bonus value method is actually just another way to calculate the fair market value of the leasehold interest.

Under the bonus value method, "[i]t is generally held that the fair market value of a leasehold is computed by first determining the fair market *rental* value of the premises and then subtracting from that value the amount of rent to be paid for the remainder of the term pursuant to the lease agreement." 4 Julius L. Sackman, *Nichols on Eminent Domain* § 13.08[6], at 13-72 (3d ed. 2017) (emphasis added). Whether one is determining the fair market value of a leasehold or the fair market rental value of real property underlying that leasehold, however, the property interest being valued is the same: namely, the right to possess land for a certain period of time.

But the total fair market rental value of real property will still be higher than the fair market value of a tenant's leasehold on that property for the same lease term. That is because a landlord who rents out real property owns the property in fee simple. A tenant who sells his or her leasehold to another tenant, by contrast, owes rent that the other tenant will still have to pay when he or she takes over the lease. A willing buyer and a willing seller of the tenant's leasehold will therefore take into account the rent that is owed under the remainder of the lease when negotiating the price of the leasehold, and will adjust the price downward accordingly. No such adjustment is necessary when determining the fair market rental value of property—that is, the price that a willing tenant and a willing landlord would agree on.

That is why the bonus value method offsets the amount of rent actually owed under the lease for the remainder of the lease term against the fair market rental value of the property in question. A willing buyer and willing landlord would not take that offset into account in negotiating the total price of a lease, so the offset would not be reflected in that price. But, logically, a tenant who willingly buys a leasehold from another tenant would agree to pay only to the extent that the value of the leasehold exceeded what he or she would be paying in rent. Otherwise,

he or she would be compensating the selling tenant for rent that the selling tenant had not yet paid under the lease. So the buying tenant would intuitively make that offset. As a result, the fair market value of a leasehold interest using either the bonus value method or the willing buyer, willing seller approach should, as a practical matter, be the same.

In any determination of the fair market value of a given property interest, however, the jury should consider the same factors that private parties would consider in the sale of that property interest. *Barnes*, 250 N.C. at 387, 109 S.E.2d at 227. As we have already discussed, these factors in this case include the billboard, rental payments, permits, and automatic lease extension. DOT argues that the bonus value method described by DOT's appraiser properly measured the value of Adams Outdoor's leasehold interest. It did not, though, because the appraiser did not consider all of the appropriate factors.[4]

DOT's appraiser testified that he thought that all of the rights granted through the lease would be adequately reflected in the rent being paid. Because of this, he determined the market rental value of the leasehold interest solely by using the rent specified in two of Adams Outdoor's other leases for sites near the site of this lease. But the appraiser's methodology was flawed for two reasons. First, he did not determine whether the nearby leases were truly comparable to Adams Outdoor's lease with respect to the rights granted, such as the right of first refusal to purchase the property and the fact that any successors or assigns of the landlord were bound by Adams Outdoor's lease and did not have the ability to terminate it. Second, he did not account for the value that Adams Outdoor's specific nonconforming billboard, in its specific location, and the enhanced rental income that it generated, along with the permits for the use of that billboard and the automatic lease extension that would have allowed Adams Outdoor to keep using that billboard, added to the value of Adams Outdoor's leasehold interest. By not accounting for these factors, the market rent that DOT's appraiser used in his bonus value method calculation did not properly reflect the fair market rental value of the leasehold interest, leading to a negative valuation.

Any evidence that does not aid the jury in fixing a fair market value of the land "may 'confuse the minds of the jury, and should be excluded.' "

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4. Eminent domain cases, like many other cases involving specialized knowledge, will generally require the use of expert testimony. Because the trier of fact will rely on the specialized knowledge of expert witnesses in eminent domain cases, expert testimony about fair market valuations should take into account all of the factors that a willing buyer and a willing seller would consider in valuing a property interest.

M.M. Fowler, 361 N.C. at 6, 637 S.E.2d at 890 (quoting *Abernathy v. S. & W. Ry. Co.*, 150 N.C. 97, 109, 63 S.E. 180, 185 (1908)). In particular, an expert witness must use a "method of proof [that] is sufficiently reliable." *Dep't of Transp. v. Haywood County*, 360 N.C. 349, 352, 626 S.E.2d 645, 647 (2006). Here, DOT's appraiser applied the bonus value method incorrectly, which made his method of proof unreliable. Because of this, DOT's bonus value method evidence would confuse the jury and is not admissible.

III. Conclusion

We conclude that (1) the fair market value provision of Article 9, not Article 11, governs this condemnation proceeding; (2) the value added by Adams Outdoor's billboard may be considered in determining the fair market value of Adams Outdoor's leasehold interest; (3) evidence of rental income derived from leasing advertising space on the billboard may be considered in determining the fair market value of the leasehold interest; (4) the value added to the leasehold interest by the permits issued to Adams Outdoor may be considered in determining the fair market value of the leasehold interest; (5) the automatic ten-year extension of the lease may be considered in determining the fair market value of the leasehold interest, but the options to renew the lease after the automatic ten-year extension may not be; and (6) the bonus value method evidence offered by DOT may not be considered in determining the fair market value of the leasehold interest. We therefore affirm the decision of the Court of Appeals in part and reverse it in part, and remand this case to the Court of Appeals for further remand to the superior court for proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Justice HUDSON concurring in part and dissenting in part.

I agree with the majority that Article 9 and not 11 of N.C.G.S. Chapter 136 governs in this condemnation proceeding. I also agree with the majority's analysis regarding the permits, the lease extensions, and most of its approach to the bonus value method. I disagree with the majority's analysis regarding whether the billboard and the lost income may properly be considered in the valuation of just compensation under Article 9. Accordingly, I would affirm in part, modify and affirm in part, and reverse in part the decision of the Court of Appeals.

Controlling Statutory Scheme

In my view, the Court of Appeals correctly reversed the trial court's decision and concluded that Article 11 does not apply here. As noted below, the trial court's findings and conclusions were based on the erroneous assumption that Article 11 does apply. Specifically, the trial court concluded:

> 3. N.C. Gen. Stat. § 136-131 specifically addresses the subject matter of the DOT condemning nonconforming outdoor advertising locations. It provides that in any such condemnation, just compensation to the owner of the outdoor advertising shall be measured by the fair market value at the time of the taking of the outdoor advertising owner's interest in the real property on which the outdoor advertising is located and such value shall include the value of the outdoor advertising.
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> . . . .
>
> 5. Because the DOT caused the removal of Adams' nonconforming outdoor advertising property interests at the CHS Lot by way of condemnation, N.C. Gen. Stat. § 136-131 is applicable and controlling in setting the conditions of measuring just compensation.
>
> 6. Although the DOT did not file an action specifically for the *taking* of the *Billboard structure*, its position that the physical structure of the Billboard and the leasehold interest are separate and distinct interests which should be valued separately is contrary to the plain and specific directives in N.C. Gen. Stat. § 136-131 that just compensation to Adams shall include the value of the outdoor advertising.

The trial court's ruling was based upon a misapprehension of law. Accordingly, I agree with the majority that remand is necessary for a determination of just compensation due to Adams Outdoor under Article 9.

Classification of Billboard

Article 9 sets forth the procedures by which the DOT may condemn property, *see* N.C.G.S. §§ 136-103 to -121.1 (2015 & Supp. 2016), and provides that when the DOT condemns an entire tract of land, the measure of damages is "the fair market value of the property at the time of

taking," *id.* § 136-112(2) (2015). In determining the fair market value of condemned property, and therefore the compensation to be awarded to the property owner, permanent improvements, such as buildings, "must be taken into account . . . in so far as they add to the market value of the land to which they are affixed." *Proctor v. State Highway & Pub. Works Comm'n*, 230 N.C. 687, 691, 55 S.E.2d 479, 482 (1949); id. at 691, 55 S.E.2d at 482 ("Buildings must be regarded as a part of the real estate upon which they stand. Indeed, they are ordinarily without value or utility apart from such realty."). On the other hand, "[n]o allowance can be made for personal property, as distinguished from fixtures, located on the condemned premises." *Lyerly v. N.C. State Highway Comm'n*, 264 N.C. 649, 650, 142 S.E.2d 658, 658 (1965) (per curiam) (quoting 29 C.J.S. *Eminent Domain* § 175a(1), at 1045 (1941)), *quoted in Midgett v. N.C. State Highway Comm'n*, 260 N.C. 241, 249, 132 S.E.2d 599, 607 (1963), *overruled on other grounds by Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 304 S.E.2d 164 (1983).

Fixtures, which are objects that are attached to land, are generally treated as permanent improvements and "understood to be a part of the realty." *Lee-Moore Oil Co. v. Cleary*, 295 N.C. 417, 419, 245 S.E.2d 720, 722 (1978) (quoting *Feimster v. Johnson*, 64 N.C. 259, 260 (1870)); *see also Fixture*, *Black's Law Dictionary* (10th ed. 2014) (defining a "fixture" as "[p]ersonal property that is attached to land or a building and that is regarded as an irremovable part of the real property, such as a fireplace built into a home"). Whether a fixture is an improvement or remains personal property can depend upon whether it is installed by the property owner or a party owning an interest less than the fee, because when a property owner installs a fixture, "the purpose is to enhance the value of the freehold, and to be permanent," but with a tenant "a different purpose is to be served." *Stephens v. Carter*, 246 N.C. 318, 321, 98 S.E.2d 311, 313 (1957) (quoting *Springs v. Atl. Ref. Co.*, 205 N.C. 444, 449, 171 S.E. 635, 637-38 (1933)). This is particularly true with trade fixtures, which are installed for the purposes of exercising a trade and remain the removable personal property of the tenant. *Id.* at 320-21, 98 S.E.2d at 312-13; *see also Wilson v. McLeod Oil Co.*, 327 N.C. 491, 515, 398 S.E.2d 586, 598-99 (1990) ("[W]hen additions are made to [the] land by its owner, it is generally viewed that the purpose of the addition is to enhance the value of the land, and the chattel becomes a part of the land. On the other hand, where the improvement is made by one who does not own the fee, such as a tenant, the law is indulgent and, in order to encourage industry, the tenant is permitted 'the greatest latitude' in removing equipment which he has installed upon the [land]." (internal citations omitted) (quoting *Little v. Nat'l Serv. Indus.*, 79 N.C. App. 688,

692-93, 340 S.E.2d 510, 513 (1986))). "Whether a thing attached to [the] land be a fixture or chattel personal, depends upon the agreement of the parties, express or implied." *Lee-Moore Oil Co.*, 295 N.C. at 419, 245 S.E.2d at 722 (quoting *Feimster*, 64 N.C. at 261); *see also Stephens*, 246 N.C. at 321, 98 S.E.2d at 312 ("The character of the structure, its purpose and the circumstances under which it was erected, the understanding and agreement of the parties at the time the erection was made, must all be considered in determining whether it became a part of the freehold or not." (quoting *W. N.C. R.R. v. Deal*, 90 N.C. 110, 113-14 (1884))).

Here the trial court found, *inter alia*:

> 32. Because of the permanent nature of the Billboard's construction including being affixed to the land by a concrete foundation 18 feet deep and six feet in diameter, removal and relocation of the entire sign would be impossible.
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> . . . .
>
> 40. As the Lease states, Adams and C.H.S. Corporation intended the Billboard to be permanently affixed to the CHS Lot.
>
> 41. The Billboard was a leasehold improvement . . . .

Further, the trial court concluded:

> 8. The property adversely affected by the DOT's condemnation is Adam's [sic] leasehold interest as improved by the Billboard.
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> . . . .
>
> 11. . . . The Billboard could not be relocated intact due to the permanent nature of its construction and because State and local laws prevented such activity. . . .
>
> 12. As between the landowner and Adams, the Billboard was the property of Adams and upon expiration of the Lease, Adams retained the discretion to salvage its sign parts. Notwithstanding, the way the Billboard was constructed and affixed to the land made it a leasehold improvement, and for purposes of condemnation, the right of Adams as the tenant to salvage parts cannot be used as a basis for adversely affecting just compensation.

> 13. As of the Date of Taking, Adams' recorded Lease constituted an interest in real property as improved by a sign.

I agree with the Court of Appeals that the trial court's findings and conclusions—that the billboard was a permanent improvement as opposed to personal property—were not supported by the evidence and were contrary to law.

It is not disputed that the billboard was erected for business purposes and therefore is a trade fixture. Looking to the express agreement of Adams Outdoor and C.H.S. Corporation (CHS), then-owner of the land, the lease provided:

> All Structures erected by or for the Lessee . . . on the Property shall at all times be and remain the property of the Lessee and may be removed by the Lessee before or within a reasonable time of termination or expiration of this lease, notwithstanding that such Structures are intended by Lessor and Lessee to be permanently affixed to the Property.

It is clear that the intent of the parties was that any structures affixed to the property, including the billboard at issue here, did not become part of the real property, but instead remained the removable personal property of Adams Outdoor. Additionally, as the Court of Appeals noted: Adams Outdoor classified its billboard structures as "Business Personal Property" for tax purposes and paid property taxes in accordance with that classification, and Adams Outdoor's vice president for real estate admitted that the billboard was personal property. *DOT v. Adams Outdoor Advert. of Charlotte, Ltd. P'ship*, ___ N.C. App. ___, ___, 785 S.E.2d 151, 157-58 (2016).

Moreover, in considering the "[t]he character of the structure, its purpose and the circumstances under which it was erected," *Stephens*, 246 N.C. at 321, 98 S.E.2d at 312, the billboard, unlike a building or other permanent improvements, is not "without value or utility apart from [the] realty," *Proctor*, 230 N.C. at 691, 55 S.E.2d at 482. As the Court of Appeals pointed out, Adams Outdoor in fact "removed the billboard and structure from the CHS Lot by carefully dismantling them and reinstalling major components thereof at another billboard location along Independence Boulevard, as permitted by the lease agreement." *Adams Outdoor*, ___ N.C. App. at ___, 785 S.E.2d at 157. Nor was the billboard erected to "enhance the value of the freehold, and to be permanent." *Stephens*, 246 N.C. at 321, 98 S.E.2d at 313. Rather, as the majority notes, "Adams Outdoor's billboard was attached to the land for the purpose

of conducting an outdoor advertising business." The billboard was intended to last only until Adams Outdoor decided to remove it, or for as long as the lease itself, which could be terminated at Adams Outdoor's discretion if and when one of the circumstances enumerated in the agreement made the advertising business unprofitable.[1] Accordingly, the billboard was a trade fixture that remained the personal property of Adams Outdoor.

While explicitly agreeing that the billboard was personal property, the majority nevertheless deems it appropriate in determining the value of the leasehold for the trial court to consider the "inherent value of the billboard's presence on the property." But, pursuant to the agreement of the parties, this particular billboard's "presence on the property" was not bound to the lease, as Adams Outdoor specifically contracted for the right to remove it as personal property. *See Ingold v. Phoenix Assurance Co.*, 230 N.C. 142, 145, 52 S.E.2d 366, 368 (1949) ("[T]he intent of the parties as evidenced by their contract, express or implied, is controlling."). Moreover, as the majority itself then explains, the value of the billboard consists entirely of its potential to produce income, "that is, from the potential to rent it out to advertisers." As discussed more fully below, I do not view this potential as compensable under Article 9, and therefore conclude that this "value" should not be considered in determining the fair market value of Adams Outdoor's leasehold interest. Accordingly, I disagree with the majority and would affirm the Court of Appeals on this issue.

Loss of Income

I also disagree with the majority's Article 9 analysis regarding the consideration of the income from the advertising business located

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1. The lease's cancellation provision reads:

> CANCELLATION: If, in Lessee's sole opinion: a) the view of the advertising copy on any Structure becomes obstructed; b) the Property cannot be safely used for the erection, maintenance or operation of any Structure for any reason; c) the value of any Structure is substantially diminished, in the sole judgment of the Lessee, for any reason; d) the Lessee is unable to obtain, maintain or continue in force any necessary permit for the erection, use or maintenance of any Structure as originally erected; or, e) the use of any Structure, as originally erected, is prevented by law or by exercise of any governmental power; then Lessee may, at its option, either: (i) reduce and abate rent in proportion to the impact or loss that such occurrence has upon the value of Lessee's Structure for so long as such occurrence continues; or, (ii) cancel this Lease and receive a refund of any prepaid rent, prorated as of the date of cancellation.

on the billboard. Historically, this Court has not considered business income in determining just compensation in a condemnation action.[2] The majority, citing M.M. Fowler, states that "care must be taken to distinguish between income from the property and income from the business conducted on the property"; however, the majority then proceeds to misapply this very principle. *DOT v. M.M. Fowler, Inc.*, 361 N.C. 1, 7, 637 S.E.2d 885, 890 (2006) (quoting 4 Julius L. Sackman et al., *Nichols on Eminent Domain*, § 12B.09, at 12B-56 to -59 (rev. 3d ed. 2006)). In my opinion, the revenue from advertisements placed on the billboard is business income, and is not equivalent to rental income received for the use of the land. In holding to the contrary, the majority relies solely upon *M.M. Fowler*, but in my view, the majority's conclusion is difficult to square with our Court's decision in *M.M. Fowler*. As such, I dissent on this issue as well.

Most recently we addressed lost business income in the context of a condemnation action in *M.M. Fowler*, in which we stated that "[t]he longstanding rule in North Carolina is that evidence of lost business profits is inadmissible in condemnation actions." 361 N.C. at 7, 637 S.E.2d at 891 (citing *Pemberton v. City of Greensboro*, 208 N.C. 466,

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2. When U.S. Supreme Court Justice Oliver Wendell Holmes served on the Supreme Judicial Court of Massachusetts, he explained, in a passage often quoted by this Court, *see Pemberton v. City of Greensboro*, 208 N.C. 466, 470, 181 S.E. 258, 260 (1935); *Williams*, 252 N.C. at 148, 113 S.E.2d at 268; *DOT v. M.M. Fowler, Inc.*, 361 N.C. 1, 8-9, 637 S.E.2d 885, 891 (2006), that

> [i]t generally has been assumed, we think, that injury to a business is not an appropriation of property which must be paid for. There are many serious pecuniary injuries which may be inflicted without compensation. It would be impracticable to forbid all laws which might result in such damage, unless they provided a *quid pro quo*. No doubt a business may be property in a broad sense of the word, and property of great value. It may be assumed for the purposes of this case that there might be such a taking of it as required compensation. But a business is less tangible in nature and more uncertain in its vicissitudes than the rights which the Constitution undertakes absolutely to protect. It seems to us, in like manner, that the diminution of its value is a vaguer injury than the taking or appropriation with which the Constitution deals. A business might be destroyed by the construction of a more popular street into which travel was diverted, as well as by competition, but there would be as little claim in the one case as in the other. It seems to us that the case stands no differently when the business is destroyed by taking the land on which it was carried on, except so far as it may have enhanced the value of the land.

Pemberton, 208 N.C. at 470, 181 S.E. at 260 (citations omitted) (quoting *Sawyer v. Commonwealth*, 182 Mass. 245, 247, 65 N.E. 52, 53 (1902)).

470-72, 181 S.E. 258, 260-61 (1935)). More specifically, the Court held in *M.M. Fowler* that:

> Admission of evidence that does not help the jury calculate the fair market value of the land or diminution in its value may "confuse the minds of the jury, and should be excluded." In particular, specific evidence of a landowner's noncompensable losses following condemnation is inadmissible.
>
> Injury to a business, including lost profits, is one such noncompensable loss. It is important to note that revenue derived directly from the condemned property itself, such as rental income, is distinct from profits of a business located on the property. . . . When evidence of income is used to valuate property, "care must be taken to distinguish between income from the property and income from the business conducted on the property."

Id. at 6-7, 637 S.E.2d at 890 (citations omitted). Accordingly, there is a distinction between "revenue derived directly from the condemned property itself, such as rental income,"[3] and revenue from "a business located on the property." *Id.* at 7, 637 S.E.2d at 890. The latter was at issue in *M.M. Fowler* when the landowner "attempted to recover for harm to its business rather than damage to the land itself." *Id.* at 7, 13, 637 S.E.2d at 890, 894.

Regarding lost profits from a business located on the property, the Court held that quantified evidence of lost business profits was inadmissible to determine the fair market value of the land. *Id.* at 14-15, 637 S.E.2d at 895. In discussing our prior decision in *Kirkman v. State Highway Commission*, 257 N.C. 428, 126 S.E.2d 107 (1962), the Court opined:

> *Kirkman* clearly does not permit quantified evidence of lost business profits. There is no difference between using lost profits to determine the fair market value of the land and awarding them as a separate item of damages. By either improper calculation, the business receives compensation for its lost profits.

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3. Although the trial court's order refers to "rental income" from the billboard, it appears that the court is actually referring to business revenue received by Adams Outdoor from entities placing ads on the billboard. For condemnation purposes, the only "rental" paid here was by Adams Outdoor to CHS to lease the land on which to place its billboard.

> Thus, in *Kirkman*, we did not approve the use of quantified evidence of lost profits. To the contrary, this Court held unquantified lost business profits are a fact that can be *generally* considered in determining whether there has been a diminution in value in the land that remains after a partial taking. Our decision in *Kirkman* must be read with our other cases, which clarify that although the jury may consider adverse effects resulting from condemnation that decrease the value of the remaining property, these effects "are not separate items of damage, recoverable as such, but are relevant only as circumstances tending to show a diminution in the over-all fair market value of the property." Allowing the jury to consider that the land may be less valuable due to the condemnation's effect on the landowner's business does not require quantified evidence of lost profits also be admitted. This is an important distinction which unifies our analysis in both *Kirkman* and *Pemberton*. Neither opinion sanctions admission of quantified lost profits evidence.

Id. at 14-15, 637 S.E.2d at 895 (citations omitted). Notably, *M.M. Fowler* involved a partial condemnation, as opposed to a condemnation of an entire tract; however, it appears that while quantified evidence of lost profits from a business located on a property is inadmissible, unquantified evidence of those profits may be "broadly" or "generally" considered in determining the fair market value. *Id.* at 14-15, 637 S.E.2d at 895.

Here the revenue received by Adams Outdoor from advertisers to display advertisements on the billboard was not rental income derived directly from the property, but rather business profits from an advertising business located on the property. Adams Outdoor is attempting "to recover for harm to its business rather than damage to the land itself." *Id.* at 7, 13, 637 S.E.2d at 890, 894. The contracts between Adams Outdoor and its advertisers are not contracts for others to personally occupy and enjoy the real property, but rather for the advertisers to attach their personal property advertisements to Adams Outdoor's personal property, which is attached to the real property for the sole purpose of operating a business. Moreover, unlike the real property that was taken by DOT, this business is not intended to last forever, but only so long as it is profitable. *See* footnote 1. In my view, the revenue Adams Outdoor received from this business conducted on the property is too attenuated to be considered "revenue derived directly from the condemned property itself." *Id.* at 7, 637 S.E.2d at 890.

I am unable to conclude, as the majority does, that Adams Outdoor's renting of billboard space is analogous to the renting of residential space in a house or apartment building, or commercial space in an office building. Houses, apartment buildings, and office buildings are permanent improvements and considered part of the real property itself—tenants of those buildings contract for the right to occupy and use some part of that real property. As previously discussed, the billboard here is not part of the real property, but rather is personal property belonging to Adams Outdoor.

Accordingly, the revenue that Adams Outdoor seeks to have considered is lost business profit. Under *M.M. Fowler* quantified evidence of this revenue may not be considered; however, unquantified evidence of Adams Outdoor's lost business profits may be "broadly" or "generally" considered in determining the fair market value of the leasehold interest. *Id.* at 14-15, 637 S.E.2d at 895. The Court of Appeals correctly determined that the revenue was lost business profit but did not acknowledge that Adams Outdoor's lost business could be considered more generally as unquantified evidence. Thus, I would modify and affirm the decision of the Court of Appeals on this issue.

The Permits, Lease Extensions, Bonus Value Method

The grandfathered permits allowing Adams Outdoor to operate a billboard (otherwise nonconforming) specifically enabled Adams Outdoor to station its personal property and conduct its business in a manner and location that would not otherwise be legally possible. Accordingly, I agree with the majority that evidence of Adams Outdoor's permits is admissible in determining the fair market value of the leasehold interest. I also agree with the majority's analysis concluding that the automatic ten-year extension of the lease is a proper factor for consideration in determining the fair market value of Adams Outdoor's leasehold, and that the subsequent optional ten-year extensions are too speculative to consider. Additionally, I agree with the majority's analysis regarding the bonus value method; I note only that, because I disagree with the majority's analysis regarding the consideration of the billboard and the advertising revenue, I disagree with which factors would constitute the "appropriate factors."

Conclusion

For the reasons set forth herein, I respectfully concur in part, and dissent in part.

Justices BEASLEY and MORGAN join in this concurring and dissenting opinion.

IN THE MATTER OF THE ESTATE OF CATHLEEN BASS SKINNER

No. 277A16

Filed 29 September 2017

Fiduciaries—guardian of the person and trustee of special needs trust—removal

The Assistant Clerk did not err by determining that the guardian of a person and trustee of her special needs trust (Mr. Skinner) exceeded the scope of his discretion and that his breaches of fiduciary duty justified his removal. The focus was upon the broader issue of whether the guardian or trustee acted in such a manner as to violate his fiduciary duty, and the fact that Mr. Skinner's conduct may have been consistent with the terms of the Special Needs Trust did not insulate him from removal.

Justice MORGAN dissenting.

Justices NEWBY and JACKSON 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, ___ N.C. App. ___, 787 S.E.2d 440 (2016), reversing an order entered on 22 October 2014 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Supreme Court on 29 August 2017.

Ward and Smith, P.A., by Jenna Fruechtenicht Butler and Alexander C. Dale, for petitioner-appellants Nancy Bass-Clark and Douglas Ray Bass.

Braswell Law, PLLC, by Ira Braswell IV, for respondent-appellee Mark Skinner.

ERVIN, Justice.

The resolution of this case hinges upon the identification and proper application of the appropriate standard of review for use in reviewing an order removing a guardian of the estate and trustee under a special needs trust for breach of fiduciary duty. After careful consideration of the record evidence in light of the relevant legal principles, we conclude that the Court of Appeals erred by reversing the removal order.

On 20 January 2010, a representative from the Adult Protective Services Division of the Wake County Human Services Department filed a petition seeking to have Cathleen Bass Skinner, who was, at that time, known as Cathy Bass, adjudicated as an incompetent and to have a guardian appointed for Ms. Skinner. In support of these requests, Adult Protective Services alleged that Ms. Skinner "is a disabled adult who has short term memory loss," "carries a diagnoses [sic] of seizure disorder and early stages of dementia," "[l]acks sufficient understanding and the capacity to make or communicate responsible decisions concerning her person," and "requires 24 hour supervision, something her siblings and extended family can not [sic] commit to her." On 13 April 2010, Assistant Clerk of Superior Court Bill Burlington found Ms. Skinner incompetent and appointed Wake County Human Services to serve as Ms. Skinner's guardian.

In July 2010, Ms. Skinner's long-time friend, Mark L. Skinner, Jr., retained Gilbert W. File, III, of the Brownlee Law Firm, for the purpose of determining whether he and Ms. Skinner could legally marry and whether he could legally serve as Ms. Skinner's guardian. On 3 August 2010, Mr. and Ms. Skinner married. On the following day, Mr. Skinner filed a motion seeking to have himself appointed as Ms. Skinner's guardian. On 10 October 2010, Mr. Skinner retained Christine S. Eatmon to assist him in litigating his motion to modify the existing guardianship arrangement. On 20 January 2011, following an evidentiary hearing held on 13 January 2011 and with the consent of Mr. Skinner, Ms. Eatmon, the attorneys for Wake County Human Services, Ms. Skinner's former guardian of the person, and Ms. Skinner's guardian ad litem, the Assistant Clerk entered an order concluding that Mr. Skinner should, on a trial basis, be appointed as the guardian of Ms. Skinner's person. On 2 August 2011, the Assistant Clerk made Mr. Skinner's appointment as the guardian of Ms. Skinner's person permanent.

Ms. Skinner's mother, Kathleen Holton Bass, died on 27 August 2012. Along with a number of her siblings and a niece and nephew, Ms. Skinner was named as a beneficiary in Ms. Bass's will. On 23 August 2013, one of Ms. Skinner's brothers, Douglass Bass, and one of Ms. Skinner's sisters, Nancy Bass Clark, filed a motion seeking to have Ms. Clark appointed as the guardian of Ms. Skinner's estate on the grounds that, since Ms. Skinner had been declared incompetent, any distributions payable to Ms. Skinner from Ms. Bass's estate "will need to be distributed to an authorized recipient in order to comply with Estate requirements/laws." On 29 August 2013, Mr. Skinner requested that he be appointed to serve as guardian of Ms. Skinner's estate instead of Ms. Clark. As Kimberly

Richards, who had been appointed to serve as Ms. Skinner's guardian ad litem, noted in her report, Ms. Skinner's family questioned the appropriateness of appointing Mr. Skinner as the guardian of Ms. Skinner's estate given that he had "sold [Ms. Skinner's] car during the pendency of the original incompetency hearing and reportedly used the funds for his own personal gain," took Ms. Skinner "to the bank so that she could withdraw fund[s] to give to him for his use," unsuccessfully sued Ms. Skinner's nephew "for reimbursement of [Mr. Skinner's] travel expenses to visit [Ms. Skinner] after she was placed in a facility by . . . Wake County Human Services," "does not appreciate the full nature of [Ms. Skinner's] mental incapacity," and "removed [Ms. Skinner] from the adult day care center that she formerly attended, perhaps to redirect her social security funds."

On 9 October 2013, after an evidentiary hearing, the Assistant Clerk entered an order appointing Mr. Skinner as the guardian of Ms. Skinner's estate. The Assistant Clerk found, in pertinent part, that:

> 1. That [Ms. Skinner] resides with [Mr.] Skinner, in an apartment located . . . in Wake Forest, North Carolina. Mr. Skinner married [Ms. Skinner] after this court declared her incompetent. To date, no legal action has been filed to challenge the validity of this marriage.
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> 2. That [Ms. Skinner] receives SSI [Supplemental Security Income] benefits of approximately $700.00 per month and is a Medicaid recipient.
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> . . . .
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> 7. [Ms. Skinner's] mother, [Ms. Bass], died on August 27, 2012. [Ms. Skinner] will inherit from her mother. [Ms. Skinner's] inheritance is expected to be between $200,000.00 and $250,000.00.
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> . . . .
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> 11. [Ms. Skinner] would be at risk of losing her SSI benefits and Medicaid assistance if her inheritance is not placed in a Special Needs Trust. [Ms. Skinner] was born October 20, 1951 and at the time of the hearing was 62 years old. [Ms. Skinner] will have medical needs for the remainder of her life.
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> 12. [Mr. and Ms.] Skinner appear to love each other. The Guardian ad Litem . . . . represented to the Court that

> [Ms. Skinner] had expressed a desire that [Mr.] Skinner be the Guardian of her Estate.
>
> 13. [Ms.] Richards is of the opinion that [Ms.] Clark should be the guardian of [Ms. Skinner] estate. She expressed concern with regard to [Mr.] Skinner's use of a document he believes is a valid Power of Attorney. Ms. Richards does not believe the Power of Attorney is valid. She further indicated that [Mr.] Skinner does not appreciate the seriousness of Cathy's mental illness, might be resistant to placing the inheritance in a Special Needs Trust, and was further concerned by testimony of [Mr.] Skinner that he had experienced significant losses in an IRA account during the recession.

Based upon these and other findings of fact, the Assistant Clerk concluded as a matter of law, in pertinent part:

> 2. That an inheritance by [Ms. Skinner] of the size testified to in this case would best be managed by a Special Needs Trust. If [Ms. Skinner] were to directly receive the inheritance, it would compromise her ability to receive essential government benefits.
>
> . . . .
>
> 4. That it is in the best interest of [Ms.] Skinner, that [Mr.] Skinner, be appointed Guardian of the Estate if he can satisfy the following conditions:
>
> a. That he can secure a bond in the amount of $250,000.00.
>
> b. That he set up a Special Needs Trust for [Ms.] Skinner and that no inheritance received by [Ms.] Skinner be spent except pursuant to the provisions of the Special Needs Trust. . . .
>
> c. That the Special Needs Trust shall contain an accounting provision whereby [Mr.] Skinner shall annually report all receipts and expenditures in the Special Needs Trust to [Ms.] Clark.
>
> 5. That [Ms.] Clark is capable of, and shall serve as Guardian of the Estate of [Ms.] Skinner should [Mr.] Skinner not be able to meet the above conditions . . . set

> out herein. The same conditions set out herein shall apply if [Ms.] Clark serves as Guardian of the Estate.

Based upon these findings and conclusions, the Assistant Clerk ordered that Mr. Skinner be appointed as guardian of Ms. Skinner's estate subject to the posting of a $250,000.00 bond and the establishment of a Special Needs Trust for the use and benefit of Ms. Skinner, with the Special Needs Trust to contain a provision "requiring an annual accounting to [Ms.] Clark of any and all receipts and expenditures from the Special Needs Trust," and that, in the event that Mr. Skinner failed to comply with these conditions, Ms. Clark be appointed to serve as the guardian of Ms. Skinner's estate.

On 5 December 2013, Mr. Skinner posted the required $250,000.00 bond. On 18 March 2014, Mr. Skinner executed the Cathleen Bass Skinner Special Needs Trust, which was approved by the Assistant Clerk by means of an order entered on 25 March 2014, in which Mr. Skinner's appointment as guardian of Ms. Skinner's estate was reaffirmed. On 30 April 2014, letters appointing Mr. Skinner as the guardian of Ms. Skinner's estate were issued. On 21 May 2014, the Assistant Clerk entered an order directing Ms. Bass's estate to distribute Ms. Skinner's share to the Special Needs Trust.

On 28 July 2014, Mr. Bass and Ms. Clark filed a petition seeking to have Mr. Skinner removed as trustee for the Special Needs Trust "due to his non-compliance with Trust Provision Section 5.04 Duty to Report and Account" and to have Ms. Clark appointed as successor trustee of the Special Needs Trust.[1] On 27 August 2014, following another evidentiary hearing, the Assistant Clerk entered an order removing Mr. Skinner as trustee under the Special Needs Trust and as guardian of Ms. Skinner's estate and appointing Ms. Clark as successor trustee and guardian of Ms. Skinner's estate in lieu of Mr. Skinner.[2] As a basis for these determinations, the Assistant Clerk found as fact, in pertinent part, that:

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1. According to Section 5.04 of the Special Needs Trust, Mr. Skinner was required, among other things, to "cause monthly statements reflecting the current balance of the Trust's assets and all receipts, disbursements and distributions made within the reporting period to be mailed to [Ms. Skinner], [Ms.] Clark . . . and [Ms. Skinner's] legal representative."

2. Although the removal petition filed by Mr. Bass and Ms. Clark did not address the issue of whether Mr. Skinner should be allowed to continue to serve as the guardian of Ms. Skinner's estate, the Assistant Clerk determined that a finding of breach of fiduciary duty "would warrant Mr. Skinner's removal as Guardian of the Estate and the hearing would . . . encompass Mr. Skinner's suitability as Guardian of the Estate in addition to his suitability as Trustee" of the Special Needs Trust. Although the Assistant Clerk "afforded [Mr. Skinner] and his counsel the opportunity to continue the hearing to another date to allow

2. In July 2010, [Mr.] Skinner engaged the Brownlee Law Firm and attorney Gil File to provide legal advice with respect to Mr. Skinner's desire to marry and become Guardian of the Person for [Ms.] Bass. The Brownlee Law Firm charged [Mr.] Skinner the sum of $1,000.00 for these legal services by invoice dated July 16, 2010.

. . . .

4. In October 2010, [Mr.] Skinner engaged the Eatmon Law Firm, P.C. and attorney Christine Eatmon to represent him in connection with pending guardianship of the person and incompetency proceedings. The Eatmon Law Firm charged [Mr.] Skinner the sum of $1,537.50 for these services as evidenced by a Fee Agreement dated October 18, 2010.

. . . .

9. After a contested hearing, [Mr.] Skinner was appointed Guardian of the Estate for [Ms. Skinner] subject to and in accordance with the Order Appointing Guardian of the Estate of Cathleen Bass Skinner entered October 9, 2013 (the "GOE Order").

10. As set forth in the GOE Order, the Court determined that [Ms. Skinner's] share of the Estate of [Ms.] Bass was best managed by a Special Needs Trust and that [Ms. Skinner's] share of the Estate of [Ms.] Bass should be distributed directly to the Cathleen Bass Skinner Special Needs Trust to be used for the sole benefit of [Ms. Skinner] pursuant to and in accordance with the terms of such trust, and in order to preserve those assets for [Ms. Skinner's] long term health needs.

. . . .

14. On or about June 14, 2014, an initial distribution was made to the Trust from the Estate of [Ms.] Bass. On June 16, 2014, the amount of $170,086.67 was deposited

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for additional preparation," Mr. Skinner elected, after conferring with his counsel, "not to continue the hearing to another date and indicated a desire to proceed with the hearing, indicating his understanding and consent as to the expanded scope of what was to be heard and decided."

into the Trust's bank account with Fidelity Bank (the "Trust Account").

15. As of July 31, 2014, only $10,313.66 remains in the Trust Account.

16. The amounts Mr. Skinner has withdrawn from and/or distributed from the Trust Account since June 16, 2014 include a check payable to the Violin Shop, [Mr.] Skinner's personal business, in the amount of $8,387.50[.]

17. Mr. Skinner testified that the $8,387.50 paid from the Trust Account to The Violin Shop included reimbursement for his payment of $1,000.00 to the Brownlee Law Firm and reimbursement for his payment of $1,537.50 to the Eatmon Law Firm.

18. The legal services provided by the Brownlee Law Firm and the Eatmon Law Firm were for Mr. Skinner personally.

19. The legal services provided by the Brownlee Law Firm and the Eatmon Law Firm pre-date the appointment of [Mr.] Skinner as Guardian of the Person for [Ms. Skinner], pre-date the appointment of [Mr.] Skinner (or anyone else) as Guardian of the Estate for [Ms. Skinner] and pre-date the establishment of the Cathleen Bass Special Needs Trust.

20. Mr. Skinner has no authority, implied or explicit, to reimburse himself from the Trust for personal attorney's fees incurred before he became a guardian for [Ms. Skinner] and that had no relationship to his performance of any duties on behalf of [Ms. Skinner] or the Trust.

21. Mr. Skinner also used the Trust assets to purchase a house (Wake Co. Deed Book 014713, Page 01402-06), new furniture, new appliances, and a prepaid burial/funeral insurance policy.

22. Mr. Skinner resides with [Ms. Skinner] in the house purchased by the Trust and he benefits from the Trust purchases and expenditures relating to the house.

23. The terms of the Trust require that the Trust assets be used for [Ms. Skinner's] sole benefit.

> 24. The Trust specifically states that funeral expenses are not permitted to be paid from the Trust prior to reimbursement to North Carolina (or any other state) for medical assistance.

Based upon these findings of fact, the Clerk concluded as a matter of law, in pertinent part, that

> 3. Mr. Skinner's use of Trust assets to reimburse himself for personal expenditures was improper, constitutes self-dealing, and is a breach of his fiduciary duties both as Trustee and as Guardian of the Estate of [Ms. Skinner].
>
> 4. Mr. Skinner's payment of $3,644.00 to Columbus Life for prepaid funeral expenses also is in contradiction to the terms of the Trust and in violation of his fiduciary duties as Trustee.
>
> 5. A Trustee is required, among other things, to administer a trust as a prudent person would by considering the purposes, terms, distributional requirements, and other circumstances of the trust in the exercise of reasonable care, skill, and caution.
>
> 6. Mr. Skinner has demonstrated that he lacks appropriate judgment and prudence.
>
> 7. Mr. Skinner is in breach of his fiduciary duties pursuant to the terms of the Trust, the terms of the GOE Order, and applicable law.
>
> 8. Mr. Skinner has wasted the Trust assets, mismanaged the Trust assets, and converted the Trust's assets to his own use.
>
> 9. [In] the discretion of the Court, and based upon the evidence presented at the hearing, Mr. Skinner is unsuitable to continue serving as Trustee of the Trust and Guardian of the Estate [of Ms. Skinner], and the removal of [Mr.] Skinner as Trustee and as Guardian of the Estate best serves the interests of [Ms. Skinner].[3]

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3. In view of the fact that the Assistant Clerk's order did not address Mr. Skinner's compliance with the reporting and accounting provisions of the Special Needs Trust, no issue relating to those provisions was properly before the trial or appellate courts in this case, obviating the necessity for us to examine the extent, if any, to which Mr. Skinner violated those reporting and accounting requirements.

Based upon these findings of fact and conclusions of law, the Assistant Clerk removed Mr. Skinner as Trustee under the Special Needs Trust and guardian of Ms. Skinner's estate, appointed Ms. Clark to replace Mr. Skinner in both of these capacities, precluded Mr. Skinner from spending additional amounts from the Trust or Ms. Skinner's estate, and required Mr. Skinner, among other things, to repay any amounts disbursed from the Trust or Ms. Skinner's estate since the date of the evidentiary hearing, to reimburse the Trust for the payments that he made to himself using Trust assets relating to his legal fee payments to the Eatmon and Brownlee law firms, and to provide all relevant records and make a full accounting to Ms. Clark.

On 5 September 2014, Mr. Skinner filed a notice of appeal seeking review of the Assistant Clerk's order in the Superior Court, Wake County. On 22 October 2014, the trial court entered an order affirming the Assistant Clerk's order. On 18 November 2014, Mr. Skinner noted an appeal to the Court of Appeals from the trial court's order.

In seeking relief from the trial court's order before the Court of Appeals, Mr. Skinner noted that "[t]he standard of review on appeal from a judgment entered after a non-jury trial is 'whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment,' " quoting *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (quoting *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163, *disc. rev. denied*, 354 N.C. 365, 556 S.E.2d 577 (2001)), *disc. rev. denied*, 356 N.C. 434, 572 S.E.2d 428 (2002), with the trial court's legal conclusions being subject to de novo review, citing *In re D.H.*, 177 N.C. App. 700, 703, 629 S.E.2d 920, 922 (2006). According to Mr. Skinner, the record did not contain sufficient evidence to show that he had engaged in self-dealing, committed a breach of fiduciary duty, acted imprudently, wasted or mismanaged trust assets, or converted trust assets to his own use. More specifically, Mr. Skinner contended that "the trial court made no findings that [he] . . . abused his discretion, acted with a dishonest motive, acted beyond the bounds of reasonable judgment or violated any specific provision of the Cathleen Bass Special Needs Trust" by using trust funds to pay for the home and associated services or attorneys' fees associated with the preparation of the trust and that the Assistant Clerk had not given sufficient deference to the discretionary decisions that he had made in the course of acting as the guardian of Ms. Skinner's estate and trustee under the Special Needs Trust.

On the other hand, Mr. Bass and Ms. Clark argued that "great deference [is accorded] to the trial court, and its ruling may be reversed only

upon a showing that its action was manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision," quoting *In re Estate of Newton*, 173 N.C. App. 530, 539, 619 S.E.2d 571, 576, *disc. rev. denied*, 360 N.C. 176, 625 S.E.2d 786 (2005). According to Mr. Bass and Ms. Clark, the record "support[s] the [Assistant] Clerk's conclusion that [Mr. Skinner] inappropriately used trust funds to benefit himself," "lacks appropriate judgment," and "mismanaged the Trust assets," with Mr. Skinner's right to exercise his discretion being insufficient, given the facts at issue in this case, to insulate him from removal as the guardian of Ms. Skinner's person and the trustee under the Special Needs Trust.

On 21 June 2016, the Court of Appeals reversed the Assistant Clerk's order removing Mr. Skinner as the guardian of Ms. Skinner's estate and trustee under the Special Needs Trust. *In re Estate of Skinner*, ___ N.C. App. ___, 787 S.E.2d 440 (2016). After noting that the abuse of discretion standard of review was only relevant with respect to "decisions that are based upon properly supported findings and legally correct conclusions" and that " 'the extent to which the trial court [had] exercised its discretion on the basis of an incorrect understanding of the applicable law raise[d] an issue of law subject to *de novo* review on appeal,' " *id.* at ___, 787 S.E.2d at 444 (quoting *In re A.F.*, 231 N.C. App. 348, 352, 752 S.E.2d 245, 248 (2013) (quoting *Koon v. U.S.*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047, 135 L.Ed.2d 392, 414 (1996))), the Court of Appeals held that the Assistant Clerk had erred by determining that the Special Needs Trust had been created "in order to preserve those assets for [Ms. Skinner's] long term health needs" given that "the subject assets were not intended to be used for [Ms.] Skinner's future medical needs," *id.* at ___, 787 S.E.2d at 445-46 (brackets in original). In addition, the Court of Appeals held that the Assistant Clerk had erred by finding "that the 'trust specifically states that funeral expenses are not permitted to be paid from the Trust prior to reimbursement to North Carolina (or any other state) for medical expenses' " given that "[t]he Trust does not bar the use of Trust funds to purchase a prepaid burial insurance policy," *id.* at ___, 787 S.E.2d at 447. Moreover, the Court of Appeals stated that the Assistant Clerk had erred by deciding that "the terms of the Trust did not permit the Trustee to use Trust assets for the purpose of a house, furniture, or appliances"; that these purchases constituted "waste and mismanagement of Trust assets"; and that the use of these assets by Mr. Skinner violated "the requirement that the Trust be administered for the 'sole benefit' of Ms. Skinner" on the grounds that the house, furniture, and appliances had been titled to the Trust; that the purchase of such assets constituted a permissible use of Trust resources; that, while

"[t]he wisdom of this investment is a separate question," it was "factually and legally inaccurate" to state that the purchase constituted waste or mismanagement "in the absence of any findings regarding the wisdom of this particular investment"; and that "an examination of the relevant regulations in the context of trust common law and the common sense realities of the life of any person, and especially of the challenges faced by a disabled person, makes it clear that the term 'sole benefit' does not mean that a disabled person . . . must live in a state of bizarre isolation in which no other person may 'benefit' from her house or furnishings." *Id.*, at ___, 787 S.E.2d at 448-51 (citing 42 U.S.C. § 1396p(d)(4)(A) and Program Operations Manual Systems Transmittal No. 48, SI 01120 TN 48). Finally, the Court of Appeals held that the Assistant Clerk had erred by concluding that "the Trust funds could not properly be used to reimburse [the] attorneys' fees" that Mr. Skinner incurred in the course of determining whether he could legally marry Ms. Skinner or be appointed as guardian for her on the grounds that "[t]he relevant Trust provisions are ambiguous" and the Assistant Clerk's findings do not "support its implied conclusion that this error constitute[d] 'a serious breach of trust' as opposed to an honest mistake," *id.* at ___, 787 S.E.2d at 452, particularly given "Mr. Skinner's uncontradicted testimony . . . that he believed that he could use Trust funds to reimburse himself for [the relevant] attorneys' fees" and the fact "that [Mr. Skinner had] agreed to repay the Trust when this error was pointed out," *id.*, at ___, 787 S.E.2d at 452. As a result, the Court of Appeals held that the trial court's order upholding the Assistant Clerk's order "must be reversed for application of the proper legal standards." *Id.* at ___, 787 S.E.2d at 453.

Judge Bryant dissented from the Court of Appeals' decision to reverse the trial court's order on the grounds that the majority had effectively "reweigh[ed] the evidence" and "disregard[ed] the deferential standard of review on appeal." *Id.* at ___, 787 S.E.2d at 453 (Bryant, J., dissenting). In the dissenting judge's opinion, the Assistant Clerk "made findings of fact which were supported by competent evidence," except for "the [Assistant] Clerk's finding that funeral expenses are not permitted to be paid from the Trust," and "those findings in turn supported his conclusion that Mr. Skinner 'is unsuitable to continue serving as Trustee of the Trust' and the guardian of Ms. Skinner's estate." *Id.* at ___, 787 S.E.2d at 454. As a result, since "the [Assistant] Clerk's findings of fact are supported by the evidence, which findings in turn support the conclusions of law," the dissenting judge could not find that the Assistant Clerk's decision to remove Mr. Skinner as trustee of the Special Needs Trust and as guardian of Ms. Skinner's estate constituted an abuse of discretion. *Id.* at ___, 787 S.E.2d at 455. Mr. Bass and Ms. Clark noted

an appeal to this Court from the Court of Appeals' decision pursuant to N.C.G.S. § 7A-30(2) (providing for "an appeal . . . of right to the Supreme Court from any decision of the Court of Appeals rendered in a case . . . [i]n which there is a dissent").

In seeking to persuade us to reverse the Court of Appeals' decision, Mr. Bass and Ms. Clark contend that the Court of Appeals erred by failing to limit its review of the Assistant Clerk's order to determining whether an abuse of discretion had occurred. According to Mr. Bass and Ms. Clark, "[b]ecause the removal of a trustee and the removal of a guardian are 'left to the discretion of the clerks of superior court,' appellate review 'is limited to a determination of whether there was a clear abuse of discretion,' " quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). As a result, Mr. Bass and Ms. Clark argue that, "in order to reverse the [Assistant] Clerk's Order, the appellate court was required to find that the [Assistant] Clerk's Order was so manifestly unsupported by reason that it could not have been the result of a reasoned decision." Mr. Bass and Ms. Clark contend that, "regardless of what the trust allowed, [Mr. Skinner] was required to act with prudence and in [Ms. Skinner's] best interests" and that the Assistant Clerk had properly determined "that [Mr. Skinner] had not acted accordingly." Finally, Mr. Bass and Ms. Clark contend that, even if the Court of Appeals had correctly concluded that the Assistant Clerk's order rested on a misinterpretation of the applicable law, the Court of Appeals should have remanded this case to the trial court for further remand to the Assistant Clerk "for consideration of the evidence in its true legal light," quoting *Allen v. Rouse Toyota Jeep, Inc.*, 100 N.C. App. 737, 740, 398 S.E.2d 64, 65 (1990), rather than simply reversing the trial court's decision to uphold the Assistant Clerk's order.

Mr. Skinner, on the other hand, contends that the Court of Appeals correctly applied the applicable standard of review in determining that the Assistant Clerk's order was "so arbitrary that it could not have been the result of a reasoned decision," quoting *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998). According to Mr. Skinner, "[n]o deference . . . is owed to the [trial court] on conclusions of law," which are "are reviewed de novo," quoting *Everett v. Pitt Cty. Bd. of Educ.*, 678 F.3d 281, 288 (4th Cir. 2012) (alterations in original), with "a court by definition [having] abuse[d] its discretion when it makes an error of law," quoting *A Helping Hand LLC v. Baltimore County*, 515 F.3d 356, 370 (4th Cir. 2008) (*rev'd per curiam*, 355 F. App'x 773 (4th Cir. 2009)). Mr. Skinner asserts that the Assistant Clerk's order was replete with "findings and conclusions of law that were unsupported by the evidence of record and inconsistent with prevailing law," including his determination

that the purpose of the Special Needs Trust was to "preserve those assets for [Ms. Skinner's] long term health needs." Thus, Mr. Skinner claims that the Assistant Clerk's decision to remove him as trustee under the Special Needs Trust and as the guardian of Ms. Skinner's estate was unwarranted given that his actions did not "injure[ ] [Ms.] Skinner by causing her to suffer any period of ineligibility for any federal or state government benefits to which she was entitled." As a result, since he acted "in good faith and with an honest purpose to effectuate the trust," Mr. Skinner argues that the Court of Appeals properly overturned the Assistant Clerk's removal order.

In the appointment and removal of guardians and trustees, the superior court exercises derivative jurisdiction, so that "appeals [from the clerk] present for review only errors of law [that were] committed by the clerk," with the trial court in such instances being required to conduct a "hearing on the record rather than *de novo*" and being "confined to the correction of errors of law." *In re Simmons*, 266 N.C. 702, 707, 147 S.E.2d 231, 234 (1966) (citations omitted). In like manner, the essential inquiry that we are required to conduct in this proceeding involves a determination of whether the Assistant Clerk, who effectively served as the trial tribunal in this matter, committed an error of law in the course of determining that Mr. Skinner should be removed as the trustee under the Special Needs Trust and the guardian of Ms. Skinner's person.

The relevant statutory provisions clearly enunciate the approach that the Assistant Clerk was required to take in determining whether the removal petition filed by Mr. Bass and Ms. Clark should have been allowed or denied, as will be set forth in more detail below. In each instance, the clerk is authorized, but not required, to remove a trustee or guardian in the event that the clerk determines that statutory grounds for removal exist. For that reason, the clerk must, in a proceeding convened to consider the removal of a trustee or guardian, ascertain what the relevant facts are, decide whether those facts establish that any of the statutorily specified grounds for removal exist, and, if one or more grounds for removal do exist, make a discretionary determination as to whether the acts or omissions of the trustee or guardian justify removal from the position that he or she occupies, with the exact contours of the applicable standard of review flowing from the nature of the inquiry that the Assistant Clerk is required to undertake. *See id.* at 706, 147 S.E.2d at 234 (affirming a removal order on the grounds that "[t]he records and summary of the evidence warrant the clerk's findings which are sufficient to support the order of removal").

In light of the nature of the review conducted by the Superior Court in cases like this one, involving review of an Assistant Clerk's decision for errors of law, the Assistant Clerk's order can be analogized to that of a trial judge sitting without a jury or by an administrative agency. When the trial court conducts a trial without a jury, "the trial court's findings of fact have the force and effect of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though the evidence could be viewed as supporting a different finding." *Bailey v. State*, 348 N.C. 130, 146, 500 S.E.2d 54, 63 (1998) (citing *Curl v. Key*, 311 N.C. 259, 260, 316 S.E.2d 272, 273 (1984)). Although findings of fact "supported by competent, material and substantial evidence in view of the entire record[ ], are conclusive upon a reviewing court, and not within the scope its of reviewing powers," *In re Berman*, 245 N.C. 612, 616-17, 97 S.E.2d 232, 235 (1957), "[f]indings not supported by competent evidence are not conclusive and will be set aside on appeal." *Penland v. Bird Coal Co.*, 246 N.C. 26, 30, 97 S.E.2d 432, 436 (1957) (citing *Logan v. Johnson*, 218 N.C. 200, 10 S.E.2d 653 (1940)). "[F]acts found under a misapprehension of the law are not binding on this Court and will be set aside, and the cause remanded to the end that the evidence should be considered in its true legal light." *Hanford v. McSwain*, 230 N.C. 229, 233, 53 S.E.2d 84, 87 (1949) (citing, *inter alia*, *McGill v. Town of Lumberton*, 215 N.C. 752, 3 S.E.2d 324 (1939)). Even if one or more factual findings were made in error, the remaining findings may still suffice to support the trial tribunal's legal conclusions. *See In re Greene*, 328 N.C. 639, 650, 403 S.E.2d 257, 263-64 (1991) (per curiam) (concluding that, even though "the finding [by the Commission] that respondent told the prosecuting witness in the assault case that she deserved to be hit and had not been hit that much is not supported by clear and convincing evidence," because "the other findings of the Commission are supported by clear and convincing evidence," "we adopt them as our own" and "agree with the conclusion of the Commission"); *King v. Nat'l Union Fire Ins. Co.*, 258 N.C. 432, 439, 128 S.E.2d 849, 855 (1963) (concluding that, even though "the finding . . . that . . . plaintiff . . . [while] in possession, . . . made extensive repairs and improvements to the dwelling house is not supported by the evidence," "[b]ased upon the crucial findings of fact, which are supported by competent evidence" the trial court's judgment was proper); *In re Estate of Pate*, 119 N.C. App. 400, 403, 459 S.E.2d 1, 2 (noting that, "[i]n a non-jury trial, [w]here there are sufficient findings of fact based on competent evidence to support the trial court's conclusions of law, the judgment will not be disturbed because of other erroneous findings") *disc. rev. denied*, 341 N.C. 649, 462 S.E.2d

515 (1995) (quoting *Black Horse Run Prop. Owners Ass'n—Raleigh v. Kaleel*, 88 N.C. App. 83, 86, 362 S.E.2d 619, 622 (1987) *cert. denied*, 321 N.C. 742, 366 S.E.2d 856 (1988)). On appeal, "[c]onclusions of law drawn by the trial court from its findings of fact are reviewable *de novo*." *In re Foreclosure of Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013) (quoting *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004)). "When an order has been made by the judge in the exercise of the discretion vested in him by the statute, his order is not reviewable by this Court, on appeal, except upon the ground that there has been an abuse of such discretion." *In re LaFayette Bank & Tr.*, 198 N.C. 783, 789-90, 153 S.E. 452, 455 (1930). An abuse of discretion exists when there has been "a showing that [the] actions are manifestly unsupported by reason . . . [and] so arbitrary that the ruling could not have been the result of a reasoned decision." *White*, 312 N.C. at 777, 324 S.E.2d at 833 (citing *Clark v. Clark*, 301 N.C. 123, 271 S.E.2d 58 (1980)).

According to well-established North Carolina law, "[t]he clerk has the power and authority on information or complaint made to remove any guardian." N.C.G.S. § 35A-1290(a) (2015). A clerk has a "duty to remove a guardian or to take other action sufficient to protect the ward's interests" in the event that a "guardian wastes the ward's money or estate or converts it to his own use," "mismanages the ward's estate," "has violated a fiduciary duty through default or misconduct," or is "unsuitable to continue serving as guardian for any reason." *Id.* § 35A-1290(b)(1), (2), (6), (c)(8) (2015), recodified as N.C.G.S. § 35A-1290(b)(1), (2), (6), (15) by Act of June 29, 2017, ch. 158, sec. 4, 2017 N.C. Sess. Laws __, __). Similarly, the clerk "may remove a trustee" who "has committed a serious breach of trust" or in the event that, "[b]ecause of unfitness, unwillingness, or persistent failure . . . to administer the trust effectively," "removal of the trustee best serves the interests of the beneficiaries." *Id.* § 36C-7-706(b)(1), (3) (2015); *see also id.* § 36C-2-203(a)(1) (2015). As a result, the Assistant Clerk had the authority, pursuant to N.C.G.S. § 35A-1290 and N.C.G.S. § 36C-7-706(b), to remove Mr. Skinner as the guardian of Ms. Skinner's estate and as trustee under the Special Needs Trust, for a number of different reasons.

"A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust" and must "exercise reasonable care, skill, and caution" while acting in his or her fiduciary capacity. *Id.* § 36C-9-902 (a) (2015).

> In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for the benefit

> of another, a fiduciary shall observe the standard of judgment and care under the circumstances then prevailing, which an ordinarily prudent person of discretion and intelligence, who is a fiduciary of the property of others, would observe as [such] fiduciary; and if the fiduciary has special skills or is named a fiduciary on the basis of representations of special skills or expertise, he is under a duty to use those skills.

Id. § 32-71(a) (2015). While "the terms of the trust, in conjunction with the North Carolina Uniform Trust Code, govern[ ] the duties and powers of a trustee," *id.* § 36C-1-105(a) (2015), those terms do not prevail over the trustee's duty "to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries," *id.* § 36C-1-105(b)(2) (2015). As a result, while "the courts will not undertake to supervise or control [a trustee's] actions" "[w]hen it appears that a trustee has exercised or proposes to exercise discretion in good faith, and with an honest purpose to effectuate the trust," *Lichtenfels v. N.C. Nat'l. Bank*, 268 N.C. 467, 476, 151 S.E.2d 78, 84 (1966) (ellipses in original) (quoting *Carter v. Young*, 193 N.C. 678, 681-82, 137 S.E. 875, 877 (1927)), "[t]he court of equity will always compel a trustee to exercise a mandatory power and will control his exercise of a discretion vested in him when it is shown that he has exercised it dishonestly or from other improper motive." *Kuykendall v. Proctor*, 270 N.C. 510, 520, 155 S.E.2d 293, 302 (1967) (citation omitted).

Similarly, the guardian of an incompetent person's estate "has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, and use of the ward's estate to accomplish the desired result of administering the ward's estate legally and in the ward's best interest." N.C.G.S. § 35A-1251 (Supp. 2016). In carrying out these responsibilities, the guardian is entitled, among other things, "[t]o expend estate income on the ward's behalf and to petition the court for prior approval of expenditures from estate principal," *id.* § 35A-1251(12), and "[t]o acquire and retain every kind of property and every kind of investment," *id.* § 35A-1251(16). This Court affirmed the removal of a guardian after stating that the clerk had found that "the net income from the ward's estate [had] dwindled" and "total expenditures for the period" included the purchase of a truck, refrigerator for the guardian's mother, and a television set, while the "remainder was paid for board and room for the ward." *In re Simmons*, 266 N.C. at 706, 147 S.E.2d at 233; *see also State ex rel. Roebuck v. Nat'l Sur. Co.*, 200

N.C. 196, 202, 156 S.E. 531, 535 (1931) (ordering a surety company that executed a bond for the faithful performance of a bank acting as guardian for a ward to pay the successor guardian a stated sum to reimburse the ward for the bank's failure to "invest[ ] the funds of its ward"; stating that, by "intermingling [the funds of the ward] with other funds of its bank, [the bank] was faithless to the trust reposed in it; and pointing out that its bondsman, the defendant, must suffer the loss for such faithlessness"). As a result, because the "level of conduct for fiduciaries . . . [must be] higher than that trodden by the crowd," *Wachovia Bank & Tr. Co. v. Johnston*, 269 N.C. 701, 711, 153 S.E.2d 449, 457 (1967) (quoting *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 5460 (1928)), Mr. Skinner was required to carry out his duties as guardian and trustee reasonably and prudently and in a manner that served Ms. Skinner's best interests.

The unchallenged findings of fact contained in the Assistant Clerk's order establish that, within less than two months after the $170,086.67 amount that Ms. Skinner inherited from Ms. Bass was transferred to the Special Needs Trust, only $10,313.66 remained available for Ms. Skinner's use. Among other things, Mr. Skinner paid $8,387.50 from the Special Needs Trust to The Violin Shop, with $1,000.00 of this amount being used to reimburse Mr. Skinner for the legal fees that he had paid to the Brownlee Law Firm for advice concerning the extent to which he could lawfully marry Ms. Skinner and become Ms. Skinner's guardian and with another $1,537.50 being used to reimburse Mr. Skinner for the legal fees that he had paid to the Eatmon Law Firm for personal representation in the guardianship and incompetency proceedings. In addition, the unchallenged findings of fact demonstrate that Mr. Skinner used monies derived from the Special Needs Trust to purchase a new house, along with furniture and appliances, in which he and Ms. Skinner were residing at the time of the removal hearing. Thus, the Assistant Clerk's unchallenged findings of fact establish that Mr. Skinner, while acting as the trustee under the Special Needs Trust and as the guardian of Ms. Skinner's estate, spent more than ninety percent of the monies that had been deposited in the Special Needs Trust for purposes for which he received some, if not all, of the benefit within sixty days of obtaining control of those monies. As a result, we have no hesitancy in concluding that the Assistant Clerk's unchallenged findings of fact support his conclusions that "Mr. Skinner's use of Trust assets to reimburse himself for personal expenditures was improper, constitutes self-dealing, and is a breach of his fiduciary duties both as Trustee and Guardian" of Ms. Skinner's estate; that "Mr. Skinner has demonstrated that he lacks appropriate judgment and prudence"; that "Mr. Skinner is

in breach of his fiduciary duties pursuant to the terms of the Trust, the . . . order [appointing him guardian of Ms. Skinner's estate], and the applicable law"; and that "Mr. Skinner has wasted the Trust assets, mismanaged the Trust assets, and converted the Trust assets to his own use." In view of the fact that his findings and conclusions demonstrate that Mr. Skinner had "waste[d] the ward's money or estate or convert[ed] it to his own use," N.C.G.S. § 35A-1290(b)(1), "mismanage[d] the ward's estate," *id.* § 35A-1290(b)(2), and "violated a fiduciary duty through default or misconduct," *id.* § 35A-1290(b)(6), and that Mr. Skinner "has committed a serious breach of trust," *id.* § 36C-7-706(b)(1), the Assistant Clerk had ample justification for determining that grounds for Mr. Skinner's removal as both the guardian of Ms. Skinner's estate and as trustee under the Special Needs Trust existed in this case. Finally, we are unable to say that the Assistant Clerk's determination that removal constituted a valid remedy for Mr. Skinner's breaches of fiduciary duty was "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." *White*, 312 N.C. at 777, 324 S.E.2d at 833. As a result, while the Assistant Clerk appears to have erroneously construed a number of the provisions of the Special Needs Trust and while the entry of a more detailed and clearly focused order would have facilitated our review on appeal, we hold that the Assistant Clerk's order should be affirmed and that the Court of Appeals erred by reaching a contrary conclusion.

In reversing the Assistant Clerk's order, the Court of Appeals focused upon the extent, if any, to which Mr. Skinner's conduct violated the specific provisions of the Special Needs Trust. Although the existence or non-existence of such violations is, of course, relevant to a proper removal inquiry, the Court of Appeals' apparent determination that Mr. Skinner was not subject to removal in the absence of a showing that he had, in fact, violated one or more provisions of the Special Needs Trust misapprehends the applicable law. Instead of being concentrated exclusively upon the extent to which Mr. Skinner's actions violated the provisions of the Special Needs Trust, the Assistant Clerk's order clearly and appropriately recognized that N.C.G.S. §§ 35A-1290 and 36C-7-706(b) focus upon the broader issue of whether the guardian or trustee acted in such a manner as to violate the fiduciary duty that he or she owes to the ward or beneficiary. A careful reading of the challenged removal order satisfies us that the Assistant Clerk did not remove Mr. Skinner from his position as guardian of Ms. Skinner's estate and trustee under the Special Needs Trust because he violated the terms and conditions of the Special Needs Trust; instead, the Assistant Clerk's findings and conclusions satisfy us that he acted as he did on the basis of a belief that

Mr. Skinner's actions, regardless of their consistency with specific provisions of the Special Needs Trust, constituted waste and mismanagement of the assets committed to his care. As we have already noted, the extent to which a guardian or trustee violated his or her fiduciary duty is a separate, and broader, question than the issue of whether he or she violated a specific provision of a written trust instrument. *See* N.C.G.S. § 36C-1-105(b)(2) (providing that "[t]he duty of a trustee . . . to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries" overrides "[t]he terms of a trust"). Thus, the fact that Mr. Skinner's conduct may have been consistent with the terms of the Special Needs Trust did not insulate him from removal.

In seeking to persuade us to reach a different result, Mr. Skinner emphasizes the scope of his discretionary authority and defends the spending decisions upon which the Assistant Clerk's order rests as having benefitted Ms. Skinner and been in her best interest. Although we recognize that a guardian and trustee has discretion in the manner in which he or she attempts to meet the needs of his or her ward or beneficiary, there are, as this Court has previously noted, limits to the scope and extent of that discretion. In view of the fact that the Assistant Clerk's findings of fact demonstrate that Mr. Skinner expended over ninety percent of the monies committed to his custody for Ms. Skinner's use and care within a short time after receiving them in ways that either directly or indirectly benefitted himself while leaving insufficient monies in the Trust to either preserve the assets into which he had invested the bulk of the Trust's funds or to take care of Ms. Skinner's long term needs, we cannot say that the Assistant Clerk erred in determining that Mr. Skinner exceeded the scope of the discretion that was admittedly available to him to such an extent that grounds for his removal as the guardian of Ms. Skinner's person and as trustee under the Special Needs Trust existed under N.C.G.S. §§ 35A-1290 and 36C-7-706(b) and that these breaches of fiduciary duty justified his removal. As a result, the Court of Appeals' decision in this case is reversed.

REVERSED.

Justice MORGAN dissenting.

I respectfully dissent from the decision of the majority that the Assistant Clerk was authorized, in his discretion as exercised under the circumstances presented in this case, to properly remove Mr. Skinner as the Trustee of his legally incompetent wife's Special Needs Trust and guardian of her estate. While the majority in its opinion acknowledges

that the Assistant Clerk erroneously construed a number of the provisions of the Special Needs Trust at issue, my learned colleagues stretch far too much to bring these critical errors within the realm of the proper exercise of broad discretion while simultaneously minimizing these missteps by overemphasizing the strength of his remaining findings. The fundamental misapprehension of the law exhibited by the Assistant Clerk is too profound to be salvaged in this manner. As a result, in my view, Mr. Skinner's removal from his position as Trustee of Mrs. Skinner's Special Needs Trust and guardian of her estate was not justified. I agree with the rationale of the Court of Appeals decision. In my view, the case should be remanded to the trial court for proper application of the correct legal standard.

In the first instance, the Assistant Clerk misinterpreted the essence of a special needs trust when making his decision to remove Mr. Skinner as Trustee and as guardian of his wife's estate. A special needs trust, such as the one at issue in the present case, which meets designated federal requirements as identified in 42 U.S.C. § 1396p(d)(4)(A) allows the beneficiary to maintain eligibility for Medicaid and Social Security disability benefits. "The whole purpose of a special needs trust is to shelter resources so that the state, through Medicaid, pays for medical expenses rather than having the beneficiary's family pay for them." *Hobbs v. Zenderman*, 542 F. Supp. 2d 1220, 1234 (D.N.M. 2008), *aff'd*, 579 F.3d 1171 (10th Cir. 2009); *ACS Recovery Servs., Inc. v. Griffin*, 723 F.3d 518, 539 (5th Cir. 2013) ("The primary purpose of special needs trusts is to allow beneficiaries to maintain eligibility for public benefits—such as Medicaid—while supplementing those benefits so that the beneficiary enjoys a better quality of life." (Haynes, J. concurring in part and dissenting in part), *cert. denied*, 134 S. Ct. 618, 187 L. Ed. 2d 400 (2013)). This was a proper consideration by the Assistant Clerk, manifested by his requirement in his 9 October 2013 order appointing Mr. Skinner as guardian of Mrs. Skinner's estate that a special needs trust be established. This recognition is displayed in the Assistant Clerk's finding, which is also cited in the majority opinion, that "[Mrs. Skinner] would be at risk of losing her SSI benefits and Medicaid assistance if her inheritance is not placed in a Special Needs Trust . . . [Mrs. Skinner] will have medical needs for the remainder of her life."

Subsequently, however, the Assistant Clerk incorrectly determined that the purpose of the Special Needs Trust was to shield Mrs. Skinner's resources for future medical expenses, rather than the actual purpose referenced in federal statutory and case law that authorizes a special needs trust to fund resources that will improve a beneficiary's quality

of life while still protecting that beneficiary's ability to access governmental resources such as Medicaid and Social Security. The Court of Appeals correctly understood and applied this fundamental purpose of a special needs trust in reversing the Assistant Clerk's order that removed Mr. Skinner from the positions of authority for his wife.

The Assistant Clerk's misunderstanding of the purpose of the Special Needs Trust is a misapprehension of law that renders his decision to remove Mr. Skinner as Trustee and guardian of Mrs. Skinner's estate an abuse of discretion. While this Court's standard of review is limited to a determination of whether the Assistant Clerk abused his discretion, "an abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction." *Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047, 135 L. Ed. 2d 392, 414 (1996) (citation omitted). It is well-established in this Court's decisions that a misapprehension of the law is appropriately addressed by remanding the case to the appropriate lower forum in order to apply the correct legal standard. *See*, *e.g.*, *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 523, 398 S.E.2d 586, 603 (1990); *State v. Grundler*, 249 N.C. 399, 402, 106 S.E.2d 488, 490 (1959), *cert. denied*, 362 U.S. 917, 80 S. Ct. 670, 4 L. Ed. 2d 738 (1960).

The Assistant Clerk's decision to remove Mr. Skinner as Trustee is replete with other examples of misapprehensions of the law which amounted to an abuse of discretion, and which were duly noted by the Court of Appeals, in the Assistant Clerk's interpretation of the Special Needs Trust and Mr. Skinner's actions regarding it.

The Assistant Clerk erred by failing to distinguish between the use of Trust funds for funeral expenses after termination of the Trust and the use of Trust funds for the purchase of prepaid funeral or burial insurance during the beneficiary's lifetime. In his removal order, the Assistant Clerk reasoned that "[t]he Trust specifically states that funeral expenses are not permitted to be paid from the Trust prior to reimbursement to North Carolina (or any other state) for medical assistance." The Assistant Clerk then concluded that "Mr. Skinner's payment of $3,644.00 to Columbus Life for prepaid funeral expenses . . . is in contradiction to the terms of the Trust and in violation of his fiduciary duties as Trustee." However, in accord with 42 U.S.C. § 1396p(d)(4)(A), upon the death of a beneficiary or upon early termination, a Special Needs Trust must reimburse the State for medical expenses. To comply with this provision, the Special Needs Trust provides that upon Mrs. Skinner's death, the Trustee is required to "notify the appropriate state agency of [Mrs. Skinner's] death and must promptly obtain an accounting from the states (or local Medicaid agencies of the states) that have made Medicaid payments on

[Mrs. Skinner's] behalf during her lifetime."[1] The Special Needs Trust further provides that after the State is fully reimbursed, the Trustee may pay for funeral expenses. There is no provision in the Special Needs Trust that prevented Mr. Skinner from using trust funds to purchase prepaid funeral and burial insurance during Mrs. Skinner's lifetime. Therefore, the Assistant Clerk misinterpreted the federal statutory provision mandating that, after death, the State was to be reimbursed before other expenses were paid, by erroneously construing the 42 U.S.C. § 1396p(d)(4)(A) language to bar payment for funeral and burial insurance before death.

The Assistant Clerk's inaccurate construction of the purpose of the Special Needs Trust likewise yielded an improper analysis of Mr. Skinner's decision to use trust funds to purchase a house to serve as the marital home for the Skinners, plus some furnishings. The Assistant Clerk found that Mr. Skinner used such assets to purchase the home, new furniture, and new appliances, and that because Mr. Skinner is the husband of the trust beneficiary wife and therefore resides in the home with her, he improperly benefits from the purchases. As a result, the Assistant Clerk reached the conclusion that Mr. Skinner showed a lack of prudence and judgment and "breach[ed] . . . his fiduciary duties pursuant to the terms of the Trust, the terms of the GOE Order, and applicable law."

Contrary to the Assistant Clerk's misapprehension of the law, the purchase of the house and related expenditures were authorized by the Special Needs Trust consistent with the purpose of a special needs trust. Article Two of the Special Needs Trust here provides, in pertinent part, that

> [t]he Trustee will hold, manage, invest and reinvest the Trust Estate, and will pay or apply the income and principal of the Trust Estate in the following manner: . . .
>
> During Beneficiary's lifetime, the Trustee will pay from time to time such amounts from the Trust Funds for the satisfaction and benefit of [the] Beneficiary's Special Needs (as hereinafter defined), as the Trustee determines in the Trustee's discretion, as hereinafter provided.

Section 7.02(a) of the Trust defines the term "special needs" as the "Beneficiary's needs that are not covered or available from any local,

1. Medicaid would have to be paid first if the Special Needs Trust was terminated early as well.

state, or federal government, or any private agency, or any private insurance carrier covering Beneficiary."

Here Mr. Skinner authorized trust assets to pay approximately $135,000.00 for the purchase of the house, which is titled to the Trust, and between $3,200.00 and $4,500.00 for furniture, appliances, and repairs to the house. The evidence shows that the house, furnishings, and appliances are owned by the Trust; the house is handicapped-accessible to readily accommodate Mrs. Skinner; and it is located in close proximity to where Mrs. Skinner previously lived. The determination of Mr. Skinner, in his role as Trustee, to improve Mrs. Skinner's quality of life through this move to a new home is consistent with the express purpose of a special needs trust. With the physical enhancements of new furnishings and fresh repairs for a better house suited to fit Mrs. Skinner's ongoing needs in a neighborhood which was familiar to her, Mr. Skinner's expenditures of the trust funds in this regard fall squarely within his discretionary authority to periodically pay such amounts for the satisfaction and benefit of his wife's special needs. The failure of the Assistant Clerk to recognize Mr. Skinner's sanctioned fulfillment of his duties as Trustee of Mrs. Skinner's Special Needs Trust, coupled with the Assistant Clerk's concomitant negative view of these permissible expenditures, constitutes a clear misapprehension of the law.

Finally, I must address the Assistant Clerk's ruling that Mr. Skinner's reimbursements which he obtained from the Special Needs Trust in the amounts of $1,000.00 and $1,537.50 for his payments to two law firms were unauthorized because these expenditures arose before Mr. Skinner's appointment to the roles of Trustee and guardian of Mrs. Skinner's estate. I embrace the Court of Appeals' position that the Assistant Clerk's misapprehension of the law on the other questioned usages of trust funds extended to a narrow view by the Assistant Clerk that Mr. Skinner was automatically ineligible for any reimbursements of expenditures that he plausibly made with regard to his guardianship status and the potential legal impact of the Skinners' marriage upon her financial well-being. I evaluate the Assistant Clerk's view of Mr. Skinner's withdrawal of $8,387.50 from the Special Needs Trust for payment to his violin business to be consistent with the Assistant Clerk's misapprehension of the law, which was reflected in the Assistant Clerk's dark lens of perceived "self-dealing," "violation of [Mr. Skinner's] fiduciary duties as Trustee," "lack[ ] [of] appropriate judgment," and "waste [ ]," "mismanage[ment]" and "conver[sion]" of Trust assets regarding the prepaid funeral expenses, burial insurance, marital home, marital home furnishings, law firm bills and overall special needs trust administration.

I believe that the Assistant Clerk's fundamental misapprehension of the law amounts to an abuse of discretion that would necessitate a reversal and remand of the trial court's order affirming the Assistant Clerk's order to remove Mr. Skinner as Trustee of his wife's Special Needs Trust and guardian of her estate.

For these reasons, I respectfully dissent and adopt the rationale of the Court of Appeals' decision, and would remand this case to the Court of Appeals for remand to the trial court with instructions to apply the appropriate legal standard.

Justices NEWBY and JACKSON join in this dissenting opinion.

IN THE MATTER OF M.A.W.

No. 279PA16

Filed 29 September 2017

Termination of Parental Rights—neglect—sufficiency of findings

The trial court did not err by terminating respondent's parental rights on the basis of neglect where the findings in the trial court's order were sufficient. Respondent had been incarcerated, and the initial allegations of neglect were based on the mother's actions, but the evidence of prior neglect did not stand alone. Respondent had a long history of criminal activity and substance abuse, and he initially indicated his desire to be involved in the child's life, but he failed to follow through consistently after his release.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 787 S.E.2d 461 (2016), reversing an order entered on 12 August 2015 by Judge J.H. Corpening, II in District Court, New Hanover County. Heard in the Supreme Court on 28 August 2017.

Regina Floyd-Davis for New Hanover County Department of Social Services, petitioner-appellant.

Parker Poe Adams & Bernstein LLP, by William L. Esser IV, for appellant Guardian ad Litem.

Rebekah W. Davis for respondent-appellee father.

JACKSON, Justice.

In this appeal we consider whether the trial court erred by terminating respondent's parental rights on the basis of neglect. Because we conclude that the findings in the trial court's order were sufficient to support termination of respondent's parental rights based upon neglect, we reverse the Court of Appeals' determination that the trial court had erred.

On 11 March 2013, the New Hanover County Department of Social Services (DSS) filed a petition alleging that the minor child M.A.W.[1] was a neglected juvenile. The petition alleged that M.A.W.'s mother "has a history of substance abuse and mental health issues." At the time the petition was filed, respondent father was incarcerated on charges of habitual impaired driving.

At the adjudication hearing on 12 June 2013, the trial court found that M.A.W.'s mother had tested positive for use of the controlled substance commonly known as Percocet without having a valid prescription for the drug. In addition, the trial court found that the mother's history of both substance abuse and mental health issues previously had interfered with her ability to provide appropriate care for her children. The trial court also noted that DNA testing had confirmed respondent's paternity and that respondent had reported participation in various services available to him during his incarceration, including a parenting class and Alcoholics Anonymous meetings. In addition, the trial court observed that respondent had requested a home study on his mother for consideration of placement for M.A.W.

Based upon these and other findings of fact, the trial court concluded as a matter of law that M.A.W. was "neglected" as defined by N.C.G.S. § 7B-101(15) and that it was in the best interest of the child to remain in the legal custody of DSS, which had the discretion to provide or arrange for foster care or another placement. The mother was ordered to comply with her Family Services Agreement, which included participating in treatment for substance abuse and mental health issues; submitting to random drug and alcohol screens; and finding and maintaining suitable housing and employment. Respondent was ordered to enter into a Family Services Agreement and to access services available to him during his incarceration—specifically parenting courses and substance

1. The Court is using initials to protect the identity of the child.

abuse treatment programs. The trial court's order also established a visitation schedule for the mother and for respondent upon his release from incarceration.

After numerous permanency planning review hearings, on 10 April 2014, M.A.W.'s mother voluntarily relinquished her parental rights and executed consent for M.A.W.'s adoption by M.A.W.'s maternal relatives. The trial court's 5 May 2014 permanency planning order relieved DSS of reunification efforts with the mother. The order also reported that respondent was still incarcerated, that he "has a drinking problem," and that "[h]is continued sobriety is paramount to any plan of reunification." The trial court added that prior to his incarceration, respondent "reports that he provided for the child financially and emotionally," "was aware of [the mother]'s substance abuse," and had "anticipated the Department's intervention." The trial court endorsed reunification with respondent as the permanent plan for the child and ordered respondent to contact DSS within three days of his release.

Respondent was released from incarceration on 29 August 2014. At a 4 September 2014 permanency planning review hearing, DSS stated that termination of parental rights was not appropriate because respondent needed to be afforded the opportunity to enter into a case plan. At the next review hearing on 8 January 2015, the trial court found, *inter alia*, that respondent had denied several requests from DSS to access the home of his mother, with whom he purported to live, that the court did not know where respondent was residing, and that respondent's initial regular visits with M.A.W. had declined in consistency. Further noting respondent's indication of his ability to pay child support arrearages for another child he had fathered, the trial court determined that respondent intended to disregard child support payments for M.A.W. Based upon these and other findings of fact, the trial court permitted DSS to cease reunification efforts with respondent and changed the permanent plan for M.A.W. to adoption.

On 10 February 2015, DSS filed a petition to terminate respondent's parental rights as to M.A.W. on the grounds of "neglect" and "failure to legitimate." N.C.G.S. § 7B-1111(a)(1), (5) (2015). Following a hearing, the trial court concluded that respondent had neglected M.A.W., and it found "a high probability that there [would] be a repetition of neglect, and that the neglect [would] continue in the foreseeable future." The trial court entered an order on 12 August 2015 terminating respondent's parental rights based upon neglect in accord with N.C.G.S. § 7B-1111(a)(1). Respondent appealed to the Court of Appeals.

In a unanimous opinion filed on 21 June 2016, the Court of Appeals reversed the trial court's termination of respondent father's parental rights, holding that the trial court erred in concluding grounds existed pursuant to N.C.G.S. § 7B-1111(a)(1) to terminate respondent's parental rights. *In re M.A.W.*, ___ N.C. App. ___, ___, 787 S.E.2d 461, 463 (2016). The Court of Appeals stated that "while there was a prior adjudication of neglect, the party responsible for the neglect was the juvenile's mother, not father." *Id.* at ___, 787 S.E.2d at 463. The court further reasoned that "[w]ithout evidence of any prior neglect, [DSS] failed to show neglect at the time of the hearing." *Id.* at ___, 787 S.E.2d at 463 (citing *In re J.G.B.*, 177 N.C. App. 375, 382, 628 S.E.2d 450, 455 (2006)). The Court of Appeals also determined that "the evidence, as well as the trial court's findings, [did] not support a conclusion that there was ongoing neglect at the time of the termination hearing." *Id.* at ___, 787 S.E.2d at 463. Accordingly, the Court of Appeals reversed the order entered by the trial court. DSS appealed to this Court.

Before this Court, DSS argues that the Court of Appeals incorrectly opined that, because respondent was incarcerated at the time of M.A.W.'s removal, he therefore could not have neglected the child. DSS also contends that the Court of Appeals failed to consider the trial court's findings of fact outlining respondent's failures to comply with the directives of that court after his release from incarceration. We agree.

In any proceeding such as this, we are reminded that "the fundamental principle underlying North Carolina's approach to controversies involving child neglect and custody [is] that the best interest of the child is the polar star." *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 251 (1984). Our General Statutes provide that a juvenile shall be deemed neglected if the court finds the juvenile to be a "neglected juvenile" within the meaning of N.C.G.S. § 7B-101. N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is statutorily defined, in pertinent part, as a juvenile "who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; . . . or who lives in an environment injurious to the juvenile's welfare." *Id.* § 7B-101(15) (2015). As in the present case, "if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016) (citing *In re Ballard*, 311 N.C. 708, 713-15, 319 S.E.2d 227, 231-32 (1984)). If past neglect is shown, the trial court also must then consider evidence of changed circumstances. *In re Ballard*, 311 N.C. at 715, 319 S.E.2d at 232.

In a recent case affirmed per curiam by this Court, a child was adjudicated neglected because of the mother's substance abuse. *In re C.L.S.*, ___ N.C. App. ___, ___, 781 S.E.2d 680, 681, *aff'd per curiam*, 369 N.C. 58, 791 S.E.2d 457 (2016). The identity of the father was unknown at the time the adjudication order was entered in that case. *Id.* at ___, 781 S.E.2d at 681. Paternity was then established while the father was incarcerated, and the trial court ceased reunification efforts with the father several months later. *Id.* at ___, 781 S.E.2d at 681-82. The father in *In re C.L.S.* initially indicated his willingness to enter into a case plan, but subsequently failed to comply with the case plan recommendations and failed to obtain and maintain stable housing and employment. *Id.* at ___, 781 S.E.2d at 681. Subsequently, DSS moved to terminate both parents' parental rights on the grounds of neglect. *Id.* at ___, 781 S.E.2d at 681. The trial court terminated both parents' parental rights and the father appealed. *Id.* at ___, 781 S.E.2d at 682. The Court of Appeals majority affirmed the trial court's decision, but the dissent contended that the prior adjudication order could not be used as evidence of past neglect as to the father because the sole party responsible for the neglect was the mother. *Id.* at ___, 781 S.E.2d at 683-84 (Tyson, J., dissenting). Notwithstanding the father's incarceration and lack of established paternity at the time of the neglect adjudication, this Court affirmed the Court of Appeals' decision affirming the trial court's order terminating the father's parental rights. *In re C.L.S.*, 369 N.C. 58, 791 S.E.2d 457 (2016).

Similarly, the neglect allegations in the instant case were based on the mother's actions, and the prior adjudication of neglect occurred while respondent was incarcerated. Our precedents are quite clear—and remain in full force—that "[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005) (quoting *In re Yocum*, 158 N.C. App. 198, 207-08, 580 S.E.2d 399, 405 (Tyson, J., dissenting), *aff'd per curiam*, 357 N.C. 568, 597 S.E.2d 674 (2003)), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006). "[A] prior adjudication of neglect may be admitted and considered by the trial court in ruling upon a later petition to terminate parental rights on the ground of neglect." *In re Ballard*, 311 N.C. at 713-14, 319 S.E.2d at 231. During a proceeding to terminate parental rights, "the trial court must admit and consider all evidence of relevant circumstances or events which existed or occurred *either before or after* the prior adjudication of neglect." *Id.* at 716, 319 S.E.2d at 232-33. As the trial court did in *In re C.L.S.*, the trial court here also appropriately considered the prior adjudication of neglect as relevant evidence during the termination hearing. Furthermore, in the present case the trial court made an independent determination that neglect

sufficient to justify termination of respondent's parental rights existed at the time of the termination hearing and that a likelihood of repetition of neglect also existed. *Cf. id.* at 716, 319 S.E.2d at 233 (reversing a trial court's order terminating the respondent's parental rights when the trial court failed to make an independent determination of whether neglect authorizing termination of the respondent's parental rights still existed at the time of the termination hearing).

"[A] prior adjudication of neglect standing alone" likely will be insufficient "to support a termination of parental rights" in cases in which "the parents have been deprived of custody for any significant period before the termination proceeding." *In re Ballard*, 311 N.C. at 714, 319 S.E.2d at 231 (citing *In re Barron*, 268 Minn. 48, 53, 127 N.W.2d 702, 706 (1964)). We also are mindful that "[i]n determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent." *In re Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252.

Here, however, the evidence of prior neglect does not stand alone. In addition to the prior adjudication of neglect, the trial court found that respondent had a long history of criminal activity and substance abuse. Moreover, respondent stipulated to the allegations of neglect that led to M.A.W.'s adjudication as a neglected juvenile and also testified during the hearing on the petition to terminate parental rights that he was aware of the substance abuse issues of M.A.W.'s mother, stating that he "knew it wouldn't be too long that [DSS] would try to take [M.A.W.] too."

The other striking similarity to the facts present in *In re C.L.S.* is that respondent initially indicated his desire to be involved in M.A.W.'s life but after his release, failed to follow through consistently with the court's directives and recommendations. The trial court considered these actions of respondent in evaluating whether there was a likelihood of repetition of neglect. Although respondent completed a parenting course, attended Alcoholics Anonymous meetings, and completed his General Educational Development (GED) program while incarcerated, the trial court made numerous relevant findings of fact supporting termination that illuminated respondent's behavior following his release and which established a likelihood of repetition of neglect.

The trial court previously emphasized the importance of respondent's sobriety based on his history of alcohol abuse, and noted in its order that as of the 29 June 2015 hearing, respondent had "not begun to participate in any aspect of the recommendations from [his] Drug & Alcohol Assessment." In addition, the trial court "stressed the

importance of regular visitation" so that respondent could "establish a father/daughter bond" with M.A.W. Upon his release, respondent was afforded, and initially took advantage of, weekly visitation with the child; however, the trial court found that the regularity of his visits diminished over time. The trial court made several other relevant findings of fact supporting termination:

> 7. . . . The Department has not seen a certificate of completion of parenting, nor is the Department specifically aware of the dynamics of said parenting course.
>
> . . . .
>
> 10. . . . [Respondent] was neither forthcoming with the Department nor compliant with the directives of this Court. The Department attempted to confirm [respondent's] permanent address as given to the Social Worker; however, [she] was denied access to his mother's home . . . .
>
> 11. . . . At a hearing held on 08 January 2015, [respondent] indicated employment with [a cleaning and painting service] averaging $500.00 per week. At this time, [respondent] maintains that he is self-employed . . . . [The trial court] finds his testimony be [sic] lacking in credibility.
>
> 12. . . . [Respondent] was ordered to undergo a Comprehensive Clinical Assessment. Two appointments were scheduled; he did not appear for the first appointment and left thirty (30) minutes into the session on the re-scheduled appointment. [Respondent] presents as angry and defensive. . . .
>
> . . . .
>
> 16. . . . [Respondent] has not provided any care, discipline or supervision of [M.A.W.] since his release from incarceration in August of 2014 . . . .

Based upon these and other findings from the termination hearing, DSS met its burden of proving sufficient facts to enable the trial court to establish by clear, cogent, and convincing evidence that grounds existed to justify termination. *See, e.g.*, *In re Ballard*, 311 N.C. at 716, 319 S.E.2d at 232 (citing former N.C.G.S. § 7A-289.30(e) (relating to termination of parental rights), repealed by Act of Oct. 22, 1998, ch. 202, sec. 5, 1997

N.C. Sess. Laws (Reg. Sess. 1998) 695, 742 (recodifying the Juvenile Code)); *see* N.C.G.S. § 7B-1111(b) (2015).

After review of the testimony during the hearing and the record on appeal, we cannot agree with the conclusion of the Court of Appeals that "there was no evidence before the trial court, and no findings of fact, that father had previously neglected [M.A.W.]" *In re M.A.W.*, ___ N.C. App. at ___, 787 S.E.2d at 463. The trial court properly found that past neglect was established by DSS and that there was a likelihood of repetition of neglect. We therefore hold that the trial court did not err in concluding that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(1) to terminate father's parental rights. Accordingly, we reverse the decision of the Court of Appeals reversing the trial court's order terminating the parental rights of respondent and instruct that court to reinstate the trial court's order.

REVERSED.

STATE OF NORTH CAROLINA
v.
WILLIAM CLIFTON CRABTREE, SR.

No. 372A16

Filed 29 September 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 790 S.E.2d 709 (2016), finding no error in part and no prejudicial error in part in judgments entered on 19 March 2015 by Judge Beecher R. Gray in Superior Court, Person County. Heard in the Supreme Court on 30 August 2017.

Joshua H. Stein, Attorney General, by Natalie Whiteman Bacon and Tracy Nayer, Assistant Attorneys General, for the State.

Mark Montgomery for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
JAMISON CHRISTOPHER GOINS

No. 273A16

Filed 29 September 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 789 S.E.2d 466 (2016), reversing an order denying defendant's motion to suppress entered on 15 April 2015 by Judge Stuart Albright, and vacating defendant's guilty plea and judgments entered on 11 May 2015 by Judge Richard S. Gottlieb, all in Superior Court, Guilford County, and remanding the case for further proceedings. Heard in the Supreme Court on 13 June 2017.

Joshua H. Stein, *Attorney General*, *by Shawn R. Evans and Kristin J. Uicker*, *Assistant Attorneys General*, *for the State-appellant.*

Drew Nelson for defendant-appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed.

REVERSED.

STATE OF NORTH CAROLINA
v.
TAE KWON HAMMONDS

No. 389A15-2

Filed 29 September 2017

Confessions and Incriminating Statements—custodial interrogation—civil commitment order

A trial court's conclusion that defendant was not in custody for purposes of *Miranda* reflected an incorrect application of legal principles to the facts found by the trial court, considering all of the circumstances. Defendant was confined under a civil commitment order and was questioned without his *Miranda* warnings.

Justice ERVIN dissenting.

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

On review pursuant to order of this Court entered on 10 June 2016 following oral argument on 18 May 2016 in session in the Old Burke County Courthouse in the City of Morganton pursuant to N.C.G.S. § 7A-10(a), in which the Court vacated the opinion of the Court of Appeals in *State v. Hammonds*, ___ N.C. App. ___, 777 S.E.2d 359 (2015), vacated an order denying defendant's motion to suppress entered on 24 July 2014 by Judge Tanya T. Wallace in Superior Court, Union County, and certified the case to the trial court for a new hearing and entry of a new order on defendant's motion to suppress. *State v. Hammonds*, 368 N.C. 906, 789 S.E.2d 1 (2016). The Court ordered the parties to submit supplemental briefs after certification of the new order to this Court. Issues raised in the supplemental briefs heard on 13 June 2017.

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

Glenn Gerding, Appellate Defender, by Anne M. Gomez, Assistant Appellate Defender, for defendant-appellant.

HUDSON, Justice.

Here we are asked to decide whether the trial court properly concluded that defendant was not subjected to a custodial interrogation as defined in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), when police questioned him while he was confined under a civil commitment order. After considering the totality of the circumstances, we conclude that defendant was in custody for *Miranda* purposes. Therefore, the failure of police to advise him of his rights under *Miranda* rendered inadmissible the incriminating statements he made during the interrogation. Accordingly, we reverse the trial court's order denying his motion to suppress those statements. Because this error was prejudicial, we vacate defendant's conviction.

I. FACTUAL AND PROCEDURAL BACKGROUND

On the evening of 10 December 2012 in Monroe, North Carolina, a man stole Stephanie Gaddy's purse in a parking lot while threatening her with a handgun. Shortly after 1:00 p.m. on 11 December 2012, Defendant Tae Kwon Hammonds was taken to the emergency room at a local hospital following an intentional overdose. An involuntary commitment order was issued at 3:50 p.m. upon a finding by a Union County magistrate that defendant was "mentally ill and dangerous to self or others." As directed in the order, the Union County Sheriff's Office took defendant into custody at 4:32 p.m. that same day.

After using surveillance footage to identify defendant as a suspect in the robbery, investigators learned that he was confined at the hospital under the involuntary commitment order. In the early evening of 12 December, while defendant was hospitalized under that order, he was questioned by Detective Jonathan Williams and his supervisor, Lieutenant T.J. Goforth, both of the Monroe Police Department, for about an hour and a half. Without informing him of his *Miranda* rights, the officers elicited self-incriminating statements from defendant during the interview. Defendant was discharged from the hospital later that evening and transported to a treatment facility.

On 4 February 2013, the Union County Grand Jury indicted defendant for robbery with a dangerous weapon. On 30 June 2014, defendant moved to suppress all statements he made to police during the 12 December 2012 interview. In support of his motion, defendant asserted that (1) he was in custody when the statements were taken and was not informed of his *Miranda* rights at that time, and (2) even if he was not in custody, his statements were not made voluntarily.

Defendant was tried during the criminal session of Superior Court, Union County, that began on 30 June 2014 before Judge Tanya T. Wallace. After hearing defendant's motion to suppress, the trial court denied the motion on 1 July 2014. The court also denied defendant's motion to dismiss at the close of the State's evidence. A jury convicted defendant as charged, and the court sentenced him to sixty to eighty-four months of imprisonment. The court also ordered defendant to pay, *inter alia*, fifty dollars in restitution to the victim. On 24 July 2014, the court entered a written order on the motion to suppress in which it made findings of fact and conclusions of law.

Defendant appealed to the Court of Appeals, which on 20 October 2015 issued a divided opinion that found no error in the guilt-innocence portion of defendant's trial but vacated the portion of the trial court's judgment ordering defendant to pay restitution to the victim and remanded the case for a new hearing on that issue. *State v. Hammonds*, ___ N.C. App. ___, ___, 777 S.E.2d 359, 371-72 (2015). Regarding defendant's challenge to the trial court's denial of his suppression motion, the majority (1) concluded that "the trial court properly considered all of the factors to determine if defendant was in custody and did not err in its conclusion of law that based on the totality of the circumstances, defendant was not in custody at the time he was interviewed," and (2) held that "the trial court's findings of fact support its conclusion of law that defendant's confession was voluntary." *Id.* at ___, ___, 777 S.E.2d at 368, 371.

The dissenting judge, however, concluded that the trial court's findings of fact did not reflect consideration of whether defendant "was physically restrained from leaving the place of interrogation" or whether he "was free to refuse to answer questions." *Id.* at ___, 777 S.E.2d at 374 (Inman, J., dissenting) (quoting *State v. Fisher*, 158 N.C. App. 133, 145, 580 S.E.2d 405, 415 (2003), *aff'd per curiam*, 358 N.C. 215, 593 S.E.2d 583 (2004)). The dissenting judge stated that she would reverse the trial court's denial of defendant's motion to suppress and remand "for reconsideration of the motion and the entry of findings and conclusions based upon all pertinent factors." *Id.* at ___, 777 S.E.2d at 375. Defendant filed his appeal of right, and on 28 January 2016 this Court allowed defendant's petition for discretionary review to consider additional issues.

On 9 June 2016, this Court vacated the opinion of the Court of Appeals and the trial court's orders denying defendant's motion to suppress, and we instructed the trial court to hold a new hearing on the motion to suppress. *State v. Hammonds*, 368 N.C. 906, 789 S.E.2d

1 (2016). We directed the trial court to "apply a totality of the circumstances test" when rehearing the motion and to consider all factors, including "whether the involuntarily committed defendant 'was told that he was free to end the questioning.' " *Id.* at 907-08, 789 S.E.2d at 2 (quoting *Howes v. Fields*, 565 U.S. 499, 517, 132 S. Ct. 1181, 1194, 182 L. Ed. 2d 17, 32 (2012)).

After taking additional evidence at a new suppression hearing, the trial court entered an order on 27 September 2016 that again denied defendant's motion to suppress. As directed by this Court, the trial court made new findings of fact and conclusions of law in its order. The matter is now back before this Court for review.

II. ANALYSIS

On appeal, in addition to challenging several of the trial court's findings of fact, defendant argues that the court's undisputed findings do not support its conclusions of law that (1) he was not in custody for purposes of *Miranda* during his 12 December 2012 interrogation, and (2) his statements to police during that interrogation were voluntary.

The standard of review in evaluating a trial court's "denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015) (quoting *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012)). "[T]he trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (quoting *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000), *cert. denied*, 531 U.S. 1165, 121 S. Ct. 1126, 148 L. Ed. 2d 992 (2001)).

Conclusions of law are fully reviewable on appeal. *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992). "[T]he trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826 (alteration in original) (quoting *State v. Golphin*, 352 N.C. 364, 409, 533 S.E.2d 168, 201 (2000), *cert. denied*, 532 U.S. 931, 121 S. Ct. 1379, 149 L. Ed. 2d 305 (2001)). A trial court's determination of whether an interrogation is conducted while a person is "in custody" for purposes of *Miranda* is a conclusion of law and thus fully reviewable by this Court. *Id.* at 336, 543 S.E.2d at 826.

For the reasons set forth below, we hold that the trial court's conclusion that defendant was not in custody for purposes of *Miranda* reflected an incorrect application of legal principles to the facts found by the trial court.[1]

In *Miranda* the United States Supreme Court recognized the "inherently compelling pressures" exerted upon an individual during an in-custody interrogation by law enforcement officers. 384 U.S. at 467, 86 S. Ct. at 1624, 16 L. Ed. 2d at 719. As a result, the Court prescribed procedural safeguards designed "to combat these pressures and to permit a full opportunity to exercise the [Fifth Amendment] privilege against self-incrimination." *Id.* at 467, 86 S. Ct. at 1624, 16 L. Ed. 2d at 719. These safeguards require that a defendant "be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* at 479, 86 S. Ct. at 1630, 16 L. Ed. 2d at 726.

A *Miranda* warning is only required, however, when an individual is subjected to a "custodial interrogation." *Barden*, 356 N.C. at 337, 572 S.E.2d at 123 (citing, *inter alia*, *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612, 16 L. Ed. 2d at 706). A "custodial interrogation" occurs when "questioning [is] initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612, 16 L. Ed. 2d at 706. In determining whether an individual was subjected to a custodial interrogation, courts consider whether, "based on the totality of the circumstances, . . . there was a 'formal arrest or [a] restraint on freedom of movement of the degree associated with a formal arrest.' " *Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828 (quoting *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405, *cert. denied*, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997)).

> Two discrete inquiries are essential to [this] determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was [not] at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are

1. Defendant's challenges to the trial court's findings of fact are rendered moot by our holding that the court's denial of his motion to suppress must be reversed.

> reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.

J.D.B. v. North Carolina, 564 U.S. 261, 270, 131 S. Ct. 2394, 2402, 180 L. Ed. 2d 310, 322 (2011) (quoting *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S. Ct. 457, 465, 133 L. Ed. 2d 383, 394 (1995) (brackets, internal quotation marks, and citations omitted)). Custody for *Miranda* purposes "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*, 511 U.S. 318, 323, 114 S. Ct. 1526, 1529, 128 L. Ed. 2d 293, 298 (1994) (per curiam). That is, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Id.* at 324, 114 S. Ct. at 1529, 128 L. Ed. 2d at 299 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S. Ct. 3138, 3151, 82 L. Ed. 2d 317, 336 (1984)).

As the United States Supreme Court has recently clarified, however, "[n]ot all restraints on freedom of movement amount to custody for purposes of *Miranda*." *Fields*, 565 U.S. at 509, 132 S. Ct. at 1189, 182 L. Ed. 2d at 28. Rather, "the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody." *Id.* at 509, 132 S. Ct. at 1190, 182 L. Ed. 2d at 28 (quoting *Maryland v. Shatzer*, 559 U.S. 98, 112, 130 S. Ct. 1213, 1224, 175 L. Ed. 2d 1045, 1058 (2010)).[2] Therefore, when a suspect's freedom of movement is already restricted because of conditions unrelated to the interrogation—such as civil commitment, criminal confinement, or hospitalization—reviewing courts must consider "all of the features of the interrogation" to determine "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Id.* at 509, 514, 132 S. Ct. at 1190, 1192, 182 L. Ed. 2d at 28, 31.

Here, in its order issued upon rehearing defendant's motion to suppress, the trial court made the following finding of fact in which it recited circumstances it found to support its determination that defendant was not subjected to a custodial interrogation:

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2. For example, "imprisonment alone is not enough to create a custodial situation within the meaning of *Miranda*," *Fields*, 565 U.S. at 511, 132 S. Ct. at 1190, 182 L. Ed. 2d at 28-29, and "the temporary and relatively nonthreatening detention involved in a traffic stop or *Terry* stop does not constitute *Miranda* custody," *Shatzer*, 559 U.S. at 113, 130 S. Ct. at 1224, 175 L. Ed. 2d at 1058 (citation omitted).

> Defendant was interviewed by two (2) detectives from the Monroe Police Department, they were in street clothes, asked permission to sit down (which was given by defendant), did not block the door; were in a room within the emergency department with a blaring loudspeaker and where conversations outside the room could be heard; that defendant was not handcuffed and was not restrained by law enforcement or the hospital, that the door to the room was glass and a sitter was assigned to observe the defendant, that the room had no bathroom, but the patient could walk to the door, open it and request personnel to accompany the patient to the bathroom (or make other requests of staff); that the interview was approximately 1 ½ (one and one half) hours in length (relatively short); that defendant was repeatedly told he was not under arrest and no warrants had been issued; that the conversation was calm and cordial in tone, that the detectives offered food or drink after the interview . . . .

The court also found, notably, the following facts:

> The officers . . . . never informed the defendant he could tell them to leave [and] never informed the defendant he could ask them to stop talking or he could stop talking to them and end the questioning.
>
> The officers did inform him that a*s soon as he talked, they could leave*.

(Emphasis added.)

Based upon its factual findings, the court explained that "after carefully weighing the totality of the circumstances, even the facts of defendant's involuntary commitment and the (very important) factor that defendant was never told he could end the questioning, this Court determines . . . that defendant was not in custody requiring Miranda Rights to be given." The court further concluded that "[a] reasonable person in defendant's position at the time of the interview would not have believed that he was in the custody of law enforcement." Accordingly, the court concluded, "The statements made by defendant were made when defendant was not in custody for purposes of the Miranda [rule]" and "[n]o Constitutional rights of defendant were violated."

In considering whether these conclusions resulted from a correct application of the law to the findings in this case, we focus on whether

"a reasonable person" in defendant's situation would "have felt he . . . was [not] at liberty to terminate the interrogation," *J.D.B.*, 564 U.S. at 270, 131 S. Ct. at 2402, 180 L. Ed. 2d at 322 (quoting *Thompson*, 516 U.S. at 112, 116 S. Ct. at 465, 133 L. Ed. 2d at 394), and "whether the relevant environment present[ed] the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Fields*, 565 U.S. at 509, 132 S. Ct. at 1190, 182 L. Ed. 2d at 28.

The United States Supreme Court in *Howes v. Fields* also addressed a situation in which a defendant's freedom of movement was limited by circumstances not connected to the interrogation. There a prisoner was escorted by corrections officers from his cell to a conference room where two sheriff's deputies questioned him for between five and seven hours without reading him his *Miranda* rights. *Id.* at 502-04, 132 S. Ct. at 1185-86, 182 L. Ed. 2d at 23. The deputies' questions, which elicited incriminating statements, concerned criminal activity unrelated to the offense that had resulted in the suspect's incarceration.

In *Fields* the Court confronted the question of whether, for purposes of *Miranda*, the suspect was "in custody" when he was incarcerated and, consequently, was "not free to leave the conference room by himself." *Id.* at 515, 132 S. Ct. at 1193, 182 L. Ed. 2d at 31. The Court first made clear that "imprisonment *alone* is not enough to create a custodial situation within the meaning of *Miranda*[,]" *id.* at 511, 132 S. Ct. at 1190, 182 L. Ed. 2d at 28-29 (emphasis added), given that the "standard conditions of confinement and associated restrictions on freedom will not necessarily implicate the same interests that the Court sought to protect when it afforded special safeguards to persons subjected to custodial interrogation," *id.* at 512, 132 S. Ct. at 1191, 182 L. Ed. 2d at 29. The Court held that rather than applying a *per se* rule in instances "[w]hen a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation. These include the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted." *Id.* at 514, 132 S. Ct. at 1192, 182 L. Ed. 2d at 30-31 (citation omitted).

In conducting its totality-of-the-circumstances analysis, the Court determined that the following circumstances weighed in favor of concluding that the suspect was in custody under *Miranda*: (1) he neither invited the interview nor consented to it in advance; (2) he was not advised that he was free to decline the interview; (3) "[t]he interview lasted for between five and seven hours in the evening and continued well past" his typical bedtime; (4) the deputies who interviewed him were armed; and (5) "one of the deputies, according to [the suspect],

'[u]sed a very sharp tone,' " and "on one occasion, profanity." *Id.* at 515, 132 S. Ct. at 1192-93, 182 L. Ed. 2d at 31.

The Court determined, on the other hand, that several circumstances weighed against a conclusion that the suspect had been subjected to a custodial interrogation: (1) he "was told at the outset of the interrogation, and was reminded again thereafter, that he could leave and go back to his cell whenever he wanted"; (2) he "was not physically restrained or threatened"; (3) he "was interviewed in a well-lit, average-sized conference room, where he was 'not uncomfortable' "; (4) he "was offered food and water"; and (5) "the door to the conference room was sometimes left open." *Id.* at 515, 132 S. Ct. at 1193, 182 L. Ed. 2d at 31.

The Court ultimately concluded that, "[t]aking into account all of the circumstances of the questioning—*including especially the undisputed fact that [the suspect] was told that he was free to end the questioning and to return to his cell*—we hold that [the suspect] was not in custody within the meaning of *Miranda*." *Id.* at 517, 132 S. Ct. at 1194, 182 L. Ed. 2d at 32 (emphasis added).

Here defendant's freedom of movement was already severely restricted by the civil commitment order. Unlike in *Fields*, however, these officers failed to inform defendant that he was free to terminate the questioning and, more importantly, communicated to him that they would leave only after he spoke to them about the robbery. As noted above, the trial court made an undisputed finding that the officers told defendant that "as soon as he talked, they could leave." Specifically, the transcript of the interrogation reveals that before defendant's incriminating statements, Lieutenant Goforth told him:

> So let's think about Monday night again and what took place Monday evening, okay. All right. And then after we talk about this, we're going to get up and walk out and you can have your supper and you can watch some Christmas shows on TV and rest, okay. And we're going to go back to work and we're going to leave you alone.

We conclude that these statements, made to a suspect whose freedom is already severely restricted because of an involuntary commitment, would lead a reasonable person in this position to believe he was not "at liberty to terminate the interrogation" without first answering his interrogators' questions about his suspected criminal activity. *J.D.B.*, 564 U.S. at 270, 131 S. Ct. at 2402, 180 L. Ed. 2d at 322 (quoting *Thompson*, 516 U.S. at 112, 116 S. Ct. at 465, 133 L. Ed. 2d at 394).

We are mindful that "no single factor is necessarily controlling when we consider the totality of the circumstances." *Barden*, 356 N.C. at 338, 572 S.E.2d at 124 (citation omitted). After considering all of the relevant facts, we conclude that defendant was subjected to a custodial interrogation and thus was entitled to a *Miranda* warning. Accordingly, the trial court's order denying defendant's motion to suppress must be reversed because the trial court's conclusion to the contrary was an erroneous application of the law.

We also conclude that this error was prejudicial and therefore requires us to vacate defendant's conviction. "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C.G.S. § 15A-1443 (2015); *see also State v. Robinson*, 330 N.C. 1, 31, 409 S.E.2d 288, 305 (1991) ("Because the error is of constitutional dimension, the State bears the burden of demonstrating that it was harmless beyond a reasonable doubt." (citing *State v. McKoy*, 327 N.C. 31, 44, 394 S.E.2d 426, 433 (1990))). The State has not attempted to show that the constitutional error alleged by defendant—and found by this Court—was harmless beyond a reasonable doubt. Accordingly, the error is deemed prejudicial.[3]

III. CONCLUSION

For the reasons stated above, we reverse the trial court's 27 September 2016 order denying defendant's motion to suppress the incriminating statements he made during his 12 December 2012 interrogation. Because this error was prejudicial, we vacate defendant's conviction and remand this case to the superior court for further proceedings not inconsistent with this opinion.

JUDGMENT VACATED; REVERSED AND REMANDED.

Justice ERVIN dissenting.

Although the determination of whether defendant was "in custody" for *Miranda* purposes strikes me as an exceedingly close call in this case, I am forced to conclude, given that we are required to employ

3. Because we hold that the trial court's erroneous conclusion that defendant was not entitled to a *Miranda* warning requires reversal of its suppression order, we need not consider whether his statements should have been suppressed on the alternative ground that they were involuntary.

a "totality of the circumstances" analysis and are bound by the trial court's findings of fact, that defendant was not subjected to "custodial interrogation" when he made the unwarned inculpatory statements which he seeks to suppress. As a result, I respectfully dissent from the Court's decision.

At approximately 8:46 p.m. on 10 December 2012, a group of men robbed Stephanie Gaddy of her purse while threatening her with a handgun. On 11 December 2012, between the hours of 12:45 p.m. and 1:05 p.m., defendant was transported by ambulance and hospitalized as the result of an intentional drug overdose. At about 3:50 p.m. on the same date, a magistrate entered an order involuntarily committing defendant based upon a finding that he was "mentally ill and dangerous to self or others." At 4:32 p.m., the Union County Sheriff's Office took defendant into custody pursuant to the magistrate's order. At about 5:11 p.m. on the following day, while still hospitalized pursuant to the involuntary commitment order, defendant was interrogated by officers of the Monroe Police Department for approximately one hour and twenty-eight minutes, during which time he made a number of inculpatory statements without ever having been advised of his *Miranda* rights.

In denying defendant's suppression motion, the trial court found, in pertinent part, that:

> 7) Jan Kinsella, nurse overseeing defendant at the time, gave permission for Detectives to speak with defendant. She informed them he was awake, conscious and alert and any medications given to defendant "should be out of his system by this time".
>
> 8) That defendant's room was located in the Emergency Department. The room had a solid door, with a full glass panel to the outside. This door was not locked during the interview.
>
> 9) When the officers entered the room, defendant was in a hospital gown in his bed, and Detective Williams sat against the back wall. [Officer] T.J. Goforth sat at the foot of defendant's bed.
>
> 10) There was no bathroom inside defendant's room. To leave the room, a patient must go to the door, open it and summon hospital personnel to accompany him or her. According to hospital records, defendant was ambulatory.

11) The officers were dressed in street clothes, but with visible badges and carrying weapons. They did not identify themselves as members of the Monroe Police Department, but did give first names at some point.

12) Before questioning, the officers asked permission to sit down, which was granted by defendant. Neither officer blocked the door.

13) No law enforcement officer sat outside defendant's room.

14) Outside the room was assigned a "sitter", a person charged to keep eyes on the defendant at all times, pursuant to his status as an involuntary commitment, although neither Defendant nor Officer Williams recalled seeing such at the time of the interview.

15) The officers announced immediately that they were not there to arrest the defendant and they did not have warrants for his arrest. This statement was repeated in various ways throughout the interview. . . .

16) The officers a) never informed the defendant he could leave. In fact, his involuntary commitment status, although civil in nature, effectively confined him to the hospital; b) never informed the defendant he could tell them to leave; and c) never informed the defendant he could ask them to stop talking or he could stop talking to them and end the questioning.

17) The officers did inform him that as soon as he talked, they could leave. The defendant was not in restraints or handcuffs; and was not arrested or served with warrants while at CMC-Union.

18) The defendant was never threatened. . . . The defendant was never isolated without the ability to contact others.

19) The interview with defendant was tape recorded, without the knowledge of the defendant. The tape is approximately one and one-half (1 ½) hours in length; about half of which concerned a theft at the defendant's workplace. The defendant is questioned last about the armed robbery.

20) In the background on the tape, an intercom blares loudly on several occasions. At other times, conversations are heard other than the one between the officers and the defendant. When questioned, Officer Williams describes the Emergency Room as "a very busy place". The defendant never asked to stop the interview, never complained of pain or discomfort, never asked for a break, or for food, beverage, etc.

21) The words spoken by both officers and defendant are conversational and cordial in tone. No voices were raised. The two officers' interrogation does not reveal a "good cop/bad cop" technique; more "very nice cop/nice cop" or at worse, "nice cop/(merely) pleasant cop".

22) The officers do continue the interview until an admission is made; and confront the defendant when they seem to believe he was being less than truthful. The interview is monotonic in tone. . . .

. . . .

58) Defendant had been involuntarily committed as a result of an intentional overdose; he was not free to leave the hospital by virtue of this status; no Miranda rights were given to defendant by law enforcement who were carrying badges and firearms. Defendant was never told he could ask law enforcement to stop questioning or to leave. Defendant had been administered medications in the late evening/early morning hours by physicians and had taken some amount of white pills late December 10, 2012 and early December 11, 2012; some of which may have remained in his system at the time of the interview.

59) Defendant was interviewed by two (2) detectives from the Monroe Police Department, they were in street clothes, asked permission to sit down (which was given by defendant), did not block the door; were in a room within the emergency department with a blaring loudspeaker and where conversations outside the room could be heard; that defendant was not handcuffed and was not restrained by law enforcement or the hospital, that the door to the room was glass and a sitter was assigned to observe the defendant, that the room had no bathroom, but the patient could walk to the door, open it and request personnel to

> accompany the patient to the bathroom (or make other requests of staff); that the interview was approximately 1 ½ (one and one half) hours in length (relatively short); that defendant was repeatedly told he was not under arrest and no warrants had been issued; that the conversation was calm and cordial in tone, that the detectives offered food or drink after the interview and promised nothing except to relay to the District Attorney the defendant's cooperation; that any residual drugs in his system were anti-anxiety or sleep-inducing; as described by the testifying experts; and seemingly lessening, in defendant's mind, the potential of coercion by officers; after carefully weighing the totality of the circumstances, even the facts of defendant's involuntary commitment and the (very important) factor that defendant was never told he could end the questioning, this Court determines by the preponderance of the evidence that the defendant was not coerced to give his statement on December 12, 2012; and the circumstances surrounding the defendant at the time and date in question show, considering the totality of the circumstances, that defendant was not in custody requiring Miranda Rights to be given.

In light of these findings of fact, the trial court concluded as a matter of law that "[a] reasonable person in defendant's position at the time of the interview would not have believed that he was in the custody of law enforcement" and that "[t]he statements made by defendant were made when defendant was not in custody for purposes of . . . Miranda." As a result, the trial court denied defendant's suppression motion.

According to well-established North Carolina law, the standard utilized in reviewing the "denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015) (quoting *State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012)). "[T]he trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (quoting *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000), *cert. denied*, 531 U.S. 1165, 121 S. Ct. 1126, 148 L. Ed. 2d 992 (2001)). "[T]he trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *Id.* at 336, 543 S.E.2d at 826 (alteration

in original) (quoting *State v. Golphin*, 352 N.C. 364, 409, 533 S.E.2d 168, 201 (2000), *cert. denied*, 532 U.S. 931, 121 S. Ct. 1379, 149 L. Ed. 2d 305 (2001)).

"[T]he initial inquiry in determining whether *Miranda* warnings were required is whether an individual was 'in custody.' " *Id.* at 337, 543 S.E.2d at 826. In *Miranda*, the United States Supreme Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706 (1966). The extent to which a person is "in custody" for *Miranda*-related purposes depends upon "whether a reasonable person in defendant's position, under the totality of the circumstances, would have believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest." *Buchanan*, 353 N.C. at 339-40, 543 S.E.2d at 828.

As the United States Supreme Court has recently stated, "[n]ot all restraints on freedom of movement amount to custody for purposes of *Miranda*," with the relevant test requiring the reviewing court to focus upon "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Howes v. Fields*, 565 U.S. 499, 509, 132 S. Ct. 1181, 1189-90, 182 L. Ed. 2d. 17, 27 (2012).

> In the paradigmatic *Miranda* situation—a person is arrested in his home or on the street and whisked to a police station for questioning—detention represents a sharp and ominous change, and the shock may give rise to coercive pressures. A person who is "cut off from his normal life and companions" and abruptly transported from the street into a "police-dominated atmosphere" may feel coerced into answering questions.
>
> By contrast, when a person who is already serving a term of imprisonment is questioned, there is usually no such change. . . . For a person serving a term of incarceration, . . . the ordinary restrictions of prison life, while no doubt unpleasant, are expected and familiar and thus do not involve the same "inherently compelling pressures" that are often present when a suspect is yanked from familiar surroundings in the outside world and subjected to interrogation in a police station.

Id. at 511, 132 S. Ct. at 1190-91, 182 L. Ed. 2d at 29 (quoting *Maryland v. Shatzer*, 559 U.S. 98, 104-106, 113, 130 S. Ct. 1213, 1219-20, 1224, 175 L. Ed. 2d 1045, 1054 and *Miranda*, 384 U.S. at 456, 86 S. Ct. at 1618, 16 L. Ed. 2d at 713). As a result, a person who is already subject to restraint for some reason, such as imprisonment or service of an involuntary commitment order, is not automatically deemed to be "in custody" for *Miranda*-related purposes. Instead, the necessary restraint equivalent to that associated with a formal arrest must stem from factors that are extraneous to the existing restraint.

After carefully reviewing the trial court's findings of fact, I am satisfied that they support a conclusion that a "reasonable person in defendant's position" would not "have believed that he was under arrest or was restrained in his movement to the degree associated with a formal arrest." *Buchanan*, 353 N.C. at 339-40, 543 S.E.2d at 828. As the trial court found, (1) the officers spoke with defendant for approximately ninety minutes in a hospital; (2) on several occasions during the interrogation, the officers clearly informed defendant that he was not under arrest, stating, among other things, that they did not possess warrants for defendant's arrest and "that they were not here to 'lock you up' "; (3) defendant was not handcuffed or formally placed under arrest prior to or during the interrogation; (4) nurses entered and left defendant's room during the interrogation; (5) defendant never lacked the ability to contact others during the interrogation; and (6), while the officers did press defendant on occasion, the interrogation was conducted in a conversational and even "monotonic" manner rather than in a confrontational tone.

As the Court notes, defendant was never asked if he wished to speak to the officers; the officers never told defendant that he could end the interrogation or ask the officers to leave; and the officers did tell defendant that, "after we talk about this, we're going to get up and walk out and you can have your supper and you can watch some Christmas shows on TV and rest, okay." Although these facts admittedly do, as my colleagues suggest, tend to cut in favor of a finding that defendant was "in custody" for *Miranda*-related purposes, I am not persuaded, in light of the totality of the circumstances, that they necessitate a finding to that effect, particularly given the fact that defendant was not isolated from civilian influences and the officers' repeated assurances that defendant was not under arrest and would not be placed under arrest during the time that he was being questioned. In fact, the officers' repeated assurance that defendant was not under arrest seems to me to be more directly relevant to the required "in custody" analysis than their failure to inform

defendant that he could end the interrogation whenever he chose to do so. Similarly, the officers' statement that they would leave once they finished "talk[ing] about this" with defendant does not, when taken in context, strike me as a threat that the conversation would continue until defendant confessed, given that such a "talk" could have concluded with a refusal on defendant's part to answer the officers' questions. When all the information reflected in the trial court's findings is considered as a unified whole and in light of the relevant legal standard, I am compelled to conclude that a reasonable person in the position in which defendant found himself would not believe that he was "under arrest or was restrained in his movement to the degree associated with a formal arrest." *Buchanan*, 353 N.C. at 339-40, 543 S.E.2d at 828. As a result, since the features of a "paradigmatic *Miranda* situation" are simply not present in this case, I respectfully dissent from my colleagues' determination that defendant's inculpatory statements were obtained in violation of *Miranda*.

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

STATE OF NORTH CAROLINA
v.
DERRICK AUNDRA HUEY

No. 355PA15

Filed 29 September 2017

1. Criminal Law—prosecutor's closing argument—personal opinion—defendant as liar—not prejudicial

A prosecutor acted improperly but not prejudicially by injecting his own opinion that defendant was lying, stopping just short of directly calling defendant a liar, pursuing the theme that "innocent men don't lie," and insinuating that defendant must be guilty because he lied. The focus of the prosecutor's argument was not on presenting multiple conflicting accounts and allowing the jury to come to its own conclusion regarding defendant's credibility, but to overwhelmingly focus on attacking defendant's credibility through the prosecutor's personal opinion. The prosecutor's statements were not so grossly improper that they amounted to prejudice because the evidence supported a permissible inference that defendant's testimony lacked credibility.

2. Criminal Law—prosecutor's closing argument—paid expert witness—excuse for defendant—improper

A prosecutor's assertion that an expert defense witness was "just a $6,000 excuse man" was improper. The statement implied that the witness was not trustworthy because he was paid by defendant for his testimony and went beyond the fact of reimbursement to name-calling.

3. Criminal Law—prosecutor's closing argument—defense counsel—not to be believed—improper

A prosecutor improperly argued that defense counsel should not be believed because he was paid to defend the defendant, insinuating that defense counsel (and an expert witness) had conspired to assist defendant in committing perjury. A prosecutor is not permitted to make uncomplimentary statements about defense counsel when there is nothing in the record to justify it.

4. Criminal Law—prosecutor's improper statements—not prejudicial—evidence against defendant not overcome

A prosecutor's improper statements were not prejudicial where defendant did not overcome the evidence against him.

5. Criminal Law—prosecutor's closing arguments—caution urged

Jury arguments, no matter how effective, must avoid base tactics such as: comments dominated by counsel's personal opinion; insinuations of conspiracy to suborn perjury when there has been no evidence of such action; name-calling; and arguing that a witness is lying solely on the basis that he will be compensated. Holdings finding no prejudice in various closing arguments must not be taken as an invitation to try similar arguments again. Trial judges must be prepared to intervene *ex mero motu* when improper arguments are made.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 777 S.E.2d 303 (2015), finding prejudicial error after appeal from a judgment entered on 18 July 2014 by Judge Eric L. Levinson in Superior Court, Mecklenburg County, and ordering that defendant receive a new trial. Heard in the Supreme Court on 29 August 2017.

Joshua H. Stein, Attorney General, by Alvin W. Keller, Jr., Assistant Attorney General, and Derrick C. Mertz, Special Deputy Attorney General, for the State-appellant.

Sarah Holladay for defendant-appellee.

BEASLEY, Justice.

In this appeal we consider whether statements made by the prosecutor in his closing argument were improper and prejudicial, such that the trial court should have intervened *ex mero motu*. The Court of Appeals concluded that the prosecutor's insinuations that defendant was a liar and lied on the stand in cahoots with defense counsel and his expert witness were improper, and had the cumulative effect of resulting in unfair prejudice to defendant. The unanimous panel of the Court of Appeals vacated the conviction and ordered a new trial. We hold that while the prosecutor's arguments were improper, the prosecutor's arguments did not amount to prejudicial error in light of the evidence against defendant. Accordingly, we reverse the decision of the Court of Appeals.

On 24 October 2011, defendant was indicted for first-degree murder. Defendant pleaded not guilty, and his trial commenced on 7 July 2014 before Judge Eric L. Levinson in Superior Court, Mecklenburg County. At trial the State's evidence tended to show that on 13 October 2011, at approximately 11:00 p.m., defendant Derrick Aundra Huey retrieved his gun from his truck, put the gun in his pocket, and told an unidentified person to ask James Love to come outside and talk about an earlier disagreement. Defendant then shot Love while they stood in the street. After the shooting defendant called 911 and, without identifying himself, stated, "I shot the motherfucker." A neighbor saw defendant's truck leave the scene after the shooting, but then returned shortly thereafter. Defendant initially denied shooting Love and told the police an unidentified man shot the victim. After listening to the 911 call, defendant admitted that he shot Love. Before trial defendant changed his account of the events in question numerous times. Then four months preceding trial, after communications with his attorney and expert witness, psychiatrist George Patrick Corvin, M.D., defendant changed his story once again and decided to admit to shooting Love, arguing that Love was shot in self-defense.

Defendant's evidence tended to show defendant and the victim had a history of prior altercations. Defendant testified that on the night in question, the victim threatened defendant. According to defendant, he was attempting to purchase drugs from an unidentified man when Love approached. Love hit defendant in the head and threatened him with what defendant believed to be a knife. While Love continued to threaten defendant, the unidentified man drew a handgun. Defendant grabbed the unidentified man's weapon and fired a warning shot. When Love did not

stop his aggressive actions towards defendant, defendant fired another shot, which killed Love. The unidentified man then took the gun and ran away. The defendant's evidence also showed the victim was known to carry a box cutter, and a box cutter was found near the victim's body. Further, the defense presented evidence that defendant has an intelligence quotient (I.Q.) of 61 and suffers from head trauma caused by an attempted suicide by automobile crash. Defendant's expert witness testified that his I.Q. and head trauma affected defendant's decision-making processes. Defendant also suffers from hallucinations, which have been treated with antipsychotic and antidepressant medications.

During closing arguments, the assistant district attorney opened by saying, "Innocent men don't lie." Over the course of his argument, the prosecutor used some variation of the verb "to lie" at least thirteen times. Referring to defendant, the prosecutor said:

> The defendant is not going to give you the truth. He's spent years planning to come in here to tell you he didn't do it, and then in the past four months he's come up with another story, and he's decided to go with that instead. But he's going to stick to that story, that story that he developed after he sat down with his attorney and his defense experts and decided on what he wanted to tell you. You're not going to find the truth there.

The prosecutor continued:

> [Dr. Corvin] sat down with Mr. Smith and the defendant and made sure the defendant understood the law, understood what he was charged with, what the elements were, and understood the defenses and what they meant and the law about the defenses. As he sits there on the stand, as he sits there right now, it has been explained to the defendant you're supposed to consider the fierceness of the assault that he was victim to. So isn't it interesting that four months ago it went from a grab to it went to a punch, a slash, a hack, not just at me but at everybody. All of a sudden a grab went to a wild-armed (phonetic) handle. Now that the law has been explained to him, now that he's been talked out of claiming I didn't do it.
>
> . . . But when the defendant was given a chance to just tell you the truth, he decided he's going to tell you whatever version he thought would get you to vote not guilty.

Referring to defense counsel, the prosecutor said:

> Mr. Smith tells you all we're trying to hide from this. All the evidence shows the box cutter was involved, the box cutter was involved, all the evidence. Do you know who's not a witness in this case? Mr. Smith. He wasn't there. He's paid to defend the defendant.

Referring to the defense's expert witness, Dr. Corvin, the prosecutor stated:

> Now, I want to talk a little bit about Dr. Corvin, some of his opinions. But before we do that, we've got to make something clear. Make no mistake. Dr. Corvin has a client here. He works for the defendant. He is not an impartial mental-health expert. . . . Dr. Corvin is a part of the defense team, he has a specific purpose, and he's paid for it. You heard Dr. Corvin makes over $300,000 a year just working for criminal defendants. He is not impartial. In fact, I'd suggest to you he's just a $6,000 excuse man. That's what he is. . . . Dr. Corvin came in here and did exactly what he was paid to do[.]

The prosecutor repeated the theme of "innocent men don't lie" once more in the opening of his rebuttal argument, stating: "I'm going to say this again, innocent men don't lie, they simply don't have to. The truth shall set you free unless, of course, you're on trial for a murder that you committed." Defense counsel did not object at any of these points during the prosecutor's closing arguments. The trial court did not intervene *ex meru moto* at any time during the prosecutor's closing arguments.

On 18 July 2014, the jury found defendant guilty of voluntary manslaughter. Defendant appealed the conviction to the Court of Appeals, arguing "the trial court erred by failing to intervene *ex mero motu* when the State made improper statements during closing arguments."[1] *State v. Huey*, ___ N.C. App. ___, ___, 777 S.E.2d 303, 305 (2015). The Court of Appeals agreed with defendant, relying heavily on *State v. Hembree*, in which this Court held the prosecutor's statements in closing argument were grossly improper and the trial court erred by failing to intervene

1. On appeal, defendant also argued the trial court erred in instructing the jury on flight. The Court of Appeals rejected this argument, concluding "[t]here is some evidence in the record supporting the theory that Defendant drove away briefly in order to dispose of the firearm he used to shoot Love." *Huey*, ___ N.C. App. ___, 777 S.E.2d at 308 (2015). That decision is not on appeal to this Court.

ex mero motu, but did not address whether this error, which was one of three identified by the defendant, was prejudicial in isolation. 368 N.C. 2, 20, 770 S.E.2d 77, 89 (2015). In this case the Court of Appeals summarily determined that defendant's entire defense was predicated on his credibility and the credibility of his expert witness; therefore, the panel concluded that the trial court's error in failing to intervene *ex mero motu* in the prosecutor's improper closing argument could not be deemed harmless. *Huey*, ___ N.C. App. at ___, 777 S.E.2d at 308. The court vacated defendant's conviction and sentence and remanded the case for a new trial. *Id.* at ___, 777 S.E.2d at 308.

In an attempt to strike a balance between allowing attorneys appropriate latitude to argue heated cases and enforcing proper boundaries to maintain professionalism, this Court has considered prosecutors' closing arguments at length.

> The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene ex mero motu. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord . . . .

State v. Jones, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citing *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999)). Thus, when defense counsel fails to object to the prosecutor's improper argument and the trial court fails to intervene, the standard of review requires a two-step analytical inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial. *See Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157 (1986); *see also Jones*, 355 N.C. at 133-34, 558 S.E.2d at 107-08. Only when it finds both an improper argument and prejudice will this Court conclude that the error merits appropriate relief. *See Jones*, 355 N.C. at 134-35, 558 S.E.2d at 108-09 (ordering a new sentencing hearing because the prejudicial arguments were made during the sentencing phase of the defendant's capital trial).

First, although control of jury argument is left to the discretion of the trial judge, trial counsel must nevertheless conduct themselves

within certain statutory parameters. *State v. Wiley*, 355 N.C. 592, 632, 565 S.E.2d 22, 50 (2002), *cert. denied* 537 U.S. 1117, 154 L. Ed. 2d 795 (2003). It is improper for lawyers in their closing arguments to "become abusive, inject [their] personal experiences, express [their] personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record." N.C.G.S. § 15A-1230(a)(2015). Within these statutory confines, we have long recognized that " 'prosecutors are given wide latitude in the scope of their argument' and may 'argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom.' " *State v. Phillips*, 365 N.C. 103, 135, 711 S.E.2d 122, 145 (2011) (quoting *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008)), *cert. denied*, 565 U.S. 1204, 182 L. Ed. 2d 176 (2012).

If an argument is improper, and opposing counsel fails to object to it, the second step of the analysis requires a showing that the argument is *so grossly* improper that a defendant's right to a fair trial was prejudiced by the trial court's failure to intervene. *Jones*, 355 N.C. at 133, 558 S.E.2d at 107. Our standard of review dictates that "[o]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Anthony*, 354 N.C. 372, 427, 555 S.E.2d 557, 592 (2001) (quoting *State v. Richardson*, 342 N.C. 772, 786, 467 S.E.2d 685, 693, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996)). "[I]t 'is not enough that the prosecutors' remarks were undesirable or even universally condemned.' " *Darden*, 477 U.S. at 181, 91 L. Ed. 2d at 157 (quoting *Darden v. Wainwright*, 699 F.2d 1031, 1036 (11th Cir. 1083)). For an appellate court to order a new trial, the "relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Id.* at 181, 91 L. Ed. 2d at 157 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)); *State v. Mann*, 355 N.C. 294, 307-08, 560 S.E.2d 776, 785 ("[T]o warrant a new trial, the prosecutor's remarks must have perverted or contaminated the trial such that they rendered the proceedings fundamentally unfair."), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002). In determining whether a prosecutor's statements reached this level of gross impropriety, we consider the statements "in context and in light of the overall factual circumstances to which they refer." *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995) (citing *State v. Pinch*, 306 N.C. 1, 24, 292 S.E.2d 203, 221, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *and overruled on other grounds by*, *inter alia*,

State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988)). When this Court has found the existence of overwhelming evidence against a defendant, we have not found statements that are improper to amount to prejudice and reversible error. *State v. Sexton*, 336 N.C. 321, 363-64, 444 S.E.2d 879, 903 (concluding the trial court was not required to intervene *ex mero motu* when prosecutor directly called the defendant a liar), *cert. denied*, 513 U.S. 1006, 130 L. Ed. 2d 429 (1994), *grant of postconviction relief aff'd*, 352 N.C. 336, 532 S.E.2d 179 (2000).

Despite this deferential standard, this Court has held that improper arguments amount to prejudice when the circumstances required. In *Jones* this Court held that it was reversible error when the trial court failed to intervene in the closing argument of a sentencing hearing after the prosecutor's comment "You got this quitter, this loser, this worthless piece of—who's mean. . . . He's as mean as they come. He's lower than the dirt on a snake's belly." 355 N.C. at 133, 558 S.E.2d at 107. In the context of a sentencing proceeding in a capital case, which involves evidence specifically geared towards a defendant's character, past behavior, and personal qualities, "personal conclusions that. . . amount[ ] to little more than name-calling" and "repeated degradations of the defendant" are "grossly improper and prejudicial." *Id.* at 134, 558 S.E.2d at 108. In *State v. Miller* this Court held the solicitor's remarks during closing arguments, especially those referencing the defendants as "habitual storebreakers," to be "grossly unfair" and "well calculated to mislead and prejudice the jury" because the defendants did not testify or offer their own character evidence, and the State did not present evidence to show the defendants were habitual storebreakers. 271 N.C. 646, 660, 157 S.E.2d 335, 346 (1967). "If verdicts cannot be carried without appealing to prejudice or resorting to unwanted denunciation, they ought not to be carried at all." *State v. Tucker*, 190 N.C. 708, 714, 130 S.E.2d 720, 723 (1925).

Turning to the prosecutor's closing argument in this case, we consider whether his statements were first, improper, and then, so grossly improper as to prejudice defendant's right to due process.

[1] First, defendant argues the prosecutor's repeated statements insinuating that defendant lied were improper. Over the course of his argument, the prosecutor used some variation of "lie" at least thirteen times, though never directly calling defendant a liar. "Innocent men don't lie" appeared to be the State's theme: the prosecutor used it at the beginning of his closing argument and again when beginning his rebuttal. The prosecutor also referred to defendant's claim of self-defense as "just not a true statement." The prosecutor commented that the unidentified man

involved in the shooting scenario was "imaginary" and "simply made up." The prosecutor also asserted defendant engaged in "[t]he act of lying" and "trie[d] to hide the truth from you all." Relying on *Hembree*, defendant argues that even though the prosecutor did not directly call defendant a liar, the effect and intimations of his statements are also improper. 368 N.C. at 19-20, 770 S.E.2d at 89.

A prosecutor is not permitted to insult a defendant or assert the defendant is a liar. *See Jones*, 355 N.C. at 133-34, 558 S.E.2d at 107; *Miller*, 271 N.C. at 659, 157 S.E.2d at 345 ("[A prosecutor] can argue to the jury that they should not believe a witness, but he should not call him a liar."). A prosecutor is permitted to address a defendant's multiple accounts of the events at issue to suggest that the "defendant had not told the truth on several occasions and the jury could find from this that he had not told the truth at his trial." *State v. Bunning*, 338 N.C. 483, 489, 450 S.E.2d 462, 465 (1994). In this case there is no doubt the prosecutor's statements directed at defendant's credibility are improper. Statutorily, the prosecutor is not permitted to inject his opinion as to the truth or falsity of the evidence or comment on a defendant's guilt or innocence during his argument. N.C.G.S. § 15A-1230(a). Here the prosecutor injected his own opinion that defendant was lying, stopping just short of directly calling defendant a liar, and his theme, "innocent men don't lie," insinuated that because defendant lied, he must be guilty. The focus of the prosecutor's argument was not on presenting multiple conflicting accounts and allowing the jury to come to its own conclusion regarding defendant's credibility. Rather, the State's argument appeared to overwhelmingly focus on attacking defendant's credibility through the prosecutor's personal opinion.

Nonetheless, even though the statements are improper, we do not find them to be so grossly improper that they amount to prejudice. Unlike the argument at issue in *Miller*, which this Court found prejudicial, the evidence in this case does support a permissible inference that defendant's testimony lacked credibility. Defendant gave six alternating versions of the shooting, five to police and one to the jury.[2] Accordingly,

2. Defendant told the 911 operator he shot the victim. He told Detective Crum he shot the victim, then told Detective Crum he meant to say an unknown male shot the victim. Defendant first told Detective Sterrett an unknown male shot the victim. Then he told Detective Sterrett he shot the victim after taking the gun from his truck and putting the gun in his pocket, and asking someone to get the victim to come outside. Then he told Detective Sterrett he shot the victim after approaching the victim with the gun exposed. At trial, defendant told the jury that while he was talking with a drug dealer, the victim approached and attacked him and the drug dealer, and defendant grabbed the drug dealer's gun and shot the victim.

this was evidence from which the prosecutor could argue defendant had not told the truth on several occasions, from which, the jury could find that defendant had not told the truth at his trial. While we do not approve of the prosecutor's repetitive and dominant insinuations that defendant was a liar, we do believe sufficient evidence to supported the premise that defendant's contradictory statements were untruthful. Further, the evidence supporting defendant's voluntary manslaughter conviction is overwhelming, as discussed below.

[2] Next, defendant argues that the prosecutor's assertion that defense expert witness Dr. Corvin was "just a $6,000 excuse man" was also improper. The statement implied Dr. Corvin was not trustworthy because he was paid by defendant for his testimony. Evidence in the record supports the assertion that Dr. Corvin received compensation. Dr. Corvin's practice received over $300,000 in 2012 for services to criminal defendants, and he testified he worked in excess of twenty hours on this case at the legislature-authorized rate of $320 per hour. This Court has held it is proper for an attorney to point out potential bias resulting from payment a witness received or would receive for his services, while it is improper to argue that an expert should not be believed because he would give untruthful or inaccurate testimony in exchange for pay. *State v. Rogers*, 355 N.C. 420, 462-64, 562 S.E.2d 859, 885-86 (2002). Here the prosecutor's statement goes beyond pointing out that Dr. Corvin was reimbursed for his opinion to argue that Dr. Corvin was paid to formulate an excuse for defendant. In *State v. Duke* this Court considered similar language when the prosecutor referred to the defendant's expert witness as the "$15,000 man" twice during closing arguments. 360 N.C. 110, 127-28, 623 S.E.2d 11, 23 (2005), *cert. denied*, 549 U.S. 855, 166 L. Ed. 2d 96 (2006). Though the statement in *Duke* was improper because it insinuated that the defendant's expert would say anything to get paid, we did not find this language "so overreaching as to shift the focus of the jury from its fact-finding function to relying on its own personal prejudices or passions." *Id.* at 130, 623 S.E.2d at 24. As is the case here, the prosecution's statement emphasized the expert witness's fee, and the jury may properly take that information into account when determining the credibility of the expert and the weight to place on his testimony. *Id.* at 130, 623 S.E.2d at 24. In this case we do acknowledge the additional word "excuse" and believe this language amounts to name-calling, which is certainly improper.

[3] Finally, defendant argues that the prosecutor improperly argued that defense counsel should not be believed because "[h]e's paid to defend the defendant." Defendant also argues the prosecutor improperly

insinuated that the defense attorney and the defense expert conspired to assist defendant in committing perjury before the jury by stating: "[H]e's going to stick to that story, that story that he developed after he sat down with his attorney and his defense experts and decided on what he wanted to tell you. You're not going to find the truth there." We agree this language was improper. A prosecutor is not permitted to make "uncomplimentary" statements about defense counsel when "there is nothing in the record to justify it." *Miller*, 271 N.C. at 658, 157 S.E.2d at 345.

In *Hembree* this Court considered a similar statement by a prosecutor: "defendant, along with his two attorneys, come together to try and create some sort of story." 368 N.C. at 20, 770 S.E.2d at 89. In *Hembree*, as in the case *sub judice*, there was no evidence in the record to suggest either defendant committed perjury at the behest of his attorney. These arguments are improper because they not only allowed the prosecutor to inject his personal opinion about how defendant's trial strategy was formed, and thus insinuate the falsity of the testimony, but they also portray defense counsel in an "uncomplimentary" light by suggesting defense counsel suborned perjury. In *Hembree* this Court did not consider whether the improper jury argument on its own amounted to prejudice. Instead, this Court held that the cumulative effect of the trial court's three errors (allowing excessive evidence of the defendant's prior conduct under Rule 404(b), allowing impermissible character evidence under Rule 404(a), and failing to intervene in improper jury argument) deprived the defendant of a fair trial without determining whether any single error was prejudicial in isolation. 368 N.C. at 9, 770 S.E.2d at 83. That kind of cumulative effect does not exist in this case. Here the improper jury argument was the single alleged error, occurring over the span of an eleven-day trial, that is before this Court on appeal. We turn now to the prejudice analysis.

[4] Though "we have found grossly improper the practice of flatly calling a witness or opposing counsel a liar when there has been no evidence to support the allegation," *id.* at 19, 770 S.E.2d at 89 (quoting *Rogers*, 355 N.C. at 462, 562 S.E.2d at 885), the inquiry does not end there.[3] Despite

3. *Rogers* cites to *Couch v. Private Diagnostic Clinic*, 133 N.C. App. 93, 100, 515 S.E.2d 30, 36 (1999), *aff'd per curiam*, 351 N.C. 92, 520 S.E.2d 785 (1999), in which this Court concluded that counsel "engaged in a grossly improper jury argument that included at least nineteen explicit characterizations of the defense witnesses and opposing counsel as liars," but this Court split over whether the trial court's failure to intervene *ex mero motu* was prejudicial to the defendant. Thus, the Court of Appeals holding that the improper argument was not of "such gross impropriety to entitle the defendants to a new trial," 133 N.C. App. at 100, 515 S.E.2d at 36, was left undisturbed and stands without precedential value.

our agreement with defendant that each of the prosecutor's contested statements are improper, the applicable standard of review requires us to consider whether these improper arguments deprived defendant of a fair trial. To demonstrate prejudice, defendant has the burden to show a "reasonable possibility that, had the error[s] in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a)(2015). The primary focus of our inquiry is not solely on the frequency of the improper arguments or the substance of such statements. While certainly taking such variables into consideration, a reviewing court must focus on the statements' likely effect on the jury's role as fact-finder, namely whether the jury relied on the evidence or on prejudice enflamed by the prosecutor's statements. *See Duke*, 360 N.C. at 130, 623 S.E.2d at 24. Though we cannot always be certain which aspects of evidence and argument the jury actually considered in coming to its decision, we must consider the arguments "in context and in light of the overall factual circumstances to which they refer." *Alston*, 341 N.C. at 239, 461 S.E.2d at 709 (citing *Pinch*, 306 N.C. at 24, 292 S.E.2d at 221). Thus, we look to the evidence presented at trial and compare it with what the jury actually found. Incongruity between the two can indicate prejudice in the conviction.

Here, despite defendant's five conflicting stories before trial, it was undisputed at trial that defendant shot the victim after having previously argued with him. Defendant admitted to being upset because the victim had "cussed him out" before the shooting. Immediately after the shooting, defendant admitted to the 911 operator that he shot the victim. According to defendant's own testimony, despite believing the victim may have had a knife or box cutter in one of his hands, he did not see a weapon in the victim's hand before he shot him. Defendant explained that it was dark at the time, and although he never saw the box cutter, he "felt it." Defendant's injuries from the altercation consisted of a scratch on his collarbone area and a torn t-shirt, while the State presented evidence suggesting the additional "mark" on his head may have been in existence previously. According to defendant's own testimony, the unidentified bystander pulled out a gun to shoot the victim, and defendant grabbed the gun and shot the victim himself. It is undisputed that defendant fled the scene after the shooting. Defendant also testified he returned to the scene after fleeing. Defendant also admitted to drinking before and being high on heroin during the altercation. Finally, even without the prosecutor's statements addressing defendant's credibility, it was relatively clear from Detective Crum's, Detective Sterrett's, and defendant's own testimony that several, widely varying iterations of

defendant's story existed prior to the version defendant presented to the jury at trial.

During its deliberations the jury asked to see a photo of the box cutter as it was found at the scene and the box cutter itself. The jury also asked to see the t-shirt defendant was wearing when he was arrested, which defendant testified had been torn during the altercation with the victim. Further, the jury asked to review the transcripts of the 911 call and Detective Sterrett's interrogation of defendant. Therefore, the jury considered the evidence during deliberations, rather than solely relying on the prosecutor's improper statements. Also, the jury's finding that defendant was guilty of voluntary manslaughter, rather than first-degree murder, indicates the jury was persuaded by defendant's and his expert's testimony to some extent. If the prosecutor's statements had destroyed all credibility of the defense team, as defendant asserts, there would be no testimony to support a finding of voluntary manslaughter; however, the jury convicted defendant of voluntary manslaughter, indicating they found he acted in imperfect self-defense. A finding of self-defense, whether perfect or imperfect, requires the jury to find a defendant's testimony credible to some degree because the jury must find that the defendant possessed an honest and reasonable belief it was necessary to kill the victim in order to save himself from death or great bodily harm. *See State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981). Here the jury was properly instructed on self-defense and imperfect self-defense. From the evidence against defendant in this case, it is reasonable that a jury could find defendant used excessive force as there is no evidence he actually saw a weapon in the victim's hand. Defendant has not overcome the evidence against him and thus has failed to show prejudice. Therefore, it was error for the Court of Appeals to assume prejudice without considering the evidence against defendant and the jury's finding of voluntary manslaughter rather than first-degree murder.

[5] For the foregoing reasons, we hold it was not reversible error when the trial court failed to intervene *ex mero motu* in the prosecutor's closing arguments. Nonetheless, we are disturbed that some counsel may be purposefully crafting improper arguments, attempting to get away with as much as opposing counsel and the trial court will allow, rather than adhering to statutory requirements and general standards of professionalism. Our concern stems from the fact that the same closing argument language continues to reappear before this Court despite our repeated warnings that such arguments are improper. *See Jones*, 355 N.C. at 134-35, 558 S.E.2d at 108-09; *see also Rogers*, 355 N.C. at 464-65, 562 S.E.2d at 886.

"The power and effectiveness of a closing argument is a vital part of the adversarial process that forms the basis of our justice system. A well-reasoned, well-articulated closing argument can be a critical part of winning a case." *Jones*, 355 N.C. at 135, 558 S.E.2d at 108. Yet, arguments, no matter how effective, must avoid base tactics such as: (1) comments dominated by counsel's personal opinion; (2) insinuations of conspiracy to suborn perjury when there has been no evidence of such action; (3) name-calling; and (4) arguing a witness is lying solely on the basis that he will be compensated. Our holding here, and other similar holdings finding no prejudice in various closing arguments, must not be taken as an invitation to try similar arguments again. We, once again, instruct trial judges to be prepared to intervene *ex mero motu* when improper arguments are made.

Therefore, for the reasons stated above, we reverse the decision of the Court of Appeals as to the issue before us on appeal and instruct that court to reinstate the trial court's judgment.

REVERSED.

STATE OF NORTH CAROLINA
v.
ALONZO ANTONIO MURRELL

No. 233PA16

Filed 29 September 2017

Indictment and Information—armed robbery—dangerous weapon—not sufficiently described

An armed robbery indictment was insufficient where the dangerous weapon element was alleged to be a note that said "armed." The nature, identity, or deadly character of that unidentified weapon was not described at any point in the indictment.

Justice JACKSON dissenting.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, ___ S.E.2d ___ (2016), arresting a judgment entered on 15 May 2015 by Judge John E. Nobles, Jr., in Superior Court, Onslow County, and remanding for resentencing. Heard in the Supreme Court on 10 April 2017.

Joshua H. Stein, Attorney General, by Oliver G. Wheeler, IV, Assistant Attorney General, for the State-appellant.

Glenn Gerding, Appellate Defender, by Daniel L. Spiegel, Assistant Appellate Defender, for defendant-appellee.

ERVIN, Justice.

The issue before us in this case is whether an indictment returned for the purpose of charging defendant with the offense of robbery with a dangerous weapon sufficed to give the trial court jurisdiction to enter judgment against defendant based upon his conviction for having committed that offense. After careful consideration of the record in light of the applicable law, we hold that the challenged indictment was fatally defective because it did not sufficiently allege all of the essential elements of the offense of robbery with a dangerous weapon and, for that reason, affirm the Court of Appeals' decision.

At 11:45 a.m. on 13 September 2013, Stacy Phillips, a teller at a PNC Bank branch located in Jacksonville, was the victim of a robbery. At that time, a man entered the bank and laid a note on the counter in front of Ms. Phillips. "[T]he first thing [Ms. Phillips] saw on [the note] was 'armed,' " which led her to believe that a robbery was in progress. More specifically, the note that the man placed before Ms. Phillips read "armed" and instructed, "eyes down, 2,000 — or two straps of hundreds, two straps of fifties, two straps of twenties, no devices." In spite of the fact that the only item that she saw in the robber's possession was a case that he carried under his arm, Ms. Phillips believed that the robber was armed based upon the information contained in the note that he presented to her.

Although Ms. Phillips attempted to grab the note, the robber said, "Don't touch it." At that point, Ms. Phillips gave the robber a bait strap, which included $330 in marked bills; some additional $20, $50, and $100 bills; and a dye pack, all of which the robber placed in the case. As the robber reached the door and began to leave the bank, Ms. Phillips

activated a silent alarm and complied with PNC's robbery protocol by calling the police, locking the facility's doors, preparing an account of what she had experienced, and providing assistance to the other persons present at the time of the robbery.

Detective Gary Manning of the Jacksonville Police Department, accompanied by several other officers, arrived at the bank shortly after the robbery. After securing the crime scene and obtaining information from other witnesses, Detective Manning viewed surveillance video footage related to the robbery. As he did so, Detective Manning observed that a "red bloom . . . emanat[ed] from the . . . front passenger area of the vehicle" apparently used by the robber to facilitate his escape. According to Karen Salefsky, the bank manager, the "red bloom" that could be seen in the surveillance video resulted from the explosion of the dye pack contained in the bait strap.

On the following day, Detective Manning received a call from an individual who "had found money in a dumpster in Phoenix Park Apartments." While searching the dumpster, Detective Manning retrieved money "stained with a bright red" dye "consistent with the manner in which a dye pack is prepared." In addition, Detective Manning determined that the serial numbers of the currency retrieved from the dumpster matched those printed on the currency taken during the robbery.

On 23 September 2013, Crime Stoppers received a tip identifying the suspect depicted in the surveillance footage, which had been released to the public, as defendant, a resident of Kinston. After noticing "a striking resemblance between photographs . . . of [defendant] and the person depicted in the surveillance footage," Detective Manning began to investigate defendant's possible connection to the robbery. Detective Manning learned that defendant had access to a vehicle resembling the one shown in the surveillance video footage, which was a black Suzuki XL7 that was registered to defendant's girlfriend, Heather Crider. On 4 October 2013, Ms. Crider's Suzuki XL7 was located in downtown Kinston. While searching the vehicle with Ms. Crider's consent, Detective Manning observed red smudges on the vehicle's exterior consistent with those that would have been made during the release of the dye pack contained in the bait strap.

At the time that he was arrested in Kinston on 11 October 2013, defendant possessed a duffle bag that contained, among other things, a green bed sheet stained with red material that was consistent with the color of certain stains found in the dumpster and on the exterior of Ms. Crider's Suzuki XL7. After waiving his *Miranda* rights, defendant

admitted that he had robbed the Jacksonville PNC Bank and gave an account of that episode consistent with the information that Detective Manning developed during his investigation. Although defendant told Detective Manning that he had been "provided" with a "pee shooter," which Detective Manning "took to mean a small caliber pistol," before entering the PNC Bank, investigating officers never recovered it or any other weapon believed to have been used during the robbery.

On 12 August 2014, the Onslow County grand jury returned a bill of indictment that was intended to charge defendant with robbery with a dangerous weapon. The indictment alleged, in pertinent part, that:

> defendant [ ] unlawfully, willfully and feloniously did steal, take and carry away another's personal property, U.S. Money from PNC Financial Services Group, Inc., at the location of "PNC Bank" . . . when a bank employee, Stacy Phillips was present. The defendant committed this act by way of it reasonably appearing to the victim Stacy Phillips that a dangerous weapon was in the defendant's possession, being used and threatened to be used by communicating that he was armed to her in a note with demands and instructions for her to complete, whereby the life of Stacy Phillips was threatened and endangered.

The charges against defendant came on for trial before the trial court and a jury at the 11 May 2015 criminal session of the Superior Court, Onslow County. On 15 May 2015, the jury returned a verdict convicting defendant as charged. Based upon the jury's verdict, the trial court entered a judgment sentencing defendant to a term of fifty-three to seventy-six months imprisonment. Defendant noted an appeal from the trial court's judgment to the Court of Appeals.

In seeking relief from the trial court's judgment before the Court of Appeals, defendant argued, among other things, that the trial court had erred by failing to dismiss the indictment returned against him in this case on the grounds that it failed to properly charge him with the commission of robbery with a dangerous weapon. According to defendant, "[t]he requirements for an indictment charging a crime in which one of the elements is the use of a deadly weapon are (1) to 'name the weapon and (2) either to state expressly that the weapon used was a "deadly weapon" or to allege such facts as would necessarily demonstrate the deadly character of the weapon,' " quoting *State v. Brinson*, 337 N.C. 764, 768, 448 S.E.2d 822, 824 (1994) (emphasis omitted) (quoting *State*

v. Palmer, 293 N.C. 633, 639-40, 239 S.E.2d 406, 411 (1997)). More specifically, defendant asserted that

> [a]lthough the language "robbery with a dangerous weapon" appears in the caption, the indictment fails to name any weapon. Since no weapon was named, the State could not expressly state that the weapon was a deadly weapon or allege facts that demonstrate the deadly character of the weapon. The indictment also fails to allege any facts of how the victim's life was threatened or endangered. The indictment simply states that it appeared to the victim that Mr. Murrell possessed a "dangerous weapon."

In defendant's view, "[b]ecause the dangerous weapon [that] Mr. Murrell allegedly possessed inside the bank was not named[,] the trial court was without subject matter jurisdiction." In support of this contention, defendant pointed out that "the 'implement' alleged in the indictment is a note which contained the word 'armed,' " which "is not an article, instrument or substance likely to produce death or great bodily harm," citing *State v. Wiggins*, 78 N.C. App. 405, 406, 337 S.E.2d 198, 199 (1985), and which "cannot[, for that reason,] constitute a dangerous weapon for purposes of robbery with a dangerous weapon pursuant to N.C.[G.S.] § 14-87."

The State, on the other hand, argued that the indictment intended to charge defendant with robbery with a dangerous weapon sufficed to establish the trial court's jurisdiction because it alleged "that Defendant handed a note saying 'armed' to the victim, and that it reasonably appeared to the victim that Defendant possessed a 'dangerous weapon.' " According to the State, the indictment at issue in this case alleged the essential elements of the crime of robbery with a deadly weapon, citing *State v. Beaty*, 306 N.C. 491, 496, 293 S.E.2d 760, 764 (1982), *disapproved of on other grounds by State v. White*, 322 N.C. 506, 518, 369 S.E.2d 813, 819 (1988), given that the indictment included references to "deadly weapon" and "armed."

On 19 April 2016, the Court of Appeals filed an opinion holding that the indictment intended to charge defendant with robbery with a dangerous weapon was fatally defective because it failed to name any dangerous weapon that defendant allegedly employed. *State v. Murrell*, ___ N.C. App ___, ___ S.E.2d ___, 2016 WL 1565576, at *5, (Apr. 19, 2016) (No. COA15-1097) (unpublished). As a result, the Court of Appeals arrested judgment with respect to the charge of robbery with a dangerous weapon. *Id.* However, given that the challenged indictment sufficiently alleged the commission of a common law robbery, the Court of

Appeals remanded this case to the Superior Court, Onslow County, "for entry of judgment and resentencing on common law robbery." *Id.* (quoting *State v. Marshall*, 188 N.C App. 744, 752, 656 S.E.2d 709, 715, *disc. rev. denied*, 362 N.C. 368, 661 S.E.2d 890 (2008)). On 22 September 2016, this Court granted the State's discretionary review petition.

In seeking to persuade this Court to reverse the Court of Appeals' decision, the State argues that the indictment at issue in this case sufficed to charge the commission of a robbery with a dangerous weapon because it alleged all of the elements of that criminal offense. As an initial matter, the State notes that this Court has held that "[i]t is sufficient for indictments or warrants seeking to charge a crime in which one of the elements is the use of a deadly weapon (1) to name the weapon and (2) either to state expressly that the weapon used was a 'deadly weapon' or to allege such facts as would necessarily demonstrate the deadly character of the weapon," quoting *Palmer*, 293 N.C. at 639-40, 239 S.E.2d at 411 (emphasis omitted). The indictment at issue in this case satisfies the first of these two approaches, according to the State, because "the indictment *did* name a weapon" given the allegation that defendant presented a "note saying that [he] was armed," and because this statement "amounts to [an allegation concerning the] actual threatened use of a dangerous weapon." In addition, the State asserts that the indictment at issue in this case satisfies the second of the approaches delineated in *Palmer* because "the indictment here expressly states that it appeared that Defendant possessed a 'dangerous weapon.' " As a result, contrary to the Court of Appeals' decision, the State contends that "the indictment meets the aforementioned requirements for robbery with a dangerous weapon."

On the other hand, defendant asserts that the indictment that was intended to charge defendant with robbery with a dangerous weapon in this case failed to satisfy either of the approaches delineated in *Palmer* and did not, for that reason, suffice to support defendant's conviction for robbery with a dangerous weapon given its failure to "specify a dangerous weapon," to "set forth any facts describing a dangerous weapon," or to "allege that Mr. Murrell possessed any weapon at all." According to defendant, *Palmer* requires "some minimal degree of specificity in describing the dangerous weapon at issue in an indictment for robbery with a dangerous weapon." In defendant's view, "[t]he State . . . must prove that the instrument in question is a dangerous weapon"; in the event that "the State cannot name a dangerous weapon nor describe one, the State cannot allege nor prove [armed robbery]." A note containing the word "armed," cannot, in defendant's view, constitute a

"dangerous weapon." According to defendant, the indictment fails to allege that defendant possessed a dangerous weapon while committing the robbery, citing *State v. Keller*, 214 N.C. 447, 449, 199 S.E. 620, 621 (1938) (holding that robbery with a dangerous weapon "requires as a constituent element the presence of firearms [or some other dangerous weapon]"). A mere allegation that defendant informed the bank teller that he was armed simply "fails to allege that Mr. Murrell in fact possessed a dangerous weapon." (Emphasis omitted.) Put another way, defendant argues that the indictment alleged that defendant "conveyed the impression that he possessed some type of weapon" while failing to allege the actual possession of a dangerous weapon. As a result, defendant asserts that "[t]he indictment was fatally defective and conferred jurisdiction only for common law robbery."

According to well-established North Carolina law, a valid indictment is necessary to confer jurisdiction upon the trial court. *See*, *e.g.*, *State v. Morgan*, 226 N.C. 414, 415, 38 S.E.2d 166, 167 (1946); *see also State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996). Generally speaking, an indictment is sufficient if it: (1) "apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense"; (2) "protect[s] him from subsequent prosecution for the same offense"; and (3) "enable[s] the court to know what judgment to pronounce in the event of conviction." *State v. Coker*, 312 N.C. 432, 434-35, 323 S.E.2d 343, 346 (1984) (citations omitted); *see also* N.C.G.S. § 15A-924(a)(5) (2015) (requiring that a criminal pleading contain "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation"). In order to satisfy the relevant statutory requirements, including the provision of adequate notice, an "indictment must allege lucidly and accurately all the essential elements of the offense endeavored to be charged." *State v. Ellis*, 368 N.C. 342, 344, 776 S.E.2d 675, 677 (2015) (quoting *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600, *cert. denied*, 539 U.S. 985, 124 S. Ct. 44, 156 L. Ed. 2d 702 (2003)). Consistent with this general rule, "[a]n indictment charging a statutory offense must allege all of the essential elements of the offense." *Snyder*, 343 N.C. at 65, 468 S.E.2d at 224 (citation omitted). "A criminal pleading . . . is fatally defective if it 'fails to state some essential and necessary element of the offense of which the defendant is found guilty,' " *Ellis*, 368 N.C. at 344, 776 S.E.2d at 677 (quoting *State v. Gregory*, 223 N.C. 415, 418, 27 S.E.2d 140, 142 (1943)), with the presence or absence of such a fatal defect to be "judged based solely upon

the language of the criminal pleading in question without giving any consideration to the evidence that is ultimately offered in support of the accusation contained in that pleading," *id.* at 347, 776 S.E.2d at 679.

> Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night . . . shall be guilty of a Class D felony.

N.C.G.S. § 14-87(a) (2015) (defining "Robbery with firearms or other dangerous weapons"). As a result, the essential elements of the offense of robbery with a dangerous weapon are (1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use, or threatened use of firearms or other dangerous weapon,[1] implement, or means; and (3) a danger or threat to the life of the victim. *See State v. Moore*, 279 N.C. 455, 458, 183 S.E.2d 546, 548 (1971); *see also* N.C.G.S. § 14-87(a). Although the indictment at issue in this case clearly alleges that defendant unlawfully took the personal property of another while threatening the life of the victim, we do not believe that the indictment adequately alleges the possession, use, or threatened use of firearms or other dangerous weapon, implement, or means.

As this Court has previously stated, "robbery *with* firearms of necessity requires as a constituent element the presence of firearms," *Keller*, 214 N.C. at 449, 199 S.E. at 621, or, by logical extension, the presence of a dangerous weapon. *See also State v. Joyner*, 295 N.C. 55, 63, 243 S.E.2d 367, 373 (1978) (stating that "[t]he question in an armed robbery case is whether a person's life was in fact endangered or threatened by defendant's possession, use or threatened use of a dangerous weapon,

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1. A "well-accepted definition of a deadly weapon in this State" is "a weapon which is likely to cause death or serious bodily injury." *State v. Sturdivant*, 304 N.C. 293, 303, 283 S.E.2d 719, 727 (1981) (citations omitted); *see also State v. Watkins*, 200 N.C. 692, 694, 158 S.E. 393, 394 (1931) (stating that "[a]ny instrument which is likely to produce death or great bodily harm, under the circumstances of its use, is properly denominated a deadly weapon"). "Whether an instrument can be considered a dangerous weapon depends upon the nature of the instrument, the manner in which defendant used it or threatened to use it, and in some cases the victim's perception of the instrument and its use." *State v. Peacock*, 313 N.C. 554, 563, 330 S.E.2d 190, 196 (1985) (citations omitted) (finding that the victim's "life was endangered by defendant's use of the glass vase," with which he struck her head).

not whether the victim was scared or in fear of his life"). In evaluating the meaning of the statutory reference to "the use or threatened use of any firearms," N.C.G.S. § 14-87(a), we have previously determined that

> the word "use" as a noun has the meaning of an "act of employing anything, or state of being employed; application; employment . . . . The words "threatened use" coupled, as they are, with the preceding words clearly indicate the threatened act of employing. Hence, construed contextually the clause "*with* the use or threatened use" of a weapon, requires, in the one instance, or presupposes, in the other, the presence of the weapon with which the act may be executed or threatened.

Keller, 214 N.C. at 449, 199 S.E. at 621-22 (internal citations omitted); *see also State v. Hinton*, 361 N.C. 207, 211-12, 639 S.E.2d 437, 440 (2007) (stating that "the General Assembly intended to require the State to prove that a defendant used an external dangerous weapon before conviction under the statute is proper"); *State v. Williams*, 335 N.C. 518, 520, 438 S.E.2d 727, 728 (1994) (stating that, "[t]o establish robbery or attempted robbery with a dangerous weapon, the State was required to prove beyond a reasonable doubt that the defendant possessed a firearm or other dangerous weapon at the time of the robbery or attempted robbery and that the victim's life was in danger or threatened") (citing N.C.G.S. § 14-87 (1986)); *State v. Gibbons*, 303 N.C. 484, 491, 279 S.E.2d 574, 578 (1981) (stating that "[o]ur interpretation, which requires both an act of possession and an act with the weapon which endangers or threatens the life of the victim gives substance to all of the terms of the statute"). As a result, an indictment sufficient to charge the offense of robbery with a dangerous weapon must allege the presence of a firearm or dangerous weapon used to threaten or endanger the life of a person.

In *State v. Palmer*, this Court, in addressing the manner in which the use of a "dangerous weapon" must be alleged,[2] held

> that it is sufficient for indictments . . . seeking to charge a crime in which one of the elements is the use of a deadly weapon (1) to name the weapon and (2) either to state expressly that the weapon used was a "deadly weapon" or to allege such facts as would *necessarily* demonstrate

2. "The terms 'dangerous' and 'deadly,' when used to describe a weapon, are practically synonymous." *Sturdivant*, 304 N.C. at 303, 283 S.E.2d at 727 (citing *Black's Law Dictionary* 355, 359 (5th ed. 1979)).

> the deadly character of the weapon. Whether the state can prove the allegation is, of course, a question of evidence which cannot be determined until trial.

293 N.C. at 639-40, 239 S.E.2d at 411.[3] For instance, in *State v. Brinson*, an indictment purporting to charge an assault with a deadly weapon alleged, in pertinent part, that the defendant "unlawfully, willfully and feloniously did assault John Delton Eason, Jr. . . . by . . . slamming his head against the cell bars, a deadly weapon, and floor. The assault was intended to kill and resulted in serious injury, a broken neck . . . and . . . left the victim paralyzed." *Brinson*, 337 N.C. at 767, 448 S.E.2d at 824. This Court determined that the indictment satisfied the first of the two approaches delineated in *Palmer* because it "specifically referred to the cell bars and cell floor" and satisfied the second of the two approaches delineated in *Palmer* by stating that "the victim's broken neck and paralysis resulted from the 'assault,' " " 'necessarily demonstrat[ing] the deadly character' of the cell bars and floor." *Id.* at 768, 448 S.E.2d at 825 (quoting *Palmer*, 293 N.C. at 640, 239 S.E.2d at 411 (emphasis omitted)).

The indictment at issue in this case alleged that defendant took money "by way of it reasonably appearing to the victim . . . that a dangerous weapon was in the defendant's possession, being used and threatened to be used by communicating that he was armed to her in a note." An allegation that it "reasonably appear[ed] . . . that a dangerous weapon was in the defendant's possession" is simply not equivalent to an allegation that defendant actually possessed a weapon.[4] In the event that the allegation that defendant was "armed" was intended to suggest

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3. As a result of the fact that "[t]he crime of armed robbery defined in [N.C.]G.S. [§] 14-87 includes an assault on the person with a deadly weapon," *State v. Richardson*, 279 N.C. 621, 628, 185 S.E.2d 102, 107 (1971), this case is controlled by *Palmer*. The State does not, in its brief before this Court, question *Palmer*'s validity or suggest that it is not controlling in this case. Instead, the State appears to argue that the allegations contained in the indictment at issue in this case are fully *Palmer*-compliant.

4. The absence of a reference to any weapon differentiates this case from *Marshall*, 188 N.C. App. at 749-50, 656 S.E.2d at 713-14, in which the Court of Appeals determined that, while an allegation that the defendant's action in "keeping his hand in his coat" sufficiently "nam[ed] the weapon," the indictment was still fatally defective because "pretending to possess a dangerous weapon is not a dangerous weapon" and because the indictment "fail[ed] either to state expressly that the weapon was dangerous or to allege facts that necessarily demonstrat[ed] the dangerous nature of the weapon." Instead, the indictment at issue in this case resembles the indictment at issue in *State v. Moses*, 154 N.C. App. 332, 335, 572 S.E.2d 223, 226 (2002), in which the count of the indictment returned for the purpose of charging defendant with assault with a deadly weapon inflicting serious injury alleged that the defendant "assault[ed] Mateo Mendez Jimenez with a deadly weapon" resulting "in the infliction of a serious injury, knocking out his teeth."

that defendant possessed an unidentified weapon, the nature, identity, or deadly character of that unidentified weapon is not described at any point in the indictment. *See State v. Hines*, 166 N.C. App. 202, 207, 600 S.E.2d 891, 895 (2004) (addressing a fatal variance claim, rather than a challenge to the indictment's sufficiency, arising under an indictment describing the weapon used in a robbery as "an unknown blunt force object causing trauma to the head of the victim."). Simply put, the indictment at issue in this case provides no basis for a determination that defendant was "armed" with any implement that was inherently dangerous or used in such a manner as to threaten the infliction of death or serious injury.[5] As a result, since the indictment returned against defendant in this case failed to sufficiently allege that defendant possessed, used, or threatened to use a dangerous weapon,[6] the Court of Appeals correctly held that the indictment returned against defendant in this case for the purpose of charging him with the commission of a robbery with a dangerous weapon was fatally defective.

AFFIRMED.

Justice JACKSON dissenting.

When bank employees resist robbery attempts, tragedy often results. The policy that bank employees should comply with a robber's demands has protected countless lives. Here, because no one resisted defendant's

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5. Although the indictment does allege that it "reasonabl[y] appear[ed]" to Ms. Phillips that "a dangerous weapon was in the defendant's possession," that allegation is not tantamount to an assertion that defendant was, in fact, in possession of a dangerous weapon or that any such weapon was used to threaten Ms. Phillips with death or serious bodily harm. To be sure, this Court has found the evidence sufficient to support a defendant's conviction for robbery with a dangerous weapon based upon a presumption or inference arising from "the defendant's use of what appeared to the victim to be a firearm or other dangerous weapon." *State v. Joyner*, 312 N.C. 779, 786, 324 S.E.2d 841, 846 (1985). Rather than obviating the necessity for proof that the defendant actually possessed or utilized an implement that was, in fact, a dangerous weapon, *Joyner* and similar decisions allow a jury to find the possession or use of such an implement based upon testimony describing what the item reasonably appeared to be. As a result, there is no conflict between *Palmer* and decisions such as *Joyner*, none of which allow a defendant to be convicted of robbery with a dangerous weapon on the basis of a threat divorced from the actual possession or use of a deadly weapon.

6. The State suggests that the indictment identifies the note that defendant allegedly displayed to Ms. Phillips as the required weapon. However, when the relevant portions of the indictment are read in their ordinary sense, the indictment simply asserts that the note was the means by which defendant informed Ms. Phillips that he was "armed."

threat, no one was injured. Law enforcement eventually apprehended defendant, and the grand jury issued an indictment that notified defendant of the charge against him. Based upon this indictment, defendant was able to prepare adequately for trial. The jury considered the evidence and convicted defendant. Now, the majority sets aside the jury's verdict based upon an alleged error in wording. The indictment charging defendant with the offense of robbery with a dangerous weapon was sufficient to confer jurisdiction upon the trial court because the indictment clearly notified defendant of the charge against him, thus allowing him ample opportunity to prepare a defense. Accordingly, I respectfully dissent from the majority opinion.

In this case the indictment alleged that defendant:

> [u]nlawfully, willfully and feloniously did steal, take and carry away another's personal property, U.S. Money from PNC Financial Services Group, Inc. . . . when a bank employee, Stacy Phillips[,] was present. The defendant committed this act by way of it reasonably appearing to the victim[,] Stacy Phillips[,] that a dangerous weapon was in the defendant's possession, being used and threatened to be used by communicating that he was armed to her in a note with demands and instructions for her to complete, whereby the life of Stacy Phillips was threatened and endangered.

The majority holds that the indictment "clearly alleges that defendant unlawfully took the personal property of another while threatening the life of the victim" but is nonetheless "fatally defective because it did not sufficiently allege all of the essential elements of the offense of robbery with a dangerous weapon." Specifically, the majority notes that the indictment fails to "adequately allege[ ] the possession, use or threatened use of firearms or other dangerous weapon, implement or means." In reaching this conclusion, the majority essentially holds that the indictment is only sufficient to support the lesser included offense of common law robbery.

Unlike common law robbery, the offense of robbery with a dangerous weapon requires the use or threatened use of a dangerous weapon. According to section 14-87(a):

> Any person or persons who, having in possession or with the use or *threatened* use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or *threatened*, unlawfully takes or

> attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

N.C.G.S. § 14-87(a) (2015) (emphases added). "The critical and essential difference between" the offense set forth in N.C.G.S. § 14-87—robbery with a dangerous weapon or armed robbery—and common law robbery is that for a jury to find a defendant guilty of armed robbery, "the victim must be endangered or threatened by the use or *threatened use* of a 'firearm or other dangerous weapon, implement or means.' " *State v. Bailey*, 278 N.C. 80, 87, 178 S.E.2d 809, 813 (1971) (emphasis added) (quoting *State v. Covington*, 273 N.C. 690, 700, 161 S.E.2d 140, 147 (1968)). If the threatened use of a dangerous weapon is sufficient to sustain a *conviction* for the offense, then the same allegation must be sufficient to place defendant on *notice* of that same charged offense. To rule otherwise seems to create the classic chicken and egg dilemma. How can the State convict a person of a crime for which he cannot be indicted? Adopting the majority's logic would inhibit, if not outright prohibit, such prosecutions. This cannot be what the legislature intended.

In so doing, the majority also discounts the effect of this threat upon the person subjected to such a threat—an effect specifically contemplated by both the statute and our precedent. Our cases make clear that it is not only the possession of a weapon that meets the threshold for robbery with a dangerous weapon but also the threat resulting from such possession, whether real or merely implied. As we noted in *State v. Williams*, there is a presumption that (1) a defendant has used a firearm or other dangerous weapon when he commits a robbery by the use or threatened use of an implement which *appears to be* a firearm or other dangerous weapon, and (2) such conduct endangered or threated the victim's life. 335 N.C. 518, 520-21, 438 S.E.2d 727, 728 (1994); *see also State v. Thompson*, 297 N.C. 285, 288-89, 254 S.E.2d 526, 528 (1979). The presumption may be rebutted with a showing of "some evidence" that the victim was not endangered or threatened, at which point a permissive inference survives. *Williams*, 335 N.C. at 521, 438 S.E.2d at 729 (emphasis omitted) (quoting *State v. White*, 300 N.C. 494, 507, 268 S.E.2d 481, 489 (1980)).

Our case law addressing the purpose of indictments is both longstanding and clear. As the majority opinion correctly notes, and thoroughly discusses, the fundamental purpose of an indictment is to place

a criminal defendant on notice of the charges being brought against him in order to allow him to prepare an adequate defense. In short, the indictment notifies defendant of the charge against him; the jury determines if the evidence is adequate to support the charge. The information provided in the indictment—including the reference to section 14-87—clearly was sufficient to place defendant on notice that he was being tried for robbery with a dangerous weapon and that the gravamen of his offense was the bank employee's reasonable apprehension based upon the note he showed her stating that he was armed.

The majority cites our previous decision in *State v. Palmer* for the proposition that an indictment alleging the use of a dangerous weapon must "name the weapon." *Palmer*, 293 N.C. 633, 639, 239 S.E.2d 406, 411 (1977). *Palmer* does require an indictment for assault with a deadly weapon to identify a particular weapon; however, I am troubled by the analytical framework set forth in *Palmer* in that it appears to be inconsistent with the long-standing precedents of this Court and places significant reliance upon a case that depended in large part on a legal treatise for the foundation of its legal analysis. *See id.* at 639-40, 239 S.E.2d at 410-11.

Palmer actually concerned the sufficiency of an indictment for assault with a deadly weapon—a wholly different statute than the one at issue here. Therefore, *Palmer*'s utility in analyzing this case is of limited value. Moreover, there are three additional reasons *Palmer* should not guide our inquiry in this case. First, *Palmer* stated that indictments for crimes involving the use of a deadly weapon must "name the weapon," 293 N.C. at 639, 239 S.E.2d at 411, but, to the extent that this rule applied to statutes other than the one at issue in *Palmer*, that requirement was dictum. In addition, *Palmer* based its rule on a case that relied substantially on an entry from *Corpus Juris Secundum* (C.J.S.). *See id.* at 639, 239 S.E.2d at 410-11 (quoting *State v. Wiggs*, 269 N.C. 507, 513, 153 S.E.2d 84, 89 (1967)). But legal treatise entries are not binding authority on this Court—nor should they be—so the source of *Palmer*'s rule is troubling. Finally, a review of the pertinent C.J.S. entry quoted in *Palmer* fails to support the rule that *Palmer* set forth. That C.J.S. entry suggests only that an indictment must *either* (1) name the weapon (if its dangerous or deadly nature is obvious), (2) assert that a dangerous or deadly weapon was used, or (3) state enough facts to show that the weapon was deadly or dangerous. For all these reasons, we should not extend *Palmer*'s dictum to cover the statute at issue here.

Because *Palmer* is inconsistent with *Williams* and its forebears and progeny, however, *Palmer* has erroneously engrafted a requirement

not included within the plain meaning of the words of the assault with a deadly weapon statute. Therefore, I cannot agree with the majority's determination that it is appropriate to engraft that same requirement on the statute at issue here—namely, robbery with a dangerous weapon—because the plain meaning of *that* statute does not include the requirement.

Simply considering the statutory requirements for a conviction for robbery with a dangerous weapon, I find it impossible to conclude that the majority opinion has reached the correct conclusion in this case. In addition, in practice the majority's holding will place a high burden on law enforcement and prosecutors who prepare indictments to ensure that the dangerous weapon actually utilized during the robbery has been located. This seems to be a quantum shift in the jurisprudence of both this Court and our Court of Appeals.[1] According to our current precedents, a serious crime has been committed, but the majority's analysis will make it far more difficult to prosecute these types of offenses in the absence of the actual weapon utilized in the commission of a crime.

For the foregoing reasons, I dissent.

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

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1. *See, e.g.*, *State v. Waters*, ___ N.C. App. ___, 799 S.E.2d 287, 2017 WL 2118718, at *4 (2017) (unpublished) (holding that a defendant's threat of possessing a bomb, which provoked victim's reasonable belief in the veracity of that threat, was sufficient to overcome the defendant's motion to dismiss a charge of robbery with a dangerous weapon even though police failed to "discover a bomb, evidence of a bomb, or any bomb-making materials"); *State v. Jarrett*, 167 N.C. App. 336, 337, 341, 607 S.E.2d 661, 662, 664 (2004) (holding no error in the defendant's trial and conviction for robbery with a dangerous weapon even though "[a] gun was not found on defendant's body nor in the house from which [law enforcement] saw defendant exit"), *cert. denied*, 359 N.C. 324, 611 S.E.2d 840 (2005); *State v. Coatney*, 164 N.C. App. 599, 596 S.E.2d 472, 2004 WL 1191779, at *1, *3 (2004) (unpublished) (concluding that, on a charge of robbery with a dangerous weapon, "the evidence here entitled the State to a mandatory presumption that defendant used a firearm or dangerous weapon and endangered or threatened the victim's life," while noting that police did not recover a gun).

ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA	)	
v.	)	From Wake County
PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; AND THE STATE OF NORTH CAROLINA	)	

No. 52PA17-2

ORDER

A three-judge panel of the superior court dismissed plaintiff's complaint because the panel determined that it lacked jurisdiction over the subject matter of plaintiff's claims. Plaintiff now asks this Court to review that determination and to decide whether his claims have merit.

The Constitution of North Carolina vests the superior court with "original general jurisdiction throughout the State." N.C. Const. art. IV, § 12(3). That body is charged with hearing claims in the first instance, even when the issue presented is solely a question of law. By contrast, the Constitution vests this Court with "jurisdiction to review *upon appeal* any decision of the courts below, upon any matter of law or legal inference." *Id.* art. IV, § 12(1) (emphasis added). As we stated in *Greene v. Spivey*: "This is an appellate court. Our function, under the Constitution, is to review alleged errors and rulings of the trial court, and unless and until it is shown that a trial court ruled on a particular question, it is not given for us to make specific rulings thereon." 236 N.C. 435, 442, 73 S.E.2d 488, 493 (1952). As a result, without determining that we lack the authority to reach the merits of plaintiff's claims, we conclude that the proper administration of justice would be best served in the event that we allowed the panel, in the first instance, to address the merits of plaintiff's claims before undertaking to address them ourselves.

Nevertheless, this Court does have the constitutional authority to "issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts" in this state. N.C. Const. art. IV, § 12(1). The Court also has the inherent authority to do what is reasonably necessary to ensure the proper administration of justice during the consideration of a case that is properly before us. In light of the importance of the issues presented by this case and the fact that a municipal election cycle is in progress, we invoke our authority to order:

1. That this case be certified to the panel with instructions for that court to enter a new order within 60 days that (a) explains the basis for its earlier determination that it lacked jurisdiction to reach the merits of the claims advanced in plaintiff's complaint and (b) addresses the issues that plaintiff has raised on the merits.

2. That, immediately following the entry of the panel's new order, this case be certified back to this Court for a final appellate decision.

3. That the order of this Court, dated 20 July 2017, which resolves plaintiff's petition for writ of supersedeas, be amended to add the following paragraph:

   > "4. Until this case is resolved by the Court, any county board of elections with a vacancy reducing its membership to two members—such that the board cannot meet quorum requirements under Sections 7.(h) and 7.(i) of Session Law 2017-6—may meet and conduct business under N.C.G.S. §§ 163-30 and -31 (2015), with a quorum and unanimous assent of two members."

4. That the parties retain the right to petition for the purpose of obtaining any modifications to this order and the prior order of the Court, dated 20 July 2017, that they deem necessary to preserve the status quo and to ensure the orderly and lawful conducting of local and other elections during the consideration of this case by this Court, with any such modification requests to be directed to the panel from the date of the issuance of this order until the panel certifies its new order to this Court in accordance with Paragraph No. 2 above.

By order of the Court in Conference, this the 1st day of September, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of September, 2017.

s/J. Bryan Boyd

J. BRYAN BOYD
Clerk of the Supreme Court

MARGARET DICKSON, ET AL.	)	
	)	
v.	)	
	)	
ROBERT RUCHO, ET AL.	)	
	)	From Wake County
NORTH CAROLINA STATE CONFERENCE OF BRANCHES OF THE NAACP, ET AL.	)	
	)	
v.	)	
	)	
THE STATE OF NORTH CAROLINA, ET AL.	)	

No. 201PA12-4

AMENDED ORDER

On 30 May 2017, the Supreme Court of the United States granted certiorari and vacated and remanded this Court's judgment in *Dickson v. Rucho*, 368 N.C. 481, 781 S.E.2d 404 (2015), *modified*, 368 N.C. 673, 789 S.E.2d 436 (2016) (order). *Dickson v. Rucho*, 137 S. Ct. 2186, 198 L. Ed. 2d 252 (2017) (mem.). The Supreme Court's instruction to this Court is to review *Dickson* "for further consideration in light of *Cooper v. Harris*, 581 U.S. ___ (2017)." *Id*. at 2186, 198 L. Ed. 2d at 252. Pursuant to the Supreme Court's remand and instruction, and after careful consideration, this Court remands this case to the trial court to determine whether (1) in light of *Cooper v. Harris* and *North Carolina v. Covington*, a controversy exists or if this matter is moot in whole or in part; (2) there are other remaining collateral state and/or federal issues that require resolution; and (3) other relief may be proper. *See Cooper v. Harris*, 581 U.S. ___, 137 S. Ct. 1455, 197 L. Ed. 2d 837 (2017); *North Carolina v. Covington*, 581 U.S. ___, 137 S. Ct. 1624, 198 L. Ed. 2d 110 (2017) (per curiam); *North Carolina v. Covington*, 137 S. Ct. 2211, 198 L. Ed. 2d 655 (2017) (mem.).

By order of the Court in Conference, this the 9th day of October, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of October, 2017.

s/J. Bryan Boyd

J. Bryan Boyd
Clerk of the Supreme Court

IN RE COLVARD

[370 N.C. 205 (2017)]

IN THE MATTER OF HELEN MAE CASE COOPER WALLS HOUSE, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program	)	Industrial Commission
IN THE MATTER OF RUBY JACQUELINE BROWN DAVIS, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program	)	Industrial Commission
IN THE MATTER OF MARTIN WILLIAM ZIMMERMAN, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program	)	Industrial Commission
IN THE MATTER OF GENEVA MORAGNE WARE, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program	)	Industrial Commission
IN THE MATTER OF MAXINE COLVARD, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program	)	Industrial Commission

Nos. 101P16, 146P16, 147P16, 177P16, and 178P16

ORDER

The petitions for discretionary review filed in cases 146P16, 147P16, 177P16, and 178P16 are allowed for the limited purpose of reversing the Court of Appeals' dismissal of claimants' constitutional claims. These cases are remanded to the Court of Appeals for expedited consideration of the constitutional claims on the merits. *See In re Redmond*, ___ N.C. ___, ___, 797 S.E.2d 275, 280 (2017) ("When an appeal lies directly to the Appellate Division from an administrative tribunal, . . . a constitutional challenge may be raised for the first time in the Appellate Division as it is the first destination for the dispute in the General Court of Justice.").

To prevent manifest injustice, the petition for discretionary review filed in case 101P16 is allowed for the limited purpose of remanding the case to the Court of Appeals for expedited consideration of claimant's constitutional claim on the merits.

By Order of the Court in Conference, this 26th day of September, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 26th day of September, 2017.

s/J. Bryan Boyd

J. BRYAN BOYD
Clerk of the Supreme Court

STATE v. CHOLON

[370 N.C. 207 (2017)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Onslow County
	)	
DEREK JACK CHOLON	)	

No. 87PA17

ORDER

Defendant's petition for discretionary review is allowed for the limited purpose of vacating the decision of the Court of Appeals and remanding to that court with instructions for further remand to the trial court to hold an evidentiary hearing on defendant's motion for appropriate relief in light of *State v. Todd*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2017) (18A14-2) (remanding for determination of whether counsel made a particular strategic decision and if so, whether such decision was reasonable), *State v. Thomas*, 327 N.C. 630, 630, 397 S.E.2d 79, 80 (1990) (remanding to determine whether the "defendant knowingly consented to trial counsel's concessions of guilt to the jury"), and other relevant authority. The trial court shall enter findings of facts and conclusions of law and determine whether defendant is entitled to relief.

By Order of the Court in Conference, this 28th day of September, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 29th day of September, 2017.

J. BRYAN BOYD
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Robeson County
	)	
ROCKY KURT WILIAMSON	)	

No. 66P17

AMENDED ORDER

State's petition for discretionary review is allowed for the limited purpose of vacating the decision of the Court of Appeals and remanding to that court with instructions for further remand to the trial court to hold an evidentiary hearing on defendant's motion for appropriate relief based on recanted testimony, following the standard set forth in this Court's opinion in *State v. Britt*, 320 N.C. 705, 360 S.E.2d 660 (1987), *superseded in part on other grounds by statute as stated in State v. Defoe*, 364 N.C. 29, 33-38, 691 S.E.2d 1, 4-7 (2010). The trial court shall enter findings of fact and conclusions of law and determine whether defendant is entitled to relief.

By Order of the Court in Conference, this 28th day of September, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 29th day of September, 2017.

J. BRYAN BOYD
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

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

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035P17	State v. Luis Alberto Rodriguez and Matthew L. Gregory, Bail Agent and Financial Casualty & Surety, Surety	Def's (Matthew L. Gregory) PDR Under N.C.G.S. § 7A-31 (COA16-76)	Denied
039P17	Arthur O. Armstrong v. North Carolina, et al.	1. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* 2. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* 3. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* 4. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* 5. Plt's *Pro Se* Motion for Leave to File a Writ of Mandamus 6. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* 7. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* 8. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* 9. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* 10. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* 11. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* 12. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* 13. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* 14. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* 15. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* 16. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* 17. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* 18. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus* 19. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	1. Denied 2. Denied 3. Denied 4. Denied 5. Denied 6. Denied 7. Denied 8. Denied 9. Denied 10. Denied 11. Denied 12. Denied 13. Denied 14. Denied 15. Denied 16. Denied 17. Denied 18. Denied 19. Denied

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		20. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	20. Denied
		21. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	21. Denied
		22. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	22. Denied
		23. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	23. Denied
		24. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	24. Denied
		25. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	25. Denied
		26. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	26. Denied
		27. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	27. Denied
		28. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	28. Denied
		29. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	29. Denied
		30. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	30. Denied
		31. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	31. Denied
		32. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	32. Denied
		33. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	33. Denied
		34. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	34. Denied
		35. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	35. Denied
		36. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	36. Denied
		37. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	37. Denied **Ervin, J., recused**
040P17	Arthur O. Armstrong v. North Carolina, et al.	1. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	1. Denied
		2. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	2. Denied
		3. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	3. Denied

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	4. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	4. Denied
	5. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	5. Denied
	6. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	6. Denied
	7. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	7. Denied
	8. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	8. Denied
	9. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	9. Denied
	10. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	10. Denied
	11. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	11. Denied
	12. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	12. Denied
	13. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	13. Denied
	14. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	14. Denied
	15. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	15. Denied
	16. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	16. Denied
	17. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	17. Denied
	18. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	18. Denied
	19. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	19. Denied
	20. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	20. Denied
	21. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	21. Denied
	22. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	22. Denied
	23. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	23. Denied
	24. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	24. Denied
	25. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	25. Denied

		26. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	26. Denied
		27. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	27. Denied
		28. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	28. Denied
		29. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	29. Denied
		30. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	30. Denied
		31. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	31. Denied
		32. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	32. Denied
		33. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	33. Denied
		34. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	34. Denied
		35. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	35. Denied
		36. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	36. Denied
		37. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	37. Denied
		38. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	38. Denied
		39. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	39. Denied
		40. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	40. Denied
041P17	Arthur O. Armstrong v. North Carolina, et al.	1. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	1. Denied
		2. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	2. Denied
		3. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	3. Denied
		4. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	4. Denied
		5. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	5. Denied
		6. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	6. Denied
		7. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	7. Denied

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		8. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	8. Denied
		9. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	9. Denied
		10. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	10. Denied
		11. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	11. Denied
		12. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	12. Denied
		13. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	13. Denied
		14. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	14. Denied
		15. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	15. Denied
		16. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	16. Denied
		17. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	17. Denied
		18. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	18. Denied
		19. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	19. Denied
052PA17-2	Cooper v. Berger, et al.	State of N.C.'s Consent Petition for Modification of Order Dated 20 July 2017	Special Order **09/01/2017**
052PA17-2	Cooper v. Berger, et al.	State's Motion to Amend State's Response to the Court's 17 August 2017 Order	Allowed **08/25/2017**
061P17	RME Management, LLC v. Chapel H.O.M. Associates, LLC & Chapel Hill Motel Enterprises, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA16-596)	Denied
063P15-3	State v. Isidro Garcia Hernandez	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP16-288)	Dismissed **Ervin, J., recused**

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066P17	State v. Rocky Kurt Williamson	1. State's Motion for Temporary Stay (COA16-631) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. State's Petition for *Writ of Certiorari* to Review Order of COA	1. Allowed **02/27/2017** Dissolved **09/28/2017** 2. Denied 3. Special Order 4. Dismissed as moot
072P17-3	Lequan Fox v. State of N.C.	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **09/21/2017**
078P17	In the Matter of the Foreclosure of a Deed of Trust Executed by Bruce J. Adams Dated December 28, 2004 and Recorded in Book 18194 at Page 265 in the Mecklenburg County Public Registry, North Carolina	1. Appellant's Motion for Temporary Stay (COA16-653) 2. Appellant's Petition for *Writ of Supersedeas* 3. Appellant's PDR Under N.C.G.S. § 7A-31	1. Allowed **03/13/2017** Dissolved **09/28/2017** 2. Denied 3. Denied
087P17	State v. Derek Jack Cholon	Def's PDR Under N.C.G.S. § 7A-31 (COA16-4)	Special Order
101P16	In the Matter of Helen Mae Case Cooper Walls House, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program	Claimant's PDR Under N.C.G.S. § 7A-31 (COA15-879)	Special Order **09/26/2017**
115P17	State v. Dean Michael Varner	1. State's Motion for Temporary Stay (COA16-591) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/12/2017** 2. Allowed 3. Allowed
120P17	State v. Shymel D. Jefferson	Def's PDR Under N.C.G.S. § 7A-31 (COA16-745)	Denied

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138P17	State v. Vinni Vaugier Valentine	Def's PDR Under N.C.G.S. § 7A-31 (COA16-427)	Denied
143P17	Melissa Lovelace, Administrator of the Estate of Johnny Lee Whitley, Deceased Employee v. B&R Auto Service, Inc., Employer; et al.	Plt's PDR Under N.C.G.S. § 7A-31 (COA16-1045)	Denied
145P17	In the Matter of A.P.	1. Petitioners' Motion for Temporary Stay (COA16-1010) 2. Petitioners' Petition for *Writ of Supersedeas* 3. Petitioners' PDR Under N.C.G.S. § 7A-31	1. Allowed **05/09/2017** 2. Allowed 3. Allowed
146P16	In the Matter of Ruby Jacqueline Brown Davis, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program	Claimant's PDR Under N.C.G.S. § 7A-31 (COA15-882)	Special Order **09/26/2017**
146P17	Wayne T. Brackett, Jr. v. Kelly J. Thomas, Commissioner	Respondent's PDR Under N.C.G.S. § 7A-31 (COA16-912)	Allowed
147P16	In the Matter of Martin William Zimmerman, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program	Claimant's PDR Under N.C.G.S. § 7A-31 (COA15-937)	Special Order **09/26/2017**
156P17	Christopher DiCesare, James Little, and Johanna MacArthur, Individually and on behalf of all others similarly situated v. The Charlotte-Mecklenburg Hospital Authority, d/b/a Carolinas HealthCare System	1. Def's Petition for *Writ of Certiorari* to Review Order of N.C. Business Court 2. North Carolina Hospital Association's Motion for Leave to File Amicus Brief	1. Denied 2. Dismissed as moot

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157A17	Rexnord Corporation, Zurn Industries, LLC, and Green Turtle Americas, LTD v. Sun Drainage Products, LLC and James R. Bauer	Joint Motion to Dismiss Appeal	Allowed **08/18/2017**
158P06-15	State v. Derrick D. Boger	1. Def's *Pro Se* Motion for Tort Claim 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appeal 4. Def's *Pro Se* Motion for *Writ of Coram Nobis*	1. Dismissed 2. Allowed 3. Dismissed 4. Denied
175P17	In the Matter of T.K.	1. State's Motion for Temporary Stay (COA16-1047) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/05/2017** Dissolved **09/28/2017** 2. Denied 3. Denied
177P16	In the Matter of Geneva Moragne Ware, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program	Claimant's PDR Under N.C.G.S. § 7A-31 (COA15-909)	Special Order **09/26/2017**
177P17	Du Phan d/b/a Good Food Market v. Clinard Oil Company, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA16-1083)	Denied
178P16	In the Matter of Maxine Colvard, Claim for Compensation Under the North Carolina Eugenics Asexualization and Sterilization Compensation Program	Claimant's PDR Under N.C.G.S. § 7A-31 (COA15-923)	Special Order **09/26/2017**
188P17	State v. Layton Allen Waters	Def's PDR Under N.C.G.S. § 7A-31 (COA16-985)	Denied

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192P17	In the Matter of the Foreclosure of a Deed of Trust Executed by Holly B. Rankin and Darrin L. Rankin (Present Record Owner(s): Mozijah Bailey and Wendy Carolina Lopez) and (Darrin L. Rankin, as to Life Estate Only) in the Original Amount of $307,920.00 Dated October 4, 2006, Recorded in Book 21173, Page 276, Mecklenburg County Registry Substitute Trustee Services, Inc., Substitute Trustee	1. Respondent's (Mozijah Bailey) Motion for Temporary Stay (COA16-771) 2. Respondent's (Mozijah Bailey) Petition for *Writ of Supersedeas* 3. Respondent's (Mozijah Bailey) PDR Under N.C.G.S. § 7A-31 4. Petitioner's Motion for Sanctions	1. Allowed **6/16/2017** Dissolved **09/28/2017** 2. Denied 3. Denied 4. Denied
207P17	State v. Michael Anthony Scaturro, Jr.	1. State's Motion for Temporary Stay (COA16-1026) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **06/23/2017** Dissolved **09/28/2017** 2. Denied 3. Denied 4. Dismissed as moot
218P17	NNN Durham Office Portfolio 1, LLC, et al. v. Grubb & Ellis Company, et al.	1. Plts' PDR Prior to a Decision of the COA (COA17-607) 2. Defs' Conditional PDR Prior to a Decision of the COA	1. Denied 2. Dismissed as moot
219P17	Courtney NC, LLC d/b/a Oakwood Raleigh at Brier Creek v. Monette Baldwin a/k/a Nell Monette Baldwin	1. Def's *Pro Se* Motion for Temporary Stay (COAP17-459) 2. Def's *Pro Se* Petition for *Writ of Supersedeas* 3. Def's *Pro Se* Motion for Notice of Appeal 4. Plt's Motion to Dismiss Appeal 5. Def's *Pro Se* Motion to Amend Petition for *Writ of Supersedeas* and Motion to Stay 6. Def's P*ro Se* Motion to Enlarge Time to Accept Response and Motion to Treat Petition for *Writ of Supersedeas* to Petition for *Certiorari* to Review Order	1. Denied **07/07/2017** 2. Denied 3. --- 4. Allowed 5. Dismissed as moot 6. Dismissed as moot

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		7. Def's *Pro Se* Revised Motion to Amend Petition for *Writ of Supersedeas* and Motion to Stay	7. Dismissed as moot
		8. Def's *Pro Se* Motion for Sanctions	8. Dismissed as moot
		9. Def's *Pro Se* Motion for Leave to Add a Supplement to Revised Motion to Amend Petition for *Writ of Supersedeas* and Motion to Stay	9. Dismissed as moot
		10. Def's *Pro Se* Motion to Make (Unrevised) Petition for *Writ of Supersedeas*/Motion to Stay Moot	10. Dismissed as moot
		11. Def's *Pro Se* Motion for Leave to Supplement Petition for *Writ of Supersedeas*/Motion to Stay	11. Dismissed as moot
		12. Def's *Pro Se* Motion for Extraordinary Reasons and in the Interest of Justice, for Leave Out of Time to Renew Application for Stay	12. Dismissed as moot
		13. Def's *Pro Se* Motion to Supplement the Application for Extraordinary Reasons and in the Interest of Justice for Leave Out of Time to Review Application for Stay	13. Dismissed as moot
		14. Def's *Pro Se* Motion to Supplement Motion for Leave Out of Time to Renew Application for Stay with Motion for Temporary Stay Pending a Motion for Writ of Restitution	14. Dismissed as moot
		15. Def's *Pro Se* Motion to Review Appeal to the Right as *Certiorari* Review	15. Dismissed as moot
		16. Def's *Pro Se* Motion to Withdraw Appeal to the Right from the COA	16. Dismissed as moot
		17. Def's *Pro Se* Revised Motion to Amend Her Petition for a *Writ of Supersedeas* and Motion to Stay with the Attached Amended Petition Corrected to Form in the Alternative to be a Petition for *Writ of Certiorari*	17. Dismissed as moot
		18. Def's *Pro Se* Motion for Sanctions and Leave to Speak	18. Dismissed as moot **Beasley and Morgan, JJ., recused**
220P17	State v. Alfred Lamont Butler a/k/a Hakeem Ahbad Muhammad	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1255)	Denied

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226P17	State v. Michael Arnold Gillespie	Def's PDR Under N.C.G.S. § 7A-31 (COA16-881)	Denied
228P17	State v. Corey Montrez McCree	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-690) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
233P17	State v. Curtis Leon Abney	Def's PDR Under N.C.G.S. § 7A-31 (COA16-840)	Denied
238P17	Kaleb Lee Roberts v. Mars Hill University and Mars Hill University Board of Trustees	Plt's PDR Under N.C.G.S. § 7A-31 (COA16-1093)	Denied
239A17	State v. Jose Daniel Gonzalez	Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA16-1325)	Dismissed
242P17	State v. Michael M. Williams	*Def's Pro Se Motion for PDR (COAP17-302)*	Dismissed
246P17	State v. Jerimy Rashaud Love	1. Def's *Pro Se* Motion for Appointment of Counsel 2. Def's *Pro Se* Motion for Notice of Appeal (COAP17-337) 3. Def's *Pro Se* Motion for PDR 4. Def's *Pro Se* Petition for *Writ of Certiorar*i to Review Order of Superior Court, Cabarrus County	1. Dismissed as moot 2. Dismissed *ex mero motu* 3. Denied 4. Denied **Ervin, J., recused**
247P17	State v. Francis L. DeMaio, Sr.	Def's *Pro Se* Motion for PDR (COAP16-397)	Dismissed
248P17	State v. Jason Rodger Dubose	Def's PDR Under N.C.G.S. § 7A-31 (COA16-169)	Denied
249P17	Columbus County Department of Social Services *ex rel.* Tiffanee A. Moore v. Calvin T. Norton	1. Def's *Pro Se* Motion for Temporary Stay (COA16-735) 2. Def's *Pro Se* Petition for *Writ of Supersedeas* 3. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question 4. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Denied **08/02/2017** 2. Denied 3. Dismissed *ex mero motu* 4. Denied

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253P09-2	State v. Quintis Travon Spruiell	1. Def's Motion for Temporary Stay (COA16-639) 2. Def's Petition for *Writ of Certiorari* to Review Order of COA 3. Def's PDR Under N.C.G.S. § 7A-31 4. Def's Petition for *Writ of Certiorari* to Review Order of COA	1. Denied **01/10/2017** 2. Denied 3. Denied 4. Denied
254P17	State v. Stephen David Brown	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-1044) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
255A17	Billy Bruce Justice as Administrator of the Estate of Pamela Jane Justus v. Michael J. Rosner, M.D.; Michael J. Rosner, M.D., P.A.; Fletcher Hospital, Inc., d/b/a Park Ridge Hospital; Adventist Health System; and Adventist Health System Sunbelt Healthcare Corporation	1. Defs' (Michael J. Rosner, M.D., and Michael J. Rosner, M.D., P.A.) Notice of Appeal Based Upon a Dissent (COA15-1196) 2. Defs' (Michael J. Rosner, M.D., and Michael J. Rosner, M.D., P.A.) PDR as to Additional Issues	1. --- 2. Allowed
258P17	State v. Franklin Thomas Street	Def's PDR Under N.C.G.S. § 7A-31 (COA16-307)	Denied
260P17	Amy Betts v. Stephen Brett Armstrong, et al.	1. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Cabarrus County 2. Petitioner's *Pro Se* Petition for Writ of Prohibition 3. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis* 4. Respondents Eric Costine and Edward S. (Ted) Shapack's Motion to Dismiss Petition for *Writ of Certiorari* and Writ of Prohibition	1. Denied 2. Denied 3. Allowed 4. Dismissed as moot
261P17	State v. Jairus Tyrone Henley	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-1171)	Denied
262A17	Dr. Peter C. Benedith v. Wake Forest Baptist Medical Center	Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA17-284)	Dismissed

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

28 SEPTEMBER 2017

264P17	State v. Lewis Edward Person	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Wake County 2. Def's *Pro Se* Motion for Notice of Appeal	1. Dismissed 2. Dismissed
267P17	Lewis E. Person v. Johnney Hawkins/ Josh Stein	Defs' *Pro Se* Motion for Notice of Appeal (COAP17-489)	Dismissed
269P17	In the Matter of G.M.C., T.L.C.	Respondent-Mother's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-1257)	Denied
271P17	Barbara G. O'Neal, By and Through G. Elvin Small, III, Guardian of the Estate of Barbara G. O'Neal v. Pamela Sue O'Neal; Pamela Sue O'Neal, Trustee of Barbara O'Neal Land Trust; Pamela Sue O'Neal, as Trustee of Barbara O'Neal Farm Land Trust; Pamela Sue O'Neal, as Trustee of Barbara O'Neal Barco Land Trust; Barbara O'Neal Land Trust; Barbara O'Neal Farm Land Trust; Barbara O'Neal Barco Land Trust; and Lori Ann Chappell	Defendants' (Pamela Sue O'Neal, Individually and as Trustee) PDR Under N.C.G.S. § 7A-31 (COA16-1299)	Denied
275P17	State v. Fronta Lamont Gilchrist	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Guilford County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
278P17	State v. John Andrew Maddux	1. State's Motion for Temporary Stay (COA16-1248) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/18/2017** 2.
279PA16	In the Matter of M.A.W.	Guardian Ad Litem's Motion to Amend New Brief	Allowed **08/25/2017**

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

28 SEPTEMBER 2017

280A17	State v. James Edward Arrington	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/18/2017** 2.
281P17	State v. Christopher Scott Ellis	1. State's Motion for Temporary Stay (COA16-938) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/18/2017** 2.
287P17	John Fitzgerald Moore, Sr. v. Board of Elections of Henderson County	1. Petitioner's Motion for Temporary Stay (COAP17-594) 2. Petitioner's Petition for *Writ of Supersedeas* 3. Petitioner's Petition for Writ of Prohibition 4. Petitioner's Petition for *Writ of Certiorari* to Review Order of COA	1. Denied **08/28/2017** 2. 3. 4.
290A17	State v. Marcus Marcel Smith	1. State's Motion for Temporary Stay (COA16-1229) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/28/2017** 2.
291P17	State v. Richard W. Williams	1. Def's *Pro Se* Motion for PDR 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed **Beasley and Morgan, JJ., recused**
292P17	State v. Walter Columbus Simmons	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/29/2017** 2.
293P17	Poor Substitute Trustee, LTD., Substitute Trustee v. Guy E. Franklin and Rita Thomas Franklin	1. Defs' *Pro Se* Motion for Temporary Stay (COAP17-625) 2. Defs' *Pro Se* Petition for *Writ of Supersedeas*	1. Dismissed **08/31/2017** 2. Denied
295P17	State v. Terry Jerome Wilson	1. State's Motion for Temporary Stay (COA16-1212) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **09/01/2017** 2.

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

28 SEPTEMBER 2017

296P17	In Re Foreclosure of Real Property Under Deed of Trust from Melvin R. Clayton and Jackie B. Clayton, in the original amount of $165,000.00, and dated June 13, 2008 and Recorded on June 18, 2008 in Book 2083 at Page 506, Henderson County Registry Trustee Services of Carolina, LLC, Substitute Trustee	1. Respondent's (Jackie B. Clayton) PDR Under N.C.G.S. § 7A-31 (COA16-960) 2. Respondent's (Jackie B. Clayton) Petition for *Writ of Certiorari* to Review Decision of COA 3. Respondent's (Jackie B. Clayton) Petition for *Writ of Supersedeas* 4. Motion (Respondent's) for Temporary Stay	1. 2. 3. 4. Allowed **09/18/2017**
302A14	State v. Juan Carlos Rodriguez	1. State's Motion to Strike Def's Supplemental Brief 2. State's Motion in the Alternative for Leave to File State's Supplemental Brief	1. 2. Allowed **09/26/2017**
310A16	Worley, et al. v. Moore, et al.	Plts' Motion to Admit Jerrold J. Ganzfried *Pro Hac Vice*	Allowed **08/24/2017** **Ervin, J., recused**
319A17	State v. Ahmad Jamil Nicholson	1. State's Motion for Temporary Stay (COA17-28) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **09/22/2017** 2.
320P17	In the Matter of the Imprisonment of Ryan Lamar Parsons	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **09/25/2017**
336P16-2	WidenI77 v. North Carolina DOT, I-77 Mobility Partners LLC and State of North Carolina	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA16-818) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' (N.C. Dept of Transportation and State of N.C.) Motion to Dismiss Appeal 4. Defs' (I-77 Mobility Partners, LLC) Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed 4. Allowed
404P16-2	State v. Samson Jamarco Coleman	Def's *Pro Se* Motion for PDR (COAP16-719)	Denied **09/25/2017**

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

28 SEPTEMBER 2017

450P16	Arthur O. Armstrong v. North Carolina, et al.	1. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	1. Denied
		2. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	2. Denied
		3. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	3. Denied
		4. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	4. Denied
		5. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	5. Denied
		6. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	6. Denied
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		22. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	22. Denied

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	204. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	204. Denied
	205. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	205. Denied
	206. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	206. Denied
	207. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	207. Denied
	208. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	208. Denied
	209. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	209. Denied
	210. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	210. Denied
	211. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	211. Denied
	212. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	212. Denied
	213. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	213. Denied
	214. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	214. Denied
	215. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	215. Denied
	216. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	216. Denied
	217. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	217. Denied
	218. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	218. Denied
	219. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	219. Denied
	220. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	220. Denied

	221. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	221. Denied
	222. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	222. Denied
	223. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	223. Denied
	224. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	224. Denied
	225. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	225. Denied
	226. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	226. Denied
	227. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	227. Denied
	228. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	228. Denied
	229. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	229. Denied
	230. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	230. Denied
	231. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	231. Denied
	232. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	232. Denied
	233. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	233. Denied
	234. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	234. Denied
	235. Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	235. Denied

FRIDAY INVS., LLC v. BALLY TOTAL FITNESS OF MID-ATL., INC.

[370 N.C. 235 (2017)]

FRIDAY INVESTMENTS, LLC
v.
BALLY TOTAL FITNESS OF THE MID-ATLANTIC, INC. f/k/a Bally Total Fitness of the Southeast, Inc. f/k/a Holiday Health Clubs of the Southeast, Inc. as successor-in-interest to Bally Total Fitness Corporation; and BALLY TOTAL FITNESS HOLDING CORPORATION

No. 248PA16

Filed 3 November 2017

1. Indemnity—tripartite attorney-client relationship—common interest between indemnitor and indemnitee

A contractual duty to defend and indemnify arising from the transfer of leasehold interest created a tripartite attorney-client relationship. An indemnification agreement creates a common interest between the indemnitor and the indemnitee in that the indemnitor contractually shares in the indemnitee's legal well-being.

2. Attorneys—tripartite attorney-client relationship—communications not privileged

Even though a tripartite attorney-client relationship existed arising from an indemnity agreement in the transfer of a lease, the trial court did not abuse its discretion or misapply the law by compelling disclosure of the communications at issue. Neither party requested findings or conclusions in the underlying order compelling discovery, and it is presumed that the trial court found facts sufficient to support its determination that the communications were not privileged. Moreover, defendants did not properly present the allegedly privileged documents for appellate review.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 788 S.E.2d 170 (2016), affirming an order entered on 13 April 2015 by Judge Jesse B. Caldwell III in Superior Court, Mecklenburg County. Heard in the Supreme Court on 29 August 2017.

Horack, Talley, Pharr & Lowndes, P.A., by Keith B. Nichols, for plaintiff-appellee.

Knox, Brotherton, Knox & Godfrey, by Lisa G. Godfrey; and Burt & Cordes, PLLC, by Stacy C. Cordes, for defendant-appellants.

NEWBY, Justice.

In this case we consider whether an attorney–client relationship exists between defendants and a non-party that contractually agreed to indemnify defendants. Recognizing its tripartite nature, we conclude that the contractual duty to defend and indemnify gives rise to an attorney–client relationship. Nonetheless, because defendants failed to request that the trial court provide written findings of fact and did not present in a timely manner the documents at issue for appellate review, we must presume the trial court found facts sufficient to support its conclusion. Given the bare record before us, we cannot conclude that the trial court erroneously determined that the attorney–client privilege did not extend to the communications at issue. Accordingly, we modify and affirm the decision of the Court of Appeals.

In February 2000, the predecessor in interest to defendant Bally Total Fitness of the Mid-Atlantic, Inc. (Bally Mid-Atlantic) entered into a lease agreement with the predecessor in interest to Friday Investments, LLC (plaintiff) for a large commercial space in Charlotte, North Carolina, in which to place a health club.[1] Codefendant Bally Total Fitness Holding Corporation (Bally Holding), the parent company of both Bally Mid-Atlantic and the original tenant, guaranteed the lease. Bally Mid-Atlantic later sold some of its health clubs, including the Charlotte club, to Blast Fitness Group, LLC (Blast). The Asset Purchase Agreement between Bally Mid-Atlantic and Blast transferred any obligations arising under the real property leases of the clubs sold. The Agreement also included an indemnification clause, wherein Blast agreed to "defend, indemnify, and hold [defendants] . . . harmless of, from and against any Losses incurred . . . on account of or relating to . . . any Assumed Liabilities, including those arising from or under the Real Property Leases after the Closing."

On 9 May 2014, plaintiff sued defendants for payment of back rent and other charges due under the lease stemming from Blast's failure to pay rent on the space defendants had assigned to Blast. Defendants notified Blast of the lawsuit, and Blast promptly agreed to indemnify and defend defendants in accord with their Agreement. During discovery, counsel for plaintiff requested copies of "post-suit correspondence and documents exchanged between [defendants] and Blast." After

1. Around 14 February 2000, Tower Place Joint Venture (Original Lessor), as landlord, and Bally Total Fitness Corporation (Original Lessee), as tenant, entered into a lease agreement for the property at issue. Friday Investments, LLC (plaintiff) is the current owner of the property at issue and successor in interest to Tisano Realty Inc., the successor in interest to the Original Lessor. Defendant Bally Mid-Atlantic is the successor in interest to the Original Lessee.

defendants refused to comply, plaintiff moved to compel production of the requested documents. Defendants objected and moved for a protective order, asserting the attorney–client privilege. The trial court orally ordered defendants to produce the documents and a privilege log for *in camera* review.

On 2 April 2015, after completing its *in camera* review, the trial court notified counsel via e-mail that it had denied defendants' motion for a protective order and granted plaintiff's motion to compel. On 13 April 2015, the trial court entered its written order summarily denying defendants' motion for a protective order and granting plaintiff's motion to compel. At no point did either party request that the trial court make written findings of fact and conclusions of law. Defendants appealed the trial court's interlocutory order, successfully contending that the subject of the appeal affects a "substantial right." After settling the record on appeal, and after the briefing deadline had passed, defendants moved to submit the documents at issue under seal for *in camera* review by the Court of Appeals.

The Court of Appeals affirmed the trial court's grant of plaintiff's motion to compel. *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, ___ N.C. App. ___, 788 S.E.2d 170 (2016). Before discussing the merits of the appeal, the Court of Appeals denied defendants' request to present the records for appellate review as untimely because the request was made after plaintiff had submitted its brief to the Court of Appeals. *Id.* at ___, 788 S.E.2d at 175; *see* N.C. R. App. P. 9(b)(5)(a). On the merits, the Court of Appeals held that a tripartite attorney–client relationship did not exist between defendants and Blast because "an indemnification provision in an asset purchase agreement, standing alone, is insufficient to create a common legal interest between a civil litigant indemnitee and a third-party indemnitor." *Friday Invs., LLC*, ___ N.C. App. at ___, 788 S.E.2d at 172. The Court of Appeals reasoned that defendants and Blast shared merely a common business interest and that this distinction rendered inapplicable our previous decision in *Raymond v. North Carolina Police Benevolent Ass'n*, 365 N.C. 94, 98, 721 S.E.2d 923, 926 (2011) (recognizing the tripartite attorney–client relationship). As a result, the attorney–client privilege did not extend to the communications between defendants and Blast. This Court allowed discretionary review. *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, 369 N.C. 185, 793 S.E.2d 685 (2016).

[1] "The primary purpose of the discovery rules is to facilitate the disclosure prior to trial of any *unprivileged* information that is relevant and material to the lawsuit so as to permit the narrowing and sharpening of

the basic issues and facts that will require trial." *Bumgarner v. Reneau*, 332 N.C. 624, 628, 422 S.E.2d 686, 688-89 (1992) (emphasis added) (citation omitted). Rule 26 provides for a broad scope of discovery, allowing "[p]arties [to] obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action." N.C.G.S. § 1A-1, Rule 26(b)(1) (2015) (emphasis added).

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L. Ed. 2d 584, 591 (1981) (citation omitted). For the privilege to apply and thus exclude relevant evidence, "the relation of attorney and client [must have] existed at the time the [particular] communication was made." *In re Investigation of Miller*, 357 N.C. 316, 335, 584 S.E.2d 772, 786 (2003) (quoting *State v. McIntosh*, 336 N.C. 517, 523, 444 S.E.2d 438, 442 (1994)).

Historically, an attorney–client relationship arises between an attorney and a single client the attorney represents. *See id.* at 335, 584 S.E.2d at 786. This Court, however, has also recognized a multiparty attorney–client relationship in which an attorney represents two or more clients. *See Dobias v. White*, 240 N.C. 680, 685, 83 S.E.2d 785, 788 (1954) (indicating that an attorney–client relationship can exist when "two or more persons employ the same attorney to act for them in some business transaction"). "The rationale for recognizing this tripartite attorney-client relationship is that individuals with a common interest in the litigation should be able to freely communicate with their attorney, and with each other, to more effectively defend or prosecute their claims." *Raymond*, 365 N.C. at 99, 721 S.E.2d at 926 (citation omitted).

In *Raymond* a former police officer and member of the Southern States Police Benevolent Association (SSPBA) contacted the SSPBA and spoke with an SSPBA attorney in confidence, seeking legal advice regarding his recent demotion. *Id.* at 95-96, 721 S.E.2d at 924-25. The SSPBA then referred the officer to outside legal counsel paid for by the SSPBA. As a dues-paying member, the former officer's SSPBA membership entitled him to various SSPBA services, including legal representation in grievance and disciplinary matters. Recognizing the tripartite nature of the arrangement, this Court held that an attorney–client relationship existed between the former police officer, the SSPBA and its attorney, and the outside legal counsel selected by the association to represent the former officer. *Id.* at 99, 721 S.E.2d at 927. As such, any communications between them that also satisfied the five-factor test articulated in *State v. Murvin*, 304 N.C. 523, 531, 284 S.E.2d 289,

294 (1981), were privileged. *Raymond*, 365 N.C. at 100-01, 721 S.E.2d at 927-28.

Our decision in *Raymond* analogized the relationship between the officer, the SSPBA and an attorney for the association, and outside defense counsel to those relationships common in the insurance context. *See id.* at 98, 721 S.E.2d at 926 ("In the insurance context, courts find that the attorney defending the insured and receiving payment from the insurance company represents both the insured and the insurer . . . ." (citing *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 602-03, 617 S.E.2d 40, 46 (2005), *aff'd per curiam*, 360 N.C. 356, 625 S.E.2d 779 (2006) (mem.))). As in the insurance context, a tripartite attorney–client relationship arose from the officer and the SSPBA's common interest in the litigation, stemming from the officer's contractual relationship with the SSPBA as a dues-paying member. *See Raymond*, 365 N.C. at 98, 721 S.E.2d at 926 ("[N]otwithstanding that usually only the insured has been sued, a tripartite attorney-client relationship exists because the interests of both the insured and the insurer in prevailing against the plaintiff's claim are closely aligned.").

"[A] contractual duty to defend and indemnify creates a common interest and tripartite relationship between the insurer, the insured, and the defense attorney." *Id.* at 98-99, 721 S.E.2d at 926 (citing *Bourlon*, 172 N.C. App. at 603-05, 617 S.E.2d at 46-47). Like the common interest found between the insurer and the insured, an indemnification agreement creates a common interest between the indemnitor and the indemnitee in that the indemnitor contractually shares in the indemnitee's legal well-being because the agreement subjects the indemnitor to the "damages assessed and loss resulting from an adverse judgment." *Queen City Coach Co. v. Lumberton Coach Co.*, 229 N.C. 534, 536, 50 S.E.2d 288, 289 (1948) (citation omitted); *see also Dixie Container Corp. of N.C. v. Dale*, 273 N.C. 624, 627, 160 S.E.2d 708, 711 (1968) (noting that an indemnity contract "will be construed to cover all losses, damages, and liabilities which reasonably appear to have been within the contemplation of the parties"). The fact that indemnification relates to a business purpose does not sever but strengthens that common interest. *See Dobias*, 240 N.C. at 685, 83 S.E.2d at 788 (recognizing an attorney–client relationship between more than two individuals when "two or more persons employ the same attorney to act for them in some business transaction"). As a result, a tripartite attorney–client relationship arises because the interests of both the indemnitor and indemnitee in prevailing against the plaintiff's claim are contractually aligned, notwithstanding that usually only the indemnitee has been sued. *See Raymond*, 365 N.C. at 98, 721 S.E.2d at 926.

In all significant ways, the question of the formation of an attorney–client relationship here is indistinguishable from that resolved by our decision in *Raymond*. Blast contractually agreed to indemnify and defend defendants against any losses incurred relating to their real property lease. After this litigation commenced, defendants notified Blast of the litigation, and Blast engaged counsel to defend the case under the indemnification agreement. Like the common interest found in the insurance context, Blast's interest in defendants' legal well-being as indemnitees creates the common interest in this litigation: The indemnification provision subjects Blast to any damages that result from an adverse judgment against defendants. Accordingly, a tripartite attorney–client relationship exists between defendants, Blast, and their defense counsel.

[2] The mere fact that an attorney–client relationship exists, however, does not automatically trigger the attorney–client privilege. *See Dobias*, 240 N.C. at 684, 83 S.E.2d at 788 (Simply because "the evidence relates to communications between attorney and client alone does not require its exclusion."). For the attorney–client privilege to apply, the communication must satisfy the five-factor *Murvin* test:

> (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege.

Murvin, 304 N.C. at 531, 284 S.E.2d at 294 (citing 1 Henry Brandis, Jr., *Stansbury's North Carolina Evidence* § 62 (1973)). "[I]f any one of these five elements is not present in any portion of an attorney-client communication, that portion of the communication is not privileged." *Brown v. Am. Partners Fed. Credit Union*, 183 N.C. App. 529, 534, 645 S.E.2d 117, 121 (2007) (quoting *In re Miller*, 357 N.C. at 335, 584 S.E.2d at 786). "The trial court is best suited to determine, through a fact-sensitive inquiry, whether the attorney-client *privilege* applies to a specific communication." *Raymond*, 365 N.C. at 100, 721 S.E.2d at 927 (emphasis added) (citing *In re Miller*, 357 N.C. at 336, 584 S.E.2d at 787).

"Findings of fact and conclusions of law are necessary on decisions of any motion . . . only when requested by a party . . . ." N.C.G.S. § 1A-1, Rule 52(a)(2) (2015). The purpose of requiring findings of fact

and conclusions of law by the trial court "is to allow meaningful review by the appellate courts." *O'Neill v. S. Nat'l Bank of N.C.*, 40 N.C. App. 227, 231, 252 S.E.2d 231, 234 (1979) (citation omitted). "When the trial court is not required to find facts and make conclusions of law and does not do so, it is presumed that the court on proper evidence found facts to support its judgment." *Estrada v. Burnham*, 316 N.C. 318, 324, 341 S.E.2d 538, 542 (1986), *superseded by statute*, N.C.G.S. § 1A-1, Rule 11(a) (Cum. Supp. 1988), *on other grounds as stated in Turner v. Duke Univ.*, 325 N.C. 152, 163-64, 381 S.E.2d 706, 712-13 (1989) (citations omitted).

A trial court's discovery ruling is reviewed for abuse of discretion, *see Firemen's Mut. Ins. Co. v. High Point Sprinkler Co.*, 266 N.C. 134, 143, 146 S.E.2d 53, 62 (1966), and will be overturned "only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision," *In re Foreclosure of Lucks*, 369 N.C. 222, 228, 794 S.E.2d 501, 506 (2016) (quoting *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)).

Though a tripartite attorney–client relationship exists, we cannot conclude, given the bare record before us, that the trial court abused its discretion or misapplied the law in compelling disclosure of the communications at issue. The underlying trial court order compelling discovery contains neither findings of fact nor conclusions of law, as neither party requested them. Therefore, we must presume that the trial court found facts sufficient to support its determination that the communications at issue were not privileged. Moreover, defendants did not properly present the allegedly privileged documents for appellate review. *See State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983) ("It is the appellant's duty and responsibility to see that the record is in proper form and complete."). As such, the record merely contains a privilege log that briefly describes each of the allegedly privileged documents. Nothing in the privilege log or the trial court's order suggests that the trial court erroneously concluded that a tripartite attorney–client relationship had not formed or that the court misapplied the five-factor *Murvin* test. Given the record before us, we cannot conclude that the trial court's decision was so arbitrary that it could not have been the result of a reasoned decision.

In sum, we hold that Blast's contractual duty to defend and indemnify defendants created a tripartite attorney–client relationship. Nonetheless, the record before us fails to indicate that the trial court abused its discretion in determining that the post-litigation communications between defendants and Blast were not privileged. Accordingly,

we modify and affirm the decision of the Court of Appeals. We remand this case to the Court of Appeals for further remand to the trial court for additional proceedings not inconsistent with this opinion.

MODIFIED AND AFFIRMED; REMANDED.

IN THE MATTER OF A.E.C.

No. 82PA15-2

Filed 3 November 2017

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order of the Court of Appeals entered on 24 October 2016 dismissing an appeal from orders signed on 2 February 2016 by Judge Edward A. Pone in District Court, Cumberland County. Heard in the Supreme Court on 11 October 2017.

Elizabeth Kennedy-Gurnee, *Christopher L. Carr*, *and James D. Dill for Cumberland County Department of Social Services*, *petitioner-appellant.*

Beth A. Hall, *Attorney Advocate for appellee Guardian ad Litem.*

Joyce L. Terres, *Assistant Appellate Defender*, *for respondent-appellee-father.*

PER CURIAM.

CERTIORARI IMPROVIDENTLY ALLOWED.

KB AIRCRAFT ACQUISITION, LLC v. BERRY

[370 N.C. 243 (2017)]

KB AIRCRAFT ACQUISITION, LLC
v.
JACK M. BERRY, JR. AND 585 GOFORTH ROAD, LLC

No. 349PA16

Filed 3 November 2017

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 790 S.E.2d 559 (2016), affirming an order of summary judgment entered on 6 February 2015 by Judge Richard L. Doughton in Superior Court, Watauga County. Heard in the Supreme Court on 9 October 2017.

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by Byron L. Saintsing, for plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Clint S. Morse and John H. Small, for defendant-appellees.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA
v.
SANDRA MESHELL BRICE

No. 244PA16

Filed 3 November 2017

Indictment and Information—habitual misdemeanor larceny—prior convictions—statutory requirement—not jurisdictional

Where the indictment charging defendant with habitual misdemeanor larceny failed to comply with N.C.G.S. § 15A-928—which provided that the element of the prior convictions be charged in a separate special indictment or a separate count—the indictment was not fatally defective, and the trial court had jurisdiction over the case. The provision contained in section 15A-928 was not a jurisdictional issue that defendant was entitled to raise on appeal without having objected or otherwise sought relief before the trial court.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 786 S.E.2d 812 (2016), vacating and remanding a judgment entered on 12 February 2015 by Judge Michael D. Duncan in Superior Court, Catawba County. Heard in the Supreme Court on 30 August 2017.

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

Glenn Gerding, Appellate Defender, by Daniel L. Spiegel, Assistant Appellate Defender, for defendant-appellee.

ERVIN, Justice.

After defendant Sandra Meshell Brice was convicted of committing the felony of habitual misdemeanor larceny, a unanimous panel of the Court of Appeals vacated defendant's conviction and remanded this case to the trial court for the entry of a new judgment and resentencing based upon a misdemeanor larceny conviction on the grounds that the indictment returned against defendant in this case was fatally defective. We reverse the Court of Appeals' decision.

On 22 July 2013, the Catawba County grand jury returned a single-count bill of indictment purporting to charge defendant with habitual

misdemeanor larceny. The charge against defendant came on for trial before the trial court and a jury during the 9 February 2015 criminal session of the Superior Court, Catawba County. After the jury was empaneled and prior to the making of the parties' opening statements, defendant admitted, outside the presence of the jury and after an appropriate colloquy with the trial court, to having been convicted of the four prior larcenies delineated in the indictment. On 12 February 2015, the jury returned a verdict convicting defendant of habitual misdemeanor larceny. Based upon the jury's verdict, the trial court entered a judgment sentencing defendant to an active term of ten to twenty-one months imprisonment, suspended defendant's active sentence, and placed defendant on supervised probation for a period of twenty-four months on the condition that defendant comply with the usual terms and conditions of probation, serve a seventy-five-day term of imprisonment, and pay a $300.00 fine, attorney's fees, and the costs. Defendant noted an appeal to the Court of Appeals from the trial court's judgment.

In her sole challenge to the trial court's judgment before the Court of Appeals, defendant argued that the indictment's failure to comply with the requirements spelled out in N.C.G.S. § 15A-928 deprived the trial court of "jurisdiction to enter judgment and sentence against [defendant] for felony habitual misdemeanor larceny," so that her "conviction for habitual misdemeanor larceny must be vacated and remanded for entry of judgment on misdemeanor larceny."

The State, on the other hand, noted defendant's failure to challenge the validity of the indictment that had been returned for the purpose of charging her with habitual misdemeanor larceny before the trial court and pointed out that defendant had not contended that "the indictment fails to describe each element of the crime with sufficient specificity" or that she had been "prejudiced in preparing her defense as a result of the indictment." Thus, in the State's view, any "variation" between "the strict requirements of N.C.[G.S.] § 15A-928" and the indictment returned against defendant in this case "is not reversible" error. As a result, the State urged the Court of Appeals to leave the trial court's judgment undisturbed.

In vacating the trial court's judgment and remanding this case to the Superior Court, Catawba County, for resentencing based upon a conviction for misdemeanor, rather than habitual misdemeanor, larceny, the Court of Appeals concluded that "an indictment for habitual misdemeanor larceny is subject to the provisions of N.C.[G.S.] § 15A-928" and that, "[o]n its face, the indictment here failed to comply with" that statutory provision. *State v. Brice*, ___ N.C. App. ___, ___, 786 S.E.2d 812, 815

(2016). The Court of Appeals rejected the State's argument in reliance upon the decision in *State v. Jernigan*, 118 N.C. App. 240, 455 S.E.2d 163 (1995), in which the Court of Appeals had held that noncompliance with the arraignment procedures set out in N.C.G.S. § 15A-928(c) constituted harmless error given that the defendant, who had stipulated to his prior convictions prior to trial, "was fully aware of the charges against him . . . , understood his rights and the effect of the stipulation, and . . . was in no way prejudiced by the failure of the court to formally arraign him and advise him of his rights." *Brice*, ___ N.C. App. at ___, 786 S.E.2d at 815 (quoting *Jernigan*, 118 N.C. App. at 245, 455 S.E.2d at 167). In reaching this result, the Court of Appeals stated that, while "a formal arraignment under [N.C.G.S. §] 15A-928(c) is not a matter of jurisdictional consequence," the indictment requirements set out in N.C.G.S. § 15A-928(b) had been held to be jurisdictional in *State v. Williams*, 153 N.C. App. 192, 568 S.E.2d 890 (2002), *disc. rev. improvidently allowed*, 357 N.C. 45, 577 S.E.2d 618 (2003) (per curiam). *Id.* at ___, 786 S.E.2d at 815. As a result, since the failure of the indictment returned against defendant in this case to comply with the requirements of N.C.G.S. § 15A-928 deprived the trial court of jurisdiction to enter judgment against defendant based upon a conviction for habitual misdemeanor larceny, the Court of Appeals vacated defendant's conviction for that offense and remanded this case to the trial court for the entry of judgment and resentencing based upon a conviction for misdemeanor, rather than habitual misdemeanor, larceny. *Id.* at ___, 786 S.E.2d at 815.

The State sought discretionary review of the Court of Appeals' decision by this Court on the grounds that "bills of indictment [should not be quashed] for mere informality or minor defects which do not affect the merits of the case," quoting *State v. Brady*, 237 N.C. 675, 679, 75 S.E.2d 791, 793 (1953), and that this Court "do[es] not favor the practice of quashing an indictment or arresting a judgment for informalities which could not possibly have been prejudicial to the rights of defendant in the trial court," quoting *State v. Russell*, 282 N.C. 240, 248, 192 S.E.2d 294, 299 (1972). According to the State, the Court of Appeals implicitly held in *State v. Stephens*, 188 N.C. App. 286, 293, 655 S.E.2d 435, 439-40, *disc. rev. denied*, 362 N.C. 370, 662 S.E.2d 389 (2008), that "an indictment that alleges all the felony offense's essential elements, including the prior conviction, properly alleges the felony offense" "despite not complying with [the] form requirements" set out in N.C.G.S. § 15A-928(b). In the State's view, the Court of Appeals erred by relying upon *Williams*, which had been "wrongly decided." Finally, the State asserted that, assuming that noncompliance with N.C.G.S. § 15A-928 constituted a jurisdictional

defect, the Court of Appeals had erred by failing to simply arrest judgment given that the trial court lacked jurisdiction to convict defendant of, and sentence defendant for, a misdemeanor in this case.

Defendant, on the other hand, argued that compliance with N.C.G.S. § 15A-928 "is no mere formality, but rather is the formal mechanism by which the purpose of [N.C.G.S.] § 15A-928 is achieved." "If a defendant is not apprised of the opportunity to admit the prior convictions outside of the presence of the jury," "the defendant will be unable to avoid the certain prejudice that would result from evidence of prior convictions being presented to the jury." In defendant's view, the State is requesting the Court to disturb settled North Carolina law, in accordance with which "the statute must be strictly followed in order to apprise [the] defendant of the offense for which he is charged and to enable him to prepare an effective defense," quoting *State v. Jackson*, 306 N.C. 642, 652 n.2, 295 S.E.2d 383, 389 n.2 (1982). Finally, defendant asserted that the remedy that the Court of Appeals afforded to defendant in this case has been "applied . . . time and time again" and "should remain undisturbed." This Court granted the State's discretionary review petition on 8 December 2016.

In seeking to persuade us to overturn the Court of Appeals' decision, the State points out that this Court has held that "[a]n indictment is sufficient if it charges all essential elements of the offense with sufficient particularity to apprise the defendant of the specific accusations against him and (1) will enable him to prepare his defense and (2) will protect him against another prosecution for that same offense," quoting *State v. Bowden*, 272 N.C. 481, 483, 158 S.E.2d 493, 495 (1968), and, citing *State v. House*, 295 N.C. 189, 200, 244 S.E.2d 654, 660 (1978), that noncompliance with provisions couched in mandatory terms is not necessarily fatal to the validity of an indictment. The State contends that a decision to invariably quash an indictment under circumstances such as those present here would attribute "to the Legislature an intent to paramount [sic] mere form over substance," quoting *House*, 295 N.C. at 203, 244 S.E.2d at 662. As a result, the State argues that, given that "we are no longer bound by the 'ancient strict pleading requirements of the common law' " and that "contemporary criminal pleadings requirements have been 'designed to remove from our law unnecessary technicalities which tend to obstruct justice,' " quoting *State v. Williams*, 368 N.C. 620, 623, 781 S.E.2d 268, 271 (2016) (quoting *State v. Freeman*, 314 N.C. 432, 436, 333 S.E.2d 743, 746 (1985)), "[t]his Court should hold that a pleading that does not conform to [N.C.G.S. §] 15A-928's form requirements is not jurisdictionally defective for that reason alone."

Defendant, on the other hand, contends that the failure of the indictment returned against him in this case to separate the allegations setting out the substantive offense from the allegations delineating defendant's prior convictions renders that indictment fatally defective and insufficient to confer jurisdiction upon the trial court to enter judgment against defendant based upon an habitual misdemeanor larceny conviction. The fact that N.C.G.S. § 15A-928 utilizes mandatory terms such as "must" and "may not" in describing the manner in which allegations concerning a defendant's prior convictions should be set out indicates that these requirements should be treated as jurisdictional in nature, particularly given that the relevant statutory provisions do not explicitly state that noncompliance with the provisions of N.C.G.S. § 15A-928 is not a jurisdictional defect and that the General Assembly has failed to amend the relevant statutory provision to reflect the State's interpretation despite several Court of Appeals opinions finding that noncompliance with the separate indictment provisions of N.C.G.S. § 15A-928 constitutes a fatal defect.

> The crime of larceny is a felony, without regard to the value of the property in question, if the larceny is . . . [c]ommitted after the defendant has been convicted in this State or in another jurisdiction for any offense of larceny under this section, or any offense deemed or punishable as larceny under this section, or of any substantially similar offense in any other jurisdiction, regardless of whether the prior convictions were misdemeanors, felonies, or a combination thereof, at least four times. A conviction shall not be included in the four prior convictions required under this subdivision unless the defendant was represented by counsel or waived counsel at first appearance or otherwise prior to trial or plea. If a person is convicted of more than one offense of misdemeanor larceny in a single session of district court, or in a single week of superior court or of a court in another jurisdiction, only one of the convictions may be used as a prior conviction under this subdivision; except that convictions based upon offenses which occurred in separate counties shall each count as a separate prior conviction under this subdivision.

N.C.G.S. § 14-72(b)(6) (2015). As a result, a criminal defendant is guilty of the felony of habitual misdemeanor larceny in the event that he or she "took the property of another" and "carried it away" "without the owner's consent" and "with the intent to deprive the owner of his property permanently," *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815

(1982) (citations omitted), *overruled in part on other grounds by State v. Mumford*, 364 N.C. 394, 402, 699 S.E.2d 911, 916 (2010), after having been previously convicted of an eligible count of larceny on four prior occasions. N.C.G.S. § 14-72(b)(6).

N.C.G.S. § 15A-924 (a) provides, in pertinent part, that:

> A criminal pleading must contain . . . [a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C.G.S. § 15A-924(a)(5) (2015). "To be sufficient under our Constitution, an indictment 'must allege lucidly and accurately all the essential elements of the offense endeavored to be charged.' " *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (quoting *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953)), *cert. denied*, 539 U.S. 985, 124 S. Ct. 44, 156 L. Ed. 2d 702 (2003). "It is hornbook law that a valid indictment is a condition precedent to the jurisdiction of the Superior Court to determine the guilt or innocence of the defendant, and to give authority to the court to render a valid judgment." *State v. Ray*, 274 N.C. 556, 562, 164 S.E.2d 457, 461 (1968) (citing, *inter alia*, N.C. Const. art. I, § 12). "A criminal pleading . . . is fatally defective if it 'fails to state some essential and necessary element of the offense of which the defendant is found guilty.' " *State v. Ellis*, 368 N.C. 342, 344, 776 S.E.2d 675, 677 (2015) (quoting *State v. Gregory*, 223 N.C. 415, 418, 27 S.E.2d 140, 142 (1943) (citations omitted)). "[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (citations omitted), *cert. denied*, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000). "As to other less serious defects, objection must be made by motion to quash the indictment or, in proper cases, a bill of particulars may be demanded." *Gregory*, 223 N.C. at 418, 27 S.E.2d at 142.

The indictment returned against defendant in this case alleged that:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above [Sandra Meshell Brice] unlawfully, willfully, and feloniously did steal, take, and carry away FIVE PACKS OF STEAKS, the personal property of FOOD

> LION, LLC, such property having a value of SEVENTY DOLLARS ($70.00), and the defendant has had the following four prior larceny convictions in which [s]he was represented by counsel or waived counsel:
>
> On or about MAY 8, 1996 the defendant committed the misdemeanor of LARCENY in violation of the law of the State of North Carolina, G.S. 14-72, and on or about SEPTEMBER 10, 1996 the defendant was convicted of the misdemeanor of LARCENY in the District Court of Lincoln County, North Carolina; and that
>
> On or about FEBRUARY 19, 1997, the defendant committed the misdemeanor of LARCENY in violation of the law of the State of North Carolina, G.S. 14-72, and on or about JULY 29, 1997 the defendant was convicted of the misdemeanor of LARCENY in the District Court of Catawba County, North Carolina; and that
>
> On or about JUNE 13, 2003 the defendant committed the misdemeanor of LARCENY in violation of the law of the State of North Carolina, G.S. 14-72, and on or about OCTOBER 17, 2003 the defendant was convicted of the misdemeanor of LARCENY in the District Court of Catawba County, North Carolina; and that
>
> On or about JULY 7, 2007 the defendant committed the misdemeanor of LARCENY in violation of the law of the State of North Carolina, G.S. 14-72, and on or about SEPTEMBER 24, 2007 the defendant was convicted of the misdemeanor of LARCENY in the District Court of Catawba County, North Carolina.

A careful reading of the indictment returned against defendant in this case clearly indicates that the Catawba County grand jury alleged that defendant had stolen, taken, and carried away the property of another with the requisite intent after having been previously convicted of misdemeanor larceny at times when she had either been represented by or waived counsel in various North Carolina District Courts on four separate occasions. As a result, given that the indictment returned against defendant in this case alleged all of the essential elements of habitual misdemeanor larceny, it sufficed to give the trial court jurisdiction over this case under the traditional test utilized in evaluating the facial validity of a criminal pleading. On the other hand, the indictment returned against defendant in this case unquestionably failed to comply with the

requirements of N.C.G.S. § 15A-928(a) and (b), which provide that, in instances in which "the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter, an indictment or information for the higher offense may not allege the previous conviction," N.C.G.S. § 15A-928(a) (2015), and must, instead, "be accompanied by a special indictment or information, filed with the principal pleading, charging that the defendant was previously convicted of a specified offense," or the special indictment may be contained "in the principal indictment as a separate count," *id.* § 15A-928(b) (2015). As a result, the ultimate issue presented for our consideration in this case is whether the fact that the indictment returned against defendant in this case failed to comply with the separate indictment or separate count requirement set out in N.C.G.S. § 15A-928 constituted a fatal defect sufficient to deprive the trial court of jurisdiction to enter judgment against defendant.

Admittedly, this Court has stated on a number of occasions that, "[w]here jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (quoting *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975), *overruled on other grounds by Quick v. Quick*, 305 N.C. 446, 457-58, 290 S.E.2d 653, 661 (1982), *superseded in part by statute*, N.C.G.S. § 50-13.4(f)(9) (1983)). The extent, if any, to which a particular statutory provision creates a jurisdictional requirement hinges upon the meaning of the relevant statutory provisions. *In re D.S.*, 364 N.C. 184, 187, 694 S.E.2d 758, 760 (2010) (stating that "[o]ur principal task here is to interpret the statute"). According to well-established North Carolina law, "[t]he primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990) (citation omitted). "The best indicia of [the legislative] intent are the language of the statute . . . , the spirit of the act, and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted).

The statutory scheme created in N.C.G.S. § 15A-928 serves two important purposes. *State v. Ford*, 71 N.C. App. 452, 454, 322 S.E.2d 431, 432 (1984) (stating that the "purpose of [N.C.G.S. § 15A-928] is to insure that defendants are informed of the prior convictions they are charged with and are given a fair opportunity to either admit or deny them before

the State's evidence is concluded"). As an initial matter, the provision set out in N.C.G.S. § 15A-928(b) requiring "a special indictment or information" "charging that the defendant was previously convicted of a specified offense" serves the purpose of ensuring that "the defendant has notice that he is to be charged as a recidivist before pleading . . . , eliminating the possibility that he will enter a guilty plea on the expectation that the maximum punishment he could receive would be that provided for in the statute defining the present crime." *State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977) (quoting Harold Dubroff, Note, *Recidivist Procedures*, 40 N.Y.U. L. Rev. 332, 348 (1965) [hereinafter *Recidivist Procedures*]) (discussing the North Carolina Habitual Felons Act and noting, at 292 N.C. at 434, 233 S.E.2d at 587, the procedural similarities between that Act and the provisions of N.C.G.S. § 15A-928).[1] Secondly, the requirement set out in N.C.G.S. § 15A-928(a) and (b) that the defendant's prior conviction be alleged in a special indictment or information or in a separate count is intended to prevent "any prejudice due to the introduction of evidence of prior convictions before the trier of guilt for the present offense." *Id.* at 435, 233 S.E.2d at 588 (quoting *Recidivist Procedures* at 348). The separate indictment requirement operates to prevent such prejudice using the procedures prescribed in N.C.G.S. § 15A-928(c), which requires the trial court, out of the presence of the jury, to "arraign the defendant upon the special indictment or information" after advising him or her that "he [or she] may admit the previous conviction alleged, deny it, or remain silent," N.C.G.S. § 15A-928(c) (2015), with an admission of the prior conviction element sufficing to preclude the admission of evidence concerning the defendant's prior conviction before the jury, *id.* § 15A-928(c)(1), and with a denial of the prior conviction element sufficing to authorize "the State [to] prove that element of the offense charged before the jury as a part of its case," *id.* § 15A-928(c)(2).

An examination of the language in which N.C.G.S. § 15A-928 is couched and the purposes sought to be achieved by N.C.G.S. § 15A-928 do not persuade us that noncompliance with the relevant statutory

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1. This Court has stated, in dicta, that, "when [N.C.]G.S. § 15A-928 does apply, the statute must be strictly followed." *Jackson*, 306 N.C. at 652 n.2, 295 S.E.2d at 389 n.2. The quoted statement was made in a case involving a special indictment alleging a prior conviction that had been returned nearly two months after the indictment charging the substantive offense. *Id.* at 652 n.2, 295 S.E.2d at 389 n.2. In stating that the indictment charging the prior conviction or convictions "must be filed *with* the principal pleading," *id.* at 652 n.2, 295 S.E.2d at 389 n.2, the Court was clearly referring to the notice-related concerns sought to be addressed by N.C.G.S. § 15A-928.

provisions constitutes a jurisdictional defect. Although the separate indictment provisions contained in N.C.G.S. § 15A-928 are couched in mandatory terms, that fact, standing alone, does not make them jurisdictional in nature. *Cf. House*, 295 N.C. at 200-03, 244 S.E.2d at 660-62 (stating that the word "must" or "shall" in a statute does not always "indicate a legislative intent to make a provision of the statute mandatory, and a failure to observe it fatal to the validity of the purported action" and holding that, though N.C.G.S. § 15A-644(a)(5) directs that an indictment "must contain" the grand jury foreman's signature "attesting the concurrence of 12 or more grand jurors in the finding of a true bill of indictment," an indictment lacking the express statement that "12 or more grand jurors concurred in such finding" was nevertheless valid "where the foreman's statement upon the bill is clearly so intended and there is nothing to indicate the contrary."). Similarly, the notice and prejudice-related purposes that underlie N.C.G.S. § 15A-928 are not the sort of goals typically sought to be achieved by the imposition of additional jurisdictional requirements over and above those otherwise required. Although the provision of sufficient notice does appear to have jurisdictional overtones, a defendant can obtain sufficient notice of the exact nature of the charge that has been lodged against him or her through compliance with the traditional facial validity requirements set out in N.C.G.S. § 15A-924(a)(5) without the necessity for compliance with the separate indictment provisions of N.C.G.S. § 15A-928. Similarly, compliance with the separate indictment requirement set out in N.C.G.S. § 15A-928 is not absolutely necessary to ensure the absence of prejudice to defendant stemming from the disclosure of defendant's prior convictions to the jury given that defendant was separately arraigned on the prior conviction allegations in this case as required by N.C.G.S. § 15A-928(c), admitted to the prior convictions, and was convicted by a jury that had no knowledge of her prior larceny convictions. As a result, a careful examination of the language in which N.C.G.S. § 15A-928 is couched, coupled with an analysis of the purposes sought to be served by the enactment of the relevant statutory language, persuades us that the separate indictment provision contained in N.C.G.S. § 15A-928 is not a jurisdictional issue that defendant was entitled to raise on appeal without having lodged an appropriate objection or otherwise sought relief on the basis of that claim before the trial court.[2]

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2. Although defendant asserts that similar language contained in the statutory provisions governing the sentencing of habitual felons was held to be jurisdictional in *State v. Patton*, 342 N.C. 633, 635, 466 S.E.2d 708, 709-10 (1996), we do not understand *Patton* to involve a jurisdictional holding.

In response to questions posed during oral argument, defendant asserted that there were only two categories of indictment-related error—facial defects that deprived the trial court of jurisdiction and errors for which no relief could be afforded even if the alleged defect in the indictment was brought to the trial court's attention by objection, a motion to dismiss or quash, or otherwise. *See*, *e.g.*, *State v. Cheek*, 307 N.C. 552, 555, 299 S.E.2d 633, 636 (1983) (rejecting the defendant's argument that the omission of "with force and arms" rendered a rape indictment fatally defective); *State v. Corbett*, 307 N.C. 169, 173-75, 297 S.E.2d 553, 557-58 (1982) (same); *State v. Dudley*, 182 N.C. 822, 825, 109 S.E. 63, 65 (1921) (stating that, while "[i]t may have been the better form to have added to the bill that the alleged default was also 'contrary to the statute in such case made and provided,' but this, if it be a defect, is one cured in express terms by our Statute of Jeofails"); *State v. Sykes*, 104 N.C. 694, 698-99, 10 S.E. 191, 192-93 (1889) (opining that "the grounds assigned in support of the motion to quash are untenable" given that "it was not necessary that the affidavit or warrant should conclude 'against the statute' "); *State v. Howard*, 92 N.C. 772, 778 (1885) (holding that it was not necessary for an indictment for murder to allege that the "prisoner, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil" or that the "deceased was in the peace of God and the State").[3] In advancing this argument, however, defendant has overlooked a third category of indictment-related errors involving deficiencies that must be brought to the trial court's attention as a prerequisite for the assertion of that indictment-related claim on appeal. *See*, *e.g.*, *State v. Green*, 266 N.C. 785, 788-89, 147 S.E.2d 377, 379-80 (1966) (per curiam) (stating that the defendant, "by going to trial on this warrant without making a motion to quash, waived any duplicity in the warrant" (citing *State v. Best*, 265 N.C. 477, 144 S.E.2d 416 (1965))); *State v. Strouth*, 266 N.C. 340, 342, 145 S.E.2d 852, 853 (1966) (observing that, "by going to trial without making a motion to quash, defendant waived any duplicity in the warrant" (quoting *Best*, 265 N.C. at 481, 144 S.E.2d at 418)); *State v. Merritt*, 244 N.C. 687, 688, 94 S.E.2d 825, 826 (1956) (stating that "[t]he defendant could have required separate counts, one charging operation of a motor vehicle while under the influence of intoxicating liquor" and "the other charging the operation

3. A number of the decisions cited at this point in the text rely upon N.C.G.S. § 15-155, which is entitled "Defects which do not vitiate" and which provides, in pertinent part, that "[n]o judgment upon any indictment for felony or misdemeanor . . . shall be stayed or reversed for the want of the averment of any matter unnecessary to be proved, nor for omission of the words . . . 'with force and arms,' . . . nor for omission of the words 'against the form of the statute' or 'against the form of the statutes.' "

while under the influence of narcotics," but, "[b]y going to trial without making a motion to quash, [the defendant] waived any duplicity which might exist in the bill" (citing multiple cases)). The Court of Appeals applied a similar analysis in evaluating claims arising from noncompliance with the separate indictment provisions of N.C.G.S. § 15A-928 in *State v. Sullivan*, 111 N.C. App. 441, 442, 432 S.E.2d. 376, 377 (1993), in which the defendant successfully filed a "motion to strike the surplus language" from an indictment that violated the separate pleading requirement set out in N.C.G.S. § 15A-928, and *Stephens*, 188 N.C. App. at 288, 293, 655 S.E.2d at 437, 440, in which the Court of Appeals upheld the trial court's decision to allow the State to amend an indictment in order to ensure compliance with N.C.G.S. § 15A-928 by separating the substantive allegations from the allegations concerning the defendant's prior convictions. As a result, we hold that the claim that defendant has sought to present on appeal in this case is similar to other sorts of claims which, while not involving challenges to noncompliance with formalities that have little practical purpose, do involve deviations from statutory requirements that attempt to effectuate significant legislative policy goals and, for that reason, may well support an award of appellate relief in appropriate cases in the event that those claims are properly preserved for purposes of appellate review.

In this case, however, defendant did not challenge before the trial court the failure of the indictment returned against her to comply with the separate indictment provision set out in N.C.G.S. § 15A-928. For that reason, given that the claim that she has presented for our consideration is not jurisdictional in nature, she is not entitled to seek relief based upon that indictment-related deficiency for the first time on appeal.[4] As a result, we reverse the decision of the Court of Appeals and instruct that court to reinstate the judgment of the trial court.

REVERSED.

4. For the reasons set forth in the text of this opinion, the Court of Appeals' decision in *Williams*, 153 N.C. App. 192, 568 S.E.2d 890, is also overruled.

STATE OF NORTH CAROLINA
v.
MICHAEL ANTONIO BULLOCK

No. 194A16

Filed 3 November 2017

Search and Seizure—traffic stop—reasonable suspicion of drug activity—prolonged stop

Where a police officer pulled over defendant for multiple traffic violations, performed a safety frisk, asked defendant to sit in the front seat of the patrol car while he ran his database checks, asked permission to search defendant's car, and, a few minutes later, was joined by another officer, whose police dog alerted on a bag from defendant's trunk containing a large amount of heroin, the stop was not unlawfully prolonged. Defendant behaved nervously, had two cell phones, was driving a rental car that had been rented in someone else's name, had $372 of cash on his person, told an inconsistent story about his destination, and broke eye contact when answering questions about his destination—giving the officer reasonable suspicion of drug activity that justified the prolonged stop.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 785 S.E.2d 746 (2016), reversing an order denying defendant's motion to suppress entered on 4 August 2014, and vacating defendant's guilty plea entered on 30 July 2014 and a judgment entered on 30 July 2014, all by Judge Orlando F. Hudson, Jr. in Superior Court, Durham County, and remanding the case for further proceedings. Heard in the Supreme Court on 10 April 2017.

Joshua H. Stein, *Attorney General*, *by Derrick C. Mertz*, *Special Deputy Attorney General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by Jon H. Hunt and Michele Goldman*, *Assistant Appellate Defenders*, *for defendant-appellee.*

MARTIN, Chief Justice.

Officer John McDonough pulled defendant over for several traffic violations on I-85 in Durham. During the traffic stop that followed, Officer McDonough and another police officer discovered a large amount of heroin inside of a bag in the car that defendant was driving. Before the

superior court, defendant moved to suppress all evidence derived from this search, arguing that the search had violated the Fourth Amendment. The trial court denied defendant's motion to suppress, defendant appealed, and the Court of Appeals reversed the trial court's order. *State v. Bullock*, ___ N.C. App. ___, ___, 785 S.E.2d 746, 747 (2016). The Court of Appeals concluded that the traffic stop that led to the discovery of the heroin had been unlawfully prolonged under the standard that the Supreme Court of the United States set out in *Rodriguez v. United States*, 575 U.S. ___, 135 S. Ct. 1609 (2015). *Bullock*, ___ N.C. App. at ___, ___, 785 S.E.2d at 750, 752. We hold that the stop was not unlawfully prolonged under that standard, and therefore reverse.

After the superior court denied defendant's motion to suppress, defendant pleaded guilty but specifically reserved the right to appeal the denial of his motion. Before the Court of Appeals, defendant raised three arguments: first, that Officer McDonough unlawfully prolonged the traffic stop; second, that the consent to search defendant's car that defendant gave during the stop was not voluntary; and third, that the superior court erred in accepting defendant's guilty plea. In a divided opinion, the Court of Appeals agreed with defendant's first argument, which made it unnecessary for the court to rule on his other two arguments. *See id.* at ___, 785 S.E.2d at 755. The State exercised its statutory right of appeal to this Court based on the dissenting opinion in the Court of Appeals.

The Fourth Amendment to the United States Constitution states that "[t]he right of the people to be secure . . . , against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. "A traffic stop is a seizure 'even though the purpose of the stop is limited and the resulting detention quite brief.' " *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (quoting *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)). Under *Rodriguez*, the duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission of the stop, *see* 575 U.S. at ___, 135 S. Ct. at 1612 (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)), unless reasonable suspicion of another crime arose before that mission was completed, *see id.* at ___, ___, 135 S. Ct. at 1614, 1615. The reasonable duration of a traffic stop, however, includes more than just the time needed to write a ticket. "Beyond determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries incident to [the traffic] stop.' " *Id.* at ___, 135 S. Ct. at 1615 (alteration in original) (quoting *Caballes*, 543 U.S. at 408). These inquiries include "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.*

In addition, "an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely." *Id.* at ___, 135 S. Ct. at 1616. These precautions appear to include conducting criminal history checks, as *Rodriguez* favorably cited a Tenth Circuit case that allows officers to conduct those checks to protect officer safety. *See id.* (citing *United States v. Holt*, 264 F.3d 1215, 1221-22 (10th Cir. 2001) (en banc), *abrogated on other grounds as recognized in United States v. Stewart*, 473 F.3d 1265, 1269 (10th Cir. 2007)); *see also United States v. McRae*, 81 F.3d 1528, 1536 n.6 (10th Cir. 1996) ("Considering the tragedy of the many officers who are shot during routine traffic stops each year, the almost simultaneous computer check of a person's criminal record, along with his or her license and registration, is reasonable and hardly intrusive."), *quoted in Holt*, 264 F.3d at 1221. Safety precautions taken to facilitate investigations into crimes that are unrelated to the reasons for which a driver has been stopped, however, are not permitted if they extend the duration of the stop. *Rodriguez*, 575 U.S. at ___, 135 S. Ct. at 1616. But investigations into unrelated crimes during a traffic stop, even when conducted without reasonable suspicion, are permitted if those investigations do not extend the duration of the stop. *See id.* at ___, ___, 135 S. Ct. at 1612, 1614.

The reasonable suspicion standard is "a less demanding standard than probable cause" and a "considerably less [demanding standard] than preponderance of the evidence." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). In order to meet this standard, an officer simply must "reasonably . . . conclude in light of his experience that criminal activity may be afoot." *Terry v. Ohio*, 392 U.S. 1, 30 (1968). The officer "must be able to point to specific and articulable facts," and to "rational inferences from those facts," that justify the search or seizure. *Id.* at 21. "To determine whether reasonable suspicion exists, courts must look at 'the totality of the circumstances' as 'viewed from the standpoint of an objectively reasonable police officer.' " *State v. Johnson*, ___ N.C. ___, ___, 803 S.E.2d 137, 139 (2017) (citations omitted) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981), and *Ornelas v. United States*, 517 U.S. 690, 696 (1996)).

When reviewing a ruling on a motion to suppress, we analyze whether the trial court's "underlying findings of fact are supported by competent evidence . . . and whether those factual findings in turn support the [trial court's] ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).

In summary, the trial court found the facts as follows. Officer McDonough is an experienced police officer, having served with the

Durham Police Department since 2000 and specifically on the drug interdiction team within the special operations division of the department since 2006. On 27 November 2012, while monitoring I-85 South in Durham, Officer McDonough observed a white Chrysler speeding, following a truck too closely, and weaving briefly over the white line marking the edge of the road. Officer McDonough pulled the Chrysler over, then walked up to the passenger-side window and spoke to defendant, who was the car's driver and sole occupant. Officer McDonough asked to see defendant's driver's license and vehicle registration. Defendant's hand trembled when he handed his license to Officer McDonough. The car was a rental, but defendant was not listed as an authorized driver on the rental agreement. Officer McDonough saw that defendant had two cell phones in the rental car, and, in Officer McDonough's experience, people who transport illegal drugs have multiple phones. I-85 is a major thoroughfare for drug trafficking between Atlanta and Virginia.

Officer McDonough asked defendant where he was going. Defendant said that he was going to his girlfriend's house on Century Oaks Drive in Durham, and that he had missed his exit. Officer McDonough knew that defendant was well past his exit if defendant was going to Century Oaks Drive. Specifically, defendant had gone past at least three exits that would have taken him where he said he was going. Defendant said that he had recently moved from Washington, D.C., to Henderson, North Carolina. Officer McDonough asked defendant to step out of the Chrysler and sit in the patrol car, and told defendant that he would be receiving a warning, not a ticket. Behind the Chrysler, Officer McDonough frisked defendant. The frisk revealed a wad of cash totaling $372 in defendant's pocket. After the frisk, defendant sat in Officer McDonough's patrol car.

While running defendant's information through various law enforcement databases, Officer McDonough and defendant continued to talk. Defendant gave contradictory statements about his girlfriend, saying at one point that his girlfriend usually visited him in Henderson but later saying that the two of them had never met face-to-face. While talking with Officer McDonough in the patrol car, defendant made eye contact with the officer when answering certain questions but looked away when asked specifically about his girlfriend and about where he was travelling. The database checks, moreover, revealed that defendant had been issued a North Carolina driver's license in 2000, and that he had a criminal history in North Carolina starting in 2001. These facts appeared to contradict defendant's earlier claim to have just moved to North Carolina.

Officer McDonough asked defendant for permission to search the Chrysler. Defendant gave permission to search it but not his possessions—namely, a bag and two hoodies—within it.[1] A few minutes later, another officer arrived, and Officer McDonough opened the trunk of the Chrysler. Officer McDonough found the bag and two hoodies, but defendant quickly objected that the bag was not his (contradicting his earlier statement) and said that he did not want it to be searched. Officer McDonough put the bag on the ground and had his police dog sniff the bag. The dog alerted to the bag, and, on opening it, the officers found a large amount of heroin.

At the suppression hearing, the trial court heard testimony from Officer McDonough and reviewed video footage of the stop captured by his patrol car's dash cam. Officer McDonough testified about his experience patrolling I-85 and his knowledge that the highway serves as a major thoroughfare for drug trafficking. Officer McDonough also testified that he observed defendant going about 70 miles per hour in a 60 mile-per-hour zone, crossing over the white shoulder line twice, and coming within a car length and a half of a truck in front of him. The dash-cam video shows Officer McDonough pulling defendant over, asking him for his driver's license, and telling him not to follow other vehicles too closely. In recounting what he observed during the traffic stop, Officer McDonough testified that defendant had two phones: one smartphone and one flip phone. The video shows Officer McDonough asking defendant about his destination and defendant giving an answer that does not match his driving route. Officer McDonough then asks for defendant's rental agreement and receives it from defendant. Shortly after this, the officer asks defendant to exit the rental car, and defendant complies. On camera, behind the rental car, Officer McDonough says that defendant will receive only a warning, and then, after asking permission, briefly frisks defendant, finding a wad of cash. After that, Officer McDonough asks defendant to sit in the front passenger seat of the patrol car, which defendant does.

During his testimony, Officer McDonough gave details about the three databases that he generally runs a driver's information through during a traffic stop: one local, one statewide, and one national. He also explained that his conversation with defendant in the patrol car happened while he was running the database checks, which ran in the background during the conversation. He testified that these checks inherently

1. In this opinion, we do not decide whether the permission that defendant gave constituted legal consent to search the car.

take a few minutes to run. The video captured the conversation that Officer McDonough had with defendant while the checks were running. On the video, defendant gives self-contradictory statements about when and where he has seen his girlfriend previously.

The video then shows Officer McDonough asking defendant about a list of controlled substances that might be in the car. Defendant denies possession of all of them. He objects to any search of his bag or his hoodies, but says that Officer McDonough can search the Chrysler if he wants to. After this conversation, Officer McDonough tells defendant that he is waiting for another officer to arrive. The video shows the time after the second officer has arrived, and shows the removal of a bag from the Chrysler's trunk. Defendant suddenly says that the bag is not his and repeats that he does not want it searched. The actual dog sniff that Officer McDonough's police dog performed, and that resulted in an alert on the bag, occurs offscreen, but Officer McDonough testified about it and about the subsequent search of the bag. Officer McDonough can also be heard on the video discussing the heroin that he and the other officer have found.

The dash-cam video, combined with Officer McDonough's suppression hearing testimony, provides more than enough evidence to support the trial court's findings of fact. We therefore turn to the second part of our review: namely, "whether those factual findings in turn support the [trial court's] ultimate conclusions of law." *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619. We review conclusions of law de novo. *E.g.*, *State v. Williams*, 366 N.C. 110, 114, 726 S.E.2d 161, 165 (2012).

The initiation of the traffic stop here—which defendant does not challenge—was justified by Officer McDonough's observations of defendant's driving. "[R]easonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected," *Styles*, 362 N.C. at 415, 665 S.E.2d at 440, and Officer McDonough reasonably suspected multiple traffic violations. Defendant was driving ten miles per hour over the speed limit; following a truck too closely, which is forbidden by N.C.G.S. § 20-152; and weaving over the white line marking the edge of the road, which is forbidden by N.C.G.S. § 20-146(d)(1). These facts allowed Officer McDonough to pull defendant over based on reasonable suspicion of those violations.

Once the traffic stop had begun, Officer McDonough could and did lawfully ask defendant to exit the rental car. "[A] police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle . . . ." *Maryland v. Wilson*, 519 U.S. 408, 410 (1997) (citing

Pennsylvania v. Mimms, 434 U.S. 106 (1977) (per curiam)). Asking a stopped driver to step out of his or her car improves an officer's ability to observe the driver's movements and is justified by officer safety, which is a "legitimate and weighty" concern. *See Mimms*, 434 U.S. at 110. "[T]he government's officer safety interest stems from the mission of the stop itself." *Rodriguez*, 575 U.S. at ___, 135 S. Ct. at 1616; *see also id.* at ___, 135 S. Ct. at 1614 (indicating that the proper duration of a traffic stop includes time spent to "attend to related safety concerns"). So any amount of time that the request to exit the rental car added to the stop was simply time spent pursuing the mission of the stop.

After defendant left the rental car, Officer McDonough lawfully frisked him for weapons without unconstitutionally prolonging the stop, for two independent reasons.

First, frisking defendant before placing him in Officer McDonough's patrol car enhanced the officer's safety. "Traffic stops are 'especially fraught with danger to police officers,' so," as we have already noted, "an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely." *Id.* at ___, 135 S. Ct. at 1616 (citation omitted) (quoting *Arizona v. Johnson*, 555 U.S. 323, 330 (2009)). Once again, because officer safety stems from the mission of the traffic stop itself, time devoted to officer safety is time that is reasonably required to complete that mission. As a result, the frisk here did not "prolong[ ]" a stop "beyond the time reasonably required to complete th[e] mission" of the stop under *Rodriguez*. *Id.* at ___, 135 S. Ct. at 1612 (second alteration in original) (quoting *Caballes*, 543 U.S. at 407). "Highway and officer safety are interests different in kind from the Government's endeavor to detect crime in general or drug trafficking in particular." *Id.* at ___, 135 S. Ct. at 1616.

Second, traffic stops "remain[ ] lawful only 'so long as [unrelated] inquiries do not *measurably* extend the duration of the stop.' " *Id.* at ___, 135 S. Ct. at 1615 (second set of brackets in original) (emphasis added) (quoting *Johnson*, 555 U.S. at 333). It follows that there are some inquiries that extend a stop's duration but do not extend it measurably. In *Rodriguez*, the government claimed that extending a traffic stop's duration by seven or eight minutes did not violate the Fourth Amendment. *Id.* at ___, ___, 135 S. Ct. at 1613, 1615-16. The Supreme Court disagreed. *Id.* at ___, 135 S. Ct. at 1616. But here, the frisk lasted eight or nine seconds. While we do not need to precisely define what "measurably" means in this context, it must mean something. And if it means anything, then *Rodriguez*'s admonition must countenance a frisk that lasts just a few

seconds. So this very brief frisk did not extend the traffic stop's duration in a way that would require reasonable suspicion.[2]

Asking defendant to sit in the patrol car did not unlawfully extend the stop either.[3] Officer McDonough had three database checks to run before the stop could be finished: one check for information covering the Durham area, one for statewide information, and one for out-of-state information. It takes a few minutes to run checks through these databases, and it takes no more time to run the checks when a defendant is in a patrol car than when a defendant is elsewhere. Indeed, as the trial court found here and as both the dash-cam video and Officer McDonough's testimony also established, Officer McDonough spoke with defendant while the checks were running. With these checks running in the background, Officer McDonough was free to talk with defendant at least up until the moment that all three database checks had been completed.

The conversation that Officer McDonough had with defendant while the database checks were running enabled Officer McDonough to constitutionally extend the traffic stop's duration. The trial court's findings of fact show that, by the time these database checks were complete, this conversation, in conjunction with Officer McDonough's observations from earlier in the traffic stop, permitted Officer McDonough to prolong the stop until he could have a dog sniff performed.

Officer McDonough came into the stop with extensive experience investigating drug running, and he knew that I-85 is a major drug trafficking corridor. Shortly after pulling defendant over, Officer McDonough observed defendant's nervous demeanor and two cell phones—including a flip phone—in the Chrysler that defendant was driving, and the officer learned that the Chrysler was a rental car that had been rented

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2. In addition to arguing that the frisk unconstitutionally prolonged the stop, defendant also argues in his brief to this Court that the frisk itself was unconstitutional. When an appeal of right is based solely on a dissent in the Court of Appeals, we limit our review to the issue or issues "specifically set out in the dissenting opinion as the basis for that dissent," unless a party successfully petitions this Court for discretionary review of additional issues. N.C. R. App. P. 16(b). In this case, the Court of Appeals did not decide whether defendant had consented to the frisk because it decided the case on other grounds, *see State v. Bullock*, ___ N.C. App. at ___, 785 S.E.2d at 752, and neither party petitioned this Court for discretionary review of this issue. The issue is therefore not properly before us.

3. In his brief, defendant also appears to argue that Officer McDonough independently violated the Fourth Amendment when he had defendant sit in his patrol car, regardless of whether this extended the stop. But, like the issue of whether defendant consented to the frisk, this issue was not "the basis for th[e] dissent" in the Court of Appeals, N.C. R. App. P. 16(b)(1), and no party has petitioned us to review it. It is thus not before us.

in someone else's name. All of this information suggested possible drug running, even before defendant began talking.

Defendant's conversation with Officer McDonough, and other aspects of their interaction, quickly provided more evidence of drug activity. Defendant gave an illogical account of where he was going, given that he had driven past at least three different exits that he could have taken to reach his purported destination. The $372 in cash that Officer McDonough discovered during the frisk behind the car added to Officer McDonough's suspicion of drug crime. And Officer McDonough certainly gained reasonable suspicion of drug activity that justified a prolonged stop shortly after defendant entered the patrol car.[4] There, as he continued his conversation with Officer McDonough, defendant gave mutually contradictory statements about his girlfriend, whom he claimed to be visiting, and the database check revealed, among other things, that defendant had apparently not been truthful when he said that he had recently moved to North Carolina. On top of all of this, defendant broke eye contact when discussing his girlfriend and his travel plans, after maintaining eye contact while giving apparently honest answers to other questions. So, after Officer McDonough had spoken with defendant in his patrol car and finished the database checks, the officer legally extended the duration of the traffic stop to allow for the dog sniff.

The Supreme Court indicated in *Rodriguez* that reasonable suspicion, if found, would have justified the prolonged seizure that led to the discovery of Rodriguez's methamphetamine. *See* 575 U.S. at ___, 135 S. Ct. at 1616-17. Officer McDonough prolonged the traffic stop of defendant's rental car only after the officer had formed reasonable suspicion that defendant was a drug courier, which allowed for the dog sniff that ultimately led to the discovery of heroin in the bag that was pulled from the rental car. Because this extension of the stop's duration was properly justified by reasonable suspicion, it poses no constitutional problem under *Rodriguez*.

It is worth noting just how different the procedural posture of this case is from the one that the Supreme Court confronted in *Rodriguez*.

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4. As we have already said, unless a party has successfully petitioned this Court for discretionary review of other issues, we limit our review to the issue or issues "specifically set out in the dissenting opinion as the basis for that dissent." N.C. R. App. P. 16(b). The dissent in this case agreed with the majority that reasonable suspicion was not formed before defendant had entered the patrol car, *see Bullock*, ___ N.C. App. at ___, 785 S.E.2d at 756 (McCullough, J., dissenting), and the State did not petition this Court for review of this issue. We therefore take no position on whether reasonable suspicion existed earlier in the stop.

There, the Eighth Circuit had not reached the question of reasonable suspicion in its opinion. *See id.* at ___, ___, 135 S. Ct. at 1614, 1616-17. As a result, the Supreme Court essentially had to assume, for the purposes of its Fourth Amendment analysis, that no reasonable suspicion had existed at any time before the dog sniff in that case occurred. *See id.* at ___, 135 S. Ct. at 1616-17. And in *Rodriguez*, the officer had issued a written warning and therefore completed the traffic stop before the dog sniff occurred. *Id.* at ___, 135 S. Ct. at 1613. So the Supreme Court found that the stop was necessarily prolonged beyond the time needed to complete the stop's mission, *see id.* at ___, 135 S. Ct. at 1614-16, but did not determine whether reasonable suspicion to prolong the stop existed, *see id.* at ___, 135 S. Ct. at 1616-17. Instead, the Supreme Court remanded the case to the Eighth Circuit and noted that the reasonable suspicion question "remain[ed] open for Eighth Circuit consideration on remand." *Id.* at ___, 135 S. Ct. at 1616-17. Here, by contrast, the question of reasonable suspicion is squarely before us.

Officer McDonough did not extend the duration of the traffic stop in this case beyond the time needed to complete the mission of the stop until he had reasonable suspicion to do so. It is worth reiterating that we are addressing only the issue that formed the basis of the dissenting opinion in the Court of Appeals, as we are required to do under Rule 16(b) of our Rules of Appellate Procedure. We therefore reverse the decision of the Court of Appeals and remand this case to the Court of Appeals to consider defendant's remaining arguments on appeal.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA
v.
CALVIN RENARD CARTER

No. 193PA16

Filed 3 November 2017

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 786 S.E.2d 432 (2016), vacating and remanding a judgment entered on 7 May 2015 by Judge Michael D. Duncan in Superior Court, Forsyth County. Heard in the Supreme Court on 28 August 2017.

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

Richard J. Costanza for defendant-appellee.

PER CURIAM.

For the reasons stated in *State v. Brice*, ___ N.C. ___, ___ S.E.2d ___ (Nov. 3, 2017) (No. 244PA16), the decision of the Court of Appeals is reversed.

REVERSED.

STATE v. REED

[370 N.C. 267 (2017)]

STATE OF NORTH CAROLINA
v.
DAVID MICHAEL REED

No. 365A16

Filed 3 November 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 791 S.E.2d 486 (2016), reversing a judgment entered on 20 July 2015 by Judge Thomas H. Lock in Superior Court, Johnston County, following defendant's plea of guilty after entry of an order by Judge Gale Adams on 14 July 2015 denying defendant's motion to suppress. Heard in the Supreme Court on 13 June 2017.

Joshua H. Stein, Attorney General, by Kathleen N. Bolton, Assistant Attorney General, for the State-appellant.

Paul E. Smith for defendant-appellee.

PER CURIAM.

The decision of the Court of Appeals is vacated, and this case is remanded to the Court of Appeals for reconsideration in light of our decision in *State v. Bullock*, ___ N.C. ___, ___ S.E.2d ___ (2017) (194A16).

VACATED AND REMANDED.

STATE v. ROUSSEAU

[370 N.C. 268 (2017)]

STATE OF NORTH CAROLINA
v.
RYAN SAMUEL ROUSSEAU

No. 10A17

Filed 3 November 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 793 S.E.2d 292 (2016), finding no error after appeal from a judgment entered on 1 April 2015 by Judge Richard S. Gottlieb in Superior Court, Forsyth County. Heard in the Supreme Court on 10 October 2017.

Joshua H. Stein, Attorney General, by Phillip T. Reynolds, Assistant Attorney General, for the State.

Michael E. Casterline for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE v. WILSON

[370 N.C. 269 (2017)]

STATE OF NORTH CAROLINA
v.
JENNIFER MARIE WILSON

No. 28A17

Filed 3 November 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 794 S.E.2d 921 (2016), finding no error after appeal from a judgment entered on 2 December 2015 by Judge Benjamin G. Alford in Superior Court, Lenoir County. Heard in the Supreme Court on 11 October 2017.

Joshua H. Stein, Attorney General, by Brenda Menard, Special Deputy Attorney General, for the State.

Russell J. Hollers, III and Adam Elkins for defendant-appellant.

PER CURIAM.

AFFIRMED.

ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA	)	
v.	)	From Wake County
PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; AND THE STATE OF NORTH CAROLINA	)	

No. 52PA17-2

ORDER

Having received the three-judge panel's 31 October 2017 order in this case, the Court sets the following supplemental briefing schedule:

1. Plaintiff-appellant may file a supplemental brief on or before 16 November 2017.

2. Defendant-appellees may file a supplemental brief on or before 30 November 2017.

3. Plaintiff-appellant may file a supplemental reply brief on or before 6 December 2017.

By order of the Court in Conference, this the 2nd day of November, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 2nd day of November, 2017.

s/Christie S. Cameron Roeder
CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

IN RE: APPEAL OF THE FEE AWARD OF THE NORTH CAROLINA INDUSTRIAL COMMISSION IN N.C.I.C. NOS. W82780 & W98474	)	
KEITH SAUNDERS	)	
v.	)	From Buncombe County
ADP TOTALSOURCE FI XI, INC., EMPLOYER, AND LIBERTY MUTUAL/HELMSMAN MANAGEMENT SERVICES, CARRIER	)	

No. 399P16

ORDER

Upon Consideration of Plaintiff's Petition for Discretionary Review, Plaintiff's Petition for Discretionary Review is allowed as to issue number three only. The petition is denied as to any remaining issues.

By order of the Court in Conference, this 1st day of November, 2017.

s/Morgan, J
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of November, 2017.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. BATTLE

[370 N.C. 272 (2017)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Duplin County
	)	
TERRIL COURTNEY BATTLE	)	

No. 464P16

ORDER

Upon consideration of the Petition For Discretionary Review filed by the State on the 12th day of January, 2017, the Court allows the State's Petition For Discretionary Review for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of our decision in *State v. Brice*, ___ N.C. ___, ___ S.E.2d ___ (3 November 2017).

By order of the Court, this the 1st day of November, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of November, 2017.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. NORMAN

[370 N.C. 273 (2017)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Washington County
	)	
AILKEEM ANTHONY NORMAN	)	

No. 153P17

ORDER

Upon consideration of the Petition For Discretionary Review filed by the State on the 6th day of June, 2017, the Court allows the State's Petition For Discretionary Review for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of our decision in *State v. Brice*, ___ N.C. ___, ___ S.E.2d ___ (3 November 2017).

By order of the Court, this the 1st day of November, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of November, 2017.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Nash County
	)	
CHRISTOPHER ANGELO WHITEHEAD	)	

No. 465P16

ORDER

Upon consideration of the Petition for Discretionary Review filed by the State on the 12th day of January, 2017, the Court allows the State's Petition For Discretionary Review for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of our decision in *State v. Brice*, ___N.C.___, ___ S.E.2d___ (3 November 2017).

By Order of this Court, this the 1st day of November, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of November, 2017.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

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

1 NOVEMBER 2017

004P16-2	State v. Jamonte Dion Baker	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Mecklenburg County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed **Ervin, J., recused**
012PA17	Eli Global, LLC, et al. v. Heavner	Joint Motion to Continue Oral Argument	Allowed **10/27/2017**
032P17	State v. Dwayne Robinson	Def's PDR Under N.C.G.S. § 7A-31 (COA16-490)	Denied
075P17-3	Ocwen Loan Servicing v. Margaret Ann Reaves	Def's *Pro Se* Motion for Petition for Injunction	Denied
082PA15-2	In the Matter of A.E.C.	Respondent Father's Motion to Dismiss Appeal	Dismissed as moot
112P17	State v. Anthonio Shontari Farrar	1. State's Motion for Temporary Stay (COA16-679) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/10/2017** Dissolved **11/01/2017** 2. Denied 3. Denied
121P15-2	State v. Aggrey Winston Manning	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP16-824)	Denied **10/17/2017** **Ervin, J., recused**
140P17	Jacqueline Renee Crocker v. Transylvania County Department of Social Services Director Tracy Jones	1. Respondent's PDR Under N.C.G.S. § 7A-31 (COA16-875) 2. Petitioner's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
142P17	State v. Terance Germaine Malachi	1. State's Motion for Temporary Stay (COA16-752) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/04/2017** 2. Allowed 3. Allowed

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

1 NOVEMBER 2017

153P17	State v. Ailkeem Anthony Norman	1. State's Motion for Temporary Stay (COA16-1005) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/17/2017** Dissolved **11/01/2017** 2. Dismissed as moot 3. Special Order
159P17	In re: Foreclosure of Real Property Under Deed of Trust from Vicque Thompson and Christalyn Thompson, in the Original Amount of $205,850.00, and Dated September 26, 2007 and Recorded on September 28, 2007 in Book 2953 at Page 653 and Rerecorded/ Modified/Corrected on February 27, 2015 in Book 4266, Page 911, Onslow County Registry Trustee Services of Carolina, LLC, Substitute Trustee	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA16-1014) 2. Def's (USAA Federal Savings Bank) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
161P17-2	David Felton v. Paul G. Butler, Jr.; James L. Forte; Willis J. Fowler; Danny G. Moody; Pat McCrory; and Roy Cooper	1. Plt's *Pro Se* Motion for Notice of Appeal 2. Plt's *Pro Se* Motion for Reconsideration	1. Dismissed 2. Dismissed
164P17	Wasco, LLC v. N.C. Department of Environment and Natural Resources, Division of Waste Management	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA16-414) 2. Petitioner's Motion for Withdrawal and Substitution of Counsel	1. Denied 2. Allowed
173P17	State v. Melvin Leroy Fowler	1. State's Motion for Temporary Stay (COA16-947) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/05/2017** 2. Allowed 3. Allowed

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

1 NOVEMBER 2017

189P17-2	State v. Robert A.D. Waldrup	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Lincoln County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel 4. Def's *Pro Se* Motion to Append Motion for Appropriate Relief	1. Dismissed 2. Allowed 3. Dismissed as moot 4. Dismissed
203P17	Shaun Weaver, Employee v. Daniel Glenn Dedmon d/b/a Dan the Fence Man d/b/a Bayside Construction, Employer, Noninsured, and Daniel Glenn Dedmon, Individually, and Seegars Fence Company, Inc. of Elizabeth City, Employer, and Builders Mutual Insurance Company, Carrier	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA16-55) 2. Defs' (Seegars Fence Company, Inc. of Elizabeth City and Builders Mutual Insurance Company) PDR Under N.C.G.S. § 7A-31 3. Plt's and Defs' (Seegars Fence Company, Inc. of Elizabeth City and Builders Mutual Insurance Company) Joint Motion to Hold PDRs in Abeyance	1. 2. 3. Allowed
211P17-2	Christopher Buckner, Employee v. United Parcel Service, Employer Liberty Mutual Insurance Company, Carrier	Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA	Dismissed
213P17	Blake J. Geoghagan v. Bernadette M. Geoghagan	Plt's PDR Under N.C.G.S. § 7A-31 (COA16-711)	Denied

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

1 NOVEMBER 2017

219P17	Courtney NC, LLC DBA Oakwood Raleigh at Brier Creek v. Monette Baldwin AKA Nell Monette Baldwin	1. Def's *Pro Se* Motion to Request that Arrest Warrant Be Delivered to the Honorable Supreme Court for Review 2. Def's *Pro Se* Motion to Quash Arrest Warrants 3. Def's *Pro Se* Motion to Sanction Plt and Their Attorneys for Fraud Upon the Court and Abuse of Process 4. Def's *Pro Se* Motion for Deferral of Fees	1. Dismissed as moot **10/05/2017** 2. Dismissed as Moot **10/05/2017** 3. Dismissed as Moot **10/05/2017** 4. Dismissed as moot **10/05/2017** **Beasley and Morgan, JJ, recused**
221P17	State v. Willie James Langley	1. State's Motion for Temporary Stay (COA16-1107) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/06/2017** 2. Allowed 3. Allowed
231P17-2	Antwone D. Archie v. Johnney Hawkins/ Jose Stein	1. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Forsyth County (COAP17-362) 2. Petitioner's *Pro Se* Motion to Review Defendant's Capacity to Proceed 3. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed 3. Allowed **Hudson, J., recused**
233PA16	State v. Alonzo Antonio Murrell	Def's Motion to Expedite Issuance of Mandate	Allowed **10/03/2017**
234P17	Eagle Services & Towing, LLC, George K. Clardy, Jr., and Sylvia W. Clardy v. Ace Motor Acceptance Corp.	Def's PDR Under N.C.G.S. § 7A-31 (COA16-693)	Denied

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243P17	State v. Pierre Je Bron Moore	1. Def's Petition for *Writ of Mandamus* (COA16-999) 2. Def's Petition for Writ of Prohibition 3. Def's Motion for Temporary Stay 4. Def's Petition for *Writ of Supersedeas* 5. Def's PDR Under N.C.G.S. § 7A-31 6. Def's Motion to Hold PDR in Abeyance	1. Denied 2. Denied 3. Denied **07/28/2017** 4. Denied 5. Denied 6. Dismissed as moot
244P17	In the Matter of J.L.T. and S.J.R.T.	1. Petitioner's Motion for Temporary Stay (COA16-1242) 2. Petitioner's Petition for *Writ of Supersedeas* 3. Petitioner's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/24/2017** Dissolved **11/01/2017** 2. Denied 3. Denied
246P17-2	State v. Jerimy Rashaud Love	Def's *Pro Se* Motion for Notice of Appeal (COAP17-337)	Dismissed *ex mero motu* **Ervin, J., recused**
248P15-2	Paul Frampton v. The University of North Carolina and The University of North Carolina at Chapel Hill	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1236)	Denied
253P17	State v. Darrell Lee Melton	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1088)	Allowed
256P17	State v. Kirk Deanglo Evans	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1216)	Denied
257P17	State v. Michael Deshawn Gilchrist	Def's PDR Under N.C.G.S. § 7A-31 (COA16-956)	Denied
263P17	NNN Durham Office Portfolio 1, LLC, et al. v. Highwoods Realty Limited Partnership, et al.	Plt's PDR Prior to a Decision of COA (OA17-756)	Denied

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265P17	State v. Shannon Dale Isom	1. Def's Motion for Temporary Stay (COA16-1052) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/04/2017** Dissolved **11/01/2017** 2. Denied 3. Denied
271PA15-2	State v. Felix Ricardo Saldierna	1. State's Motion for Temporary Stay (COA14-1345-2) 2. State's Petition for *Writ of Supersedeas* 3. State's Petition for Discretionary Review Under N.C.G.S. § 7A-31	1. Allowed **08/03/2017** 2. Allowed 3. Allowed
273P17	Jacqueline Freeman v. State of N.C., Administrative Office of the Courts, Kirk Douglas Freeman	1. Petitioner's *Pro Se* Motion for Constitutional Challenge to a Statute 2. Petitioner's *Pro Se* Motion for Petition for Writ of Mandate, Prohibition, Injunction, or Other Appropriate Relief 3. Petitioner's *Pro Se* Motion for Expedited Hearing	1. Dismissed 2. Dismissed 3. Dismissed
274P17	Nathaniel R. Webb v. Wake County Detention Center	1. Petitioner's *Pro Se* Petition for Prohibition 2. Petitioner's *Pro Se* Petition for *Writ of Mandamus* 3. Petitioner's *Pro Se* Motion for Request for Order to Show Cause (Petition for Writ of Prohibition) 4. Petitioner's P*ro Se* Motion for Request for Order to Show Cause (Petition for *Writ of Mandamus*) 5. Petitioner's *Pro Se* Motion for Summary Disposition	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed
280A17	State v. James Edward Arrington	1. State's Motion for Temporary Stay (COA16-761) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **08/18/2017** 2. Allowed 3. ---

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286P17	Friends of Crooked Creek, L.L.C.; Mark Bertrand; Donna Bertrand; Sylvia T. Terry; Robert F. Zahn; and Michelle R. Zahn v. C.C. Partners, Inc. and Crooked Creek Golfland LLC	Plts' PDR Under N.C.G.S. § 7A-31 (COA17-32)	Denied
287P17	John Fitzgerald Moore, Jr. v. Board of Elections of Henderson County	1. Petitioner's Motion for Temporary Stay (COAP17-594) 2. Petitioner's Petition for *Writ of Supersedeas* 3. Petitioner's Petition for Writ of Prohibition 4. Petitioner's Petition for *Writ of Certiorari* to Review Order of COA	1. Denied **08/28/2017** 2. Denied 3. Denied 4. Denied
288P17	Thomas & Craddock Sales, Inc., a North Carolina Corporation v. Gift Bag Lady, Inc. d/b/a Bag Lady, a California Corporation	Def's PDR Under N.C.G.S. § 7A-31 (COA16-936)	Denied
299P17	Jason Kyle v. Helmi L. Felfel and Laura C. Felfel	Plt's PDR Under N.C.G.S. § 7A-31 (COA16-1318)	Denied
300P17	State v. Corey Lopez Johnson	1. Def's *Pro Se* Motion for Notice of Appeal (COA16-954) 2. Def's *Pro Se* Petition for Writ of Certiorari to Review Decision of COA	1. Dismissed *ex mero motu* 2. Denied
301P17	Valerie Arroyo v. Daniel J. Zamora, Zamora Law Firm, PLLC	1. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP17-510) 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed **Ervin, J., recused**
302P17	State v. Marc Fellner	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1092)	Denied **Morgan, J., recused**

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303P17	State v. Oscar Gallegos	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-1058) 2. Def's Motion to Deem PDR Timely Filed 3. Def's Motion in the Alternative to Consider PDR a Petition for *Writ of Certiorari*	1. Dismissed 2. Denied 3. Denied
306P17	David R. Shipp and wife, Cassandra R. Shipp v. City of Fayetteville, a North Carolina Municipal Corporation	Plts' *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COA17-789)	Denied
307P17	Soma Technology, Inc. v. Photios Dalamagas; Denova Medical, Inc.; and Hiren Desai	Def's (Hiren Desai) PDR Prior to a Decision of the COA	Allowed
309P17	State v. Guss Bobby Carter, Jr.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-854) 2. State's Motion to Deem Response to PDR as Timely Filed	1. Denied 2. Allowed
310P17	State v. Milton Calonie Morris	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-121)	Denied
314A17	State v. Montanelle Deangelo Posey	Def's Motion to Withdraw Appeal	Allowed **10/20/2017**
318A17	Andrea Morrell, G. Pony Morrell, and The Pasta Wench, Inc. v. Hardin Creek, Inc., John Sidney Greene, and Hardin Creek Timberframe and Millwork, Inc.	1. Defs' Notice of Appeal Based Upon a Dissent (COA16-878) 2. Defs' PDR as to Additional Issues 3. Plts' Motion to Supplement the Printed Record on Appeal 4. Plts' Conditional PDR Under N.C.G.S. § 7A-31 5. Plts' Motion to Amend Response to PDR	1. --- 2. Allowed 3. 4. Denied 5. Allowed
319A17	State v. Ahmad Jamil Nicholson	1. State's Motion for Temporary Stay (COA17-28) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **09/22/2017** 2. Allowed 3. ---

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321P17	State v. Anthony Lamont Boulware	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-22)	Denied
322P17	State v. Abdullah Hamid (A.K.A. Antonio Mosley)	1. Def's *Pro Se* Petition for *Writ of Certiorar*i to Review Order of Superior Court, Mecklenburg County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
323P17	Nathaniel R. Webb v. Melanie Shekita	Petitioner's *Pro Se* Petition for Writ of Prohibition	Dismissed
325P17	State v. Jose Joel Torres-Gonzalez	Def's Petition for *Writ of Certiorari* to Review Decision of COA (COA12-831)	Dismissed
326P17	State v. Ricky D. Wagoner	Def's *Pro Se* Motion for PDR (COAP17-575)	Denied
328P06-2	State v. Robert Walter Huffman	Def's *Pro Se* Motion for PDR	Denied **10/17/2017**
328P17	State v. Juan Manuel Villa	1. Def's Motion for Temporary Stay (COA16-1104) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **10/05/2017** 2.
329A09-3	State v. Martinez Orlando Black	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Mecklenburg County	Denied **Jackson, J., recused**
331P17	State v. Amia Smith Ervin	1. State's Motion for Temporary Stay (COA17-324) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **10/05/2017** 2.
332P17	Joris Haarhuis, Administrator of the Estate of Julie Haarhuis v. Emily Cheek	1. Def's Motion for Temporary Stay (COA16-961) 2. Def's Petition for *Writ of Supersedeas* 3. Def's Notice of Appeal Based Upon a Constitutional Question 4. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed w/o prejudice **10/06/2017** 2. 3. 4.
333P17	N.C. State Board of Education v. The State of North Carolina, and Mark Johnson, in his Official Capacity	1. Plt's Motion for Temporary Stay (COAP17-687) (16CvS15607) 2. Plt's Petition for *Writ of Supersedeas*	1. Allowed **10/16/2017** 2. **Martin, C.J., recused**

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

1 NOVEMBER 2017

338P16	Candie L. Willoughby and Jerome Willoughby, Plaintiffs v. Johnston Memorial Hospital Authority; Johnston Memorial Hospital Authority d/b/a Johnston Health; Johnston Memorial Hospital Authority d/b/a Johnston Medical Center-Smithfield, Defendants and Third-Party Plaintiffs v. Steris Corporation and General Electric Company	1. Defs' and Third-Party Plts' PDR Under N.C.G.S. § 7A-31 (COA15-832, 833, 834) 2. Third-Party Def's (Steris Corporation) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied **Ervin, J., recused**
345P17	Eddricco Li'shaun Brown v. State	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **10/16/2017**
349P17	Christopher C. Harris v. State	Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP17-595)	Denied **10/18/2017**
351P17	Matthew J. Medlin v. Donnie Harrison	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **10/19/2017**
365P17	Alexey David McCoy v. Donnie Harrison	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **10/26/2017**
382P10-7	State v. John Lewis Wray, Jr.	Def's *Pro Se* Motion to Appeal (COAP17-43)	Dismissed
395A16	XPO Logistics, Inc. v. Fouzi Anis	1. Def's Motion to Supplement the Record 2. Def's Motion to Withdraw Appeal	1. Dismissed as moot **10/06/2017** 2. Allowed with prejudice **10/06/2017**

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

1 NOVEMBER 2017

399P16	In re Appeal of the Fee Award of The North Carolina Industrial Commission in N.C.I.C. Nos. W82780 & W98474 Keith Saunders v. ADP TotalSource FI XI, Inc., Employer, and Liberty Mutual/Helmsman Management Services, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-1390)	Special Order
402PA15-2	State v. Donna Helms Ledbetter	1. Def's Motion for Temporary Stay (COA15-414-2) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/22/2016** Dissolved 2. Allowed 3. Allowed
427P09-3	State v. Jonathan Leigh Henslee	Def's *Pro Se* Motion for Notice of Appeal (COAP17-681)	Dismissed **Ervin, J., recused**
464P16	State v. Terril Courtney Battle	1. State's Motion for Temporary Stay (COA16-355) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/22/2016** Dissolved **11/01/2017** 2. Dismissed as moot 3. Special Order
465P16	State v. Christopher Angelo Whitehead	1. State's Motion for Temporary Stay (COA16-294) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Deem Response Timely Filed	1. Allowed **12/22/2016** Dissolved **11/01/2017** 2. Dismissed as moot 3. Special Order 4. Allowed

DAVID EASTER-ROZZELLE, EMPLOYEE
v.
CITY OF CHARLOTTE, EMPLOYER, SELF-INSURED

No. 52PA16

Filed 8 December 2017

Workers' Compensation—third-party claim settled—no waiver of compensation under Act—subrogation lien

Where plaintiff-employee was injured while driving to his doctor's office to retrieve an out-of-work note for a compensable injury, settled the third-party claim for the automobile accident, and subsequently—when his workers' compensation attorney learned that the accident occurred on plaintiff's way to get his out-of-work note—added a workers' compensation claim for his head injury, plaintiff did not waive his right to compensation under the Workers' Compensation Act. In addition, the Industrial Commission correctly determined that once the subrogation lien amount is determined by agreement of the parties or by a superior court judge, defendant is entitled to reimbursement of its lien from the benefits due to plaintiff.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 780 S.E.2d 244 (2015), reversing an opinion and award filed on 2 March 2015 by the North Carolina Industrial Commission. Heard in the Supreme Court on 28 August 2017.

Sumwalt Law Firm, *by Vernon Sumwalt; and Fink & Hayes*, *PLLC*, *by Steven B. Hayes*, *for plaintiff-appellant.*

Jones, *Hewson & Woolard*, *by Lawrence J. Goldman*, *for defendant-appellee.*

Wallace and Graham, *P.A.*, *by Edward L. Pauley*, *for North Carolina Advocates for Justice*, *amicus curiae.*

HUDSON, Justice.

Defendant, the City of Charlotte, appealed the opinion and award of the North Carolina Industrial Commission awarding plaintiff, David Easter-Rozzelle, benefits arising out of a 29 June 2009 automobile

accident. *Easter-Rozzelle v. City of Charlotte*, ___ N.C. App. ___, 780 S.E.2d 244 (2015). On appeal, the Court of Appeals reversed, holding that because plaintiff had elected to settle his personal injury claim against the third-party tortfeasor without the consent of defendant and had received disbursement of the settlement proceeds, plaintiff was barred from pursuing compensation for that claim under the Workers' Compensation Act (Act). *Id.* at ___, 780 S.E.2d at 250. Because the Act protects both the employer's lien against third-party proceeds and the employee's right to pursue workers' compensation benefits in these circumstances, we reverse.

Background

On 18 June 2009, while working as a utility technician, plaintiff injured his neck and shoulder when he slipped while handling a manhole cover. Defendant City, plaintiff's self-insured employer, accepted plaintiff's claim as compensable under the Act by filing a Form 60 with the North Carolina Industrial Commission. Defendant authorized treatment with Scott Burbank, M.D. at OrthoCarolina for plaintiff's injury. Dr. Burbank restricted plaintiff from work until 29 June 2009, at which point plaintiff contacted and informed defendant that he was still in too much pain to report to work. Following defendant's instructions, plaintiff contacted Dr. Burbank's office, which informed plaintiff that they would provide him with an out-of-work note that he could pick up at their office.

While driving to Dr. Burbank's office to retrieve the note, plaintiff was involved in an automobile crash and suffered a traumatic brain injury. That same day, after being transported to the hospital, plaintiff gave his wife a card containing the name and contact information for his supervisor, Mr. William Lee, and asked her to call Mr. Lee and inform him of the incident. Plaintiff's wife contacted Mr. Lee and told him that plaintiff had been in a wreck while traveling to Dr. Burbank's office to get an out-of-work note and that plaintiff would not be coming to work that day. In the ensuing three-day period, plaintiff had at least two conversations with Mr. Lee about the circumstances of the injury. Plaintiff also informed his safety manager and multiple employees in defendant's personnel office that he had been in a car crash on the way to his doctor's office to get an out-of-work note for defendant.

Plaintiff underwent surgery in May and November 2010 for his shoulder injury. On 18 November 2011, Dr. Burbank assigned plaintiff a ten percent permanent partial disability rating to the right shoulder and imposed permanent work restrictions. Defendant has continued to pay plaintiff weekly temporary total disability benefits.

Meanwhile, plaintiff received treatment for the traumatic brain injury sustained in the car wreck from David R. Wiercisiewski, M.D. of Carolina Neurosurgery & Spine and Dr. Bruce Batchelor of Charlotte Neuropsychologists. Dr. Wiercisiewski diagnosed plaintiff with a concussion and post-concussion syndrome, and both physicians referred plaintiff to a psychologist for ongoing post-traumatic stress disorder symptoms, memory loss, and cognitive deficits.

Plaintiff retained separate attorneys for his personal injury claim relating to the crash and for his workers' compensation claim relating to his original shoulder injury. Plaintiff's personal injury lawyer informed his personal health insurance carrier, Blue Cross Blue Shield, that he was not "at work" when he sustained the injuries from the crash, and therefore, medical bills for these injuries should be covered by Blue Cross Blue Shield. On 1 August 2011, the third-party claim settled for $45,524.20. The settlement proceeds were disbursed and plaintiff received his share of the funds.

As his workers' compensation claim proceeded, plaintiff and defendant agreed to mediation. At the 9 April 2012 mediation, plaintiff's workers' compensation attorney first learned that plaintiff had been traveling to the office of his authorized physician to get an out-of-work note when the wreck occurred. The mediation was suspended and plaintiff filed an amended Form 18 Notice of Accident to Employer in which he restated his initial claim for injuries and added a claim for his closed head and brain injury which occurred while he "was driving to see authorized treating physician and was involved in a car wreck." On 13 December 2012, defendant filed a Form 61 with the Commission denying the head injury claim. In its filing, defendant stated that it had no notice of the car accident or that plaintiff claimed that the car accident was related to his workers' compensation claim until the April 2012 mediation. Defendant asserted that plaintiff should be estopped from claiming compensation for the head injury because "the motor vehicle accident resulted in a settlement with a third party and the distribution of the settlement funds without preserving defendant's lien." Because the parties were unable to agree on compensability of the head injury, plaintiff filed a Form 33 with the Commission in January 2013 requesting that the claim be assigned for a hearing.

Deputy Commissioner Phillip A. Holmes heard this matter on 11 December 2013. On 7 March 2014, Deputy Commissioner Holmes entered an opinion and award denying plaintiff's claim for benefits. The deputy commissioner concluded that N.C.G.S. § 97-10.2 "provides the only method in which the employer's lien is satisfied from a third party

settlement." The deputy commissioner further concluded that under *Hefner v. Hefner Plumbing Co.*, 252 N.C. 277, 113 S.E.2d 565 (1960), when an employee settles and disburses funds from a third-party settlement without preserving the defendant's lien, or applying to a superior court judge to reduce or eliminate the lien, the employee is barred from recovering under the Act. Accordingly, Deputy Commissioner Holmes determined that plaintiff here was estopped from claiming benefits from his 29 June 2009 car wreck because he did not contend it was compensable until after the third-party claim settled and the settlement proceeds were distributed. Plaintiff appealed to the Full Commission.

The Full Commission heard the case on 15 August 2014, and on 2 March 2015, issued an opinion and award reversing the decision of the deputy commissioner. In so doing, the Commission considered the record of the proceedings before the deputy commissioner, which included the parties' stipulations, exhibits, and testimony from witnesses, including plaintiff and his wife. The Commission assigned credibility to the testimony of plaintiff and his wife and found that plaintiff was not aware that his injuries from the car crash were arguably compensable until the April 2012 mediation. Further, the Commission found and concluded that plaintiff provided timely actual notice of the car wreck to defendant and that defendant knew of the collision and its attendant circumstances. Regarding defendant's lien and the applicability of *Hefner*, the Commission found, in relevant part:

> 25. The Full Commission finds that the present case is distinguishable from *Hefner*. In *Hefner*, the Plaintiff was injured in an automobile collision arising out of and in the course of his employment. Plaintiff's attorney advised the Defendant-Carrier that Plaintiff was proceeding against the third-party and was not making a claim for workers' compensation benefits at that time. The Plaintiff's attorney did provide periodic correspondence and informed the carrier of the status of Plaintiff's injuries and the developments in the negotiations with the third-party. The Plaintiff then settled his claim against the third-party and executed a release and thereafter filed a claim with the North Carolina Industrial Commission. The Plaintiff in *Hefner* contended that although Plaintiff chose to settle with the third-party tortfeasor, Defendant-Carrier should now be made to pay a proportionate part of Plaintiff's attorney fees in the third-party matter. The Supreme Court specifically stated in *Hefner* that the Court based

> its decision upon the interpretation of N.C. Gen. Stat. § 97-10 as it existed prior to June 20, 1959, which restricted an employee from recovering both under a workers' compensation action and an action at law against a third party tortfeasor. The Supreme Court in *Hefner* held that pursuant to the repealed provisions of N.C. Gen. Stat. § 97-10, an employee may waive his claim against his employer and pursue his remedy against the third party. The Plaintiff in *Hefner* had elected to pursue his remedy against the third party instead of pursuing benefits under the Workers' Compensation Act and was therefore barred from recovering under the Act. The present matter is controlled by the current provisions of N.C. Gen. Stat. § 97-10.2 which do not include the waiver provisions in effect in the *Hefner* case. The *Hefner* holding is not applicable to the present case.

(Punctuation inconsistencies in original.) Furthermore, the Commission concluded that

> 5. With regard to Plaintiff's distribution of third party settlement funds without Defendant's knowledge and consent and without the prior approval of the Industrial Commission, or applying to a Superior Court Judge to determine the subrogation amount, the Full Commission concludes that the North Carolina Supreme Court decision in *Hefner v. Hefner Plumbing Co., Inc*[.], 252 N.C. 277, 113 S.E.2d 565 (1960) does not preclude Plaintiff from pursuing benefits under the Workers' Compensation Act for his June 29, 2009 automobile accident. The Supreme Court in *Hefner* stated:
>
> > This is the determinative question on this appeal: May an employee injured in the course of his employment by the negligent act of a third party, after settlement with the third party for an amount in excess of his employer's liability, and after disbursement of the proceeds of such settlement, recover compensation from his employer in a proceeding under the Workman's Compensation Act. In light of the provisions of the Act as interpreted by this Court, the answer is "No."
>
> However, the Full Commission concludes that the present case is distinguishable from *Hefner*. As stated in

the findings of fact above, in *Hefner*, the Plaintiff was injured in an automobile collision arising out of and in the course of his employment. Plaintiff's attorney advised the Defendant-Carrier that Plaintiff was proceeding against the third-party and was not making a claim for workers' compensation benefits at that time. The Plaintiff's attorney did provide periodic correspondence and informed the carrier of the status of Plaintiff's injuries and the developments in the negotiations with the third-party. The Plaintiff then settled his claim against the third-party and executed a release and thereafter filed a claim with the North Carolina Industrial Commission. The Plaintiff in *Hefner* contended that although Plaintiff chose to settle with the third-party tortfeasor, Defendant-Carrier should now be made to pay a proportionate part of Plaintiff's attorney fees in the third-party matter. The Supreme Court specifically stated in *Hefner* that the Court based its decision upon the interpretation of N.C. Gen. Stat. § 97-10 as it existed prior to June 20, 1959, which restricted an employee from recovering both under a workers' compensation action and an action at law against a third party tortfeasor. The Supreme Court in *Hefner* held that pursuant to the repealed provisions of N.C. Gen. Stat. § 97-10, an employee may waive his claim against his employer and pursue his remedy against the third party. The Plaintiff in *Hefner* had elected to pursue his remedy against the third party instead of pursuing benefits under the Workers' Compensation Act and was therefore barred from recovering under the Act. The present matter is controlled by the current provisions of N.C. Gen. Stat. § 97-10.2 which do not include the waiver provisions in effect in the *Hefner* case. The *Hefner* holding is not applicable to the present case. *Hefner v. Hefner Plumbing Co., Inc*[.], 252 N.C. 277, 113 S.E.2d 565 (1960).

. . . .

11. An employer's statutory right to a lien on recovery from the third party tortfeasor is mandatory in nature. *Radzisz v. Harley Davidson of Metrolina, Inc.*, 346 N.C. 84, 484 S.E.2d 566 (1997). The employer's lien is in existence even before payments have been made by the employer. *Id.* Even though Defendant has not accepted

> Plaintiff's claim for his June 29, 2009 accident and has not paid any medical bills related to his June 29, 2009 accident, Defendant is entitled to a statutory lien on recovery from the third party settlement proceeds. Although the third party settlement funds have been disbursed, Defendant is still entitled to a reimbursement for its statutory lien after the subrogation lien amount has been determined. *Id.*

(Punctuation inconsistencies in original.) Accordingly, the Commission awarded plaintiff benefits arising out of the 29 June 2009 automobile crash and ordered defendant to pay all related medical expenses incurred by plaintiff when those bills are approved by the Commission under established procedures. The Commission further ordered that defendant be reimbursed "for its statutory lien against the third party settlement in this matter when the subrogation amount is determined by agreement of the parties or by a Superior Court Judge." The Commission ordered defendant to continue paying plaintiff temporary total disability benefits. Defendant appealed from the Commission's opinion and award.

In a unanimous opinion filed on 1 December 2015, with one judge concurring separately, the Court of Appeals reversed the Full Commission. *Easter-Rozzelle*, ___ N.C. App. at ___, 780 S.E.2d at 250. The majority opined that the Commission misstated the law by asserting that *Hefner* precluded an employee from recovering both from his employer under the Act and from a third-party tortfeasor in an action at law. *Id.* at ___, 780 S.E.2d at 248. The majority noted that the provision requiring an employee to elect between the two remedies was removed in 1933 and observed that *Hefner* recognized that an employee could pursue both remedies under the formerly applicable statute, N.C.G.S. § 97-10. *Id.* at ___, 780 S.E.2d at 248; *see also Hefner*, 252 N.C. at 282-83, 113 S.E.2d at 569 ("Indeed the applicable statute contemplates that where employee pursues his remedy against the employer and against the third party, a determination of benefits due under the Act must be made prior to the payment of funds recovered from the third party.").

Furthermore, relying upon this Court's decision in *Pollard v. Smith*, 324 N.C. 424, 426, 378 S.E.2d 771, 773 (1989), the Court of Appeals majority stated that under the current statute, N.C.G.S. § 97-10.2, a settlement requires the written consent of the employer in order to be valid, even when the case is settled in accord with subsection (j), which allows either party to apply to the superior court to determine the subrogation amount of the employer's lien. *Id.* at ___, 780 S.E.2d at 248-49. The majority opined that the General Assembly intended for employers to have involvement and consent in the settlement process and added that

allowing defendant to be reimbursed "from settlement funds already paid and disbursed does not accomplish the statute's purpose and intent, and is unfair to Defendant." *Id.* at ___, 780 S.E.2d at 249-50. The majority concluded that, "[i]n light of the requirement of N.C. Gen.[ ]Stat. § 97-10.2(h) that the employer provide written consent to the Plaintiff's settlement with a third party, the reasoning of the *Hefner* case is applicable here." *Id.* at ___, 780 S.E.2d at 250. Because plaintiff here settled his claim with the third party and disbursed the proceeds without the written consent of defendant, and without an order from the superior court or the Commission, the majority held that plaintiff was barred from recovery under the Act. *Id.* at ___, 780 S.E.2d at 250.[1]

Plaintiff sought this Court's review of the Court of Appeals' unanimous decision. On 8 December 2016, the Court allowed plaintiff's petition for writ of certiorari.

Analysis

Plaintiff argues that in reversing the Full Commission, the Court of Appeals relied upon cases that had been superseded by statute, including *Hefner* and *Pollard*, and misinterpreted the provisions of the Act. We agree, and thus reverse the decision of the Court of Appeals.

We review an order of the Full Commission to determine only "whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000); *see also* N.C.G.S. § 97-86 (2015). "The Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted). We review decisions of the Court of Appeals for errors of law. *Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611, 781 S.E.2d 282, 284 (2016) (citing N.C. R. App. P. 16(a)).

1. Writing separately, Judge Dietz concurred in the result, but opined that plaintiff is barred from recovery under the Act by the doctrine of quasi-estoppel. *Id.* at ___, 780 S.E.2d at 250 (Dietz, J., concurring) ("This case presents a hornbook example of the doctrine of quasi-estoppel.") Because plaintiff accepted the benefit of a settlement without defendant's consent and without court approval, Judge Dietz opined that plaintiff later "took a plainly inconsistent position by asserting that his injury was, in fact, subject to the [Act] despite having just settled the claim in a manner that indicated it was not." *Id.* at ___, 780 S.E.2d at 250.

Here the Court of Appeals majority concluded that the Commission misstated the holding in *Hefner* and that *Hefner* bars plaintiff from recovering compensation under the Act. This reliance on *Hefner* is misplaced because the provisions relating to claims against third-party tortfeasors were substantially amended in 1959, and *Hefner* was decided under the previous statute. Further, we note that the Commission did slightly misstate this Court's holding in *Hefner* by suggesting that under the old statutory framework, an employee could never recover both under a workers' compensation claim and against a third-party tortfeasor. This is understandable on the part of the Commission in that the Court in *Hefner* was applying N.C.G.S. § 97-10, a "somewhat prolix enactment," *Lovette v. Lloyd*, 236 N.C. 663, 667, 73 S.E.2d 886, 890 (1953), which was the last in a line of provisions not heralded for their clarity. *See A Survey of Statutory Changes in North Carolina in 1943*, 21 N.C. L. Rev. 323, 382 (1943) [hereinafter *Survey*] ("Section 11 of the Act has always been a source of difficulty." (footnote omitted)).

The original Workers' Compensation Act, enacted in 1929, required an employee to choose between recovering compensation from his employer under the Act or recovering damages against the third-party tortfeasor. The North Carolina Workmen's Compensation Act, ch. 120, sec. 11, 1929 N.C. Pub. [Sess.] Laws 117, 122. Specifically, section 11 provided that when an employee

> may have a right to recover damages for such injury, loss of service, or death from any person other than such employer, he may institute an action at law against such third person or persons before an award is made under this act, and prosecute the same to its final determination; *but either the acceptance of an award hereunder, or the procurement of a judgment in an action at law, shall be a bar to proceeding further with the alternate remedy.*

Id. (emphasis added). This express "election of remedies" language was removed in 1933 when the General Assembly deleted section 11 and replaced it with a new version, Act of May 12, 1933, ch. 449, sec. 1, 1933 N.C. Pub. [Sess.] Laws 798, 798, which was further amended in 1943, Act of Mar. 8, 1943, ch. 622, sec. 1, 1943 N.C. Sess. Laws 728, 728-29. The amended section, which was codified at N.C.G.S. § 97-10, provided that "after the Industrial Commission shall have issued an award, or the employer or his carrier has admitted liability . . . the employer or his carrier shall have the *exclusive right* to commence an action" against the third party for a period of six months, after which the employee

possessed the right to bring the action.[2] N.C.G.S. § 97-10 (1943) (emphasis added). Because an employee who had received either an award from the Commission or an admission of liability from the employer could—after the employer's exclusive six-month period expired—also proceed against the third-party tortfeasor, this amended section, which was applicable in *Hefner*, was no longer a wholesale bar to an employee pursuing both remedies. *See Lovette*, 236 N.C. at 667, 73 S.E.2d at 890 ("Under [N.C.G.S. § 97-10], the right to maintain a common law action still exists in behalf of an employee against a third party through whose negligence he is injured, even though the injury is compensable under the Act, and even though the employee actually receives compensation for it under the Act."). Yet, the amended section gave little guidance in situations when an employee had filed a claim for compensation, but there had been no award and no admission of liability, or in situations in which the employee had yet to file a claim at all.[3]

A variation of the latter situation arose in *Ward v. Bowles*, 228 N.C. 273, 45 S.E.2d 354 (1947). There, after the plaintiff was injured in a car accident while in the course of his employment, he brought a negligence action against the third party. *Id.* at 274-75, 45 S.E.2d at 354-55. The

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2. Following the 1933 amendments, the Act

> seemed to intend that compensation claims should be determined and the employer (or insurer) should then be assured of reimbursement from any common law recovery to which the employee was entitled by giving the employer the exclusive right to assert such claim for a period of six months. The section as interpreted, however, did not prevent the employee from getting his common law action under way and collecting both a judgment and compensation without the employer knowing of the suit at common law.

Survey at 382; *see also Whitehead & Anderson, Inc. v. Branch*, 220 N.C. 507, 17 S.E.2d 637, (1941) (holding that an employer who had paid benefits to a deceased employee's dependents under the Act could not proceed in a wrongful death action against an independent third-party tortfeasor when the administrator of the deceased employee had already obtained a judgment against that third party). This may explain why in 1943 the legislature added the word "exclusive" to the employer's right to bring the action, and also provided that the right existed not just after an award by the Commission, but also upon an admission of liability by the employer. *Survey* at 382-83; *see also* ch. 622, sec. 1, 1943 N.C. Sess. Laws at 728-29.

3. *See Survey* at 383 ("Whether an action already started by the employee would abate on the commission's awarding of compensation (it certainly would not automatically) or whether the employer could then join as party plaintiff and take charge of the suit, the statute does not say. It should have gone farther and dealt with these and other specific and highly practical problems in detail.").

third-party defendant contended that, because the plaintiff had never filed a claim for compensation against his employer, and because there had been no award issued by the Commission and no admission of liability by the employer, the plaintiff was precluded from pursuing damages against the defendant under N.C.G.S. § 97-10. *Id.* at 274-75, 45 S.E.2d at 354-55. The Court disagreed, concluding that "[w]hile the rights of the employee, as against a third party after claim for compensation is filed, are limited, G.S. 97-10, there is nothing in the Act which denies him the right to waive his claim against his employer and pursue his remedy against the alleged tort-feasor by common law action for negligence." *Id.* at 275, 45 S.E.2d at 355. Thus, while N.C.G.S. § 97-10, as interpreted, allowed an employee who had filed a claim for compensation against his employer to also seek recovery from the third party in the limited circumstances prescribed by the statute, section 97-10 still provided for an election of remedies for a plaintiff who sought to avoid those limitations. This decision became the basis for the holding in *Hefner*.

In *Hefner*, after the plaintiff was injured in a car accident, he informed the insurance carrier that he was making no workers' compensation claim at that time and was proceeding against the third-party tortfeasor. 252 N.C. at 278, 113 S.E.2d at 565-66. The plaintiff reached a settlement with the third party, and the settlement funds were disbursed. *Id.* at 278-79, 113 S.E.2d at 566-67. The plaintiff then filed a workers' compensation claim seeking to have the defendant insurance carrier pay a proportionate part of the attorney's fee in the third-party action. *Id.* at 278, 113 S.E.2d at 566. The Court first noted that, although N.C.G.S. § 97-10 had recently been repealed and replaced with new provisions, the new provisions did not apply in *Hefner* based on the date of the plaintiff's injuries. *Id.* at 281, 113 S.E.2d at 568. The Court then stated:

> Under the language of the deleted statute, G.S. 97-10, it appears that several courses of action are open to an employee who is injured, in the course of his employment by the negligent act of a person other than his employer. Among the remedies, he may waive his claim against his employer and pursue his remedy against the third party. *Ward v. Bowles*, 228 N.C. 273, 45 S.E.2d 354. This is the course taken by plaintiff here.

Id. at 282, 113 S.E.2d at 568-69. The Court did recognize that an employee could recover compensation under the Act and also seek damages from a third party, but in accordance with *Ward*, *see* 228 N.C. at 275, 45 S.E.2d at 355 ("[T]he rights of the employee, as against a third party after claim for compensation is filed, are limited, G.S. 97-10 . . . ."), concluded that in

those cases the specific procedures of the section needed to be followed. *Hefner*, 252 N.C. at 282-83, 113 S.E.2d at 569 ("Indeed the applicable statute contemplates that where [the] employee pursues his remedy against the employer and against the third party, a determination of benefits due under the Act must be made prior to the payment of funds recovered from the third party.").

Accordingly, the Court of Appeals majority here correctly noted that the "*Hefner* opinion was not a blanket preclusion of an employee's right to recover from his employer as well as the third party tortfeasor under N.C. Gen.[ ]Stat. § 97-10." *Easter-Rozzelle*, ___ N.C. App. at ___, 780 S.E.2d at 248 (majority opinion). Nonetheless, *Hefner* did apply an election of remedies that is incompatible with the current statutory framework.

In 1959 the General Assembly repealed N.C.G.S. § 97-10 and enacted N.C.G.S. §§ 97-10.1 and 97-10.2. Act of June 20, 1959, ch. 1324, sec. 1, 1959 N.C. Sess. Laws 1512, 1512-15. Notably, these new provisions gave *to the employee* the exclusive right to bring the third-party action for the first twelve months from the date of the injury. *Id.* at 1512-13. More importantly, subsection 97-10.2(i), which was not addressed here by the Court of Appeals, provides, as it has continuously since 1959, that:

> Institution of proceedings against or settlement with the third party, or acceptance of benefits under this Chapter, shall not in any way or manner affect any other remedy which any party to the claim for compensation may have except as otherwise specifically provided in this Chapter, and *the exercise of one remedy shall not in any way or manner be held to constitute an election of remedies so as to bar the other.*

N.C.G.S. § 97-10.2(i) (2015) (emphasis added); *see also* ch. 1324, sec. 1, 1959 N.C. Sess. Laws at 1515. We can hardly envision a stronger legislative mandate against an election of remedies doctrine. The Court's pronouncement in *Hefner* that among an employee's remedies, "he may waive his claim against his employer and pursue his remedy against the third party," 252 N.C. at 282, 113 S.E.2d at 568-69, is contrary to the express language of N.C.G.S. § 97-10.2. Accordingly, *Hefner* does not apply here to bar plaintiff's claim under the Act.

Nor does the employer's lack of consent to the settlement revive *Hefner*'s application for a new era. *See Easter-Rozzelle*, ___ N.C. App. at ___, 780 S.E.2d at 250 ("In light of the requirement of N.C. Gen.[ ]Stat.

§ 97-10.2(h) that the employer provide written consent to the Plaintiff's settlement with a third party, the reasoning of the *Hefner* case is applicable here."). Subsection (h) of the original N.C.G.S. § 97-10.2 required the employee or employer to obtain the written consent of the other before making a settlement or accepting payment from a third party and provided that no release or agreement obtained without consent was valid or enforceable. N.C.G.S. § 97-10.2(h) (1959); *see also* ch. 1324, sec. 1, 1959 N.C. Sess. Laws at 1514-15. In 1983 the legislature added N.C.G.S. § 97-10.2(j), which provided:

> In the event that a judgment is obtained which is insufficient to compensate the subrogation claim of the Workers' Compensation Insurance Carrier, or in the event that a settlement has been agreed upon by the employee and the third party when said action is pending on a trial calendar and the pretrial conference with the judge has been held, either party may apply to the resident superior court judge of the county in which the cause of action arose or the presiding judge before whom the cause of action is pending, for determination as to the amount to be paid to each by such third party tortfeasor. If the matter is pending in the federal district court such determination may be made by a federal district court judge of that division.

Act of June 30, 1983, ch. 645, sec. 1, 1983 N.C. Sess. Laws 604, 604. In *Pollard* we opined that "subsection (j) must be read *in pari materia* with the rest of the section," specifically subsection (h), and therefore, written consent was still required before a case was settled in accord with subsection (j). 324 N.C. at 426, 378 S.E.2d at 773; *see also Williams v. Int'l Paper Co.*, 324 N.C. 567, 572, 380 S.E.2d 510, 513 (1989) ("This statute, by its terms, makes it clear that neither the employer nor the employee may make a valid settlement without the written consent of the other. . . . N.C.G.S. § 97-10.2(j) does not supersede § 97-10.2(h) and subsection (j) should be read *in pari materia* with the other provisions of the statute."). Here the Court of Appeals majority correctly recited the Court's holding in *Pollard*, but failed to account for the statutory revisions that followed.

Specifically, in 1991 the legislature substantially overhauled subsections (h) and (j), Act of June 26, 1991, ch. 408, sec. 1, 1991 N.C. Sess. Laws 768, 771-72, and made further revisions to subsection (j) in 1999 and 2004, Act of June 9, 1999, ch. 194, sec. 1, 1999 N.C. Sess. Laws 401, 401; Act of July 18, 2004, ch. 199, sec. 13.(b), 2003 N.C. Sess. Laws (Reg.

Sess. 2004) 786, 792. Unlike the applicable statute in *Pollard*, the current version of N.C.G.S. § 97-10.2 provides that no consent is required when a case is settled in accord with subsection (j). Specifically, subsection (h) states:

> Neither the employee or his personal representative nor the employer shall make any settlement with or accept any payment from the third party without the written consent of the other and no release to or agreement with the third party shall be valid or enforceable for any purpose unless both employer and employee or his personal representative join therein; *provided, that this sentence shall not apply*:
>
> (1) If the employer is made whole for all benefits paid or to be paid by him under this Chapter less attorney's fees as provided by (f)(1) and (2) hereof and the release to or agreement with the third party is executed by the employee; or
>
> (2) *If either party follows the provisions of subsection (j) of this section.*

N.C.G.S. § 97-10.2(h) (2015) (emphases added). Furthermore, subsection (j) has been amended to further obviate the need for consent:

> (j) Notwithstanding any other subsection in this section, in the event that a judgment is obtained by the employee in an action against a third party, or in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge of the county in which the cause of action arose or where the injured employee resides, or to a presiding judge of either district, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, *and with or without the consent of the employer*, the judge shall determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer.

Id. § 97-10.2(j) (2015) (emphasis added). Accordingly, it is clear that consent is no longer required for a valid settlement and that either party can

avail itself of subsection (j). *See, e.g.*, *Fogleman v. D&J Equip. Rentals, Inc.*, 111 N.C. App. 228, 232, 431 S.E.2d 849, 852 ("*Pollard* endowed subrogation lienholders . . . with the right not to have their lien abridged without their consent. The amended version of section 97-10.2 affected that right by allowing a party to apply to Superior Court to have it determine the amount of the lien, *regardless of whether the lienholder had consented.*"), *disc. rev. denied*, 335 N.C. 172, 436 S.E.2d 374 (1993).

Defendant attempts to draw a distinction between the situation here and the statute based on the settlement funds having been disbursed, asserting that allowing plaintiff to pursue workers' compensation benefits is unfair when defendant had no participation in the settlement process. The court below agreed. *See Easter-Rozzelle*, ___ N.C. App. at ___, 780 S.E.2d at 249-50 ("[T]he General Assembly clearly intended for the employer to have involvement and consent in the settlement process . . . . Allowing Defendant to recoup its lien from settlement funds already paid and disbursed does not accomplish the statute's purpose and intent, and is unfair to Defendant."). This argument is without merit. Any distinction based upon the timing of the disbursement of a third-party settlement ignores the entirety of N.C.G.S. § 97-10.2. We conclude that barring a plaintiff who has received funds from a third party from pursuing a workers' compensation claim contravenes the express language of subsection (i). *See* N.C.G.S. § 97-10.2(i) ("[T]he exercise of one remedy *shall not in any way or manner* be held to constitute an election of remedies so as to bar the other." (emphasis added)).

Further, we note that an employer's lien interest in third-party proceeds is "mandatory in nature," and thus, there is no "windfall of a recovery" to plaintiff here because defendant is entitled to recover the amount of its lien by means of a credit against plaintiff's ongoing workers' compensation benefits. *Radzisz v. Harley Davidson of Metrolina, Inc.*, 346 N.C. 84, 88-90, 484 S.E.2d 566, 568-70 (1997) (holding that although the defendants had denied liability and there had been no award from the Commission, as contemplated by subsection (f), the defendants were still entitled to a lien interest in settlement proceeds that had been disbursed to the plaintiff). Subsection (j) contains no temporal requirement, and either party here may apply to the superior court judge to determine the amount of defendant's lien. As the Commission found:

> Plaintiff's distribution of the third party funds does not affect Defendant's right to a subrogation lien on the third party settlement funds. Plaintiff is still receiving Workers' Compensation benefits and Defendant can still pursue reimbursement of its lien from benefits due Plaintiff after

> the subrogation amount is determined by agreement of the parties or by a Superior Court Judge.

The Commission's approach was entirely consistent with the current statutes, which protect both the employee's right to pursue his workers' compensation claim and the employer's right to reimbursement if a third party also has some liability for the injuries.

Moreover, while the Court of Appeals expressed concern with the fairness of the notice given by plaintiff here, we conclude that the applicable statute, N.C.G.S. § 97-22, as well the unchallenged findings of the Commission, addresses this concern. Specifically, the statute provides:

> Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident, and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this Article prior to the giving of such notice, unless it can be shown that the employer, his agent or representative, had knowledge of the accident, or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity, or the fraud or deceit of some third person; but no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.

N.C.G.S. § 97-22 (2015); *see also* N.C.G.S. § 97-18(j) (2015) ("The employer or insurer shall promptly investigate each injury reported or known to the employer and at the earliest practicable time shall admit or deny the employee's right to compensation or commence payment of compensation . . . .").

Here the Commission made findings and conclusions that plaintiff gave defendant notice of the car accident. The Commission found, in relevant part:

> 6. The Full Commission finds the testimony of Plaintiff's wife and Plaintiff to be credible.

7. Based upon a preponderance of the evidence, the Full Commission finds as fact that Plaintiff notified Mr. Lee, his supervisor, Ms. Brown, his safety manager, and some other employees in Defendant's personnel office that he was injured in an automobile accident on June 29, 2009 while traveling to his doctor's office to get an out-of-work medical note related to his shoulder injury.

. . . .

20. With regard to Defendant's notice of Plaintiff's June 29, 2009 automobile accident and injury and the fact that his injury from the automobile accident occurred while he was driving to see Dr. Burbank for treatment relating to his compensable right shoulder, the Full Commission finds, based upon a preponderance of the credible evidence, that Defendant had actual notice from Plaintiff's wife on the day of his automobile accident and from Plaintiff within three days following his automobile accident that Plaintiff was injured on June 29, 2009 while traveling to Dr. Burbank's office to obtain an out-of-work note related to his work-related right shoulder injury, which had been requested by Defendant-Employer.

21. The Full Commission further finds that the notice to Defendant-Employer given by Plaintiff's wife and Plaintiff advising that Plaintiff was injured in an automobile accident on June 29, 2009 while traveling to his doctor's office to get an out-of-work medical note for his compensable shoulder injury as requested by his employer was timely given and constituted sufficient actual notice to alert Defendant that Plaintiff's injury from the automobile accident flowed directly from and was causally related to his compensable right shoulder injury. At a minimum, Defendant had sufficient actual notice to investigate whether the automobile accident was compensable under the Act and to direct medical treatment for Plaintiff, if appropriate.

22. The Full Commission also finds that Plaintiff had a reasonable excuse for his delay in giving written notice to Defendant that he was injured in an automobile accident on June 29, 2009 while traveling to his doctor's office to get

> an out-of-work medical note for his compensable shoulder injury as requested by his employer, as Defendant was given actual notice on the day of the accident and again within three days thereafter. Thus, Defendant had actual notice that Plaintiff's automobile accident either was, or was likely compensable under the Act because it occurred under circumstances where Plaintiff was seeking medically related treatment for his compensable right shoulder condition. Additionally, Plaintiff did not know that his injuries from the automobile accident were arguably compensable as part of his Workers' Compensation claim until the date of mediation on April 9, 2012.

We note that these findings were unchallenged by defendant, and they therefore are binding on our review. *See Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 423, 760 S.E.2d 732, 738 (2014) ("[W]here findings of fact are not challenged and do not concern jurisdiction, they are binding on appeal." (citing, *inter alia*, N.C.G.S. § 97-86 (2013))). Further, the Commission concluded:

> 4. The Full Commission concludes that Defendant had actual notice from Plaintiff's wife on the day of his automobile accident and from Plaintiff within three days following his automobile accident that Plaintiff was injured on June 29, 2009 while traveling to Dr. Burbank's office to obtain an out-of-work note related to his work-related right shoulder injury, which had been requested by Defendant-Employer. The notice provided to Defendant was timely given and constituted sufficient actual notice to alert Defendant that Plaintiff's injury from the automobile accident flowed directly from and was causally related to his compensable right shoulder injury. At a minimum, Defendant had sufficient actual notice to investigate whether the automobile accident was compensable under the Act and to direct medical treatment for Plaintiff, if appropriate. Plaintiff had a reasonable excuse for his delay in giving written notice to Defendant as Defendant had actual notice of the automobile accident and Plaintiff's resulting injury and that the automobile accident flowed directly from and was causally related to travel related to medical treatment for his compensable shoulder condition. Additionally, Plaintiff did not know that his injuries from the automobile accident were arguably compensable

> as part of his Workers' Compensation claim until the date of mediation on April 9, 2012.

This conclusion is supported by the unchallenged findings of fact.

Accordingly, defendant had an opportunity to participate in the settlement process with the third-party tortfeasor but did not do so. Plaintiff had no reason to delay negotiations with the third party or disbursement of the settlement proceeds because, based on the unchallenged findings of the Commission, he did not know that his injuries were potentially compensable under the Act. On the other hand, because defendant received actual notice, it had an opportunity to promptly investigate the accident and determine its compensability. Had defendant done so, it would have discovered what became apparent in the 9 April 2012 mediation—that plaintiff suffered compensable injuries—and it could have participated in the settlement process.

Conclusion

In sum, we hold that the Commission correctly concluded that *Hefner* is inapplicable here and that plaintiff had not waived his right to compensation under the Act. Further, the Commission correctly determined that once the subrogation lien amount is determined by agreement of the parties or by a superior court judge, defendant is entitled to reimbursement of its lien from the benefits due to plaintiff. Accordingly, we reverse the decision of the Court of Appeals, and remand this case to that court for further remand to the Commission for additional proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

STATE v. DICK

[370 N.C. 305 (2017)]

STATE OF NORTH CAROLINA
v.
QUENTON LEE DICK

No. 386PA16

Filed 8 December 2017

Sexual Offenses—first-degree sexual offense—aided and abetted by another individual—actual or constructive presence not required

The trial court did not err by instructing the jury on the theory that defendant committed a first-degree sexual offense by being aided and abetted by another individual in the commission of the sexual act. The other men who entered the victim's apartment helped to bind the victim with duct tape, moved her into the bedroom, removed her clothes, and touched her inappropriately. It was unnecessary to address the other men's physical proximity to defendant or the victim at the time of the offense in order to prove defendant's guilt under the theory of aiding and abetting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 791 S.E.2d 873 (2016), vacating defendant's conviction after appeal from a judgment entered on 18 June 2015 by Judge Susan E. Bray in Superior Court, Guilford County. Heard in the Supreme Court on 10 October 2017.

Joshua H. Stein, *Attorney General*, *by James M. Stanley, Jr.*, *Special Deputy Attorney General*, *for the State-appellant.*

Mark Montgomery for defendant-appellee.

MORGAN, Justice.

I. Background and Procedural History

In this appeal we consider whether a jury was properly instructed on the theory that Quenton Lee Dick (defendant) committed a first-degree sexual offense by being aided and abetted by another individual in the commission of the sexual act. The Court of Appeals concluded that there was not sufficient evidence to submit the instruction to the jury. We hold that, based upon our enunciated test used to establish the principle of aiding and abetting, the evidence was sufficient to allow the jury to be instructed on the theory of aiding and abetting.

The State presented evidence at trial tending to show that at around 2:00 a.m. on 4 December 2013, E.M.[1] was studying in her apartment for an examination and conversing with three of her friends, all of whom were college students. Those in the apartment included E.M.'s roommate. They were all getting ready for bed when there was a knock at the door, and E.M.'s roommate answered it because she was expecting a guest. The person at the door asked for someone who did not live in the apartment.

A short time later, there was another knock on the door and when the door was opened, a man wearing a bandanna on his face walked into the kitchen of the apartment, looked around, and walked back out. E.M. and her friends were under the impression that someone was playing a trick on them. E.M.'s roommate tried to push the door to close it, but four men prevented her from doing so by charging into the apartment. All of the men were wearing bandannas across their faces and hoods on their heads. At least two of the men had handguns. Three of the men headed to the back of the apartment and started to ransack it. The last man stayed in the living room with E.M. and the other students. E.M. and her friends were ordered to go into their rooms and bring back everything they had. The men took several items, including cell phones, laptop computers, and a television.

Next, the four college students were ordered to sit back down on the couch in the living room. The intruders duct taped the students' hands behind their backs. The man in the living room ordered E.M. to get up from the couch and walk into one of the bedrooms in the back of the apartment. Three of the men were walking in the bedroom. E.M. attempted to step into the bathroom that was connected to the bedroom, but one of the men grabbed her and told her to go into the bedroom. E.M. started crying and begged the men not to rape her. One of the men replied, "Shut up, bitch. We're not going to rape you." In response, E.M. "kept crying and saying stuff." One of the men responded, "Well, I see we're going to have to . . . tape her mouth because she won't shut up." He then taped shut E.M.'s mouth. Another of the men left the room at that time in order to tape shut the other students' mouths.

E.M. had been left in the bedroom with two of the intruders, one of whom was defendant. The two men took off E.M.'s pants, lifted her shirt and began touching her inappropriately. A third man stepped into the room and said something indicating "that maybe they ha[d] to go or

1. We use initials to protect the victim's privacy.

they need[ed] to hurry up or something." All of the men then departed, leaving E.M. in the bedroom alone; however, defendant quickly returned to the room, ripped off the tape from E.M.'s mouth, and forced her to perform oral sex on him. E.M. could see a gun in defendant's pocket while performing the sexual act. During this time, E.M.'s shirt had been lifted and she was not wearing any underwear. E.M.'s hands were still duct taped behind her back. The sexual act lasted about thirty seconds. Defendant ejaculated on E.M.'s face and shirt. Subsequently, he ran out of the apartment.

E.M. and her friends went to her neighbor's apartment and called the police. Law enforcement officers arrived and questioned the victims. They then took E.M. to a local hospital, where she completed a rape kit. Defendant's DNA profile was later determined to match the semen on E.M.'s shirt.

On 3 February 2014, defendant was indicted on four counts of first-degree kidnapping, one count of first-degree burglary and four counts of robbery with a dangerous weapon. Defendant was also charged with conspiracy to commit robbery with a firearm, but that charge was subsequently dismissed by the State. On 2 June 2014, defendant was indicted on one count of first-degree sexual offense. After all of the evidence was presented at trial, defendant moved to dismiss all charges for insufficiency of the evidence. These motions were denied. A jury returned unanimous verdicts of guilty on all the charges. The four robbery with a firearm convictions and the four kidnapping convictions were consolidated for judgment, with defendant being sentenced to four consecutive terms of 83 to 112 months each followed by a term of 276 to 392 months on the sexual offense charge and another consecutive term of 73 to 100 months on the first-degree burglary conviction. Defendant gave written notice of appeal.

At the Court of Appeals, defendant argued that the trial court erred by improperly instructing the jury on the first-degree sexual offense charge. The jury was given a disjunctive instruction at trial, allowing it to find defendant guilty of first-degree sexual offense if defendant "employed a dangerous and deadly weapon or was aided and abetted by another person or persons" when he committed the sexual act. In considering this issue and ultimately finding error by the trial court, the Court of Appeals reasoned that when a jury is given instructions at trial indicating that a defendant can be found guilty of a crime under two separate theories, there must be sufficient evidence to find such a defendant guilty under both theories. *State v. Dick*, ___ N.C. App. ___, 791 S.E.2d 873, 2016 WL 5746395 (2016) (unpublished). The Court of Appeals noted

in the instant case that defendant did not dispute that there was sufficient evidence to properly allow the jury to consider whether he had employed a dangerous or deadly weapon in the commission of the sexual offense, *Dick*, 2016 WL 5746395, at *3; on the other hand, however, the Court of Appeals held that there was not sufficient evidence presented that defendant was aided or abetted by another individual during the act giving rise to defendant's first-degree sexual offense conviction, *id.* at *4.[2] This latter determination by the Court of Appeals regarding the lack of sufficient evidence of defendant's guilt on the theory of aiding and abetting, which was a part of the disjunctive jury instruction, is erroneous and must be reversed.

II. Standard of Review

Defendant contends that the trial court erred in submitting the disjunctive instruction to the jury because the evidence was insufficient for the jury to determine that defendant was aided or abetted when he committed the sexual act. "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Scott*, 356 N.C. at 597, 573 S.E.2d at 869. We have held that there must be sufficient evidence to find a defendant guilty under either theory of criminal culpability for the disjunctive instruction to be properly given to the jury. *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990) (holding that insufficient evidence regarding one theory submitted to the jury, when prejudicial, was reversible error requiring new trial). In our view, in the case sub judice the evidence was sufficient to instruct the jury to consider both whether defendant employed a dangerous or deadly weapon in the commission of the sexual offense, as well as whether defendant was aided or abetted by another individual during the act giving rise to defendant's first-degree sexual offense conviction. There was substantial evidence to support each of these two theories of defendant's guilt of this offense, thus legitimizing the disjunctive jury instruction.

III. Analysis

The trial court did not err in giving the jury the disjunctive instruction at issue because the evidence was sufficient to find defendant guilty of first-degree sexual offense under the theory that he employed

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2. The Court of Appeals went on to conclude that there was error which prejudiced defendant based on our precedent in *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987); however, we do not reach this issue for analysis because it is our determination that there was sufficient evidence presented by the State to allow the jury to find that defendant was aided or abetted by another individual when he committed the sexual offense.

a dangerous or deadly weapon in the commission of the sexual act as well as under the theory that he was aided and abetted by one or more persons in the perpetration of the crime.

Defendant was charged with first-degree sexual offense. A first-degree sexual offense is committed when

> the person engages in a sexual act with another person by force and against the will of the other person, and does any of the following:
>
> 1) Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon.
>
> 2) Inflicts serious personal injury upon the victim or another person.
>
> 3) The person commits the offense aided and abetted by one or more other persons.

N.C.G.S. § 14-27.26 (2015). In *State v. Bell* we reasoned that:

> Two lines of cases have developed regarding the use of disjunctive jury instructions. *State v. Diaz* [,317 N.C. 545, 346 S.E.2d 488 (1986), and its progeny] stand[ ] for the proposition that "a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense." In such cases, the focus is on the conduct of the defendant.
>
> In contrast, this Court has recognized a second line of cases [stemming from *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990),] standing for the proposition that "if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied." In this type of case, the focus is on the intent or purpose of the defendant instead of his conduct.

359 N.C. 1, 29-30, 603 S.E.2d 93, 112-13 (2004) (citing and quoting *State v. Lyons*, 330 N.C. 298, 302-03, 412 S.E.2d 308, 312 (1991)), *cert. denied*, 544 U.S. 1052 (2005). The current case is consistent with the *Hartness* line of cases. Whether defendant employed or displayed a dangerous or

deadly weapon during the commission of the offense, or whether he was aided and abetted by at least one other individual, are different acts that will establish an element of first-degree sexual offense. The properness of the disjunctive jury instruction involved in the present case depends on whether there is sufficient evidence to instruct the jury on the theory that defendant was aided and abetted when he committed the sexual act. The Court of Appeals opined that a person is guilty of aiding or abetting another when he is

> actually or constructively present at the scene of the crime and . . . aids, advises, counsels, instigates or encourages another to commit the offense. Even though not actually present during the commission of the crime, a person may be an aider or abettor if he shares the criminal intent of the perpetrator and if, during the commission of the crime, he is in a position to render any necessary aid to the perpetrator.

Dick, 2016 2016 WL 5746395, at *3 (alteration in original) (quoting *State v. Barnette*, 304 N.C. 447, 458, 284 S.E.2d 298, 305 (1981) (citations omitted)).

In stating this test, the Court of Appeals cited this Court's decision in *Barnette*. That case applied the then-existing case law regarding aiding and abetting a crime. However, in *State v. Bond*, we recognized that

> [a]lthough several of our cases decided before 1981 state that actual or constructive presence is required to prove a crime under an aiding and abetting theory, this is no longer required. Our legislature abolished all distinctions between accessories before the fact and principals in the commission of felonies by enacting N.C.G.S. § 14–5.2, effective 1 July 1981. Thus, accessories before the fact, who do not actually commit the crime, and indeed may not have been present, can be convicted of first-degree murder under a theory of aiding and abetting. A showing of defendant's presence or lack thereof is no longer required.

345 N.C. 1, 23-24, 478 S.E.2d 163, 174 (1996), *cert. denied*, 521 U.S. 1124 (1997). Thus, distinctions between individuals actually or constructively present at the scene and those not present at the scene are now irrelevant with respect to aiding and abetting. The abolition of this distinction is further demonstrated by our decision in *State v. Francis* in which we upheld jury instructions concerning aiding and abetting advising the jury that it must

> find three things in order to convict the defendant of first-degree murder on [the] theory [of aiding and abetting]: (1) that the crime was committed by another; (2) that the defendant knowingly advised, instigated, encouraged, procured, or aided the other person; and (3) that the defendant's actions or statements caused or contributed to the commission of the crime by the other person.

341 N.C. 156, 459 S.E.2d 269 (1995) (citing *State v. Allen*, 339 N.C. 545, 453 S.E.2d 150 (1995), *abrogated by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396 (1997)). Noticeably missing from this instruction is any reference to the defendant's location when the crime was committed. A year later in *Bond*, we concluded that giving a jury the pattern jury instructions with respect to aiding and abetting and its "accordance with the requirements delineated in *Francis* was sufficient." 345 N.C. at 24, 478 S.E.2d at 175. Consistent with this evolution in the law pursuant to the 1981 legislative enactment, this Court stated in *Gaines*, that "to the extent our cases decided after N.C.G.S. § 14–5.2 became applicable suggest that actual or constructive presence is necessary to prove a crime under an aiding and abetting theory, these cases are no longer authoritative on this issue." 345 N.C. at 676, 483 S.E.2d at 414 (citations omitted), *cert. denied*, 522 U.S. 900 (1997). Two years later, we reiterated the aiding and abetting test approved in *Francis* and reemphasized in *Gaines*. *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999). Accordingly, we now apply this same three-prong test to the case at bar because it aligns with the legislature's intent to remove any required analysis concerning a person's proximity to the alleged criminal incident.

In the instant case, the elements needed to satisfy the principle of aiding or abetting are met. Although the other individuals left the room before defendant committed the sexual act, there is sufficient evidence for the jury to conclude that the individuals aided and abetted defendant. E.M. testified that "two of [the men], I think, began to tape us up behind our backs with duct tape." Three of the men worked together to separate E.M. from the rest of the group. One of the men grabbed E.M. and ordered her to come back into the bedroom when she instead tried to go into the adjoining bathroom. In the bedroom defendant and another individual inappropriately groped E.M., removed all of her clothes below her waist, and fondled her body. The majority of these acts were executed by defendant, along with others. The acts of taping shut E.M.'s mouth, taping her hands behind her back, moving her to the bedroom, removing her clothing, and inappropriately touching E.M. equate to encouragement, instigation, and aid which collectively readily meet the standards

of the aiding and abetting test that we articulated in *Bond* and its progeny. Thus, there is evidence here tending to show that defendant committed the crime of first-degree sexual offense while other individuals instigated, encouraged and aided him. By joining defendant in unclothing and immobilizing E.M., while performing a series of overt acts that created an atmosphere to subvert the will of E.M., others are deemed to have contributed to the commission of the crime.

Defendant argues that there is insufficient evidence for a jury to find that he was aided or abetted by another during the commission of the sexual act because he was the only individual in the room with the victim when the incident occurred, thereby demonstrating that no one was in a position to render any necessary aid to him. While the trial evidence regarding the precise physical locations of the other men who accompanied defendant is inexact during the time that defendant committed the sexual act, the evidence nonetheless supports the conclusion that there was sufficient evidence for a jury to find that defendant was aided and abetted by at least one other individual, since under the *Bond* rationale, neither actual nor constructive presence was required to prove a crime under the theory of aiding and abetting based upon legislation that became effective the same year this Court issued our opinion in *Barnette*.

In view of our holding in *Bond* and its succeeding line of cases, the other men aided, instigated or encouraged defendant to commit this offense. We reach this conclusion in light of the evidence adduced at trial, and find it unnecessary to address the other men's physical proximity to defendant or the victim at the time of the offense in order to prove defendant's guilt under the theory of aiding and abetting. Due to the sufficiency of the evidence as to defendant being one who employed or displayed a dangerous or deadly weapon, and that he was aided and abetted by one or more other persons in the commission of the crime of first-degree sexual offense, the trial court gave a proper disjunctive jury instruction.

Therefore, the Court of Appeals erroneously reversed the trial court by vacating defendant's conviction for this offense and remanding the matter for a new trial on this charge. Accordingly, this Court reverses the judgment of the Court of Appeals and instructs that court to reinstate the trial court's judgment and defendant's conviction for first-degree sexual offense.

REVERSED.

STATE OF NORTH CAROLINA
v.
HAROLD LAMONT FLETCHER

No. 94PA16

Filed 8 December 2017

1. Sexual Offenses—first-degree sexual exploitation of a minor—digital manipulation of photo

The trial court erred by failing to sustain defendant's objection when the prosecutor asserted in his closing argument that digital manipulation of a photo to make a minor appear to engage in sexual activity constitutes first-degree sexual exploitation of a minor. Despite this error, the trial court gave clear, correct instructions as to this issue, and the error was not prejudicial.

2. Sexual Offenses—first-degree sexual exploitation of a minor—oral intercourse—no penetration requirement

In defendant's trial for numerous sexual offenses against his step-daughter, the trial court did not err by denying defendant's request to instruct the jury that the "oral intercourse" element of first-degree sexual exploitation of a minor involves "penetration, however slight." The Supreme Court declined to adopt defendant's definition of "oral intercourse," which would narrow the scope of the protections from sexual exploitation of minors afforded by the statute.

Justice MORGAN concurring in part and concurring in the result only in part.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 782 S.E.2d 926 (2016), finding no error at trial after appeal from judgments entered on 23 May 2014 by Judge Phyllis M. Gorham in Superior Court, New Hanover County. Heard in the Supreme Court on 13 February 2017.

Joshua H. Stein, Attorney General, by Laura E. Crumpler, Special Deputy Attorney General, for the State.

Glenn Gerding, Appellate Defender, by James R. Grant, Assistant Appellate Defender, for defendant-appellant.

ERVIN, Justice.

The issues before us in this case include whether the trial court abused its discretion by overruling defendant's objection to alleged misstatements of law contained in the prosecutor's final argument to the jury and whether the trial court erroneously denied defendant's request that the jury be instructed that the "oral intercourse" element of first-degree sexual exploitation of a minor involves "penetration, however slight." We hold that the challenged prosecutorial argument, while erroneous, was not prejudicial and that the trial court did not err by refusing to deliver defendant's requested "oral intercourse" instruction. As a result, we modify and affirm the Court of Appeals' decision.

On 26 May 2002, defendant Harold Lamont Fletcher married "Theresa," who had two young children from a previous marriage, including "Diane."[1] Diane referred to defendant, who had become involved in Diane's life when she was one year old, as "Dad." Theresa had known since the beginning of the couple's marriage that defendant had a pornography-related addiction and eventually insisted that defendant receive counseling for this problem. As a result, both defendant and Theresa underwent counseling that was intended to address defendant's pornography-related addiction.

During her third or fourth grade year, Diane noticed that defendant had begun to enter her bedroom after she had gone to bed. On one occasion, Diane found defendant standing over her with his hand on her chest. On another occasion, defendant told Diane that "he was picking a piece of cotton or lint out of [her] mouth from [her] blanket" when she confronted him about being in her room at night. In early March 2012, when she was fifteen years old, Diane saw a red light outside of her bedroom window. A few weeks later, on 12 March 2012, Diane saw a camera outside the same window as she dressed. Defendant was outside the family home on both occasions.

In early December 2012, after Diane told Theresa that she believed that defendant was entering her bedroom and "touching her chest," Theresa took Diane to speak with the counselor who had assisted defendant and Theresa with defendant's addiction to pornography, given that the "counselor was aware of [defendant's] habits." After consulting with the counselor, Theresa contacted the New Hanover County Department of Social Services.

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1. "Theresa" and "Diane" are pseudonyms used for ease of reading and to protect the identity of the persons involved.

Subsequently, the State Bureau of Investigation initiated an investigation into defendant's activities. During a search of the family home, investigating officers seized multiple videos and photographs of Diane from files stored on defendant's computer, including several images depicting Diane in various states of undress and four images depicting a hand holding a penis against or near Diane's mouth while she slept. According to Theresa, the hand and the penis depicted in the second set of images belonged to defendant.

Although defendant admitted that he had recorded images of Diane "in the bathroom getting ready to take a shower, dressing, undressing," and "asleep in her bed" for purposes of "sexual gratification," he denied having ever touched her in an inappropriate manner. At trial, defendant admitted to having committed secret peeping and having taken indecent liberties with a child. However, defendant denied his guilt of statutory sex offense and first-degree sexual exploitation of a minor on the grounds that the images depicting his penis near Diane's mouth did not show actual conduct and had, instead, been digitally manipulated to produce that appearance. Although Lars Daniel, an expert in digital imaging manipulation, testified that defendant "display[ed] an advanced level of ability [with] Photoshop" and that it was "highly likely" that at least one of the images depicting a penis near Diane's mouth had been digitally manipulated, he could not formulate an opinion concerning the extent, if any, to which any of the other images depicting defendant's penis against or near Diane mouth had been digitally altered.

On 18 March 2013, the New Hanover County grand jury returned bills of indictment charging defendant with one count of first-degree sexual exploitation of a minor; statutory sex offense with a fifteen year-old; eighteen counts of secret peeping; and six counts of taking indecent liberties with a child, with these offenses allegedly having occurred between 24 December 2009 and 3 December 2012. The charges against defendant came on for trial before the trial court and a jury at the 19 May 2014 criminal session of the Superior Court, New Hanover County.

During the jury instruction conference, the trial court rejected defendant's request that the trial court instruct the jury that the "oral intercourse" necessary for a finding of guilt of first-degree sexual exploitation of a minor "requires something more than a mere touching" and could require proof of "penetration, however slight." After the State asserted that proof of penetration was not required to establish "oral intercourse" and that "oral intercourse" and "fellatio" were interchangeable terms, the trial court refused to instruct the jury in accordance with defendant's request and permitted the parties to advance their

competing definitions of "oral intercourse" before the jury during their closing arguments.

Once defendant had asserted in his closing argument that the images depicting his penis on or near Diane's mouth had been digitally altered and that these images, even in their unaltered state, did not depict his penis in physical contact with Diane's mouth, the trial court allowed the prosecutor to argue, over defendant's objection, that:

> The other charge is sexual exploitation of a minor. That's a very fancy way for saying manufacturing or producing child pornography. You have to know the content of the material, using a minor for the purposes of producing material that contains a visual representation depicting sexual activity. Does not matter if the image was altered. If I take a picture of a child from the newspaper at a tennis match and I go back to my house and I take a picture of myself unclothed and I am able to manipulate those photos to show that I am engaged in a sexual act with that child, that's manufacturing child pornography. The child does never have to actually be involved in the sexual act itself.

Although the trial court did instruct the jury that, in order to find defendant guilty of first-degree sexual exploitation of a minor, it had to find beyond a reasonable doubt that "defendant used, induced, coerced, encouraged or facilitated a [minor] to engage in [oral intercourse] for the purpose of producing material that contains a visual representation depicting this activity," the trial court never defined "oral intercourse" during its final instructions to the jury.

On 22 May 2014, the jury returned verdicts finding defendant guilty of first-degree sexual exploitation of a minor, attempted statutory sex offense, eighteen counts of secret peeping, and six counts of taking indecent liberties with a child. On 23 May 2014, the trial court arrested judgment with respect to each of the secret peeping charges; entered judgments sentencing defendant to consecutive terms of 16 to 20 months imprisonment based upon each of defendant's convictions for taking indecent liberties with a child, to a consecutive term of 73 to 97 months based upon defendant's conviction for first-degree sexual exploitation of a minor, and to a consecutive term of 157 to 198 months imprisonment based upon defendant's conviction for attempted statutory sex offense; and ordered that defendant register as a sex offender following his release from imprisonment. Defendant noted an appeal to the Court of Appeals from the trial court's judgments.

In seeking relief from the trial court's judgments before the Court of Appeals, defendant argued that the trial court had erred by allowing the prosecutor "to misstate the law to the jury regarding an essential element of sexual exploitation" of a minor and by failing to instruct the jury that guilt of first-degree sexual exploitation of a minor required proof of "penetration, however slight." In rejecting defendant's challenge to the prosecutor's closing argument, the Court of Appeals determined that "the prosecutor's remarks [constituted] reasonable inferences of the law" given that first-degree sexual exploitation "include[s] digitally manipulated photos that had been produced without a minor being *actually engaged* in sexual activity, provided that the image depicted an *actual minor* engaged in sexual activity." *State v. Fletcher*, -- N.C. --, 782 S.E.2d 926, 2016 WL 797895 (2016) (unpublished), at *5. The Court of Appeals further noted that, "to the extent that the prosecutor's argument could be construed as a misstatement of law, it was remedied by the trial court's multiple reiterations that it will instruct on the law and its instructing was in accordance with the pattern jury instructions." *Id.* at *6.

Secondly, the Court of Appeals rejected defendant's contention that " 'oral intercourse' requires some evidence that that defendant's male sex organ penetrated Diane's mouth." *Id.* at *9. After acknowledging long-standing precedent to the effect that both vaginal intercourse and anal intercourse require penetration, the Court of Appeals stated that, "[g]iven the ambiguity of the phrase and these indicators of meaning," it would decline "to impose the requirement that, when the State proceeds under 'oral intercourse,' it must prove that the victim's mouth was penetrated." *Id.* at *10. As a result, the Court of Appeals found no error in the proceedings leading to the entry of the trial court's judgments.

In seeking further review of the Court of Appeals' decision by this Court, defendant argued that "the prosecutor misstated the law during his closing argument when he told the jury that it could convict [defendant] of first degree exploitation even if it determined that the images were fabricated or manipulated" and that the trial court's decision to overrule his objection to the prosecutor's argument "endorsed the prosecutor's misstatement in the presence of the jury." In addition, defendant argued that the Court of Appeals' decision to the effect that " 'oral intercourse' as contemplated by N.C.G.S. § 14-190.16 does not require penetration" "conflict[s] with this Court's well-established precedent regarding the definition of sexual 'intercourse.' " The State, on the other hand, urged us to refrain from granting further review in this case on the grounds that the Court of Appeals had correctly determined that

the challenged prosecutorial argument rested upon " 'reasonable inferences' derived from the sexual exploitation statute"; that, "even assuming some impropriety, the trial court's instruction to the jury cured any such improper argument"; and that the Court of Appeals had "relied upon several well established principles of statutory construction" in determining that "oral intercourse" as that term is used in N.C.G.S. § 14-190.13(5)(b) did not involve penetration. We granted defendant's petition for discretionary review of the Court of Appeals' decision on 9 June 2016.

In seeking to persuade us that the trial court erred by overruling his objection to the prosecutor's argument that the images utilized to support the first-degree sexual exploitation of a minor charge did not need to depict actual sexual activity, defendant contends that the relevant statutory provision requires "that a minor actually be exposed to sexual activity" on the grounds that the presence or absence of such activity "is one distinction separating first-degree sexual exploitation from the two lesser degrees of sexual exploitation," citing N.C.G.S. §§ 14-190.17 and 14-190.17A. The trial court's failure to sustain defendant's objection to the challenged prosecutorial argument clearly prejudiced defendant given that his "primary defense" "was that the images of Diane sleeping" had been "digitally manipulated through the use of computer software" and, "at worst, simulated sexual activity." In defendant's view, the trial court's jury instructions did not suffice to cure the prejudice arising from the prosecutor's argument given that "the pattern instruction employed by the trial court merely tracked the language of the statute, and . . . did not explicitly address the prosecutor's misstatement." Finally, defendant asserted that "the jury's logically inconsistent verdicts of *attempted* statutory sex offense and *completed* first-degree sexual exploitation" highlighted the prejudicial effect of the trial court's error.

Secondly, defendant contends that the trial court's failure to instruct the jury that "oral intercourse" required proof of "penetration, however slight," constituted prejudicial error. After noting that a "trial court is required to give [a requested] instruction, at least in substance, if it is a correct statement of the law and supported by the evidence," citing *State v. Shaw*, 322 N.C. 797, 804, 370 S.E.2d 546, 550 (1988), defendant contends that, because "this Court has consistently held that the phrases 'vaginal intercourse' and 'anal intercourse' both entail penetration, however slight," the statutory reference to "oral intercourse" should be understood to require "penetration" as well given that "it is conclusively presumed that the intention of the Legislature must be taken to be in the import of the words previously judicially construed," quoting *Jones v. Commissioners*, 137 N.C. 579, 608, 50 S.E. 291, 301 (1905).

The State, on the other hand, contends that the Court of Appeals correctly determined that the challenged portion of the prosecutor's argument, rather than misstating the law, reflected a "reasonable inference" "derived from the exploitation statute." Moreover, even if the trial court erred by failing to sustain defendant's challenge to the relevant portion of the prosecutor's argument, "[d]efendant cannot demonstrate prejudicial error" given the overwhelming evidence of defendant's guilt and the fact that the trial court correctly instructed the jury concerning the issue of defendant's guilt of first-degree sexual exploitation of a minor, with any inconsistency between the jury's verdicts concerning the issue of defendant's guilt of statutory sex offense and first-degree sexual exploitation of a minor failing to establish prejudice "stemming from the prosecutor's brief statement concerning manipulated images," citing *State v. Davis*, 214 N.C. 787, 794, 1 S.E.2d 104, 108 (1939) (holding that, if the record contains sufficient evidence to support a verdict, "mere inconsistency will not invalidate the verdict").

In addition, the State asserts that the trial court's jury instructions "adequately addressed each essential element" of the offense of first-degree sexual exploitation of a minor, so that "the trial judge was not required to read [d]efendant's requested jury instruction." According to the State, defendant's requested instruction concerning the definition of "oral intercourse" "would narrow the scope of the statute and . . . [allow] an adult [to] escape prosecution even if he actively filmed or produced a picture of his penis touching the lips, tongue or mouth of a minor" despite the General Assembly's clear intention to protect minors "from the physiological and psychological injuries resulting from sexual exploitation and abuse," quoting *State v. Williams*, 232 N.C. App. 152, 159, 754 S.E.2d 418, 423-24, *appeal dismissed and disc. rev. denied*, 367 N.C. 784, 766 S.E.2d 846 (2014). As a result, the State urges us to affirm the Court of Appeals' decision.

[1] As a general proposition, parties are given "wide latitude" in their closing arguments to the jury, *State v. Monk*, 286 N.C. 509, 515, 212 S.E.2d 125, 131 (1975) (citations omitted), with the State being entitled to "argue to the jury the law, the facts in evidence and all reasonable inferences drawn therefrom," *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007) (quoting *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709-10 (1995), *cert. denied*, 516 U.S. 1148, 116 S. Ct. 1021, 134 L. Ed. 2d 100 (1996)), *cert. denied*, 555 U.S. 835, 129 S. Ct. 59, 172 L. Ed. 2d 58 (2008). However, "[i]ncorrect statements of law in closing arguments are improper, and upon [a] defendant's objection, the trial judge should . . . sustain [the] objection and instruct the jury to disregard the statement."

State v. Ratliff, 341 N.C. 610, 616-17, 461 S.E.2d 325, 328-29 (1995) (citation omitted).[2] A challenge to the trial court's failure to sustain a defendant's objection to a comment made during the State's closing argument is reviewed for an abuse of discretion, *State v. Walters*, 357 N.C. 68, 101, 588 S.E.2d 344, 364 (citing *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002)), *cert. denied*, 540 U.S. 971, 124 S. Ct. 442, 157 L. Ed. 2d 320 (2003), with the reviewing court being required to "first determine if the remarks were improper" and then "determine if the remarks were of such a magnitude that their inclusion prejudiced [the] defendant." *Id.* at 101, 588 S.E.2d at 364 (citing and quoting *Jones*, 355 N.C. at 131, 558 S.E.2d at 106). Assuming that the trial court's refusal to sustain the defendant's objection was erroneous, the defendant must show that there is a reasonable possibility that the jury would have acquitted him had the challenged argument not been permitted. *Ratliff*, 341 N.C. at 617, 461 S.E.2d at 329 (citing, *inter alia*, N.C.G.S. § 15A-1443(a) (1988), which is identical to the current statute).

The statutory framework governing criminal liability arising from the creation and distribution of child pornography was initially enacted by the General Assembly in 1985. *Cinema I Video, Inc. v. Thornburg*, 320 N.C. 485, 489, 358 S.E.2d 383, 384 (1987). Under the current statutory scheme, a defendant can be convicted of sexual exploitation of a minor in the event that he commits a variety of acts, with the defendant's conduct being subject to varying degrees of punishment depending upon the nature and extent of the defendant's involvement with the minor in question. *See* N.C.G.S. §§ 14-190.16, -190.17 (2015); *see also id.* § 14-190.17A (2015) (enacted in 1989). For example, the offense of third-degree sexual exploitation of a minor prohibits the mere possession of child pornography. *See id.* § 14-190.17A(a) (stating that "[a] person commits the offense of third degree sexual exploitation of a minor if, knowing the character or content of the material, he possesses material that contains a visual representation of a minor engaging in sexual activity"). On the other hand, a defendant commits the offense of second-degree sexual exploitation of a minor if he or she "[r]ecords, photographs, films,

2. Although the State contends that defendant's general objection did not suffice to preserve his challenge to the trial court's failure to sustain his objection to the challenged portion of the prosecutor's argument for purposes of appellate review, no statement of the basis for an objection is required unless the ground for the objection is "not apparent from the context." N.C. R. App. P. 10(a)(1). When the relevant portions of the State's final argument are considered in the context of the basic thrust of defendant's defense, the basis for defendant's objection is obvious. As a result, we conclude that defendant's challenge to the trial court's refusal to sustain defendant's objection to a portion of the prosecutor's final argument is properly preserved for purposes of appellate review.

develops, or duplicates material that contains a visual representation of a minor engaged in sexual activity; or . . . [d]istributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material that contains a visual representation of a minor engaged in sexual activity," *id.* § 14-190.17(a)(1)-(2), with the common thread running through the conduct statutorily defined as second-degree sexual offense being that the defendant had taken an active role in the production or distribution of child pornography without directly facilitating the involvement of the child victim in the activities depicted in the material in question. Finally, the offense of first-degree sexual exploitation of a minor is committed if the defendant, "knowing the character or content of the material or performance":

> (1) Uses, employs, induces, coerces, encourages, or facilitates a minor to engage in or assist others to engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; or
>
> (2) Permits a minor under his custody or control to engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; or
>
> (3) Transports or finances the transportation of a minor through or across this State with the intent that the minor engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; or
>
> (4) Records, photographs, films, develops, or duplicates for sale or pecuniary gain material that contains a visual representation depicting a minor engaged in sexual activity.

Id. § 14-190.16(a).[3] As a result, the acts necessary to establish the defendant's guilt of first-degree sexual exploitation of a minor can be categorized as involving either direct facilitation of the minor's involvement in sexual activity or the production of child pornography for sale or profit. *See id.*

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3. The definition of "sexual activity" as set out in N.C.G.S. § 14-190.13(5) (2015) is discussed in more detail below. The "act" of being photographed while sleeping does not, however, fall within any component of the statutory definition of "sexual activity" contained in that statutory provision.

The indictment returned against defendant for the purpose of charging him with first-degree sexual exploitation of a minor alleged that defendant "use[d] or induce[d] or coerce[d] or encourage[d] or facilitate[d] [Diane] to engage in sexual activity, oral intercourse, for the purpose of producing material containing a visual representation depicting this activity" while "knowing the character of the material." As a result, the record clearly establishes that the State sought to prosecute defendant for committing the offense delineated in N.C.G.S. § 14-190.16(a)(1). According to the plain language of the relevant statutory provision, the minor in question is required to have engaged in sexual activity. *See Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980) (stating that, "[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it plain and definite meaning") (citations omitted); *see also Cinema I Video, Inc. v. Thornburg*, 83 N.C. App. 544, 566, 351 S.E.2d 305, 319 (1986) (concluding that the statutory provisions prohibiting the sexual exploitation of a minor contemplate "live performance or photographic or other visual reproduction of live performances") (quoting *New York v. Ferber*, 458 U.S. 747, 765, 102 S. Ct. 3348, 3358, 73 L. Ed. 2d 1113, 1127 (1982)), *aff'd*, 320 N.C. 485, 358 S.E.2d 383 (1987). Thus, when the minor depicted in an image appears to have been shown as engaged in sexual activity as the result of digital manipulation, the defendant has not committed the offense of first-degree sexual exploitation of a minor. As a result, both the prosecutor's assertion that it "[d]oes not matter if the image [appearing to depict sexual activity involving a minor] was altered" and the prosecutor's statement that, "[i]f I take a picture of a child from the newspaper . . . and I take a picture of myself unclothed, and I am able to manipulate those photos to show that I am engaged in a sexual act with that child, that's manufacturing child pornography" constitute misstatements of the applicable law.

The State's reliance upon the decision of the United States Supreme Court in *United States v. Williams*, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008), to support its defense of the prosecutor's argument is misplaced. As an initial matter, the issue before the Court in *Williams* was whether a federal statute that "criminalizes, in certain specified circumstances, the pandering or solicitation of child pornography" was impermissibly "overbroad under the First Amendment [to the United States Constitution] or impermissibly vague under the Due Process Clause of the Fifth Amendment." *Id.* at 288, 128 S. Ct. at 1835, 170 L. Ed. 2d at 659. In other words, *Williams* addressed the issue of whether a legislative body could constitutionally criminalize certain conduct rather than whether the General Assembly, in enacting N.C.G.S. § 14-190.16(a)(1),

actually did criminalize certain types of conduct.[4] Secondly, the federal statutory provision at issue in *Williams*, unlike N.C.G.S. § 14-190.16(a)(1), explicitly defined prohibited "sexually explicit conduct" as including various acts that could be either "actual or simulated." *Id.* at 290, 128 S. Ct. at 1837, 170 L. Ed. 2d at 661. As a result, even though "[t]he emergence of new technology and the repeated retransmission of picture files over the Internet could make it nearly impossible to prove that a particular image was produced using real children," *id.* at 290, 128 S. Ct. at 1837, 170 L. Ed. 2d at 661, the United States Supreme Court's decision in *Williams* has no bearing upon the proper resolution of defendant's first challenge to the trial court's judgments.

Although the trial court erred by failing to sustain defendant's objection to the challenged prosecutorial argument, the commission of such an error, standing alone, does not suffice to justify a decision to award defendant a new trial, *see State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208, *cert. denied*, 510 U.S. 1028, 114 S. Ct. 644, 126 L. Ed. 2d 602 (1993), given that a party's misstatement of the law during the course of its final argument is deemed to have been "cured by the court's correct jury instructions on [the issue misstated]," *State v. Phillips*, 365 N.C. 103, 140, 711 S.E.2d 122, 148 (2011), *cert. denied*, 565 U.S. 1204, 132 S. Ct. 1541, 182 L. Ed. 2d 176 (2012); *see also State v. Anderson*, 322 N.C. 22, 38, 366 S.E.2d 459, 469, *cert. denied*, 488 U.S. 975, 109 S. Ct. 513, 102 L. Ed. 2d 548 (1988). As defendant concedes, the trial court instructed the jury that it could only convict defendant of first-degree sexual exploitation of a minor in the event that it found beyond a reasonable doubt that "the defendant used, induced, coerced, encouraged or facilitated a person to engage in sexual activity for the purpose of producing material that contains a visual representation depicting this activity," with "[o]ral intercourse [constituting] sexual activity." Although this instruction explicitly informed the jury that, in order for it to return a guilty verdict, it had to find that defendant "used, induced, coerced, encouraged or facilitated" Diane's involvement in sexual activity, defendant contends that a finding that the trial court's failure to sustain his objection to the prosecutor's misstatement of the law constituted harmless error would be inappropriate given the centrality of the issue addressed in the challenged portion of the prosecutor's argument to defendant's defense

4. We do not, of course, wish the textual discussion to be understood as expressing any opinion concerning the extent, if any, to which digitally altering otherwise innocent photographs of minors so as to create images that appear to depict the minor engaged in sexual activity or the possession of such digitally altered images constitute either second-degree sexual exploitation of a minor or third-degree sexual exploitation of a minor.

and the fact that the trial court's decision to overrule his objection to the relevant portion of the prosecutor's argument placed the imprimatur of the trial court's approval on the challenged argument. However, given the clarity of the language used in the trial court's instruction and the absence of any North Carolina authority tending to support defendant's contention, we do not find defendant's contentions with respect to the prejudice issue persuasive.[5]

Moreover, the fact that the jury returned what defendant describes as "inconsistent" verdicts has no tendency to show that it failed to understand and heed the trial court's instructions concerning the showing that the State was required to make in order for the jury to convict defendant of first-degree sexual exploitation of a minor, which clearly required proof beyond a reasonable doubt that defendant used Diane to engage in actual sexual activity. Although the jury's verdicts might have some tendency to suggest that the jury had difficulty determining whether defendant's penis actually touched Diane's lips, its verdicts do not in any way tend to suggest that the jury accepted the prosecutor's contention that a conviction for first-degree sexual exploitation of a minor can rest upon digitally altered images rather than evidence of some sort of actual sexual activity. As a result, we do not believe that there is any reasonable possibility that, but for the trial court's failure to sustain defendant's objection to the prosecutor's misstatement of the applicable law, the jury would have acquitted defendant of first-degree sexual exploitation of a minor. *Ratliff*, 341 N.C. at 617, 461 S.E.2d at 329; *see also* N.C.G.S. § 15A-1443(a) (2015)).

[2] "The jury charge is one of the most critical parts of a criminal trial." *State v. Walston*, 367 N.C. 721, 730, 766 S.E.2d 312, 318 (2014). "The purpose of . . . a charge to the jury is to give a clear instruction to assist the jury in an understanding of the case and in reaching a correct verdict," *Shaw*, 322 N.C. at 803, 370 S.E.2d at 549, including how "the law . . . should be applied to the evidence," *State v. Sutton*, 230 N.C. 244, 247,

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5. Although defendant did cite the United States Supreme Court's decision in *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), in support of the prejudice argument discussed in the text, his reliance on *Bruton* is unavailing given that this case involves a prosecutorial misstatement of the law that was corrected in the trial court's jury instructions while *Bruton* involved the admission of a codefendant's confession that also implicated the defendant subject to an instruction that the jury should only consider the information contained in the codefendant's confession against the codefendant. Unlike the evidence at issue in *Bruton*, the challenged prosecutorial argument cannot reasonably be described as "of the most persuasive sort, ineradicable, as a practical matter, from the jury's mind[.]" *Kansas v. Carr*, 577 U.S. ___, ___, 136 S. Ct. 633, 645, 193 L. Ed. 2d 535, 548 (2016) (citations omitted).

52 S.E.2d 921, 923 (1949) (citations omitted). As a result, the trial court has a duty "to instruct the jury on all substantial features of a case raised by the evidence." *Shaw*, 322 N.C. at 803, 370 S.E.2d at 549 (citing *State v. Ferrell*, 300 N.C. 157, 163, 265 S.E.2d 210, 214 (1980), *disapproved of on other grounds by State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993)). In the event that a "defendant's request for [an] instruction [is] correct in law and supported by the evidence in the case, the trial court [is] required to give the instruction, at least in substance." *Shaw*, 322 N.C. at 804, 370 S.E.2d at 550 (citing *State v. Howard*, 274 N.C. 186, 199, 162 S.E.2d 495, 504 (1968)). "[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.' " *Walston*, 367 N.C. at 731, 766 S.E.2d at 319 (quoting *State v. Avery*, 315 N.C. 1, 31, 337 S.E.2d 786, 803 (1985)). Even if a trial court errs by failing to give a requested and legally correct instruction, the defendant is not entitled to a new trial unless there is "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a); *see also Shaw*, 322 N.C. at 804, 370 S.E.2d at 550.

As we have already noted, defendant was charged with "us[ing], employ[ing], induc[ing], coerc[ing], encourag[ing], or facilitat[ing] a minor to engage in . . . sexual activity . . . for the purpose of producing material that contains a visual representation depicting this activity." N.C.G.S. § 14-190.16(a)(1). "Sexual activity" for purposes of N.C.G.S. § 14-190.16(a)(1) consists of:

> a. Masturbation, whether done alone or with another human or an animal.
>
> b. Vaginal, anal, or oral intercourse, whether done with another human or with an animal.
>
> c. Touching, in an act of apparent sexual stimulation or sexual abuse, of the clothed or unclothed genitals, pubic area, or buttocks of another person or the clothed or unclothed breasts of a human female.
>
> d. An act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a person clad in undergarments or in revealing or bizarre costume.
>
> e. Excretory functions; provided, however, that this subsubdivision shall not apply to [N.C.]G.S. [§] 14-190.17A.

f. The insertion of any part of a person's body, other than the male sexual organ, or of any object into another person's anus or vagina, except when done as part of a recognized medical procedure.

g. The lascivious exhibition of the genitals or pubic area of any person.

Id. § 14-190.13(5) (2015). In rejecting defendant's request that the trial court instruct the jury that "oral intercourse" for purposes of N.C.G.S. § 14-190.13(5)(b) involves penetration, the trial court stated that, since "the indictment indicates that the sexual activity was oral intercourse," he would "instruct the jury that the sexual activity was oral intercourse" without further defining that term and would "allow counsel to argue definitions of oral intercourse and fellatio."[6]

The extent to which "oral intercourse," as that term is used in N.C.G.S. § 14-190.13(5)(b), requires penetration presents a question of first impression for this Court. "When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself." *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010). "If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005). Aside from the fact that neither the General Assembly[7] nor the courts[8]

6. As an aside, we urge the members of the trial bench to refrain from avoiding the necessity for instructing the jury concerning all of the essential elements of first-degree sexual exploitation of a minor or any other offense by allowing the parties to argue alternative definitions of a relevant statutory expression in lieu of defining that expression during the trial court's final instructions. As we have already indicated, "[i]t is the duty of the trial court to instruct the jury on all substantial features of a case," including the definition of statutory terms such as "oral intercourse," to the extent that it is necessary to clarify the nature of the decision that the jury is required to make. *Shaw*, 322 N.C. at 803, 370 S.E.2d at 549.

7. The term "oral intercourse" does appear, without further definition, in N.C.G.S. § 14-190.1(c)(1), which defines "sexual conduct" in the context of punishing "[o]bscene literature and exhibitions," and N.C.G.S. § 15A-615, which permits testing defendants charged with committing offenses that "involve[ ]nonconsensual vaginal, anal, or oral intercourse" or "vaginal, anal, or oral intercourse" with a victim under the age of sixteen for the presence of sexually transmitted diseases. N.C.G.S. §§ 14-190.1(c)(1), 15A-615(a) (2015).

8. Although the term "oral intercourse" does appear in some of this Court's opinions, these references consist of quotations from various statutory provisions or portions of the pattern jury instructions or of references to factual information contained in the record. None of these references shed any light upon the proper resolution of the question that we are called upon to decide in this case. *See, e.g.*, *State v. Autry*, 321 N.C. 392, 395, 364

have defined "oral intercourse," that term lacks an unambiguous "plain and definite meaning" as well. *Id.* at 614, 614 S.E.2d at 277. Although courts often consult dictionaries for the purpose of determining the plain meaning of statutory terms, *see State v. Ludlum*, 303 N.C. 666, 671, 281 S.E.2d 159, 162 (1981), that approach is of no avail in this case given the absence of any definition of "oral intercourse" in reference volumes such as *Webster's Third New International Dictionary* (1971), *The American Heritage Dictionary of the English Language* (4th ed. 2000), and the *New Oxford American Dictionary* (3d ed. 2010), or in online dictionaries, *see, e.g.*, *Merriam-Webster*, https://www.merriam-webster.com (last visited May 25, 2017).[9] As a result, given the absence of any generally accepted understanding of the meaning of the statutory reference to "oral intercourse," "judicial construction must be used to ascertain the legislative will." *Beck*, 359 N.C. at 614, 614 S.E.2d at 277 (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990)).

According to well-established North Carolina law, "[t]he intent of the Legislature controls the interpretation of a statute." *State v. Joyner*, 329 N.C. 211, 217, 404 S.E.2d 653, 657 (1991) (quoting *State v. Perry*, 305 N.C. 225, 235, 287 S.E.2d 810, 816 (1982), *overruled by State v. Mumford*, 364 N.C. 394, 402, 699 S.E.2d 911, 916 (2010)). "In ascertaining such intent, a court may consider the purpose of the statute and the evils it was designed to remedy, the effect of the proposed interpretations of the statute, and the traditionally accepted rules of statutory construction." *State v. Tew*, 326 N.C. 732, 738-39, 392 S.E.2d 603, 607 (1990) (citation omitted); *see also State v. Barnett*, 369 N.C. 298, 304, 794 S.E.2d 306, 311 (2016) (stating that, "[i]n ascertaining the legislative intent, courts should consider the language of the statute, the spirit of the statute,

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S.E.2d 341, 344 (1988); *State v. Locklear*, 320 N.C. 754, 756, 360 S.E.2d 682, 683 (1987); *State v. Tucker*, 317 N.C. 532, 535, 346 S.E.2d 417, 419 (1986); *State v. Ford*, 314 N.C. 498, 503, 334 S.E.2d 765, 769 (1985); *State v. Jean*, 310 N.C. 157, 159, 311 S.E.2d 266, 267 (1984); *State v. Riddle*, 300 N.C. 744, 745, 268 S.E.2d 80, 81 (1980); *State v. Self*, 280 N.C. 665, 667, 187 S.E.2d 93, 94 (1972).

9. The dictionaries that have been consulted in the drafting of this opinion do consistently define "oral sex" as the oral stimulation of the sex organ of another without making any reference to any sort of penetration requirement. *See, e.g.*, *New Oxford American Dictionary* 1233 (3d ed. 2010) (defining "oral sex" as "sexual activity in which the genitals of one partner are stimulated by the mouth of the other; fellatio or cunnilingus"); *The American Heritage Dictionary of the English Language* 1236 (4th ed. 2000) (defining "oral sex" as "oral stimulation of one's partner's sex organs"); *Merriam-Webster*, https://www.merriam-webster.com/dictionary/oral%20sex (last visited May 25, 2017) (defining "oral sex" as "oral stimulation of the genitals: cunnilingus, fellatio").

and what it seeks to accomplish" (quoting *State ex rel. Utils. Comm'n v. Pub. Staff*, 309 N.C. 195, 210, 306 S.E.2d 435, 444 (1983))). Although the title given to a particular statutory provision is not controlling, it does shed some light on the legislative intent underlying the enactment of that provision. *Brown v. Brown*, 353 N.C. 220, 224, 539 S.E.2d 621, 623 (2000) (first citing *In re Forsyth County*, 285 N.C. 64, 71, 203 S.E.2d 51, 55 (1974); and then citing *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 812, 517 S.E.2d 874, 879 (1999)). Similarly, "[w]hile a criminal statute must be strictly construed against the State, the courts must nevertheless construe it with regard to the evil which it is intended to suppress." *Tew*, 326 N.C. at 739, 392 S.E.2d at 607 (citation omitted). "A construction of a statute which operates to defeat or impair its purpose must be avoided if that can reasonably be done without violence to the legislative language." *Id.* at 739, 392 S.E.2d at 607 (citation omitted).

Statutory provisions criminalizing the making, dissemination, and possession of child pornography have been enacted by "virtually all of the States and the United States" out of concern "that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." *New York v. Ferber*, 458 U.S. at 758, 102 S. Ct. at 3355, 73 L .Ed. 2d at1123. Such laws

> are designed to prevent the victimization of individual children, and to protect "minors from the physiological and psychological injuries resulting from sexual exploitation and abuse." This Court has noted that child pornography poses a particular threat to the child victim because "the child's actions are reduced to a recording [and] the pornography may haunt him in future years, long after the original misdeed took place."

State v. Howell, 169 N.C. App. 58, 63, 609 S.E.2d 417, 420-21 (2005) (alteration in original) (quoting *Cinema I Video*, 83 N.C. App. at 5552, 568-69, 351 S.E.2d at 311, 320)). Thus, as is evidenced by the legislative decision to title the relevant legislation as "An Act To Strengthen the Obscenity Laws of this State and the Enforcement of These Laws, To Protect Minors from Harmful Material that Does Not Rise to the Level of Obscenity, and To Stop the Sexual Exploitation and Prostitution of Minors," *see* Act of July 11, 1985, ch. 703, 1985 N.C. Sess. Laws 929, we have no hesitation in concluding that the General Assembly enacted N.C.G.S. § 14-190.16(a)(1) for the purpose of protecting minors from the harms arising from the "use[ ], employ[ment], induce[ment], coerc[ion], encourage[ment], or facilitat[ion] [of] a minor to engage in or assist

others to engage in sexual activity for live performance or for the purpose of producing material that contains a visual representation depicting this activity." N.C.G.S. § 14-190.16(a)(1). As a result, we believe that the General Assembly intended that the relevant statutory language be construed broadly in order to provide minors with the maximum reasonably available protection from sexual exploitation.

Adoption of the definition of "oral intercourse" as requiring proof of penetration as contended for by defendant would contravene this understanding of the relevant legislative intent by narrowing the scope of the protections from the sexual exploitation of minors afforded by N.C.G.S. § 14-190.16(a)(1). Although this Court has consistently held that other forms of "intercourse" require "penetration, however slight," that definition appears to have been limited in recent years to sexual acts that inherently involve penetration of the body of another by the male sex organ. *See, e.g.*, *State v. Brown*, 312 N.C. 237, 244-45, 321 S.E.2d 856, 861 (1984) (defining vaginal intercourse as the "*slightest* penetration of the female sex organ by the male sex organ"); *State v. Atkins*, 311 N.C. 272, 275, 316 S.E.2d 306, 308 (1984) (stating that anal intercourse "requires penetration of the anal opening . . . by the penis"). "When a term has long-standing legal significance, it is presumed that legislators intended the same significance to attach by use of that term, absent indications to the contrary." *Black v. Littlejohn*, 312 N.C. 626, 639, 325 S.E.2d 469, 478 (1985) (quoting *Sheffield v. Consol. Foods Corp.*, 302 N.C. 403, 427, 276 S.E.2d 422, 437 (1981)). For that reason, we conclude that the references to vaginal and anal intercourse contained in N.C.G.S. § 14-190.13(5)(b) assume the existence of a penetration requirement. On the other hand, we believe that, when read in context, "oral intercourse" was intended as a gender-neutral reference to cunnilingus and fellatio, which are the only components of the definition of "sexual act" as currently set out in N.C.G.S. § 14-27.20(4) that are not otherwise explicitly included in the definition of "sexual activity" contained in N.C.G.S. § 14-190.13(5).[10] As we have previously recognized, neither fellatio nor cunnilingus, as those

10. Appellate courts in other jurisdictions have reached similar conclusions. For example, the South Carolina Court of Appeals held that cunnilingus constituted "sexual battery," statutorily defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening of another person's body," despite the absence of penetration. *State v. Morgan*, 352 S.C. 359, 365, 574 S.E.2d 203, 206 (S.C. Ct. App. 2002) (emphasis omitted) (quoting S.C. Code Ann. § 16-3-651(h) (1985)); *see also Stephan v. State*, 810 P.2d 564, 568 (Alaska Ct. App. 1991) (stating that cunnilingus constituted "sexual penetration," defined as "genital intercourse, cunnilingus, fellatio, anal intercourse, or an intrusion, however slight, of an object or any part of a person's body into the genital or anal opening

terms are currently used in N.C.G.S. § 14-27.20(4), require penetration. *State v. Goodson*, 313 N.C. 318, 319, 327 S.E.2d 868, 869 (1985) (defining "fellatio" as "oral sex" performed by a female upon a male consisting of "contact between the mouth of one party and the sex organs of another" without making any mention of penetration); *Ludlum*, 303 N.C. at 669, 281 S.E.2d at 161 (stating that "[w]e do not agree, however, that penetration is required before cunnilingus, as that word is used in the statute, can occur"). In light of the obvious legislative intent to provide broad protection against the sexual exploitation of minors, the fact that the existence of a penetration requirement with respect to "vaginal intercourse" and "anal intercourse" does not logically compel a determination that "oral intercourse" includes a penetration requirement as well, the inconsistent treatment between the offense of sexual exploitation of a minor and sexual offense that would result from the interpolation of a penetration requirement into the definition of "oral intercourse," and the desirability of avoiding "saddl[ing] the criminal law with hypertechnical distinctions and the prosecution with overly complex and in some cases impossible burdens of proof," *Ludlum*, 303 N.C. at 672, 281 S.E.2d at 162,[11] we decline to adopt defendant's proposed definition of "oral intercourse" as containing a penetration requirement and conclude, that since defendant's requested instruction did not constitute an accurate statement of the applicable law, *see Shaw*, 322 N.C. at 804,

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of another person's body," despite the absence of penetration) (quoting Alaska Stat. Ann. § 11.81.900(b)(53) (1991)); *State v. Beaulieu*, 674 A.2d 377, 378 (R.I. 1996) (per curiam) (concluding that cunnilingus, in the absence of evidence of penetration, establishes a defendant's guilt of first-degree sexual assault given that R.I. Gen. Laws 1956 § 11-37-1(8) "does not require *actual penetration*, only sexual penetration"); *State v. Marcum*, 109 S.W.3d 300, 303 & n.4, 304 (Tenn. 2003) (holding that a defendant was not entitled to a jury instruction concerning the issue of his guilt of attempted rape of child based upon fellatio, without evidence of actual penetration, given the statutory definition of "sexual penetration" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of [the] person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body") (quoting Tenn. Code Ann. § 39-13-501(7) (1997)).

11. The fact that defendant's conviction for first degree sexual exploitation of a minor rests upon conduct that would also be included within the scope of another subsection of definition of "sexual activity" set out N.C.G.S. § 14-190.13(5) does not necessitate the inclusion of a penetration requirement into the definition of "oral intercourse" given that there is much overlap in the conduct described in the various components of that definition. For example, both vaginal and anal intercourse, as this Court has defined those terms, would appear to involve "[t]ouching, in an act of apparent sexual stimulation or sexual abuse, of the clothed or unclothed genitals, pubic area, or buttocks of another person or the clothed or unclothed breasts of a human female." N.C.G.S. § 14-190.13(5)(c).

370 S.E.2d at 550, the trial court did not err by refusing to instruct the jury in accordance with defendant's request. As a result, for the reasons set forth above, the decision of the Court of Appeals, as modified in this opinion, is affirmed.

MODIFIED AND AFFIRMED.

Justice MORGAN concurring in part and concurring in the result only in part.

I concur with the majority decision's reasoning and holding that the prosecutor's challenged statements—that manipulating innocent images so that they *appear* to show a child engaged in a sexual act is manufacturing child pornography and thus constitutes first-degree sexual exploitation of a minor—were erroneous, but not prejudicial.

With regard to the denial of defendant's request for a jury instruction defining "oral intercourse," I further concur with the majority's ultimate determination that defendant is not entitled to a new trial on that basis. Nonetheless, I reach this result only because I believe that defendant cannot establish prejudice, and not on the basis that the trial court did not err in refusing to give defendant's requested definition. Proper application of principles of statutory interpretation demonstrates that the term "oral intercourse" as used in the sexual exploitation statutes is defined as requiring penetration, however slight, of the mouth by the male sex organ. Accordingly, the trial court should have so instructed the jury at defendant's request.

Before addressing the divergence of my analysis from that of the majority on this issue, I first note three key points of agreement with my esteemed colleagues. First, the issue of whether, in the context of our State's sexual exploitation statutes, "oral intercourse" requires penetration presents a matter of first impression for this Court. Second, because "oral intercourse" is not clearly defined in case law, statutes, or general usage dictionaries, we must employ principles of statutory construction to determine the meaning of the term. Third, and most critically, I emphatically agree with the majority that the General Assembly undoubtedly intended for the sexual exploitation statutes to apply to the sex acts that defendant committed against Diane.

For purposes of sexual exploitation, as well as other public morality and decency offenses concerning minors, N.C.G.S. § 14-190.13 (the definitions statute) defines "[s]exual activity" to encompass numerous acts, including "[m]asturbation"; "[v]aginal, anal, or oral intercourse"; the

sexually stimulating or sexually abusive touching of the genitals, pubic area, or buttocks of another, or of the female breasts; sexualized torture, bondage, and sadomasochistic behaviors; "[e]xcretory functions"; penetration of the vagina or anus by an object or a body part other than the male sex organ; and "lascivious exhibition of the genitals or pubic area." N.C.G.S. § 14-190.13(5)(a)-(g) (2015). This review illustrates the broad range and diverse nature of the acts that the General Assembly sought to prohibit in protecting children from the harms of pornography and sexual exploitation. In light of this important purpose and the lengthy enumeration of acts that constitute sexual activity, I consider it to be beyond question that the General Assembly intended that, for purposes of the crime of sexual exploitation of a minor, the term "sexual activity" should include *both* the penetration of the mouth by the male sex organ as well as the mere touching of the male sex organ with the mouth, even without penetration.

It is at this stage, however, that my analysis of the proper means to arrive at the correct outcome in this case diverges from the rationales employed by my learned colleagues. The necessary goal of the protection of society's vulnerable minors from sexual exploitation can still be accomplished in our courts without compromising this Court's well-established and long-standing recognition of the need to construe statutes consistently. Such expected consistency would certainly include a construction of terminology that is harmonious throughout the spectrum of statutory enactments which address a given area of the criminal law. While these fundamental principles of statutory construction are deeply embedded in analyses routinely applied by this Court, the majority unfortunately departs from them in its interpretation of the term "intercourse" when we are called upon to ascribe a definition to the term "oral intercourse."

Upon this premise, I do not subscribe to the majority's unsupported assertion that "[a]doption of the definition of 'oral intercourse' as requiring proof of penetration . . . would contravene this understanding of the relevant legislative intent by narrowing the scope of protections" under the sexual exploitation statute.[1] Application of the well-established

1. Likewise, the State argued that mere touching of a sex organ with the mouth can only fall under subdivision (5)(b) as a form of "oral intercourse" and asserted that, were this Court to hold that "oral intercourse" requires penetration, a visual representation depicting the act of touching a child's lips with a penis could not support a prosecution for sexual exploitation. As with all cases, the State must simply take care to indict a defendant correctly under the applicable statutory provision in light of the behavior constituting a criminal offense.

rules of statutory construction reveals that the mere touching of the male sex organ with the mouth falls under subdivision (5)(c) of the definitions statute—"[t]ouching, in an act of apparent sexual stimulation or sexual abuse, of the clothed or unclothed genitals"—while the penetration of the mouth by the male sex organ falls under subdivision (5)(b), which includes, *inter alia*, "oral intercourse." *Id.* § 14-190.13(5)(b), (c). Therefore, the specific sexual activity for which defendant allegedly used Diane is a form of sexual exploitation of a minor, namely, sexual touching and not "oral intercourse." This distinction is neither trivial nor academic since, as defendant observes, here "the State elected to exclusively indict under a theory of 'oral intercourse,' and it was bound to prove that theory." *See State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980) (A defendant may not be "convict[ed] upon some abstract theory not supported by the bill of indictment.").

When, as here, a statutory term is not clear, any "ambiguity should be resolved so as to effectuate the true legislative intent." *State ex rel. Comm'r of Ins. v. N.C. Auto. Rate Admin. Office*, 287 N.C. 192, 202, 214 S.E.2d 98, 104 (1975) (citing *Duncan v. Carpenter & Phillips*, 233 N.C. 422, 64 S.E.2d 410 (1951), *overruled on other grounds by Taylor v. J. P. Stevens & Co.*, 300 N.C. 94, 265 S.E.2d 144 (1980), *McLean v. Durham Cty. Bd. of Elections*, 222 N.C. 6, 21 S.E.2d 842 (1942), and *State ex rel. Thomasson v. Patterson*, 213 N.C. 138, 195 S.E. 389 (1938)). In my view, the point of ambiguity here is simply whether the General Assembly intended to regard the undefined act of "oral intercourse" in the same manner as the other acts listed in N.C.G.S. § 14-190.13(5)(b) that contain the word "intercourse" and are clearly defined, or in the same manner as acts included in N.C.G.S. § 14-190.13(5)(f) as a form of sexual touching. In construing a statute, we presume that none of its subdivisions are redundant. *Sheffield v. Consol. Foods Corp.*, 302 N.C. 403, 421-22, 276 S.E.2d 422, 434 (1981) (citing *Jones v. Cty. Bd. of Educ.*, 185 N.C. 303, 307, 117 S.E. 37, 39 (1923)). Accordingly, I proceed on the presumption that the subdivisions of the definitions statute are not duplicative and that the touching of a male sex organ to the mouth or lips without penetration is covered under only one of them.

As acknowledged in the majority decision, this Court has consistently held that other forms of "intercourse" require penetration with the male sex organ, however slight. *See*, *e.g.*, *State v. Brown*, 312 N.C. 237, 244-45, 321 S.E.2d 856, 861 (1984) (stating that vaginal intercourse includes the "*slightest* penetration of the female sex organ by the male sex organ"); *State v. Atkins*, 311 N.C. 272, 275, 316 S.E.2d 306, 308 (1984) (stating that anal intercourse "requires penetration of the anal opening

. . . by the penis"). The majority suggests that this definition of "intercourse" has "been limited in recent years[2] to sexual acts that inherently involve penetration of the body of another by the male sex organ." While this observation may have some interesting historic validity, it bears no substantive legal applicability. The legal terms "anal intercourse" and "vaginal intercourse" are explicitly *defined* as the penetration of the anus and vagina, respectively, by the male sex organ. Thus, the penetration element of "anal intercourse" and "vaginal intercourse" is only "inherent" to these acts in the way that the *defining* characteristics of *any* sex act are. In this regard, elementary principles of statutory construction yield the conclusion that a consistent interpretation of the word "intercourse" inherently contemplates "penetration."

In determining legislative intent, I discern no evidence that the General Assembly intended to "limit" or alter the meaning of the term "intercourse" when it drafted the sexual exploitation laws in 1985. The definition of "intercourse" as requiring penetration by the male sex organ appears in decisions of this Court dating back at least to the middle of the twentieth century, nearly seven decades ago.[3] *See, e.g.*, *State v. Bowman*, 232 N.C. 374, 375-76, 61 S.E.2d 107, 108 (1950) ("There is 'carnal knowledge' or 'sexual intercourse' in a legal sense if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male."). As noted by the majority, "[w]hen a term has longstanding legal significance, it is presumed that legislators intended the same significance to attach by use of that term, absent indications to the contrary." *Black v. Littlejohn*, 312 N.C. 626, 639, 325 S.E.2d 469, 478 (1985) (quoting *Sheffield*, 302 N.C. at 427, 276 S.E.2d at 437). Because our case law as demonstrated in *Bowman* had clearly defined "intercourse" as requiring penetration by the male sex organ some thirty-five years before the enactment of the sexual exploitation statutes in 1985, the General Assembly must be viewed to have intended this same word in the phrase "oral intercourse" to also require penetration.

This legislative intent appears even clearer in light of the other terms that the General Assembly has employed to encompass contact between the mouth and sexual organs without the requirement

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2. I would observe that the sexual exploitation statutes were first enacted in 1985. The General Assembly's understanding and intent in its statutory enactments before 1985 that are still valid, and the applicable case law interpreting them that also is still valid, should not be discounted merely because they are older.

3. Similarly, general usage dictionaries define "sexual intercourse" as "sexual contact between individuals *involving penetration*, esp. *the insertion of a man's erect penis* into a woman's vagina." *New Oxford American Dictionary* 1601 (3d ed. 2010) (emphasis added).

of penetration. *See*, *e.g.*, N.C.G.S. § 14-27.20(4), (5) (2015) (defining, for purposes of rape and other sex offenses, the term "sexual act" as excluding vaginal intercourse, but including "*cunnilingus*, *fellatio*, analingus, . . . anal intercourse," and "the penetration, however slight, by any object into the genital or anal opening of another person's body," and the term "[s]exual contact" as "(i) touching the sexual organ, anus, breast, groin, or buttocks of any person, (ii) *a person touching another person with their own sexual organ*, anus, breast, groin, or buttocks, or (iii) a person ejaculating, emitting, or placing semen, urine, or feces upon any part of another person") (emphases added). Further, it is evident that the General Assembly was aware of other phraseology for conduct that involves touching of sex organs with the mouth but without a penetration requirement. *See also State v. Goodson*, 313 N.C. 318, 319, 327 S.E.2d 868, 869 (1985) (defining fellatio and oral sex, neither of which require penetration); *State v. Ludlum*, 303 N.C. 666, 672, 281 S.E.2d 159, 162 (1981) (defining cunnilingus as not requiring penetration).[4] The majority's efforts to deftly move between and among this myriad of sexual acts in an effort to harmonize their definitions with the majority's brittle approach to statutory construction here present an awkward fit in the symmetry of the pertinent laws. Yet, in its wisdom, the General Assembly did not use any of those terms for purposes of sexual exploitation, instead selecting a word with a well-known, longstanding meaning: "intercourse."

Further indication of the intended meaning of the term "oral intercourse" can be derived from the General Assembly's focus in the definitions statute on distinguishing between sexual acts that involve penetration by the male sex organ and those which do not. The legislature chose to separately list "vaginal intercourse" and "anal intercourse"—acts the majority agrees require penetration of the vagina and anus with the male sex organ—in N.C.G.S. § 14-190.13(5)(b); penetration of the vagina and anus with any other body part or object—in N.C.G.S. § 14-190.13(5)(f); and mere touching of the male or female genital area—in N.C.G.S. § 14-190.13(5)(c). Despite this plain language regarding vaginal

4. Likewise, in contrast to the dearth of definitions for "oral intercourse" in general usage dictionaries, the term "oral sex" is defined—consistently—in such sources as the oral stimulation of another's sex organ, without any requirement of penetration. *See*, *e.g.*, *New Oxford American Dictionary* 1233 (3d ed. 2010) (defining oral sex as "sexual activity in which the genitals of one partner are stimulated by the mouth of the other; fellatio or cunnilingus"); *The American Heritage Dictionary of the English Language* 1236 (4th ed. 2000) (defining oral sex as "oral stimulation of one's partner's sex organs"); *Merriam-Webster*, https://www.merriam-webster.com/dictionary/oral%20sex (last visited Nov. 27, 2017) ("oral stimulation of the genitals: cunnilingus, fellatio").

and anal sexual activity, the majority concludes that "oral intercourse" alone does not require penetration because the term was intended by the General Assembly "as a gender-neutral reference to 'cunnilingus' or 'fellatio,' " neither of which requires penetration.[5] The majority's interpretation results in a rather haphazard categorization of various types of sexual activity replete with redundancy and inconsistency.

In conclusion, I therefore would deem the touching of the genitals by the mouth without penetration to be included in N.C.G.S. § 14-190.13(5)(c) of the definitions statute. I would hold that, as used in N.C.G.S. § 14-190.13, the General Assembly intended that the term "oral intercourse," like "vaginal intercourse" and "anal intercourse," requires penetration by the male sex organ, however slight. Therefore, I determine that the instruction requested by defendant was "correct in law." *See State v. Shaw*, 322 N.C. 797, 804, 370 S.E.2d 546, 550 (1988).

Because defendant's requested instruction was raised by the evidence presented and is legally correct, I would further hold that the trial court erred in refusing to give it, "at least in substance." *See id.* at 804, 370 S.E.2d at 550 (citing *State v. Howard*, 274 N.C. 186, 162 S.E.2d 495 (1968)). Nonetheless, I do not believe defendant should receive a new trial based on this error, because a defendant is not entitled to a new trial unless he can also show prejudice, meaning there is "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a) (2015); *see also Shaw*, 322 N.C. at 804, 370 S.E.2d at 550. When a defendant fails to meet this burden, an instructional error will not merit relief. N.C.G.S. § 15A-1443(a); *see also Shaw*, 322 N.C. at 804, 370 S.E.2d at 550. In my view, defendant has failed to show prejudice and therefore is not entitled to a new trial. Accordingly, I ultimately concur with the result reached by the majority, although based on different reasoning.

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5. I would note that if the legislature wished to refer to "cunnilingus" and "fellatio," it could have simply used those two well-defined words in lieu of the previously undefined two-word phrase "oral intercourse." *See, e.g.*, *Ludlum*, 303 N.C. at 672, 281 S.E.2d at 162 (holding that "the Legislature intended by its use of the word cunnilingus to mean stimulation by the tongue or lips of any part of a woman's genitalia" and not requiring penetration); *State v. Smith*, 362 N.C. 583, 593, 669 S.E.2d 299, 306 (2008) (defining "fellatio" as "any touching of the male sexual organ by the lips, tongue, or mouth of another person" and thus not requiring penetration) (quoting *State v. Johnson*, 105 N.C. App. 390, 393, 413 S.E.2d 562, 564, *appeal dismissed and disc. review denied*, 332 N.C. 348, 421 S.E.2d 158 (1992)). If the General Assembly wished to employ a gender-neutral term, it could have used another two-word phrase—"oral sex"—which "describe[es] a sexual act involving 'contact between the mouth of one party and the sex organs of another,' " but not requiring penetration. *Goodson*, 313 N.C. at 319, 327 S.E.2d at 869 (quoting *People v. Dimitris*, 115 Mich. App. 228, 234, 320 N.W.2d 226, 228 (1981) (per curiam)).

STATE v. JACKSON

[370 N.C. 337 (2017)]

STATE OF NORTH CAROLINA
v.
ADAM ROBERT JACKSON

No. 397A16

Filed 8 December 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 791 S.E.2d 505 (2016), affirming an order entered on 13 March 2015 and a judgment entered on 11 February 2015 by Judge Joseph N. Crosswhite in Superior Court, Alexander County. Heard in the Supreme Court on 7 November 2017.

Joshua H. Stein, Attorney General, by Joseph A. Newsome, Assistant Attorney General, for the State.

Glenn Gerding, Appellate Defender, by Jillian C. Katz, Assistant Appellate Defender, for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
PIERRE JE BRON MOORE

No. 22A17

Filed 8 December 2017

Probation and Parole—probation revocation hearing—notice—statement of the violations alleged

Defendant received adequate notice of his probation revocation hearing pursuant to N.C.G.S. § 15A-1345(e) where the probation violation reports filed by the State included a list of the criminal offenses that defendant allegedly had committed and the trial court found that defendant had violated the condition of probation to commit no criminal offense. The phrase in the statute "a statement of the violations alleged" referred to a statement of the actions a probationer took to violate his conditions of probation, and it did not require a statement of the underlying conditions that were violated.

Justice ERVIN, concurring, in part, and concurring in the result, in part.

Justice HUDSON joins in this concurring opinion.

Justice BEASLEY dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 795 S.E.2d 598 (2016), finding no error after appeal from judgments entered on 15 January 2016 by Judge R. Allen Baddour in Superior Court, Orange County. Heard in the Supreme Court on 11 October 2017.

Joshua H. Stein, Attorney General, by Jessica V. Sutton and Teresa M. Postell, Assistant Attorneys General, for the State.

Allegra Collins for defendant-appellant.

MARTIN, Chief Justice.

Defendant was convicted of committing four crimes over a two-month period. He received two suspended sentences and was placed on probation. His probation was revoked after he was charged with

committing additional crimes. We now consider whether defendant received adequate notice of his probation revocation hearing pursuant to N.C.G.S. § 15A-1345(e). We modify and affirm the decision of the Court of Appeals and uphold the revocation of defendant's probation.

In August 2012, defendant was arrested for and charged with breaking and entering and larceny after breaking and entering. Defendant was released on bond and then, in September 2012, was arrested for and charged with committing those same offenses again. Defendant pleaded guilty to the August crimes and entered an *Alford* plea for the September crimes. Defendant received a suspended sentence of eight to nineteen months and supervised probation for twenty-four months for the August crimes. He received a suspended sentence of six to seventeen months and supervised probation for twenty-four months for the September crimes. The punishments for these crimes were to run consecutively. The judgments in both instances listed many of the "regular conditions of probation" under N.C.G.S. § 15A-1343(b). The listed conditions included that "defendant shall . . . [c]ommit no criminal offense in any jurisdiction," consistent with the language of N.C.G.S. § 15A-1343(b)(1).

Defendant's probation for the September crimes was modified and extended a number of times due to violations of probation conditions. On 3 June 2015, the State filed two probation violation reports relating to defendant's probation for the August and September 2012 crimes, respectively. The reports alleged violations of monetary conditions of probation. Each report also alleged an "Other Violation" that listed various pending criminal charges. Specifically, under "Other Violation" the reports each stated the same thing:

> The defendant has the following pending charges in Orange County. 15CR 051315 No Operators License 6/8/15, 15CR 51309 Flee/Elude Arrest w/MV 6/8/15. 13CR 709525 No Operators License 6/15/15, 14CR 052225 Possess Drug Paraphernalia 6/16/15, 14CR 052224 Resisting Public Officer 6/16/15, 14CR706236 No Motorcycle Endorsement 6/29/15, 14CR 706235 Cover Reg Sticker/Plate 6/29/15, and 14CR 706234 Reg Card Address Change Violation.

(Original in all uppercase.)

In January 2016, after many months of continuances, the trial court held a hearing on these violation reports.[1] Defendant's probation officer

1. During the time period covered by the continuances, defendant was also charged with first-degree murder.

testified about the new offenses alleged in the reports, and two police officers testified about defendant's fleeing to elude arrest two different times. The trial court found that defendant had violated the condition of probation to commit no criminal offense, and specifically found that defendant had "committed the charges of" fleeing to elude arrest and of not having an operator's license. The trial court accordingly revoked defendant's probation and activated the suspended sentences for defendant's August and September 2012 crimes, to be served consecutively.

Defendant appealed to the Court of Appeals, claiming that the probation violation reports did not give him adequate notice because they did not specifically state the condition of probation that he allegedly violated. In a divided opinion, the Court of Appeals affirmed the trial court's judgments. *State v. Moore*, ___ N.C. App. ___, ___, 795 S.E.2d 598, 600 (2016). The Court of Appeals concluded that the notice was adequate—that there was "no ambiguity"—because the allegations in the violation reports could point only to the revocation-eligible violation of the condition to commit no new criminal offense. *Id.* at ___, 795 S.E.2d at 600. Defendant appealed to this Court based on the dissenting opinion in the Court of Appeals.

Before revoking a defendant's probation, a trial court must conduct a hearing to determine whether the defendant's probation should be revoked, unless the defendant waives the hearing. N.C.G.S. § 15A-1345(e) (2015). "The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged." *Id.* Probation can be revoked only if a defendant (1) commits a criminal offense in any jurisdiction in violation of N.C.G.S. § 15A-1343(b)(1); (2) absconds from supervision in violation of N.C.G.S. § 15A-1343(b)(3a); or (3) has already served two periods of confinement for violating other conditions of probation according to N.C.G.S. § 15A-1344(d2). *Id.* § 15A-1344(a) (2015). Only the first of these statutorily-enumerated instances—the commission of a criminal offense—is at issue here.

Defendant argues that, because the probation violation reports did not specifically list the "commit no criminal offense" condition as the condition violated, the reports did not provide the notice that subsection 15A-1345(e) requires. We must address whether these reports complied with the statute's notice requirement. To do that, we need to examine what exactly that statutory provision means. This is a matter of first impression for this Court.

"In resolving issues of statutory construction, this Court must first ascertain legislative intent to assure that both the purpose and the intent

of the legislation are carried out. In undertaking this task, we look first to the language of the statute itself." *Poole v. Miller*, 342 N.C. 349, 351, 464 S.E.2d 409, 410 (1995) (citation omitted). "[O]rdinarily words of a statute will be given their natural, approved, and recognized meaning." *Victory Cab Co. v. City of Charlotte*, 234 N.C. 572, 576, 68 S.E.2d 433, 436 (1951).

Subsection 15A-1345(e) provides that "[t]he State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged." Neither the term "violation" nor the term "violations," as used in the statutory framework of which subsection 15A-1345(e) is a part, are defined by statute. *Black's Law Dictionary* defines "violation" as "1. An infraction or breach of the law; a transgression. . . . 2. The act of breaking or dishonoring the law; the contravention of a right or duty." *Violation*, *Black's Law Dictionary* (10th ed. 2014). Similarly, *Merriam-Webster's Collegiate Dictionary* defines "violation" as "the act of violating" and indicates in its definition of "violate" that "violating" means "break[ing]" or "disregard[ing]." *Merriam-Webster's Collegiate Dictionary* 1396 (11th ed. 2007). These definitions show that a violation is an action that violates some rule or law; a violation is not the underlying rule or law that was violated. In section 15A-1345, and hence in subsection 15A-1345(e), the words "violation" and "violations" refer to violations of conditions of probation. *See*, *e.g.*, N.C.G.S. § 15A-1345(a) (2015) (discussing when "[a] probationer is subject to arrest for violation of conditions of probation"). It follows that the phrase "a statement of the violations alleged" refers to a statement of what a probationer *did* to violate his conditions of probation. It does not require a statement of the underlying conditions that were violated.

"[I]n effectuating legislative intent, it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used." *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014). Defendant would have us insert a requirement into the statute that simply is not there: one that requires the State to provide notice of the specific condition of probation that defendant allegedly violated. This approach would effectively add words to the statute so that the statute would read "a statement of the violations alleged *and the conditions of probation allegedly violated*." But the statute as it actually reads, without the italicized words, requires only a statement of the actions that violated the conditions, not of the conditions that those actions violated.

Our straightforward interpretation is further supported by looking at the use of the word "violation" in N.C.G.S. § 15A-1344(a). This provision

appears in the statute that directly precedes the statute in which subsection 15A-1345(e) appears and is part of the same statutory framework regarding probation. Subsection 15A-1344(a) pertains to the authority of trial courts to modify or revoke probation. In discussing when a court can revoke probation, the provision states that "[t]he court may only revoke probation for a violation *of a condition of probation* under" certain specified provisions. N.C.G.S. § 15A-1344(a) (emphasis added). So the word "violation" cannot be synonymous with the phrase "condition of probation," because subsection 15A-1344(a) uses "condition of probation" to *modify* "violation." And that makes sense, because the phrase "condition of probation" is describing what was violated rather than the action that constituted the violation.

This interpretation is also consistent with the notice provision's purpose. Just as with the notice provided by criminal indictments, *see, e.g.*, *State v. Russell*, 282 N.C. 240, 243-44, 192 S.E.2d 294, 296 (1972), "[t]he purpose of the notice mandated by [N.C.G.S. § 15A-1345(e)] is to allow the defendant to prepare a defense and to protect the defendant from a second probation violation hearing for the same act," *State v. Hubbard*, 198 N.C. App. 154, 158, 678 S.E.2d 390, 393 (2009) (citing *Russell*, 282 N.C. at 243-44, 192 S.E.2d at 296). A statement of a defendant's alleged actions that constitute the alleged violation will give that defendant the chance to prepare a defense because he will know what he is accused of doing. He will also be able to determine the possible effects on his probation that those allegations could have, and he will be able to gather any evidence available to rebut the allegations. Our interpretation is therefore consistent with both the language of the statute and its purpose.

The Court of Appeals in this case based its holding on, and the parties primarily argue over, a line of cases with which we disagree. Before the Justice Reinvestment Act (JRA) was enacted in 2011, the Court of Appeals correctly interpreted subsection 15A-1345(e) in *State v. Hubbard*, 198 N.C. App. 154, 678 S.E.2d 390 (2009). In *Hubbard*, the Court of Appeals held that the State had complied with the notice requirement because, "while the condition of probation which Defendant allegedly violated might have been ambiguously stated in the [violation] report, the report also set forth the specific facts that the State contended constituted the violation." *Id.* at 158, 678 S.E.2d at 394. "Defendant received notice of the specific behavior Defendant was alleged and found to have committed in violation of Defendant's probation." *Id.* at 159, 678 S.E.2d at 394. In other words, notice of the factual allegations—the specific behavior—that constituted the violation was enough.

After the JRA was passed, however, the Court of Appeals began imposing an additional notice requirement that is not found in the text of subsection 15A-1345(e). Starting with *State v. Tindall*, 227 N.C. App. 183, 742 S.E.2d 272 (2013), the Court of Appeals began requiring that, when the State seeks to revoke a defendant's probation at a revocation hearing, the notice of the hearing provided by the State must indicate the revocation-eligible condition of probation that the defendant has allegedly violated. *See id.* at 187, 742 S.E.2d at 275. The Court of Appeals noted in *Tindall* that the JRA changed the law by making only some of the conditions of probation revocation-eligible instead of all of them. *Id.* at 185, 742 S.E.2d at 274; *see also* Justice Reinvestment Act of 2011, ch. 192, sec. 4(b), 2011 N.C. Sess. Laws 758, 767-68 (amending N.C.G.S. § 15A-1344(a)). The Court of Appeals then concluded that *Hubbard* did not apply because it was decided before the JRA changed the law. *Tindall*, 227 N.C. App. at 187, 742 S.E.2d at 275. The Court of Appeals reasoned that, after the JRA, a probationer needs to "receive[ ] notice that the alleged violation was the type of violation that could potentially result in a revocation of her probation." *Id.* at 187, 742 S.E.2d at 275.

In *State v. Kornegay*, 228 N.C. App. 320, 745 S.E.2d 880 (2013), the Court of Appeals recognized that it was bound by *Tindall* and applied that decision. *See id.* at 323, 745 S.E.2d at 883. The Court of Appeals stated that, in order "[t]o establish jurisdiction over specific allegations in a probation revocation hearing, the defendant either must waive notice or be given proper notice of the revocation hearing, *including the specific grounds on which his probation might be revoked.*" *Id.* at 324, 745 S.E.2d at 883 (emphasis added). The Court of Appeals later applied the *Tindall* and *Kornegay* line of cases in *State v. Lee*, 232 N.C. App. 256, 753 S.E.2d 721 (2014).

But the JRA did not change the notice requirements for probation revocation hearings. So, to the extent that *Tindall*, *Kornegay*, and *Lee* created a new notice requirement not found in the text of subsection 15A-1345(e), they are overruled.

It is true that, before the JRA was enacted in 2011, trial courts had authority to revoke probation for a violation of any probation condition. *See* N.C.G.S. § 15A-1344 (2010). After the JRA, by contrast, only violations of any of the three conditions specified in N.C.G.S. § 15A-1344(a) are revocation-eligible. Yet the purpose of the JRA had nothing to do with heightened notice requirements for revocation hearings. The JRA's purpose was "to reduce prison populations and spending on corrections and then to reinvest the savings in community-based programs." James M. Markham, *The North Carolina Justice Reinvestment Act* 1 (2012).

Before the JRA was enacted, over half of the individuals entering North Carolina prisons were doing so because of violations of conditions of probation. *Id.* at 2. In fiscal year 2009, moreover, three-quarters of these individuals were entering "for violations of supervision conditions, not the result of a new conviction or absconding." Council of State Gov'ts Justice Ctr., *Justice Reinvestment in North Carolina: Three Years Later* 3 (Nov. 2014). The changes to the law that the JRA effected were consistent with these concerns because subsection 15A-1344(a), as amended by the JRA, now makes only committing a new criminal offense or absconding revocation-eligible unless a defendant has already served two periods of confinement for violating other conditions of probation. *See* Ch. 192, sec. 4(b), N.C. Sess. Laws at 767-68. The decrease in revocation-eligible conditions—that is, the decrease in conditions whose violation would land a probationer back in prison—would have the natural effect of reducing the prison population.

Even more fundamental than purpose, of course, is text. As we have discussed, the phrase "a statement of the violations alleged" in subsection 15A-1345(e)'s notice requirement has a straightforward meaning when each of the words in that phrase is "given [its] natural, approved, and recognized meaning." *Victory Cab Co.*, 234 N.C. at 576, 68 S.E.2d at 436. And the JRA did not change the text of this phrase, *compare* Act of June 23, 1977, ch. 711, sec. 1, 1977 N.C. Sess. Laws 853, 870-71 (captioned "An Act to Amend the Laws Relating to Criminal Procedure"), *with* N.C.G.S. § 15A-1345(e) (2015), so it did not change the phrase's meaning. That should not be surprising, because keeping the notice requirement as-is comports with the JRA's purpose. Just as reducing the number of substantive crimes could reduce the prison population without any change in indictment requirements, reducing the number of revocation-eligible conditions of probation can reduce the prison population without any change in notice requirements.

Turning to the specifics of this case, the State sought to prove that defendant had violated the condition that he commit no criminal offense. As we have seen, subsection 15A-1345(e) required the State to give defendant notice of his probation revocation hearing that "includ[ed] a statement of the violations alleged." This means that the notice needed to contain a statement of the actions defendant allegedly took that constituted a violation of a condition of probation—that is, a statement of what defendant allegedly *did* that violated a probation condition. Here the alleged violation was the act of committing a criminal offense. Defendant therefore needed to receive a statement of the criminal offense or offenses that he allegedly committed.

The violation reports in this case stated that "the defendant has the following pending charges in Orange County," and then went on to list, among other things, the names of the specific offenses and the criminal case file numbers. While incurring criminal charges is not a violation of a probation condition, criminal charges are alleged criminal offenses. And committing a criminal offense is a violation of a probation condition. A statement of pending criminal charges, then, is a statement of alleged violations. The information in the violation reports therefore constituted "a statement of the violations alleged" because it notified defendant of the actions he allegedly took that violated a probation condition.[2] As the Court of Appeals stated in *Hubbard*, "[d]efendant received notice of the specific behavior [d]efendant was alleged and found to have committed in violation of [his] probation." 198 N.C. App. at 159, 678 S.E.2d at 394. That is all that is required under subsection 15A-1345(e).

Both the concurring opinion and the dissenting opinion in this case suggest that our interpretation of subsection 15A-1345(e) could result in due process violations. The dissent appears to take that analysis even further and finds that defendant's due process rights were violated in this case. But defendant appealed this case to this Court based solely on a dissent in the Court of Appeals, and neither party petitioned for discretionary review of additional issues. Our review is therefore limited to the issue or issues "specifically set out in the dissenting opinion as the basis for that dissent." N.C. R. App. P. 16(b). In this case, the basis for the dissent in the Court of Appeals was only that the majority had not properly applied subsection 15A-1345(e). *See Moore*, ___ N.C. App. at ___, 795 S.E.2d at 600-02 (Hunter, Jr., J., dissenting). The Court of Appeals dissent said nothing at all about due process or the Fourteenth Amendment. *See generally id.* As a result, there is no constitutional issue before us. This case is simply about statutory interpretation.

The "statement of the violations alleged" requirement in N.C.G.S. § 15A-1345(e) is satisfied by a statement of the actions that a defendant has allegedly taken that constitute a violation of a condition of probation. We therefore modify the Court of Appeals' decision to the extent that it holds otherwise. In this case, the probation violation reports included a list of the criminal offenses that defendant allegedly committed. That list provided a statement of alleged acts by defendant that, if proved, would violate a probation condition, as required by subsection 15A-1345(e).

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2. We do not hold that a probation violation report must necessarily contain all of the information that these violation reports included in order to constitute "a statement of the violations alleged." We hold only that the information in these reports was enough.

Accordingly, we modify and affirm the decision of the Court of Appeals and uphold the trial court's revocation of defendant's probation.

MODIFIED AND AFFIRMED.

Justice ERVIN, concurring, in part, and concurring in the result, in part.

In this case, the Court holds that the trial court had jurisdiction to revoke defendant's probation because "the probation violation reports included a list of the criminal offenses that defendant allegedly committed" and "[t]hat list provided a statement of defendant's alleged acts that violated a probation condition, as required by subsection 15A-1345(e)." In reaching this conclusion, the Court has overruled the Court of Appeals' decisions in *State v. Lee*, 232 N.C. App. 256, 753 S.E.2d 721 (2014); *State v. Kornegay*, 228 N.C. App. 320, 745 S.E.2d 880; and *State v. Tindall*, 227 N.C. App. 183, 742 S.E.2d 272 (2013), on the grounds that the State is not required to give probationers "notice of the particular revocation-eligible violation," *Lee*, 232 N.C. App. at 260, 753 S.E.2d at 723 (2014), and that a statement of the probationer's alleged conduct is all that is required to support a trial court's revocation decision. Although I fully concur in the Court's decision to uphold the revocation of defendant's probation, I cannot agree with all of the reasoning in which the Court has engaged in order to reach that result or with its decision to overrule the Court of Appeals' decisions in *Tindall*, *Kornegay*, and *Lee*.[1]

As the majority notes, "[a]fter the [Justice Reinvestment Act] was passed" "only some of the conditions of probation [became] revocation-eligible instead of all of them." *See Tindall*, 227 N.C. App. at 185, 742 S.E.2d at 274. More specifically, following the enactment of the Justice Reinvestment Act, a trial court was only entitled to revoke a defendant's probation in the event that the defendant has (1) committed a criminal offense; (2) absconded supervision; or (3) served two periods of confinement in response to violation of other conditions of probation. N.C.G.S. § 15A-1344(a) (2015).

1. As an aside, I note that the State did not seek discretionary review in either *Tindall* or *Kornegay* and has not questioned the correctness of any of the decisions that the Court has overruled in the brief that it filed with us in this case. Instead, the only issue debated in the parties' briefs was the extent to which the allegations contained in the violation notices at issue in this case satisfied the test enunciated in *Tindall*, *Kornegay*, and *Lee*.

> Before revoking or extending probation, the court must, . . . hold a hearing to determine whether to revoke or extend probation and must make findings to support the decision and a summary record of the proceedings. The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged.

Id. § 15A-1345(e) (2015). The ultimate issue before the Court in this case is the meaning of the statutory requirement that the probationer receive "a statement of the violations alleged" before a trial court can revoke his or her probation.

"A probation revocation proceeding is not a formal criminal prosecution, and probationers thus have 'more limited due process right[s].' " *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014) (alteration in original) (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 789, 93 S. Ct. 1756, 1763, 36 L. Ed. 2d 656, 666 (1973), *superseded by statute*, Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 228 (1976)). As a matter of due process, however,

> [t]he probationer is entitled to written notice of the claimed violations of his probation; disclosure of the evidence against him; an opportunity to be heard in person and to present witnesses and documentary evidence; a neutral hearing body; and a written statement by the fact-finder as to the evidence relied on and the reasons for revoking probation.

Black v. Romano, 471 U.S. 606, 612, 105 S. Ct. 2254, 2258, 85 L. Ed. 2d 636, 642-43 (1985) (citing *Gagnon*, 411 U.S. at 786, 93 S. Ct. at 1761, 36 L. Ed. 2d at 664). The General Assembly has effectuated this notice-related due process requirement by enacting N.C.G.S. § 15A-1345(e), the proper construction of which is the only issue that is before us in this case.

As should be obvious, "[t]he purpose of the notice mandated by this section is to allow the defendant to prepare a defense and to protect the defendant from a second probation violation hearing for the same act." *State v. Hubbard*, 198 N.C. App. 154, 158, 678 S.E.2d 390, 393 (2009) (citation omitted). For that reason, I am inclined to believe that the notice required by N.C.G.S. § 15A-1345(e) must adequately inform the probationer of the condition that he or she is alleged to have violated, given that, following the enactment of the Justice Reinvestment Act,[2]

2. The Court is, of course, correct in pointing out that the enactment of the Justice Reinvestment Act made no change to the notice requirement spelled out in N.C.G.S.

violations of certain conditions of probation justify revocation while violations of other conditions of probation do not. I am frankly at a loss to see how a probationer can adequately prepare a defense in the event that he or she cannot determine the consequences to the continued existence of his "conditional liberty" that might flow from a determination in the State's favor.[3]

According to the Court, the statutory reference to "a statement of the violations alleged" contained in N.C.G.S. § 15A-1345(e) "requires only a statement of the actions that violated the conditions, not of the conditions that those actions violated," with this determination being predicated, at least in part, on the understanding that "the word 'violation' cannot be synonymous with the phrase 'condition of probation,' because subsection 15A-1344(a) uses 'condition of probation' to *modify* 'violation.' " After examining the plain language of N.C.G.S. § 15A-1345(e), I am inclined to refrain from parsing the relevant statutory language that finely. Instead of being limited solely to a statement of conduct, it seems to me that the statutory reference to "a statement of the violations alleged," when read as a unified whole, necessarily refers to both the specific conduct in which a defendant allegedly engaged and the likely effect of that conduct upon the continuation of the defendant's conditional liberty.

A defendant does, in many instances, receive adequate notice as required by N.C.G.S. § 15A-1345(e) in the event that a violation report includes nothing more than "a statement of the actions defendant allegedly took that constituted a violation of a condition of probation." Such a situation exists when the conduct alleged "could only point to a revocation-eligible violation." *State v. Moore*, ___ N.C. App. ___, ___, 795 S.E.2d 598, 600 (2016). For instance, in *State v. Lee*, the violation report alleged that the "defendant had violated four conditions of his probation," including "that he commit no criminal offense," 232 N.C. App. at 258, 753 S.E.2d at 722, and listed "several new pending charges which

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§ 15A-1345(e). On the other hand, the enactment of the Justice Reinvestment Act did substantially change the effect of particular probation violations. Prior to the enactment of the Justice Reinvestment Act, a probationer alleged to have violated any term or condition of probation knew that he or she was subject to having his or her probation revoked. The same is not true in the aftermath of the enactment of the Justice Reinvestment Act. As a result, additional allegations may, in some instances, be necessary before a probationer receives the same notice after the enactment of the Justice Reinvestment Act that he or she received prior to its enactment.

3. This interpretation is reinforced by the language in N.C.G.S. § 15A-1345(e) requiring that the probationer be notified of "the hearing and its purpose."

were specifically identified," *id.* at 259, 753 S.E.2d at 723. I believe that the Court of Appeals correctly held in *Lee* that the notice provided to the defendant in that case sufficed for purposes of N.C.G.S. § 15A-1345(e) given that "[t]he violation report identified the criminal offense on which the trial court relied to revoke defendant's probation."[4] *Id.* at 260, 753 S.E.2d at 724. On the other hand, there are also occasions when a mere statement of the probationer's alleged conduct does not unambiguously "point to a revocation-eligible violation." *Moore*, ___ N.C. App. at ___, 795 S.E.2d at 600. In *State v. Tindall*, for example, the violation report "indicat[ed] that defendant had violated her probation by using illegal drugs . . . and by failing to 'complete Crystal Lakes treatment program' as ordered." 227 N.C. App. at 184, 742 S.E.2d at 274. Unlike the allegations contained in the violation report at issue in *Lee*, the facts alleged in the violation report at issue in *Tindall* sufficed to allege both a violation of the condition of probation that the probationer "[c]ommit no criminal offense in any jurisdiction," N.C.G.S. § 15A-1343(b)(1) (2013), and the condition that the probationer "[n]ot use, possess, or control any illegal drug or controlled substance unless it has been prescribed for him or her by a licensed physician and is in the original container with the prescription number affixed on it," *id.* § 15A-1343(b)(15) (2013). Obviously, a violation of the condition of probation set out in N.C.G.S. § 15A-1343(b)(1) is "revocation-eligible" while a violation of the condition of probation set out in N.C.G.S. § 15A-1343(b)(15) is not. In light of that set of circumstances, I do not believe that the probationer in *Tindall* received an adequate "statement of the violations alleged" and conclude that the Court of Appeals did not err by finding the notice at issue in that case insufficient. *Tindall*, 227 N.C. App. at 187, 742 S.E.2d at 275.[5] As a result, while I share the Court's discomfort with some of the language that the Court of Appeals used in its opinions in these decisions and do not believe that they should be understood as holding that, in each and every case, a violation notice fails to support the revocation

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4. I would, in fact, be inclined to uphold the sufficiency of the notice at issue in *State v. Lee* even if it had not referenced the condition of probation which the defendant was alleged to have violated given that the defendant's alleged conduct could only have been relevant to the "commit no criminal offense" condition of probation.

5. The violation notice before the Court in *State v. Kornegay* was even less likely to give the probationer adequate notice than the violation notice at issue in *Tindall*, given that the trial court in *Kornegay* revoked the probationer's probation based upon a finding that the probationer had violated the conditions of probation set out in N.C.G.S. § 15A-1343(b)(1) despite the fact that the violation notice alleged, among other things, that the probationer had violated the condition that he " '[n]ot use, possess or control any illegal drug' " without making any reference to the "commit no criminal offense" condition. *Kornegay*, 228 N.C. App. at 321, 323, 745 S.E.2d at 881, 883.

of a probationer's probation unless it specifically and explicitly alleges a violation of a "revocation-eligible" condition of probation, I do believe that each of these cases was correctly decided on the facts and cannot, for that reason, join the Court's decision to overrule them.

Admittedly, the violation notice at issue in this case, unlike the violation notice at issue in *Lee*, does not make an explicit reference to an alleged violation of the condition of probation set out in N.C.G.S. § 15A-1343(b)(1). On the other hand, given the terms and conditions of defendant's probation, I am unable to understand, for the reasons stated by the Court, how the allegation that defendant had been charged with committing various criminal offenses could be understood as anything other than an allegation that he had violated the condition of probation that he "[c]ommit no criminal offense in any jurisdiction." N.C.G.S. § 15A-1343(b)(1). In fact, as I read the briefs and record before us in this case, defendant does not seem to have had any doubt that the proceeding held in the trial court was focused upon the issue of whether he had violated the condition of probation set out in N.C.G.S. § 15A-1343(b)(1). As a result, given that defendant had ample notice of the violation of the terms and conditions of probation that he was alleged to have committed and the effect of a determination that he had committed the alleged violation, I agree with both the Court and the majority in the Court of Appeals that the trial court's order revoking defendant's probation should be affirmed.

Justice HUDSON joins in this concurring opinion.

Justice BEASLEY dissenting.

The majority concludes that defendant had adequate notice of the alleged violations of probation, where the probation report contained a laundry list of "Other Violation[s]" and failed to designate a statutory condition under N.C.G.S. §§ 15A-1343(b)(1), 15A-1343(b)(3a), or 15A-1344(d2). The majority further holds that a probation violation report need only describe behavior to provide sufficient notice. This holding does not comport with Fourteenth Amendment Due Process or the Justice Reinvestment Act's changes to North Carolina's probation system because it does not require proper notice to a defendant that her probation may be revoked. Therefore, I respectfully dissent.

Due process under the Federal Constitution and our state statute requires notice to the defendant of the alleged violations against her before a hearing on probation revocation may take place. *See Morrissey*

v. Brewer, 408 U.S. 471, 486-87, 33 L. Ed. 2d 484, 497 (1972) ("[T]he parolee should be given notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation. The notice should state what parole violations have been alleged."); *see also* N.C.G.S. § 15A-1345(e) (2015) ("The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged."). In *Morrissey v. Brewer*, two Iowa parolees had their parole revoked without the benefit of a hearing. 408 U.S. at 472-73, 33 L. Ed. 2d at 489-90. The United States Supreme Court held in *Morrissey* that when the State attempts to curtail a parolee's constitutionally protected liberty interest by revoking parole, due process mandates certain procedural safeguards. *See id.* at 481-82, 33 L. Ed. 2d at 495. Specifically, the Court said in *Morrissey* that

> the liberty of a parolee, although indeterminate, includes many of the *core values of unqualified liberty and its termination inflicts a "grievous loss"* on the parolee and often on others. . . . By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.

Id. at 482, 33 L. Ed. 2d at 495 (emphasis added).

While *Morrissey* addressed liberty interests of parolees facing parole revocation, in *Gagnon v. Scarpelli* the Court applied the same analysis to conclude that the liberty interests were synonymous for purposes of parole and probation, both requiring notice of the violations alleged against a defendant. *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 786, 36 L. Ed. 2d 656, 664 (1973), *superseded by statute*, Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 228 (1976). The Court in *Gagnon* clarified that probation revocation, like parole revocation "is not a stage of a criminal prosecution, but does result in a loss of liberty." *Id.* at 782, 36 L. Ed. 2d at 662. Because a probationer risks the loss of liberty, she is entitled to notice of the asserted violations in compliance with the due process requirements of the Fourteenth Amendment. *Id.* at 786, 36 L. Ed. 2d at 664.

The import of these cases is that the State must not only give the defendant written notice of the violation at issue but also provide a number of other due process protections, including:

> (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and

> cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Morrissey, 408 U.S. at 489, 33 L. Ed. 2d at 492. Importantly, *Morrissey* and *Gagnon* reject older concepts based on the tenet that because probation was only an "act of grace," a defendant had little recourse to contest the violations asserted against her. *See e.g.*, *State v. Duncan*, 270 N.C. 241, 246, 154 S.E.2d 53, 57 (1967) ("[P]robation or suspension of sentence is an act of grace and not of right[.]"). Definitively, the right to due process during probation proceedings is derived from the Fourteenth Amendment's liberty interest protections, and therefore, the right to proper notice cannot be so lightly dismissed.

The Justice Reinvestment Act of 2011 (JRA), in implementing a plan for criminal justice reform, mirrored the Court's rationale in *Morrissey*, which emphasized the importance probation plays in rehabilitation and reduction in costs of incarceration. *See Morrissey*, 408 U.S. at 477, 33 L. Ed. 2d at 492. Part of the basis for the JRA was a report commissioned in 2009 by North Carolina state government officials. Council of State Gov'ts Justice Ctr., *Justice Reinvestment in North Carolina* 1 (Apr. 2011). The State asked the Council of State Governments Justice Center to provide data-driven analysis, that would produce recommendations for new policies designed to both improve public safety and reduce the costs of our corrections system. *Id.* A key finding of the report was that "[p]robation revocations accounted for greater than 50 percent of admissions to prison in FY 2009," *id.* at 2, which led the Council to recommend three priorities: "strengthen probation supervision, hold offenders accountable in more meaningful ways, and reduce the risk of reoffending," *id.* at 1.

Researchers struck a balance among these three priorities by stressing the importance of holding offenders accountable, while encouraging completion of probation programs through community-driven approaches. *See id.* at 3. One of the Council's recommendations for holding offenders accountable, which is at issue in this case, was to limit revocation to those defendants who have committed a new criminal offense or absconded from supervision. *Id.* at 15. The JRA implemented this recommendation, among others, and codified the requirement that "[t]he court may only revoke probation for a violation of a condition

of probation under G.S. 15A-1343(b)(1)[1] or G.S. 15A-1343(b)(3a),[2] except as provided in G.S. 15A-1344(d2).[3] Imprisonment may be imposed pursuant to G.S. 15A-1344(d2) for a violation of a requirement other than G.S. 15A-1343(b)(1) or G.S. 15A-1343(b)(3a)." Justice Reinvestment Act of 2011, ch.192, sec. 4(b), 2011 N.C. Sess. Law 758, 767-68. Before the insertion of this language, any judge entitled to sit in the court that imposed probation could revoke it, with the exception of drug treatment probation[4] and unsupervised probation,[5] both of which had jurisdictional limits. *See id.*

The majority discusses the JRA's purpose, but fails to consider the changes it has made in North Carolina's probation procedures. While it is true that the JRA did not amend the specific provision relating to notice in N.C.G.S. § 15A-1345(e), the notice requirement cannot be read outside

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1. "(b) Regular Conditions. — As regular conditions of probation, a defendant must: (1) Commit no criminal offense in any jurisdiction." N.C.G.S. § 15A-1343(b)(1) (2015).

2. "(b) Regular Conditions. — As regular conditions of probation, a defendant must: . . . (3a) Not abscond by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer, if the defendant is placed on supervised probation." *Id.* § 15A-1343(b)(3a) (2015).

3. "(d2) Confinement in Response to Violation. — When a defendant under supervision for a felony conviction has violated a condition of probation other than G.S. 15A-1343(b)(1) or G.S. 15A-1343(b)(3a), the court may impose a period of confinement of 90 consecutive days to be served in the custody of the Division of Adult Correction of the Department of Public Safety. The court may not revoke probation unless the defendant has previously received a total of two periods of confinement under this subsection. A defendant may receive only two periods of confinement under this subsection. The 90-day term of confinement ordered under this subsection for a felony shall not be reduced by credit for time already served in the case. Any such credit shall instead be applied to the suspended sentence. However, if the time remaining on the maximum imposed sentence on a defendant under supervision for a felony conviction is 90 days or less, then the term of confinement is for the remaining period of the sentence. Confinement under this section shall be credited pursuant to G.S. 15-196.1." *Id.* § 15A-1344(d2) (2015).

4. "(a1) Authority to Supervise Probation in Drug Treatment Court. — Jurisdiction to supervise, modify, and revoke probation imposed in cases in which the offender is required to participate in a drug treatment court or a therapeutic court is as provided in G.S. 7A-272(e) and G.S. 7A-271(f). Proceedings to modify or revoke probation in these cases must be held in the county in which the drug treatment court or therapeutic court is located." *Id.* § 15A-1344(a1) (2015).

5. "(b) Limits on Jurisdiction to Alter or Revoke Unsupervised Probation. — If the sentencing judge has entered an order to limit jurisdiction to consider a sentence of unsupervised probation under G.S. 15A-1342(h), a sentence of unsupervised probation may be reduced, terminated, continued, extended, modified, or revoked only by the sentencing judge or, if the sentencing judge is no longer on the bench, by a presiding judge in the court where the defendant was sentenced." *Id.* § 15A-1344(b) (2015).

the context of the remainder of the statutory framework for probation created by the JRA. Currently, N.C.G.S. § 15A-1345(e) requires that

> [b]efore revoking or extending probation, the court must, unless the probationer waives the hearing, hold a hearing to determine whether to revoke or extend probation and must make findings to support the decision and a summary record of the proceedings. *The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged.*

N.C.G.S. § 15A-1345(e) (emphasis added). However, as already explained, before the JRA was enacted a judge could revoke probation for virtually any violation, while after the JRA judges were limited to only three types of probation violations that could result in revocation (i.e., N.C.G.S. §§ 15A-1343(b)(1), 15A-1343(b)(3a), or 15A-1344(d2)).

Therefore, post JRA, probation violations can result in revocable *or* nonrevocable consequences to a defendant. For example, nonrevocable consequences could include probation modification under N.C.G.S. § 15A-1344(d), holding a defendant in contempt under N.C.G.S. § 15A-1344(e1), or ordering a period of confinement under N.C.G.S. § 15A-1343(a1)(3). Additionally, some conditions of probation may fall into *either* category of revocable and nonrevocable violations. An illustration can be found in *State v. Tindall*, in which the defendant had a substance abuse problem and was ordered to submit to substance abuse treatment. 227 N.C. App. 183, 184, 742 S.E.2d 272, 273 (2013). There "the violation reports alleged that defendant violated two conditions of her probation: to '[n]ot use, possess or control any illegal drug' and to 'participate in further evaluation, counseling, treatment or education programs recommended [ ] and comply with all further therapeutic requirements.' " *Id.* at 186, 742 S.E.2d at 275. The Court of Appeals correctly found that this description of the defendant's behavior, while providing notice generally that the defendant's conduct violated her probation, was not enough to support revocation of probation. *Id.* at 187, 742 S.E.2d at 275. The mere allegation that the defendant possessed or used a controlled substance was insufficient to put the defendant on proper notice of a potential revocation because the behavior could constitute a revocable violation (due to the nature of the conduct as a criminal offense) but could also be a technical violation triggering one of a host of nonrevocable consequences. *See*, *e.g.*, *id.* at 187, 742 S.E.2d at 275; *see also* N.C.G.S. § 15A-1343(b)(15) (2015) (requiring as a regular condition of probation that a defendant "[n]ot use, possess, or control any illegal drug or controlled substance").

As defense counsel discussed at oral argument before this Court, the facts of this case provide another example in which allegations of behavior are insufficient to put a defendant on notice of the probation hearing's possible consequences. Here the probation officer's report included in the section labeled "Other Violation[s]" that defendant had the pending charge of "No Operators License," in violation of N.C.G.S. § 20-7(a) (2015) (requiring a license to operate a motor vehicle). However, operating a vehicle without a license can be either an infraction or a criminal misdemeanor. *See* N.C.G.S. § 20-35 (2015) (listing differing circumstances under which the offense of driving a motor vehicle without a driver's license is classified as a misdemeanor or an infraction). Therefore, the infraction relating to driving without an operator's license might result only in a modification of probation because the court may impose additional requirements, such as the defendant surrendering her driver's license, or defendant's probation could be subject to revocation for committing a criminal offense. *Id.* § 15A-1343(b)(1). Thus, only stating the defendant's behavior in the notice, without more specificity, does not always notify the defendant of the class of the offense or if the court plans to modify or revoke her probation.

Similarly, in *State v. Cunningham*, the Court of Appeals found error when the defendant was given notice only of probation violations upon which the trial court did not rely in its decision to revoke the defendant's probation. 63 N.C. App. 470, 475, 305 S.E.2d 193, 196 (1983). The alleged violation was that the defendant created a noise disturbance by playing loud music during late night hours. *Id.* at 474, 305 S.E.2d at 196. But, the trial court found defendant in violation of probation not for the noise disturbance but for trespassing and destroying his neighbor's property, offenses that were not included in his probation violation report and for which he did not have notice. *Id.* at 475, 305 S.E.2d at 196. As the Court of Appeals in *Cunningham* correctly held, only the allegations contained in the violation report can serve as notice to a defendant of conditions for which the trial court can consider revocation. *Id.* at 475, 305 S.E.2d at 196.

The majority's effort to define the word "violation" by using its dictionary definition and its belief that a description of the defendant's behavior is all that is legally required completely fails to reflect the specificity required for proper notice. Despite the majority's contention to the contrary, a statement describing "the specific behavior [d]efendant was alleged and found to have committed," *State v. Hubbard*, 198 N.C. App. 154, 159, 678 S.E.2d 390, 394 (2009), lacks the specificity sufficient to give notice to a defendant that her probation could be revoked at a

hearing. Constitutionally and statutorily, notice requires a description of the violation alleged. *See Morrissey*, 408 U.S. at 486-87, 33 L. Ed. 2d at 497; *see also* N.C.G.S. § 15A-1345 (2015). Logically, to satisfy notice, the term "violation" also requires a specific description of the condition of probation violated (in this case N.C.G.S. § 15A-1343(b)(1)) and *not* simply a description of the behavior that constituted the violation. If the notice describes the defendant's behavior alone without reference to a probation condition violated, the defendant, before entering the hearing, would not know whether the State might seek to revoke her probation or impose some lesser consequence.[6] Describing only general types of behavior that may or may not fall under one of the three revocable conditions is insufficient because such an incomplete description permits the State to pick and choose when to proceed with revocation. Descriptions of general behavior only will cause a defendant to be ill-prepared for the hearing and do not "allow the defendant to prepare a defense and to protect the defendant from a second probation violation hearing for the same act." *Hubbard*, 198 N.C. App. at 158, 678 S.E.2d at 393 (citing *State v. Russell*, 282 N.C. 240, 243-44, 192 S.E.2d 294, 296 (1972)).

The Supreme Court of the United States has ruled that probation implicates "core values of unqualified liberty and its termination inflicts a 'grievous loss,' " and thus the State may not impinge upon that constitutionally protected liberty interest without appropriate process. *Morrissey*, 408 U.S. at 482, 33 L. Ed. 2d at 495. The majority ignores this mandate by failing to ensure that a defendant receives notice before her probation is revoked. Although I do not condone this defendant's alleged behavior,[7] the process required under the Fourteenth Amendment, for him as well as all other defendants is fundamental. As a result, I respectfully dissent.

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6. I also note that the majority's holding that a description of behavior alone is sufficient to provide notice goes far beyond the reasonable inference standard applied by the Court of Appeals below. Furthermore, the majority overrules a line of cases decided by the Court of Appeals that have correctly applied constitutional and statutory mandates since the passage of the JRA. *See generally*, *State v. Lee*, 232 N.C. App. 256, 753 S.E.2d 721 (2014); *State v. Kornegay*, 228 N.C. App. 320, 745 S.E.2d 880 (2013); *State v. Tindall*, 227 N.C. App. 183, 742 S.E.2d 272 (2013).

7. As the majority points out, defendant was also charged with first degree murder during the time defendant's hearing was continued.

STATE v. SANCHEZ

[370 N.C. 357 (2017)]

STATE OF NORTH CAROLINA
v.
JOSHUA SANCHEZ

No. 410PA16

Filed 8 December 2017

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 791 S.E.2d 904 (2016), finding prejudicial error in a judgment entered on 17 April 2015 by Judge Michael J. O'Foghludha in Superior Court, Wake County, and ordering that defendant receive a new trial. Heard in the Supreme Court on 8 November 2017.

Joshua H. Stein, Attorney General, by Ebony J. Pittman, Assistant Attorney General, for the State-appellant.

Rudolph A. Ashton, III for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

DENNIS WORLEY, STERLING KOONCE, FLYING A LIMITED PARTNERSHIP L.P., JOSEPH W. FORBES JR., KENNETH CLARK, JAMES BOGGESS, JOEL WEBB, JAIMIE LIVINGSTON, JAMES E. BENNETT JR., DAVID MINER, RONALD ENGLISH, AND MDF, LLC

v.

ROY J. MOORE, PIERCE J. ROBERTS, DAVID BROWN, MICHAEL ADAMS, CHRISTOPHER BAKER, JAMES KERR, FRANK McCAMANT, NEIL KELLEN, GINI COYLE, JOSEPH MOWERY, TOSHIBA CORPORATION, ALAMO ACQUISITION CORP., AND STEPHENS, INC.

No. 310A16

Filed 8 December 2017

Attorneys—Rule of Professional Conduct 1.9(a)—disqualification of counsel—objective test

In a complex business case, the trial court erroneously disqualified defendants' counsel under North Carolina Rule of Professional Conduct 1.9(a). While Rule 1.9(a) permits disqualification of an attorney from representing a new client if there is a substantial risk that the attorney could use confidential information shared by the client in the former matter against that same client in the current matter, the trial court erroneously applied the "appearance of impropriety" test rather than an objective test. The case was remanded with instruction to objectively assess the facts without relying on the former client's subjective perception of the circumstances.

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

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) from an order dated 13 May 2016 by Judge Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases appointed by the Chief Justice under N.C.G.S. § 7A-45.4, in Superior Court, Columbus County. Heard in the Supreme Court on 29 August 2017.

Nexsen Pruet, PLLC, by R. Daniel Boyce and David S. Pokela; and Ganzfried Law, by Jerrold J. Ganzfried, pro hac vice, for plaintiff-appellees.

Kilpatrick Townsend & Stockton LLP, by Adam H. Charnes and John M. Moye, for defendant-appellants.

NEWBY, Justice.

In this case we consider whether the trial court properly disqualified defendants' counsel under North Carolina Rule of Professional Conduct 1.9(a). This rule balances an attorney's ethical duties of confidentiality and loyalty to a former client with a party's right to its chosen counsel. The rule permits disqualification of an attorney from representing a new client if there is a substantial risk that the attorney could use confidential information shared by the client in the former matter against that same client in the current matter. This analysis requires the trial court to determine whether confidential information that would normally have been shared in the former matter is also material to the current matter. To do so, the trial court must objectively assess the scope of the representation and whether the matters are substantially related. Rather than applying an objective test, here the trial court disqualified defendants' counsel based on the former client's subjective perception of the past representation as well as the now replaced "appearance of impropriety" test. As a result, we reverse the trial court's decision and remand this matter to that court for application of the appropriate legal standard.

The factual background leading to the instant litigation involves three other disputes, all relating to plaintiff Joseph W. Forbes's former employer Consert, Inc. (Consert): a patent dispute between Forbes and Consert (the patent dispute), Forbes's 220 shareholder inspection rights action against Consert (the 220 action), and a contract dispute between Itron, Inc. (Itron) and Consert (the *Itron* litigation).

Plaintiff Forbes is one of thirteen named plaintiffs in the present action, all former shareholders of Consert. Beginning in 2008, Forbes was a shareholder and member of the Board of Directors of Consert and served as Chief Operating Officer. In the fall of 2011, Forbes was removed as an officer and director but remained a significant shareholder. Soon after his removal, Forbes and Consert disagreed about Forbes's unpaid compensation and ownership of certain patents (the patent dispute), but the dispute never resulted in direct litigation even though Forbes was represented by counsel.

Sometime in 2012, Toshiba, a technology company, expressed interest in purchasing Consert. Concerned about the proposed sale, Forbes sued Consert in December 2012 under Section 220 of the Delaware General Corporation statutes (the 220 action), asserting his shareholder rights and requesting certain corporate records regarding the sale. In the 220 action, Forbes referenced, *inter alia*, the ongoing patent dispute in his allegations concerning Consert's mismanagement.

At the same time, Consert was also defending a lawsuit filed by Itron, a licensee and successor in interest to a development agreement with Consert, over certain payment terms under that agreement (the *Itron* litigation). Based on Forbes's allegations in the 220 action, Itron amended its complaint to include claims based on Consert's failure to disclose the ongoing patent dispute with Forbes.

Amidst the *Itron* litigation, Toshiba acquired Consert on 5 February 2013 as a wholly owned subsidiary. Following the Consert–Toshiba merger, Consert engaged Kilpatrick Townsend & Stockton LLP (Kilpatrick) to represent it in the *Itron* litigation. Itron sought to depose Forbes regarding the Consert–Toshiba merger, the 220 action, and primarily the patent dispute with Consert.[1] By mid-February 2013, Forbes and Consert settled the 220 action, and by May 2013, Forbes and Consert resolved the patent dispute, leaving only the *Itron* litigation unresolved.

In October 2013, counsel from Winston & Strawn, LLP, who represented Forbes at the time, communicated with Joe Bush of Kilpatrick (Bush),[2] counsel to Consert, about Forbes's deposition. Bush disclosed to Forbes's counsel that, in addition to his primary representation of Consert, he also represented former employees and shareholders of Consert in the *Itron* litigation. Bush later offered limited representation to Forbes at Consert's expense as long as Forbes agreed to the proposed engagement terms. Forbes eventually agreed that Bush would represent him in the *Itron* litigation regarding his role as a former Officer and Director of Consert.

On 23 January 2014, Forbes signed an engagement letter that outlined the terms of Bush's limited representation of Forbes (the engagement letter), which began by stating, "As you are aware, this firm is outside litigation counsel to [Consert] in connection with the [*Itron* litigation]." The engagement letter then explained that the representation of Forbes would "be limited to legal services associated with discovery efforts (such as depositions, witness statements, factual development, and document analysis), [Forbes's] potential testimony at trial, and specifically in connection with [Forbes's] former role as Chief Operating Officer of Consert." Forbes agreed that he would be "willing to permit

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1. Forbes produced requested documents during the *Itron* litigation while represented by Winston & Strawn, LLP. Kilpatrick did not assist Forbes with document production.

2. Plaintiff seeks to disqualify both Bush and Kilpatrick, his law firm, from representing defendants. For simplicity, references hereinafter to "Bush" include both him and his law firm as counsel.

Kilpatrick Townsend to disclose to Consert, to any related entities, and to the employees of these entities, any of the information it learns in its communications with [him] if, in [counsel's] discretion, it becomes necessary or appropriate to the defense of this lawsuit." Forbes also agreed that he would "not object to Kilpatrick Townsend continuing to represent Consert and its related entities in this lawsuit" should a conflict of interest arise. Winston & Strawn negotiated the terms of the limited representation on behalf of Forbes.

Forbes's counsel from Winston & Strawn initially prepared him for his deposition and communicated with Forbes via teleconference two to three times for approximately an hour on each occasion. In final preparation, Forbes met with Bush once for approximately two to three hours the night before the deposition. Forbes's privately retained counsel from Winston & Strawn attended approximately an hour of that meeting.

During the deposition the next day, Itron's counsel asked Forbes about his relationship with Consert, the 220 action, the Consert–Toshiba merger, and primarily the patent dispute. Twice during the deposition, Forbes requested a break and spoke with his privately retained counsel from Winston & Strawn, even though Bush was present at the deposition. When asked about the Consert–Toshiba merger, Forbes stated, "I have not read the agreement of the merger between [Toshiba] and Consert. That might come as a surprise to you, but I have not read it." The *Itron* litigation settled on 1 February 2015.

At some point on or before 5 February 2015, Forbes and counsel at Winston & Strawn recognized Forbes's potential claims at issue in the present action. As a result, on 5 February 2015, Winston & Strawn sent a litigation hold letter to Bush, based on his representation of Toshiba affiliates, informing him that Forbes and other former Consert shareholders were considering filing the present action. On 9 November 2015, Forbes and other former Consert shareholders filed the present action against Toshiba (as the parent company of Consert) and former officers, directors, and shareholders of Consert, some of whom were jointly represented by Bush in the *Itron* litigation.[3] Defendants retained Bush to represent them against plaintiffs. Plaintiffs allege that, through the Consert–Toshiba merger agreement, defendants engaged in a "collusive scheme" to "benefit themselves and to defraud Plaintiffs out of millions of dollars that Plaintiffs should have received for the shares

3. On 16 November 2016, the Chief Justice designated this case as a complex business case.

of stock they had purchased and held in Consert."[4] The merger agreement included "earn out" provisions that obligated Toshiba to pay certain future proceeds directly to a "Shareholders Fund" for distribution to Consert stockholders. Two post-merger events, including resolution of the *Itron* litigation, would fund this account. Plaintiffs, however, contend that the earn out provisions were "illusory and a sham" because defendants knew at the time of the agreement that the triggering events required to generate the proceeds at issue would never occur, thus precluding any payment to the shareholders.

Before the trial court, plaintiffs moved to disqualify Bush from the present action based on his past representation of Forbes during the *Itron* litigation. In support of the motion, Forbes filed a declaration stating his views of the prior relationship and outlining his communications with Bush. Defendants responded that the communications between Forbes and Bush were not confidential because the engagement letter expressly limited the nature of Bush's representation of Forbes and specifically authorized Bush to disclose, in his discretion, "any of the information" he learned in his communications with Forbes to "Consert," "any related entities," and their "employees" during the *Itron* litigation.

Recognizing that the facts here presented a "close case," the trial court noted:

> In considering a motion to disqualify counsel, the Court considers the professional obligations imposed on attorneys by the North Carolina Rules of Professional Conduct . . . , as well as the goal of preventing the appearance of impropriety in the profession. Disqualification of counsel is a serious matter . . . and the moving party has a high standard of proof to meet in order to prove that counsel should be disqualified. Nevertheless, a motion to disqualify counsel . . . . should succeed or fail on the reasonableness of a client's perception that confidences it once shared with its lawyer are potentially available to its adversary.

(Second ellipsis in original) (internal citations and quotation marks omitted).

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4. Specifically, plaintiffs assert the following claims against defendants: (1) breach of fiduciary duty, (2) common law fraud, (3) constructive fraud, (4) conspiracy to defraud, (5) fraudulent inducement, (6) violation of the North Carolina Securities Act, (7) unlawful taking, conversion, and unjust enrichment under common law, and (8) violation of the North Carolina Unfair and Deceptive Trade Practices Act.

The trial court found that an attorney–client relationship existed between Bush and Forbes in the past representation and that defendants' position is materially adverse to Forbes's position in the present action, thus leaving unresolved only whether the current matter is "substantially related to the matter in which Bush and Kilpatrick previously represented Forbes." In particular, quoting *Plant Genetic Systems, N.V. v. Ciba Seeds*, 933 F. Supp. 514, 518 (M.D.N.C. 1996), the trial court sought to answer whether "there is a reasonable probability that confidences were disclosed in the prior representation which could be used against the former client in the current litigation."

In its analysis the trial court resolved this issue by trying to discern what actually occurred during the past representation as stated by Forbes and Bush. The trial court relied on Forbes's declaration, which included his characterizations of the attorney–client relationship. The trial court quoted portions of the declaration detailing Forbes's impressions of the nature of his communications with Bush and conversely observed that Bush had not refuted Forbes's "descriptions or characterizations of the information he shared with Bush during the prior representation."

In reviewing the engagement letter, the trial court focused on the absence of evidence showing that Bush actually disclosed any confidential information provided by Forbes while the *Itron* litigation was ongoing. Moreover, by the terms of the engagement letter, Forbes's permission to disclose ended with the *Itron* litigation, thereby limiting future disclosure by Bush. Absent evidence of actual disclosure, the trial court found the engagement letter had little bearing on its analysis. The trial court gave substantial weight to Forbes's "perception" that the prior disclosures could be used to his disadvantage, which the trial court found was not "unreasonable." Ultimately, the trial court determined that "the significant areas of overlap between the issues in the two representations strongly suggest that the two matters are 'substantially related.' "

Notably, the trial court determined, "Even if the matters are not substantially related within the strict meaning of Rule 1.9(a), however, the Court would nonetheless conclude, in its discretion, that Bush and Kilpatrick should be disqualified in order to avoid the appearance of impropriety." As a result, the trial court disqualified Bush because his "continued representation of Defendants in this matter creates an appearance of impropriety that the Court cannot allow." Defendants appealed.

"Decisions regarding whether to disqualify counsel are within the discretion of the trial judge," *Travco Hotels, Inc. v. Piedmont Nat. Gas*

Co., 332 N.C. 288, 295, 420 S.E.2d 426, 430 (1992), but a trial court's exercise of discretion is subject to reversal when the court orders disqualification based on a misunderstanding of the law, *see In re Estate of Skinner*, ___ N.C. ___, ___, 804 S.E.2d 449, 457 (2017); *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S. Ct. 2447, 2461, 110 L. Ed. 2d 359, 382 (1990) (noting that the "[trial] court would necessarily abuse its discretion [in deciding a Rule 11 motion] if it based its ruling on an erroneous view of the law"). The movant seeking to disqualify his former counsel must meet a particularly high burden of proof. *See Gov't of India v. Cook Indus.*, 569 F.2d 737, 739 (2d Cir. 1978) ("[T]here is a particularly trenchant reason for requiring a high standard of proof on the part of one who seeks to disqualify his former counsel . . . .").

Rule 1.9(a), governing the disqualification of counsel for a conflict of interest relating to a former client, balances the prevented use of confidential information against a former client with a current client's right to choose his counsel freely. *See, e.g.*, N.C. St. B. Ethics Op. RPC 48 (Oct. 28, 1988), *reprinted in North Carolina State Bar Lawyer's Handbook 2016*, at 217 (2016) (recognizing, *inter alia*, "the right of clients to counsel of their choice"). The rule prevents an attorney from using confidential material information received from a former client against that client in current litigation. *See* N.C. St. B. Rev. R. Prof'l Conduct r. 1.9 cmt. 1 ("After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule.").[5]

Rule 1.9(a) provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

N.C. St. B. Rev. R. Prof'l Conduct r. 1.9(a). Under Rule 1.9(a), a party seeking to disqualify opposing counsel must establish that (1) an attorney–client relationship existed between the former client and the opposing

5. *See Nix v. Whiteside*, 475 U.S. 157, 168-70, 106 S. Ct. 988, 994-96, 89 L. Ed. 2d 123, 135-37 (1986) (relying on the guidance offered in the commentary of the Rules of Professional Conduct to interpret the Rules).

counsel in a matter such that confidential information would normally have been shared; (2) the present action involves a matter that is the same as or substantially related to the subject of the former client's representation, making the confidential information previously shared material to the present action; and (3) the interests of the opposing counsel's current client are materially adverse to those of the former client.

In applying Rule 1.9(a), the trial court considers the circumstances surrounding each representation to objectively assess what would "normally" have occurred within the scope of that representation.[6] *See id.* r. 1.9 cmt. 3 ("A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services."). The test is whether, objectively speaking, "a substantial risk" exists "that the lawyer has information to use in the subsequent matter." *Id.*; *see id.* r. 1.9 cmt. 2 ("The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question."). The test does not rely on the subjective assessment provided by the former client or the attorney. *See* Restatement (Third) of The Law Governing Lawyers § 132A cmt. d(iii) (Am. Law Inst. 2017) ("[It] would be self-defeating if, in order to obtain its protection, the former client were required to reveal in a public proceeding the particular communication or other confidential information that could be used in the subsequent representation.").

Here it is undisputed that the third prong of the test under Rule 1.9(a) is satisfied: the interests of Forbes and defendants in the present action are "materially adverse." For the two remaining prongs, the trial court must consider the scope of the past representation to determine whether the former client would normally have shared confidential information in the course of that representation and, if so, whether that information is material to the present action. *See* N.C. St. B. Rev. R. Prof'l Conduct r. 1.9 cmt. 2 ("The scope of a 'matter' for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree.").

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6. *See Normal*, *Black's Law Dictionary* (10th ed. 2014) ("According to a regular pattern; . . . In this sense, its common antonyms are *unusual* and *extraordinary*. . . . According to an established rule or norm . . . ."); *Objective*, *Black's Law Dictionary* (10th ed. 2014) ("Of, relating to, or based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions . . . .").

The first prong of Rule 1.9(a) explores the existence and scope of an attorney–client relationship between the attorney and the former client. "[A]n attorney-client relationship is formed when a client communicates with an attorney *in confidence* seeking legal advice regarding a specific claim and with an intent to form an attorney-client relationship." *Raymond v. N.C. Police Benevolent Ass'n*, 365 N.C. 94, 98, 721 S.E.2d 923, 926 (2011) (emphasis added) (citation omitted). The scope of such a relationship, however, is a matter of contract, and a lawyer may reasonably limit the scope and expectations of the representation "by agreement with the client or by the terms under which the lawyer's services are made available to the client." N.C. St. B. Rev. R. Prof'l Conduct r. 1.2 cmt. 6.

The commentary to Rule 1.9(a) anticipates the use of engagement letters that outline both the scope of representation and limitations on confidentiality at the time the former client engaged counsel. *See id.* r. 1.9 cmt. 2 (describing a lawyer's involvement in a "matter" as dependent "on the facts of a particular situation or transaction" and the "degree" of engagement). For example, a common representation agreement could provide for the sharing of confidential information among the co-parties represented by the same attorney but keep the information confidential as to third-parties. Likewise, a former client's concurrent representation by another attorney also informs as to the degree of the contested counsel's involvement and the confidences normally shared by a client in that situation. Thus, under the rule, the emphasis is not on the traditional notions of the formation of an attorney–client relationship, but on the scope of that relationship, when ascertaining the reasonable expectation of confidentiality under the circumstances. *See Allegaert v. Perot*, 565 F.2d 246, 250 (2d Cir. 1977) (Disqualification is not warranted unless "the attorney was in a position where he *could* have received information which his former client might reasonably have assumed the attorney would withhold from his present client.").

Here the trial court erred by trying to determine whether Forbes actually shared confidential information with Bush that Bush did not share with the other parties to the common representation agreement. Instead, the trial court should apply the objective test of whether a client in Forbes's position would normally have shared confidential information given the terms of the engagement letter and the type of disclosure that usually occurs within that common representation arrangement. Further, the trial court failed to consider the normal implications of simultaneous and ongoing representation of Forbes by other counsel. On remand, the trial court should objectively consider what confidential

factual information "would normally have been obtained" within the scope of the past representation. N.C. St. B. Rev. R. Prof'l Conduct r. 1.9 cmt. 3.

If the trial court determines that confidential information would normally have been shared within the scope of the past representation, it must then consider whether that information is material to the present action by deciding if the two matters are "substantially related." A former client must objectively demonstrate "a substantial risk that [confidential] information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." *Id.* Through an objective, fact-intensive inquiry, the trial court is best suited to determine whether such a substantial risk exists. *See id.* (considering "the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services"); *see also* Restatement (Third) of The Law Governing Lawyers § 132A cmt. d(iii) (Am. Law Inst. 2017) ("The substantial-relationship test . . . focus[es] upon the *general features* of the matters involved and inferences as to the likelihood that confidences were imparted by the former client that could be used to adverse effect in the subsequent representation." (emphasis added)).

In assessing whether two matters are "substantially related," the trial court should consider, *inter alia*, the following illuminative factors: (1) the initial engagement letter, including the scope of the representation and any limitations on confidentiality; (2) the factual background leading to the past representation, including common representation of others and any concurrent representation of the former client; (3) the amount of time spent with the attorney; (4) the subject matter of the two representations; and (5) all of the facts and circumstances of the current litigation, particularly as compared with those of the past representation. A former client's subjective perception or conclusory allegations that he shared confidential information during the past representation should not be considered. *See*, *e.g.*, *Silver Chrysler Plymouth*, *Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 756-57 (2d Cir. 1975).

Here the trial court erred by concluding that the matters appeared to be "substantially related" based on Forbes's conclusory belief that he had shared confidential information with Bush "directly related to the claims . . . against Defendants in this case." Thus, the trial court improperly determined disqualification in reliance on the former client's subjective judgment, which Rule 1.9(a) prohibits, rather than objectively comparing the facts and circumstances of both representations.

In its final rationale, the trial court mistakenly applied the now replaced "appearance of impropriety" test as a consideration in favor of disqualification. Unlike its predecessor, the Model Code of Professional Responsibility, the Rules of Professional Conduct do not recognize "appearance of impropriety" as a basis for disqualification, having deleted any reference to this standard in the 2002 revisions.[7] The tendency of the old test to lean towards a subjective, rather than objective, analysis rendered it "no longer helpful."[8] As a result, the "appearance of impropriety" test is no longer an appropriate legal standard for determining whether to disqualify counsel.

In sum, the trial court applied the incorrect standard under Rule 1.9(a) in disqualifying defendants' counsel. In making its determination upon remand, the trial court must objectively assess the facts surrounding the motion to disqualify counsel without relying on the former client's subjective perception of his prior representation. The trial court should avoid the outmoded "appearance of impropriety" test. We reverse the trial court's decision and remand this case to that court for application of the correct legal test.

REVERSED AND REMANDED.

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

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7. The Model Rules of Professional Conduct, of which Rule 1.9 is a part, replaced the ABA Code of Professional Responsibility, which dated back to canons first promulgated in 1908. *See* Monroe H. Freedman, *The Kutak Model Rules v. the American Lawyer's Code of Conduct*, 26 Vill. L. Rev. 1165, 1165 (1981). Under the ABA Code, parties generally moved for disqualification under Canon 4, "A Lawyer Should Preserve the Confidences and Secrets of a Client," and Canon 9, "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." Model Code of Prof'l Responsibility Canons 4, 9 (Am. Bar Ass'n 1980). By 1986 North Carolina had adopted the Model Rules of Professional Conduct as its governing standard.

8. *See A Legislative History* 242 (Art Garwin ed., 2013) (noting that the Ethics 2000 Commission Reporter's Explanation of Proposed Changes included the statement that comment 5, referencing the appearance of impropriety standard, was "deleted as no longer helpful to the analysis of questions arising under this Rule").

ACTS RETIREMENT-LIFE COMMUNITIES, INC.	)	
v.	)	From Polk County
TOWN OF COLUMBUS, NORTH CAROLINA	)	

No. 334PA16

ORDER

The Court, on its own motion, orders that the parties submit supplemental briefs concerning the following issue:

Did the trial court err in finding that the Town acted arbitrarily and discriminatorily on the grounds that the findings of fact, entered by the trial court, when applied to North Carolina law show that the Town's actions were lawful?

Defendant's supplemental brief shall be filed no later than thirty days after the date of this order, plaintiff's supplemental brief shall be filed no later than thirty days following defendant's filing, and defendant's supplemental reply brief shall be filed no later fifteen days following plaintiff's filing.

By order of the Court, this the 7th day of December, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 8th day of December, 2017.

CHRISTIE S. CAMERON ROEDER
Clerk,
Supreme Court of North Carolina

s/M.C. Hackney
Assistant Clerk,
Supreme Court of North Carolina

CHELSEA DOOLITTLE	)	
	)	
v.	)	From Catawba County
	)	
ROBERT M. GEORGE, IN HIS INDIVIDUAL CAPACITY AS AN OFFICER OF THE HICKORY POLICE DEPARTMENT; VIDAL A. SIPE, IN HIS INDIVIDUAL CAPACITY AS AN OFFICER OF THE HICKORY POLICE DEPARTMENT; FRANK C. PAIN, IN HIS INDIVIDUAL CAPACITY AS AN OFFICER OF THE HICKORY POLICE DEPARTMENT; AND THE CITY OF HICKORY, A NORTH CAROLINA MUNICIPALITY	)	

No. 195P17

ORDER

The following order was entered:

Defendant's Motion to Amend or Supplement Motion to File Confidential Material Under Seal, filed on 2 August 2017, is allowed in part, in the Supreme Court, as to all documents appended to plaintiff's Response in Opposition to Defendant-Petitioner's Petition for Writ of Certiorari, Petition for Writ of Supersedeas and Application for Temporary Stay, filed on 23 June 2017; all documents appended to defendant's Motion for Leave to Amend or Supplement Petition for Writ of Certiorari, Petition for Writ of Supersedeas and Motion for Temporary Stay, filed on 30 June 2017; all documents appended to defendant's Motion for Leave to File a Reply to Plaintiff's Response to George's Petition for Writ of Certiorari, Writ of Supersedeas and Motion for Temporary Stay, filed on 30 June 2017; all documents appended to defendant's Reply to Plaintiff's Response to Petition for Writ of Certiorari, Petition for Writ of Supersedeas and Motion for Temporary Stay, filed on 27 July 2017; all documents appended to defendant's Motion to File Confidential Material Under Seal, filed on 27 July 2017; and all documents appended to defendant's Motion to Amend or Supplement Motion to File Confidential Material Under Seal, filed on 2 August 2017.

Defendant's motion is, in all other respects, denied.

By order of the Court in Conference, this the 7th day of December, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 8th day of December, 2017.

CHRISTIE SPEIR CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

NORTH CAROLINA STATE BOARD OF EDUCATION	)	
v.	)	From Wake County
THE STATE OF NORTH CAROLINA AND THE NORTH CAROLINA RULES REVIEW COMMISSION	)	

No. 110PA16-2

ORDER

This Court will hear oral arguments in this case during the February 2018 calendar. On its own motion, this Court sets the following briefing schedule: The Appellant's brief will be due on 22 December 2017. The Appellees' brief will be due on 16 January 2018. Should Appellant wish to file a reply brief, the reply brief will be due on 22 January 2018.

By order of the Court in Conference, this 15th day of December, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of December, 2017.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

NORTH CAROLINA STATE BOARD OF EDUCATION	)	
v.	)	From Wake County
THE STATE OF NORTH CAROLINA AND MARK JOHNSON, IN HIS OFFICIAL CAPACITY	)	

No. 333PA17

ORDER

This Court will hear oral arguments in this case during the February 2018 calendar. On its own motion, this Court sets the following briefing schedule: The Appellant's brief will be due on 29 December 2017. The Appellees' brief will be due on 16 January 2018. Should Appellant wish to file a reply brief, the reply brief will be due on 22 January 2018.

By order of the Court in Conference, this 15th day of December, 2017.

s/Morgan, J.
For the Court

MARTIN, C.J., recused.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of December, 2017.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Surry County
	)	
WALTER COLUMBUS SIMMONS	)	

No. 292P17

ORDER

Upon consideration of the Petition for Discretionary Review filed by the State on the 15th day of September 2017, the Court allows the State's Petition for Discretionary Review for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of our decision in *State v. Sandra Meshell Brice*, ___ N.C. ___, 806 S.E.2d 32 (2017).

By order of the Court in conference, this the 7th day of December 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 8th day of December 2017.

CHRISTIE SPEIR CAMERON ROEDER
Clerk of Supreme Court

s/M.C. Hackney
Assistant Clerk

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

7 DECEMBER 2017

091P14-4	State v. Salim Abdu Gould	1. Def's *Pro Se* Motion for Stay 2. Def's *Pro Se* Petition for *Writ of Supersedeas* 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied **11/16/2017** 2. 3.
109P17-2	In re Olander R. Bynum	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied
114P17	State v. Kevin Salvador Golphin	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Cumberland County	Dismissed without prejudice to Defendant's right to seek appropriate relief in the trial court **11/08/2017**
151P15-2	State v. Timothy Neal Prince	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1275)	Denied
158P06-16	State v. Derrick D. Boger	Def's *Pro Se* Motion for Civil Complaint in Tort Action	Dismissed
168A17	In re Southeastern Eye Center	Defendant's (Douglas S. Harris) Motion to Consolidate Appeals	Denied **11/15/2017**
176P17	Andy Learon Crabtree and Carol Ann Crabtree v. Elesha M. Smith, d/b/a The Law Firm of Elesha M. Smith; Bank of America, N.A. f/k/a BAC Home Loans Servicing, LP; Rushmore Loan Management Services LLC; and U.S. Bank, N.A.	Plts' PDR Under N.C.G.S. § 7A-31 (COA16-864)	Denied
178P17	Karyn Wilson and Thomas Baumgardner, Individually, and Walter L. Hart, IV, Guardian Ad Litem for B.B., a Minor v. Ashley Women's Center, P.A., George Daniel Jacobs, M.D., and Nancy Kuney, CNM	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA16-1004) 2. Defendants' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot

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

7 DECEMBER 2017

195P17	Chelsea Doolittle v. Robert M. George, in his Individual Capacity as an Officer of the Hickory Police Department; Vidal A. Sipe, in his Individual Capacity as an Officer of the Hickory Police Department; Frank C. Pain, in his Individual Capacity as an Officer of the Hickory Police Department; and The City of Hickory, a North Carolina Municipality	1. Def's (Robert M. George) Motion for Temporary Stay (COAP17-349) 2. Def's (Robert M. George) Petition for *Writ of Supersedeas* 3. Def's (Robert M. George) Petition for *Writ of Certiorari* to Review Order of COA 4. Def's (Robert M. George) Motion to Amend or Supplement Petition for *Writ of Certiorari*, Petition for *Writ of Supersedeas*, and Motion for Temporary Stay 5. Def's (Robert M. George) Motion for Leave to File Reply to Response to Petition for *Writ of Certiorari*, Petition for *Writ of Supersedeas*, and Motion for Temporary Stay 6. Def's (Robert M. George) Motion to File Confidential Material Under Seal 7. Def's (Robert M. George) Motion to Amend or Supplement Motion to File Confidential Material Under Seal	1. Allowed **06/16/2017** Dissolved **12/07/2017** 2. Denied 3. Denied 4. Allowed 5. Allowed **07/13/2017** 6. Dismissed as moot 7. Special Order
196P17	Maeghan Richmond v. Robert M. George, in his Individual Capacity as an Officer of the Hickory Police Department; Vidal A. Sipe, in his Individual Capacity as an Officer of the Hickory Police Department; Frank C. Pain, in his Individual Capacity as an Officer of the Hickory Police Department; and The City of Hickory, a North Carolina Municipality	1. Def's (Robert M. George) Motion for Temporary Stay (COAP17-350) 2. Def's (Robert M. George) Petition for *Writ of Supersedeas* 3. Def's (Robert M. George) Petition for *Writ of Certiorari* to Review Order of COA 4. Def's (Robert M. George) Motion for Leave to Amend or Supplement Petition for *Writ of Certiorari*, Petition for *Writ of Supersedeas*, and Motion for Temporary Stay 5. Def's (Robert M. George) Motion for Leave to File Reply to Response to Petition for *Writ of Certiorari*, Petition for *Writ of Supersedeas*, and Motion for Temporary Stay	1. Allowed **06/19/2017** Dissolved **12/07/2017** 2. Denied 3. Denied 4. Allowed 5. Allowed **07/28/17**

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

7 DECEMBER 2017

200P17	Barry D. Edwards, XMC Films, Incorporated, Aegis Films, Inc., and David E. Anthony v. Clyde M. Foley, Ronald M. Foley, Lavonda S. Foley, Samuel L. Scott, CRS Trading Co. LLC, Brown Burton, Ronald Jed Meadows, and American Solar Kontrol, LLC	1. Defs' Motion for Temporary Stay (COA16-1060) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Motion to Admit Bryan M. Knight *Pro Hac Vice*	1. Allowed **06/20/2017** Dissolved **12/07/2017** 2. Denied 3. Denied 4. Dismissed as moot
222A17	State v. Sam Babb Clonts, III	1. State's Motion for Temporary Stay (COA16-566) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent 4. State's PDR of Additional Issues	1. Allowed **07/07/2017** 2. Allowed 3. --- 4. Allowed
240P17-2	In re Bruce Bunting	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	1. Dismissed
250P17	State v. Justin Lee Perry	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-768)	Denied
252P17	State v. Sammy Lee Hensley, Sr.	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-689) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
254P09-2	David Reed Wilson v. Mark Carver, Supt. Of Caswell Correctional Center #4415	Petitioner's *Pro Se* Motion for PDR (COAP17-641)	Denied **11/06/2017**
259A17	In re Southeastern Eye Center	Defendant's (Douglas S. Harris) Motion to Consolidate Appeals	Denied **11/15/2017**

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

7 DECEMBER 2017

268P17	Estate of Vaughn E. Russell, By and Through Its Administrator, Nancy E. Russell, and Nancy E. Russell, Individually v. Sondra Lynn Russell and Janice M. Russell	Plts' PDR Under N.C.G.S. § 7A-31 (COA17-21)	Denied
270P17	In the Matter of M.B., B.B., and J.B.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA16-1270)	Denied
282P17	Thomas Bentley, Employee v. Jonathan Piner Construction, Alleged Employer, Stonewood Insurance Company, Alleged Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA16-62-2)	Denied
290A17	State v. Marcus Marcel Smith	1. State's Motion for Temporary Stay (COA16-1229) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent 4. State's PDR as to Additional Issues 5. Def's Motion to Dismiss or Clarify the Scope of Notice of Appeal 6. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed 08/28/2017 2. Allowed 3. --- 4. Allowed 5. 6. Allowed
292P03-4	State v. Wali Farad Muhammad Bilal	Def's *Pro Se* Motion for PDR (COAP17-579)	Dismissed
292P17	State v. Walter Columbus Simmons	1. State's Motion for Temporary Stay (COA16-1065) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **08/29/2017** Dissolved **12/07/2017** 2. Denied 3. Special Order 4. Denied
294P17	State v. Nancy Benge Austin	Def's Petition for *Writ of Certiorari* to Review Order of COA (COAP17-508)	Allowed

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

7 DECEMBER 2017

295P17	State v. Terry Jerome Wilson	1. State's Motion for Temporary Stay (COA16-1212) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/01/2017** 2. Allowed 3. Allowed
297P17	In the Matter of N.X.A. and In the Matter of B.R.S.A-D. and D.S.K.A-D.	Respondent-Mother and Respondent-Father's Joint PDR Under N.C.G.S. § 7A-31 (COA17-95)	Denied
305P17	State v. William Jesse Buchanan	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COA16-697) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* Petition for *Writ of Habeas Corpus*	1. 2. 3. Denied **12/07/2017**
307PA17	Soma Technology, Inc. v. Dalamagas, et al.	Joint Motion to Withdraw Appeals	Allowed **11/21/2017**
308A17	Soma Technology, Inc. v. Dalamagas, et al.	Joint Motion to Withdraw Appeals	Allowed **11/21/2017**
310A16	Worley, et al. v. Moore, et al.	Plts' Motion for Leave to Submit Supplemental Response	Allowed **Ervin, J., recused**
311P17	Angela Brown, Next of Kin of Donald L. Brown, Deceased Employee v. N.C. Department of Public Safety, Employer, Self-Insured (Corvel Corporation, Third-Party Administrator)	Plt's PDR Under N.C.G.S. § 7A-31 (COA16-740)	Denied

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

7 DECEMBER 2017

313P17	Arthur McArdle, Kimberly McArdle, Seldon Jones, Jacob McArdle, Hannah McArdle, Banning McArdle, and Frederick S. Barbour, as Guardian ad Litem for Sophie McArdle v. Mission Hospital, Inc. and Mission Health System, Inc.	1. Plts' PDR (COA16-554) 2. Plts' Motion to Amend PDR	1. Denied 2. Allowed
315P17	Judith Barbee and Thomas Barbee, Co-Administrators of the Estate of Lauren Barbee v. WHAP, P.A. and Lyndhurst Gynecologic Associates, P.A.	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA16-1154) 2. Plts' Motion to Withdraw PDR	1. --- 2. Allowed
324P17	Martin T. Slaughter v. Nicole B. Slaughter	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-1153) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Withdraw PDR	1. --- **11/14/2017** 2. Dismissed as moot **11/14/2017** 3. Allowed **11/14/2017**
327P17	Jeff Myres, Employee v. Strom Aviation, Inc., Employer; and United States Fire Insurance Company / Crum & Forster Insurance Company, Carrier	Plt's PDR Under N.C.G.S. § 7A-31(c) (COA16-558)	Denied
329P17	Cynthia Frank, Employee v. Charlotte Symphony, Employer, and Selective Insurance Company of America, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-211)	Denied

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

7 DECEMBER 2017

333P17	North Carolina State Board of Education v. The State of North Carolina, and Mark Johnson, in his Official Capacity	1. Plt's Motion for Temporary Stay (COAP17-687) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's PDR Prior to a Determination by the COA	1. Allowed **10/16/2017** 2. Allowed 3. Allowed **Martin, C.J., recused**
341P17	Mark Malecek v. Derek Williams	1. Notice of Appeal Based Upon a Constitutional Question Under N.C.G.S. § 7A-30(1) (COA16-830) 2. PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
342P17	State v. Daniel Richard McCoy	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1099)	Denied
344P17	State v. Michael Lewis Williams	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP17-495) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
345P17-2	Eddricco Li'Shaun Brown v. State of N.C.	1. Petitioner's *Pro Se* Motion for Notice of Appeal 2. Petitioner's *Pro Se* Motion to Demand Default Judgment	1. Denied **11/06/2017** 2. Denied **11/06/2017**
346P17	State v. Leon Develda Caldwell	Def's *Pro Se* Motion for Appropriate Relief	Dismissed without prejudice
347P17	Jonathan James Newell v. N.C. Department of Public Safety Division of Adult Corrections	Petitioner 's *Pro Se* Motion for PDR (COAP17-721)	Dismissed
348P17	State v. Matthew Scott Krause	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP17-677)	Dismissed

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

7 DECEMBER 2017

350A17	State of N.C. *ex rel.* Utilities Commission, et al. v. N.C. Waste Awareness & Reduction Network	1. Center for Biological Diversity, Food and Water Watch, Friends of the Earth, Greenpeace, Inc., and Institute for Local Self-Reliance's Motion for Leave to File Amicus Brief 2. Motion to Admit Anchun Jean Su *Pro Hac Vice* 3. Motion to Admit Howard M. Crystal *Pro Hac Vice*	1. Allowed **11/20/2017** 2. Allowed **11/20/2017** 3. Allowed **11/20/2017**
352P17	State v. Thomas W. McNeill	Def's *Pro Se* Motion for PDR (COAP17-629)	Dismissed
355P17	State v. Antione Cedric McKenith	Def's PDR Under N.C.G.S. § 7A-31 (COA17-81)	Denied
357P17	State v. Fredrick Canady	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Columbus County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
358A16	In re Southeastern Eye Center	Defendant's (Douglas S. Harris) Motion to Consolidate Appeals	Denied **11/15/2017**
360P17	State v. Kevin Christopher McReed	Def's PDR Under N.C.G.S. § 7A-31 (COA17-229)	Denied
361P17	Blue Ridge Healthcare Hospitals Inc. d/b/a Carolinas Healthcare System – Blue Ridge, Petitioner v. NC Department of Health and Human Services, Division of Health Service Regulation, Healthcare Planning and Certificate of Need Section, Respondent, and Caldwell Memorial Hospital, Inc. and SCSV, LLC, Respondent-Intervenors	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA17-137)	Denied

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

7 DECEMBER 2017

363A14-3	Sandhills Amusements, Inc., et al. v. Sheriff of Onslow County, et al.	1. Plts' Motion for Temporary Stay (COAP17-693) 2. Plts' Petition for *Writ of Supersedeas* 3. Plts' Petition for *Writ of Certiorari* to Review Order of COA	1. Denied 11/13/2017 2. 3. **Ervin, J., recused**
363P17	In the Matter of J.M. and J.M.	1. Respondent-Father's PDR Under N.C.G.S. § 7A-31 (COA17-275) 2. Petitioner and GAL's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed
364P17	State v. J. Guadalupe Garay Galindo	Def's *Pro Se* Motion for PDR (COAP17-590)	Dismissed
367P17	State v. Zachary John Rose	1. State's Motion for Temporary Stay (COA17-190) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **11/03/2017** Dissolved **11/27/2017** 2. Dismissed as moot **11/27/2017**
370A17	State v. Dyquaon Kenner Brawley	1. State's Motion for Temporary Stay (COA17-287) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **11/06/2017** 2. Allowed **11/28/2017** 3. ---
372P07-3	State v. Ricky Dean Johnson	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Cleveland County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot **Ervin, J., recused**

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

7 DECEMBER 2017

372P17	In the Matter of Kenneth Kelly Duvall v. State of N.C., et al.	1. Petitioner's *Pro Se* Motion for Default Judgment (COAP17-711) 2. Petitioner's *Pro Se* Motion for Injunctive Relief and *De Novo* Review and Answers to Constitutional Questions 3. Petitioner's *Pro Se* Motion to Appoint Counsel 4. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 11/07/2017 2. 3. 4.
373P17	Mike Causey, Commissioner of Insurance of North Carolina v. Cannon Surety, LLC, a North Carolina Limited Liability Company	1. Petitioner's Motion for Temporary Stay 2. Petitioner's Petition for *Writ of Supersedeas* 3. Petitioner's Notice of Appeal 4. Petitioner's Petition for *Writ of Certiorari* to Review Order of Business Court	1. Denied **11/07/2017** 2. Denied **11/07/2017** 3. Dismissed *ex mero motu* **11/07/2017** 4. Denied **11/07/2017**
379A17	State of N.C. v. Brandon Malone	1. State's Motion for Temporary Stay (COA16-1290) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **11/09/2017** 2.
386P17	Eric Jamal Whitley v. Donnie Harrison	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **11/17/2017**
387P17	In re Timothy D. Reels, Jr.	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **11/16/2017**
388P17	State v. Andwele Willie Eaves	1. Def's Motion for Temporary Stay (COA17-159) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **11/16/2017** 2.
393P17	State v. Byron Jerome Parker	1. State's Motion for Temporary Stay (COA17-108) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/21/2017** 2. 3.
394P17	State v. Dontail Brinkley	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **11/21/2017** 2.

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

7 DECEMBER 2017

398P15-2	Samuel Lee Gaskins v. Larry Dail, Superintendent	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **11/06/2017**
398P15-3	Samuel Lee Gaskins v. Larry Dail, Superintendent	Petitioner's *Pro Se* Motion to Reconsider Order Denying Petition for *Writ of Habeas Corpus*	Dismissed **11/17/2017**
403P17	Cameron Lee Hinton v. Donnie Harrison; Wake County Detention Center	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **11/28/2017**
404P17	Nancy Rogers, et al. v. Claudia Metcalf, et al.	1. Defs' *Pro Se* Motion for Temporary Stay 2. Defs' *Pro Se* Emergency Petition for *Writ of Certiorari* to Review Order of COA 3. Defs' *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Allowed **11/28/2017** Dissolved **12/07/2017** 2. Denied 3. Allowed
405P17	State v. J.C.	1. State's Motion for Temporary Stay (COA17-207-2) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. State's Petition for *Writ of Certiorari* to Review Order of COA 5. Petitioner's Motion to Proceed Under a Pseudonym 6. Petitioner's Motion to Restrict Electronic Access, Place Case "Under Seal," and Redact Superior Court Case Numbers from All Published Materials	1. Allowed **11/27/2017** 2. 3. 4. 5. 6.
421P10-7	Robert Alan Lillie v. Mark Carver, Superintendent of Caswell Correctional Center	Petitioner's *Pro Se* Motion to Reconsider	Dismissed
514PA11-2	State v. Harry Sharod James	State's Motion to Amend Its Brief as Appellant by Striking a Portion of the Brief	Allowed

STEVEN HARRIS, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, RESPONDENT

No. 110A17

Filed 22 December 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 798 S.E.2d 127 (2017), affirming a final decision dated 25 January 2016 issued by Administrative Law Judge Donald W. Overby in the Office of Administrative Hearings. Heard in the Supreme Court on 13 December 2017.

Law Offices of Michael C. Byrne, by Michael C. Byrne, for petitioner-appellee.

Joshua H. Stein, Attorney General, by Tamika L. Henderson, Assistant Attorney General, and Ryan Park, Deputy Solicitor General, for respondent-appellant.

Essex Richards, P.A., by Norris A. Adams, II, for North Carolina Fraternal Order of Police, and Blanchard, Miller, Lewis & Isley, P.A., by E. Hardy Lewis, for North Carolina State Employees Association, amici curiae.

The McGuinness Law Firm, by J. Michael McGuinness, and Milliken Law, by Megan A. Milliken, for North Carolina Police Benevolent Association and Southern States Police Benevolent Association, amici curiae.

PER CURIAM.

AFFIRMED.

IN RE G.T.

[370 N.C. 387 (2017)]

IN THE MATTER OF G.T.

No. 420A16

Filed 22 December 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 791 S.E.2d 274 (2016), affirming an adjudication order entered on 3 February 2016, and reversing in part a dispositional order entered on 26 February 2016, both by Judge Ward D. Scott in District Court, Buncombe County. Heard in the Supreme Court on 11 December 2017.

Matthew J. Putnam for petitioner-appellant Buncombe County Department of Social Services.

Michael N. Tousey for appellant Guardian ad Litem.

Joyce L. Terres, Assistant Appellate Defender, for respondent-appellee mother.

PER CURIAM.

AFFIRMED.

STATE v. GODBEY

[370 N.C. 388 (2017)]

STATE OF NORTH CAROLINA
v.
RONNIE PAUL GODBEY

No. 443PA16

Filed 22 December 2017

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 792 S.E.2d 820 (2016), finding no error after appeal from a judgment entered on 8 December 2014 by Judge Christopher W. Bragg in Superior Court, Rowan County. Heard in the Supreme Court on 13 December 2017.

Joshua H. Stein, Attorney General, by Anita LeVeaux, Special Deputy Attorney General, and Sherri Horner Lawrence, Assistant Attorney General, for the State.

Glenn Gerding, Appellate Defender, by James R. Grant, Assistant Appellate Defender, for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE v. WILSON

[370 N.C. 389 (2017)]

STATE OF NORTH CAROLINA
v.
JOSHUA RYAN WILSON

No. 466A16

Filed 22 December 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 793 S.E.2d 737 (2016), affirming a judgment entered on 24 September 2015 by Judge Michael J. O'Foghludha in Superior Court, Alamance County. Heard in the Supreme Court on 7 November 2017.

Joshua H. Stein, Attorney General, by Marie Hartwell Evitt, Assistant Attorney General, and Derrick C. Mertz, Special Deputy Attorney General, for the State.

Leslie Rawls for defendant-appellant.

PER CURIAM.

AFFIRMED.

WHEELER v. CENT. CAROLINA SCHOLASTIC SPORTS, INC..

[370 N.C. 390 (2017)]

STEPHEN VICTOR WHEELER
v.
CENTRAL CAROLINA SCHOLASTIC SPORTS, INC. D/B/A CENTRAL CAROLINA SCHOLASTIC BASEBALL SUMMER LEAGUE

No. 150A17

Filed 22 December 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 798 S.E.2d 438 (2017), affirming an order granting summary judgment entered on 22 April 2016 by Judge Claire V. Hill in Superior Court, Cumberland County. Heard in the Supreme Court on 11 December 2017.

Jerome P. Trehy, Jr. for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Melody J. Jolly, for defendant-appellee.

PER CURIAM.

AFFIRMED.

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

22 DECEMBER 2017

110A17	Steven Harris v. North Carolina Department of Public Safety	Petitioner's Motion to Dismiss Appeal	Dismissed as moot

ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA

v.

PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; AND THE STATE OF NORTH CAROLINA

No. 52PA17-2

Filed 26 January 2018

1. Constitutional Law—North Carolina—session law creating Bipartisan State Board of Elections and Ethics Enforcement—challenge by Governor—subject matter jurisdiction

Where the legislature created the Bipartisan State Board of Elections and Ethics Enforcement following the election of Roy A. Cooper III as Governor, the three-judge trial court panel erred by dismissing the Governor's complaint for lack of subject matter jurisdiction. This case involved an issue of constitutional interpretation—whether the statutory provisions governing the manner in which the Bipartisan State Board was constituted and required to operate pursuant to Session Law 2017-6 impermissibly encroached upon the governor's executive authority to see that the laws are faithfully executed—rather than a nonjusticiable political question, and a decision to the contrary would sharply limit the ability of executive branch officials to advance separation of powers claims.

2. Constitutional Law—North Carolina—session law creating Bipartisan State Board of Elections and Ethics Enforcement—challenge by Governor—standing

Where the legislature created the Bipartisan State Board of Elections and Ethics Enforcement following the election of Roy A. Cooper III as Governor, the three-judge trial court panel erred by dismissing the Governor's complaint for lack of standing, to the extent that it did so. Apart from the legislative leaders' contention that the Governor's claim was a nonjusticiable political question, which the Supreme Court rejected, the legislative leadership did not appear to contend explicitly that the Governor lacked the necessary personal stake in the outcome of the controversy.

3. Constitutional Law—North Carolina—session law creating Bipartisan State Board of Elections and Ethics Enforcement—challenge by Governor—separation of powers—structure and operation of Board

Where the legislature created the Bipartisan State Board of Elections and Ethics Enforcement following the election of Roy A. Cooper III as Governor, and the Governor challenged the law as unconstitutionally infringing on his executive powers in violation of separation of powers, the Supreme Court held that the manner in which the membership of the Bipartisan State Board was structured and operated under Session Law 2017-6 impermissibly, facially, and beyond a reasonable doubt interfered with the Governor's ability to ensure that the laws are faithfully executed as required by Article III, Section 5(4) of the North Carolina Constitution. The state's Constitution does not permit the General Assembly to structure an executive branch commission such that the Governor is unable, within a reasonable period of time, to take care that the laws are faithfully executed because he is required to appoint half of the commission members from a list of nominees consisting of individuals who are likely not supportive of his policy preferences while the Governor also is given limited supervisory control over the agency and circumscribed removal authority over commission members.

4. Constitutional Law—North Carolina—session law creating Bipartisan State Board of Elections and Ethics Enforcement—challenge by Governor—selection of Executive Director

Where the legislature created the Bipartisan State Board of Elections and Ethics Enforcement following the election of Roy A. Cooper III as Governor, and the Governor challenged the law as unconstitutionally infringing on his executive powers in violation of separation of powers, the Supreme Court, after holding unconstitutional the provisions of the law concerning the composition of the Bipartisan State Board, declined to reach the issue of whether the provisions governing the selection of the Executive Director constituted a separate violation of Article III, Section 5(4) of the North Carolina Constitution.

5. Constitutional Law—North Carolina—session law creating Bipartisan State Board of Elections and Ethics Enforcement—challenge by Governor—chair and restructuring of county boards

Where the legislature created the Bipartisan State Board of Elections and Ethics Enforcement following the election of Roy A. Cooper III as Governor, the Supreme Court declined to express any opinion on the Governor's argument challenging the provisions of Session Law 2017-6 requiring that the office of the chair of the Bipartisan State Board be rotated between the state's two largest

political parties and the provisions restructuring the county boards of election.

6. Constitutional Law—North Carolina—session law creating Bipartisan State Board of Elections and Ethics Enforcement—challenge by Governor—temporary restraining order—moot

Where the legislature created the Bipartisan State Board of Elections and Ethics Enforcement following the election of Roy A. Cooper III as Governor, the Supreme Court dismissed as moot the legislative leadership's appeal from the temporary restraining order entered by the three-judge panel in the trial court following the filing of the Governor's complaint.

Chief Justice MARTIN dissenting.

Justice JACKSON joins in this dissenting opinion.

Justice NEWBY dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of orders entered on 28 April 2017 and 1 June 2017 in the Superior Court, Wake County, by a three-judge panel appointed by the Chief Justice pursuant to N.C.G.S. § 1-267.1. Heard in the Supreme Court on 28 August 2017. Following oral argument, on 1 September 2017, the Court ordered that this case be remanded to the panel for the entry of a supplemental order. After the entry of the supplemental order, the Court, on 2 November 2017, ordered supplemental briefing. Determined without further oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Daniel F.E. Smith, Jim W. Phillips, Jr., and Eric M. David, for plaintiff-appellant/appellee.

Nelson Mullins Riley & Scarborough LLP, by D. Martin Warf and Noah H. Huffstetler, III, for legislator defendant-appellants/appellees.

Joshua H. Stein, Attorney General, by Alexander McC. Peters, Senior Deputy Attorney General, for defendant-appellee State of North Carolina.

Poyner Spruill LLP, by Andrew H. Erteschik, for Brennan Center for Justice at N.Y.U. School of Law and Democracy North Carolina, amici curiae.

Robinson, Bradshaw & Hinson, P.A., by John R. Wester, J. Dickson Phillips, III, Adam K. Doerr, and Kevin Crandall, for James B. Hunt, Jr., and Burley B. Mitchell, Jr., amici curiae.

ERVIN, Justice.

On 8 November 2016, plaintiff Roy A. Cooper, III, was elected Governor of the State of North Carolina for a four-year term office commencing on 1 January 2017. On 16 December, 2016, the General Assembly enacted Senate Bill 4 and House Bill 17, which abolished the existing State Board of Elections and the existing State Ethics Commission; created a new Bipartisan State Board of Elections and Ethics Enforcement; and appointed the existing members of the State Ethics Commission to serve as the members of the Bipartisan State Board. The legislation in question was signed into law by former Governor Patrick L. McCrory on 16 December 2016. On 17 March 2017, a three-judge panel of the Superior Court, Wake County, convened pursuant to N.C.G.S. § 1-267.1(b1), determined that the legislation in question violated the separation-of-powers provisions of the North Carolina Constitution by unconstitutionally impinging upon the Governor's ability to faithfully execute the laws. *Cooper v. Berger*, No. 16 CVS 15636, 2017 WL 1433245 (N.C. Super. Ct. Wake County, Mar. 17, 2017).

On 25 April 2017, Chapter 6 of the 2017 North Carolina Session Laws became law notwithstanding the Governor's veto. *See* Act of Apr. 11, 2017, ch. 6, 2017-2 N.C. Adv. Legis. Serv. 21 (LexisNexis).[1] Session Law 2017-6 was captioned

> AN ACT TO REPEAL G.S. 126-5(D)(2C), AS ENACTED BY S.L. 2016-126; TO REPEAL PART I OF S.L. 2016-125; AND TO CONSOLIDATE THE FUNCTIONS OF ELECTIONS, CAMPAIGN FINANCE, LOBBYING, AND ETHICS UNDER

1. Session Law 2017-6 required the Revisor of Statutes to recodify substantial portions of the existing statutory provisions governing elections, campaign finance, lobbying, and ethics into a new Chapter 163A. Although the necessary recodification has now been completed, the Court will cite to the statutory provisions not directly enacted by virtue of Session Law 2017-6 as they existed prior to the recodification in this opinion.

ONE QUASI-JUDICIAL AND REGULATORY AGENCY BY CREATING THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT.

The newly-enacted legislation provided, in pertinent part, that:

Article 1.

Bipartisan State Board of Elections and Ethics Enforcement.

§163A-1. Bipartisan State Board of Elections and Ethics Enforcement established.

There is established the Bipartisan State Board of Elections and Ethics Enforcement, referred to as the State Board in this Chapter.

§ 163A-2. Membership.

(a) The State Board shall consist of eight individuals registered to vote in North Carolina, appointed by the Governor, four of whom shall be of the political party with the highest number of registered affiliates and four of whom shall be of the political party with the second highest number of registered affiliates, as reflected by the latest registration statistics published by the State Board. The Governor shall appoint four members each from a list of six nominees submitted by the State party chair of the two political parties with the highest number of registered affiliates, as reflected by the latest registration statistics published by the State Board.

. . . .

(c) Members shall be removed by the Governor from the State Board only for misfeasance, malfeasance, or nonfeasance. Violation of G.S. § 163A-3(d) shall be considered nonfeasance.

. . . .

(f) At the first meeting in May, the State Board shall organize by electing one of its members chair and one of its members vice-chair, each to serve a two-year term as such. In 2017 and every four years thereafter, the chair shall be a member of the political party with the highest number of registered affiliates, . . . and the vice-chair a

member of the political party with the second highest number of registered affiliates. In 2019 and every year four years thereafter, the chair shall be a member of the political party with the second highest number of registered affiliates, as reflected by the latest registration statistics published by the State Board, and the vice-chair a member of the political party with the highest number of registered affiliates.

. . . .

§ 163A-3. Meetings; quorum; majority.

. . . .

(c) Unless otherwise specified in this Chapter, an affirmative vote of at least five members of the State Board shall be required for all actions by the State Board.

. . . .

§ 163A-5. Independent agency, staff, and offices.

(a) The State Board shall be and remain an independent regulatory and quasi-judicial agency and shall not be placed within any principal administrative department. The State Board shall exercise its statutory powers, duties, functions, and authority and shall have all powers and duties conferred upon the heads of principal departments under G.S. 143B-10.

. . . .

§ 163A-6. Executive Director of the State Board.

(a) There is hereby created the position of Executive Director of the State Board, who shall perform all duties imposed by statute and such duties as may be assigned by the State Board.

(b) The State Board shall appoint an Executive Director for a term of two years with compensation to be determined by the Office of State Human Resources. The Executive Director shall serve beginning May 15 after the first meeting held after new appointments to the State Board are made, unless removed for cause, until a successor is appointed. In the event of a vacancy, the vacancy shall be filled for the remainder of the term.

(c) The Executive Director shall be responsible for staffing, administration, and execution of the State Board's decisions and orders and shall perform such other responsibilities as may be assigned by the State Board.

(d) The Executive Director shall be the chief State elections official.

. . . .

§ 163-30. County boards of elections; appointments; terms of office; qualifications; vacancies; oath of office; instructional meetings.

In every county of the State there shall be a county board of elections, to consist of four persons of good moral character who are registered voters in the county in which they are to act. Two of the members of the county board of elections shall be of the political party with the highest number of registered affiliates, and two shall be of the political party with the second highest number of registered affiliates, as reflected by the latest registration statistics published by the State Board. In 2017, members of county boards of elections shall be appointed by the State Board . . . . In 2019, members of county boards of elections shall be appointed by the State Board on the last Tuesday in June, and every two years thereafter, and their terms of office shall continue for two years from the specified date of appointment and until their successors are appointed and qualified.

. . . .

The State chair of each political party shall have the right to recommend to the State Board three registered voters in each county for appointment to the board of elections for that county. If such recommendations are received by the Board 15 or more days before the last Tuesday in June 2017 and each two years thereafter, it shall be the duty of the State Board to appoint the county boards from the names thus recommended. . . .

. . . .

At the first meeting in July annually, the county boards shall organize by electing one of its members chair and

one of its members vice-chair, each to serve a one-year term as such. In the odd-numbered year, the chair shall be a member of the political party with the highest number of registered affiliates, as reflected by the latest registration statistics published by the State Board, and the vice-chair a member of the political party with the second highest number of registered affiliates. In the even-numbered year, the chair shall be a member of the political party with the second highest number of registered affiliates, as reflected by the latest registration statistics published by the State Board, and the vice-chair a member of the political party with the highest number of registered affiliates.

. . . .

§ 163-31. Meetings of county boards of elections; quorum; majority; minutes.

. . . Three members shall constitute a quorum for the transaction of board business. Except where required by law to act unanimously, a majority vote for action of the board shall require three of the four members.

. . . .

SECTION 9. Notwithstanding G.S. 163A-2, as enacted by Section 4 of this act, the chairs of the two political parties shall submit a list of names to the Governor . . . , and the Governor shall make appointments from those lists . . . . The State chairs of the two political parties shall not nominate, and the Governor shall not appoint, any individual who has served two or more full consecutive terms on the State Board of Elections or State Ethics Commission, as of April 30, 2017.

SECTION 10. Notwithstanding G.S. 163A-2(f) and (g), as enacted by Section 4 of this act, the Governor shall appoint a member of the State Board to serve as chair, a member to serve as vice-chair, and a member to serve as secretary of the State Board until its first meeting in May 2019, at which time the State Board shall select its chair and vice-chair in accordance with G.S. 163A-2(f) and select a secretary in accordance with G.S. 163A-2(g).

. . . .

> **Section 17.** Notwithstanding G.S. 163A-6, the Bipartisan State Board of Elections and Ethics Enforcement shall not appoint an Executive Director until May 2019. Until such time as the Bipartisan State Board of Elections and Ethics Enforcement appoints an Executive Director in accordance with G.S. 163A-6, as enacted by this act, the Executive Director of the State Board of Elections under G.S. 163-26, as of December 31, 2016, shall be the Executive Director.

Id., secs. 4, 7(h)-(i), 9, 10, 17, at 23-34.

On 26 April 2017, the Governor filed a complaint, a motion for a temporary restraining order, and a motion for a preliminary injunction challenging the constitutional validity of Sections 3 through 22[2] of Session Law 2017-6 and seeking to preclude its implementation. On 27 April 2017, the Chief Justice of the Supreme Court of North Carolina assigned a three-judge panel of the Superior Court, Wake County, to hear and decide this case as required by N.C.G.S. § 1-267.1(b1). On 28 April 2017, defendants Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives, filed a response in opposition to the Governor's motion for temporary restraining order. On the same date, the panel, by a divided vote, entered an order temporarily enjoining the enforcement of Sections 3 through 22 of Session Law 2017-6 "pending expiration of this Order or further Order of this Court."

On 23 May 2017, the Governor and the legislative leadership filed summary judgment motions.[3] In addition, the legislative leadership filed a motion seeking to have the Governor's complaint dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1), on the grounds that the claims asserted by the Governor "constitute non-justiciable political questions" and that the Governor "lacks standing" and an answer in which they denied the material allegations of the Governor's complaint and asserted a number of affirmative defenses, including the political question doctrine, and the State of North Carolina filed an answer requesting the panel to "grant

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2. Sections 1 and 2 of Session Law 2017-6 repealed Part I of Session Law 2016-125 and N.C.G.S. § 126-5(d)(2c) as enacted by Session Law 2016-126. S.L. 2017-6.

3. The parties agreed to an extension of the temporary restraining order pending a decision on the merits as part of a consent scheduling order that the panel entered on 10 May 2017.

such relief as may be just and proper." On 1 June 2017, the panel entered an order dismissing the Governor's complaint pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1). On 6 June 2017, the Governor noted an appeal to the Court of Appeals from the panel's order. On 15 June 2017, the legislative leadership noted an appeal to the Court of Appeals from the temporary restraining order. On 19 July, 20 July, and 24 July 2017, respectively, this Court entered orders granting the Governor's petition for discretionary review prior to a decision by the Court of Appeals, allowing the legislative leadership to file an appellants' brief, prohibiting the parties "from taking further action regarding the unimplemented portions" of the challenged legislation, establishing an expedited briefing schedule, and setting this case for oral argument on 28 August 2017.

In his initial brief, the Governor argued that, while the General Assembly has the authority to enact laws, citing Article II, Sections 1 and 20 of the North Carolina Constitution (vesting "[t]he legislative power" in the General Assembly), its authority is subject to the constraints set out in Article I, Section 6 (providing that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other"). According to the Governor, the panel's decision to dismiss his complaint for lack of subject matter jurisdiction "ignor[es] separation of powers as a cornerstone of State government." In addition, the Governor asserted that he had standing to "protect the constitutional rights granted to his office," citing N.C. Const. art. I, § 6; *id.* art. II, §§ 1, 5; *State ex rel. McCrory v. Berger*, 368 N.C. 633, 645, 781 S.E.2d 248, 256 (2016) (noting that, since the adoption of the 1868 Constitution, the Governor has had the duty, pursuant to Article III, Section 5(4) of the North Carolina Constitution, to faithfully execute the laws); *Mangum v. Raleigh Board of Adjustment*, 362 N.C. 640, 642, 669 S.E.2d 279, 281-82 (2008) (explaining that "the North Carolina Constitution confers standing on those who suffer harm"); *Bacon v. Lee*, 353 N.C. 696, 718, 549 S.E.2d 840, 855 (observing that "Article III, Section 5 of the State Constitution enumerates the express duties of the Governor"), *cert. denied*, 533 U.S. 975, 122 S. Ct. 22, 150 L. Ed. 2d 804 (2001). The Governor denied that this case involves a nonjusticiable political question in light of the judicial branch's duty "to identify where the line should be drawn . . . between the Executive Branch and the Legislature," quoting *News & Observer Publishing Co. v. Easley*, 182 N.C. App. 14, 15-16, 641 S.E.2d 698, 700, *disc. rev. denied*, 361 N.C. 429, 648 S.E.2d 508 (2007). The Governor contended that, contrary to the arguments advanced by the legislative leadership, the presumption of constitutionality does not insulate Session Law 2017-6 from judicial scrutiny, citing *Moore v. Knightdale Board of Elections*, 331 N.C. 1, 4,

413 S.E.2d 541, 543 (1992) (stating that "[t]he presumption of constitutionality is not, however, and should not be, conclusive"). Finally, the Governor contended that the challenged portions of Session Law 2017-6 should be invalidated because they deprive him of the ability to exercise "enough 'control over the views and priorities of the officers' that implement 'executive policy' to allow the Governor to fulfill his constitutional duty of faithful execution," quoting *McCrory*, 368 N.C. at 647, 781 S.E.2d at 257.

The legislative leadership argued, on the other hand, that this case involves a nonjusticiable political question and that the Governor lacks standing to challenge the constitutionality of Session Law 2017-6. According to the legislative leadership, "the commitment of the power to alter the functions and duties of state agencies is reserved for the Legislature," with the manner in which the General Assembly has chosen to exercise that authority constituting a "political question that this Court has no authority to review." In addition, the legislative leadership contended that the Governor lacks standing to challenge the constitutionality of Session Law 2017-6 because the alleged constitutional injury upon which the Governor relies did not result from the enactment of the challenged legislation "given the similar or identical provisions in prior law," citing N.C.G.S. § 163-19 and section 4(c) of Session Law 2017-6. In view of the fact that the panel did not reach the merits of the Governor's claim, the legislative leadership urged this Court to refrain from addressing the constitutionality of the challenged legislation even if it concluded that this case was justiciable and that the Governor had standing to challenge the constitutionality of Session Law 2017-6. In the event that the Court elected to reach the merits of the Governor's constitutional claim, the legislative leadership asserts that the challenged legislation represents nothing more than the proper exercise of the General Assembly's constitutionally-derived legislative authority.

On 1 September 2017, "without determining that we lack the authority to reach the merits of plaintiff's claims," the Court entered an order concluding that "the proper administration of justice would be best served in the event that we allowed the panel, in the first instance, to address the merits of [the Governor's] claims before undertaking to address them ourselves." As a result, the Court certified this case "to the panel with instructions . . . to enter a new order . . . that (a) explains the basis for its earlier determination that it lacked jurisdiction to reach the merits of the claims advanced in [the Governor's] complaint and (b) addresses the issues that [the Governor] has raised on the merits."

On 31 October 2017, the panel entered an order determining that it lacked jurisdiction to reach the merits of the Governor's claims on the grounds that "[t]he functions, powers, and duties of an agency encompass how a particular agency might work, its structure, and what role it may play in enforcement of the laws"; "the power to alter the functions and duties of state agencies is reserved to the Legislature through its law-making ability and the Governor through executive order subject to review by the Legislature"; and that "[t]he merger of the Board of Elections and Ethics Commission into the Bipartisan Board . . . is a political question and therefore a nonjusticiable issue." In compliance with our order requesting it to address the merits of the Governor's claims, the panel found that:

> 1. The General Assembly has the authority and power to create and modify the duties of state agencies. *See*, *e.g.*, *Adams v. N. Carolina Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 696-97, 249 S.E.2d 402, 410 (1978).
>
> . . . .
>
> 5. Plaintiff has produced no authority that a commission or board with an even number of members is unconstitutional as a matter of law. Plaintiff has also produced no authority that "deadlock" on a particular issue constitutes a separation of powers violation.
>
> 6. The requirement that the Governor must make his appointments from lists provided by the state party chairs does not constrain his execution of the laws or otherwise violate separation of powers, as the Governor (and not the General Assembly) has a choice among the names on the lists and is making the decision about who will ultimately serve. . . . Session Law 2017-[6]—N.C. Gen. Stat. § 163-19—also requires that the Governor appoint members to the Board of Elections from lists provided by the party chairs. This requirement was first added by Session Law 1985-62 after the election of Governor James Martin. Other statutory changes to the Board of Elections (including the extension of the term of the Executive Director, see S.L. 1973-1409, § 2; S.L. 1985-62), may have coincided with a change in the political party of the Governor but have not resulted in constitutional challenges.
>
> . . . .

8. The Executive Director of the Bipartisan Board is to be, beginning in May 2019, chosen by the Bipartisan Board. Until that time, the current Executive Director of the Board of Elections, whose term is extended by Session Law 2017-6, will serve as the Executive Director of the Bipartisan Board. Such a statutory extension of a term of office has been found to be constitutional. . . .

9. The chair of the Bipartisan Board will initially be chosen by the Governor and will, thereafter, be chosen by the Bipartisan Board. . . .

10. The Governor also has the ability to remove any or all members from the Bipartisan Board for misfeasance, malfeasance, or nonfeasance. The General Assembly has no ability to remove members.

11. The Governor has adequate supervision over the Bipartisan Board, given the Bipartisan Board's role in and impact on state government as the oversight authority for ethics, elections, and lobbying. Additionally, Session Law 2017-6 expressly states that the Bipartisan Board must comply with the duties under N.C. Gen. Stat. § 143B-10, which includes reporting duties to the Governor. The General Assembly does not retain the ability to supervise the Bipartisan Board.

12. Session Law 2017-6 reserves no ongoing control to the General Assembly, and therefore, the General Assembly neither exercises power that the constitution vests exclusively in the executive branch nor prevents the Governor from performing his constitutional duties. Were the Governor given the degree of control he seeks over with the Board of Elections or Bipartisan Board in this case, neither Board could continue to function as "an independent regulatory and quasi-judicial agency" as the Board of Elections under prior law, N.C. Gen. Stat. § 163-28, and the Bipartisan Board would under Session Law 2017-6 (enacting N.C. Gen. Stat. § 163A-5(a)).

13. On a facial challenge, this Court cannot consider hypothetical situations that *could* sink the statute; to the contrary, Plaintiff must "establish that no set of circumstances exists under which the [a]ct would be valid."

> *Bryant*, 359 N.C at 564, 614 S.E.2d 486 (2005) (quotations omitted). . . .
>
> 14. There is evidence that supports the Bipartisan Board being able to function in politically divided situations. . . .
>
> 15. There are also numerous other boards and commissions tasked with some administrative functions that are made up of an even number of members such that tie votes and, therefore, deadlock, are hypothetical possibilities. . . .

After conceding that "circumstances could arise where a deadlock or stalemate so stifles the work of the Bipartisan Board that [the Governor] would have standing to raise a challenge that this statute is unconstitutional, not on its face but as applied to that particular situation," the panel held that Session Law 2017-6 is not unconstitutional on its face.

In the supplemental briefs that the Court requested following the filing of the panel's order, the Governor argued that "the judicial branch has subject matter jurisdiction to resolve separation of powers disputes," citing *McCrory*, 368 N.C. at 638, 781 S.E.2d at 25, *In re Alamance County Court Facilities*, 329 N.C. 84, 99, 405 S.E.2d 125, 132 (1991), and *State ex rel. Wallace v. Bone*, 304 N.C. 591, 608, 286 S.E.2d 79, 88 (1982), and that he has standing to advance the claim asserted in this complaint because the "North Carolina Constitution confers standing on the Governor to challenge statutes that cause him constitutional harm," citing Article I, Section 18 of the North Carolina Constitution and *Mangum*, 362 N.C. at 642, 669 S.E.2d at 281-82. In addressing the merits of his challenge to Session Law 2017-6, the Governor contends that the General Assembly's action in appointing the Executive Director of the Bipartisan State Board represented an unconstitutional exercise of control over an executive branch agency, with decisions authorizing legislative extensions of existing terms of office being inapplicable to a proper constitutional analysis given that those cases involved pre-existing municipal offices in which an incumbent's term was extended in lieu of holding a new election, citing *Penny v. Salmon*, 217 N.C. 276, 277, 7 S.E.2d 559, 560 (1940), and *Crump v. Snead*, 134 N.C. App. 353, 354, 517 S.E.2d 384, 385, *disc. rev. denied*, 351 N.C. 101, 541 S.E.2d 143 (1999), while the office of Executive Director of the Bipartisan State Board did not exist prior to the enactment of the challenged legislation, citing section 4(c) of Session Law 2017-6 (creating "the position of Executive Director of the State Board"), and given that the challenged legislation abolished the office

of Executive Director of the State Board of Elections, citing subsections 7(e) and (f) of Session Law 2017-6 (repealing N.C.G.S. §§ 163-26). Finally, the Governor contends that Session Law 2017-6 contravenes the separation-of-powers principles set out in *McCrory*, which require a reviewing court to focus upon the extent to which the Governor has a sufficient degree of control over executive branch agencies. According to the Governor, *McCrory* requires that "the Governor must have 'enough control' over executive branch entities and officials that possess 'final executive authority' in order to perform his constitutional duty to ensure that the laws are faithfully executed," quoting *McCrory*, 368 N.C. at 646, 781 S.E.2d at 256, with the requisite degree of control being exercised by means of appointment, supervision, and removal, citing *McCrory*, 368 N.C. at 646, 781 S.E.2d at 256. Although the General Assembly may require the appointment of statutory officers from lists and may require that appointees satisfy additional qualifications, the provisions of the challenged legislation "deprive[ ] the Governor of the ability to appoint a majority of members of the [Bipartisan] State Board who share his views and priorities."

On the other hand, the legislative leadership argues that the panel correctly decided that it lacked jurisdiction over the subject matter at issue in this case because the North Carolina Constitution provides the Governor with the authority to "make such changes in the allocation of offices and agencies and in the allocation of those functions, powers, and duties as he considers necessary for efficient administration," subject to later legislative review, quoting Article III, Section 5(10) of the North Carolina Constitution, thereby eliminating any need for the judicial branch to "interject itself into a balance struck in the text of the Constitution specifically dealing with the organization and structure of a state agency." For that reason, "[t]he question raised in this case by the Governor goes to the structure and function of the agency, which is textually committed to a balance struck in the text of the Constitution."

As far as the merits are concerned, the legislative leadership contends that *McCrory* does not necessitate the invalidation of Session Law 2017-6 because the Bipartisan State Board is structured as an independent agency. According to the legislative leadership, "the quasi-judicial nature of a commission can support its independence from being under the thumb of the executive," citing *Morrison v. Olson*, 487 U.S. 654, 687-88, 108 S. Ct. 2597, 2617, 101 L. Ed. 2d 569, 603 (1988). In addition, unlike the situation at issue here, the General Assembly appointed more members to the executive bodies at issue in *McCrory* than the Governor, citing *McCrory*, 368 N.C. at 637-38, 781 S.E.2d at 250-51.

Finally, the legislative leadership asserts that the Executive Director of the Bipartisan State Board is, on an ongoing basis, to be appointed by the members of the Bipartisan State Board and that the sole authority to remove the Executive Director is vested in the members of the Bipartisan State Board, citing section 4(c) of Session Law 2017-6. The legislative leadership further argues that the provisions of Session Law 2017-6 designating the Executive Director of the Bipartisan State Board represent nothing more than the extension of a pre-existing term of office and that the Governor has mischaracterized the role of the Executive Director, whose authority is limited to "staffing, administration, and execution of the State Board's decisions and orders," quoting section 4(c) of Session Law 2017-6.

[1] "[O]ne of the fundamental principles on which state government is constructed," John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 50 (2d ed. 2013), is that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other," N.C. Const. art. I, § 6. The legislative power is "vested in the General Assembly," N.C Const. art. II, § 1, which "enact[s] laws, within constitutional limits, to protect or promote the health, morals, order, safety, and general welfare of society," *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949) (citations omitted); *see also* N.C. Const. art. II, § 20. "The executive power of the State shall be vested in the Governor," N.C. Const. art. III, § 1, who "faithfully executes, or gives effect to, these laws," *McCrory*, 368 N.C. at 635, 781 S.E.2d at 250; *see also* N.C. Const. art. III, § 5(4).[4] Finally, "[t]he judicial power of the State, shall . . . be vested in a Court for the Trial of Impeachments and in a General Court of Justice," N.C. Const. art. IV, § 1, which "interprets the laws and, through its power of judicial review, determines whether they comply with the constitution," *McCrory*, 368 N.C. at 635, 781 S.E.2d at 250; *see also* N.C. Const. art. IV, § 1. *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 6-7 (1787).

"The political question doctrine controls, essentially, when a question becomes 'not justiciable . . . because of the separation of powers provided by the Constitution.' " *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854 (alteration in original) (quoting *Powell v. McCormack*, 395 U.S. 486, 517, 89 S. Ct. 1944, 1961, 23 L. Ed. 2d 491, 514 (1969)). "The . . . doctrine

4. As was the case in *McCrory*, 368 N.C. at 646 n. 5, 781 S.E.2d at 256 n. 5, "[o]ur opinion takes no position on how the separation of powers clause applies to those executive departments that are headed by the independently elected members of the Council of State."

excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the" legislative or executive branches of government. *Id.* at 717, 549 S.E.2d at 854 (alteration in original) (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230, 106 S. Ct. 2860, 2866, 92 L. Ed. 2d 166, 178 (1986)). "In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." *Baker v. Carr*, 369 U.S. 186, 210, 82 S. Ct. 691, 706, 7 L. Ed. 2d 663, 682 (1962) (brackets in original) (quoting *Coleman v. Miller*, 307 U.S. 433, 454-55, 59 S. Ct. 972, 982, 83 L. Ed. 1385, 1397 (1939)).

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

Id. at 211, 82 S. Ct. at 706, 7 L. Ed. 2d at 682. In other words, the Court necessarily has to undertake a separation of powers analysis in order to determine whether the political question doctrine precludes judicial resolution of a particular dispute.

The distinction between cases that do and do not involve nonjusticiable political questions can be seen by comparing our decision in *Bacon* with the Court of Appeals' decision in *News & Observer Publishing Co. v. Easley*. In *Bacon*, which involved a challenge to "the constitutionality of the Governor's exercise of his clemency power under Article III, Section 5(6) of the Constitution of North Carolina," 353 N.C. at 698, 549 S.E.2d at 843, this Court stated that "a question may be held nonjusticiable under this doctrine if it involves 'a textually demonstrable constitutional commitment of the issue to a coordinate political department,' " *id.* at 717, 549 S.E.2d at 854 (quoting *Baker*, 369 U.S. at 217, 82 S. Ct. at 710, 7 L. Ed. 2d at 686). As a result of the fact that "Article III, Section 5(6) of the State Constitution expressly commits the substance of the clemency power to the sole discretion of the Governor," we concluded that, "beyond the minimal safeguards applied to state clemency procedures," "judicial review of the exercise of clemency power would unreasonably disrupt a core power of the executive." *Id.* at 717, 549 S.E.2d at 854. On the other hand, in *News & Observer Publishing Co.*, which

also dealt with clemency-related issues, the Court of Appeals concluded that "the question before the Court is whether the [*News & Observer*] is entitled, under the Public Records Law, to certain clemency records within the possession of the Governor," 182 N.C. App. at 19, 641 S.E.2d at 702; determined that "[t]he answer to that question turns not on a political question, but on the meaning of our constitution's proviso that the Governor's power is subject to legislation 'relative to the manner of applying for pardons,' " *id.* at 19, 641 S.E.2d at 702 (quoting N.C. Const. art. III, § 5(6)); and noted that "[t]he principle that questions of constitutional and statutory interpretation are within the subject matter jurisdiction of the judiciary is just as well established and fundamental to the operation of our government as the doctrine of separation of powers," *id.* at 19, 641 S.E.2d at 702 (citations omitted). As a result, in order to resolve the justiciability issue, we must decide whether the Governor is seeking to have the judicial branch interfere with an issue committed to the sole discretion of the General Assembly or whether the Governor is seeking to have the Court undertake the usual role performed by a judicial body, which is to ascertain the meaning of an applicable legal principle, such as that embodied in N.C. Const. art. III, § 5(4).

As the briefs that he has submitted for our consideration clearly reflect, the Governor has not challenged the General Assembly's decision to merge the State Board of Elections and the Ethics Commission into the Bipartisan State Board, which is, as he appears to concede, a decision committed to the sole discretion of the General Assembly. *See* N.C. Const. art. III, § 5(10) (providing that "[t]he General Assembly shall prescribe the functions, powers, and duties of the administrative departments and agencies of the State and may alter them from time to time"). Instead, the Governor has alleged in his complaint that the enactment of Session Law 2017-6 "curtail[ed], in significant ways[, his] executive powers." More specifically, the Governor has alleged that "Session Law 2017-6 violate[s] the separation of powers by preventing the Governor from performing his core function under the North Carolina Constitution to 'take care that the laws be faithfully executed,' " quoting Article III, Section 5(4) of the North Carolina Constitution. As a result, the Governor is not challenging the General Assembly's decision to "prescribe the functions, powers, and duties of the administrative departments and agencies of the State" by merging the State Board of Elections and the Ethics Commission into the Bipartisan State Board and prescribing what the Bipartisan State Board is required or permitted to do; instead, he is challenging the extent, if any, to which the statutory provisions governing the manner in which the Bipartisan State Board is constituted and required to operate pursuant to Session Law 2017-6

impermissibly encroach upon his constitutionally established executive authority to see that the laws are faithfully executed.

As this Court explained in *McCrory*, "the separation of powers clause requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions." 368 N.C. at 636, 781 S.E.2d at 250 (citing *Hart v. State*, 368 N.C. 122, 126-27, 774 S.E.2d 281, 285 (2015)). In that case, this Court considered former Governor McCrory's "challenge [to the constitutionality of] legislation that authorize[d] the General Assembly to appoint a majority of the voting members of three administrative commissions" on the grounds "that, by giving itself the power to appoint commission members, the General Assembly ha[d] usurped Governor McCrory's constitutional appointment power and interfered with his ability to take care that the laws are faithfully executed," *id.* at 636, 781 S.E.2d at 250, and noted that, in order to decide the issues before it in that case, the Court was required to "construe[ ] and appl[y] . . . provisions of the Constitution of North Carolina," *id.* at 638-39, 781 S.E.2d at 252 (citations omitted). Instead of holding that Governor McCrory's challenge to the validity of the legislation in question involved a nonjusticiable political question, we addressed Governor McCrory's claim on the merits.[5]

Our implicit decision that Governor McCrory's claim was justiciable is fully consistent with the literal language contained in Article III, Section 5(10) of the North Carolina Constitution, which refers to "the functions, powers, and duties of the administrative departments and agencies of the State," or, in other words, to what the agencies in question are supposed to do, rather than the extent to which the Governor has sufficient control over those departments and agencies to ensure "that the laws be faithfully executed," N.C. Const. art. III, § 5(4). Alternatively, even if one does not accept this understanding of the scope of the General Assembly's authority under Article III, Section 5(10), we continue to have the authority to decide this case because the General Assembly's authority pursuant to Article III, Section 5(10) is necessarily constrained by the limits placed upon that authority by other constitutional provisions. *See Buckley v. Valeo*, 424 U.S. 1, 132, 96 S. Ct. 612, 688, 46 L. Ed. 2d 659, 752 (1976) (noting that "Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction") (citation omitted). For this reason,

5. The political question doctrine was not invoked by any party to *McCrory* or explicitly discussed in our opinion.

the Governor's authority to appoint constitutional officers pursuant to Article III, Section 5(8) is subject to the constitutional provisions limiting dual office holding, N.C. Const. art. VI, § 9, and separation of powers, *State ex rel. Wallace*, 304 N.C. at 608, 286 S.E.2d at 888 (holding that the appointment of sitting legislators to membership on administrative commissions constitutes a separation-of-powers violation); the General Assembly's exclusive authority to classify property for taxation-related purposes does not allow more favorable tax classification treatment for one religious organization as compared to another in light of the constitutional guarantees of religious liberty and equal protection, *see* N.C. Const. art. 1, §§ 13 and 19; *Heritage Village Church & Missionary Fellowship, Inc. v. State*, 299 N.C. 399, 406 n. 1, 263 S.E.2d 726, 730 n. 1 (1980); and the General Assembly's exclusive authority to enact criminal statutes, N.C. Const. art. II, § 1 (providing that the legislative power of the State is to be exercised by the General Assembly), does not authorize the enactment of ex post facto laws in violation of Article I, Section 16. As a result, under either interpretation of the relevant constitutional language, the authority granted to the General Assembly pursuant to Article III, Section 5(10)[6] is subject to other constitutional limitations, including the explicit textual limitation contained in Article III, Section 5(4).[7]

In this case, like *McCrory*, the Governor has alleged that the General Assembly "usurped [his] constitutional . . . power and interfered with

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6. The same analysis applies to Article III, Section 11 of the North Carolina Constitution (providing that, "[n]ot later than July 1, 1975, all administrative departments, agencies, and offices of the State and their respective functions, powers, and duties shall be allocated by law among and within not more than 25 principal administrative departments so as to group them as far as practicable according to major purposes"; "[r]egulatory, quasi-judicial, and temporary agencies may, but need not, be allocated within a principal department."

7. Although the legislative leadership has also suggested that the Governor is precluded from seeking relief from the judicial branch for justiciability and exhaustion-related reasons by virtue of the fact that he is entitled, under Article III, Section 5(10) of the North Carolina Constitution, to "make such changes in the allocation of offices and agencies and in the allocation of those functions, powers, and duties as he considers necessary for efficient administration," we do not find this argument persuasive given that the constitutional provision in question deals with the "functions, powers, and duties" of "the administrative departments and agencies of the State" rather than with the extent to which the Governor has the ability to control their operations in order to "take care that the laws be faithfully executed" pursuant to Article III, Section 5(4) of the North Carolina Constitution, and given that such changes become ineffective in the event that they are, prior to adjournment of the relevant legislative session "sine die," "specifically disapproved of by resolution of either house of the General Assembly or specifically modified by joint resolution of both house of the General Assembly."

his ability to take care that the laws are faithfully executed," *id.* at 636, 781 S.E.2d at 250, requiring us, consistent with *McCrory*, to "construe[ ] and appl[y] . . . provisions of the Constitution of North Carolina," *id.* at 638, 781 S.E.2d at 252. In other words, unlike *Bacon*, this case involves a conflict between two competing constitutional provisions. For that reason, this case, like *McCrory*, involves an issue of constitutional interpretation, which this Court has a duty to decide utilizing the manageable judicial standard enunciated in that decision, rather than a nonjusticiable political question arising from nothing more than a policy dispute. *See* N.C. Const. art. IV, § 1. A decision to reach a contrary result would necessarily compel the conclusion that both *McCrory* and *Wallace* were wrongly decided and sharply limit, if not eviscerate, the ability of executive branch officials to advance separation-of-powers claims. As a result, the panel erred by dismissing the Governor's complaint for lack of subject matter jurisdiction.[8]

[2] In order to have standing to maintain this case, the Governor was required to allege that he had suffered an injury as a result of the enactment of Session Law 2017-6 or, in other words, that he had "a personal stake in the outcome of the controversy." *Mangum*, 362 N.C. at 642, 669 S.E.2d at 282 (quoting *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973)) (citing N.C. Const. art. I, § 18). This Court held in *McCrory* that the Governor had standing to challenge the legislation at issue in that case on the grounds that it "interfered with his ability to take care that the laws are faithfully executed." 368 N.C. at 636, 781 S.E.2d at 250. Similarly, as is evidenced by the allegations set out in his complaint, the Governor has clearly asserted the existence of a "personal stake in the outcome of the controversy" in this case. *Mangum*, 362 N.C. at 642, 669 S.E.2d at 282. Simply put, if a sitting Governor lacks standing to maintain a separation-of-powers claim predicated on the theory that legislation impermissibly interferes with the authority constitutionally committed to the person holding that office, we have difficulty ascertaining who would ever have standing to assert such a claim. Apart from their contention that the claim advanced in the Governor's complaint is a nonjusticiable political question, which we have already rejected, the legislative leadership does not appear to explicitly contend

8. The result that we have reached with respect to the political question issue does not amount to a determination that Article III, Section 5(4) of the North Carolina Constitution trumps Article III, Section 5(10) of the North Carolina Constitution. Instead, we believe that these constitutional provisions address different issues and can be harmonized with each other so that each of them is, as should be the case, given independent meaning.

that the Governor lacks the necessary personal stake in the outcome of this controversy to deprive him of standing.[9] As a result, we hold that the panel erred by dismissing Governor Cooper's complaint for lack of standing to the extent that it did so.

[3] Finally, we must address the merits of the Governor's claim that Session Law 2017-6 "unconstitutionally infringe[s] on the Governor's executive powers in violation of separation of powers."[10] "We review constitutional questions de novo." *McCrory*, 368 N.C. at 639, 781 S.E.2d at 252 (citing *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001)). "In exercising de novo review, we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond a reasonable doubt." *Id.* at 639, 781 S.E.2d at 252 (first citing *Hart*, 368 N.C. at 131, 774 S.E.2d at 287-88; then citing *Baker v. Martin*, 330 N.C. 331, 334-35, 410 S.E.2d 887, 889 (1991)). In order to "determine whether the violation is plain and clear, we look to the text of the constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and our precedents." *Id.* at 639, 781 S.E.2d at 252 (citations omitted). A facial

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9. The legislative leadership does assert that the Governor lacks standing to maintain the present action because his alleged injuries did not result from the enactment of Session Law 2017-6. As we understand this argument, the legislative leadership contends that the injury of which the Governor complains was worked by prior legislative enactments rather than by the enactment of Session Law 2017-6. In spite of the fact that certain aspects of the manner in which the Bipartisan State Board is to be selected were reflected in prior statutory provisions, the record clearly shows that the composition of the Bipartisan State Board and the manner in which the members of the Bipartisan State Board and the Executive Director are selected, which is the focus of the Governor's separation of powers claim, resulted from the enactment of Session Law 2017-6 and represented a substantial change from prior law. Thus, we believe that the Governor is, in fact, seeking relief from an alleged injury to his constitutional executive authority stemming from the enactment of Session Law 2017-6 and that effective relief for that injury can be provided in the event that the Governor's constitutional claim proves successful on the merits.

10. In their initial brief, the legislative leadership urged us to refrain from reaching the merits in the event that we rejected their justiciability and standing contentions on the grounds that this Court is an appellate court and that the trial court had not had an opportunity to consider and address the merits of the Governor's challenge to the constitutionality of Session Law 2017-6. In view of our agreement with the legislative leadership that, in virtually all circumstances, this Court benefits from reviewing trial court decisions rather than exercising our supervisory authority in what amounts to a vacuum, we afforded the panel an opportunity to make a determination on the merits in our certification order. Having had the benefit of what is, in any realistic sense, a decision by the panel with respect to the merits of the Governor's claim, we believe that we are now in a position to evaluate the substantive validity of the Governor's challenge to Session Law 2017-6.

challenge to the constitutionality of legislation enacted by the General Assembly, which is the type of challenge asserted in the Governor's complaint, "is the most difficult challenge to mount successfully." *Hart*, 368 N.C. at 131, 774 S.E.2d at 288 (citing *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009)).

As we have already noted, the North Carolina Constitution, unlike the United States Constitution, contains an explicit separation-of-powers provision. *See* N.C. Const. art. I, § 6 (stating that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other"). For that and other reasons, "the separation of powers doctrine is well established under North Carolina law." *Bacon*, 353 N.C. at 716, 549 S.E.2d at 854 (citing, *inter alia*, *State ex rel. Wallace*, 304 N.C. at 595-601, 286 S.E.2d at 81-84 (stating at 304 N.C. at 595, 286 S.E.2d at 81, that "each of our constitutions has explicitly embraced the doctrine of separation of powers")). As we explained in *McCrory*, separation-of-powers violations can occur "when one branch exercises power that the constitution vests exclusively in another branch" or "when the actions of one branch prevent another branch from performing its constitutional duties." *McCrory*, 368 N.C. at 645, 781 S.E.2d at 256.

This Court has held that Article III, Section 5(4) of the North Carolina Constitution requires "the Governor [to] have enough control over" commissions or boards that "are primarily administrative or executive in character" "to perform his [or her] constitutional duty," *id.* at 645-46, 781 S.E.2d at 256, with the sufficiency of the Governor's "degree of control" "depend[ing] on his [or her] ability to appoint the commissioners, to supervise their day-to-day activities and to remove them from office," *id.* at 646, 781 S.E.2d at 256. In view of the fact that "each statutory scheme" is different, "[w]e cannot adopt a categorical rule that would resolve every separation of powers challenge" and "must resolve each challenge by carefully examining its specific factual and legal context." *Id.* at 646-47, 781 S.E.2d at 257. In holding that the legislation at issue in *McCrory* violated Article III, Section 5(4) of the North Carolina Constitution, we noted that the General Assembly had "appoint[ed] executive officers that the Governor ha[d] little power to remove" and left "the Governor with little control over the views and priorities of the officers that the General Assembly appoint[ed]." *Id.* at 647, 781 S.E.2d at 257.

The test adopted in *McCrory* is functional, rather than formulaic, in nature. Although we did not explicitly define "control" for separation-of-powers purposes in *McCrory*, we have no doubt that the relevant

constitutional provision, instead of simply contemplating that the Governor will have the ability to preclude others from forcing him or her to execute the laws in a manner to which he or she objects, also contemplates that the Governor will have the ability to affirmatively implement the policy decisions that executive branch agencies subject to his or her control are allowed, through delegation from the General Assembly, to make as well. In the absence of such an understanding, the power of an executive branch agency to adopt rules and regulations could be rendered completely nugatory without any separation-of-powers violation having occurred.

The Bipartisan State Board established by Session Law 2017-6, which has responsibility for the enforcement of laws governing elections, campaign finance, lobbying, and ethics, clearly performs primarily executive, rather than legislative or judicial, functions.[11] *See id.* at 646, 781 S.E.2d at 256 (referring to "the final executive authority" that the three commissions at issue in that case "possess[ed]"). The Bipartisan State Board consists of eight members appointed by the Governor, four of whom must be members of the political party with the highest number of registered affiliates selected from a list of nominees provided by the chair of the party in question and four of whom must be members of the political party with the second highest number of registered affiliates selected from a list of nominees provided by the chair of the party in question. Ch. 6, sec. 4(c), 2017-2 N.C. Adv. Legis. Serv. at 23 (enacting N.C.G.S. § 163A-2 (2017)). In addition, Session Law 2017-6, like the

11. The basic functions, powers, and duties that the Bipartisan State Board is required to perform are, of course, outlined in statutory provisions enacted by the General Assembly. The General Assembly did not, however, make all of the policy-related decisions needed to effectively administer the election, campaign finance, lobbying, and ethics laws. Instead, consistent with much modern legislation, the General Assembly has delegated to the members of the Bipartisan State Board the authority to make numerous discretionary decisions, including, but not limited to, the extent to which particular administrative rules and regulations should be adopted, N.C.G.S. § 163-22(a) and N.C.G.S. § 163-22.2; the extent to which jurisdiction should be asserted over election-related protests pending before county boards of elections, N.C.G.S. § 163-182.12; and the number and location of the early voting sites to be established in each county and the number of hours during which early voting will be allowed at each site, N.C.G.S. § 163-227.2. As a result, the General Assembly has, in the exercise of its authority to delegate the making of interstitial policy decisions to administrative agencies, given decision making responsibilities to the executive branch by way of the Bipartisan State Board. We refer to the ability of the executive branch to make these discretionary determinations as the effectuation of "the Governor's policy preferences" throughout the remainder of this opinion. The use of this expression should not be understood as suggesting that the Bipartisan State Board has the authority to make any policy decision that conflicts with or is not authorized by the General Assembly, subject to applicable constitutional limitations.

legislation governing the agencies at issue in *McCrory*, precludes the Governor from removing members of the Bipartisan State Board in the absence of "misfeasance, malfeasance, or nonfeasance," *id.*, at 24 (enacting N.C.G.S. § 163A-2(c) (2017)); *see McCrory*, 368 N.C. at 646, 781 S.E.2d at 257 (stating that "the challenged legislation sharply constrains the Governor's power to remove members of any of the three commissions, allowing him to do so only for cause") and limits the ability of persons who share the Governor's policy preferences to supervise the day-to-day activities of the Bipartisan State Board, at least in the short term, by ensuring that no one could be appointed to the position of Executive Director other than the General Assembly's appointee until May 2019. As was the case in *McCrory*, in which we determined that the General Assembly had exerted excessive control over certain executive agencies by depriving the Governor of "control over the views and priorities" of a majority of the members of the commissions at issue in that litigation, 368 N.C. at 647, 781 S.E.2d at 257, we conclude that the relevant provisions of Session Law 2017-6, when considered as a unified whole, "leave[ ] the Governor with little control over the views and priorities" of the Bipartisan State Board, *id.* at 647, 781 S.E.2d at 257, by requiring that a sufficient number of its members to block the implementation of the Governor's policy preferences be selected from a list of nominees chosen by the leader of the political party other than the one to which the Governor belongs,[12] limiting the extent to which individuals supportive of the Governor's policy preferences have the ability to supervise the activities of the Bipartisan State Board, and significantly constraining the Governor's ability to remove members of the Bipartisan State Board.

In seeking to persuade us to reach a different result, the legislative leadership has advanced a number of arguments, each of which we

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12. We are, of course, unable to conclude with absolute certainty that persons chosen by the chair of the opposing political party will invariably and in all instances act to thwart the Governor's policy preferences at every turn. However, we do not believe that the applicable standard of review, including the presumption of constitutionality, requires us to turn a blind eye to the functions appropriately performed by the leader of an opposition party in our system of government or to force the Governor to be subject to the uncertainty that will necessarily arise from a determination that the showing of an actual interference with the Governor's executive authority is a necessary prerequisite to his or her ability to challenge legislation as violative of Article III, Section 5(4) of the North Carolina Constitution. Utilizing similar logic, the Court held in *McCrory* that the Governor lacked sufficient control over the administrative commissions at issue in that case based upon the fact that a majority of appointments had been made by the members of the General Assembly. 368 N.C. at 647, 781 S.E.2d at 248. As a result, our decision in this case is fully consistent with the applicable standard of review.

have carefully considered. Among other things, the legislative leadership asserts that the General Assembly has not retained ongoing supervision or control over the Bipartisan State Board given that none of its members are either legislators, as was the case in *Wallace*, or legislative appointees, as was the case in *McCrory*. This argument rests upon an overly narrow reading of *McCrory*, which focuses upon the practical ability of the Governor to ensure that the laws are faithfully executed rather than upon (1) the exact manner in which his or her ability to do so is impermissibly limited or (2) whether the impermissible interference stems from (a) direct legislative supervision or control or from (b) the operation of some other statutory provision. Put another way, the separation-of-powers violations noted in *Wallace* and *McCrory* do not constitute the only ways in which the Governor's obligation to "faithfully execute the laws" can be the subject of impermissible interference. Instead, as *McCrory* clearly indicates, the relevant issue in a separation-of-powers dispute is whether, based upon a case-by-case analysis of the extent to which the Governor is entitled to appoint, supervise, and remove the relevant executive officials, the challenged legislation impermissibly interferes with the Governor's ability to execute the laws in any manner.

The General Assembly does, of course, have the authority pursuant to Article III, Section 5(10) of the North Carolina Constitution to specify the number of members of an executive branch commission. Moreover, the General Assembly clearly has the authority to establish qualifications for commission membership, to make certain persons ex officio members of the commission, and to mandate that differing policy preferences be reflected in the commission's membership.[13] Similarly, the General Assembly has the undoubted authority to prescribe the commission's functions, powers and duties and to determine the substance of the laws and policies that the commission is called upon to execute. Finally, the General Assembly has the authority to provide the commission with a reasonable degree of independence from short-term political interference[14] and to foster the making of independent, non-partisan decisions.

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13. Our holding in this case does not hinge upon the fact that the General Assembly has required that half of the members of the Bipartisan State Board be members of a political party other than that to which the Governor belongs; instead, our decision rests upon the totality of the limitations imposed upon the Governor's appointment, supervisory, and removal authority set out in Session Law 2017-6.

14. The Court noted in *McCrory* that the General Assembly "insulate[d] the Coal Ash Management Commission from executive branch control even more by requiring the commission to exercise its powers and duties 'independently,' without the 'supervision, direction, or control' of the Division of Emergency Management or the Department of Public

All of these determinations are policy-related decisions committed to the General Assembly rather than to this Court. The General Assembly cannot, however, consistent with the textual command contained in Article III, Section 5(4) of the North Carolina Constitution, structure an executive branch commission in such a manner that the Governor is unable, within a reasonable period of time, to "take care that the laws be faithfully executed" because he or she is required to appoint half of the commission members from a list of nominees consisting of individuals who are, in all likelihood, not supportive of, if not openly opposed to, his or her policy preferences while having limited supervisory control over the agency and circumscribed removal authority over commission members. An agency structured in that manner "leaves the Governor with little control over the views and priorities of the [majority of] officers" and prevents the Governor from having "the final say on how to execute the laws." *McCrory*, 368 N.C. at 647, 781 S.E.2d at 257. As a result, the manner in which the membership of the Bipartisan State Board is structured and operates under Session Law 2017-6 impermissibly, facially, and beyond a reasonable doubt interferes with the Governor's ability to ensure that the laws are faithfully executed as required by Article III, Section 5(4) of the North Carolina Constitution. *Id.*

[4] In addition to challenging the validity of the provisions of Session Law 2017-6 governing the composition of the Bipartisan State Board, the Governor has also challenged the statutory provisions "creat[ing] the position of Executive Director of the [Bipartisan] State Board" and making the Executive Director, who is designated as the "chief State elections official," "responsible for staffing, administration, and execution of the State Board's decisions and orders" and for performing "such other responsibilities as may be assigned by the State Board." Ch. 6, sec. 4(c), 2017-2 N.C. Adv. Legis. Serv. at 26 (enacting N.C.G.S § 163A-6 (a), (c), (d) (2017)). Although the General Assembly appointed the individual then serving as the Executive Director of the State Board of Elections to be the Executive Director of the Bipartisan State Board for a term of office lasting until at least May 2019, *see id.*, sec. 17, at 34, the Bipartisan State Board is entitled to appoint an Executive Director by a majority vote after that point, N.C.G.S. § 163A-6 (2017). As a result, the relevant provisions of Session Law 2017-6 ensure that the Governor will not have

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Safety." 368 N.C. at 646, 781 S.E.2d at 257. Needless to say, we did not hold in *McCrory*, and do not hold now, that the entire concept of an "independent" agency is totally foreign to North Carolina constitutional law. Instead, the degree of independence with which an agency is required to operate is simply a factor that must be considered in making the required separation-of-powers determination.

any control over the identity of the Executive Director of the Bipartisan State Board until May 2019 and, perhaps, even after that time, given the manner in which the General Assembly has structured the membership of the Bipartisan State Board in Session Law 2017-6, *id.* § 163A-2.

Although the legislative leadership argues that, rather than appointing the Executive Director of the Bipartisan State Board, the General Assembly simply extended the term of the Executive Director of the State Board of Elections, we do not find that argument persuasive. As an initial matter, given that Session Law 2017-6 abolished the State Board of Elections, the position of Executive Director of that body no longer exists. Instead, Session Law 2017-6 expressly "create[s] the position of Executive Director of the [Bipartisan] State Board," *id.* § 163-6(a), clearly indicating that the position of Executive Director of the Bipartisan State Board is a new office rather than the continuation of an existing one. In addition, given the General Assembly's decision to combine the functions previously performed by the State Board of Elections and the Ethics Commission into the functions to be performed by a single agency, the duties assigned to the Executive Director of the Bipartisan State Board are necessarily more extensive than the duties assigned to the Executive Director of the State Board of Elections. *See* Ch. 6, sec. 4(c), at 26 (enacting N.C.G.S. § 163A-1 (2017)). As a result, we cannot agree that the General Assembly's decision to designate the Executive Director of the State Board of Elections as the Executive Director of the Bipartisan State Board constitutes nothing more than the exercise of the General Assembly's authority to extend the term of an existing officeholder in order to achieve some valid public policy goal.

As the Bipartisan State Board is structured in Session Law 2017-6, the General Assembly's decision to appoint the Executive Director of the Bipartisan State Board and to preclude the Bipartisan State Board from either selecting a new Executive Director prior to May 2019 or removing the Executive Director in the absence of "cause," N.C.G.S. § 163A-6(b), could impermissibly constrain the Governor's ability to ensure that the laws are faithfully executed. *See McCrory*, 368 N.C. at 645-46, 781 S.E.2d at 256-57. On the other hand, in the event that the membership of the Bipartisan State Board is structured in such a manner as to pass constitutional muster under Article III, Section 5(4) of the North Carolina Constitution and the Board is given adequate control over the manner in which the duties assigned to the Executive Director are performed, the Bipartisan State Board's ability to supervise and control the actions of the Executive Director might suffice to give the Governor adequate control over the Executive Director's activities, which appear to be

primarily administrative in nature,[15] for separation-of-powers purposes. For that reason, an interim appointment to the position of Executive Director of the Bipartisan State Board made by the General Assembly for a limited term might not constitute a separation-of-powers violation in the event that the Governor otherwise has sufficient control over the Bipartisan State Board. For that reason, given our determination that, in light of the totality of the circumstances, the manner in which the members of the Bipartisan State Board must be selected pursuant to Session Law 2017-6 is constitutionally invalid, we need not reach the issue of whether the provisions governing the selection of the Executive Director constitute a separate violation of Article III, Section 5(4) of the North Carolina Constitution at this time and decline to do so.

[5] Finally, the Governor has questioned the validity of the provisions of Session Law 2017-6 requiring that the office of the chair of the Bipartisan State Board be rotated between the state's two largest political parties and the provisions of Session Law 2017-6 restructuring the county boards of elections. Among other things, the Governor contends that the restructuring of the county boards of elections worked by Session Law 2017-6 "interferes with the executive function by creating deadlocked structures" and argues that the manner in which the county boards of elections are structured, coupled with the similar provisions governing the structure of the Bipartisan State Board, are likely to have the effect

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15. In seeking to persuade us to hold that the provisions of Session Law 2017-6 governing the appointment of the Executive Director, standing alone, work a separation-of-powers violation, the Governor has pointed to a number of statutory provisions assigning various responsibilities to the Executive Director and argued that his lack of control over the manner in which the Executive Director carries out these responsibilities impermissibly impairs his ability to ensure that the laws are faithfully executed. A number of these statutory provisions, including those portions of N.C.G.S. § 163-23 requiring the Executive Director to notify candidates and treasurers of the dates by which certain reports must be filed, that required reports had not been filed in a timely manner, and that certain complaints had been filed, and the provision of N.C.G.S. § 163-278.24 requiring the Executive Director to examine each report to determine if it complies with the relevant legal requirements, strike us as primarily ministerial, rather than discretionary, in nature. Although other statutory provisions do, as the Governor suggests, appear to authorize the Executive Director to take action that is discretionary in nature, *see*, *eg.*, N.C.G.S. § 163-271 (authorizing the Executive Director to take action in the event that certain emergencies affecting the holding of an election have occurred); N.C.G.S. § 163-132.4 (authorizing the Executive Director to promulgate directives to county boards of election); and N.C.G.S. § 163-278.23 (authorizing the Executive Director to issue written advisory opinions concerning campaign finance issues upon which candidates and treasurers are entitled to rely), the scope of the Executive Director's authority to engage in these actions may well be limited by other statutory provisions, including, for example, N.C.G.S. § 163A-6(c), which makes the Executive Director "responsible for staffing, administration, and execution of the [Bipartisan] State Board's decisions and orders" and "perform[ing] such other responsibilities as may be assigned by the [Bipartisan] State Board."

of thwarting the implementation of any particular Governor's election law-related policy preferences given that both boards will have a sufficient number of members who are unlikely to share the Governor's policy views to preclude the implementation of his or her preferred method of executing the elections laws. Although we agree that the provisions of Session Law 2016-7 governing the selection of the chair of the Bipartisan State Board and the manner in which the county boards of elections are structured have the effect of compounding the separation-of-powers violation which we have identified earlier in this opinion, we further note that the Governor has not argued before this Court that either of these sets of provisions, taken in isolation, work an independent separation-of-powers violation. In light of the manner in which the Governor has argued these issues before this Court and our decision to invalidate the provisions of Session Law 2017-6 relating to the composition of the Bipartisan State Board, we express no opinion concerning the extent, if any, to which an independent separation-of-powers challenge relating to provisions of Session Law 2017-6 governing the rotation of the office of chair of the Bipartisan State Board among the two largest political parties or the provisions of Session Law 2017-6 governing the composition of the county boards of elections would have merit.

[6] As we have already noted, the General Assembly noted an appeal from the temporary restraining order that the panel entered following the filing of the Governor's complaint. However, given that this temporary restraining order was dissolved relatively shortly after its entry, any decision that we might make with respect to its validity "cannot have any practical effect on the existing controversy." *Roberts v. Madison Cty. Realtors Ass'n*, 344 N.C. 394, 398-399, 474 S.E.2d 783, 787 (1996). Moreover, since we conclude that the issues that had to be addressed during the proceedings leading to the entry of the challenged temporary restraining order are unlikely to recur, we do not believe that the legislative leadership's challenge to the entry of the temporary restraining order is "capable of repetition, yet evading review." *See Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 286, 292, 517 S.E.2d 401, 405 (1999) (stating that "[a]n otherwise moot claim falls within this exception where '(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again' " (quoting *Ballard v. Weast*, 121 N.C. App. 391, 394, 465 S.E.2d 565, 568 (alterations in the original), *appeal dismissed and disc. rev. denied*, 343 N.C. 304, 471 S.E.2d 66 (1996))). Similarly, given that the temporary restraining order has been dissolved and that we have decided the Governor's constitutional claim on the

merits, we are not persuaded that a decision to address the legislative leadership's challenge to the temporary restraining order would, at this point, serve the "public interest." *Cape Fear River Watch v. N.C. Envtl. Mgmt. Comm'n*, 368 N.C. 92, 100, 772 S.E.2d 445, 450 (2015) (declining to reach the merits of an obviously significant issue relating to the regulatory treatment of coal ash lagoons because any decision to do so would not "have any practical impact"). For all of these reasons, the legislative leadership's appeal from the temporary restraining order is dismissed as moot.

Thus, we hold that the panel erred by dismissing the Governor's complaint. Simply put, the claim asserted in the Governor's complaint does not raise a nonjusticiable political question, and the Governor clearly has standing to assert the claim that he has presented for consideration by the judicial branch. In addition, for the reasons set forth in more detail above, the provisions of Session Law 2017-6 concerning the membership of and appointments to the Bipartisan State Board, taken in context with the other provisions of that legislation, impermissibly interfere with the Governor's ability to faithfully execute the laws in violation of Article III, Section 5(4) of the North Carolina Constitution. Finally, the legislative leadership's appeal from the 28 April 2017 temporary restraining order is moot and does not come within the proper scope of either of the exceptions to the mootness doctrine upon which the legislative leadership relies. As a result, (1) the panel's 1 June 2017 order is reversed, with this case being remanded to the panel for further proceedings not inconsistent with this opinion, including the entry of a final judgment on the merits, and (2) the legislative leadership's appeal from the 28 April 2017 temporary restraining order is dismissed as moot.

ORDER ENTERED ON 1 JUNE 2017 REVERSED AND REMANDED; APPEAL FROM ORDER ENTERED ON 28 APRIL 2017 DISMISSED AS MOOT.

Chief Justice MARTIN dissenting.

The majority opinion imposes a constitutional requirement that the Governor be able to appoint a majority of the members of the Bipartisan State Board of Elections and Ethics Enforcement from his own political party. In so doing, the majority deviates from our holding in *State ex rel. McCrory v. Berger*, 368 N.C. 633, 781 S.E.2d 248 (2016). Because the majority opinion impermissibly constrains the General Assembly's constitutional authority to determine the structure of state administrative bodies, I respectfully dissent.

We must resolve every separation of powers challenge "by carefully examining its specific factual and legal context." *Id.* at 646-47, 781 S.E.2d at 257. The type of separation of powers violation that the Governor alleges here occurs "when the actions of one branch prevent another branch from performing its constitutional duties." *Id.* at 645, 781 S.E.2d at 256 (citing *Bacon v. Lee*, 353 N.C. 696, 715, 549 S.E.2d 840, 853, *cert. denied*, 533 U.S. 975, 122 S. Ct. 22 (2001)). When this type of violation is alleged, we must determine whether the Governor has "enough control" over administrative bodies that have final executive authority to be able to perform his constitutional duties. *Id.* at 646, 781 S.E.2d at 256. *McCrory* set forth a functional analysis to be applied in this context, one that focuses not on the precise mechanism by which the Governor's power is allegedly interfered with but instead on the extent to which the challenged legislation limits the Governor's ability to perform a core executive duty. *See id.* at 645-47, 781 S.E.2d at 256-57.

To determine whether the Governor had "enough control" under the circumstances of *McCrory*, we noted several aspects of that case that were relevant to our analysis. There, each commission created by the challenged legislation—specifically, the Coal Ash Management Commission, the Mining Commission, and the Oil and Gas Commission—"ha[d] final authority over executive branch decisions." *Id.* at 645, 781 S.E.2d at 256. The General Assembly appointed a majority of the voting members of each of the three commissions. *See id.* at 646, 781 S.E.2d at 256. And the challenged legislation allowed the Governor to remove commission members only for cause. *Id.* at 646, 781 S.E.2d at 257. By having majority control over commissions with final executive authority, the General Assembly prevented the Governor from performing his constitutional duty to take care that the laws be faithfully executed, and the General Assembly retained too much control over that power through its legislative appointments. *Id.* at 647, 781 S.E.2d at 257 (citing *Bacon*, 353 N.C. at 717-18, 549 S.E.2d at 854; and *State ex rel. Wallace v. Bone*, 304 N.C. 591, 608, 286 S.E.2d 79, 88 (1982)); *see also* N.C. Const. art. III, § 5(4) ("The Governor shall take care that the laws be faithfully executed.").

McCrory therefore clarified that the Governor must have "enough control" over a body with final executive authority, such as by an appropriate combination of appointment and removal powers, to ensure that the laws are faithfully executed. Contrary to what the majority suggests, however, *McCrory* did not mandate that the Governor be able to appoint a *majority* of voting members who share his views and priorities to every executive branch board or commission. Nor did it say that the Governor himself had to have "the final say on how to execute the

laws." *Cf. McCrory*, 368 N.C. at 647, 781 S.E.2d at 257 (referring to "a *commission* that has the final say on how to execute the laws" (emphasis added)). As the majority says, *McCrory* did essentially hold that legislation is unconstitutional when it "leaves the Governor with little control over the views and priorities of the [majority of] officers" on an executive branch board or commission, at least when (as in *McCrory*) only one other appointing authority is selecting that entire majority. *See id.* at 647, 781 S.E.2d at 257. But that is just another way of saying that, in that circumstance, the Governor may not be left with a *minority* of appointees.

In this case, even if having to appoint half of the members of the Bipartisan State Board from a list provided by the chair of the opposition party is tantamount to those members being appointed by someone else, that still leaves the Governor with the ability to appoint *half* of the members from his own party—not a minority. The majority purports to simply apply *McCrory* but, like a funhouse mirror, distorts it instead.

As the three-judge panel recognized, Session Law 2017-6 gives the Governor enough control over the Board to avoid violating the separation of powers clause. "Enough control" does not mean unlimited or unbridled control. It does not necessarily mean majority control, either. It simply means that the Governor must not be compelled to enforce laws while having little or no control over how that enforcement occurs. *See id.* at 647, 781 S.E.2d at 257. Here, the Board requires an affirmative vote of five of its members to take any action, Act of Apr. 11, 2017, ch. 6, sec. 4(c), 2017-2 N.C. Adv. Legis. Serv. 21, 25 (LexisNexis) (codified at N.C.G.S. § 163A-3(c) (2017)), and the Governor has enough control over the Board because he appoints half of its members from his own political party, *see id.* at 23 (codified at N.C.G.S. § 163A-2(a) (2017)). This means that the Board may not take any action without at least one vote of a member appointed by the Governor from his own party. At least one of those appointees, in other words, will cast the deciding vote when the Board is otherwise divided along party lines. Conversely, the four appointees from the Governor's party can veto any action that the opposition-party members of the Board otherwise want to take.[1]

1. To the extent that the Governor argues that the structure of the Bipartisan State Board makes it likely to deadlock rather than reach a five-vote consensus, this argument is speculative and therefore not appropriate for consideration on a facial challenge. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-50, 128 S. Ct. 1184, 1190 (2008) ("In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases."); *accord Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009).

Additionally, the Governor has the exclusive power to remove members of the Bipartisan State Board for misfeasance, malfeasance, or nonfeasance. *See id.* at 24 (codified at N.C.G.S. § 163A-2(c) (2017)). Although this is the same amount of removal power that the Governor had in *McCrory*, *see* 368 N.C. at 637-38, 781 S.E.2d at 251, and although it is limited to for-cause instances, this removal power is robust enough to address any concerns peculiar to this Board—namely, that Board members could violate the public trust by using their official positions for obviously malicious or purely partisan purposes. *See Malfeasance*, *Black's Law Dictionary* (10th ed. 2014) ("A wrongful, unlawful, or dishonest act; esp., wrongdoing or misconduct by a public official . . . ."). Giving the Governor the power to remove members *without* cause, moreover, would leave the Board open to political coercion. *Cf. Wiener v. United States*, 357 U.S. 349, 353, 355-56, 78 S. Ct. 1275, 1278, 1279 (1958) (reasoning that the War Claims Commission's need for insulation from political coercion weighed in favor of the President being able to remove Commission members only for cause).[2]

Let's not lose sight of the Board's purpose, which is to administer elections and adjudicate ethics complaints. The structure and makeup of the Board requires members to cooperate in a bipartisan way before taking any official action and encourages neutrality and fairness.[3] But,

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2. The majority also argues that, by selecting the most recent Executive Director of the prior State Board of Elections to be an interim Executive Director of the Bipartisan State Board until May 2019, Session Law 2017-6 "limits the ability of persons who share the Governor's policy preferences to supervise the day-to-day activities of the Bipartisan State Board." But the Executive Director does not supervise the Bipartisan State Board; in fact, the opposite is true. *See* Act of Apr. 11, 2017, ch. 6, sec. 4(c), 2017-2 N.C. Adv. Legis. Serv. 21, 26 (LexisNexis) (codified at N.C.G.S. § 163A-6(c) (2017)) (noting that the Executive Director is responsible for "staffing, administration, and execution of *the [Bipartisan] State Board's decisions and orders*," and also "perform[s] such other responsibilities *as may be assigned by the [Bipartisan] State Board*" (emphases added)). The majority seems to recognize this very fact when it concedes that the "Executive Director's activities . . . appear to be primarily administrative in nature."

3. Preserving confidence in the political neutrality and operational independence in the administration of elections is essential. *See Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S. Ct. 5, 7 (2006) (per curiam) ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy."); *cf.* Christopher S. Elmendorf, *Election Commissions and Electoral Reform: An Overview*, 5 Election L.J. 425, 425 (2006) (describing the recent interest in creating "politically insulated bodies to administer elections" to avoid partisan favoritism during those elections); Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 Wash. & Lee L. Rev. 937, 978-89 (2005) (describing recent electoral controversies in the United States and advocating for nonpartisan election administration). The "specific factual . . . context" of *McCrory*—which involved complex areas of

strangely, the majority opinion constitutionalizes a *partisan* makeup of the Bipartisan State Board, which threatens to inject political gamesmanship into the implementation of our election and ethics laws and undermines the neutrality inherent in an evenly divided bipartisan composition.

Indeed, in light of today's holding, the Federal Election Commission—which is the closest federal analogue to the Bipartisan State Board—would be unconstitutional under North Carolina law. The FEC is composed of six voting members, no more than three of whom may be from the same political party, and the voting members are appointed by the President and confirmed by the Senate. *See* 52 U.S.C. § 30106(a) (Supp. III 2015). Does the majority really believe that our state constitution prohibits neutral, bipartisan election boards?

It is beyond question that the courts should have "neither FORCE nor WILL but merely judgment." *United States v. Hatter*, 532 U.S. 557, 568, 121 S. Ct. 1782, 1791 (2001) (quoting *The Federalist* No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). "Our constitutionally assigned role is limited to a determination of whether the legislation is plainly and clearly prohibited by the constitution." *Hart v. State*, 368 N.C. 122, 127, 774 S.E.2d 281, 285 (2015); *see also Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) (explaining that legislation will not be invalidated unless it is unconstitutional "beyond reasonable doubt" (quoting *Gardner v. City of Reidsville*, 269 N.C. 581, 595, 153 S.E.2d 139, 150 (1967))); *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989) ("[This Court] will not lightly assume that an act of the legislature violates the . . . Constitution . . . ."). By contrast, the General Assembly acts as the "arm of the electorate," *McCrory*, 368 N.C. at 639, 781 S.E.2d at 252 (quoting *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (per curiam)), and is constitutionally empowered to organize the departments and agencies of our state government, *see* N.C. Const. art. II, § 1; *id.* art. III, § 5(10); *see also Wallace*, 304 N.C. at 595-96, 286 S.E.2d at 82. The General Assembly could, of course, choose to give the Governor the ability to appoint a majority of appointees, without any constraints, to any given executive branch board or commission. But doing so is the prerogative of the General Assembly, not of the courts. *See In re Alamance Cty. Ct. Facils.*, 329 N.C. 84, 95, 405 S.E.2d 125, 130 (1991) ("The courts have absolutely no authority to

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state environmental regulation—called for a substantial degree of executive oversight and policy discretion. *McCrory*, 368 N.C. at 646-47, 781 S.E.2d at 257. But the specific factual context of this case—which involves administration of election and ethics laws—calls for neutrality and independence.

control or supervise the power vested by the Constitution in the General Assembly as a coordinate branch of the government." (quoting *Person v. Bd. of State Tax Comm'rs*, 184 N.C. 499, 503, 115 S.E. 336, 339 (1922))).

I would hold that, by giving the Governor appointment and removal power over Bipartisan State Board members, and by allowing the Governor to appoint half of those members from his own political party, the General Assembly has satisfied the requirements established by our constitution. *See Hart*, 368 N.C. at 126, 774 S.E.2d at 284 ("If constitutional requirements are met, the wisdom of the legislation is a question for the General Assembly."); *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961) ("The wisdom and expediency of a statute is for the legislative department, when acting entirely within constitutional limits."). The majority instead constitutionalizes a requirement that the Governor be able to appoint a majority of Bipartisan State Board members from his own political party—to a board responsible for administering our state's election and ethics laws, no less.[4] By doing so, this Court has encroached on the General Assembly's constitutional authority and placed the courts in the position of micromanaging the organization and reorganization of state government. Our decision in *McCrory* does not compel this result, and the prudential exercise of our limited role counsels against it. "Just as the legislative and executive branches of government are expected to operate within their constitutionally defined spheres, so must the courts." *Hart*, 368 N.C. at 126, 774 S.E.2d at 285.[5] I therefore respectfully dissent.

Justice JACKSON joins in this dissenting opinion.

Justice NEWBY dissenting.

This case presents the question of whether the General Assembly has the authority to create an independent, bipartisan board to administer the laws of elections, ethics, lobbying, and campaign finance. Because the state constitution expressly commits this specific power to the legislative branch, this Court lacks the authority to intervene;

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4. As the three-judge panel warned, giving the Governor the degree of control that he seeks will prevent the board from functioning like the former State Board of Elections did—as "an independent regulatory and quasi-judicial agency."

5. I share Justice Newby's concerns about the breadth of the majority opinion and its implications for judicial encroachment on the role of the General Assembly under "our tripartite system of government." *Bacon*, 353 N.C. at 712, 549 S.E.2d at 851. I see these concerns as properly addressed in the context of analyzing the merits of the case.

the issue presents a nonjusticiable political question. In exercising judicial power under these circumstances, this Court violates the very separation-of-powers principle it claims to protect. The Court strips the General Assembly of its historic, constitutionally prescribed authority to make the laws and creates a novel and sweeping constitutional power in the office of Governor—the authority to implement personal policy preferences. In doing so, the Court ignores the carefully crafted, express constitutional roles of the political branches and boldly inserts the judiciary into the political, legislative process. If the Court should reach the merits, I would agree with the analysis of Chief Justice Martin's dissent; however, because the trial court correctly held that this case presents a nonjusticiable political question, I dissent separately.

Under the state constitution, the General Assembly considers various policy alternatives, and those measures enacted become the laws. The Governor may influence the lawmaking process and can even veto a measure. Nevertheless, once the General Assembly passes a law, the constitution requires the Governor to "faithfully" execute "the laws." "The laws" are not the Governor's policy preferences, but are those measures enacted by the General Assembly.

I.

The idea of the judiciary preventing the legislature, through which the people act, from exercising its power is the most serious of judicial considerations. *State ex rel. McCrory v. Berger*, 368 N.C. 633, 650, 781 S.E.2d 248, 259 (2016) (Newby, J., concurring in part and dissenting in part). As the agent of the people's sovereign power, *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 787, 787 (1895), the General Assembly has the presumptive power to act, *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989) ("[G]reat deference will be paid to acts of the legislature—the agent of the people for enacting laws."). Possessing plenary power, the General Assembly is only limited by the express terms of the constitution. *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891-92 (1961).

When this Court strikes down an act of the General Assembly, it prevents an act of the people themselves. *Baker v. Martin*, 330 N.C. 331, 336-37, 410 S.E.2d 887, 890 (1991); *see also McIntyre*, 254 N.C. at 515, 119 S.E.2d at 891 ("The courts will not disturb an act of the law-making body unless it runs counter to a constitutional limitation or prohibition.").[1] A

1. *See, e.g.*, *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 189, 581 S.E.2d 415, 429 (2003) ("By seeking to curb unlawful discrimination by regulating covered

constitutional limitation upon the General Assembly must be expressed in the constitutional text. *Preston*, 325 N.C. at 448-49, 385 S.E.2d at 478 ("All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution." (citations omitted)). Thus, a claim that a law is unconstitutional must surmount the high bar imposed by the presumption of constitutionality and meet the highest quantum of proof, a showing that the statute is unconstitutional beyond a reasonable doubt. *Baker*, 330 N.C. at 334-37, 410 S.E.2d at 889-90.

II.

Since 1776 our constitutions have recognized that all political power resides in the people, N.C. Const. art. I, § 2; N.C. Const. of 1868, art. I, § 2; N.C. Const. of 1776, Declaration of Rights § I, and is exercised through their elected officials in the General Assembly, N.C. Const. art. II, § 1; N.C. Const. of 1868, art. II, § 1; N.C. Const. of 1776, § I. *See Jones*, 116 N.C. at 570, 21 S.E. at 787; *see also* John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 95 (2d ed. 2013) [hereinafter *State Constitution*] ("The legislative power is vested in the General Assembly, so called because all the people are present there in the persons of their representatives."). The structure of the bicameral legislative branch itself diffuses its power, *see McCrory*, 368 N.C. at 653, 781 S.E.2d at 261, and the people themselves limit legislative power by express constitutional prohibitions, *see Baker*, 330 N.C. at 338-39, 410 S.E.2d at 891-92.

Accountable to the people, N.C. Const. art. II, §§ 3, 5, through the most frequent elections, *id.* art. II, §§ 2, 4, "[t]he legislative branch of government is without question 'the policy-making agency of our government . . . . The General Assembly is the 'policy-making agency' because it

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employers, the enabling legislation and the Ordinance have the practical effect of regulating labor, as forbidden by Article II, Section 24."); *State v. Elam*, 302 N.C. 157, 160, 273 S.E.2d 661, 664 (1981) (noting that the General Assembly "was without authority to enact G.S. 15A-1446(d)(6) [affecting appellate rules]," as doing so violated Article IV, Section 13(2), providing that "[t]he Supreme Court shall have exclusive authority to make rules of practice and procedure for the Appellate Division" (second alteration in original) (quoting N.C. Const. art. IV, § 13(2))); *Sir Walter Lodge, No. 411, I.O.O.F. v. Swain*, 217 N.C. 632, 637-38, 9 S.E.2d 365, 368-69 (1940) (General Assembly exceeded its power under Article V, Section 5 to grant tax exemptions for property held for certain purposes.); *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 6-7 (1787) (Statute directing that suits brought by claimants of property confiscated during the American Revolution should be dismissed exceeded General Assembly's lawmaking power, as it denied the right to trial by jury guaranteed under Section IX of the Declaration of Rights in the North Carolina Constitution of 1776.).

is a far more appropriate forum than the courts for implementing policy-based changes to our laws," *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004) (quoting *McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956)). *See also McCrory*, 368 N.C. at 653, 781 S.E.2d at 261 ("The diversity within the [legislative] branch . . . ensures healthy review and significant debate of each proposed statute, the enactment of which frequently reaches final form through compromise.").

Article III vests primary executive power with the Governor. N.C. Const. art. III, § 1. Though each of our state constitutions has placed executive power in the Governor generally, *id.* art. III, § 1; N.C. Const. of 1868, art. III, §§ 1, 4; N.C. Const. of 1776, § XIX, the constitutional powers of the executive have always been divided among various officials, N.C. Const. art. III, §§ 7(1)-(2), 8, with the Governor acting as chief executive, *id.* art. III, §§ 1, 5, within a multimember executive branch. *See McCrory*, 368 N.C. at 655-57, 781 S.E.2d at 262-63.

Unlike the General Assembly, the Governor historically has only those powers expressly granted by the constitution. *E.g.*, N.C. Const. art. III, § 5 (outlining the "Duties of Governor"); N.C. Const. of 1868, art. III, § 6 ("to grant reprieves, commutations and pardons"); *id.*, art. III, § 9 ("to convene the General Assembly in extra session"); N.C. Const. of 1776, § XIX (including the "Power to draw for and apply such Sums of Money as shall be voted by the General Assembly" and to exercise clemency, "the Power of granting Pardons and Reprieves"). Among the express constitutional duties of the Governor is to "take care that the laws be faithfully executed." N.C. Const. art. III, § 5(4). This provision does not create an independent, policymaking power in the Governor; it simply requires the Governor to enforce "the laws" as passed by the General Assembly. *See Winslow v. Morton*, 118 N.C. 486, 489-90, 24 S.E. 417, 418 (1896) (acknowledging that, when the constitution authorizes the General Assembly to legislate, the Governor, "as the constituted head of the executive department," is charged "with the duty of seeing that the statute is carried into effect"). Nowhere does the text of the constitution grant the Governor the authority to implement personal policy choices.

While Article III generally outlines executive authority, it nonetheless specifies numerous occasions when the legislature shares in the various responsibilities.[2] Only recently have the people, by constitutional

2. *See* N.C. Const. art. III, § 5(2) (Governor recommends to the General Assembly "such measures as he shall deem expedient."); *id.* art. III, § 5(3) (Governor prepares and recommends comprehensive budget to General Assembly for enactment and, after enactment, Governor shall effect the necessary economies to prevent deficits.); *id.* art. III, § 5(6) (Governor may grant clemency "subject to regulations prescribed by law relative to

amendment, allowed the Governor to participate in lawmaking through the power of gubernatorial veto. *See* Act of Mar. 8, 1995, ch. 5, secs. 3, 4, 1995 N.C. Sess. Laws 6, 8 (establishing referendum to amend the constitution to provide gubernatorial veto to take effect 1 January 1997). Nonetheless, a three-fifths vote in each legislative chamber can override a veto. N.C. Const. art. II, § 22(1). As illustrated by the gubernatorial veto provision, the constitutional text indicates the balance struck between the executive and legislative branches, granting the legislature the ultimate lawmaking authority. Only the people, by constitutional amendment, can change that power balance. *McCrory*, 368 N.C. at 654, 781 S.E.2d at 262.

This Court's decision in *Winslow v. Morton* illustrates how the aforementioned constitutional powers of the legislative and executive branches apply without conflict. In *Winslow* this Court reviewed the historic and express gubernatorial role of commander-in-chief of the militia. 118 N.C. at 488, 24 S.E. at 417. In comparing that role to the federal Executive, the Court noted that Congress, under the Federal Constitution, may provide by law for "raising, equipping and maintaining armies and navies" and "may make rules for the government of the land and naval forces." *Id.* at 489, 24 S.E. at 418 (citation omitted). "When Congress asserts its authority . . . within the purveiw [sic] of its powers the President is deprived of the supreme power of military head of the Government" and instead "incurs the obligation as Chief Executive to see that the laws made by the legislative branch of the government are faithfully executed." *Id.* at 489, 24 S.E. at 418 (citation omitted). In the same way,

> the Constitution of North Carolina (Art. XII, sec. 2) having authorized the Legislature "to provide for the organization, arming, equipping and discipline of the militia," where it passes an act in pursuance of this section, it imposes *pro tanto* a limit upon the incidental authority of the Governor, as commander in chief and charges him, as the constituted head of the executive department (Article III, section 1), with the duty of seeing that the statute is carried into effect.

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the manner of applying for pardons."); *id.* art. III, § 5(7) (Governor may convene General Assembly in extra session.); id. art. III, § 5(8) ("Governor shall nominate and by and with the advice and consent of a majority of the Senators appoint all officers whose appointments are not otherwise provided for."); *id.* art. III, § 6 (Lieutenant Governor "shall perform such additional duties as the General Assembly or the Governor may assign to him."); *id.* art. III, § 7(2) ("[R]espective duties [of the Council of State] shall be prescribed by law.").

Id. at 489-90, 24 S.E. at 418 (citing N.C. Const. of 1868, art. III, § 1, and quoting *id.*, art. XII, § 2).

Synthesizing the executive's constitutional role as commander-in-chief with the legislature's lawmaking power, the Court concluded that the Governor could in his discretion "dismiss officers of the militia when his powers and duties are not defined by any legislative act." *Id.* at 490, 24 S.E. at 418 ("The power to dismiss being conferred by the constitutional provision and affirmed by statute, it is clear that the Governor may still lawfully exercise it, unless the Legislature, by virtue of its authority to organize and discipline the militia, has either expressly or by implication repealed the statute."). Once the General Assembly limited the Governor's powers and duties by statute, however, he was constitutionally required to execute the laws as enacted. *Winslow* further illustrates the general principle that the specific and express allocations of authority between the branches as established by the text must be construed harmoniously.

III.

"The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. The separation-of-powers clause is located within the Declaration of Rights of Article I, an expressive yet nonexhaustive list of protections afforded to citizens against government intrusion, along with "the ideological premises that underlie the structure of government." *State Constitution* 46. The placement of the clause there suggests that keeping each branch within its described spheres protects the people by limiting overall governmental power. The clause does not establish the various powers but simply states the powers of the branches are "separate and distinct." N.C. Const. art. I, § 6. The constitutional text develops the nature of those powers. *State Constitution* 46 ("Basic principles, such as popular sovereignty and separation of powers, are first set out in general terms, to be given specific application in later articles.").

Thus, the separation-of-powers clause "is to be considered as a general statement of a broad, albeit fundamental, constitutional principle," *State v. Furmage*, 250 N.C. 616, 627, 109 S.E.2d 563, 571 (1959), and must be considered with the related, more specific provisions of the constitution that outline the practical workings for governance,[3] *see*

3. *Compare Piedmont Publ'g Co. v. City of Winston-Salem*, 334 N.C. 595, 598, 434 S.E.2d 176, 177-78 (1993) ("One canon of construction is that when one statute deals with a particular subject matter in detail, and another statute deals with the same subject matter in general and comprehensive terms, the more specific statute will be construed as

N.C. Const. art. II (providing the framework for legislative power); *id.* art. III (providing the framework for executive power); *id.* art. IV (providing the framework for judicial power). "Nowhere was it stated that the three powers or branches had to be equal. In fact, although the balance occasionally shifted, the preponderant power has always rested with the legislature." *State Constitution* 50.

Given that "a constitution cannot violate itself," *Leandro v. State*, 346 N.C. 336, 352, 488 S.E.2d 249, 258 (1997), a branch's exercise of its express authority by definition comports with separation of powers. A violation of separation of powers only occurs when one branch of government exercises, or prevents the exercise of, a power reserved for another branch of government. *McCrory*, 368 N.C. at 660, 781 S.E.2d at 265.[4] Understanding the prescribed powers of each branch, as divided between the branches historically and by the text itself, is the basis for stability, accountability, and cooperation within state government. *See State v. Emery*, 224 N.C. 581, 584, 31 S.E.2d 858, 861 (1944) ("[Constitutions] should receive a consistent and uniform construction . . . even though circumstances may have so changed as to render a different construction desirable.").

IV.

When confronted with an alleged separation-of-powers violation, a court must first determine if the conflict is nonjusticiable under the political question doctrine. Under this doctrine, courts will refuse to

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controlling."), *with Preston*, 325 N.C. at 449, 385 S.E.2d at 478 ("Issues concerning the proper construction of the Constitution of North Carolina 'are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments.' " (quoting *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953))).

4. A coordinate branch may not encroach upon or exercise a power that the text of the state constitution expressly allocates to another branch. *See, e.g.*, *Bacon v. Lee*, 353 N.C. 696, 704, 549 S.E.2d 840, 846-47 (2001) (recognizing that any substantive review of the Governor's express constitutional authority to grant clemency would have resulted in an attempt by the judiciary to exercise a power reserved for the executive branch, thus violating separation of powers); *Elam*, 302 N.C. at 160, 273 S.E.2d at 664 (preventing the General Assembly from making rules for the state's appellate courts because those powers were reserved for the Supreme Court by express provision in Article IV, Section 13(2) of the state constitution); *Person v. Bd. of State Tax Comm'rs*, 184 N.C. 499, 502-04, 115 S.E. 336, 339-40 (1922) (concluding that, for the judicial branch to compel the collection of taxes on stockholder income when no statute requires such a tax would interfere with the General Assembly's constitutional power of taxation); *State v. Holden*, 64 N.C. 829, 830 (1870) (The power to "declare a County . . . in a state of insurrection, and call out the militia" "is a discretionary power, vested in the Governor by the Constitution . . . and cannot be controlled by the Judiciary, but the Governor alone is responsible to the people for its proper exercise.").

resolve a dispute of "purely political character" or when "[judicial] determination would involve an encroachment upon the executive or legislative powers." *Political Questions*, *Black's Law Dictionary* (6th ed. 1990). Federal guidance provides that, "as essentially a function of the separation of powers," *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710, 7 L. Ed. 2d 663, 686 (1962), a court should not review questions better suited for the political branches. The same separation-of-powers principles limit this Court's review.

> The political question doctrine controls, essentially, when a question becomes "not justiciable . . . because of the separation of powers provided by the Constitution." *Powell v. McCormack*, 395 U.S. 486, 517, 23 L. Ed. 2d 491, 514 (1969). "The . . . doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill-suited to make such decisions . . . ." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230, 92 L. Ed. 2d 166, 178 (1986). "It is well established that the . . . courts will not adjudicate political questions." *Powell*, 395 U.S. at 518, 23 L. Ed. 2d at 515. A question may be held non-justiciable under this doctrine if it involves "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217, 7 L. Ed. 2d 663, 686 (1962).

Bacon v. Lee, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001) (ellipses in original).

As explained by the Supreme Court of the United States, under the political question doctrine, a court should refuse to become embroiled in a separation-of-powers dispute if any one of the following is true: (1) there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department;" (2) the matter involves "a lack of judicially discoverable and manageable standards for resolving it;" (3) the matter is impossible to "decid[e] without an initial policy determination of a kind clearly for nonjudicial discretion;" or (4) a court cannot possibly undertake an "independent resolution without expressing lack of the respect due coordinate branches of government." *Baker*, 369 U.S. at 217, 82 S. Ct. at 710, 7 L. Ed. 2d at 686. The presence of any one of these factors cautions against judicial entanglement. Judicial review

of a political question itself violates separation of powers because the Court asserts a power it does not have to prevent the exercise of a specific power held by a political branch.

V.

Against the backdrop of the General Assembly's plenary legislative power,[5] Article III provides the General Assembly specific authority to create and structure administrative entities. The constitution likewise gives the Governor specific guidelines by which he may influence the allocation of administrative functions, powers, and duties. Nonetheless, the text reserves the final authority for the legislative branch:

> (10) Administrative reorganization. The General Assembly shall prescribe the functions, powers, and duties of the administrative departments and agencies of the State and may alter them from time to time, but the Governor may make such changes in the allocation of offices and agencies and in the allocation of those functions, powers, and duties as he considers necessary for efficient administration. If those changes affect existing law, they shall be set forth in executive orders, which shall be submitted to the General Assembly not later than the sixtieth calendar day of its session, and shall become effective and shall have the force of law upon adjournment sine die of the session, unless specifically disapproved by resolution of either house of the General Assembly or specifically modified by joint resolution of both houses of the General Assembly.

N.C. Const. art. III, § 5(10). By the plain language, the General Assembly has the express authority to "prescribe the functions, powers, and duties of the administrative departments and agencies of the State and may alter them from time to time." *Id.*; *see also McCrory*, 368 N.C. at 664, 781 S.E.2d at 268 (noting "the General Assembly's significant express

5. The General Assembly possesses the plenary power to make law. Were the constitution silent as to which branch can by law reorganize administrative agencies, the legislative branch retains the authority to do so. *See McIntyre*, 254 N.C. at 515, 119 S.E.2d at 891 ("[A] State Constitution is in no matter a grant of power. All power which is not limited by the Constitution inheres in the people, and an act of a State legislature is legal when the Constitution contains no prohibition against it." (quoting *Lassiter v. Northampton Cty. Bd. of Elections*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958), *aff'd*, 360 U.S. 45, 79 S. Ct. 985, 3 L. Ed. 2d 1072 (1959))).

constitutional authority to assign executive duties to the constitutional executive officers and organize executive departments").[6]

Elsewhere in the same Article, the text again acknowledges the General Assembly's authority over administrative agencies:

> [A]ll administrative departments, agencies, and offices of the State and their respective functions, powers, and duties shall be allocated by law among and within not more than 25 principal administrative departments so as to group them as far as practicable according to major purposes. Regulatory, quasi-judicial, and temporary agencies may, but need not, be allocated within a principal department.

N.C. Const. art. III, § 11. It is the General Assembly that statutorily assigns the "respective functions, powers, and duties" of "all administrative departments, agencies, and offices." *Id.* Moreover, the text specifically acknowledges the validity of "[r]egulatory, quasi-judicial, and temporary agencies" independent of any principal department of the executive branch. *Id.*

By executive order, the Governor may also "make such changes . . . as he considers necessary for efficient administration." *Id.* art. III, § 5(10). When the Governor makes changes, he submits them to the General Assembly, and they become effective "unless specifically disapproved by resolution of either house . . . or specifically modified by joint resolution." *Id.* Much like the gubernatorial veto, the General Assembly retains the prerogative to statutorily override these changes, to reorganize the structure and functions of the executive branch, and to alter the branch's supervisory structure. *Id.* art. III, §§ 5(10), 11.

The framers of our current constitution understood the text of Article III, Sections 5(10) and 11 as simply incorporating the historic legislative authority to create and reorganize administrative divisions by statute:

> The General Assembly will not be deprived of any of its present authority over the structure and organization of state government. It retains the power to make changes

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6. The majority correctly notes that in *McCrory* the General Assembly did not argue that the Governor's challenge constituted a nonjusticiable political question. *But see McCrory*, 368 N.C. at 661, 781 S.E.2d at 266 (analogizing clemency review as "an explicit constitutional power" of the Governor, thus presenting "a nonjusticiable, political question," with the General Assembly's designated, "constitutional power to assign itself the authority to fill statutory positions" (citing *Bacon*, 353 N.C. at 716-17, 549 S.E.2d at 854)).

> on its own initiative, it can disapprove any change initiated by the Governor, and it can alter any reorganization plan which it has allowed to take effect and then finds to be working unsatisfactorily.

N.C. State Constitution Study Comm'n, *Report of the North Carolina State Constitution Study Commission* 131-32 (1968) [hereinafter *Report*].[7] Though the General Assembly may arrange an administrative structure or assign a particular power, function, or duty to an administrative office at present, the constitution provides that the legislature may arrange differently or assign elsewhere in the future. *Id.* Inherently, these decisions involve political and policy decisions.

As demonstrated here, the text of Article III, Sections 5(10) and 11 specifically assigns to the General Assembly authority over the administrative divisions it legislatively creates,[8] including the power to alter those same administrative divisions, to structure them as bipartisan, and to make them independent by housing them outside of the executive branch. N.C. Const. art. III, §§ 5(10), 11. The text of Article III, Section 5(10) likewise specifically affords the Governor a role for making changes by executive order, but subjects those changes to legislative approval. *Id.* art. III, § 5(10).

Significantly, there is nothing in the constitutional text of Article III, Sections 5(10) or 11 which limits the power of the General Assembly

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7. Before the state constitution incorporated the specific text of Article III, section 5(10), the North Carolina State Constitution Study Commission reviewed our constitution, drafted and proposed amendments to our current constitution, and transmitted a special report to the Governor and General Assembly. *See Report* at i-ii.

8. Relevant here, the constitution specifically recognizes that the General Assembly's policymaking authority includes passing laws related to and regulating elections. *See* N.C. Const. art. VI, § 2(2) ("The General Assembly may reduce the time of residence for persons voting in presidential elections."); *id.* art. VI, § 2(3) ("No person adjudged guilty of a felony against this State or the United States . . . shall be permitted to vote unless that person shall be first restored to the rights of citizenship in the manner prescribed by law."); *id.* art. VI, § 3 ("Every person offering to vote shall be at the time legally registered as a voter as herein prescribed and in the manner provided by law. The General Assembly shall enact general laws governing the registration of voters."); *id.* art. VI, § 5 ("A contested election for any office established by Article III of this Constitution shall be determined by joint ballot of both houses of the General Assembly in the manner prescribed by law."); *id.* art. VI, § 8 (recognizing the General Assembly's right to prescribe laws restoring rights of citizenship); *id.* art. VI, § 9 ("No person shall hold concurrently any two or more appointive offices or places of trust or profit, or any combination of elective and appointive offices or places of trust or profit, except as the General Assembly shall provide by general law."). The constitution recognizes no similar role for the Governor.

to create an independent, bipartisan board. Likewise, there is no constitutional text that grants the Governor the power to assert personal policy preferences, much less the power to override a policy decision of the General Assembly. Neither Section 5(4) of Article III nor any other constitutional provision gives the Governor an authority that in any way conflicts with the General Assembly's assigned power in Sections 5(10) and 11. Section 5(4) does not limit the power of the General Assembly in any manner; it simply requires the Governor to execute the laws as enacted by the General Assembly. Section 5(4) says nothing about the Governor's role in reorganization and clearly is not an "explicit textual limitation" on the General Assembly's power. The constitutional provisions of Article III do not conflict. The General Assembly makes the laws, and the Governor implements them. As conceded by the majority, when "the Governor is seeking to have the judicial branch interfere with an issue committed to the sole discretion of the General Assembly," the matter is nonjusticiable. The trial court correctly observed:

> g. The text of the Constitution makes clear that the power to alter the functions and duties of state agencies is reserved to the Legislature through its law-making ability and to the Governor through executive order subject to review by the Legislature.
>
> h. This Court cannot interject itself into the balance struck in the text of a Constitution specifically dealing with the organization and structure of a state agency. The [challenge here] is a political question and therefore a nonjusticiable issue, and this Court lacks authority to review it.

VI.

Moreover, not only does this case present a political question because the constitution textually commits the type of government reorganization here to the General Assembly, *see Baker*, 369 U.S. at 217, 82 S. Ct. at 710, 7 L. Ed. 2d at 686, this lawsuit likewise requires an "initial policy determination of a kind clearly for nonjudicial discretion," *id.* at 217, 82 S. Ct. at 710, 7 L. Ed. 2d at 686.

Here the General Assembly enacted Session Law 2017-6, creating the bipartisan board, "an independent regulatory and quasi-judicial agency [that] shall not be placed within any principal administrative department." Act of Apr. 11, 2017, ch. 6, sec. 4(c), 2017-2 N.C. Adv. Legis. Serv. 21, 25 (LexisNexis) (codified at N.C.G.S. § 163A-5(a) (2017)). In its enactment, the General Assembly found, among other policy reasons,

> that bipartisan cooperation with election administration and ethics enforcement lends confidence to citizens in the integrity of their government; and . . . it [is] beneficial and conducive to consistency to establish one quasi judicial and regulatory body with oversight authority for ethics, elections, and lobbying; and . . . it [is] imperative to ensure protections of free speech rights and increase public confidence in the decisions to restrict free speech; and . . . voices from all major political parties should be heard in decisions relating to First Amendment rights of free speech . . . .

Ch. 6, 2017-2 N.C. Adv. Legis. Serv. at 21. As evident from the stated purpose, the decision to place elections, lobbying, ethics, and campaign finance within a bipartisan, independent agency, at its heart, is a policy one, seeking to insulate these areas from political influence and creating the structure for achieving this end. Such a decision is precisely the type of "initial policy determination" assigned to the legislative branch. *See Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 363 N.C. 500, 512, 681 S.E.2d 278, 286 (2009) (Newby, J., concurring) (concluding that political considerations "should be left to a body like the General Assembly, which is in the best position to consider the full range of evidence and balance the competing objectives").

While the Governor attacks the independent and bipartisan nature of the consolidated board, a judicial resolution would require an initial policy determination this Court cannot make[9] and judicially discoverable and manageable standards that do not exist. By inserting itself into this controversy, the Court expresses a "lack of the respect due" the General Assembly's express constitutional lawmaking authority. This case presents a nonjusticiable political question because it satisfies not just one, which would be sufficient, but all four of the cited *Baker* criteria.

VII.

The majority's novel analysis creates two significant problems in our jurisprudence, forecasting perilous consequences for years to come. The majority's approach eliminates the political question doctrine and inserts the judiciary into every separation-of-powers dispute between

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9. As the majority concedes, "the General Assembly has the authority to provide the [board] with a reasonable degree of independence from short-term political interference and to foster the making of independent, non-partisan decisions. All of these determinations are policy-related decisions committed to the General Assembly rather than to this Court."

the political branches. Most concerning, the Court's decision judicially amends our constitution to grant the Governor a constitutional power to enact personal policy preferences, even elevating those preferences over the duly enacted laws when they conflict. While the majority correctly states the traditional rule for nonjusticiability as outlined in *Bacon* and *Baker*, it then crafts an exception to nonjusticiability that completely swallows the rule: Matters are justiciable any time a party seeks to have the Court "ascertain the meaning of an applicable legal principle, such as [a constitutional provision]."

Under the majority's new test, every separation-of-powers dispute is justiciable. Without exception, a party to a constitutional lawsuit asks the Court to "ascertain the meaning of [the] applicable legal principle." Swept up in this broad reach is *Bacon*, in which this Court held a challenge to a governor's textual clemency power was a nonjusticiable political question. *Bacon*, 353 N.C. at 716-17, 721-22, 549 S.E.2d at 854, 857. The plaintiff there sought the "meaning" of the applicable legal principle, Article III, Section 5(6). *See id.* at 701-04, 711, 549 S.E.2d at 844-47, 851 (asking whether a governor, who as Attorney General defended against the plaintiff's appeal, could consider the plaintiff's clemency request under Article III, Section 5(6)). Under the majority's new test, however, this Court wrongly decided *Bacon*. Such an approach to separation-of-powers claims unavoidably sounds the death knell of nonjusticiability. Any claim by a governor under Article I, Section 6 and Article III, Section 5(4) against the legislative branch will be justiciable.

The majority vainly searches to support this inventive approach with a Court of Appeals decision. In *News & Observer Publishing Co. v. Easley*, the *News & Observer* filed a public records request for clemency records, arguing the Public Records Law was a "regulation[ ] prescribed by law relative to the manner of applying for pardons" as envisioned by Article III, Section 5(6). *News & Observer Publ'g Co. v. Easley*, 82 N.C. App. 14, 22-23, 641 S.E.2d 698, 704-05 (2007) (quoting N.C. Const. art. III, § 5(6)). In essence, the dispute was not a question regarding a constitutional power textually committed to one branch. It involved the straightforward application of a constitutional provision to a statute. The Court of Appeals simply decided the Public Records Law was not a regulation "relative to the manner of applying for pardons." *Id.* at 23, 641 S.E.2d at 704.

Seeming to question its own analysis, the majority maintains that

> even if one does not accept this understanding of the scope of the General Assembly's authority under Article

> III, Section 5(10), we continue to have the authority to decide this case because the General Assembly's authority pursuant to Article III, Section 5(10) is necessarily constrained by the limits placed upon that authority by other constitutional provisions.

While the majority cites examples of express limitations that applied in other cases, it does not identify any such constitutional provision that expressly "limits" the General Assembly's authority under Article III, Sections 5(10) and 11.

The majority concedes that the constitution in Article III, Sections 5(10) and 11 textually assign to the General Assembly the authority to create the bipartisan board. It further admits that if the constitution assigns a specific power to a branch, a challenge to that power is nonjusticiable. Missing an actual "explicit textual limitation," the majority manufactures one to create a conflict in the text by judicially rewriting Article III, Section 5(4) to say, "The Governor shall take care that the Governor's personal policy preferences be faithfully executed." It thereby judicially creates a constitutional authority of the Governor to enforce personal policy preferences superior to the General Assembly's historic constitutional authority to make the laws. The majority then holds that, beyond a reasonable doubt, the General Assembly violated separation of powers in creating this bipartisan board because the board's structure prevents the Governor from exercising this newly-minted constitutional authority. Under this holding, the Governor no longer must seek to influence policy by participating in the constitutionally specified procedures of executive orders and the veto, both of which the General Assembly can override. The Governor prevails simply by complaining to the judicial branch that any legislation interferes with the implementation of personal policy preferences.

VIII.

Prominent jurists have warned that courts undermine their legitimacy when they take sides in policy questions assigned to the political branches:

> The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.

Baker, 369 U.S. at 267, 82 S. Ct. at 737-38, 7 L. Ed. 2d at 714-15 (Frankfurter, J., dissenting). With today's sweeping opinion, the majority effectively eliminates the political question doctrine, embroiling the Court in separation-of-powers disputes for years to come. In reaching this decision, the majority creates a new and superior constitutional power in the Governor to enforce personal policy preferences, elevating those policy preferences over the constitutionally enacted laws. The General Assembly has the express, as well as the plenary, authority to create a bipartisan, independent board as it did here. Because the General Assembly acted within its express constitutional power, plaintiff's challenge presents a nonjusticiable political question. The only separation of powers violation in this case is this Court's encroachment on the express constitutional power of the General Assembly. Accordingly, I dissent.

ABRONS FAM. PRAC. & URGENT CARE, PA v. N.C. DEP'T OF HEALTH & HUMAN SERVS.

[370 N.C. 443 (2018)]

ABRONS FAMILY PRACTICE AND URGENT CARE, PA; NASH OB-GYN ASSOCIATES, PA; HIGHLAND OBSTETRICAL-GYNECOLOGICAL CLINIC, PA; CHILDREN'S HEALTH OF CAROLINA, PA; CAPITAL NEPHROLOGY ASSOCIATES, PA; HICKORY ALLERGY & ASTHMA CLINIC, PA; HALIFAX MEDICAL SPECIALISTS, PA; AND WESTSIDE OB-GYN CENTER, PA, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES AND COMPUTER SCIENCES CORPORATION

No. 427A16

Filed 2 March 2018

Administrative Law—Medicaid reimbursements—class action—failure to exhaust administrative remedies or demonstrate futility

Where plaintiff medical practices sued the N.C. Department of Health and Human Services (DHHS) and the company that designed DHHS's software system for managing Medicaid reimbursements, alleging that they had not received reimbursement for Medicaid claims, the trial court correctly concluded that plaintiffs had failed to exhaust their administrative remedies and to demonstrate that available administrative remedies were inadequate. After receiving Remittance Statements indicating adverse determinations on Medicaid reimbursement claims, the providers failed to request a reconsideration review or to file a petition for a contested case, instead bypassing administrative procedures and filing a class action complaint in the trial court. In view of the inadequacy of notice, plaintiffs were still entitled to exhaust their available administrative remedies.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 792 S.E.2d 528 (2016), reversing an order dated 12 June 2015 by Judge Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases, in Superior Court, Wake County, and remanding for additional proceedings. On 26 January 2017, the Supreme Court allowed both defendants' petitions for discretionary review of additional issues. Heard in the Supreme Court on 12 December 2017.

Williams Mullen, by Camden R. Webb, Elizabeth C. Stone, and Ruth A. Levy, for plaintiff-appellees.

Joshua H. Stein, Attorney General, by Olga Vysotskaya de Brito and Amar Majmundar, Special Deputy Attorneys General, for defendant-appellant North Carolina Department of Health and Human Services.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Charles F. Marshall III and Jennifer K. Van Zant, for defendant-appellant Computer Sciences Corporation.

Parker Poe Adams & Bernstein LLP, by Matthew W. Wolfe, for American Medical Association, North Carolina Academy of Family Physicians, North Carolina Hospital Association, North Carolina Health Care Facilities Association, and North Carolina Medical Society, amici curiae.

Ott Cone & Redpath, P.A., by Matthew Jordan Cochran, Thomas E. Cone, Curtis B. Venable, and Stephen J. White, for Charlotte–Mecklenburg Hospital Authority, Duke University Medical Center, Mission Hospitals, Inc., The Moses H. Cone Memorial Hospital Operating Corporation, North Carolina Baptist Hospital, and WakeMed, amici curiae.

JACKSON, Justice.

In this appeal we consider whether the Court of Appeals correctly held that the trial court erroneously dismissed plaintiffs' action for lack of subject-matter jurisdiction due to plaintiffs' failure to exhaust administrative remedies in seeking damages for denied Medicaid reimbursement claims. Because we conclude that plaintiffs have failed to exhaust their available administrative remedies, we reverse the decision of the Court of Appeals reversing the trial court's order granting defendants' motions to dismiss for lack of subject-matter jurisdiction.

Plaintiffs Abrons Family Practice and Urgent Care, PA; Nash OB-GYN Associates, PA; Highland Obstetrical-Gynecological Clinic, PA; Children's Health of Carolina, PA; Capital Nephrology Associates, PA; Hickory Allergy & Asthma Clinic, PA; Halifax Medical Specialists, PA; and Westside OB-GYN Center, PA are medical practices in North Carolina, all of which provide care to Medicaid-eligible patients pursuant to Medicaid contracts with the State of North Carolina. Defendant North Carolina Department of Health and Human Services (DHHS or

the Department) administers the State's Medicaid plan. Defendant Computer Sciences Corporation (CSC) is a Nevada corporation with its principal office in Falls Church, Virginia. After being required by the federal Centers for Medicare and Medicaid Services (CMS) to replace its Medicaid Management Information System (MMIS), the State of North Carolina awarded a contract to CSC to develop a new MMIS. CSC designed and developed NCTracks, the new system intended to manage reimbursement payments to health care providers for services provided to Medicaid recipients across North Carolina. NCTracks went live on 1 July 2013, and plaintiffs began submitting claims to DHHS for Medicaid reimbursements under the new system. In the first few months of being in operation, NCTracks experienced over 3,200 software errors, resulting in delayed, incorrectly paid, or unpaid reimbursements to plaintiffs.

On 31 January 2014, plaintiffs filed a First Amended Class Action Complaint against defendants. Plaintiffs asserted that NCTracks ultimately proved to be "a disaster, inflicting millions of dollars in damages upon North Carolina's Medicaid providers." Specifically, plaintiffs alleged that CSC was negligent in its design and implementation of NCTracks and that DHHS breached its contracts with each of the plaintiffs by failing to pay Medicaid reimbursements. Plaintiffs also alleged that they had a contractual right to receive payment for reimbursement claims and that this was "a property right that could not be taken without just compensation." As a result of these allegations, plaintiffs sought damages based upon claims of negligence and unfair and deceptive acts against CSC, and claims of breach of contract and violation of Article I, Section 19 of the North Carolina Constitution against DHHS. Additionally, plaintiffs sought a declaratory judgment that the methodology for payment of Medicaid reimbursement claims established by DHHS violated Medicaid reimbursement rules.

Plaintiffs further maintained that, because the available administrative procedures would not compel the State to adhere to Medicaid reimbursement rules or provide recovery of certain damages, plaintiffs were not required to exhaust their administrative remedies before filing their civil action. Additionally, plaintiffs contended that "the administrative procedures [were] futile and inadequate."

On 4 April 2014, defendants filed motions to dismiss pursuant to North Carolina Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6). Defendants argued, *inter alia*, that plaintiffs' complaint failed to establish personal and subject-matter jurisdiction. The trial court concluded that plaintiffs had failed to exhaust their administrative remedies and

had not demonstrated that the available administrative remedies were inadequate. Because the trial court determined that it lacked subject-matter jurisdiction over plaintiffs' claims, it denied as moot defendants' motions to dismiss pursuant to Rules 12(b)(2) and 12(b)(6).

The Court of Appeals majority reversed the trial court's order, holding that the trial court erred by dismissing plaintiffs' complaint for failure to exhaust administrative remedies without resolving "whether DHHS issues final agency decisions in Medicaid claim matters and whether DHHS supplies providers with written notice of its final agency decisions." *Abrons Fam. Prac. & Urgent Care, PA v. N.C. Dep't of Health & Hum. Servs.*, ___ N.C. App. ___, ___, 792 S.E.2d 528, 539 (2016). The Court of Appeals majority also concluded that plaintiffs sufficiently demonstrated that it would be futile to pursue administrative remedies. *Id.* at ___, 792 S.E.2d at 538. Because the Court of Appeals reversed the trial court's order, it did not address plaintiffs' remaining arguments. *See id.* at ___, 792 S.E.2d at 539.

Judge McCullough dissented, concluding that the trial court's decision should be affirmed because plaintiffs did not exhaust the available administrative remedies or prove that those remedies were inadequate to resolve their claims. *Id.* at ___, 792 S.E.2d at 539-40 (McCullough, J., dissenting). Both defendants appealed based on the dissent and sought discretionary review of additional issues, which this Court allowed.

On appeal to this Court, defendants contend that the Court of Appeals erred by reversing the dismissal of plaintiffs' claims because plaintiffs failed to exhaust their available administrative remedies prior to filing a lawsuit. Defendants also argue that plaintiffs only have speculated that pursuing the available administrative remedies would be futile or inadequate. We agree.

Section 108C-12 explicitly indicates that the Administrative Procedure Act (APA) governs the appeals process for Medicaid providers. N.C.G.S. § 108C-12 (2017). The APA states in relevant part that "any dispute between an agency and another person that involves the person's rights, duties, or privileges . . . should be settled through informal procedures." *Id.* § 150B-22 (2017). If the parties do not resolve the dispute through informal procedures, either party may request a formal administrative proceeding, "at which time the dispute becomes a 'contested case.' " *Id.* "[A] request for a hearing to appeal an adverse determination of the Department [of Health and Human Services] . . . is a contested case subject to the provisions of" the Administrative Procedure Act. N.C.G.S.

§ 108C-12. An "[a]dverse determination" is defined, in relevant part, as "[a] final decision by [DHHS] to deny, terminate, suspend, reduce, or recoup a Medicaid payment." *Id.* § 108C-2(1) (2017). Finally, if a party is aggrieved by the outcome of a contested case hearing and has exhausted all available administrative remedies, the party "is entitled to judicial review of the decision [pursuant to] this Article." *Id.* § 150B-43 (2017).

As authorized by the General Assembly in N.C.G.S. § 108A-54, the Department has promulgated specific rules governing the informal review process. *See generally* 10A NCAC Subchapter 22J (2016). These regulations enumerate the rights of providers to appeal reimbursement rates and challenge the Department's decisions on various claims related to payments. 10A NCAC 22J .0101.

When a provider submits a Medicaid reimbursement claim, the Department responds by sending the provider a "Remittance Statement" that discloses the initial disposition of the claim. At this stage, claims are either paid, denied, or placed in "pending" status. A provider may then request a reconsideration review, but must do so within thirty calendar days "from receipt of final notification of payment, payment denial, disallowances, payment adjustment, notice of program reimbursement and adjustments." *Id.* .0102(a). This "final notification . . . means that all administrative actions necessary to have a claim paid correctly have been taken by the provider and . . . the fiscal agent has issued a final adjudication." *Id.* If the provider fails to request a reconsideration review within the specified time period, the state agency's decision becomes final. *Id.* In the alternative, a provider may resubmit a denied claim to DHHS at any time within eighteen months "after the date of payment or denial of [the] claim." 10A NCAC 22B .0104(b) (2016).

If a provider seeks a reconsideration review and disagrees with the result, the provider may request a contested case hearing before the Office of Administrative Hearings (OAH). *Id.* 22J .0104. Then, as outlined in the statutory framework, once all administrative remedies are exhausted, the provider may seek judicial review. N.C.G.S. § 150B-43. Judicial review "is generally available only to aggrieved persons who have exhausted all administrative remedies made available by statute or agency rule." *Empire Power Co. v. N.C. Dep't of Env't, Health & Nat. Res.*, 337 N.C. 569, 594, 447 S.E.2d 768, 783 (1994) (citing N.C.G.S. § 150B-43 (1991)). A plaintiff's failure to exhaust administrative remedies may result in the dismissal of the complaint for lack of subject-matter jurisdiction. *See Presnell v. Pell*, 298 N.C. 715, 722, 260 S.E.2d 611, 615 (1979); *see also Vass v. Bd. of Trs. of the Teachers' & State Emps.'*

Comprehensive Major Med. Plan, 324 N.C. 402, 408-09, 379 S.E.2d 26, 30 (1989).

Here, after receiving Remittance Statements that indicated an adverse determination on a Medicaid reimbursement claim, the providers failed to request a reconsideration review or file a petition for a contested case. Instead, plaintiffs bypassed the administrative procedures set forth above and filed a class action complaint in the trial court. To justify their failure to exhaust administrative remedies, plaintiffs rely upon 10A NCAC 22J .0102 which indicates that the provider has thirty calendar days "from receipt of final notification of payment [or] payment denial" to request reconsideration review. 10A NCAC 22J .0102(a). Plaintiffs argue that defendants cannot assert the defense of failure to exhaust administrative remedies because defendants failed to provide the required final notification that triggers the administrative review process. Subsection 150B-23(f) mandates that the time limit to file a petition in a contested case commences "when notice is given of the agency decision to all persons aggrieved" and states that the notice "shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition." N.C.G.S. § 150B-23(f) (2017). CSC argued before the trial court that a provider's receipt of the Remittance Statement triggers the *option* to pursue resubmission or administrative remedies. On the other hand, plaintiffs contend that defendants never provided the required final notification. In addition to arguing that defendants failed to provide final notification, plaintiffs also contend that defendants provided defective notice to plaintiffs of their rights to pursue administrative remedies.

In support of these arguments, plaintiffs cite *Davidson County v. City of High Point*, 321 N.C. 252, 362 S.E.2d 553 (1987). The dispute in *Davidson County* centered around the County's issuance of a special use permit to allow renovation of a City-owned sewage treatment plant. *Id.* at 253, 362 S.E.2d at 554. The County argued that the City could not challenge the meaning of one of the prerequisite conditions necessary to receive a permit because the City had failed to pursue the administrative remedies afforded pursuant to the special use permit. *Id.* at 260, 362 S.E.2d at 558. Plaintiffs in the present case contend that in *Davidson County*, the County provided no notice of administrative remedies and that as a result, this Court rejected the County's assertion that the City failed to exhaust administrative remedies. This is an incorrect interpretation of our conclusion in *Davidson County*. Moreover, an administrative appeal that falls outside the framework of the APA does not provide

the best analog for analysis of a dispute that lies squarely within the purview of the APA.

In *Davidson County* this Court determined that "the City was unaware of the County's differing interpretation of" a prerequisite condition to receive a permit and as a result, "could not have known that it should have appealed the issue . . . within thirty days of receiving the permit." *Id.* at 260, 362 S.E.2d at 558. We concluded that "[t]he County cannot now be heard to assert that the City should have pursued administrative remedies for a problem it was unaware existed." *Id.* at 260, 362 S.E.2d at 558. The issue in *Davidson County* turned on whether one party was even aware that a *problem* existed, not whether a party was aware of the available *administrative remedies*. Unlike the plaintiffs in *Davidson County*, plaintiffs in the case *sub judice* were aware not only of the existence of the problem but also of the existence of the available administrative remedies.

In addressing the applicable time limits in which a provider must appeal an adverse determination, the Administrative Code states that a provider may seek reconsideration review after receiving "final notification of payment." 10A NCAC 22J .0102(a). The Code further states that if a provider does not seek such review within thirty days "from receipt of final notification," then the Department's "action shall become final." *Id.* As the Court of Appeals majority highlighted, the central problem here is that the status of the Remittance Statement seems unclear if a "final notification" later becomes "final." *Abrons*, ___ N.C. App. at ___, 792 S.E.2d at 536 (majority opinion). The Administrative Code allows a provider to resubmit a denied claim to DHHS at any time within eighteen months after receiving the Remittance Statement, 10A NCAC 22B .0104(b); yet the previously mentioned provision indicates that if a provider does not seek reconsideration review within the thirty-day window, then that decision becomes final, *id.* 22J .0102.

There does appear to be confusion surrounding the time frame in which a provider must seek reconsideration review, and the State conceded as much in oral argument, acknowledging that there was no statute of limitations running, given the inadequacy of notice. During rebuttal, the State addressed the Court's question originally posed to counsel for the appellee, as to whether Section 150B-23(f) tolls the statute of limitations. Counsel for the State answered, "Of course it does."

Notwithstanding this inadequacy of notice, if a provider was aggrieved by the denial of a reimbursement claim, a reconsideration

review should have been requested, followed by the filing of a petition for a contested case hearing, if necessary. In addition, the APA establishes a process by which a party may commence a contested case by, *inter alia*, showing that an agency has failed to use proper procedure. *See* N.C.G.S. § 150B-23(a) (2017) (providing that a petition for a contested case shall state facts establishing that the agency has, *inter alia*, "[f]ailed to use proper procedure" or "[f]ailed to act as required by law or rule"). The APA also gives an aggrieved party the opportunity to request a declaratory ruling to determine "the validity of a rule" or to resolve a conflict "regarding an interpretation of" a rule. *See id.* § 150B-4(a) (2017). The declaratory ruling has the same effect as a final agency decision and would have provided certainty to plaintiffs in pursuit of their determination of whether the Remittance Statement itself was in fact a final statement by the Department.[1] Although any procedural confusion as to finality and notice does not relieve plaintiffs from the requirement to exhaust their available administrative remedies, here the State has conceded that there is no issue with the statute of limitations running; therefore, plaintiffs remain free to appeal the adverse determinations by initiating contested case hearings at OAH.[2]

This is an essential step in addressing the disputed payments. The requirement to exhaust administrative remedies ensures that "matters of regulation and control are first addressed by commissions or agencies particularly qualified for the purpose." *Presnell*, 298 N.C. at 721, 260 S.E.2d at 615. Although administrative remedies were available to plaintiffs, none of the plaintiffs appear to have invoked these available remedies. Without a single provider having initiated an appeal from a denied reimbursement claim, it cannot be said that plaintiffs have exhausted all available administrative remedies.

As to their claims against CSC, plaintiffs contend that these claims "are independent of [their] claims for reimbursement against DHHS";

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1. With that certain determination, there also would have been a very clear path for plaintiffs to exhaust their administrative remedies prior to seeking relief in the General Court of Justice.

2. We express no opinion as to what our decision would have been in the absence of the State's concession; however, faced with a statute of limitations that concededly is not a bar to plaintiffs' pursuit of their administrative remedies, we are in the unusual position of allowing them to do so notwithstanding the present action. Our research has disclosed no similar precedent in our law, and we caution that the circumstances in the instant case and magnitude of the current dispute present unique challenges that mandate a resolution which should not be read broadly.

however, their amended complaint reveals how intertwined its claims are against DHHS and CSC. For example, plaintiffs allege that "CSC's contract obligated CSC to design and develop NCTracks so that it provided a common, unified, and flexible system meeting DHHS' business requirements regarding Medicaid." Plaintiffs further allege that "DHHS and CSC have also placed thousands of reimbursement claims in 'limbo' by failing to issue decisions on reimbursement claims." The actual language of these excerpts from the complaint indicate the sheer difficulty in wholly separating the actions of DHHS from the actions of CSC.

In further support of their argument that their claims against CSC are independent of their claims against DHHS, plaintiffs also contend that they are suing CSC for its conduct before it became the State's fiscal agent, which took place on the "go-live" date of 1 July 2013. Again, plaintiffs' amended complaint indicates the close involvement between the acts of DHHS and CSC. The amended complaint alleges that CSC was negligent in that it "failed to exercise due care," *inter alia*, "in the attempts to fix defects found in NCTracks after go-live." Therefore, plaintiffs' amended complaint itself uses language that indicates plaintiffs are suing CSC not only for its conduct *before* it became the State's fiscal agent, but also for its conduct *after* said time. Furthermore, plaintiffs' claims against CSC will be affected by the outcome of their claims against DHHS. If, in fact, the reimbursement claims were denied properly, then plaintiffs' claims against CSC may fail or the damages awarded may not be awarded in full. The record in this case reveals that plaintiffs' claims against DHHS and CSC would be difficult, if not impossible, to wholly disentangle. Similarly, the State's and CSC's defenses are interwoven as well. Therefore, plaintiffs' causes of action against CSC remain viable, too.

Plaintiffs also alleged in their complaint that they are exempt from the requirement to exhaust administrative remedies because doing so would be futile and the remedies would be inadequate. Our courts have not required plaintiffs to exhaust administrative remedies prior to bringing suit, if the pursuit of administrative remedies would be futile. *State ex rel. Utils. Comm'n v. S. Bell Tel. & Tel. Co.*, 93 N.C. App. 260, 268, 377 S.E.2d 772, 776 (1989), *rev'd on other grounds*, 326 N.C. 522, 391 S.E.2d 487 (1990). The party claiming excuse from exhaustion bears the burden of alleging both the inadequacy and the futility of the available administrative remedies. *See Snuggs v. Stanly Cty. Dep't of Pub. Health*, 310 N.C. 739, 740, 314 S.E.2d 528, 529 (1984) (per curiam). Plaintiffs first argue that initiating a dispute with DHHS "is not available to Medicaid providers because of the overwhelming number of reimbursement errors and

because of [the] utter inability [of DHHS] to address providers' issues." Plaintiffs allege that defendants have "placed thousands of reimbursement claims in 'limbo' by failing to issue decisions on reimbursement claims." Not only do plaintiffs fail to provide an exact number of claims at issue, but, given that there are eight plaintiffs, the inadequacy of the administrative procedures cannot be evaluated on the basis of this bare allegation. Furthermore, this Court previously has determined that the breadth of a claim may not create a burden sufficient to relieve a plaintiff of the exhaustion requirement. *See Lloyd v. Babb*, 296 N.C. 416, 426-28, 251 S.E.2d 843, 850-51 (1979) (requiring exhaustion of administrative remedies notwithstanding plaintiffs having to individually challenge the voting rights of between 6,000 and 10,000 people). Here, the sheer number of claims does not satisfy plaintiffs' burden.

Plaintiffs also asserted in their complaint that pursuing administrative remedies would be futile because "[n]o procedures exist to recover for damage to the Plaintiffs' businesses, to recover for payment of the $100 re-enrollment fee . . . and to recover damages in the form of time value of money." The reasoning in *Jackson ex. rel. Jackson v. North Carolina Department of Human Resources Division of Mental Health, Developmental Disabilities, & Substance Abuse Services*, 131 N.C. App. 179, 505 S.E.2d 899 (1998), *disc. rev. denied*, 350 N.C. 594, 537 S.E.2d 213, 214 (1999)—that plaintiffs' insertion of a prayer for monetary damages does not relieve them from the necessity for compliance with the exhaustion requirement—is persuasive here. In *Jackson* the Court of Appeals acknowledged that, although the plaintiff sought damages that could not be awarded through administrative procedures, the plaintiff's primary claim—"the provision of mental health care"—was an issue that first should be determined by the agency. *Id.* at 188-89, 505 S.E.2d at 905. Similarly, plaintiffs' claims in the present case stem from the failure of DHHS to pay Medicaid reimbursement claims. The majority of the claims for relief even specifically mention these unpaid reimbursements. Because resolution of the reimbursement claims must come from DHHS, simply inserting a prayer for monetary damages does not automatically demonstrate that pursuing administrative remedies would be futile. Notwithstanding the claims that are outside the relief that can be granted by an administrative law judge, the reimbursement claims "should properly be determined in the first instance by the agenc[y] statutorily charged with administering" the Medicaid program. *Id.* at 188-89, 505 S.E.2d at 905. "Pursuing an administrative remedy is 'futile' when it is useless to do so either as a legal or practical matter." *Bailey v. State*, 330 N.C. 227, 248, 412 S.E.2d 295, 308 (1991) (Mitchell, J., concurring in

part and dissenting in part) (quoting *Honig v. Doe*, 484 U.S. 305, 327, 108 S. Ct. 592, 606, 98 L. Ed. 2d 686, 709 (1988)), *cert. denied*, 504 U.S. 911, 112 S. Ct. 1942, 118 L. Ed. 2d 547 (1992), *disavowed by Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998). Plaintiffs have failed to demonstrate that pursuing reconsideration review or a contested case would be "useless."

Finally, in addressing plaintiffs' allegations regarding business damages, the trial court, in its Amended Opinion and Order on Motions to Dismiss, included the following footnote:

> The Court notes that Plaintiffs did not cite to any authority to support their assertion that the business damages they seek could not be sought through the administrative process, and the Court is unable to find any specific statute, regulation, or case law expressly stating that tort-type damages are unavailable as a remedy at the administrative level in this context.

This conclusion incorrectly interprets the scope of an administrative hearing. The purpose of the APA is to "ensure that the functions of rule making, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process." N.C.G.S. § 150B-1(a) (2017). Furthermore, five specific grounds for alleging an agency's wrongdoing are enumerated in N.C.G.S. § 150B-23(a). By its very nature, the quasi-judicial forum of an administrative hearing precludes the adjudication of claims seeking compensatory damages; however, when any part of the relief sought is provided through an administrative process, a plaintiff must exhaust that process prior to seeking the same or related relief from the judicial system.

In conclusion, the Department's decision to deny plaintiffs' claims would be subject to judicial review only after plaintiffs had exhausted their available administrative remedies or demonstrated that doing so would have been futile. Plaintiffs have not succeeded at either endeavor; however, given the inadequacy of notice, plaintiffs still are entitled to exhaust the available administrative remedies. Nevertheless, because plaintiffs have failed to exhaust their administrative remedies and have failed to demonstrate futility of the available remedies at this time, the Court of Appeals erred by reversing the dismissal of plaintiffs' claims. For the foregoing reasons, we reverse the decision of the Court of Appeals.

REVERSED.

ALLIED SPECTRUM, LLC D/B/A APEX CROWN EXPRESS
v.
GERMAN AUTO CENTER, INC., MOHAMED ALI DARAR, AND REEM TAMIM DARAR

No. 453A16

Filed 2 March 2018

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 793 S.E.2d 271 (2016), affirming an order for summary judgment entered on 7 July 2015 by Judge Paul G. Gessner in Superior Court, Wake County. Heard in the Supreme Court on 5 February 2018.

Bratcher Adams PLLC, by Brice M. Bratcher and J. Denton Adams, for plaintiff-appellant.

Austin Law Firm, PLLC, by John S. Austin, for defendant-appellees.

PER CURIAM.

AFFIRMED.

DAVIS v. HULSING ENTERS., LLC

[370 N.C. 455 (2018)]

THOMAS A.E. DAVIS, JR., ADMINISTRATOR OF THE ESTATE OF LISA MARY DAVIS
v.
HULSING ENTERPRISES, LLC; HULSING HOTELS NC MANAGEMENT COMPANY; HULSING HOTELS NORTH CAROLINA, INC.; HULSING HOTELS, INC. D/B/A CROWNE PLAZA TENNIS & GOLF RESORT ASHEVILLE AND MULLIGAN'S

No. 160A16

Filed 2 March 2018

Negligence—contributory negligence—dram shop claim

The Court of Appeals erred by determining that plaintiff had stated a valid negligence per se dram shop claim pursuant to N.C.G.S. § 18B-305(a). The factual allegations of plaintiff's complaint established decedent's contributory negligence, and thus, the issue of the first-party dram shop claim was not considered.

Justice HUDSON dissenting.

Justices BEASLEY and MORGAN 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, ___ N.C. App. ___, 783 S.E.2d 765 (2016), reversing an order entered on 25 November 2013 by Judge Richard Boner in Superior Court, Mecklenburg County. On 18 August 2016, the Supreme Court allowed defendants' petition for discretionary review of additional issues. Heard in the Supreme Court on 12 April 2017.

Charles G. Monnett III for plaintiff-appellee.

Northup McConnell & Sizemore, PLLC, by Isaac N. Northup, Jr., for defendant-appellants.

Jordan Price Wall Gray Jones & Carlton, by R. Frank Gray and Lori P. Jones, for North Carolina Restaurant and Lodging Association, amicus curiae.

JACKSON, Justice.

In this case we are asked to consider whether North Carolina recognizes plaintiff's first-party claim for dram shop liability and if so, whether that claim is barred by the contributory negligence of the decedent.

Based upon our conclusion that plaintiff cannot recover because of the decedent's contributory negligence, we do not reach plaintiff's first-party dram shop claim and therefore hold that discretionary review was improvidently allowed on that issue. For the reasons stated below, we reverse the decision of the Court of Appeals.

When evaluating a motion to dismiss pursuant to Rule 12(b)(6), we accept the "factual allegations in a complaint as true." *Turner v. Thomas*, 369 N.C. 419, 424, 794 S.E.2d 439, 444 (2016) (quoting *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 225, 695 S.E.2d 437, 440 (2010)). Here the complaint alleges the following: On 5 October 2012, plaintiff Thomas A.E. Davis, and plaintiff's wife, the decedent Lisa Mary Davis, checked into the Crowne Plaza Tennis & Golf Resort in Asheville, North Carolina, to celebrate their wedding anniversary. Defendants Hulsing Enterprises, LLC and Hulsing Hotels, Inc. own and operate this resort hotel, as well as a restaurant and bar called Mulligan's, which is located within the hotel. Shortly after checking into the hotel, the couple decided to have dinner at Mulligan's. During the course of four and a half hours, the couple ate dinner and ordered twenty-four alcoholic beverages. The decedent consumed at least ten of the drinks and became visibly intoxicated. As the Davises walked down a hallway after leaving Mulligan's, the decedent fell down. She was so intoxicated that an employee of defendants arrived with a wheelchair to transport the decedent to her room. After assisting the decedent into the wheelchair, the employee helped her to her hotel room and onto her bed. When plaintiff awoke the next morning, he found his wife lying on the floor deceased. The cause of death later was determined to be acute ethanol (alcohol) poisoning.

On 15 July 2013, plaintiff, the administrator of the decedent's estate, filed a complaint for wrongful death, alleging the following causes of action: (1) common law dram shop liability; (2) negligent aid, rescue, or assistance; and (3) punitive damages. Plaintiff's dram shop claim alleged that defendants were negligent per se because they violated N.C.G.S. § 18B-305 by knowingly selling and giving alcoholic beverages to the decedent, an intoxicated person. On 13 August 2013, defendants filed a Rule 12(b)(6) motion to dismiss the complaint for failure to state a claim for which relief can be granted under the laws of North Carolina. Defendants filed their answer on 8 November 2013 and raised several affirmative defenses, including contributory negligence. On 25 November 2013, the trial court entered an order dismissing plaintiff's common law dram shop and related punitive damages claims. The parties proceeded to a jury trial on the negligent rescue and remaining punitive damages

claims. On 23 October 2014, the trial court entered a judgment dismissing the action after a jury found that the decedent's death was not proximately caused by the negligence of defendants. Plaintiff appealed to the Court of Appeals. On appeal, plaintiff contested only the dismissal of his common law dram shop claim. *Davis v. Hulsing Enters.*, ___ N.C. App. ___, ___, 783 S.E.2d 765, 768 (2016).

The Court of Appeals determined that plaintiff had stated a valid negligence per se dram shop claim pursuant to N.C.G.S. § 18B-305(a) and therefore reversed the trial court's order dismissing that claim. *Id.* at ___, ___,783 S.E.2d at 772, 773. The majority concluded that defendants breached their duty to not sell or give alcoholic beverages to the decedent and opined that it was reasonable that defendants should have foreseen the injuries caused by their conduct. *Id.* at ___, 783 S.E.2d at 769-70. In reaching these conclusions, the majority ultimately determined that the decedent's death was "the direct and proximate result of" defendants' negligence. *Id.* at ___, 783 S.E.2d at 770. In contrast, the dissenting judge reasoned that, although plaintiff alleged facts sufficient to support a claim of negligence per se, plaintiff also alleged facts that demonstrated that the decedent "acted negligently in proximately causing her own death." *Id.* at ___, 783 S.E.2d at 774 (Dillon, J., dissenting). Defendants appealed the decision of the Court of Appeals to this Court based upon the dissenting opinion. In addition, we allowed discretionary review to address defendants' proposed issue as to whether North Carolina recognizes a first-party cause of action for dram shop liability.

Defendants argue that the factual allegations of plaintiff's complaint establish the decedent's contributory negligence. Because we agree, we do not reach the issue of the first-party dram shop claim.

When evaluating the legal sufficiency of plaintiff's complaint, "the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citing *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E.2d 297 (1976)).

Our opinion in *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 332 N.C. 645, 423 S.E.2d 72 (1992), is both instructive and controlling in this case. Similar to the circumstances in this case, the claim in *Sorrells* was brought by the administrator of the estate of a person who was fatally injured after driving while in a highly intoxicated state. *Id.* at 646, 423 S.E.2d at 72. The representative of the decedent's estate sued a bar for wrongful death, alleging negligence and gross negligence. *Id.* at 647,

423 S.E.2d at 73. The estate alleged in its complaint that the twenty-one-year-old decedent and one or more of his friends were intoxicated, that their waitress was informed on at least three separate occasions by the decedent's friends that he was driving and should not be served more alcohol, and that, nevertheless, the bartender served the decedent more alcohol. *Id.* at 646-47, 423 S.E.2d at 72-73. After consuming his last drink, the decedent proceeded to drive himself—against the advice of his friends—lost control of his vehicle on the interstate highway, and struck a bridge abutment. *Id.* at 647, 423 S.E.2d at 73.

The trial court dismissed the estate's claim based upon the decedent's contributory negligence, and the estate appealed to the Court of Appeals, which reversed the trial court. *Id.* at 647, 423 S.E.2d at 73. On appeal to this Court, the estate argued that the claim should not be dismissed because the bar acted with willful and wanton negligence. *Id.* at 648, 423 S.E.2d at 74. This Court concluded that plaintiff's complaint alleged facts which denied the right to relief and that the trial court properly granted defendant's motion to dismiss. *Id.* at 648-49, 423 S.E.2d at 73-74. Specifically, the Court stated that "defendant's motion to dismiss was properly granted since plaintiff's complaint 'discloses an unconditional affirmative defense which defeats the claim asserted [and] pleads facts which deny the right to any relief on the alleged claim.' " *Id.* at 648, 423 S.E.2d at 73 (alteration in original) (quoting *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 166 (1970)).

Here plaintiff's complaint alleges that defendants were negligent in "serv[ing] at least one and more likely, several additional intoxicating liquor drinks" to the decedent after "her mental and/or physical faculties were appreciably and noticeably impaired." Plaintiff also alleges facts indicating that this negligence was the "direct and proximate" cause of her death. Nonetheless, even if plaintiff's dram shop claim is valid, it is well established that "a plaintiff's contributory negligence is a bar to recovery from a defendant who commits an act of ordinary negligence." *Id.* at 648, 423 S.E.2d at 73-74 (citing *Adams ex rel. Adams v. State Bd. of Educ.*, 248 N.C. 506, 511, 103 S.E.2d 854, 857 (1958)).

Turning to the statute governing the claim raised here—the wrongful death statute—N.C.G.S. § 28A-18-2 provides for survivorship of only those claims that could have been brought by the decedent herself had she lived. *Carver v. Carver*, 310 N.C. 669, 673, 314 S.E.2d 739, 742 (1984). Because this claim is being brought by the administrator of the decedent's estate, this claim is subject to the affirmative defense of contributory negligence. *See generally Sorrells*, 332 N.C. 645, 423 S.E.2d 72.

Plaintiff argues on appeal that because the decedent's death was proximately caused by defendants' gross negligence, only gross contributory negligence on the part of the decedent would bar recovery. As the Court of Appeals majority highlighted, a plaintiff's ordinary contributory negligence is not a bar to recovery when a "defendant's gross negligence, or willful or wanton conduct, is a proximate cause of the plaintiff's injuries." *Yancey v. Lea*, 354 N.C. 48, 51, 550 S.E.2d 155, 157 (2001) (citation omitted); *see also Sorrells*, 332 N.C. at 648, 423 S.E.2d at 73-74. "An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Yancey*, 354 N.C. at 52, 550 S.E.2d at 157 (citations omitted). We conclude here, as we did in *Sorrells*, that the actions of both the decedent and defendants rise to the same level of negligence, thereby barring plaintiff's common law dram shop claim.

The events leading up to the decedent's death are undeniably tragic; however, in this State contributory negligence precludes recovery for a plaintiff when, as here, the complaint alleges facts that demonstrate the plaintiff's decedent exhibited the same level of negligence as the defendant. Accordingly, we conclude here, as we did in *Sorrells*, that the trial court properly granted defendants' motion to dismiss because plaintiff's complaint "discloses an unconditional affirmative defense which defeats the claim asserted [and] pleads facts which deny the right to any relief on the alleged claim." *Sorrells*, 332 N.C. at 648, 423 S.E.2d at 73 (alteration in original) (quoting *Sutton*, 277 N.C. at 102, 176 S.E.2d at 166).

For the foregoing reasons, we reverse the decision of the Court of Appeals that reversed the trial court's 25 November 2013 order dismissing plaintiff's common law dram shop claim for failure to state a claim under Rule 12(b)(6) and further conclude that defendants' petition for discretionary review as to the additional issue was improvidently allowed.

REVERSED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

Justice HUDSON dissenting.

Here the majority concludes that plaintiff's dram shop claim is barred because the complaint establishes the decedent's contributory negligence as a matter of law, based largely on *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 332 N.C. 645, 423 S.E.2d 72 (1992). The majority also asserts that the actions of the decedent and defendants rise to the same level of negligence, barring plaintiff's claim. I disagree with

the application of *Sorrells* and conclude that the complaint sufficiently alleges gross negligence on the part of defendants; moreover, I see no allegations in the complaint supporting gross contributory negligence on the part of the decedent. As such, I respectfully dissent.

I agree with the majority's recitation of the standard of review regarding a motion to dismiss under Rule 12(b)(6). The relevant inquiry is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted." *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 203 (2005) (quoting *Meyer v. Walls*, 347 N.C. 97, 111, 489 S.E.2d 880, 888 (1997)). Additionally, I generally agree with the majority's discussion of the applicable principles regarding negligence and contributory negligence. As the majority recognizes, "[i]n this state, a plaintiff's contributory negligence is a bar to recovery from a defendant who commits an act of ordinary negligence," *Sorrells*, 332 N.C. at 648, 423 S.E.2d at 73-74 (citing *Adams ex rel. Adams v. State Bd. of Educ.*, 248 N.C. 506, 511, 103 S.E.2d 854, 857 (1958)), but "[c]ontributory negligence is not a bar to a plaintiff's recovery when the defendant's gross negligence, or willful or wanton conduct, is a proximate cause of the plaintiff's injuries," *Yancey v. Lea*, 354 N.C. 48, 51, 550 S.E.2d 155, 157 (2001) (citing *Brewer v. Harris*, 279 N.C. 288, 297, 182 S.E.2d 345, 350 (1971)). This Court has "defined 'gross negligence' as 'wanton conduct done with conscious or reckless disregard for the rights and safety of others.' " *Yancey*, 354 N.C. at 52, 550 S.E.2d at 157 (quoting *Bullins v. Schmidt*, 322 N.C. 580, 583, 369 S.E.2d 601, 603 (1988)); *see also id.* at 53, 550 S.E.2d at 158 ("An act or conduct rises to the level of gross negligence when the act is done purposely and with knowledge that such act is a breach of duty to others, i.e., a *conscious* disregard of the safety of others."). I do not agree with the majority's application of these principles to the complaint here.

For the purposes of Rule 12(b)(6), we take the allegations of the complaint as true. *Newberne*, 359 N.C. at 784, 618 S.E.2d at 203. The majority here does not specify which allegations in the complaint suffice, as a matter of law, to establish the decedent's ordinary contributory negligence, let alone establish that "the actions of both the decedent and defendants rise to the same level of negligence." Nonetheless, assuming *arguendo* that the allegations of the complaint can be taken as conclusively establishing ordinary contributory negligence on the part of the decedent, the allegations of the complaint, in my view, plainly allege gross negligence on the part of defendants, so that contributory negligence does not bar the claim. Specifically, plaintiff alleged in the complaint:

51. The employee(s) or agent(s), such as "1241 Michael," of Defendants' conduct of serving twenty-four (24) alcoholic beverages, of which the Decedent was served at least ten (10) of those drinks, in approximately a four-to-five hour period was an egregious, wrongful act which constitutes gross negligence and was willful or wanton conduct which evidences a reckless disregard for the safety of others.

52. That the employee(s) or agent(s), such as "1241 Michael," of Defendants continued to serve intoxicating liquor drinks to the decedent, Lisa Mary Davis, after Lisa Mary Davis became noticeably or visibly intoxicated was an egregious, wrongful act which constitutes gross negligence and was willful or wanton conduct which evidences a reckless disregard for the safety of others.

53. That the employee(s) or agent(s) of Defendants knew or had reason to know that Lisa Mary Davis was so grossly intoxicated so as to be a danger to herself and knew or had reason to know that the quantities of alcohol she had been served and consumed were potentially lethal . . . .

. . . .

55. That the egregious, willful or wanton conduct of Defendants' employee(s) or agent(s), while in the course and scope of their employment with Defendants as set forth above was a proximate cause of the injuries and damages sustained by Plaintiff.

Facially, these allegations assert gross negligence and willful and wanton conduct evidencing a reckless disregard for the safety of others. Taking these allegations as true, I conclude that the majority has improperly applied inferences of ordinary contributory negligence to bar plaintiff's claims for gross negligence and willful and wanton conduct as a matter of law. These allegations contend in part that defendants served a noticeably intoxicated person anywhere between ten and twenty-four liquor drinks over a four to five hour period, with knowledge both of the person's intoxication and that the quantities served were "potentially lethal." In my view, it is for the jury to decide whether the facts as alleged are ultimately shown by evidence to constitute a conscious, or even a reckless, "disregard of the safety of others." *Yancey*, 354 N.C. at 53, 550

S.E.2d at 158; *see also Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 334 S.E.2d 751, 755 (1985) ("A complaint should not be dismissed under Rule 12(b)(6) '. . . unless it affirmatively appears that plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim.' " (ellipsis in original) (quoting *Presnell v. Pell*, 298 N.C. 715, 719, 260 S.E.2d 611, 613 (1979))).

Moreover, I see no allegations in the complaint that can be construed as establishing, as a matter of law, gross contributory negligence on the part of the decedent, as was the case in *Sorrells*. There, as the majority noted, the plaintiff argued that the allegations in the complaint of the defendant's serving alcohol to the intoxicated decedent, after being requested to refrain from serving him, sufficiently alleged gross negligence, such that the decedent's ordinary contributory negligence would not bar recovery. *Sorrells*, 332 N.C. at 647-48, 423 S.E.2d at 73-74. Yet, the Court noted that the complaint also alleged that the decedent had chosen to drive his vehicle while highly intoxicated—a willful violation of the impaired driving statute. *Id.* at 648, 423 S.E.2d at 74.[1] Accordingly, the Court held that "to the extent the allegations in the complaint establish more than ordinary negligence on the part of defendant, they also establish a similarly high degree of contributory negligence on the part of the decedent." *Id.* at 649, 423 S.E.2d at 74. Although driving while highly intoxicated clearly evinces "a *conscious* disregard of the safety of others," *Yancey*, 354 N.C. at 53, 550 S.E.2d at 158, I am unaware of any decision from this Court holding that drinking to the point of intoxication in a safe location, absent accompanying allegations of impaired driving or other conduct, constitutes gross negligence as a matter of law.

In looking solely at the allegations of the complaint and taking them as true, and expressing no view on the ultimate merits of plaintiff's claim, I conclude that plaintiff has sufficiently alleged gross negligence on the part of defendants. Unlike in *Sorrells*, there are no allegations in the complaint that, as a matter of law, constitute gross contributory negligence on the part of the decedent. As such, I disagree with the majority's

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1. The Court also noted that it had previously held that "a willful violation of this statute constitutes culpable negligence" and that the decedent's conduct, had his driving while impaired resulted in the death of another, would have amounted to manslaughter. 332 N.C. at 648, 423 S.E.2d at 74 (citing *State v. McGill*, 314 N.C. 633, 637, 336 S.E.2d 90, 92 (1985)); *see also id.* at 648-49, 423 S.E.2d at 74 ("Proof of both a willful violation of the statute and a causal connection between the violation and a death is all that is needed to support a successful prosecution for manslaughter. Plaintiff cannot dispute either of these elements under the facts as alleged in the complaint." (citing *McGill*, 314 N.C. at 636, 336 S.E.2d at 92)).

conclusion that contributory negligence dooms plaintiff's claim at the pleading stage and respectfully dissent from the Court's decision. I would affirm the Court of Appeals on this issue and proceed to address the issue of the first-party dram shop claim.

Justices BEASLEY and MORGAN join in this dissenting opinion.

IN THE MATTER OF D.E.M.

No. 279A17

Filed 2 March 2018

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 802 S.E.2d 766 (2017), affirming an order entered on 29 September 2016, as amended by an order entered on 10 October 2016, by Judge David V. Byrd in District Court, Wilkes County. Heard in the Supreme Court on 5 February 2018.

Vannoy, Colvard, Triplett & Vannoy, P.L.L.C., by Daniel S. Johnson, for petitioner-appellees.

Robert W. Ewing for respondent-appellant mother.

PER CURIAM.

AFFIRMED.

IN RE J.A.M.

[370 N.C. 464 (2018)]

IN THE MATTER OF J.A.M.

No. 7PA17

Filed 2 March 2018

Child Abuse, Dependency, and Neglect—standard of review —findings

Where, in its order adjudicating minor J.A.M. to be a neglected juvenile, the trial court found that "[t]o date, [respondent-mother] failed to acknowledge her role in the [prior juveniles] entering custody and her rights subsequently being terminated," the Court of Appeals erred by determining that respondent's vague concession to having made "poor decisions" contradicted that finding and by reversing the decision of the trial court. Because the trial court's finding was supported by clear and convincing evidence, it should have been deemed conclusive—even though some evidence would have supported a contrary finding.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 795 S.E.2d 262 (2016), reversing an order entered on 30 March 2016 by Judge Louis A. Trosch in District Court, Mecklenburg County. Heard in the Supreme Court on 9 January 2018.

Matthew D. Wunsche, GAL Appellate Counsel, for appellant Guardian ad Litem; and Marc S. Gentile and Keith S. Smith, Associate County Attorneys, for petitioner-appellant Mecklenburg County Department of Social Services, Youth and Family Services.

Richard Croutharmel for respondent-appellee mother.

PER CURIAM.

It is well settled that "[i]n a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re N.G.*, 186 N.C. App. 1, 4, 650 S.E.2d 45, 47 (2007) (quoting *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997)), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008); *see also In re Montgomery*, 311 N.C. 101, 110-11, 316 S.E.2d 246, 252-53 (1984) ("Although the question of the *sufficiency* of the evidence to support the findings may be raised on appeal, our appellate courts are bound by

the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." (citations omitted)). Here, in its order adjudicating J.A.M. to be a neglected juvenile, the trial court found that "[t]o date, [respondent-mother] failed to acknowledge her role in the [prior juveniles] entering custody and her rights subsequently being terminated."

The evidence presented at the adjudication phase tended to show that respondent has a long history of violent relationships with the fathers of her previous six children, in which respondent's children "not only witnessed domestic violence, but were caught in the middle of physical altercations." Furthermore, during this time, respondent repeatedly declined services from Mecklenburg County Department of Social Services, Youth and Family Services (YFS), and "continued to deny, minimize and avoid talking about incidences of violence." This resulted in her three oldest children first entering the custody of YFS on 24 February 2010.

The most serious incident occurred in June 2012 when, shortly after respondent represented to the court "that she was through with [E.G., Sr.]" and that "her relationship with [E.G., Sr.] was over" in order to regain custody of her children, she quickly invited E.G., Sr. back into her home. Following another domestic violence incident between herself and E.G., Sr., she "placed [E.G., Jr.] in an incredibly unsafe situation sleeping on the sofa with [E.G., Sr.]" for the night, which resulted in E.G., Jr. suffering severe, life-threatening injuries, including multiple skull fractures, at the hands of E.G., Sr. The next morning, respondent "observed [E.G., Jr.'s] swollen head, his failure to respond, [and] his failure to open his eyes or move his limbs," but did not dial 911 for over two hours. Following this incident, respondent's children re-entered the custody of YFS. Afterwards, she refused to acknowledge E.G., Jr.'s "significant special needs" that resulted from his injuries, claiming "there is nothing wrong with him," and proceeded to have another child with E.G., Sr. in 2013 when he was out on bond for charges of felony child abuse. Respondent's parental rights to her previous six children were terminated on 21 April 2014 largely owing to her failure to take "any steps to change the pattern of domestic violence and lack of stability for the children since 2007."

At the adjudication hearing below, respondent vaguely acknowledged "[m]aking bad decisions" and "bad choices" in the past, without offering specific examples except for "giv[ing] men benefits of the doubts." Shortly after this, respondent testified:

> Q. Why were your rights terminated?
>
> A. Because when my child came back into -- my kids came back into custody, due to my child being physical injury by his father, [E.G., Sr.]. That's --
>
> Q. So your understanding is that your rights to your six other children was -- were terminated because of one child being physically abused?
>
> A. Oh, yes, ma'am.

Regarding her role in that abuse, respondent testified:

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

Plainly, there was clear and convincing evidence to support the trial court's finding of fact that respondent "failed to acknowledge her role" both in her previous six children "entering custody" and in "her rights subsequently being terminated."

The Court of Appeals, however, determined that respondent's vague concession to having made "poor decisions" constituted evidence that "directly contradicts the finding [that respondent failed to acknowledge her role in the children entering custody and her rights subsequently being terminated] and there is no evidence in the record to the contrary." *In re J.A.M.*, ___ N.C. App. ___, ___, 795 S.E.2d 262, 265 (2016). While that evidence potentially "might sustain findings to the contrary," *In re Montgomery*, 311 N.C. at 110-11, 316 S.E.2d at 252-53, the Court of Appeals here misapplied the standard of review in that the trial court's finding was "supported by clear and convincing competent evidence" and is therefore "deemed conclusive," *In re N.G.*, 186 N.C. App. at 4, 650 S.E.2d at 47.

Accordingly, the decision of the Court of Appeals is reversed, and this case is remanded to the Court of Appeals for reconsideration and for proper application of the standard of review.

REVERSED AND REMANDED.

DESIREE KING, BY AND THROUGH HER GUARDIAN AD LITEM, G. ELVIN SMALL, III, AND AMBER M. CLARK, INDIVIDUALLY

v.

ALBEMARLE HOSPITAL AUTHORITY D/B/A ALBEMARLE HEALTH/ ALBEMARLE HOSPITAL, SENTARA ALBEMARLE REGIONAL MEDICAL CENTER, LLC D/B/A SENTARA ALBEMARLE MEDICAL CENTER, NORTHEASTERN OB/GYN, LTD., BARBARA ANN CARTER, M.D., AND ANGELA McWALTER, CNM

No. 382PA16

Filed 2 March 2018

Statutes of Limitation and Repose—medical malpractice—minor—guardian ad litem appointed

The trial court correctly dismissed plaintiff's medical malpractice claims as time barred where the trial court had appointed a guardian ad litem (GAL) on behalf of a minor and specifically tasked him with bringing an action on behalf of the minor. A minor plaintiff who continues under that status until age eighteen has one year to file the claim, but the appointment of a GAL in this case removed plaintiff's disability of minority so that the three-year statute of limitations for medical malpractice actions began running.

Justice BEASLEY dissenting.

Justices HUDSON and MORGAN join in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 791 S.E.2d 662 (2016), reversing an order entered on 27 July 2015 by Judge Cy A. Grant in Superior Court, Pasquotank County, and remanding the case for further proceedings. Heard in the Supreme Court on 8 November 2017.

Hammer Law, PC, by Amberley G. Hammer; and Ashcraft & Gerel, LLC, by Wayne M. Mansulla, pro hac vice, for plaintiff-appellee King.

Harris, Creech, Ward and Blackerby, P.A., by Jay C. Salsman and Charles E. Simpson, Jr., for defendant-appellants Albemarle Hospital Authority and Sentara Albemarle Regional Medical Center, LLC.

Smith Anderson Blount Dorsett Mitchell & Jernigan LLP, by Samuel G. Thompson and Robert E. Desmond, for defendant-appellants Northeastern OB/GYN, Ltd., Barbara Ann Carter, M.D., and Angela McWalter, CNM.

Tin, Fulton, Walker & Owen, by Adam Stein; and Whitley Law Firm, by Ann C. Ochsner, for North Carolina Advocates for Justice, amicus curiae.

NEWBY, Justice.

In this case we decide whether the appointment of a guardian *ad litem* on behalf of a minor removes the disability of minority and starts the running of the statute of limitations. As a minor's legal representative with the authority and directive to act, a guardian *ad litem* advocates for the legal rights of the minor in the minor's stead. The trial court's appointment of a guardian *ad litem* on behalf of a minor therefore removes that minor's disability of minority and starts the running of the statute of limitations. The statute of limitations continues to run even if the guardian *ad litem* files and then dismisses a legal action. Because a court-appointed guardian *ad litem* has the duty to pursue the minor's claim within the statute of limitations, a failure to do so time bars the claim. Accordingly, we reverse the decision of the Court of Appeals.

Plaintiff was born on 4 February 2005. Obstetrician Barbara Ann Carter, M.D. (Carter) and nurse midwife Angela McWalter, CNM (McWalter) managed the birth. Soon after, medical staff discovered plaintiff had sustained a brain injury during delivery. Almost three years later, on 10 January 2008, upon motion the trial court appointed a guardian *ad litem* (GAL), G. Elvin Small, III, for plaintiff for the purpose of bringing a civil action on her behalf. The same day, plaintiff, by and through her GAL, filed an action against Carter and Albemarle Hospital Authority (Hospital Authority) alleging plaintiff's brain injury resulted

from medical negligence. For undisclosed reasons, on 31 October 2008, the GAL voluntarily dismissed the action under Rule of Civil Procedure 41(a)(1).

Over six years later, on 30 January 2015, the trial court again granted a motion to appoint the same GAL to represent plaintiff "for the purpose of commencing a civil action on her behalf." The same day, plaintiff, by and through the GAL, filed the present action, again alleging medical negligence but, in addition to the Hospital Authority and Carter, naming other defendants, including McWalter and the Hospital Authority's successor corporation, Sentara Albemarle Regional Medical Center, LLC. The trial court dismissed plaintiff's claims as time barred on 27 July 2015, applying the three-year statute of limitations for medical malpractice claims.

Plaintiff appealed to the Court of Appeals, arguing that the plain language of N.C.G.S. § 1-17(b) tolled the statute of limitations period until 4 February 2024 when plaintiff reaches the age of nineteen. *See* N.C.G.S. § 1-17(b) (2009) (tolling certain limitations periods if a claim accrues when a plaintiff is under a disability). The Court of Appeals agreed and determined that, despite having had a court-appointed GAL, plaintiff's minority status constituted a disability that triggered the tolling provision of subsection 1-17(b). *King v. Albemarle Hosp. Auth.*, ___ N.C. App. ___, 791 S.E.2d 662, 2016 WL 4608188 (2016) (unpublished). Under the Court of Appeals' interpretation of subsection 1-17(b), the appointment of the GAL did not remove plaintiff's disability of minority, allowing plaintiff the same nineteen-year statute of limitations as a plaintiff for whom the trial court had not appointed a GAL. *King*, 2016 WL 4608188, at *3.[1] We allowed defendants' petition for discretionary review.

The question presented here is whether plaintiff filed the current action within the statute of limitations. Subsection 1-15(c) establishes the standard three-year statute of limitations for medical malpractice actions. N.C.G.S. § 1-15(c) (2017). Once a defendant properly raises a statute of limitations defense, the plaintiff must show that she initiated the action within the applicable time period. *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996) (citation omitted). "We have long recognized that a party must initiate an action

1. The Court of Appeals also held that, even though here plaintiff refiled the suit six years after the first voluntary dismissal under Rule 41 of the Rules of Civil Procedure, well outside of the one-year refiling deadline specified by the Rule, only a second voluntary dismissal under Rule 41 by plaintiff would result in an adjudication on the merits. *Id.* (citing N.C.G.S. § 1A-1, Rule 41(a) (2015)).

within a certain statutorily prescribed period after discovering its injury to avoid dismissal of a claim." *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, ___ N.C. ___, ___, 802 S.E.2d 888, 891 (2017).

"The purpose of a statute of limitations is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time." *Id.* at ___, 802 S.E.2d at 891 (quoting *Shearin v. Lloyd*, 246 N.C. 363, 371, 98 S.E.2d 508, 514 (1957), *superseded by statute*, N.C.G.S. § 1-15(b) (1971), *on other grounds as recognized in Black v. Littlejohn*, 312 N.C. 626, 630-31, 325 S.E.2d 469, 473 (1985)). "This security must be jealously guarded, for '[w]ith the passage of time, memories fade or fail altogether, witnesses die or move away, [and] evidence is lost or destroyed.' " *Id.* at ___, 802 S.E.2d at 891 (Alterations in original) (quoting *Estrada v. Burnham*, 316 N.C. 318, 327, 341 S.E.2d 538, 544 (1986), *superseded by statute*, N.C.G.S. § 1A-1, Rule 11(a) (Cum. Supp. 1988), *on other grounds as stated in Turner v. Duke Univ.*, 325 N.C. 152, 163-64, 381 S.E.2d 706, 712-13 (1989)). "[I]t is for these reasons, and others, that statutes of limitations are inflexible and unyielding and operate without regard to the merits of a cause of action." *Id.* at ___, 802 S.E.2d at 891-92 (quoting *Estrada*, 316 N.C. at 327, 341 S.E.2d at 544).

Balanced against the disadvantage of stale claims as protected by the statute of limitations is the problem that individuals under certain disabilities are unable to appreciate the nature of potential legal claims and take the appropriate action. Section 1-17 tolls certain statutes of limitation periods while a plaintiff is under a legal disability, such as minority, that impairs her ability to bring a claim in a timely fashion. The version of section 1-17 relevant here provides in part:

> (a) A person entitled to commence an action who is under a disability at the time the cause of action accrued may bring his or her action within the time limited in this Subchapter, after the disability is removed . . . within three years next after the removal of the disability, and at no time thereafter.
>
> . . . .
>
> (b) Notwithstanding the provisions of subsection (a) of this section, an action on behalf of a minor for malpractice arising out of the performance of or failure to perform professional services shall be commenced within the limitations of time specified in G.S. 1-15(c), except that if those time limitations expire before the minor attains the

> full age of 19 years, the action may be brought before the minor attains the full age of 19 years.

N.C.G.S. § 1-17(a), (b) (2009).

Subsection 1-17(a) contains many general provisions which address the applicability of this tolling provision, including the definition of "disability." *See id.* § 1-17(a)(1)-(3). Assuming a person is "under a disability at the time the cause of action accrue[s]," the statute requires the person to bring the cause of action within the time specified "after the disability is removed." *Id.* § 1-17(a). The disability of minority can be removed by the appointment of a GAL or by the passage of time, whichever occurs first. Thus, under subsection 1-17(a), a minor plaintiff who continues under the disability of minority, upon reaching the age of eighteen, has a three-year statute of limitations to bring a claim based on a general tort. *See id.* § 1-17(a)(1).

Whereas the tolling provision of subsection (a) focuses on general torts, the tolling provision of subsection (b) specifically addresses professional negligence claims, including medical malpractice. *Id.* § 1-17(b). As with general torts, when a medical malpractice claim accrues while a plaintiff is a minor, N.C.G.S. § 1-17(b) tolls the standard three-year statute of limitations provided by N.C.G.S. § 1-15(c). *Id.* Section 1-17(b), however, reduces the standard three-year statute of limitations, after a plaintiff reaches the age of majority, to one year by requiring a filing before the age of nineteen.[2] *Id.* Thus, a minor plaintiff who continues under that status until age eighteen has one year to file her claim. *Id.* The

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2. Effective 1 October 2011, the General Assembly amended this section to reduce the minor's age from nineteen to ten years, *see* Act of June 13, 2011, ch. 400, sec. 9, 2011 N.C. Sess. Laws 1712, 1716 (captioned "An Act to Reform the Laws Relating to Money Judgment Appeal Bonds, Bifurcation of Trials in Civil Cases, and Medical Liability") (codified as amended at N.C.G.S. § 1-17 (2017)), thus further narrowing the time period for a minor to pursue a medical malpractice claim. Currently, section 1-17 of the General Statutes includes the following pertinent language in subsection (c):

> Notwithstanding the provisions of subsection (a) and (b) of this section, an action on behalf of a minor for injuries alleged to have resulted from malpractice arising out of a health care provider's performance of or failure to perform professional services shall be commenced within the limitations of time specified in G.S. 1-15(c), except as follows:
>
> (1) If the time limitations specified in G.S. 1-15(c) expire before the minor attains the full age of 10 years, the action may be brought any time before the minor attains the full age of 10 years.

N.C.G.S. § 1-17(c)(1) (2017).

language of "Notwithstanding the provisions of subsection (a)" refers to this reduced time period to bring an action. *Id.* Like subsection (a), subsection (b) still allows the minor to reach adulthood before requiring her to pursue her medical malpractice claim, assuming her disability is otherwise uninterrupted. *Compare id.* § 1-17(a), *with id.* § 1-17(b). Removal of the disability either by reaching the age of majority or by appointment of a GAL triggers the running of the statute of limitations.

This statutory interpretation comports with our long-standing jurisprudence: When the trial court appoints a GAL for the purpose of pursuing a minor plaintiff's legal claim, it removes the minor's disability and begins the running of the statute of limitations.

> In North Carolina the rule is that the statute of limitations begins to run against an infant . . . who is represented by a [court-appointed] guardian at the time the cause of action accrues. If he has no guardian at that time, then the statute begins to run upon the appointment of a guardian or upon the removal of his disability as provided by G.S. 1-17, whichever shall occur first.

First-Citizens Bank & Tr. v. Willis, 257 N.C. 59, 62, 125 S.E.2d 359, 361 (1962) (citation omitted); *see also Teele v. Kerr*, 261 N.C. 148, 150, 134 S.E.2d 126, 128 (1964) (The appointment of a guardian who acts as a legal representative starts "the statute of limitations . . . as to any action which the guardian could or should bring, at the time the cause of action accrues." (citing *First-Citizens Bank*, 257 N.C. 59, 125 S.E.2d 359)); *Johnson v. Pilot Life Ins. Co.*, 217 N.C. 139, 144, 7 S.E.2d 475, 478 (1940) ("Exposure to a suit by the guardian—one which was within the scope of both his authority and duty—for a sufficient length of time, would constitute a bar to the action of the ward."); *Tate v. Mott*, 96 N.C. 19, 24, 2 S.E. 176, 178 (1887) ("When an infant thus brings his action, the Court has jurisdiction of him, just as if he were an adult plaintiff, and orders, judgments and decrees entered in the course of it are binding and conclusive upon him, while they remain unreversed. And generally, any infant may thus bring his action, if he has good cause . . . ."); *White v. Albertson*, 14 N.C. 241, 242-43 (1831) (differentiating between a valid judgment against a represented minor and an invalid judgment by default against minors not represented). As a result, "ordinarily the failure of the guardian to sue in apt time is the failure of the ward, entailing the same legal consequence with respect to the bar of the statute." *Johnson*, 217 N.C. at 144, 7 S.E.2d at 477-78.

Moreover, once the statute of limitations begins to run, it is not thereafter tolled. *Rowland v. Beauchamp*, 253 N.C. 231, 234-35, 116 S.E.2d 720, 723 (1960) (appointing a new GAL did not restart the statute of limitations, which began to run at the appointment of the first GAL); *id.* at 235, 116 S.E.2d at 723 ("It is well settled that, when the statute of limitations begins to run, nothing stops it." (quoting *Frederick v. Williams*, 103 N.C. 189, 190-91, 9 S.E. 298, 298 (1889))).[3] As such, the court's appointment of a GAL requires the GAL, as the minor's legal representative, to comply with the standard three-year statute of limitations for medical malpractice claims. *See* N.C.G.S. § 1-17(a), (b) (requiring the claim be brought within the time specified by N.C.G.S. § 1-15(c) after the disability is removed). This interpretation of section 1-17 mirrors the codified duty of a GAL to advocate on behalf of the minor as if the minor is under no disability. *Id.* § 1A-1, Rule 17(e) (2017) ("Any guardian ad litem appointed for any party . . . shall file and serve such pleadings as may be required within the times specified by these rules . . . . [T]he court may proceed to final judgment . . . against any party so represented as effectually and in the same manner *as if said party had been under no legal disability* . . . ." (emphasis added)).

Here, on 10 January 2008, the trial court appointed the GAL and specifically tasked him with bringing an action on behalf of the minor plaintiff. Such an appointment provided plaintiff a legal representative and removed plaintiff's disability of minority. Under section 1-17, the removal of the disability eliminates the tolling and starts the running of the applicable three-year statute of limitations for medical malpractice actions. The GAL's subsequent dismissal of the action did not reinstate the tolling. Plaintiff filed this current action after the statute of limitations expired. Accordingly, we reverse the decision of the Court of Appeals and instruct that court to reinstate the trial court's order dismissing plaintiff's claims as time barred.

REVERSED.

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3. *See also Genesco, Inc. v. Cone Mills Corp.*, 604 F.2d 281, 283 (4th Cir. 1979) ("Unlike most jurisdictions, North Carolina does not suspend the running of the statute of limitations on an infant's cause of action during the period of infancy when the infant has a guardian charged with the duty of bringing the action on his behalf."); *id.* at 285 ("The rationale of the *Rowland* doctrine is that since an infant represented by a guardian has the capacity, despite his infancy, to bring suit through his guardian, there is no need to suspend the running of the statute of limitations."); *Simmons ex rel. Simmons v. Justice*, 87 F. Supp. 2d 524, 530 (W.D.N.C. 2000) (Under state law, "even a parent bringing suit on behalf of their own child will not start the running of the statute of limitations against the infant unless the parent is that child's court appointed guardian.").

Justice BEASLEY dissenting.

The majority engages in judicial interpretation of a clear and unambiguous statute, N.C.G.S. § 1-17(b), to reach a result that is contrary to its plain language. I would hold that the plain language of N.C.G.S. § 1-17(b) dictates that plaintiff's claim is timely, and the unanimous decision of the Court of Appeals below should be upheld. Accordingly, I respectfully dissent.

While the general limitations period applicable to professional negligence claims is three years, N.C.G.S. § 1-15(c) (2017), this case is controlled by the more specific provision addressing the time period within which professional negligence claims "may be brought" "on behalf of a minor," *id.* § 1-17(b) (2017). Subsection 1-17(b) provides, in relevant part:

> *Notwithstanding the provisions of subsection (a) of this section*, . . . an action on behalf of a minor for malpractice arising out of the performance of or failure to perform professional services shall be commenced within the limitations of time specified in [N.C.]G.S. [§] 1-15(c), *except that if those time limitations expire before the minor attains the full age of 19 years*, *the action may be brought before the minor attains the full age of 19 years*.

Id. § 1-17(b) (emphases added).[1] The statute's language could not be more clear. The provision allows a minor plaintiff injured by the professional negligence of another to bring a claim at any time "before the minor attains the full age of 19 years." *Id.* There is no proviso in subsection 1-17(b) allowing for a different result in the event that the minor is appointed a guardian *ad litem* (GAL) or if the minor files suit but elects to take a voluntary dismissal without prejudice under N.C.G.S. § 1A-1, Rule 41(a)(1).

Despite the clear, unambiguous language used by the legislature, the majority concludes—without citation to authority—that "[r]emoval of

1. All parties to this appeal, the Court of Appeals, and the majority agree that the General Assembly's addition of N.C.G.S. § 1-17(c) became effective 1 October 2011 and does not apply to plaintiff's claim because the actions upon which plaintiff's claim is based occurred prior to that date. *See* Act of June 13, 2011, ch. 400, sec. 9, 2011 N.C. Sess. Laws 1712, 1716 (captioned "An Act to Reform the Laws Relating to Money Judgment Appeal Bonds, Bifurcation of Trials in Civil Cases, and Medical Liability") (codified as amended at N.C.G.S. § 1-17 (2017)). However, the majority's interpretation of N.C.G.S. § 1-17(b) would apply with equal force to the amended statute to which the majority refers, N.C.G.S. § 1-17(c)(1) (2017).

the disability [of minority] . . . by appointment of a GAL triggers the running of the statute of limitations," and that subsections 1-17(a) and (b) "requir[e] [that the minor's claim] be brought within the time specified by N.C.G.S. § 1-15(c) after the disability is removed." In doing so, the majority grafts additional terms onto subsection 1-17(b) that stem from provisions of *general applicability*: N.C.G.S. § 1-15(c) and N.C.G.S. § 1-17(a). *See First-Citizens Bank & Tr. v. Willis*, 257 N.C. 59, 62, 125 S.E.2d 359, 361 (1962) (interpreting the general disability tolling provision of N.C.G.S. § 1-17 as it existed at the time); *see also Teele v. Kerr*, 261 N.C. 148, 150, 134 S.E.2d 126, 128 (1964) (same); *Johnson v. Pilot Life Ins. Co.*, 217 N.C. 139, 143-44, 7 S.E.2d 475, 477-78 (1940) (same). The majority's reasoning is sound when applied to a minor's cause of action that does not fall within the scope of N.C.G.S. § 1-17(b). *See Rowland v. Beauchamp*, 253 N.C. 231, 234-35, 116 S.E.2d 720, 722-23 (1960). But the plain language of subsection 1-17(b) is not susceptible to this interpretation.

Subsection 1-17(b) begins by directing the reader to *disregard* the provisions of general applicability from subsection 1-17(a) which would require a minor plaintiff to bring her cause of action within three years "after the removal of the disability." *See* N.C.G.S. § 1-17(b) ("Notwithstanding the provisions of subsection (a) of this section. . . ."); *see also Notwithstanding*, *Black's Law Dictionary* (10th ed. 2014) (defining "[n]otwithstanding" as "Despite; in spite of"). Additionally, N.C.G.S. § 1-15, describing the generally applicable three-year limitations period for professional negligence actions, states that "[c]ivil actions can only be commenced within the periods prescribed in this Chapter, after the cause of action has accrued, *except where in special cases a different limitation is prescribed by statute*." N.C.G.S. § 1-15(a) (2017) (emphasis added). Subsection 1-17(b) prescribes a "different limitation" for the "special cases" of professional negligence actions brought on behalf of minors. "Where the language of a [statute] is clear and unambiguous, there is no room for judicial construction and the courts must give [the statute] its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974) (quoting 7 Strong's North Carolina Index 2d: *Statutes* § 5, at 77 (1968) (footnotes omitted)); *see also* Ernest Bruncken, *Interpretation of the Written Law*, 25 Yale L.J. 129, 130 (1915) ("[T]he actual intention of the legislat[ure] is quite immaterial [to a plain reading construction]; what matters is the way in which [legislators] ha[ve] actually expressed [their] intention. We must look to the wording of the statute, and to that alone."). Further,

> [w]here there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but, to the extent of any necessary repugnancy between them, *the special statute, or the one dealing with the common subject matter in a minute way, will prevail over the general statute*, according to the authorities on the question, unless it appears that the legislature intended to make the general act controlling; and this is true *a fortiori* when the special act is later in point of time, although the rule is applicable without regard to the respective dates of passage.

Nat'l Food Stores v. N. C. Bd. of Alcoholic Control, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966) (emphasis added) (quoting 82 C.J.S. *Statutes* § 369, at 839-43 (1953) (second italics added) (footnotes omitted)). Here, the later enacted, more specific provision of subsection 1-17(b) controls over the general provisions of subsections 1-17(a) and 1-15(c).

According to the plain language of subsection 1-17(b), "the action may be brought before the minor attains the full age of 19 years." N.C.G.S. § 1-17(b). This action was brought before plaintiff's nineteenth birthday. Thus, the decision of the Court of Appeals is correct and should be affirmed.

Justices HUDSON and MORGAN join in this dissenting opinion.

N.C. DEP'T OF TRANSP. v. MISSION BATTLEGROUND PARK, DST

[370 N.C. 477 (2018)]

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION
v.
MISSION BATTLEGROUND PARK, DST; MISSION BATTLEGROUND PARK LEASECO, LLC, Lessee; LASALLE BANK NATIONAL ASSOCIATION, as Trustee for the Registered Holders of CD 2006-CD3 Commercial Mortgage Pass-Through Certificates; and LAT BATTLEGROUND PARK, LLC

No. 361PA16

Filed 2 March 2018

1. Appeal and Error—preservation of issues—exclusion of testimony—not properly preserved

An argument by the Department of Transportation (DOT) that defendants did not properly preserve for appellate review the exclusion of a realtor's fair market value testimony was not properly before the N.C. Supreme Court. DOT's response to defendants' petition for discretionary review did not state any additional issues that DOT sought to present. Even so, defendants' offer of proof regarding the testimony was apparently sufficient to preserve the issue, regardless of whether defendants tried to call the witness to testify about fair market value at trial.

2. Witnesses—real estate broker—expert testimony—fair market value

The trial court erred by prohibiting a real estate broker from giving expert testimony about fair market value based on N.C.G.S. § 93A-83(f). The authority of a real estate broker to prepare an expert report and to testify as an expert in court comes from Rule of Evidence 702, not from Article 6 of Chapter 93A, which distinguishes between licensed brokers and licensed appraisers.

3. Evidence—exclusion of real estate broker's testimony—prejudicial

There was prejudice from the exclusion of a real estate broker's testimony in a case involving the condemnation of land for highway construction where there was a reasonable probability that the trial court would have admitted the broker's fair market value testimony under Rule 702 if the trial court had not excluded that testimony based on subsection 93A-83(f). Moreover, if the broker's testimony about fair market value had been admitted under Rule 702, there was a reasonable probability that his testimony would have affected the jury's verdict.

4. Eminent Domain—condemnation—instructions—fair market value

The North Carolina Supreme Court declined to disturb *Carolina Power & Light Co. v. Creasman*, 262 N.C. 390, in a condemnation case, remanded on other grounds, which included an issue involving a fair market value instruction that was likely to recur.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 791 S.E.2d 478 (2016), finding no error after appeal from a judgment entered on 30 July 2015 and orders entered on 24 September 2015 by Judge Richard S. Gottlieb in Superior Court, Guilford County. Heard in the Supreme Court on 7 November 2017.

Joshua H. Stein, Attorney General, by Hilda Burnett-Baker, Special Deputy Attorney General, and Phyllis A. Turner, Assistant Attorney General, for plaintiff-appellee.

Smith Moore Leatherwood LLP, by Patrick M. Kane, Bruce P. Ashley, Kip D. Nelson, and Matthew Nis Leerberg, for defendant-appellants.

Wilson & Helms LLP, by Lorin J. Lapidus and G. Gray Wilson, for Civitas Institute, amicus curiae.

Bass Dunklin McCullough & Smith, PLLC, by Garth K. Dunklin, for James F. Collins, amicus curiae.

MARTIN, Chief Justice.

In March 2013, the North Carolina Department of Transportation (DOT) condemned 2.193 acres of land in Greensboro, North Carolina, for a highway construction project. This land had previously been part of a 240-unit apartment complex that is now called Landmark at Battleground Park. The defendants in this case are the current and former owners, the lessee, and the mortgage holder of the Landmark apartment complex. In its Declaration of Taking and Notice of Deposit, DOT stated that it had deposited $276,000 with the Superior Court of Guilford County and indicated that defendants could seek disbursement of this money as partial or full compensation for the taking. Defendants argued that $276,000 did not amount to just compensation and demanded a trial to determine the correct amount of damages.

At trial, defendants sought to introduce James Collins, a licensed real estate broker, as an expert witness who would testify about the fair market value of the Landmark apartment complex before and after the taking. In his expert report, Mr. Collins compared the fair market value of the entire tract just before the taking with what the fair market value of the remainder of the tract would be after the construction of the highway. After comparing these two values, Mr. Collins opined that the proper amount of just compensation for the taking was $3.734 million.

After DOT moved in limine to exclude Mr. Collins' expert report and expert testimony, the trial court excluded Mr. Collins' report and prohibited him from testifying about the fair market value of the property in question based on N.C.G.S. § 93A-83, which governs the practice of providing broker price opinions and comparative market analyses. According to the trial court, Mr. Collins could provide a "broker price opinion or comparative market analysis" using his expertise as a broker, but that opinion or analysis would have to focus on the probable selling price of the property rather than on its fair market value. The trial court based its ruling specifically on the language of section 93A-83 and did not analyze any of Mr. Collins' proposed fair-market-value testimony under Rule 702 of the North Carolina Rules of Evidence. The trial court noted its discomfort with its conclusion, questioning whether the General Assembly had intended the result that the trial court reached. But the trial court ultimately stated that what it thought was "the plain reading of the statute" controlled.

The trial proceeded with Mr. Collins' report and fair-market-value testimony excluded. The trial court admitted testimony on fair market value from other experts. Two DOT experts argued that just compensation should be set at $276,050 and $1,271,850, respectively. The trial court allowed defendants to introduce testimony from another expert, who argued for a just compensation figure of $3,169,175. While instructing the jury, the trial court stated that "[f]air market value should not include the diminution in value of the remainder property caused by the acquisition and use of the adjoining lands of others for the same undertaking." The jury ultimately returned a verdict setting just compensation for the taking at $350,000.

Defendants appealed this decision to the Court of Appeals, alleging, among other things, that Mr. Collins' report and his testimony on fair market value should have been admitted as evidence. Defendants also objected to the special jury instruction that we have just quoted. The Court of Appeals found no error and affirmed the trial court's decision.

N.C. Dep't of Transp. v. Mission Battleground Park, DST, ___ N.C. App. ___, ___, 791 S.E.2d 478, 486 (2016). Defendants sought discretionary review of the statutory exclusion of Mr. Collins' testimony about fair market value, as well as of the allegedly improper jury instruction. We allowed discretionary review of these issues.

[1] DOT argues that defendants did not properly preserve the exclusion of Mr. Collins' fair-market-value testimony for appellate review. But this argument is not properly before us, because DOT's response to defendants' petition for discretionary review did not state any additional issues that DOT sought to present. *See* N.C. R. App. P. 15(d). Our scope of review is therefore limited to the issues that defendants have raised.

Even if this issue were properly before us, however, it appears that defendants' offer of proof regarding Mr. Collins' testimony was sufficient to preserve the issue, regardless of whether defendants tried to call him to testify about fair market value at trial. "An offer of proof under Rule 43(c) must be specific and must indicate what testimony the excluded witness would give." *Currence v. Hardin*, 296 N.C. 95, 100, 249 S.E.2d 387, 390 (1978). During the offer of proof, Mr. Collins laid out his credentials in detail, including his thirty-nine years of experience in the apartment complex business, during which he had estimated the fair market values of hundreds of apartment complexes. Mr. Collins also announced his $3.734 million estimate of the damages due to defendants and summarized the calculation that led to that estimate. We do not find any defect in this offer of proof.

[2] We typically review a trial court's ruling on the admission or exclusion of expert testimony for abuse of discretion. *See State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016). In this case, however, the decision to exclude testimony was based specifically on the interpretation of a statute. Because we review questions of statutory interpretation de novo, *In re Foreclosure of Vogler Realty, Inc.*, 365 N.C. 389, 392, 722 S.E.2d 459, 462 (2012), we likewise review any exclusion of evidence based specifically and only on statutory interpretation de novo.

DOT is arguing, in effect, that an expert witness needs to prepare an expert report on a given issue in order to give expert testimony on that issue. We assume, for the sake of argument, that this is true. But, DOT asserts, Mr. Collins could not lawfully prepare an expert report about fair market value because N.C.G.S. § 93A-83(f) forbids him from doing so. DOT thus concludes that Mr. Collins could not give expert testimony about fair market value. Under DOT's argument, then, Mr. Collins' ability to give expert testimony about fair market value depends on his ability

to prepare an expert report on fair market value without violating subsection 93A-83(f). We therefore focus on whether he could prepare the expert report on fair market value that he in fact prepared without violating that subsection.

Subsection 93A-83(f) states:

> **Restrictions.** — Notwithstanding any provisions to the contrary, a person licensed [as a real estate broker] pursuant to this Chapter may not knowingly prepare a broker price opinion or comparative market analysis for any purpose in lieu of an appraisal when an appraisal is required by federal or State law. A broker price opinion or comparative market analysis that estimates the value of or worth [of] a parcel of or interest in real estate rather than sales or leasing price shall be deemed to be an appraisal and may not be prepared by a licensed broker under the authority of this Article, but may only be prepared by a duly licensed or certified appraiser, and shall meet the regulations adopted by the North Carolina Appraisal Board. A broker price opinion or comparative market analysis shall not under any circumstances be referred to as a valuation or appraisal.

These restrictions distinguish between licensed brokers—who are allowed to provide estimates of the "probable selling price or leasing price" of real property under N.C.G.S. §§ 93A-82 and 93A-83(a) and (b)—on the one hand, and licensed or certified *appraisers*—who are allowed to provide estimates of the *value* of real property—on the other. The question, then, is whether this limitation on licensed brokers applies when a licensed broker prepares an expert report in a civil proceeding.

The second sentence of subsection 93A-83(f) may, at first glance, seem to be an impediment to Mr. Collins' preparing an expert report in this case. That sentence indicates that a broker price opinion (BPO) or a comparative market analysis (CMA) that estimates the value of property rather than the price of property will "be deemed to be an appraisal," and that a licensed broker cannot prepare that document "under the authority of this Article." N.C.G.S. § 93A-83(f) (2017). That last, quoted phrase is key to our analysis, though, and both the trial court and the Court of Appeals seem to have overlooked it.

That phrase refers to the authority given to licensed brokers in Article 6 of Chapter 93A—more specifically, to the authority given to licensed brokers in subsections 93A-83(a) and (b), which authorize

brokers to prepare BPOs and CMAs and to collect fees for doing so. But the authority of a broker (or of anyone else) *to testify as an expert in court*, and thus to prepare an expert report, does not come from Article 6 of Chapter 93A in the first place. That authority instead comes from Rule of Evidence 702 and the cases that set out the standard for admission of expert testimony under that rule. Any person who can qualify as an expert under that standard, which is articulated in *State v. McGrady*, 368 N.C. 880, 787 S.E.2d 1, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993), and other pertinent caselaw, can testify without having to invoke any other source of authority. Meeting that standard is both necessary and sufficient.

Subsection 93A-83(f)'s language that a BPO or a CMA that contains an appraisal of value rather than an estimate of probable price "may only be prepared by a duly licensed or certified appraiser" does not change this conclusion. That language must be read in conjunction with the rest of the sentence in which it appears: when a licensed broker mistakenly relies on the authority set forth in Article 6 to prepare what is actually an appraisal—and, it implicitly follows, when a broker therefore *lacks* the authority to prepare that appraisal—the limitation that only an appraiser may prepare an appraisal kicks in. That limitation does not apply when a broker relies on a source of authority outside of Article 6 to prepare an expert report to support his in-court testimony.

In other words, because Mr. Collins did not prepare his expert report "under the authority of" Article 6 of Chapter 93A, and relied on the authority that Rule 702 purportedly gave him instead, his preparation of that report did not violate the second sentence of subsection 93A-83(f). This is true even if we assume what we need not, and do not, decide—namely, that Mr. Collins' expert report would also qualify as a BPO or a CMA under section 93A-82.

The statement in subsection 93A-83(f)'s third sentence—that a BPO or a CMA "shall not under any circumstances be referred to as a valuation or [an] appraisal"—does not present a problem for Mr. Collins' expert report either, for two reasons.

First, this statement simply requires that a BPO or a CMA not be *called* a valuation or an appraisal. Even assuming that his expert report was a BPO or a CMA, Mr. Collins complied with that requirement. He did not refer to his report as a "valuation" or an "appraisal" of the property taken, either in the report itself or elsewhere. He did purport to estimate the "fair market value" of the property in question, but that does not violate the third sentence of subsection (f) at all.

Second and more importantly, though, subsection (f)'s third sentence must be interpreted holistically with the rest of the statute. "Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012). Subsection (f) is labelled "Restrictions." Read in the context of section 93A-83 as a whole, this subsection's effect is to restrict—or, at least, to clarify the limits of—the authority that subsections 93A-83(a) and (b) grant to licensed brokers to issue BPOs and CMAs. The first sentence of subsection (f) indicates that a broker cannot prepare a BPO or a CMA in lieu of an appraisal when an appraisal is required by law; the second sentence of subsection (f) indicates that a broker cannot prepare what is, in substance, an appraisal but call it a BPO or a CMA. The restriction in the third sentence of subsection (f) is basically the inverse of the restriction in the second sentence; it indicates that a broker cannot prepare what is, in substance, a BPO or a CMA but call it an appraisal or a valuation.

Subsection (f), then, is not a freestanding provision that applies to anything that in theory falls within the statutory definition of a BPO or a CMA. It simply limits, or clarifies preexisting limitations on, the authority granted in subsections 93A-83(a) and (b). Once again, Mr. Collins derived his purported authority to submit an expert report in this case from Rule 702, not from section 93A-83. We have already discussed why that fact makes the second sentence of subsection 93A-83(f) inapplicable here, and it makes the third sentence inapplicable here too.

It is worth noting that, under DOT's reading of the statute, subsection 93A-83(f) would bar a licensed broker from testifying about fair market value simply because he holds a broker's license—even when an intelligent layperson, without any license, *could* potentially testify about fair market value. Subsection (f) says nothing about whether an appraisal of property value can be done by a layperson, after all. But professional licenses grant an individual the right to legitimately engage in certain activities; they do not revoke capacities that the individual previously had. So, in addition to running afoul of the statute's meaning, DOT's reading of the statute would lead to absurd results.

[3] Having established that the trial court erroneously invoked subsection 93A-83(f) to exclude Mr. Collins' expert testimony, we turn to the question of whether that error was prejudicial or harmless. "In civil cases, '[t]he burden is on the appellant not only to show error but to enable the court to see that he was prejudiced or the verdict of the jury

probably influenced thereby.' " *HAJMM Co. v. House of Raeford Farms, Inc.*, 328 N.C. 578, 589, 403 S.E.2d 483, 490 (1991) (alteration in original) (quoting *Wilson Cty. Bd. of Educ. v. Lamm*, 276 N.C. 487, 492, 173 S.E.2d 281, 285 (1970)). In other words, defendants must show a "reasonable probability" that the jury would have reached a more favorable verdict had the trial court not excluded Mr. Collins' testimony about fair market value on erroneous statutory grounds. *See id.* (citing, inter alia, *Gregory v. Lynch*, 271 N.C. 198, 203, 155 S.E.2d 488, 492 (1967)).

To begin with, there is a reasonable probability that the trial court would have admitted Mr. Collins' fair-market-value testimony under Rule 702 if the trial court had not excluded that testimony based on subsection 93A-83(f). The trial court would have permitted Mr. Collins to testify about probable selling price if defendants had called him as an expert witness at trial and laid a proper foundation for his testimony. The trial court also expressed misgivings about the result that it reached under subsection (f) but incorrectly thought that subsection (f) "constrained" it to exclude Mr. Collins' testimony about fair market value.

And if Mr. Collins' testimony about fair market value had been admitted under Rule 702, there is a reasonable probability that his testimony would have affected the jury's verdict. The amount of money due to defendants was the only issue for the jury to decide. Any probable effect on the dollar figure decided on by the jury would therefore be enough to establish prejudice. While Mr. Collins' testimony may not have resulted in defendants' receiving all of the compensation that they wanted, it almost certainly would have changed the jury's analysis, and therefore would have changed the final dollar figure announced in the verdict. Standing alone, the approximately $3.17 million value estimate that defendants' sole expert introduced may have seemed like an outlier to the jury. But an additional, even higher estimate could have changed that perception.

Mr. Collins' $3.734 million calculation of just compensation, moreover, was significantly higher than any of the three figures to which the other experts actually testified at trial, and was over half a million dollars higher than even the figure to which defendants' other expert testified. The jury did not adopt any expert's figure exactly in its verdict, but it did reach a figure that was closer to those of DOT's two experts than to that of defendants' one expert. In light of these facts, it would have been improbable for the introduction of Mr. Collins' fair-market-value testimony *not* to have affected the jury's conclusions.

DOT is correct that the trial court would have allowed Mr. Collins to testify about the probable selling price of the property. That is not an

adequate substitute for testimony about the property's fair market value, however. N.C.G.S. § 136-112(1) explicitly states that, when only part of a tract of land is taken, damages are determined by calculating the difference between the *fair market value* of the entire tract of land before the taking and the *fair market value* of the remaining tract of land after the taking. If Mr. Collins had testified only about probable selling price, DOT could have easily attacked his testimony as not relevant to this determination, or at a minimum as less relevant than the testimony of the other experts.

Fair market value, after all, is defined as "the price to which a *willing* buyer and a *willing* seller would agree." *Dep't of Transp. v. Adams Outdoor Advert. of Charlotte Ltd. P'ship*, ___ N.C. ___, ___, 804 S.E.2d 486, 493 (2017) (emphases added). An analysis of probable selling price could take into account things that would not factor into an analysis of fair market value, though, such as individual motivations or hardships that might force either a buyer or a seller to accept a worse deal than he or she would if approaching the transaction willingly. In other words, fair market value and probable selling price are conceptually distinct, and an estimate of one cannot appropriately substitute for an estimate of the other. Indeed, DOT's main argument for excluding Mr. Collins' testimony is based entirely on the fact that subsection 93A-83(f) allows licensed brokers to estimate one but not the other in their BPOs and their CMAs.

We conclude that N.C.G.S. § 93A-83(f) did not prohibit Mr. Collins from preparing his expert report on fair market value in this case, and that the trial court's erroneous exclusion of Mr. Collins' testimony about fair market value on that basis prejudiced defendants. We therefore reverse the Court of Appeals on that issue and remand this case to the Court of Appeals with instructions to remand the case to the superior court for a new trial. We take no position on whether Mr. Collins was qualified under Rule 702 of the North Carolina Rules of Evidence to give the expert testimony that he intended to give. Assuming that defendants tender Mr. Collins as an expert again, the superior court should decide in the first instance whether his testimony about fair market value is admissible under Rule 702.

[4] Because we hold that a new trial is warranted based on the improper statutory exclusion of Mr. Collins' testimony, we do not need to reach defendants' argument concerning the allegedly improper special jury instruction given at trial. There is a good chance that the same issue will arise on retrial, however, so it is worthwhile to address the issue here. As we have said, the trial court instructed the jury that "[f]air market

value should not include the diminution in value of the remainder property caused by the acquisition and use of the adjoining lands of others for the same undertaking." This instruction was taken almost verbatim from this Court's opinion in *Carolina Power & Light Co. v. Creasman*, 262 N.C. 390, 137 S.E.2d 497 (1964). The pertinent language in that opinion was, in turn, quoting from an opinion of the Supreme Court of the United States. *See Campbell v. United States*, 266 U.S. 368, 372, 45 S. Ct. 115, 117 (1924). We see no reason to disturb *Creasman* and therefore affirm the decision of the Court of Appeals on this issue.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY
v.
LILLIAN DIANNE HULL AND ANNITTA B. CROOK

No. 45A17

Filed 2 March 2018

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 795 S.E.2d 420 (2016), affirming an order entered on 23 February 2016 by Judge Mark E. Klass in Superior Court, Davidson County. Heard in the Supreme Court on 6 February 2018.

Caudle & Spears, P.A., by Harold C. Spears and Christopher P. Raab, for plaintiff-appellant.

Doran Law Offices, by Michael Doran, for defendant-appellees.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed. This matter is remanded to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

STATE v. CANNON

[370 N.C. 487 (2018)]

STATE OF NORTH CAROLINA
v.
GARY WILLIAM CANNON

No. 276A17

Filed 2 March 2018

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 804 S.E.2d 199 (2017), affirming in part and vacating in part a judgment entered on 13 May 2016 by Judge Daniel A. Kuehnert in Superior Court, Lincoln County, and remanding for a new sentencing hearing. Heard in the Supreme Court on 6 February 2018.

Joshua H. Stein, Attorney General, by Thomas J. Campbell, Special Deputy Attorney General, for the State.

William D. Spence for defendant-appellant.

PER CURIAM.

The decision of the Court of Appeals is affirmed. However, we specifically disavow that court's taking of judicial notice of the prevalence of Wal-Mart stores in Gastonia and in the area between Gastonia and Denver, as well as of the "ubiquitous nature of Wal-Mart stores." *State v. Cannon*, ___ N.C. App. ___, ___, 804 S.E.2d 199, 202 (2017).

AFFIRMED.

STATE OF NORTH CAROLINA
v.
LINDA BETH CHEKANOW AND ROBERT DAVID BISHOP

No. 390PA16

Filed 2 March 2018

Drugs—marijuana—constructive possession—plants growing on property

The trial court properly denied defendants' motions to dismiss for insufficient evidence charges of constructive possession of marijuana plants found growing on their property where a jury could reasonably infer from the evidence that defendants knowingly possessed the marijuana plants.

Justice NEWBY concurring in the result only.

Chief Justice MARTIN and Justice JACKSON join in this concurring opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 791 S.E.2d 872 (2016), reversing and remanding judgments entered on 5 August 2015 by Judge R. Stuart Albright in Superior Court, Alleghany County. Heard in the Supreme Court on 9 October 2017.

Joshua H. Stein, Attorney General, by Adrian W. Dellinger, Assistant Attorney General, for the State-appellant.

J. Clark Fischer for defendant-appellees.

BEASLEY, Justice.

In this appeal we consider whether evidence was sufficient to permit a jury to find defendants were aware of, and exercised control over, the twenty-two marijuana plants found growing on their property. The Court of Appeals concluded that defendants did not have exclusive possession of the portion of the property where the plants were found, and therefore, the State was required to show evidence of other incriminating circumstances to survive defendants' motion to dismiss. Because the Court of Appeals held the State failed to show other incriminating

circumstances that would permit a jury to find defendants were aware of, and exercised control over, the marijuana plants, the unanimous panel reversed the trial court's judgments, and remanded the matter to the trial court for entry of an order granting defendants' motions to dismiss. We hold that despite defendants' nonexclusive control, the State presented sufficient evidence of other incriminating circumstances to allow the case to go to the jury. Accordingly, we reverse the decision of the Court of Appeals.

Defendants were charged with manufacturing marijuana, possession with intent to manufacture, sell, or deliver marijuana, and felony possession of marijuana and were tried during the 3 August 2015 criminal session of Superior Court in Alleghany County.[1]

At trial, the State's evidence tended to show that on 21 August 2014, law enforcement agencies, while conducting marijuana eradication operations by helicopter, observed marijuana plants growing on a three-acre parcel of land owned by defendants. The officers were initially alerted to defendants' property because they observed defendant Chekanow standing on the front porch of her home making an obscene gesture ("shooting the bird") at the helicopter. When officers arrived at the property, they found defendant Chekanow attempting to leave her house in a vehicle. The officers directed her back to her home and she complied. Chekanow was the only person present at the residence, and she consented to a search of the area where the plants were located, the outbuildings, and her home.

Officers on the ground located twenty-two marijuana plants growing on a fenced-in, one-half acre portion of defendants' property. This area was bordered by a woven wire fence and contained a chicken coop, defendants' chickens, and fruit trees. Officers testified the fence was approximately four feet high and not easy to climb over. In addition, officers testified the single gate to the fence was located adjacent to defendants' yard. One officer testified that to access the fenced-in area, one would have to be "right there in front of the house, at the front yard," and there were no other designated access points from the public roadway. As the officers walked to the location where the plants were growing, one observed that the grass along the fence line was not as high as elsewhere; instead, it had been "cut down, mowed, trampled on." Also, inside the fenced-in area was a "cleared-out area . . . maybe weed-eated, mowed, where the chicken house was." Further, an officer in the

1. Defendants waived any conflict of interest, were represented by the same defense attorney, and were tried jointly.

helicopter testified that a trail leading from the house to the plants was visible from the air. The path of the trail appeared to be "smashed down" as if it had been used regularly.

The marijuana plants were located sixty to seventy yards beyond the gate; fifty to seventy-five yards, or approximately two hundred feet, from defendants' house; and ten to twenty yards from a mowed and maintained area with a trampoline. The plants were "well taken care of," growing in a row in a cleared area behind some high weeds, and were placed in a location that allowed them to blend in with the weeds. Officers on the ground testified they could not see the marijuana plants until they were "right on top of [them]" or about five to ten feet away from the plants. The plants were approximately three to five feet in height, and the ground at the base of the plants had been tilled. One officer testified that it appeared the plants were started individually in a pot and then transferred into the ground.

During the search, no marijuana or related paraphernalia was found in the home or outbuildings; however, officers did locate small and large pots, shovels, trowels, and other gardening equipment. One officer testified to finding a "small starter kit" consisting of a very small cardboard cup:

> Through my experience, we have seen that multiple times . . . . they will plant the seeds—marijuana seeds into a starter kit, which are the small cups that are cardboard. And then they grow [the marijuana plants] to a certain height or maturity; then they transplant them from there to a bigger bucket or a planter until they reach another maturity level. And then once a fuller maturity level is reached, then they will take those and plant them into dirt . . . .

The officer further testified that the gardening equipment could have been used for growing marijuana or for legitimate gardening purposes because defendants had a garden and potted plants on the property in addition to the marijuana plants. One of the shovels was covered in dirt that was similar to the dirt at the base of the marijuana plants, whereas the dirt in the garden was brown.

The evidence was uncontroverted that defendants had owned and occupied the property on which the marijuana plants were found for about nine years. Defendants' nine-year-old son also lived in the home. Defendants testified that another individual—who lived nearby and possessed a key to defendants' house—had been on their property frequently

to perform yard work, maintenance, and take care of the house and animals while defendants were out of town. Defendants maintained they had no knowledge of the marijuana plants.

Because the State could not prove actual possession of the marijuana plants, the State proceeded on the theory of constructive possession based on the foregoing evidence. At the close of the State's evidence and again at the close of all the evidence, defendants moved to dismiss the charges for insufficient evidence. The trial court denied both motions. On 5 August 2015, a jury found both defendants guilty of all charges against them, and the trial court sentenced defendants to six to seventeen months of imprisonment, suspended for eighteen months subject to supervised probation.

Defendants appealed their convictions to the Court of Appeals, arguing the trial court erred in denying their motions to dismiss because the State presented insufficient evidence to establish that they were in constructive possession of the plants.[2] The Court of Appeals agreed with defendants, holding that though defendants' ownership and occupation of the property created an "inference of constructive possession," the defendants' possession of the property was not exclusive and the State "failed to show other incriminating circumstances" which would permit a jury to find defendants were aware of, and exercised control over, the marijuana plants. *State v. Chekanow*, ___ N.C. App. ___, 791 S.E.2d 872, 2016 WL 5746386, at *4 (2016) (unpublished). The court reversed the trial court's judgments, and remanded the matter to the trial court for entry of an order granting defendants' motions to dismiss. *Id.* This Court granted the State's petition for discretionary review of the sufficiency issue.

In this case, we review a unique application of the constructive possession doctrine. The doctrine is typically applied in cases when a defendant does not have actual possession of the contraband, but the contraband is found in a home or in a vehicle associated with the defendant; however, in this case we examine the doctrine as applied to marijuana plants found growing on a remote part of the property defendants owned and occupied. The sole issue presented in this appeal is whether the trial court properly denied defendants' motions to dismiss, in which defendants argued the State presented insufficient evidence showing

2. The Court of Appeals noted the defendants raised three proposed issues on appeal, but only addressed one in their brief. The court did not address the other two issues and deemed them to be abandoned, pursuant to N.C. Rule of Appellate Procedure 28(b).

defendants were aware of, and exercised control over, the twenty-two marijuana plants growing on their property.

"In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (quoting *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002)). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* at 301, 560 S.E.2d at 781 (citation omitted).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). "[T]he trial court is concerned only with the sufficiency of the evidence to take the case to the jury and not with its weight," and "[t]he test of the sufficiency of the evidence to withstand the motion is the same whether the evidence is direct, circumstantial or both." *State v. Malloy*, 309 N.C. 176, 178-79, 305 S.E.2d 718, 720 (1983). "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 913, 919 (1993) (quoting *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988))), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000). "Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then 'it is for the jury to decide whether the facts . . . satisfy [the jury] beyond a reasonable doubt that the defendant is actually guilty.' " *Id.* at 379, 526 S.E.2d at 455 (quoting *Barnes*, 334 N.C. at 75-76, 430 S.E.2d at 919). But if "the evidence is . . . sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss must be allowed." *Malloy*, 309 N.C. at 179, 305 S.E.2d at 720 (citing *State v. Poole*, 285 N.C. 108, 119, 203 S.E.2d 786, 793 (1974)). "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016) (citing *State v. Cox*, 367 N.C. 147, 150-51, 749 S.E.2d 271, 274-75 (2013)).

To survive a motion to dismiss when a defendant has been charged with manufacturing marijuana, possession with intent to manufacture, sell, or deliver marijuana, and felony possession of marijuana, the State must provide substantial evidence that the defendant knowingly possessed the marijuana. N.C.G.S. § 90-95(a)(1), (a)(3), (d)(4) (2015). Possession of contraband may be actual or constructive. *State v. Minor*, 290 N.C. 68, 73, 224 S.E.2d 180, 184 (1976).

In this case the State proceeded on a theory that defendants constructively possessed the marijuana plants. A defendant constructively possesses contraband when he or she does not have actual possession of the contraband but has " 'the intent and capability to maintain control and dominion over' it." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (quoting *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986)). A finding of constructive possession requires a totality of the circumstances analysis. *See Miller*, 363 N.C. at 99, 678 S.E.2d at 594; *see also State v. James*, 81 N.C. App. 91, 93, 344 S.E.2d 77, 79 (1986) ("As the terms 'intent' and 'capability' suggest, constructive possession depends on the totality of circumstances in each case."). "The defendant may have the power to control either alone or jointly with others." *Miller*, 363 N.C. at 99, 678 S.E.2d at 594 (citing *State v. Fuqua*, 234 N.C. 168, 170-71, 66 S.E.2d 667, 668 (1951)).

When contraband is "found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270-71 (2001) (quoting *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972)) (emphasis added). "However, unless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred." *Id.* at 552, 556 S.E.2d at 271 (quoting *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d, 187 190 (1989)).

In our jurisprudence, cases relying on a defendant's exclusive possession of the place the contraband is found have been limited to the specific factual circumstances when contraband was discovered inside a contained area such as a home or vehicle of which the defendant was the *sole* owner, resident, or occupant at the time the contraband was discovered. *See Harvey*, 281 N.C. at 12-13, 187 S.E.2d at 714 (The evidence supported a reasonable inference that the marijuana was in the defendant's possession when marijuana was found in the defendant's home, within three or four feet from him, and the defendant was the sole

occupant of the room in which it was found.); *see also* Jessica Smith, *North Carolina Crimes* 702 (7th ed. 2012) (comparing two hypotheticals to explain the concept of exclusive possession: "[I]f drugs are found in a closet in the defendant's home and the defendant is the *sole* resident of the home, the evidence of constructive possession is sufficient to take the issue to the jury." But if drugs are found "in a vehicle driven by one person and carrying several others as passengers," the defendant is not in exclusive possession and other incriminating circumstances must be shown. (emphasis added)); *cf. Davis*, 325 N.C. at 695-97, 386 S.E.2d at 188-190 (requiring the State, despite the defendant's ownership of the mobile home, to prove other incriminating circumstances when seven individuals were present in the mobile home at the time the contraband was discovered). Unlike *Harvey*, the evidence in this case established that both defendants lived in the home with their son, and defendants allowed another individual regular access to their property to help with maintenance and to care for their property while defendants were away on vacation.

Further, this case involves consideration of a more sprawling area of real property that included a remote section where the marijuana was growing and to which others could potentially gain access. In *State v. Spencer*, an opinion issued on the *same day* as *Harvey*, this Court did not rely on ownership and occupation of the premises alone to determine the evidence was sufficient to show the defendant constructively possessed marijuana discovered in a pig shed approximately twenty yards behind his home and marijuana growing in a cornfield fifty-five yards beyond the pig pen. 281 N.C. 121, 129-30, 187 S.E.2d 779, 784-85 (1972). Rather, the Court also considered that the defendant had been seen in and around the shed, that marijuana seeds were found in his bedroom, and that a path linked the pig shed to the cornfield when holding that the evidence in that case raised a reasonable inference that the defendant exercised control over the pig shed, the cornfield, and their contents. *Id.* at 129-30, 187 S.E.2d at 784-85. The Court in *Spencer* did not mention, much less apply, the standard it issued in *Harvey* and relied instead on other incriminating circumstances, indicating there is a meaningful distinction in one's ability to control a contained space such as a home and vehicle versus sprawling property.

Thus, for evidence of constructive possession to be sufficient, if the defendant owns the premises on which the contraband is found, (1) he must also have exclusive possession of the premises on which the contraband is found, or (2) the State must show additional incriminating circumstances demonstrating the defendant has dominion or

control over the contraband.[3] *See Matias*, 354 N.C. at 552, 556 S.E.2d at 270-71 (synthesizing the law of constructive possession); *Davis*, 325 N.C. at 697-98, 386 S.E.2d at 190 (same). Reiterating that this is an inquiry that considers all the circumstances of the individual case, when there is evidence that others have had access to the premises where the contraband is discovered, whether they are other occupants or invitees, or the nature of the premises is such that imputing exclusive possession would otherwise be unjust, it is appropriate to look to circumstances beyond a defendant's ownership and occupation of the premises. As stated by two federal courts of appeals, " 'when there is joint occupancy of a residence, dominion over the premises by itself is insufficient to establish constructive possession. In joint occupancy cases, there must be some additional nexus linking the defendant to the contraband." *United States v. Wright*, 739 F.3d 1160, 1168 (8th Cir. 2014) (citations omitted), *quoted in United States v. Blue*, 808 F.3d 226, 232 (4th Cir. 2015); *accord State v. Thorpe*, 326 N.C. 451, 455-56, 390 S.E.2d 311, 314 (1990) (looking beyond the defendant's ownership and occupation of the bar and pool room to consider other incriminating circumstances).[4]

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3. In a nonexclusive possession context, ownership of property is insufficient on its own to withstand a motion to dismiss. *Contra State v. Tate*, 105 N.C. App. 175, 179, 412 S.E.2d 368, 370-71 (1992) (stating that "[i]n North Carolina, an inference of constructive possession arises against an owner or lessee who occupies the premises where contraband is found, regardless of whether the owner or lessee has exclusive or nonexclusive control of the premises").

4. The State cites *State v. Thorpe* as a case relying on *Harvey*'s standard for ownership and occupation being sufficient to take a constructive possession case to the jury. To be sure, *Thorpe* did include language from *Harvey* in its analysis. *See State v. Thorpe*, 326 N.C. 451, 455, 390 S.E.2d 311, 314 (1990). However, *Thorpe* did not merely rely on *Harvey* because *Thorpe* was not an exclusive possession scenario. *See id.* at 455, 390 S.E.2d at 314. In *Thorpe*, the defendant did not have exclusive possession over the bar he owned because others had access to the bar and pool room. *See id.* at 455, 390 S.E.2d at 314. Thus, in its sufficiency analysis, the Court considered, in addition to the defendant's property ownership (which was "strong evidence of control") and his physical presence on the premises, the defendant's ability to personally control who entered the premises by use of a key, an officer's observation of defendant alone in the game room or behind the bar on more than one occasion, and the defendant's participation in the sale of controlled substances by knowing the undercover officer's errand and directing her inside. *Id.* at 455-56, 390 S.E.2d at 314. Rather than rely on ownership and occupation alone, the Court in *Thorpe* applied a totality of the circumstances test with property ownership being a weighty, but not dispositive, factor. *See id.* at 455, 390 S.E.2d at 314 ("We hold that, considered as a whole, as required, the circumstantial evidence of defendant's power and intent to control the sale of dilaudid on both dates listed in the indictments was sufficient to support an inference of both his possession with an intent to sell or deliver that controlled substance and his participation in the transfer transactions themselves.").

Considering the circumstances of this case, neither defendant was in sole occupation of the premises on which the contraband was found, defendants allowed another individual regular access to the property, and the nature of the sprawling property on which contraband was found was such that imputing exclusive control of the premises would be unjust.[5] Therefore, we must analyze the additional incriminating circumstances present in this case.

If the defendant is not in exclusive possession of the place where contraband is found, to survive a motion to dismiss the State must show other incriminating circumstances linking the defendant to the contraband. *Miller*, 363 N.C. at 99, 678 S.E.2d at 594 (citing *Matias*, 354 N.C. at 552, 556 S.E.2d at 271). Whether incriminating circumstances exist to support a finding of constructive possession is a fact-specific inquiry. *Id.* at 99-100, 678 S.E.2d at 594-95. In determining whether sufficient incriminating circumstances exist to support a finding of constructive possession, a review of this Court's cases reveals that we have considered the following factors: (1) the defendant's ownership and occupation of the property (as previously discussed); (2) the defendant's proximity to the contraband; (3) indicia of the defendant's control over the place where the contraband is found; (4) the defendant's suspicious behavior at or near the time of the contraband's discovery; and (5) other evidence found in the defendant's possession that links the defendant to the contraband. *See id.* at 99-100, 678 S.E.2d at 594-95 (explaining that proximity and indicia of control are two factors frequently considered in this analysis); *see State v. Butler*, 356 N.C. 141, 147-48, 567 S.E.2d 137, 141 (2002) (considering the defendant's suspicious actions among the sufficient "additional incriminating circumstances"); *State v. Brown*, 310 N.C. 563, 569-70, 313 S.E.2d 585, 588-89 (1984) (considering the defendant's possession of over $1,700 in cash on his person among the sufficient "other incriminating circumstances"). No one factor controls, and courts must consider the totality of the circumstances. *See Miller*, 363 N.C. at 99-101, 678 S.E.2d at 594-95 ("Our cases addressing constructive possession have tended to turn on the specific facts presented."); *State v. Butler*, 147 N.C. App. 1, 11, 556 S.E.2d 304, 311 (2001) ("[C]onstructive possession depends on the totality of the circumstances in each case.") (quoting *State v. Jackson*, 103 N.C. App. 239, 243, 405 S.E.2d 354, 357 (1991), *aff'd per curiam*, 331 N.C. 113, 413 S.E.2d 798 (1992))), *aff'd*, 356

5. The circumstances of this case raise several practical considerations cautioning against the creation of bright line rules which could serve to implicate other innocent property owners in constructive possession cases.

N.C. 141, 567 S.E.2d 137 (2002). However, we reiterate, as this Court did in *Thorpe*, that ownership of the premises on which the contraband is found is "strong evidence of control," and thus, should be considered as a weighty factor in the analysis. *See Thorpe*, 326 N.C. at 455, 390 S.E.2d at 314.

First, in addressing a defendant's proximity to the contraband, this Court considers proximity in terms of space and time. For example, in *Miller* evidence was sufficient when, *inter alia*, contraband was found within the defendant's reach. 363 N.C. at 100, 678 S.E.2d at 595. In *State v. Bradshaw*, we considered evidence that the defendant had recently occupied the location where the contraband was found. 366 N.C. 90, 96-97, 728 S.E.2d 345, 349-50 (2012). Specifically, in *Bradshaw*, evidence was sufficient when, *inter alia*, the defendant had been present in the place where the contraband was found approximately two days later, *id.* at 96-97, 728 S.E.2d at 349-50, while in *State v. Finney* evidence of the defendant's prior presence in the location where the contraband was found some forty-four days later was held to be insufficient to support a finding of constructive possession, 290 N.C. 755, 760-61, 228 S.E.2d 433, 436 (1976).

Here, the State's evidence shows that defendants' residence was approximately two hundred feet from the plants. The plants were also growing thirty to sixty feet from a mowed and maintained portion of the property that contained a trampoline. Addressing temporal proximity, there is evidence that the ground at the base of the plants had been recently cleared of leaves and pine needles, that the plants had been maintained for approximately two and a half months, and that the area surrounding the plants had been recently accessed and maintained by defendant Bishop. Thus, in the present case, the close proximity of the growing plants to an area maintained by defendants, the reasonably close proximity of defendants' residence to the plants, and one defendant's recent access to the area where the plants were found growing are all factors to consider in the sufficiency analysis.

Second, this Court has considered as an indicator of control over the place where the contraband is found whether a defendant's personal items were found in the same location as the contraband. In *Miller*, this Court held the State's evidence was sufficient when, *inter alia*, defendant's birth certificate and State-issued identification card were found next to small plastic baggies and in the same room as cocaine. 363 N.C. at 97-98, 678 S.E.2d at 593. Also, a defendant's opportunity to place contraband in the place where it was found is additional indicia of control. In *Matias*, the State's evidence was sufficient when, *inter alia*, officers

discovered contraband in the space between the pads in the seat where the defendant had been sitting, 354 N.C. at 552-53, 556 S.E.2d at 271, and in *Brown*, evidence was sufficient when, *inter alia*, the defendant possessed a key to the residence where contraband was found, 310 N.C. at 569-70, 313 S.E.2d at 589.

Here, in addition to defendants' proximity to the marijuana plants, multiple indicia of control are present from which the jury could infer knowledge and possession. The marijuana plants were surrounded by a fence that was not easily surmountable. Similar to the defendant in *Thorpe*, defendants here had the ability to control who entered this portion of the property by establishing the sole entry point in the front yard next to their home. Also, as in *Bradshaw*, there is additional evidence here that at least one of the defendants had recently occupied the area where the marijuana was found. On the date the plants were discovered, defendant Chekanow stated that she had not been in that area of the property for over a year, while defendant Bishop testified to mowing about twenty percent of the fenced-in area, including mowing a path for the chickens around the chicken coop, a path around defendants' fruit trees, and an area roughly six feet from the fence line, indicating he frequently occupied the half-acre area. Also, viewing the evidence in the light most favorable to the State, one officer reported a trail leading from defendants' residence, by the chicken coop, and to the location where the marijuana plants were growing. This officer, who observed the trail from the helicopter, stated that the grass appeared to be "smashed down" as though it had been walked on regularly. Additionally, like the defendant in *Miller*, the evidence here indicates that additional items belonging to defendants were in the same location as the contraband in that defendants kept their chickens and chicken coop in the same fenced-in, one-half acre of their property where the marijuana was growing.

Third, this Court has considered evidence of a defendant's suspicious behavior in conjunction with the discovery of the contraband. For example, in *Butler*, this Court held the State's evidence was sufficient to survive a motion to dismiss when, *inter alia*, defendant made eye contact with officers and then proceeded to walk "very briskly" through a bus terminal, repeatedly glancing back at the officers following him, before hurrying into a taxicab and shouting "let's go, let's go, let's go." 356 N.C. at 147-48, 567 S.E.2d at 141. The evidence here shows that defendant Chekanow directed an "unfortunate gesture" at the clearly marked State Highway Patrol helicopter as it flew over her property. Further, in the light most favorable to the State, defendant Chekanow

appeared to flee the premises in a vehicle as the helicopter hovered to investigate the possible field of marijuana.

Finally, in its sufficiency analysis, this Court has considered additional evidence found in defendant's possession which links the defendant to the contraband. For example, in *Brown*, in addition to the defendant's proximity to the cocaine and indicia of his control over the apartment where the cocaine was discovered, this Court also considered that officers found over $1,700 in cash on the defendant's person in determining there was sufficient evidence of constructive possession. 310 N.C. at 569, 313 S.E.2d at 589. Also, in *State v. Spencer*, the Court considered in its sufficiency analysis the fact that officers found marijuana seeds in the defendant's bedroom at the same time marijuana plants were found in a dilapidated shed located twenty yards behind defendant's home. 281 N.C. at 129-30, 187 S.E.2d at 784.

Here, a search of defendants' property resulted in the discovery of gardening equipment outside an outbuilding. Though officers conceded the tools could have been used either for marijuana cultivation or innocent gardening, the State's evidence further revealed dark red dirt found on the shovel consistent with the dark red clay at the base of the marijuana plants, while the soil in defendants' garden was dark brown. In the light most favorable to the State, this evidence shows the tools found in or around defendants' outbuilding, including a "starter kit," were used to cultivate the marijuana plants.

Defendants provide several arguments based on their testimony at trial to rebut their alleged knowledge and possession of the marijuana plants; however, this evidence is for the jury to weigh, not the trial court, and it is certainly not for the appellate courts to reweigh. Further, "[t]he State's evidence *need not* exclude every reasonable hypothesis of innocence before the trial court properly can deny the defendant's motion to dismiss for insufficiency of the evidence." *Beaver*, 317 N.C. at 651, 346 S.E.2d at 481 (citing *State v. Riddick*, 315 N.C. 749, 759, 340 S.E.2d 55, 61 (1986)). When a trial court rules on a motion to dismiss, the court gives considerable deference to the State's evidence. Here, the Court of Appeals simply failed to consider the State's presentation of incriminating circumstances in addition to defendants' proximity to the contraband and ownership of the property on which it was found; in sum, instead of focusing on what the State did provide, the court focused on what the State did not produce in distinguishing this case from other constructive possession cases in which evidence was found sufficient to withstand a motion to dismiss.

Notwithstanding defendants' nonexclusive possession of the location in which the contraband was found, we hold there is sufficient evidence of constructive possession when the State presents evidence of defendants' ownership of the property on which the plants were growing, defendants' reasonable proximity to the growing marijuana plants, defendants' ability to control access to that portion of the property via a fence and sole entry point, one defendant's recent maintenance of the area where the plants were found, the presence of defendants' chickens and their chicken coop in the area where the plants were found, one defendant's suspicious behavior—the gesture and flight—before the discovery of the plants, and the discovery of equipment on defendants' property that could have been used to cultivate the plants. From this evidence a jury could reasonably infer that defendants knowingly possessed the marijuana plants. Thus, the trial court properly denied defendants' motions to dismiss for insufficiency of the evidence.

Therefore, for the reasons stated above, we reverse the decision of the Court of Appeals as to the issue before us on appeal and instruct that court to reinstate the trial court's judgment.

REVERSED.

Justice NEWBY concurring in the result only.

Exclusive possession is a right inherent to the ownership of real property. While the majority concedes that defendants owned and occupied the property, it proceeds on a theory of nonexclusive constructive possession, without acknowledging that defendants, as the owners in possession, have the "intent and capability to maintain control and dominion" over their three-acre residential property. Because property ownership by definition includes the right to exclusive possession, under the facts of this case defendants' ownership and occupancy raise an inference of constructive possession sufficient to submit the case to the jury. Accordingly, I concur in the result only.

The only question presented by this appeal is whether the State presented substantial evidence that defendants knowingly possessed the twenty-two mature, growing marijuana plants located on a one-half acre portion of their three-acre residential property. The majority applies the test for constructive possession which requires proof of defendants' "intent and capability to maintain control and dominion over" the marijuana plants on their real property, having either sole or joint control, and considering the totality of the circumstances. Here it is undisputed

that defendants, being in actual possession of the land, owned and occupied the three-acre residential property where the marijuana was growing. *See Matthews v. Forrest*, 235 N.C. 281, 284, 69 S.E.2d 553, 556 (1952) (opining that actual possession of land includes acting in dominion over it and making the ordinary use of it).

The majority acknowledges that our cases recognize "exclusive possession" arising under circumstances "when contraband was discovered inside a contained area such as a home or vehicle of which the defendant was the *sole* owner, resident, or occupant." Nonetheless, the majority concludes that "[c]onsidering the circumstances of this case, neither defendant was in sole occupation of the premises on which the contraband was found, defendants allowed another individual regular access to the property, and the nature of the sprawling property on which contraband was found was such that imputing exclusive control of the premises would be unjust." Apparently based upon an assumption that a three-acre parcel is "sprawling" to which "defendants allowed another individual regular access," the majority declares defendants' possessory interest in their property "nonexclusive." "Nonexclusive" means not having the power to exclude others from use of the property. *Cf. Exclusive possession*, *Black's Law Dictionary* (10th ed. 2014) ("The exercise of exclusive dominion over property, including the use and benefit of the property."); *Webster's Third New International Dictionary* 793 (1971) ("excluding or having power to exclude (as by preventing entrance or debarring from possession, participation, or use) . . . . limiting or limited to possession, control, or use (as by a single individual or organization or by a special group or class)").

Yet, by definition, ownership of land includes the right to exclusive possession.

> There is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

3 William Blackstone, *Commentaries* *1-2; *see id.* at *8 (noting as a foundational principle that the right of property "g[ives] a man an exclusive right to retain in a permanent manner . . . specific land, which before belonged generally to every body, but particularly to nobody," and that this right "excludes every one else but the owner from the use of it"). By definition, property includes "[c]ollectively, the rights in a valued

resource such as land . . . . It is common to describe property as a 'bundle of rights.' "[1] *Property*, *Black's Law Dictionary* (10th ed. 2014).

"Property rights are 'in rem' rights. That is, they are rights that may be exercised and that are protectable 'against all the world.' Thus, if a person has a property right, that person has a right to exclude others from the use of the determinate thing that is owned." 1 James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 1.03, at 1-11 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 6th ed. 2011); *see also Hildebrand v. S. Bell Tel. & Tel. Co.*, 219 N.C. 402, 408, 14 S.E.2d 252, 256 (1941) ("The term [property] comprehends not only the thing possessed but also, in strict legal parlance, means the right of the owner to the land; the right to possess, use, enjoy and dispose of it, and the corresponding right to exclude others from its use."). "Thus, it would appear that property is a right of exclusive dominion and unrestricted user, within the law." *Stedman v. City of Winston-Salem*, 204 N.C. 203, 204, 167 S.E. 813, 814 (1933); *see also Vann v. Edwards*, 135 N.C. 661, 665, 47 S.E. 784, 786 (1904) (defining "property" as "rightful dominion over external objects; ownership; the unrestricted and exclusive right to a thing; the right to dispose of the substance of a thing in every legal way, to possess it, to use it and to exclude every one else from interfering with it").

In accordance with these fundamental principles of real property ownership, "[c]onstructive possession has been found when the contraband was on the property in which the defendant had some *exclusive possessory interest* and there was evidence of his or her *presence* on the property and it has been found where possession is not exclusive but defendant exercises sole or joint physical custody." *State v. Thorpe*, 326 N.C. 451, 454-55, 390 S.E.2d 311, 313 (1990) (emphases added) (citing *State v. Harvey*, 281 N.C. 1, 187 S.E.2d 706 (1972), and *State v. Brown*, 310 N.C. 563, 313 S.E.2d 585 (1984)). Much like an essential aspect of real property ownership, constructive possession has been described by this Court as the "intent and capability to maintain control and dominion over," *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986), or the "power and intent to control":

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1. *See also Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831, 107 S. Ct. 3141, 3145, 97 L. Ed. 2d 677, 685-86 (1987) ("We have repeatedly held that, as to property reserved by its owner for private use, 'the right to exclude [others is] "one of the most essential sticks in the bundle of rights that are commonly characterized as property." ' " (Alteration in original) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433, 102 S. Ct. 3164, 3175, 73 L. Ed. 2d 868, 881 (1982))).

> He has possession of the contraband material . . . when he has both the power and intent to control its disposition or use. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession.

Harvey, 281 N.C. at 12, 187 S.E.2d at 714. As a result, "constructive possession can be reasonably inferred from the fact of ownership of premises where contraband is found." *Thorpe*, 326 N.C. at 455, 390 S.E.2d at 314; *id.* at 456, 390 S.E.2d at 314 (inferring knowledge and possession "by virtue of ownership and custody" and buttressing the inference with the defendant's physical presence). "Such ownership is strong evidence of control and 'gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession.' " *Id.* at 455, 390 S.E.2d at 314 (quoting *Harvey*, 281 N.C. at 12, 187 S.E. 2d at 714).[2]

When possession is not exclusive, with others having a common right to enter the property, the State must "show other incriminating circumstances before constructive possession may be inferred." *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989) (citation omitted); *see id.* at 695-99, 386 S.E.2d at 188-91 (finding sufficient evidence to go to the jury on the defendant's nonexclusive constructive possession of narcotics found in multi-occupant mobile home when, *inter alia*, a "sales contract" indicated that the defendant had purchased the home, and the defendant was present at the time of the search); *see also State v. Williams*, 307 N.C. 452, 456, 298 S.E. 2d 372, 375 (1983) (finding sufficient evidence of constructive possession "giv[ing] rise to an inference of knowledge and possession" of heroin found in a dilapidated building behind a residence when the mailbox bore the defendant's name and the defendant had been seen at the multi-occupant residence even though he was not present at the time of the search).

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2. This view of property rights is consistent with our trespass laws. The legal right to enter a property requires consent from the party with the current possessory interest. *See* N.C.G.S. § 14-159.12(a)(1) (2015) (stating that a person commits first-degree trespass if, "without authorization, he enters or remains . . . [o]n premises of another"); *id.* § 14-159.13(a) (2015) (stating that a person commits second-degree trespass if, "without authorization, he enters or remains on premises of another").

Defendants' ownership of the property here gave them the right of exclusive possession, and their exercise of that right, occupying and using the property at the time the marijuana plants were growing, gives rise to an inference that would permit a jury to find that defendants constructively possessed the plants. Moreover, here defendants demonstrated their power and intent to exclusively control their property as owners. The officers located the cultivated marijuana plants on roughly one-half acre of defendants' three-acre property in a fenced-in portion of the property adjacent to the yard, accessible by a single gate "right there in front of the house, at the front yard." Officers located the marijuana plants just sixty to seventy yards from that gate, around two hundred feet from the house itself, and approximately ten yards from the maintained lawn area. These facts illustrate that defendants as owners exercised their right to exclude others from the fenced-in property protected by the gated access. As noted by the majority, defendants as the property owners recognized their inherent right to exclude others from their property by explicitly granting access to a third party.

Thus, not only did defendants own the three-acre residential property, but they daily occupied and exercised exclusive control over it. Their status as owners and their exercise of ownership rights constitute substantial evidence of the element of constructive possession, *see Brown*, 310 N.C. at 568-70, 313 S.E.2d at 588-89, particularly when viewed in the light most favorable to the State, *see State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 115 S. Ct. 2565, 132 L. Ed. 2d 818 (1995). While the majority correctly states the standard of review, it nonetheless weighs the facts in favor of defendants to determine that the possession was nonexclusive. When reviewing a motion to dismiss, facts that may weigh in favor of defendants' nonexclusive possession are reserved for the jury's consideration.

In its application, the majority uses ownership as one factor and glosses over the distinctions between property owners and temporary occupants without clearly differentiating between cases in which the defendant does not own, have a possessory interest in, or occupy the property.[3] Likewise, it fails to distinguish between different types

3. *Compare Williams*, 307 N.C. at 456, 298 S.E.2d at 375 (finding evidence of permanent residence to be "substantial evidence to raise a reasonable inference that defendant was in constructive possession" of an outbuilding where heroin was found), *and Harvey*, 281 N.C. at 13, 187 S.E.2d at 714 (Evidence placing defendant "within three or four feet of the marijuana within his home," without anyone else in the room, "supports a reasonable inference that the marijuana was in defendant's possession."), *with State v. Matias*, 354 N.C. 549, 552, 556 S.E.2d 269, 270-71 (2001) (stating that contraband "found on the

of property uses such as commercial property upon which the owner invites the public. Such an analysis forsakes bedrock property ownership principles and overlooks both defendant property owners' right to control their property and their demonstrated exercise of that right in this case.

Thus, while I agree that the other incriminating circumstances presented here support the State's case against defendants, I would conclude that defendants' ownership of their three-acre residential property, and their demonstrated exercise of exclusive control over it, are sufficient to allow the case to go to the jury. Accordingly, I concur in the result only.

Chief Justice MARTIN and Justice JACKSON join in this concurring opinion.

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premises under the control of an accused, . . . in and of itself, gives rise to an inference of knowledge and possession," but requiring a showing of "other incriminating circumstances" to prove a passenger, who had occupied a vehicle for twenty minutes, possessed the cocaine), *and State v. Butler*, 356 N.C. 141, 147-48, 567 S.E.2d 137, 141 (2002) (requiring "additional incriminating circumstances" to establish defendant passenger's constructive possession of cocaine given his nonexclusive control over the taxicab where it was found).

STATE OF NORTH CAROLINA
v.
OMAR JALAM COOK

No. 251A17

Filed 2 March 2018

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 802 S.E.2d 575 (2017), finding no error after appeal from judgments entered on 9 February 2016 by Judge Hugh B. Lewis in Superior Court, Mecklenburg County. Heard in the Supreme Court on 8 January 2018.

Joshua H. Stein, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State.

Ann B. Petersen for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE v. DOWNEY

[370 N.C. 507 (2018)]

STATE OF NORTH CAROLINA
v.
GLENWOOD EARL DOWNEY

No. 85A17

Filed 2 March 2018

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 796 S.E.2d 517 (2017), affirming an order denying defendant's motion to suppress entered on 16 September 2015 by Judge Thomas H. Lock, and a judgment entered on 30 September 2015 by Judge Reuben F. Young, both in Superior Court, Johnston County. Heard in the Supreme Court on 7 February 2018.

Joshua H. Stein, Attorney General, by Derrick C. Mertz, Special Deputy Attorney General, for the State.

Glenn Gerding, Appellate Defender, by Michele A. Goldman, Assistant Appellate Defender, for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
ERIC GLENN LANE

No. 606A05-3

Filed 2 March 2018

1. Evidence—Sorenson evidence—materiality analysis—hair sample testing

The trial court did not err in a first-degree murder case by considering the Sorenson evidence in its materiality analysis of defendant's hair sample testing request when there were contested factual issues regarding the validity of the Sorenson evidence. The evidence created an insurmountable hurdle to the success of defendant's materiality argument.

2. Evidence—hair sample—DNA testing—relevancy—sentencing

The trial court did not err in a first-degree murder case by concluding the hair sample DNA testing was not material to defendant's defense. There was no reasonable probability that the DNA testing of the hair samples would have changed the jury's recommendation of death.

3. Constitutional Law—North Carolina—supervisory or inherent authority—right to postconviction DNA testing

The Supreme Court declined to use its constitutional supervisory authority or inherent authority to order postconviction DNA testing. There was enough other incriminating evidence to convict and sentence defendant regardless of the results of any hair analysis.

Appeal pursuant to N.C.G.S. § 15A-270.1 from an order entered on 18 August 2015 by Judge Arnold O. Jones, II in Superior Court, Wayne County. Heard in the Supreme Court on 11 December 2017.

Joshua H. Stein, *Attorney General*, *by Nicholaos G. Vlahos*, *Assistant Attorney General*, *for the State.*

Glenn Gerding, *Appellate Defender*, *by Daniel Shatz*, *Assistant Appellate Defender*, *for defendant-appellant.*

BEASLEY, Justice.

In this appeal we consider the materiality of postconviction DNA testing of hair samples in a capital case. In denying defendant's motion for postconviction DNA testing, the trial court found that defendant failed to show the requested testing was material to his defense—specifically, that there was no reasonable probability that the verdict would have been more favorable to defendant if the testing had been conducted. We agree and hold defendant has failed to prove the materiality of his request.

On 7 April 2003, defendant was indicted in Wayne County for first-degree murder, first-degree statutory rape, first-degree statutory sex offense, indecent liberties with a minor, lewd and lascivious conduct, and first-degree kidnapping of five-year old "P.W."[1] Defendant was tried capitally in Wayne County, and his first trial in the fall of 2004 ended in a mistrial due to juror misconduct. Defendant's second trial commenced on 1 June 2005.

The evidence at trial[2] tended to show that at approximately 4:45 p.m. on Friday, 17 May 2002, P.W. was playing at her friend Michael's house and riding a red and white bicycle up and down his driveway. The two children saw defendant in his nearby yard and went over to play on his swing set. At one point, the children went inside defendant's house to look at his goldfish and eels and then eventually returned to Michael's house. Around 6:30 p.m., Michael's mother told P.W. that she needed to go home because Michael and his family were leaving for the evening. P.W. left on the red and white bicycle.

When it was time for her dinner, P.W. could not be found at Michael's house or in the neighborhood. P.W.'s family repeatedly searched the neighborhood to no avail and called law enforcement the next morning. After commencing a general search for P.W. and questioning several people, including defendant, law enforcement agencies were unable to find P.W. Defendant's home and property were searched multiple times with his consent, and his story about his interactions with P.W. remained consistent throughout the weekend despite multiple interviews: namely, P.W. and Michael had been at defendant's house for about ten minutes on

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1. Pursuant to North Carolina Rules of Appellate Procedure 4(e), the decedent's initials are used to protect her identity.

2. A more detailed version of the procedural history and the evidence presented at trial in this case can be found in *State v. Lane*, 365 N.C. 7, 707 S.E.2d 210 (2011); here we recite an abbreviated version of the procedural history and facts of the case with emphasis on that which is necessary for analysis of defendant's materiality argument.

Friday afternoon to play on his swing set and the children came inside briefly to view his goldfish and eels.

During the early afternoon of Sunday, 19 May 2002, local residents discovered P.W.'s body while they were fishing in a nearby creek. Her upper body was wrapped in a trash bag; her legs were pulled up to her chest with duct tape, and her face and hair were not visible due to the duct tape wrapped around her head. The crotch of her shorts and panties had been jaggedly cut, and that area was bloody and red. An autopsy later showed that P.W. had suffered some blunt force trauma, had several bruises and lacerations, and had sustained a sexual assault. The official cause of P.W.'s death was "asphyxia secondary to suffocation," and the medical examiner concluded that P.W. had been alive when she was put into the trash bag. She died in part because she vomited while struggling against the duct tape and breathed some of the vomit into her lungs. A red and white bicycle, identified as the one P.W. had been riding on Friday evening, was also discovered in the creek. A blue tarp rolled up with duct tape at one end was found in a nearby ditch.

Several witnesses reported they had seen a white male on a red scooter or moped between 7:15 and 7:45 p.m. on Friday night near the bridge that crossed the creek where P.W.'s body was discovered. The witnesses described the scooter as having a black basket and reported that the rider wore a light or white helmet. The witnesses also reported seeing the man struggle with both a large bundle wrapped in a blue tarp and a small red and white bicycle. Based on this information and their knowledge that defendant had a red scooter, law enforcement returned to defendant's house. Defendant consented to another search of his residence and the storage sheds on his property, where law enforcement found a red scooter with a black basket, a white helmet, rolls of duct tape and electrical tape with blue fibers consistent with the tarp found near where P.W.'s body was discovered, and trash bags similar to the one wrapped around P.W.'s upper body. Again, defendant repeated that he had not seen P.W. after she left his house with Michael on Friday afternoon, and his story remained consistent with previous interviews.

But on 21 May 2002, defendant made a confession, first orally and then reduced to writing, which he corrected and signed:

> I, Eric Lane, came home from work on Friday, May 17, 2002, at about 3:00 p.m. or 3:30 p.m. I . . . started drinking beer. Michael . . . and [P.W.] . . . came over to my house at about ten or 15 minutes after I got home. I had drank about three beers before they got there. They [ ] were

riding bicycles. I was lying in the backyard in front of the swing. They asked if they could swing. I said yes. They asked me to push them on the swing so I did. . . . [P.W.] asked for something to drink. I went in the house and got some—got them some Pepsi. They came to the door and [P.W.] stepped in the house. . . . I told them to go look at the eels which were in the living room. They then went to [my son's] room to look at the goldfish. They stayed in the house about ten minutes. They then went back outside and played on the swing again. I went back out with them.

. . . .

After about five minutes . . . [they] left. . . .

. . . I was still drinking. About 15 minutes later, [P.W.] came back to the house riding a white and red bicycle. She asked if she could look at the eels again so we went in the house. At first I sat at the kitchen table while [P.W.] played with [my son's] toys in his room. She played in his room for ten or 15 minutes. I was still drinking beer.

I got up and started feeding the eels and she came into the living room with me. She was wearing jean shorts/skirt. I don't remember what color her shirt was. She was wearing white tennis shoes. I think I was wearing tan shorts. I wasn't wearing a shirt. I was wearing my white cap with "USA" and American flag on it.

I started playing with her, tickling her. She fell on the floor laughing. We were both [on] the floor playing. The next thing I remember I woke up on top of her. I pushed myself up with my hand which was on her shoulder. She was unconscious. My shorts were down as well as my underwear. I pulled up her shorts and maybe her panties. They were not all the way down. I shook her trying to get her to wake up. I had my hands on her shoulders while shaking her.

I started to walk around the house and tried to figure out what happened. . . . I then walked outside where I saw her bicycle. I put it in the white building. I walked around the building for ten or 15 minutes trying to figure out what to do. I knew I had to get her out so I grabbed a blue tarp in the white building and got a roll of duct tape out of the

other building. I grabbed the trash bag out of the trash can because it was the only one I had. It was white with red handles. I wrapped her in the trash bag and then taped the bag around her. I put the tarp around her and wrapped her in the tarp. I taped the tarp around her. I drank for a minute. I got her and a couple of beers and went to the white building. I put her in the middle of my scooter where you put your feet. My scooter is red. . . . I hung the bicycle on the scooter basket. I then left on the scooter.

I went to the creek. [Defendant described the route he took]. . . . I got to [the] creek, parked the scooter and got [P.W.] and the bicycle off the scooter. The tarp came off of her when I was getting her off. I don't know what time it was but it was getting dark.

A car came so I ran and threw the bicycle in the creek and [hid] under the bridge. I sat there and drank the two beers I had and threw the bottles in the creek. I laid the body at the edge of the water under the bridge where someone could find it.

I grabbed the tarp and went to the scooter. I took the same path back home. The tarp blew off on the way back. I didn't stop to get it. I just went home.

. . . I guess I raped her, too, but I don't remember.

I was wearing a white helmet when I took [P.W.] to the creek.

When I pulled out of my driveway, the body almost fell off the scooter. I stopped and pulled her back onto the scooter. . . . I was wearing a red pullover shirt and a blue jacket and tan shorts. The deputies have all the clothing that I was wearing except for the red shirt, which is still at the house. There was no blood on the floor of my house. I remember seeing a black SUV at the end of my driveway when I stopped to pull the tarp back on the scooter.

I remember that when [P.W.] and I were in the living room, I started tickling her and we both were on the floor. I tickled her between her legs and her private parts area. Her pants came down. Somehow my pant[s] came down also. I don't remember actually having sex with her but I'm pretty sure I did. I don't remember looking for signs

> that we had sex. I thought she was dead when I put the trash bag over her. She never moved so I thought I had suffocated her with my body or her neck twisted and she died.

During the interview, defendant expressed shame and remorse by making statements such as: "I'm sick. I'm a sick person. I wish I was dead," and "I'm a rapist and a killer. I wish I was dead." Defendant subsequently gave a second statement utilizing the same timeline and details, saying he "d[id] not remember but if the girl was sexually molested then I must have did [sic] it" and recounting how he wrapped P.W.'s body in a tarp and disposed of her at the creek. Based on his confession, defendant was arrested and deputies returned to his home to conduct another search. They recovered the shirt and shoes defendant said he had been wearing the day P.W. died, as well as a piece of defendant's living room carpet.

The State presented forensic evidence at trial. The trash bag in which P.W. was found was determined to be consistent with others taken from defendant's home. Blue fibers found on defendant's gloves and clothes, scooter, a roll of duct tape taken from defendant's home, P.W.'s body and clothing, the trash bag P.W. was wrapped in, the duct tape around her body, and defendant's carpet and bed cover were determined to be consistent with the blue tarp fabric found near the creek where P.W.'s body was recovered. North Carolina State Bureau of Investigation Special Agent James Gregory testified that neither defendant nor his maternal relatives could be excluded as the source of a small Caucasian hair fragment found in P.W.'s anal cavity during the autopsy. Special Agent Gregory also testified that the hairs collected from the living room carpet sample and defendant's vacuum cleaner were "microscopically consistent" with P.W.'s hair, meaning they could have come from P.W. or anyone else whose hair had similar characteristics. Finally, Special Agent Gregory testified about his examination of the contents of the trash bag in which P.W.'s body was found. Among the debris found in the trash bag, he discovered nine to ten body hair fragments consistent with African ancestry. Special Agent Gregory did not conduct any further testing on these fragments (hair samples) because he was "specifically looking for Caucasian head hairs." State Bureau of Investigation Special Agent Suzi Barker testified that she examined the vaginal and rectal swabs and smears from P.W.; however, she saw no sperm or semen in any of the samples.

On 8 July 2005, the jury convicted defendant of first-degree murder based on malice, premeditation, and deliberation, as well as under the felony murder rule. The jury also convicted defendant on all remaining

charges, except for the charge of lewd and lascivious conduct, which the trial court dismissed. Following a capital sentencing proceeding in which defendant represented himself without assistance of counsel, the jury found two aggravating circumstances regarding the murder: (1) defendant committed the murder while engaged in the commission of rape, first-degree sexual offense, or kidnapping, and (2) the murder was especially heinous, atrocious, or cruel. The jury found as a non-statutory mitigating circumstance that defendant has a learning disability. After determining the mitigating circumstance was insufficient to outweigh the aggravators, the jury recommended and the trial court imposed the death penalty. The trial court also ordered that defendant serve additional terms totaling 809 to 1010 months for the noncapital convictions. Defendant appealed directly to this Court, and this Court allowed defendant's motion to bypass the Court of Appeals as to his appeals from the noncapital convictions.

On 12 December 2008, this Court remanded the case to the trial court for a further hearing to determine whether defendant was capable of self-representation under *Indiana v. Edwards*, 554 U.S. 164, 171 L. Ed. 2d 345 (2008). *See State v. Lane*, 362 N.C. 667, 668, 669 S.E.2d 321, 322 (2008) (per curiam), *clarified by* ___ N.C. ___, 706 S.E.2d 775 (2009) (order) (instructing the trial judge to determine whether defendant fell within the category of "borderline-competent" or "gray-area" defendants who are "competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves"). The trial court conducted an evidentiary hearing and determined that defendant was not a "borderline-competent" or "gray-area" defendant as defined in *Edwards*, and was thus competent to represent himself.

Considering the *Edwards* issue and others, on 11 March 2011, this Court found that "defendant received a fair trial and capital sentencing proceeding free of prejudicial error, and that the death sentence recommended by the jury and imposed by the trial court [was] not excessive or disproportionate." *State v. Lane*, 365 N.C. 7, 40, 707 S.E.2d 210, 230, *cert. denied*, 565 U.S. 1081, 181 L. Ed. 2d 529 (2011).

Defendant was appointed postconviction counsel, and on 12 December 2014, defendant filed a motion pursuant to N.C.G.S. § 15A-269 seeking postconviction DNA testing of the vaginal and rectal swabs and smears collected from the victim's body during an autopsy. The State did not object, and on 7 January 2015, the trial court entered an order permitting defendant to submit the vaginal and rectal swabs and smears to Sorenson Forensics, LLC (Sorenson), an independent

laboratory approved by the North Carolina State Crime Laboratory for DNA testing pursuant to N.C.G.S. § 15A-266.7(a)(2). An initial forensic case report, dated 25 March 2015, indicated that Sorenson found sperm that the North Carolina State Crime Laboratory failed to detect in the vaginal and rectal swabs and smears. The trial court conducted a hearing on 2 April 2015 to determine what further DNA testing was required to assess whether the postconviction DNA testing results were favorable or unfavorable to defendant pursuant to N.C.G.S. § 15A-270. Defendant agreed to further DNA testing on the vaginal and rectal swabs and smears, and the trial court ordered Sorenson to conduct STR and Y-STR DNA testing on the sperm fraction discovered in the vaginal and rectal swabs and compare the results with defendant's liquid blood sample taken in 2002 and defendant's newly ordered buccal (cheek) swab sample.

On 11 May 2015, the trial court held an evidentiary hearing under N.C.G.S. § 15A-270 to evaluate the results of Sorenson's DNA testing. Before the hearing, defendant objected to any evidence that would be offered by the State on whether the results of Sorenson's DNA testing were favorable or unfavorable to him because no motion for appropriate relief regarding the DNA evidence was pending before the court. Nonetheless, finding the proceeding was governed by N.C.G.S. §§ 15A-269 and 15A-270, the court heard evidence from the State regarding the Sorenson DNA testing results. Specifically, the State introduced five forensic case reports from Sorenson detailing the STR DNA and Y-STR DNA testing of the vaginal and rectal swabs and smears collected from the victim during autopsy and their comparisons with defendant's bloodstain card and the new sample of defendant's DNA. The reports established that the Y-STR DNA profile recently obtained from defendant and the Y-STR DNA profile obtained from defendant's bloodstain card matched the Y-STR DNA profile obtained from the epithelial and sperm fractions of the vaginal swabs and the sperm fraction of the rectal swabs collected from the victim's body by the medical examiner during the autopsy. Additionally, the reports indicated that the sperm fraction of the vaginal swabs collected from the victim's body by the medical examiner during autopsy contained a mixture of STR DNA profiles from two contributors, defendant being included as a possible contributor and the other contributor likely being the victim. Defendant did not object to the State's motion to introduce any of the case reports and stipulated to the written language on all the reports. From this evidence (hereinafter Sorenson evidence), the trial court found that the postconviction DNA testing results were "unfavorable" to defendant, announcing its finding in open court; however, after the State drafted and submitted a proposed written order to opposing counsel, defendant objected to

entry of the order based on his various challenges to the way evidence was handled and processed by the SBI. The trial court never signed a written order containing the finding that the postconviction DNA testing results were unfavorable to defendant.

On 3 June 2015, defendant filed a new motion for postconviction DNA testing of the hair samples found in the trash bag in which the victim's body had been placed. Defendant requested that these hair samples be submitted for independent DNA testing, other forensic testing, or both. Defendant argued to the trial court that the requested DNA testing is "unquestionably material" to his defense because

> [t]he hairs obtained from the plastic bag and duct tape wrapped around the victim was [sic] examined microscopically but not submitted for DNA analysis. Given Mr. Lane's continued insistence that he is innocent, the identity of the perpetrator in this case remains at issue. The tests requested are likely to resolve this issue by identifying the perpetrator and/or confirming Mr. Lane's claim of innocence . . . .

This time, the State opposed the motion, asking the trial court to deny the request or hold a hearing to determine whether defendant could show the testing sought "is material to his defense."

The trial court heard defendant's motion on 9 July 2015. Defendant argued the requested DNA testing was material for two reasons: (1) the evidence at trial showed there were two separate crimes: "There was a rape, and there was a murder. The [Sorenson DNA] evidence that has come back has implicated our client in the rape . . . . We contend that these hairs could potentially relate to another perpetrator, and potentially the only perpetrator of that murder"; and (2) at trial, the State's closing argument relied in part on the forensic analysis of fourteen head hairs recovered from defendant's residence that were found to be microscopically consistent with P.W.'s head hairs: "If those head hairs that were found in that vacuum roll at Mr. Lane's house were material to the State . . . these hairs found on the body of the victim are clearly material."

The trial court entered an order on 18 August 2015 denying defendant's motion for postconviction DNA testing of hair samples citing defendant's failure "to show that the requested postconviction DNA testing of hair samples is material to his defense" in accordance with N.C.G.S. § 15A-269. In reaching its decision, the trial court considered: (1) the court file, (2) the evidence presented at trial, (3) defendant's

motion for postconviction DNA testing of hair samples and the State's response to that motion, (4) the arguments of counsel, (5) defendant's prior motion for postconviction DNA testing of the vaginal and rectal swabs and smears collected from P.W.'s body during autopsy, and (6) the materials generated by Sorenson after conducting the court-ordered postconviction DNA testing of the vaginal and rectal swabs and smears. In considering all of this information, the trial court specifically stated it "does not find the existence of a reasonable probability that the verdict would have been more favorable to Defendant Lane if the testing being requested in Defendant Lane's current motion had been conducted on the evidence."

On 28 August 2015, defendant filed a written notice of appeal pursuant to N.C.G.S. § 15A-270.1. On appeal, defendant first argues it was error for the trial court to consider the Sorenson evidence in its materiality analysis of defendant's hair sample testing request when there were contested factual issues regarding the validity of the Sorenson evidence. Second, even if the first round of postconviction DNA testing performed by Sorenson was determined to be valid and relevant, the hair sample DNA testing is still material to his defense because the results could implicate a second perpetrator in the crimes, specifically in the killing of the victim, or confirm his claim of innocence. In his third argument, defendant requests that, regardless of whether the testing is material to defendant's defense, this Court should use its constitutional supervisory authority or inherent authority to order the testing.

Although the standard of review for denial of a motion for postconviction DNA testing has not been expressly stated by this Court, we adopt, as the Court of Appeals did in *State v. Gardner*, the analogous standard of review for a denial of a motion for appropriate relief (MAR) because the trial court sits as finder of fact in both circumstances. *See State v. Gardner*, 227 N.C. App. 364, 365-66, 742 S.E.2d 352, 354 (2013), *disc. rev. denied*, 367 N.C. 252, 749 S.E.2d 860 (2013). In reviewing a denial of a motion for postconviction DNA testing, "[f]indings 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*." *Id.* at 365-66, 742 S.E.2d at 354, (italics added) (quoting *State v. Patton*, 224 N.C. App. 399, 2012 WL 6590534, at *2 (2012) (unpublished) (citations omitted), *petitions for disc. rev. and cert. dismissed*, 366 N.C. 565, 738 S.E.2d 375 (2013)). A trial court's determination of whether defendant's request for postconviction DNA testing is "material" to his defense, as defined in N.C.G.S. § 15A-269(b)(2), is a conclusion of law, and thus we review de novo the

trial court's conclusion that defendant failed to show the materiality of his request.

As with proceedings for postconviction MARs, "the moving party has the burden of proving by a preponderance of the evidence every fact essential to support" the motion for postconviction DNA testing, which includes the facts necessary to establish materiality. N.C.G.S. § 15A-1420(c)(5) (2017); *accord State v. Turner*, 239 N.C. App. 450, 453-54, 768 S.E.2d 356, 359 (2015) (quoting *State v. Adcock*, 310 N.C. 1, 37, 310 S.E.2d 587, 608 (1984)).

Section 15A-269 of the North Carolina General Statutes states, in relevant part:

> (a) A defendant may make a motion before the trial court that entered the judgment of conviction against the defendant for performance of DNA testing . . . if the biological evidence meets all of the following conditions:
>
> (1) Is *material* to the defendant's defense.
>
> (2) Is related to the investigation or prosecution that resulted in the judgment.
>
> (3) Meets either of the following conditions:
>
> a. It was not DNA tested previously.
>
> b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.
>
> (b) The court shall grant the motion for DNA testing . . . upon its determination that:
>
> (1) The conditions set forth in subdivisions (1), (2), and (3) of subsection (a) of this section have been met;
>
> (2) *If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant*; and
>
> (3) The defendant has signed a sworn affidavit of innocence.

N.C.G.S. § 15A-269 (2017) (emphases added). The materiality standard that a defendant must assert in his motion, and that the trial court must find, is contained in subdivision 15A-269(b)(2): "If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant." This definition of "material" is consistent with how that term has been defined in the context of claims based on *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed.2d 215 (1963).[3] Given the similarities in the *Brady* materiality standard and the standard contained in N.C.G.S. § 15A-269(b)(2), it appears the General Assembly adopted the *Brady* standard to guide a trial court in determining whether a defendant's request for postconviction DNA testing should be allowed. In such context, this Court has explained that "material" means "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *State v. Tirado*, 358 N.C. 551, 589, 599 S.E.2d 515, 540 (2004) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494 (1985), *cert. denied*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005)). The determination of materiality must be made "in the context of the entire record," *State v. Howard*, 334 N.C. 602, 605, 433 S.E.2d 742, 744 (1993) (quoting *United States v. Agurs*, 427 U.S. 97, 112, 49 L. Ed. 2d 342, 355 (1976)), and hinges upon whether the evidence would have affected the jury's deliberations. In the context of a capital case, we must consider whether the evidence would have changed the jury's verdict in either the guilt or sentencing phases. *See Brady*, 373 U.S. at 87, 10 L. Ed. 2d at 218.

[1] In his first issue, defendant argues that the trial court erred in considering the Sorenson results in the court's materiality analysis of defendant's request for DNA testing of the hair samples because contested factual issues remained regarding the validity of the Sorenson results. Defendant takes issue with the trial court's finding number twenty-two in its order denying his request for postconviction DNA testing of the hair samples. In this finding, the trial court listed the evidentiary considerations which led it to conclude that defendant's request for postconviction DNA testing of the hair samples was not material to his defense. Specifically, the court considered

> the evidence that was presented at trial, Defendant Lane's current motion for post-conviction DNA testing of hair

3. In *Brady*, the United States Supreme Court held "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." 373 U.S. at 87, 10 L. Ed. 2d at 218.

> samples, the State's response to that motion, the arguments of counsel, Defendant Lane's prior motion for post-conviction DNA testing of the vaginal and rectal swabs and smears collected from the victim's body by the medical examiner during autopsy which was granted by this Court, and *the materials generated by Sorenson Forensics after conducting that court-ordered post-conviction DNA testing*[.]

(Emphasis added.) The language in italics suggests the trial court relied in part on the Sorenson results in making its determination that DNA testing of the hair samples was not material to the defense. Because of his unresolved challenges to the validity of the Sorenson results,[4] defendant contends that there should have been greater factual development on the issues regarding this evidence before it was considered in the trial court's materiality analysis with respect to the DNA testing of hair samples.

Notwithstanding defendant's challenges to the validity of the Sorenson evidence, the second issue is dispositive of this case. As discussed below, despite defendant's contentions that the requested testing is material to his defense, we conclude that the additional overwhelming evidence of defendant's guilt presented at trial, the dearth of evidence at trial pointing to a second perpetrator, and the inability of forensic testing to determine whether the hair samples at issue are relevant to establish a third party was involved in these crimes together create an insurmountable hurdle to the success of defendant's materiality argument.[5]

At trial, the State's evidence showed that defendant, and defendant alone, raped, sodomized, and murdered P.W. Defendant's confession, introduced into evidence at trial, indicates defendant and P.W. were alone in defendant's residence when the crimes occurred. At no point did defendant mention a second perpetrator in his confession. Defendant

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4. Defendant contends the trial court did not resolve his objection to the trial court's draft order authored by the State. The trial court only rendered its decision orally during the evidentiary hearing on 11 May 2015 and has not yet entered an order stating the Sorenson evidence was unfavorable to defendant. On defendant's motion, this Court stayed further trial court proceedings while resolving the issue *sub judice*.

5. We do not take a position on the validity of the Sorenson results from the first round of postconviction DNA testing or comment on the arguments made by the parties as to the trial court's ability to consider those results of that testing in the materiality analysis before us. We only conclude that, regardless of whether the Sorenson results are considered at all, there is not a reasonable probability that even a "favorable" result in the second round of testing would result in "a more favorable outcome for defendant" in a new trial.

also confessed that he wrapped P.W. in a plastic trash bag that he got out of a trash can at his residence. The autopsy showed P.W. was alive when she was raped and sodomized, and was alive when she was put into the trash bag. The autopsy further showed the cause of P.W.'s death was asphyxiation secondary to suffocation; thus, the murder weapon was the trash bag that defendant confessed to both procuring and using. A Caucasian hair was found in P.W.'s anal canal, and forensic testing revealed that defendant, or his maternal relatives, could not be ruled out as the source of the hair.

Additionally, the State's forensic evidence revealed that the trash bag in which P.W. was found was consistent with the size, composition, construction, texture, red drawstrings, and reinforcement characteristics of the trash bags found in defendant's home. Fibers from a blue tarp and a roll of duct tape also found at defendant's home were consistent with the tarp and duct tape found near the location where P.W.'s body was found. Fourteen hairs consistent with the victim's head hairs were found in defendant's vacuum cleaner and carpet sample, confirming P.W. was in defendant's home, and these hairs exhibited signs of being cut, confirming P.W. was subjected to some kind of force.

The eyewitness testimony presented at trial is also consistent with defendant's confession that he, and he alone, moved P.W. to the creek and disposed of her body there. Several eyewitnesses testified that between 7:15 and 7:45 p.m. on the evening in question, they saw a man with a red scooter or moped equipped with a black basket, who was wearing a light or white helmet, struggling with a large bundle wrapped in a blue tarp and with a child's red and white bicycle, near the bridge under which P.W.'s body was found. Three of those eyewitnesses indicated the man was white, while the other two did not identify his race. The only inconsistency in the eyewitness testimony that tended to support the argument that a second perpetrator may have been involved came from a single eyewitness who was confronted on cross-examination with the assertion that she initially told law enforcement that she saw a "black man with dark arms." But the eyewitness testified that she did not remember telling law enforcement the man she saw was African-American.

At trial, the foregoing evidence was sufficient to convict and sentence defendant even without the results of the first round of postconviction DNA testing, because the evidence at trial showed no semen present in the victim's vaginal and anal swabs. Therefore, regardless of any consideration of the Sorenson evidence, the trial evidence was

ample to support a finding of defendant's guilt and dictated the trial court's ultimate conclusion on materiality.

Further, even if the hair samples in question were tested and found not to belong to the victim or defendant, they would not necessarily implicate another individual as a second perpetrator. Defendant argues that if he and P.W. are excluded as the source of the hair fragments, such a finding would result in a more favorable outcome for defendant; however, defendant failed to show the hair samples were placed in the trash bag at the time the crimes were committed. In addition to the hair samples, the trash bag covering the victim was filled with other creek debris because the bag had holes in it and had been in the creek for almost two days. P.W.'s body was found underneath a public roadway, in a location frequented by fishermen, and was in the middle of a construction zone; thus, there was great potential for contamination of the hole-ridden, weathered trash bag. Also, defendant cannot show the hair samples were not already in the bag when the victim was placed inside it.

Therefore, even if the samples were tested and produced a "favorable" result to defendant, that is, they were found to belong to an individual other than P.W. or defendant, it is not reasonably likely that such a finding would change the verdict for defendant. "Where ample evidence, including eyewitness testimony and defendant's own admission to law enforcement, supported a finding of defendant's guilt, defendant's motion for post-conviction DNA testing did not allege a 'reasonable probability that the verdict would have been more favorable to the defendant.' " *State v. Pegram*, ___ N.C. App. ___, 808 S.E.2d 179, 2017 WL 6002819 at *1 (2017) (unpublished) (brackets omitted). In this case, though there is no eyewitness account of the crimes themselves other than defendant's confession, a plethora of eyewitness testimony corroborates defendant's own account of how he disposed of P.W.'s body. A great deal of physical evidence also ties items in defendant's home to the location where the victim's body was found and links defendant to the crimes committed against P.W. His confession is consistent with all of this evidence, and he never implicated a second perpetrator. All the evidence in this case points to defendant—and defendant alone—as committing the crimes against the victim. In light of this evidence, defendant has failed to convince this Court that DNA testing of the hair samples is material regarding his convictions.

[2] As to defendant's sentence, there is not a reasonable probability that the DNA testing of the hair samples would have changed the jury's recommendation of death. Here, the jury found two aggravating circumstances regarding the murder of P.W.: (1) defendant committed the murder while

engaged in the commission of rape, first-degree sexual offense, or kidnapping, N.C.G.S. § 15A-2000(e)(5) (2017), and (2) the murder was especially heinous, atrocious, or cruel, *id.* § 15A-2000(e)(9) (2017). According to the plain language of subdivision 15A-2000(e)(5), the jury could have found this aggravating circumstance even if it believed defendant was merely an accomplice in the crimes perpetrated against P.W. Even if the hair samples were tested and the testing revealed they were from a third person, the jury would still be permitted to consider this aggravating factor if it was convinced another individual was involved in the crimes. Further, as already discussed, sufficient evidence—even without considering the Sorenson evidence—shows defendant committed a sexual offense against P.W. In addition to his confession, a Caucasian hair was discovered in P.W.'s anal canal during the autopsy, and defendant and his maternal relatives "could not be excluded" as the source. As to the N.C.G.S. § 15A-2000(e)(9) circumstance found by the jury, this murder, given the victim's age and the evidence detailing that she died by choking on her own vomit while wrapped in duct tape and a trash bag either immediately after or during the commission of a sexual assault, could certainly be considered especially heinous, atrocious, or cruel even if there was evidence that another person could have been involved.

Therefore, no *reasonable* probability exists under the facts of this case that a jury would fail to convict defendant or would not recommend the death penalty, even if the jury were able to consider a potential third person's hair samples that were found in the damaged trash bag in which the victim's body was placed. In fact, defendant argued to the jury at trial that the presence of these hair samples in the trash bag implicated someone other than him in the crimes, but, in light of the remaining evidence, that argument appears to have had no effect on the jury's verdict or recommendation.

[3] In addressing defendant's third issue, we also decline to use our inherent or supervisory power to order the testing regardless of materiality. During oral arguments, the parties asserted that this case implicated the balance between the thoroughness of reviewing a capital case and the finality of it. In reflecting on this balance, the Supreme Court of the United States recognized the dangers inherent in using postconviction DNA testing as an unfettered discovery tool:

> DNA testing alone does not always resolve a case. Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent. The availability of technologies not available at trial cannot mean that every criminal

> conviction, or even every criminal conviction involving biological evidence, is suddenly in doubt. The dilemma is how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice.
>
> That task belongs primarily to the legislature.

Dist. Att'y's Office v. Osborne, 557 U.S. 52, 62, 174 L. Ed. 2d 38, 47-48 (2009) (citation omitted). In North Carolina, the General Assembly made a defendant's statutory right to postconviction DNA testing contingent upon several conditions precedent, one of which is the trial court's conclusion that the requested DNA testing is material to the defense. N.C.G.S. § 15A-269(a) (2017), (b)(2). The policy behind the law is "to assist federal, State, and local criminal justice and law enforcement agencies in the identification, detection, or exclusion of individuals who are subjects of the investigation or prosecution of felonies or violent crimes against the person," *id.* § 15A-266.1 (2017); *see State v. Doisey*, 240 N.C. App. 441, 445, 770 S.E.2d 177, 180 (2015) (explaining that the law governing postconviction DNA testing's "ultimate focus is to help solve crimes through DNA *testing*"), rather than provide postconviction capital defendants with an endless series of challenges. In this case, there is "enough other incriminating evidence" to convict and sentence defendant regardless of the results of any hair analysis and as noted previously, the hair analysis results could be irrelevant because, *inter alia*, the hairs could have already been in the bag when defendant placed P.W. in it, or they could have made their way into the bag while it was soaking in a creek, exposed to the elements for two days. Ordering the testing when defendant has failed to show that a reasonable probability exists that the results of the requested testing would change the outcome of the case would set a precedent for allowing criminal defendants to ceaselessly attack the finality of criminal convictions without significantly assisting in the search for truth.

Therefore, we affirm the trial court's order denying defendant's motion requesting postconviction DNA testing of hair samples.

AFFIRMED.

STATE v. SCHALOW

[370 N.C. 525 (2018)]

STATE OF NORTH CAROLINA
v.
LEONARD PAUL SCHALOW

No. 4PA17

Filed 2 March 2018

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 795 S.E.2d 567 (2016), vacating defendant's conviction and a resulting judgment entered on 5 November 2015 by Judge Mark E. Powell in Superior Court, Henderson County. Heard in the Supreme Court on 5 February 2018.

Joshua H. Stein, *Attorney General*, *by Joseph L. Hyde*, *Assistant Attorney General*, *for the State-appellant.*

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

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE v. WILLIAMS

[370 N.C. 526 (2018)]

STATE OF NORTH CAROLINA
v.
DARYL WILLIAMS

No. 171A17

Filed 2 March 2018

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 801 S.E.2d 169 (2017), reversing a judgment entered on 12 August 2015 by Judge Paul L. Jones in Superior Court, Wayne County, and awarding defendant a new trial. On 17 August 2017, the Supreme Court allowed the State's petition for discretionary review of an additional issue. Heard in the Supreme Court on 10 January 2018.

Joshua H. Stein, Attorney General, by Scott A. Conklin, Assistant Attorney General, for the State-appellant.

Gilda C. Rodriguez for defendant-appellee.

PER CURIAM.

We reverse in part the decision of the Court of Appeals for the reasons stated in the dissenting opinion, and we remand this case to the Court of Appeals to address defendant's remaining argument on appeal. The State's petition for discretionary review as to an additional issue was improvidently allowed.

REVERSED IN PART AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

TULLY v. CITY OF WILMINGTON

[370 N.C. 527 (2018)]

KEVIN J. TULLY
v.
CITY OF WILMINGTON

No. 348A16

Filed 2 March 2018

1. Constitutional Law—North Carolina—employer violation of own policy—refusal to consider appeal—exam required for promotion—police officer

The trial court erred by dismissing plaintiff police officer's constitutional claim arising under Article I, Section 1. A police officer states a claim under the North Carolina Constitution against his employer when that employer violates its own policy by refusing to consider his appeal regarding the validity of an examination required for a promotion.

2. Constitutional Law—Law of the Land clause—job promotion—no property interest

The trial court did not err by granting the City's motion to dismiss a police officer's Article I, Section 19 claim. There is no authority recognizing a property interest in a job promotion, and the police officer conceded in his brief that no such property interest existed.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 790 S.E.2d 854 (2016), reversing a judgment entered on 1 May 2015 by Judge Gary E. Trawick in Superior Court, New Hanover County. Heard in the Supreme Court on 10 October 2017.

Tin Fulton Walker & Owen PLLC, by S. Luke Largess and Cheyenne N. Chambers, for plaintiff-appellee.

Cranfill Sumner & Hartzog LLP, by Katie Weaver Hartzog, for defendant-appellant.

Elliot Morgan Parsonage, PLLC, by Robert M. Elliot and R. Michael Elliot, for North Carolina Advocates for Justice, amicus curiae.

Law Offices of Michael C. Byrne, by Michael C. Byrne, for North Carolina Fraternal Order of Police, amicus curiae.

Edelstein and Payne, by M. Travis Payne, for Professional Fire Fighters and Paramedics of North Carolina, amicus curiae.

McGuinness Law Firm, by J. Michael McGuinness; and Milliken Law, by Megan Milliken, for Southern States Police Benevolent Association and North Carolina Police Benevolent Association, amici curiae.

HUDSON, Justice.

Here we address whether a police officer states a claim under the Constitution of North Carolina against his employer when that employer violates its own policy by refusing to consider his appeal regarding the validity of an examination required for a promotion. Because we conclude that Plaintiff Kevin J. Tully has adequately stated a claim that his rights under Article I, Section 1 of the North Carolina Constitution were violated by the City of Wilmington (the City), we affirm in part the decision of the Court of Appeals reversing the dismissal of his claims.

I. Factual and Procedural History

The following facts from Tully's complaint are taken as true for the purpose of analyzing the City's motion for judgment on the pleadings. The Wilmington Police Department (the Police Department) hired Tully in 2000 and promoted him to corporal in 2007. At the time this complaint was filed, Tully was a member of the violent crimes section and had investigated more than fifty homicides and served as lead investigator in at least 12 of those cases, which had a 100% clearance rate. Tully holds an associate's degree in Applied Science in Criminal Justice and Protective Services Technology and a bachelor's degree in Criminal Justice and has received his Advanced Police Certification from the North Carolina Criminal Justice Education and Training Standards Commission. He was named "Wilmington Police Officer of the Year" in 2011.

In October 2011, Tully sought a promotion to the rank of sergeant in the Police Department. He took a written examination, a required step in a multi-phase promotional process then in effect as set forth in the Police Department Policy Manual (the Policy Manual), but he did not receive a passing score.[1] Tully had based his answers on the prevailing

1. Pursuant to the Policy Manual, "[t]hose candidates competing for the position of Sergeant must score in the top 50 percentile of those taking the written examination in order to advance to the next phase of the promotional process." Police Department, City of Wilmington, *Policy Manual*, Directive 4.11, ¶ III(B)(1)(d)(2), at 3 (rev. July 25, 2011).

law at the time, and, after receiving a copy of the official examination answers, he discovered that the official answers were based on outdated law. Tully filed a grievance regarding this discrepancy through the City's internal grievance process but was informed in a 3 January 2012 letter from City Manager Sterling Cheatham that "the test answers were not a grievable item." A supervisor also told Tully that "[e]ven if you are correct, there is nothing that can be done."

Directive 4.11 of the Policy Manual states that "[t]his policy establishes uniform guidelines that govern promotional procedures within the Wilmington Police Department and ensures procedures used are job-related and non-discriminatory." Police Department, City of Wilmington, *Policy Manual*, Directive 4.11, ¶ I, at 1 (rev. July 25, 2011). Directive 4.11 also states that the Police Department is to work with the City's Human Resources Department to

> ensure that fair and professional standards are utilized for the purpose of promoting sworn police employees. . . . It is the objective of the City of Wilmington to provide equal promotional opportunities to all members of the Police Department based on a candidate's merit, skills, knowledge, and abilities without regard to age, race, color, sex, religion, creed, national origin, or disability.

Id. ¶ II, at 2.

Directive 4.11 explains that all examination "instruments used shall have demonstrated content and criterion validity, which is accomplished by contracting with qualified outside entities to develop the written testing instruments. Instruments will assess a candidate's knowledge, skills, and abilities as related to the promotional position." *Id.* ¶ III(B)(1)(c),

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The Policy Manual also specifies that "[t]he top 1/3 of candidates whom complete all specified phases [of the promotional process] will be placed on the eligibility lists for promotions." *Id.* ¶ III(A)(2)(e), at 2. After conducting interviews, the Chief of Police may then pick a candidate from the top third list or may, after notifying all of those candidates that they will not be promoted, select a candidate in the second third. *Id.* Because Tully relied upon the Policy Manual in his complaint and the City attached it to its answer, the document may be considered at the motion for judgment on the pleadings stage. *See Bigelow v. Town of Chapel Hill*, 227 N.C. App. 1, 4, 745 S.E.2d 316, 319-20 ("[A] document attached to the moving party's pleading may . . . be considered in connection with a Rule 12(c) motion [if] the non-moving party has made admissions regarding the document." (first alteration in original) (quoting *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 205, 652 S.E.2d 701, 708 (2007))), *disc. rev. denied*, 367 N.C. 223, 747 S.E.2d 543 (2013).

at 3. The "Grievance and Appeals" section of Directive 4.11 provides the following:

> 1. Candidates may appeal any portion of the selection process. The appeal must be made consistent with the City of Wilmington Personnel Policy on Employee Grievances.
>
> 2. If practical, re-application, re-testing, re-scoring and/or re-evaluation of candidates may be required if an error in the process is substantiated.

Id. ¶ III(F), at 6.

On 30 December 2014, Tully filed a complaint in the Superior Court in New Hanover County, asserting two claims under the North Carolina Constitution[2] on the ground that he "never had a true opportunity to grieve his denial of promotion based on his answers to the Sergeant's test." In his first claim, Tully asserted that the City violated Article I, Section 19 of the Constitution, which states in pertinent part that "[n]o person shall be . . . deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. Specifically, Tully's complaint asserted that he

> has a property interest in his employment with the City of Wilmington and that property interest cannot be denied or impeded without due process of law. . . . By denying [his] promotion due to his answers on the Sergeant's test and then determining that such a reason was not grievable, the City arbitrarily and irrationally deprived [him] of property in violation of the law of the land, in violation of the North Carolina Constitution.

In his second claim, Tully asserted that the City violated his rights under Article I, Section 1 of the Constitution, which states that "[w]e hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." *Id.* art. I, § 1. Specifically, Tully claimed that "[b]y denying [his] promotion due to his answers on the Sergeant's test and then determining that such a reason was not grievable, the City arbitrarily and irrationally deprived [him] of enjoyment of the fruits of his own labor, in violation of the North Carolina Constitution."

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2. References to the "Constitution" in this opinion are to North Carolina's Constitution unless otherwise specified.

As a remedy for these alleged violations, Tully sought a judgment declaring that the City's decision to deny him a promotion based on the October 2011 Sergeant's examination was an unconstitutional "deprivation of [his] property interest in his employment" and of the "enjoyment of the fruits of his own labor." He also requested damages resulting from the City's allegedly unconstitutional actions.

After filing its answer, the City moved for judgment on the pleadings under Rule 12(c) of the North Carolina Rules of Civil Procedure. The City argued that the parties' pleadings established that Tully did not have a property interest that could support his claims for a violation of either Section 1 or Section 19 of Article I.[3] Following a hearing on 6 April 2015 before the Honorable Gary E. Trawick, the trial court granted the City's motion and dismissed all of Tully's claims with prejudice.

Tully appealed to the North Carolina Court of Appeals, which issued a divided opinion on 16 August 2016 reversing the trial court. *Tully v. City of Wilmington*, ___ N.C. App. ___, 790 S.E.2d 854 (2016). The majority first clarified that Tully's claims were "*not* based upon an assertion that he was entitled *to receive a promotion* to the rank of Sergeant, but simply that he was entitled *to a non-arbitrary and non-capricious promotional process*" in accordance with the rules set forth in the Policy Manual, including its appeals provision. *Id.* at ___, 790 S.E.2d at 858.

After acknowledging that this case presented an issue of first impression under North Carolina law and analyzing various federal and state cases relevant to the discussion, the Court of Appeals majority concluded that "it is inherently arbitrary for a government entity to establish and promulgate policies and procedures and then not only utterly fail to follow them, but further to claim that an employee subject to those policies and procedures is not entitled to challenge that failure." *Id.* at ___, 790 S.E.2d at 860 (emphasis omitted). The majority also stated that " 'irrational and arbitrary' government actions violate the 'fruits of their own labor' clause." *Id.* at ___, 790 S.E.2d at 858 (citing *Treants Enters. v. Onslow County*, 83 N.C. App. 345, 354, 350 S.E.2d 365, 371 (1986), *aff'd*, 320 N.C. 776, 360 S.E.2d 783 (1987)).

In a dissenting opinion, the Honorable Wanda G. Bryant relied principally upon the distinction between the government acting in its capacity as regulator and its capacity as employer, explaining that

3. The City's motion did not reference Tully's specific claim that the City's actions deprived him of enjoyment of the fruits of his labor in violation of Article I, Section 1.

"[b]ecause the City is acting as an employer rather than as a sovereign, and is vested with the power to manage its own internal operations, Tully's pleadings—although asserting what appears to be an unfair result in a standard process—do not state a viable constitutional claim." *Id.* at ___, 790 S.E.2d at 861 (Bryant, J., dissenting). Judge Bryant noted, however, that "because our state Supreme Court has mandated that the N.C. Constitution be liberally construed, particularly those provisions which safeguard individual liberties, I would strongly urge the Supreme Court to take a close look at this issue to see whether it is one that, as currently pled, is subject to redress under our N.C. Constitution."[4] *Id.* at ___, 790 S.E.2d at 863 (citation omitted). Tully filed a timely notice of appeal to this Court.

II. Standard of Review

We review de novo a trial court's order granting a motion for judgment on the pleadings under Rule of Civil Procedure 12(c). *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51, 790 S.E.2d 657, 659 (2016) (citation omitted). "The party moving for judgment on the pleadings must show that no material issue of fact exists and that he is entitled to judgment as a matter of law." *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 682, 360 S.E.2d 772, 780 (1987) (citation omitted). In considering a motion for judgment on the pleadings,

> "[a]ll well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false." As with a motion to dismiss, "[t]he trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party." A Rule 12(c) movant must show that "the complaint . . . fails to allege facts sufficient to state a cause of action or admits facts which constitute a complete legal bar" to a cause of action.

CommScope Credit Union, 369 N.C. at 51-52, 790 S.E.2d at 659-60 (alterations in original) (first quoting *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 682-83, 360 S.E.2d 772, 780 (1987); then quoting *Jones v. Warren*, 274 N.C. 166, 169, 161 S.E.2d 467, 470 (1968)).

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4. We do not base our decision today upon substantive due process or equal protection, which are referenced in the Court of Appeals discussion, but rather squarely base our decision upon the constitutional provision guaranteeing the right to enjoy the fruits of one's labor. Accordingly, the dissent's and the City's reliance upon the United States Supreme Court's equal protection analysis in *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591, 170 L. Ed. 2d 975 (2008), is inapplicable.

III. Analysis

A. Article I, Section 1

[1] The City contends that Tully's complaint failed to plead a viable cause of action under Article I, Section 1 of our Constitution, which states in pertinent part that "all persons are . . . endowed by their Creator with certain inalienable rights," including "the enjoyment of the fruits of their own labor." N.C. Const. art. I, § 1. We acknowledge that application of this constitutional provision in the present context is an issue of first impression. After careful consideration, we conclude that Tully has successfully stated a claim under Section 1 of Article I and affirm the Court of Appeals on that ground.

As we explained in *Corum v. University of North Carolina*,

> [t]he civil rights guaranteed by the Declaration of Rights in Article I of our Constitution are individual and personal rights entitled to protection against state action . . . . The Declaration of Rights was passed by the Constitutional Convention on 17 December 1776, the day before the Constitution itself was adopted, manifesting the primacy of the Declaration in the minds of the framers. The fundamental purpose for its adoption was to provide citizens with protection from the State's encroachment upon these rights. . . . The very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State.

330 N.C. 761, 782-83, 413 S.E.2d 276, 289-90 (citing *State v. Manuel*, 20 N.C. 3 & 4 Dev. & Bat. 144 (1838)), *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992). We also noted in *Corum* that "[o]ur Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens" and that "[w]e 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." *Id.* at 783, 413 S.E.2d at 290 (citations omitted). We also explained that this Court "has recognized a direct action under the State Constitution against state officials for violation of rights guaranteed by the Declaration of Rights" when no other state law remedy is available. *Id.* at 783, 413 S.E.2d at 290 (citing *Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 89 S.E.2d 290 (1955)); *see id.* at 783, 413 S.E.2d at 290 ("Having no other remedy, our common law guarantees plaintiff a direct action under the State Constitution for

alleged violations of his constitutional freedom of speech rights." (citing *Sale*, 242 N.C. 612, 89 S.E.2d 290)); *see also Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 342, 678 S.E.2d 351, 356 (2009) ("[W]hen faced with a plaintiff who had suffered a colorable constitutional injury that could not be redressed through other means, this Court [has] allowed the plaintiff to proceed with his direct constitutional claim because the state law remedy did not apply to the facts alleged by the plaintiff."); *id.* at 342, 678 S.E.2d at 357 (recognizing "our long-standing emphasis on ensuring redress for every constitutional injury").

This Court has previously recognized claims against government defendants rooted in the right to enjoy the fruits of one's labor. In *State v. Ballance*, in which we held that a statute regulating photographers violated Sections 1 and 19 of Article I, we explained that the "fundamental guaranties" set forth in Sections 1 and 19 "are very broad in scope, and are intended to secure to each person subject to the jurisdiction of the State extensive individual rights." 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949). In *State v. Warren* we observed that

> Section 1, Article I, of the Constitution of North Carolina guarantees to the citizens of the State "the enjoyment of the fruits of their own labor" and declares this an inalienable right.
>
> The basic constitutional principle of personal liberty and freedom embraces the right of the individual to be free to enjoy the faculties with which he has been endowed by his Creator, to live and work where he will, to earn his livelihood by any lawful calling, and to pursue any legitimate business, trade or vocation. This precept emphasizes the dignity, integrity and liberty of the individual, the primary concern of our democracy.

252 N.C. 690, 692-93, 114 S.E.2d 660, 663 (1960).

We have also addressed a public employee's liberty interest in pursuing her chosen profession free from unreasonable actions of her employer. In *Presnell v. Pell* a school employee sued her employer school district and certain administrators for defamation and wrongful termination after, as her complaint alleged, the school's principal caused her to be fired based upon his false allegation that she had distributed liquor to maintenance contractors on school premises. 298 N.C. 715, 717-18, 260 S.E.2d 611, 613 (1979). Although we held that the plaintiff's at-will employment status meant that she had no cognizable *property* interest in continued employment, we explained that her

> complaint does however sketch a colorable claim that a constitutionally protected "liberty" interest may be at stake. One of the liberty interests encompassed in the Due Process Clause of the Fourteenth Amendment is the right "to engage in any of the common occupations of life," unfettered by unreasonable restrictions imposed by actions of the state or its agencies. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Truax v. Raich*, 239 U.S. 33 (1915). The right of a citizen to live and work where he will is offended when a state agency unfairly imposes some stigma or disability that will itself foreclose the freedom to take advantage of employment opportunities. *Board of Regents v. Roth*, [408 U.S. 564 (1972)]. . . .
>
> . . . The liberty interest here implicated—the freedom to seek further employment—was offended not by her dismissal alone, but rather by her dismissal based upon alleged unsupported charges which, left unrefuted, might wrongfully injure her future placement possibilities.

Id. at 724, 260 S.E.2d at 617. We then concluded that the plaintiff's opportunity to avail herself of a post-termination administrative hearing that could be appealed to Superior Court provided her with sufficient procedural due process to safeguard her liberty interest. *Id.* at 725, 260 S.E.2d at 617.[5]

More recently, in *King v. Town of Chapel Hill*, which concerned a tow truck company's challenge to a local towing ordinance, we explained that "[t]his 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." 367 N.C. 400, 408-09, 758 S.E.2d 364, 371 (2014) (first citing N.C. Const. art. I, § 1; then citing *Roller v. Allen*, 245 N.C. 516, 525, 96 S.E.2d 851, 859 (1957)).

The City here correctly notes that cases involving the right to pursue one's profession free from unreasonable governmental action generally involve the government acting as regulator or sovereign rather than as an employer (with the exception of *Presnell)*. Nevertheless, we are persuaded that Article I, Section 1 also applies when a governmental entity acts in an arbitrary and capricious manner toward one of its employees

5. Here, Tully did not plead a due process claim based on a liberty interest, but only on a property interest. For that reason, we do not express any opinion as to the possible viability of such a claim in this context.

by failing to abide by promotional procedures that the employer itself put in place. We note that other courts have recognized the impropriety of government agencies ignoring their own regulations, albeit in other contexts. *See, e.g.*, *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268, 98 L. Ed. 681, 687 (1954) (concluding that that Board of Immigration Appeals violated petitioner's due process rights by acting "contrary to existing valid regulations"); *United States v. Heffner*, 420 F.2d 809, 811-12 (4th Cir. 1969) ("An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down. This doctrine was announced in [*Accardi*] . . . . [T]he doctrine's purpose [is] to prevent the arbitrariness which is inherently characteristic of an agency's violation of its own procedures."); *see also Farlow v. N.C. State Bd. of Chiropractic Exam'rs*, 76 N.C. App. 202, 208, 332 S.E.2d 696, 700 (observing that *Accardi*'s "rationale is sound"), *appeal dismissed and disc. rev. denied*, 314 N.C. 664, 336 S.E.2d 621 (1985).

Here Tully has adequately stated a claim under the portion of Article I, Section 1 safeguarding the fruits of his labor because, taking all the facts in his complaint as true, he alleges that the City arbitrarily and capriciously denied him the ability to appeal an aspect of the promotional process despite the Policy Manual's plain statement that "[c]andidates may appeal any portion of the selection process." Tully's allegations state that by summarily denying his grievance petition without any reason or rationale other than that the examination answers "were not a grievable item" despite their being a "portion of the selection process," the City ignored its own established rule.[6] Tully then alleges that in so doing, "the City arbitrarily and irrationally deprived [him] of enjoyment of the fruits of his own labor." Accordingly, we conclude that the City's actions here implicate Tully's right under Article I, Section 1 to pursue his chosen profession free from actions by his governmental employer that, by their very nature, are unreasonable because they contravene policies specifically promulgated by that employer for the purpose of having a fair promotional process.

This right is not without limitation, however. Based upon our distillation of the admittedly sparse authority in this area of the law, we hold that to state a direct constitutional claim grounded in this unique right

6. Moreover, the alleged reason for Tully's grievance—that the sergeant's examination contained outdated law—went to the very heart of the Policy Manual's directive that "[a]ll" examination "instruments used shall have demonstrated content and criterion validity."

under the North Carolina Constitution, a public employee must show that no other state law remedy is available and plead facts establishing three elements: (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 as a result of that violation. If a public employee alleges these elements, he has adequately stated a claim that his employer unconstitutionally burdened his right to the enjoyment of the fruits of his labor.

Here the Policy Manual set forth clear rules specifying that "[c]andidates may appeal any portion of the selection process" and examination "instruments used shall have demonstrated content and criterion validity."[7] These rules serve the legitimate governmental interest of providing a fair procedure that ensures qualified candidates move to the next stage of the promotional process. The Policy Manual itself explains that "[i]t is the objective of the City of Wilmington to provide equal promotional opportunities to all members of the Police Department based on a candidate's merit, skills, knowledge, and abilities." Second, in his complaint Tully alleges facts showing that the City violated the above rules by arbitrarily denying his appeal challenging inaccurate official examination answers. Third, Tully has sufficiently alleged an injury in that the City's arbitrary denial of his appeal meant that, if proven, the examination defects—and his flawed test score resulting from those defects—were never addressed. Tully's allegations show that the City's actions injured him by denying him a fair opportunity to proceed to the next stage of the competitive promotional process, thereby "unfairly impos[ing] [a] stigma or disability that will itself foreclose the freedom to take advantage of employment opportunities." *Presnell*, 298 N.C. at 724, 260 S.E.2d at 617 (citation omitted).

At this stage we express no opinion on the ultimate viability of Tully's claim. Accordingly, we need not speculate regarding whether Tully

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7. The parties dispute whether these rules are incorporated by reference into the City's Charter. Tully points to language in the "Personnel Policies" portion of the City's Charter stating that "[u]nless specifically excepted by this act, all other ordinances and policies affecting the employees of the City of Wilmington shall apply to employees under the Civil Service Act." Wilmington, N.C., Code of Ordinances art. XI, § 11.8. The City observes, however, that the City's Civil Service Act does not cover promotions within the Police Department and thus cannot incorporate by reference Directive 4.11 as that provision of the Policy Manual concerns promotions. We express no opinion on whether Directive 4.11 stands on the same footing as a duly enacted city ordinance given that the above-described rules are clear and established for purposes of this claim.

would likely have received the promotion had the Police Department followed its own policy. Similarly, we need not address the remedy to which Tully would be entitled if he ultimately succeeds in proving his claim. As we explained in *Corum*,

> [w]hat that remedy will require, if plaintiff is successful at trial, will depend upon the facts of the case developed at trial. It will be a matter for the trial judge to craft the necessary relief. As the evidence in this case is not fully developed at this stage of the proceedings, it would be inappropriate for this Court to attempt to establish the redress recoverable in the event plaintiff is successful . . . .

330 N.C. at 784, 413 S.E.2d at 290-91.

B. Article I, Section 19

[2] The City also contends that the Court of Appeals majority erred in allowing Tully's claim under Article I, Section 19 to proceed. The law of the land clause of that provision states that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. As we explained in *Ballance*, " 'law of the land' is synonymous with 'due process of law,' a phrase appearing in the Federal Constitution and the organic law of many states." 229 N.C. at 769, 51 S.E.2d at 734 (citing, *inter alia*, *Yancey v. N.C. State Highway & Pub. Works Comm'n*, 222 N.C. 106, 22 S.E.2d 256 (1942)). "In analyzing a due process claim, we first need to determine whether a constitutionally protected property interest exists. To demonstrate a property interest under the [Constitution], a party must show more than a mere expectation; he must have a legitimate claim of entitlement." *McDonald's Corp. v. Dwyer*, 338 N.C. 445, 447, 450 S.E.2d 888, 890 (1994) (citation omitted).

Tully's complaint specifically asserted that his Article I, Section 19 claim was based upon a "property interest in his employment with the City of Wilmington" and that "[b]y denying [his] promotion due to his answers on the Sergeant's test and then determining that such a reason was not grievable, the City arbitrarily and irrationally deprived [him] of property in violation of the law of the land."

We have previously explained that a property interest in employment "can arise from or be created by statute, ordinance, or express or implied contract, the scope of which must be determined with reference to state law," *Presnell*, 298 N.C. at 723, 260 S.E.2d at 616 (citations

omitted), and that "[n]othing else appearing, an employment contract in North Carolina is terminable at the will of either party," *id.* at 723-24, 260 S.E.2d at 616 (citation omitted). Moreover, "[t]he fact that plaintiff was employed by a political subdivision of the state does not itself entitle her to tenure, nor does the mere longevity of her prior service." *Id.* at 724, 260 S.E.2d at 616.

We are aware of no authority recognizing a property interest in a promotion, and Tully concedes in his brief to this Court that no such property interest exists here. Accordingly, we conclude that the trial court correctly granted the City's motion to dismiss Tully's Article I, Section 19 claim because no property interest is implicated here. On this issue we reverse the Court of Appeals.

IV. Conclusion

Taking all of Tully's allegations in the light most favorable to him, as we must at the pleading stage, we hold that Tully has alleged a claim for the deprivation of his right to the enjoyment of the fruits of his labor under Article I, Section 1 of the North Carolina Constitution. "As this case moves forward to summary judgment or trial, plaintiff will have to prove that his allegations are true" and that his constitutional rights were indeed violated. *Turner v. Thomas*, 369 N.C. 419, 429, 794 S.E.2d 439, 447 (2016); *see also Harwood v. Johnson*, 326 N.C. 231, 241, 388 S.E.2d 439, 445 (1990) (concluding that although "the complaint is sufficient to withstand a motion to dismiss[,] [i]t remains to be determined, upon summary judgment, or at trial, whether plaintiff can forecast or prove" that the defendants violated his constitutional rights).

Accordingly, we affirm the Court of Appeals' holding that the trial court erred in dismissing Tully's claim arising under Article I, Section 1. We reverse the portion of the Court of Appeals decision concluding that Tully stated a valid claim under Article I, Section 19. This case is remanded to the Court of Appeals for further remand to the trial court for additional proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

EDWARD F. WILKIE AND DEBRA T. WILKIE
v.
CITY OF BOILING SPRING LAKES

No. 44PA17

Filed 2 March 2018

Eminent Domain—inverse condemnation—private purpose

Plaintiff homeowners were entitled to assert a statutory inverse condemnation claim pursuant to N.C.G.S. § 40A-51 based upon the extended flooding of their property as the result of actions taken by defendant City to adjust a lake's shore line for an allegedly private purpose. The statute did not make the availability of the remedy dependent upon whether the purpose that led to the taking was public or private.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 796 S.E.2d 57 (2016), reversing an order entered on 5 November 2015 by Judge Ebern T. Watson, III, in Superior Court, Brunswick County, and remanding the matter for further proceedings. Heard in the Supreme Court on 8 November 2017.

Smith Moore Leatherwood, LLP, by Kip David Nelson and Matthew A. Nichols; and Law Office of Kurt B. Fryar, by Kurt B. Fryar, for plaintiff-appellants.

Cauley Pridgen, P.A., by James P. Cauley, III, and David M. Rief; and Jack Cozort for defendant-appellee.

ERVIN, Justice.

The issue in this case is whether plaintiffs Edward F. and Debra T. Wilkie are entitled to seek compensation pursuant to N.C.G.S. § 40A-51 based upon the extended flooding of their property as the result of actions taken by defendant City of Boiling Spring Lakes for an allegedly private purpose. For the reasons set forth below, we reverse the Court of Appeals' decision and remand this case to the Court of Appeals for consideration of defendant's remaining challenges to the trial court's order.

Plaintiffs own a house and lot bordering Spring Lake, a thirty-one acre body of water owned by defendant that is fed by natural springs that empty into the lake and by surface water runoff from the surrounding area. Two fixed pipes drain excess water from Spring Lake.

On 25 June 2013, defendant's Board of Commissioners received a petition signed by plaintiffs[1] and other persons owning property adjacent to Spring Lake requesting that defendant modify the height of the drain pipes. According to a number of persons who owned property adjoining Spring Lake, the installation of replacement pipes a number of years earlier had lowered the lake level. On 2 July 2013, after several meetings during which concerns about the lake level continued to be expressed, the Board voted "to return Spring Lake to its original shore line as quickly as can be done."

On or about 11 July 2013, "elbows" were placed onto the inlet side of the two outlet pipes for the purpose of raising the pipes by eight or nine inches and elevating the lake level. After the pipes were raised, plaintiffs claimed that portions of their property were covered by the lake. Plaintiffs and a number of other lakeside property owners signed a second petition seeking removal of the "elbows" from the outlet pipes that was presented to the Board on 6 August 2013.

After receiving the second petition, the Board voted to lower the lake level by three inches. A number of additional Board meetings were held between 6 August 2013 and 13 January 2014, during which several residents complained that water from the lake continued to encroach upon their property. However, a majority of the Board refrained from voting to remove the elbows during these meetings. On 13 January 2014, the Board voted to hire Sungate Design Group, an engineering firm, to determine the appropriate lake level. In light of Sungate's recommendation that the lake be returned to its original level, the elbows were removed on 30 July 2014.

On 23 May 2014, plaintiffs filed a complaint in which they sought, among other things, compensation pursuant to N.C.G.S. § 40A-51. In support of their request for relief, plaintiffs asserted that they had "lost approximately fifteen to eighteen percent" of their lakeside property

1. The only member of the family who actually signed the petition was Ms. Wilkie, who affixed her name and that of Mr. Wilkie to the document.

"due to the installation of the 'elbow' and subsequent rise of Spring Lake's water level," that the Board "voted to install an elbow on a drainage pipe within Spring Lake for the purpose of raising Spring Lake's water level" "to further a public use and public purpose," and that "[t]he City did not file a complaint containing a declaration of this taking." As a result, plaintiffs sought compensation for the taking of their property pursuant to N.C.G.S. §§ 40A-8 and 40A-51, the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 19 of the North Carolina Constitution.[2]

After conducting a hearing pursuant to N.C.G.S. § 40A-47 for the purpose of resolving all disputed issues between the parties other than the amount of damages, if any, to which plaintiffs were entitled, the trial court entered an order on 5 November 2015 determining that the installation of the elbows "for the benefit of, and at the sole request of, residents around the lake" elevated the lake level and "encroached upon and submerged" plaintiffs' property and resulted in a "taking of [plaintiffs'] property without just compensation being paid." Although defendant "maintain[ed] Spring Lake at elevated levels" "for a private use," the trial court determined that plaintiffs had "proven their N.C.G.S. §[ ]40A-51 cause of action" because defendant took a temporary easement in a portion of plaintiffs' property without filing a complaint containing a declaration of taking.[3] As a result, the trial court ordered that further proceedings be held for the purpose of determining the amount of compensation to which plaintiffs were entitled in light of the temporary taking of a portion of their property.

In seeking relief from the trial court's order before the Court of Appeals, defendant argued that plaintiffs' claims should be dismissed because a claim for inverse condemnation does not lie unless plaintiffs' property is taken for a public use or public purpose. According to defendant, the trial court's determination that defendant decided to raise the

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2. According to surveys obtained by plaintiffs on 14 May 2014, while the elbows were still in place, and 18 March 2015, after the elbows had been removed, "the Lake encroached upon and submerged 1,192 square feet of [plaintiffs'] property" "during the time the elbows were installed." An appraisal commissioned by plaintiffs estimated that the value of the topsoil and centipede grass lost due to the flooding of plaintiffs' property amounted to $1,000. The validity of these damage estimates appears to be a disputed issue of fact.

3. The trial court also determined that the installation of the elbows proximately caused the encroachment of the lake water upon plaintiffs' land, that this encroachment was foreseeable, and that defendant had taken "a temporary easement interest in 1,120 square feet of [plaintiffs'] property for a period of 1 year and 20 days" along with "a portion of the topsoil and centipede grass that was located on the same."

lake level for the benefit of private landowners "should have ended the case." In defendant's view, the remedy provided by N.C.G.S. § 40A-51(a) is only available when "property has been taken by an act or omission of a condemnor listed in G.S. 40A-3(b) or (c)" "[f]or the public use or benefit." In addition, defendant argued that the trial court had erred by concluding that a taking had occurred given that (1) the encroachment upon and damage to plaintiffs' property was not foreseeable; (2) the trial court misapplied the principles enunciated in the decision of the United States Supreme Court in *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012); (3) plaintiffs were estopped from complaining about the effects of a decision that they had requested defendant to make; and (4) the trial court failed to make findings of fact concerning the boundaries of plaintiffs' property and of the property that defendant had allegedly taken.

Plaintiffs, on the other hand, contended that "neither a 'public use' nor a 'public purpose' is an element of an inverse condemnation action." According to plaintiffs, this Court held in *Kirby v. North Carolina Department of Transportation*, 368 N.C. 847, 856, 786 S.E.2d 919, 926 (2016), that a plaintiff need only show "a substantial interference with certain property rights . . . [that] caused a decrease in the fair market value of [plaintiff's] land" and defined a "taking" in *Long v. City of Charlotte*, 306 N.C. 187, 199, 293 S.E.2d 101, 109 (1982) (quoting *Penn v. Carolina Virginia Coastal Corp.*, 231 N.C. 481, 57 S.E.2d 817 (1950)), as "appropriating or injuriously affecting [private property] in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof." After noting that N.C.G.S. § 40A-51 makes no use of the term "public use," plaintiffs argue that the phrase "of a condemnor listed in [N.C.]G.S. [§] 40A-3(b) or (c)" modifies "act or omission" rather than specifying the motivation underlying the taking upon which a particular claim advanced in reliance upon N.C.G.S. § 40A-51 relied.

In reversing the trial court's order, the Court of Appeals began by noting that "[o]rders from a condemnation hearing concerning title and area taken are vital preliminary issues that must be immediately appealed pursuant to N.C.[G.S.] § 1-277, which permits interlocutory appeals of determinations affecting substantial rights." *Wilkie v. City of Boiling Spring Lakes*, ___ N.C. App. ___, ___, 796 S.E.2d 57, 61 (2016) (quoting *Town of Apex v. Whitehurst*, 213 N.C. App. 579, 582-83, 712 S.E.2d 898, 901 (2011)). According to the Court of Appeals, "there can be no inverse condemnation when property is not taken for a public use," *id.* at ___, 796 S.E.2d at 62, given that the power of eminent domain is exercised when "the government takes property *for public use*," *id.* at

___, 796 S.E.2d at 63 (quoting *Kirby*, 368 N.C. at 854, 786 S.E.2d at 924 (italics added) (emphasis omitted)). The Court of Appeals pointed out that "[t]he plain language of section 40A-51 defines when the remedy of an inverse condemnation action is available against a public condemnor" and "limits the availability of this remedy to instances in which property is taken by a condemnor pursuant to one of the enumerated acts or omissions in section 40A-3(b)." *Id.* at ___, 796 S.E.2d at 63. Since "the plain language of section 40A-51 limits its application to action taken by a municipality 'for the public use or benefit,' " the Court of Appeals held that "there is no remedy of inverse condemnation under the statute when property is not taken 'for the public use or benefit.' " *Id.* at ___, 796 S.E.2d at 63. As a result, the Court of Appeals reversed the trial court's order without addressing defendant's remaining contentions and held that, since plaintiffs had sought relief pursuant to both N.C.G.S. § 40A-51 and Article I, Section 19 of the North Carolina Constitution and since "an aggrieved person has a direct claim under the North Carolina Constitution for violation of his or her constitutional rights when no adequate state law remedy exists," this case should be remanded to the trial court for the purpose of allowing it to address plaintiffs' state constitutional claims. *Id.* at ___, 796 S.E.2d at 63-64 (first citing *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289, *cert. denied*, 506 U.S. 985, 113 S. Ct. 493, 121 L. Ed. 2d 431 (1992); then citing, *inter alia*, *Midgett v. N.C. State Highway Comm'n*, 260 N.C. 241, 250, 132 S.E.2d 599, 608 (1963), *overruled in part on other grounds by Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 616, 304 S.E.2d 164, 174 (1983)). On 3 May 2017, this Court entered a special order granting plaintiffs' request for discretionary review of the issues of "[w]hether the Court of Appeals erred by holding that taking for a public use or benefit is an element of a cause of action set forth in [N.C.G.S.] §[ ]40A-51" and "[w]hether the Court of Appeals erroneously interpreted [N.C.G.S.] §[ ]40A-51," while denying plaintiffs' request for discretionary review of certain additional issues.

In seeking relief from the Court of Appeals' decision before this Court, plaintiffs argue that N.C.G.S. § 40A-51 is "clear and unambiguous" and only requires a showing "(1) that property has been taken, (2) by an act or omission, (3) of a condemnor listed in N.C.[G.S.] § 40A-3(b) or (c), and (4) that no condemnation complaint containing a declaration has been filed," with the Court of Appeals having erred by "adding a 'public use or benefit' requirement" to the elements of a statutory inverse condemnation claim. According to plaintiffs, the phrase " 'listed in [N.C.]G.S. [§] 40A-3(b) or (c)' should be applied to the immediately preceding word 'condemnor' as opposed to the earlier phrase 'act or

omission,' " so as to limit "the type of *entity* that can be sued for inverse condemnation" rather than "the type of *action or omission* for which a property owner can recover following a taking." In advancing this argument, plaintiffs point to the doctrine of the last antecedent, pursuant to which "relative and qualifying words, phrases, and clauses ordinarily are to be applied to the word or phrase immediately preceding." *HCA Crossroads Residential Ctrs., Inc. v. N.C. Dep't of Human Res.*, 327 N.C. 573, 578, 398 S.E.2d 466, 469 (1990). In addition, plaintiffs contend that N.C.G.S. § 40A-51 is a remedial statute that should be interpreted broadly, citing *O & M Industries v. Smith Engineering Co.*, 360 N.C. 263, 268, 624 S.E. 2d 345, 348 (2006) (stating that "[a] remedial statute must be construed broadly 'in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained' " (quoting *Puckett v. Sellars*, 235 N.C. 264, 267, 69 S.E.2d 497, 499 (1952))). Plaintiffs assert that a construction of N.C.G.S. § 40A-51 allowing compensation even if the property in question could not have been acquired by eminent domain finds additional support in the statutory references to an "act or omission," rather than to "condemnation" or "eminent domain," on the theory that the General Assembly's linguistic choices tend to broaden the circumstances under which statutory inverse condemnation claims can properly be advanced. A similar inference can be drawn by reading the statutory requirement that condemnors instituting eminent domain proceedings plead "the public use for which the property is taken," N.C.G.S. § 40A-41 (2017), and file a memorandum of action containing "[a] statement of the property taken for public use," *id.* § 40A-43 (2017), in conjunction with the absence of any requirement that statutory inverse condemnation claimants do more than provide "[a] statement of the property allegedly taken," N.C.G.S. § 40A-51(b)(3) (2017). According to plaintiffs, "[t]he General Assembly simply did not intend for 'public use or benefit' to be an element of a cause of action under section 40A-51, when property has already been taken."

Defendant, on the other hand, contends that an examination of both the language in which N.C.G.S. § 40A-51 is couched and the statute's legislative history demonstrates that an inverse condemnation claimant must allege and show that the property in question was taken by one of "the enumerated acts or omissions" listed in N.C.G.S. § 40A-3(b) and (c). According to defendant, the statutory reference to an "act or omission" would be superfluous in the absence of such an interpretation, given that "everything a condemnor does is either an act or omission." Defendant asserts that the doctrine of the last antecedent provides no assistance in interpreting N.C.G.S. § 40A-51, since "listed in N.C.G.S. § 40A-3(b) or (c)" could modify either the entire phrase "enumerated acts or omissions

of condemnors" or nothing more than "condemnors." Defendant claims that the language granting "the authority to exercise the power of eminent domain" in N.C.G.S. § 40A-1 applies to and limits the availability of the statutory inverse condemnation remedy set out in N.C.G.S. § 40A-51 on the grounds that "inverse condemnation is the process of forcing a government to exercise its power of eminent domain," citing *Hoyle v. City of Charlotte*, 276 N.C. 292, 302, 172 S.E.2d 1, 8 (1970).

According to defendant, even if the phrase "listed in [G.S.] 40A-3(b) or (c)" refers to "condemnors," rather than "acts or omissions," N.C.G.S. § 40A-51 requires that the claimant show that his or her injury resulted from a "taking," which is a "term of art" that refers to "takings under the power of eminent domain." In defendant's view, "the application of inverse condemnation [is limited] to those situations '[w]here private property is *taken* for a public purpose by a governmental agency having the power of eminent domain,' " (quoting *State Highway Commission v. L.A. Reynolds Co.*, 272 N.C. 618, 623, 159 S.E.2d 198, 202 (1968)), with the only public purposes for which local public condemnors are entitled to assert the power of eminent domain being those enumerated in N.C.G.S. § 40A-3(b) and (c). As a result of the fact that defendant's actions were not intended to further one of the statutorily enumerated public purposes, defendant "lacked the power of condemnation and thus did not take the Wilkies' property." Defendant claims that plaintiffs had an adequate remedy other than inverse condemnation in light of N.C.G.S. § 40A-51(c), which provides that "[n]othing in this section shall in any manner affect an owner's common-law right to bring an action in tort for damage to his property," with a property owner having the right to seek common law relief against a defendant that acts for purposes "beyond the power of eminent domain."

The essential issue before us in this case[4] is whether a property owner seeking to assert a statutory inverse condemnation claim pursuant to N.C.G.S. § 40A-51 must show that the condemnor acted to further a public purpose. In order to resolve this issue, we are required

4. Plaintiffs also argue that defendant failed to note a timely appeal from the trial court's order and that the raising of the lake level constituted a taking for a public purpose. After carefully reviewing the record, we conclude that the trial court did not err by denying plaintiffs' motion to dismiss defendant's appeal and that the Court of Appeals did not err by addressing defendant's challenges to the trial court's order on the merits. In addition, we decline to address plaintiffs' "public use or benefit" argument both because we denied plaintiffs' request for discretionary review of that issue and because we need not do so given our decision with respect to the statutory construction issue that we did elect to review.

to construe the relevant statutory language. After carefully considering the relevant statutory language and precedent, we conclude that the references to N.C.G.S. § 40A-3(b) and (c) contained in N.C.G.S. § 40A-51 serve to simply delineate the universe of entities against whom a statutory inverse condemnation action can be brought pursuant to N.C.G.S. § 40A-51 rather than limiting the acts or omissions that must be shown in order to permit the maintenance of the statutory inverse condemnation action authorized by N.C.G.S. § 40A-51.

"Questions of statutory interpretation are ultimately questions of law for the courts and are reviewed de novo." *In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (citing *Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998)). "The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998), *cert. denied*, 526 U.S. 1098, 119 S. Ct. 1576, 143 L. Ed. 2d 671 (1999)). "The best indicia of that intent are the language of the statute . . . , the spirit of the act and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted). The process of construing a statutory provision must begin with an examination of the relevant statutory language. *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992); *see also State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010) (stating that, "[w]hen construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself"). "It is well settled that '[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.' " *In re Estate of Lunsford*, 359 N.C. 382, 391-92, 610 S.E.2d 366, 372 (2005) (alteration in original) (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)). In other words, "[i]f the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (citation omitted).

N.C.G.S. § 40A-51(a) provides, in pertinent part, that

> [i]f property has been taken by an act or omission of a condemnor listed in [N.C.]G.S. [§] 40A-3(b) or (c) and no complaint containing a declaration of taking has been filed the owner of the property [ ] may initiate an action to seek compensation for the taking.

N.C.G.S. § 40A-51(a) (2017). N.C.G.S. § 40A-3(b)[5] and (c),[6] to which reference is made in N.C.G.S. § 40A-51(a), contain a list of entities that have "the power of eminent domain" "[f]or the public use or benefit." In other words, N.C.G.S. § 40A-3(b) and (c) specify the public entities that are entitled to exercise the power of eminent domain and the purposes for which the entities in question are entitled to exercise that authority. When read in context and in accordance with ordinary English usage, the reference to N.C.G.S. § 40A-3(b) and (c) contained in N.C.G.S. § 40A-51(a) makes most sense as a simple delineation of the range of entities against whom a statutory inverse condemnation action can be brought rather than as a description of the motivations underlying the "act[s] or omission[s]" necessary for the existence of a statutory inverse condemnation claim. As a result, we hold that the plain meaning of the reference to N.C.G.S. § 40A-3(b) and (c) contained in N.C.G.S. § 40A-51(a) is to specify the entities against whom a statutory inverse condemnation claim can be asserted and nothing more.

A number of additional considerations support this "plain meaning" construction of the relevant statutory language. As plaintiffs note, "relative and qualifying words, phrases, and clauses ordinarily are to be applied to the word or phrase immediately preceding" rather than

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5. N.C.G.S. § 40A-3(b) (2017) allows "the governing body of each municipality or county" to "possess" "the power of eminent domain" for the purposes of: "[o]pening, widening, extending, or improving roads, streets, alleys, and sidewalks"; "[e]stablishing, extending, enlarging, or improving" various public enterprises; [e]stablishing, extending, enlarging or improving parks, playgrounds, and other recreational facilities"; "[e]stablishing, extending, enlarging or improving storm sewer and drainage systems and works, or sewer and septic tank lines and systems"; [e]stablishing, enlarging, or improving hospital facilities, cemeteries, or library facilities"; "[c]onstructing, enlarging, or improving city halls, fire stations, office buildings, courthouse jails and other buildings for use by any department, board, commission or agency"; "[e]stablishing drainage programs"; "[a] cquiring designated historic properties"; and "[o]pening, widening, extending, or improving public wharves." N.C.G.S. § 40A-3(b) also extends the "power of eminent domain" to "[t]he board of education of any municipality or county" "for purposes authorized by Chapter 115C of the General Statutes."

6. N.C.G.S. § 40A-3(c) (2017) authorizes "[a] sanitary district board," "[t]he board of commissioners of a mosquito control district," "[a] hospital authority," "[a] watershed improvement district," "[a] housing authority," "[a] corporation as defined in [N.C.]G.S. [§] 157.50," "a commission established under the provisions of Article 22 of Chapter 160A," "[a]n authority created under the provisions of Article 1 of Chapter 162A," "[a] district established under the provisions of Article 4 of Chapter 162A," "[t]he board of trustees of a community college," "[a] district established under the provisions of Article 6 of Chapter 162A," and "[a] regional public transportation authority" to exercise "the power of eminent domain" "[f]or the public use or benefit."

"extending to or including others more remote," "unless the context indicates a contrary intent." *HCA Crossroads*, 327 N.C. at 578, 398 S.E.2d at 469 (citations omitted); *see also Lockhart v. United States*, ___ U.S. ___, ___, 136 S. Ct. 958, 962, 194 L. Ed. 2d 48, 53 (2016) (stating that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows" (ellipsis in original) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S. Ct. 376, 380, 157 L. Ed. 2d 333, 340 (2003))). In view of the fact that the expression "listed in G.S. 40A-3(b) or (c)" as it appears in N.C.G.S. § 40A-51(a) is immediately preceded by "of a condemnor" and in view of the fact that the context does not clearly suggest that this reference to "listed in G.S. 40A-3(b) or (c)" is intended to apply to anything other than the immediately preceding expression, the doctrine of the last antecedent, as previously recognized by this Court, supports our "plain meaning" determination that "listed in G.S. 40A-3(b) or (c)" refers to the defendants against whom a statutory inverse condemnation claim may be asserted rather than to both the identity of the person against whom the claim is asserted and the purpose for which that entity acted at the time that it injured the claimant's property.

In addition, it seems to us that a decision to provide a claimant whose property has been taken for a public purpose with a statutory inverse condemnation remedy while depriving a claimant who has suffered the same injury for a non-public purpose of the right to utilize that statutory remedy seems inconsistent with the likely legislative intent. "[W]hen the Act is considered as a whole in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained," a decision to construe N.C.G.S. § 40A-51 so as to limit plaintiffs' statutory inverse condemnation remedy to instances in which the condemnor acted for a public purpose would "attribute to [the General Assembly] a purpose and intent so fraught with injustice as to shock the consciences of fair-minded men" while a contrary construction "is consonant with the general purpose and intent of the Act . . .[,] is in harmony with the other provisions of the statute, and serves to effectuate the objective of the legislation." *Puckett*, 235 N.C. at 267-68, 69 S.E.2d at 499-500; *see also O & M Indus.*, 360 N.C. at 266-68, 624 S.E.2d at 347-49 (construing broadly a "remedial" statute that codified a state constitutional provision "giving to mechanics and laborers an adequate lien on the subject-matter of their labor").[7] As a result, a number

7. Defendant asserts that N.C.G.S. § 40A-51 is a procedural, rather than a remedial, statute given that the claimant's right to recover arises from the relevant constitutional provisions rather than from N.C.G.S. § 40A-51. Although this assertion may, as a technical

of relevant canons of statutory construction provide additional support for the manner in which we believe that the "plain meaning" of N.C.G.S. § 40A-51(a) should be understood.

Although defendant contends that "taken" and "taking" as used in N.C.G.S. § 40A-51(a) are terms of art that serve to limit statutory inverse condemnation proceedings to claims arising from actions or omissions undertaken for a public purpose, we do not find that argument persuasive.[8] "Usually, words of a statute will be given their natural, approved, and recognized meaning," *Black v. Littlejohn*, 312 N.C. 626, 638, 325 S.E.2d 469, 478 (1985) (citing *In Re Martin*, 286 N.C. 66, 77, 209 S.E.2d 766, 774 (1974)). Admittedly, "[w]hen a term has long-standing legal significance, it is presumed that legislators intended the same significance to attach by use of that term, absent indications to the contrary." *Id.* at 639, 325 S.E.2d at 478 (quoting *Sheffield v. Consol. Foods Corp.*, 302 N.C. 403, 437, 276 S.E.2d 422, 427 (1981)). Although this Court's decisions sometimes utilize "taking" and "taken" in ways that are at variance from their ordinary meaning, *see*, *e.g.*, *Kirby*, 368 N.C. at 855, 786 S.E.2d at 925 (noting that "[a] taking effectuated by eminent domain does not require 'an actual occupation of the land,' but 'need only be a substantial interference with elemental rights growing out of the ownership of the property' " (quoting *Long*, 306 N.C. at 198-99, 293 S.E.2d at 109)); *W. Carolina Power Co. v. Hayes*, 193 N.C. 104, 107, 136 S.E. 353, 354 (1927) (noting that "[i]t has also been held that for the purpose of determining the sum to be paid as compensation for land taken under the right of eminent domain," "the land is taken within the meaning of this

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matter, be true, a decision in defendant's favor would deprive plaintiffs of access to the relatively clear statutory procedures spelled out in N.C.G.S. § 40A-51 and compel plaintiffs to seek redress using procedures that are less suited to the type of claim that they seek to assert. As a result, we are inclined to believe that, when viewed in any realistic sense, N.C.G.S. § 40A-51 is intended to have a remedial effect by codifying any remedies that might otherwise be available to claimants in plaintiffs' position and should be treated as a remedial statute.

8. To be sure, a number of decisions of this Court and the Court of Appeals have made reference to a "public use" requirement in generally defining an inverse condemnation claim. *See*, *e.g.*, *State Highway Comm'n. v. L.A. Reynolds Co.*, 272 N.C. at 623, 159 S.E.2d at 202; *Kirby v. N.C. Dep't. of Transp.*, 239 N.C. App. 345, 356, 769 S.E.2d 218, 228 (2015), *aff'd*, 368 N.C. 847, 786 S.E.2d 919 (2016); *Peach v. City of High Point*, 199 N.C. App. 359, 365, 683 S.E.2d 717, 722 (2009); *Adams Outdoor Advert. of Charlotte v. N.C. Dep't. of Transp.*, 112 N.C. App. 120, 122, 434 S.E.2d 666, 667 (1993). However, this Court has never refused to recognize the availability of an inverse condemnation action on such grounds or imported such a requirement into the statutory inverse condemnation action recognized by N.C.G.S. § 40A-51.

principle when the proceeding is begun," rather than when the land was physically occupied), this Court has never gone so far as to hold that "taken" invariably means "taken by the power of eminent domain" or that "taking" means nothing more or less than a "taking for the public use."[9] On the contrary, defendant's attempt to read "public use," "public benefit," or similar expressions into N.C.G.S. § 40A-51(a) based upon the reference to N.C.G.S. § 40A-3(b) and (c) runs afoul of the general principle that "[c]ourts should 'give effect to the words actually used in a statute' and should neither 'delete words used' nor 'insert words not used' in the relevant statutory language during the statutory construction process." *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016) (quoting *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014)). Finally, while "a court may consider the purpose of the statute" "[i]n ascertaining [the legislature's] intent," *State v. Tew*, 326 N.C. 732, 738, 392 S.E.2d 603, 607 (1990); *see also State v. Barnett*, 369 N.C. 298, 304, 794 S.E.2d 306, 311 (2016) (stating that, "[i]n ascertaining the legislative intent, courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish" (quoting *State ex rel. Utils. Comm'n v. Pub. Staff*, 309 N.C. 195, 210, 306 S.E.2d 435, 444 (1983))), the statement of intent upon which defendant relies expressly applies to "condemning entities," their "authority to exercise the power of eminent domain," and the procedures through which those entities are entitled to assert their right of eminent domain, *see* N.C.G.S. § 40A-1(a) (2017) (stating that "it is the intent of the General Assembly that . . . the uses set out in [N.C.]G.S. [§] 40-3 are the exclusive uses for which the authority to exercise the power of eminent domain is granted to private condemnors, local public condemnors, and other public condemnors"); *id.* § 40A-1(b) (2017) (providing that "[i]t is the intent of the General Assembly that the procedures provided by this Chapter shall be the exclusive condemnation procedures to be used in this State by all private condemnors and all local public condemnors"), rather than to the extent to which individuals whose property has been

9. Our decision in *State Highway Commission v. Batts*, 265 N.C. 346, 361-62, 144 S.E.2d 126, 137-38 (1965), in which we determined that the State Highway Commission was seeking to condemn land for a private purpose and described the removal of the landowner's trees in anticipation of the proposed condemnation as "an unauthorized trespass" for which the landowner had no recourse against the Commission, does not compel a determination that N.C.G.S. § 40A-51 necessarily incorporates a "public purpose" requirement given that *Batts* did not involve a statutory inverse condemnation claim pursuant to N.C.G.S. § 40A-51 (and, in fact, was decided before that statute was enacted). The statement about the absence of any reference to N.C.G.S. § 40A-51 can be made about our decision in *Clark v. Asheville Contr'g Co.*, 316 N.C. 475, 485-87, 342 S.E.2d 832, 838 (1986).

taken are entitled to assert a statutory inverse condemnation claim pursuant to N.C.G.S. § 40A-51. As a result, we are not persuaded by any of the arguments that defendant has advanced in support of its request that we affirm the Court of Appeals' decision with respect to this issue.

"A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35.

> While North Carolina does not have an express constitutional provision against the "taking" or "damaging" of private property for public use without payment of just compensation, this Court has allowed recovery for a taking on constitutional as well as common law principles. We recognize the fundamental right to just compensation as so grounded in natural law and justice that it is part of the fundamental law of this State, and imposes upon a governmental agency taking private property for public use a correlative duty to make just compensation to the owner of the property taken. This principle is considered in North Carolina as an integral part of " the law of the land" within the meaning of Article I, Section 19 of our State Constitution.

Beroth Oil Co. v. N.C. Dep't of Transp., 367 N.C. 333, 340-41, 757 S.E.2d 466, 472-73 (2014) (quoting *Long*, 306 N.C. at 195-96, 293 S.E.2d at 107-08 (footnotes and citations omitted)). " '[I]nverse condemnation [ ]' [is] a term often used to designate 'a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.' " *City of Charlotte v. Spratt*, 263 N.C. 656, 662-63, 140 S.E.2d 341, 346 (1965) (quoting *City of Jacksonville v. Schumann*, 167 So. 2d 95, 98 (Fla. Dist. Ct. App. 1964), *cert. denied*, 172 So.2d 597 (1965)). Although a condemning entity must establish that a proposed taking will further a public purpose before a condemnation can be authorized, we can see no reason why a reciprocal burden to establish the existence of a public purpose should be imposed upon a property owner who has been deprived of his or her property by governmental action taken for a nonpublic purpose. *See Lloyd v. Town of Venable*, 168 N.C. 531, 535, 84 S.E. 855, 857 (1915) (noting that "the owner who consents to a taking of his property, when no legal right or power to do so exists, should receive the same measure of justice as in the other case, where the power does exist"); *see also Kirkpatrick v. City of Jacksonville*, 312 So. 2d 487, 490 (Fla. Dist. Ct. App. 1975) (per curiam) ("The proviso that a landowner's

property may be taken from him only 'for a public purpose' is for the landowner's protection and is not placed in the Constitution as a sword to be used against the landowner when the state has summarily taken his property without due process."); *Harris Cty. Flood Control Dist. v. Kerr*, 499 S.W.3d 793, 813 (Tex. 2016) (*Lehrmann, J., concurring*) (stating that "it makes no sense to say that a property owner is entitled to compensation if the government does the right thing but not if it does the wrong thing"). In light of these fundamental principles and the manner in which N.C.G.S. § 40A-51(a) is worded, we cannot conclude that the General Assembly intended to make the availability of the statutory inverse condemnation remedy provided by N.C.G.S. § 40A-51 dependent upon the purpose which led to the infliction of the injury for which the affected property owner seeks redress. As a result, we reverse the Court of Appeals' determination to the contrary and remand this case to the Court of Appeals for consideration of defendant's remaining challenges to the trial court's order.

REVERSED AND REMANDED.

WILLOWMERE COMMUNITY ASSOCIATION, INC., A NORTH CAROLINA NON-PROFIT CORPORATION, AND NOTTINGHAM OWNERS ASSOCIATION, INC., A NORTH CAROLINA NON-PROFIT CORPORATION

v.

CITY OF CHARLOTTE, A NORTH CAROLINA BODY POLITIC AND CORPORATE, AND CHARLOTTE-MECKLENBURG HOUSING PARTNERSHIP, INC., A NORTH CAROLINA NON-PROFIT CORPORATION

No. 419PA16

Filed 2 March 2018

Parties—standing—homeowners associations—compliance with bylaws

Where the plaintiff homeowners associations (HOAs) filed a lawsuit challenging the validity of a zoning ordinance that permitted multifamily housing on parcels of land abutting property owned by plaintiffs, plaintiff HOAs' failure to comply with various provisions in their corporate bylaws when their respective boards of directors initiated litigation did not prevent them from having standing to bring the lawsuit.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 792 S.E.2d 805 (2016), affirming an order of summary judgment entered on 14 April 2015 by Judge Forrest D. Bridges in Superior Court, Mecklenburg County. Heard in the Supreme Court on 12 December 2017.

Law Office of Kenneth T. Davies, P.C., by Madeline J. Trilling and Kenneth T. Davies, for plaintiff-appellants.

Thomas E. Powers III, Assistant City Attorney, and Terrie Hagler-Gray, Senior Assistant City Attorney, for defendant-appellee City of Charlotte.

Moore & Van Allen PLLC, by Glenn E. Ketner, III, Anthony T. Lathrop, and William M. Butler, for defendant-appellee Charlotte-Mecklenburg Housing Partnership, Inc.

BEASLEY, Justice.

In this appeal we consider the extent to which a corporate entity must affirmatively demonstrate compliance with its internal bylaws and governance procedures before it may invoke the jurisdiction of the General Court of Justice. The Court of Appeals held that plaintiffs lacked standing because they failed to strictly comply with their corporate bylaws in bringing this suit. We agree with plaintiffs that a showing of strict compliance is not necessary to satisfy the requirements of our standing jurisprudence. Accordingly, we reverse the decision of the Court of Appeals.

Plaintiffs Willowmere Community Association, Inc. (Willowmere) and Nottingham Owners Association, Inc. (Nottingham) are non-profit corporations representing homeowners in the residential communities of Willowmere and Nottingham located in Charlotte. Plaintiffs instituted this litigation on 14 March 2014 by filing a Petition for Review in the Nature of Certiorari in Superior Court, Mecklenburg County, challenging the validity of a zoning ordinance enacted by the City of Charlotte and seeking a declaratory judgment that the zoning ordinance is invalid.[1] The challenged zoning ordinance permits multifamily housing on

1. Plaintiffs' filing originally named the City of Charlotte and Charlotte-Mecklenburg Housing Partnership, Inc. (CMHP) as well as New Dominion Bank, the owner of the parcels subject to the zoning ordinance, as defendants. New Dominion Bank is not a party to this appeal.

parcels of land abutting property owned by plaintiffs. Defendants each filed a response in which they denied the material allegations in the petition and moved to dismiss the action under Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. With leave of the trial court, on 9 July 2014, plaintiffs amended their initial filing under Rule 15(a) of the North Carolina Rules of Civil Procedure to restyle it as a complaint for declaratory judgment, alleging the same causes of action and requesting the same principal relief—that the court invalidate the zoning ordinance. Defendant CHMP answered plaintiffs' amended complaint on 17 October 2014, and defendant City of Charlotte filed its new answer on 22 October 2014. Plaintiffs and defendants each filed cross-motions for summary judgment on the issue of the ordinance's validity.

The trial court granted defendants' motions for summary judgment and denied plaintiffs' motion for summary judgment based on the court's conclusion that it lacked subject matter jurisdiction to adjudicate plaintiffs' claims. Specifically, the trial court reasoned that plaintiffs lacked standing to bring the instant suit because they each failed to comply with various provisions in their corporate bylaws when their respective boards of directors decided to initiate this litigation.[2] The trial court relied on the evidence submitted at the summary judgment hearing, which established that neither plaintiff explicitly authorized filing the present suit during a meeting with a quorum of directors present, either in person or by telephone. The trial court concluded that plaintiff Willowmere lacked standing because its board of directors agreed to initiate the lawsuit in an e-mail conversation, which was not an expressly authorized substitute for the board's written consent to take action without a formal meeting under Willowmere's corporate bylaws. Similarly, as to plaintiff Nottingham, the trial court concluded that its decision to institute this litigation was defective under its bylaws which require, *inter alia*, a formal meeting with a quorum of directors present (either in person or by telephone), recorded minutes of the meeting reflecting the proceedings of the board of directors, the board's written consent for any action outside of a formal meeting, and an explanation of its action posted by the board within three days after its decision. The trial

2. While none of defendants' motions or pleadings to the trial court explicitly raised the issue of plaintiffs' standing to bring suit, the trial court was permitted to consider the threshold question of its own subject-matter jurisdiction in ruling on the parties' cross-motions for summary judgment. *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 86 (1986) ("Every court necessarily has the inherent judicial power to inquire into, hear and determine questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction." (citing *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964))).

court's view was that, "[w]hile Plaintiffs' bylaws each permit their directors to sue regarding matters affecting their planned communities, the directors can only act through a meeting or a consent action without a meeting," and "[n]either Willowmere nor Nottingham has met their burden to show that their directors acted to initiate this litigation through one of these means in this case."[3]

Plaintiffs timely appealed to the Court of Appeals, which affirmed the trial court's award of summary judgment to defendants. *Willowmere Cmty. Ass'n, Inc. v. City of Charlotte*, ___ N.C. App. ___, ___, 792 S.E.2d 805, 812-13 (2016). On 26 January 2017, this Court allowed plaintiffs' petition for discretionary review. We now reverse the decision of the Court of Appeals.

This Court reviews a trial court's decision dismissing a case for lack of subject matter jurisdiction and a trial court's award of summary judgment de novo. *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008) (applying de novo review to a motion to dismiss for lack of standing); *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) ("Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " (quoting *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007))).

"As a general matter, the North Carolina Constitution confers standing on those who suffer harm: 'All courts shall be open; [and] every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law . . . .' " *Mangum*, 362 N.C. at 642, 669 S.E.2d at 281-82 (alterations in original) (quoting N.C. Const. art. I, § 18). "The rationale of [the standing] rule is that only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue." *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973).

> "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the

3. The trial court also stated that, if it had subject-matter jurisdiction over this matter, it would have invalidated the zoning ordinance because the ordinance was adopted in a manner inconsistent with the requirements of N.C.G.S. § 160A-383 (2015). That issue is not before us, and we express no opinion on the merits of plaintiffs' claim for declaratory judgment or the validity of the zoning ordinance. *See* N.C. R. App. P. 16(a) (limiting this Court's review to the issues presented in the petition for discretionary review and properly presented in the parties' briefs to this Court).

> outcome of the controversy as to assure that concrete adverseness which sharpens the presentation[s] of issues upon which the court so largely depends for illumination of difficult constitutional questions.' "

Id. at 28, 199 S.E.2d at 650 (alteration in original) (quoting *Flast v. Cohen*, 392 U.S. 83, 99, 20 L. Ed. 2d 947, 961 (1968) (quoting *Baker v. Carr*, 369 U.S. 186, 204, 7 L. Ed. 2d 663, 678 (1962))). "[W]hether [a] party has standing to attack the constitutionality of a statute is a question of law, which may not be settled by the parties." *Id.* at 28-29, 199 S.E.2d at 650 (first citing *Nicholson v. State Educ. Assistance Auth.*, 275 N.C. 439, 447-48, 168 S.E.2d 401, 406-07 (1969); then citing *State ex rel. Carringer v. Alverson*, 254 N.C. 204, 208, 118 S.E.2d 408, 410-11 (1961)).

"Legal entities other than natural persons may have standing." *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990). "To have standing the complaining association or one of its members must suffer some immediate or threatened injury." *Id.* at 129, 388 S.E.2d at 555 (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342, 53 L. Ed. 2d 383, 393 (1977)). "[A]n association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Id.* at 129, 388 S.E.2d at 555 (quoting *Warth v. Seldin*, 422 U.S. 490, 511, 45 L. Ed. 2d 343, 362 (1975)).

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. at 130, 388 S.E.2d at 555 (citing *Wash. State Apple Advert.*, 432 U.S. at 343, 53 L. Ed. 2d at 394). "When an organization seeks declaratory or injunctive relief on behalf of its members, 'it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.' " *Id.* at 130, 388 S.E.2d at 555 (quoting *Warth*, 422 U.S. at 515, 45 L. Ed. 2d at 364).

The Court of Appeals decision below and defendants' arguments to this Court are not based on plaintiffs' failure to meet the elements of associational standing described in *River Birch* or on the contention that plaintiffs have not "alleged . . . a [sufficient] personal stake in the

outcome of the controversy."[4] *Stanley*, 284 N.C. at 28, 199 S.E.2d at 650 (quoting *Flast*, 392 U.S. at 99, 20 L. Ed. 2d at 961). Instead, defendants contend that, by failing to follow the internal governance procedures mandated by their respective bylaws, plaintiffs' boards of directors "had no authority to act on behalf of [plaintiffs] in filing and prosecuting this lawsuit." In support of their argument, defendants rely entirely on Court of Appeals cases holding that a corporate entity "lacked standing" to bring suit based on (1) a challenge asserted *by a member of the plaintiff entity* that the plaintiff failed to comply with explicit prerequisites to filing suit imposed by the entity's bylaws or (2) the corporate entity's lack of *privity of estate* with the defendants against whom the entity sought to enforce restrictive covenants. *See Beech Mountain Prop. Owners' Ass'n v. Current*, 35 N.C. App. 135, 139, 240 S.E.2d 503, 507 (holding that, because the property owners' association did not, itself, own any property in the development at issue, it "lack[ed] the capacity" to enforce restrictive covenants that run with the land against other property owners in the development); *accord Laurel Park Villas Homeowners Ass'n v. Hodges*, 82 N.C. App. 141, 143-44, 345 S.E.2d 464, 465-66 (1986) (reaffirming the holding in *Beech Mountain* that, without owning property in the community at issue, an incorporated homeowners' association "lacked standing" to enforce restrictive covenants against property owners appearing in their deeds), *disc. rev. denied*, 318 N.C. 507, 349 S.E.2d 861 (1986); *see also Peninsula Prop. Owners Ass'n v. Crescent Res., LLC*, 171 N.C. App. 89, 95-97, 614 S.E.2d 351, 353-56 (2005) (holding that the plaintiff homeowners' association lacked standing when it failed to comply with its bylaw provision requiring a two-thirds majority vote of members to approve filing suit against the defendant on behalf of the association, when this issue was raised by the defendant property owner *who was a member of the property owners' association*[5]*)*, *appeal dismissed and disc. rev. denied*, 360 N.C. 177, 626 S.E.2d 648 (2005).

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4. In their briefs to the Court of Appeals, defendants additionally argued that plaintiffs lacked standing because they failed to establish an injury in fact stemming from the zoning ordinance and failed to meet the associational standing elements discussed in *River Birch*. However, defendants did not obtain a ruling from the trial court on this issue to preserve it for appellate review, and defendants did not include this issue in the list of issues for discretionary review pursuant to N.C. R. App. P. 15(d). As a result, that issue is not before us, and we decline to address it now. *See* N.C. R. App. P. 16(a).

5. Though not emphasized in the Court of Appeals' analysis in *Peninsula*, the fact that the defendant, Crescent Resources, LLC, owned property in the community governed by the association was noted in the opinion, clear from the record, and briefed by the parties. *See Peninsula*, 171 N.C. App. at 95, 614 S.E.2d at 355 ("Crescent owned . . . two of the nine hundred lots within the [planned residential community] at the time the [plaintiff] filed its complaint" and had "voting rights.").

Because *Beech Mountain* and *Laurel Park* deal entirely with the plaintiff associations' capacity to enforce restrictive covenants against the defendant property owners, those cases have no applicability here. *See Sedberry v. Parsons*, 232 N.C. 707, 710-11, 62 S.E.2d 88, 90 (1950) ("Where the owner of a tract of land subdivides it and sells distinct parcels thereof to separate grantees, imposing restrictions on its use pursuant to a general plan of development or improvement, such restrictions may be *enforced by any grantee against any other grantee*, either on the theory that there is a mutuality of covenant and consideration, or on the ground that mutual negative equitable easements are created.") (emphasis added) (quoting 26 C.J.S. *Deeds* § 167, at 548-49 (1941) (footnotes omitted)). The "standing" at issue in those cases, more appropriately characterized as privity of estate, was the plaintiffs' capacity to enforce restrictive covenants applicable to real property against the defendants and had nothing to do with the corporate bylaws or internal governance procedures of the plaintiff homeowners' associations.[6] *See*

6. The plaintiff homeowners' association in *Laurel Park* argued that it had standing to enforce the restrictive covenants against the defendants under N.C.G.S. § 47A-10, which expressly permitted the manager or board of directors of a condominium homeowners' association to sue on the association's behalf against a unit owner to enforce, *inter alia*, the association's "bylaws," "administrative rules and regulations," and "covenants, conditions and restrictions" in deeds. 82 N.C. App. at 142, 345 S.E.2d at 465 (quoting N.C.G.S. § 47A-10 (1985)). The Court of Appeals rejected this argument because the complaint named the association as the plaintiff rather than "the manager or board of directors on behalf of the association" and the statute only expressly addressed the authority of the association's manager or board to sue *but not* that of the association itself. *See id.* at 142, 345 S.E.2d at 465; N.C.G.S. § 47A-10. Applying its earlier decision from *Beech Mountain*, the Court of Appeals in *Laurel Park* concluded that the plaintiff homeowners' association could not enforce restrictive covenants against a unit owner in the community because the association itself (the only named plaintiff) did not own property in the community. 82 N.C. App. at 143, 345 S.E.2d at 465.

The Court of Appeals in *Laurel Park* went on to address, in dicta, the plaintiff's further argument that its corporate bylaws gave it authority to bring suit on behalf of the unit owners. *Id.* at 143-44, 345 S.E.2d at 466. The Court of Appeals rejected this argument as well, reasoning that "[t]here is nothing in the articles or the bylaws authorizing persons other than the board, its officers, or the membership to act on behalf of the corporation, and nothing in the record suggesting that any of these authorized this action," and "the statute specifically designates who may sue to enforce the restrictions" but does not designate the association itself. *Id.* at 144, 345 S.E.2d at 466. The reference in *Laurel Park* to the association's bylaws was not, as the Court of Appeals opinion in this case suggests, an instance of a corporation "fail[ing] to comply with [its] own bylaws in bringing [an] action," *Willowmere*, ___ N.C. App. at ___, 792 S.E.2d at 812 (citing *Laurel Park*, 82 N.C. App. at 143-44, 345 S.E.2d at 466), but rather a recognition that the bylaws cannot create corporate authority beyond what was provided by statute. Additionally, the statute the Court of Appeals construed in *Laurel Park* specifically governed condominium unit owners' associations and has no applicability to a homeowners' association of a planned community incorporated under the North Carolina Nonprofit Corporation Act. *Compare* N.C.G.S. § 47C-1-102 (2017) (North Carolina Condominium Act) *with* N.C.G.S. § 47F-1-102 (2017) (North Carolina Planned Community Act).

Runyon v. Paley, 331 N.C. 293, 302, 416 S.E.2d 177, 184 (1992) ("Thus, where the covenant is sought to be enforced by someone not a party to the covenant or against someone not a party to the covenant, the party seeking to enforce the covenant must show that he has a sufficient legal relationship with the party against whom enforcement is sought to be entitled to enforce the covenant.").

In *Peninsula*, the Court of Appeals held that the property owners' association lacked standing to commence legal proceedings against Crescent Resources, LLC ("Crescent"), the previous developer of the community, because the association failed to comply with an explicit provision in its bylaws that required any litigation against Crescent to be approved by a two-thirds majority vote of all association members entitled to vote. 171 N.C. App. at 94, 97, 614 S.E.2d at 354, 356. But that case is distinguishable from the case at bar because in *Peninsula*, the failure of the plaintiff to comply with the bylaws was raised by Crescent, which was a member of the plaintiff association. *See id.* at 91, 95, 614 S.E.2d at 353, 355. One of the underlying issues raised by the plaintiff in *Peninsula* was the very fact that Crescent, as developer of the community, had drafted the association's bylaws and explicitly included the two-thirds approval provision, which, in the plaintiff's view, contravened Crescent's fiduciary duties as the controlling member of the association when the bylaws were created. *See id.* at 90, 94-95, 614 S.E.2d at 352, 354-55. As a member of the plaintiff association and as the party that was clearly intended to benefit from the two-thirds approval requirement in the bylaws, Crescent was entitled to raise the association's failure to comply with this provision of its bylaws as a bar to the plaintiff's suit. Nonetheless, neither this Court nor the Court of Appeals has ever held (until the Court of Appeals opinion in this case) (1) that a defendant who is *a stranger to the plaintiff association* may assert that the plaintiff's failure to abide by its own bylaws necessitates dismissal of the plaintiff's complaint for lack of standing or (2) that a corporate defendant must affirmatively demonstrate compliance with its bylaws and internal governance procedures in order to have standing.

Nothing in our jurisprudence on standing requires a corporate litigant to affirmatively plead or prove its compliance with corporation bylaws and internal rules relating to its decision to bring suit. *Cf. Mangum*, 362 N.C. at 644, 669 S.E.2d at 283 ("We . . . note that North Carolina is a notice pleading jurisdiction, and as a general rule, there is no particular formulation that must be included in a complaint or filing in order to invoke jurisdiction or provide notice of the subject of the suit to the opposing party." (citing *Mangum v. Surles*, 281 N.C. 91, 99, 187 S.E.2d 697, 702 (1972) ("[I]t is the essence of the Rules of Civil Procedure

that decisions be had on the merits and not avoided on the basis of mere technicalities."))). Indeed, since "standing is a 'necessary prerequisite to a court's proper exercise of subject matter jurisdiction,' " *Crouse v. Mineo*, 189 N.C. App. 232, 236, 658 S.E.2d 33, 36 (2008) (quoting *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878, *disc. rev. denied*, 356 N.C. 610, 574 S.E.2d 474 (2002)), and can be challenged "at any stage of the proceedings, even after judgment," *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (quoting *Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E.2d 876, 880 (1961), *appeal dismissed and cert. denied*, 371 U.S. 22, 9 L. Ed. 96 (1962)), adopting such a rule would subject countless judgments across North Carolina to attack for want of subject matter jurisdiction. We decline to adopt such a rule.

There is no evidence in this case suggesting that any member of the communities of Willowmere or Nottingham opposed plaintiffs' prosecution of this suit. We decline to permit a defendant who is a stranger to an association to invoke the association's own internal governance procedures as an absolute defense to subject matter jurisdiction in a suit filed by the association against that defendant. If a member of either plaintiff association disagrees with the decision to file suit, the proper vehicle to challenge the association's failure to comply with its respective bylaws in making that decision is a suit against the nonprofit corporation brought by the aggrieved member or members of the association or, in certain circumstances, a derivative action. *Cf.* N.C.G.S. § 55A-3-04 (2017) (providing that, "the validity of [a] corporate action shall not be challenged on the ground that the [nonprofit] corporation lacks or lacked power to act" except in a proceeding brought against the corporation "by a member or a director" of the corporation, "the Attorney General," or "[i]n a proceeding by the corporation, directly, derivatively, or through a receiver, trustee, or other legal representative, against an incumbent or former director, officer, employee, or agent of the corporation");[7] *id.* § 55A-7-40 (2017) (authorizing and explaining the procedures

7. Plaintiffs argued to this Court that defendants are precluded under N.C.G.S. § 55A-3-04 from challenging "the validity of corporate action" to bring this suit because defendants are not listed among the classes of parties authorized to bring such a challenge in section 55A-3-04(b). Because plaintiffs failed to raise this argument before the trial court, it is not properly preserved for our review. *See* N.C. R. App. P. 10(a); *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co., Inc.*, 362 N.C. 191, 194-96, 657 S.E.2d 361, 363-64 (2008). Accordingly, we decline to address whether defendants' assertion that plaintiffs failed to comply with their respective bylaws in their decision to bring this action amounts to a challenge that their action was *ultra vires* or "[in]valid[ ] . . . on the ground that the corporation lacks or lacked power to act." *See* N.C.G.S. § 55A-3-04. It is sufficient to say that, while a member of either plaintiff association could permissibly challenge the association's failure to comply with its bylaws in instituting this suit (regardless of whether the challenge falls within the scope of N.C.G.S. § 55A-3-04), defendants may not.

by which to prosecute a derivative action under the North Carolina Nonprofit Corporation Act). "[T]he General Statutes . . . provide means for *association members* harmed by the improper commencement of this suit to seek redress from the courts if they wish to do so—either by seeking to stay or dismiss the action, or by pursuing a separate action against the appropriate parties for the unauthorized filing of the lawsuit." *Willowmere*, ___ N.C. App. at ___, 792 S.E.2d at 813 (Dietz, J., concurring) (emphasis added); *see* N.C.G.S. § 47F-2-103(a) (2017) (providing that "the declaration, bylaws, and articles of incorporation [of a planned community] form the basis for the legal authority for the planned community to act," and "are enforceable by their terms").

This holding also comports with the reasoning of other jurisdictions that have considered the issue. *See Lake Forest Master Cmty. Ass'n v. Orlando Lake Forest Joint Venture*, 10 So. 3d 1187, 1195-96 (Fla. Dist. Ct. App.) (concluding that a specific Florida statute requiring the approval of a majority of members of a homeowners' association entitled to vote before initiating any litigation involving amounts in controversy over $100,000 was for the protection of members *and could not be asserted as an affirmative defense to suit* by a non-member defendant), *review denied*, 23 So. 3d 1182 (Fla. 2009); *Little Can. Charity Bingo Hall Ass'n v. Movers Warehouse, Inc.*, 498 N.W.2d 22, 24 (Minn. Ct. App. 1993) ("[A] third party has no power to challenge corporate action based on [a violation of the entity's bylaws]."); *see also Stolow v. Greg Manning Auctions Inc.*, 258 F. Supp. 2d 236, 249 (S.D.N.Y.) ("A third-party, who is not a member of the association or corporation nor a party to the bylaws, lacks standing to bring suit against an organization for violation of its bylaws."), *aff'd*, 80 F. App'x 722 (2d Cir. 2003); *Port Liberte II Condo. Ass'n v. New Liberty Residential Urban Renewal Co.*, 435 N.J. Super. 51, 66, 86 A. 3d 730, 739 (App. Div. 2014) (holding that the plaintiff condominium homeowners' association had standing to sue the defendant developers and various contractors despite procedural defects in the approval of the litigation based, in part, on the logic that the defendants could not enforce the bylaws of the association, including one requiring members to authorize litigation, because they were not members of the association).

Accordingly, we hold that, despite plaintiffs' failure to strictly comply with their respective bylaws and internal governance procedures in their decision to initiate this suit, they nonetheless "possess a 'sufficient stake in an otherwise justiciable controversy' to confer jurisdiction on the trial court to adjudicate this legal dispute." *Willowmere*, ___ N.C. App. at ___, 792 S.E.2d at 813 (quoting *Peninsula*, 171 N.C. App. at 92,

614 S.E.2d at 353). For the reasons stated above, the decision of the Court of Appeals is reversed, and this case is remanded to that court for further remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

ELI GLOBAL, LLC, ET AL.	)	
	)	
v.	)	From Durham County
	)	
JAMES A. HEAVNER	)	

No. 12PA17

ORDER

Upon consideration the motion to dismiss the appeal is allowed. It is further ordered that the decision of the Court of Appeals is vacated.

By Order of the Court in Conference, this 1st day of March, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 2nd day of March, 2018.

Jackson, J., recused.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

IN RE SOUTHEASTERN EYE CENTER – PENDING MATTERS	)	
_____	)	From Guilford County
IN RE SOUTHEASTERN EYE CENTER – JUDGMENTS	)	

No. 168A17

ORDER

Appellant has failed to demonstrate grounds for appellate review under N.C.G.S. 7A-27(a)(3) (2017). The appeal in this matter is therefore dismissed.

By order of the Court in Conference, this the 1st day of March, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 2nd day of March, 2018.

s/Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

IN RE SE. EYE CTR.

[370 N.C. 565 (2018)]

IN RE SOUTHEASTERN EYE CENTER – PENDING MATTERS	)	
_____	)	From Wake County
IN RE SOUTHEASTERN EYE CENTER – JUDGMENTS	)	

No. 259A17

ORDER

Appellant has failed to demonstrate grounds for appellate review under N.C.G.S. 7A-27(a)(3) (2017). The appeal in this matter is therefore dismissed.

By order of the Court in Conference, this the 1st day of March, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 2nd day of March, 2018.

s/Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

IN RE SOUTHEASTERN EYE CENTER – PENDING MATTERS	)	
_____	)	From Wake County
IN RE SOUTHEASTERN EYE CENTER – JUDGMENTS	)	

No. 358A16

ORDER

Appellants have failed to demonstrate grounds for appellate review under N.C.G.S. 7A-27(a)(3) (2017). The appeals in this matter are therefore dismissed.

By order of the Court in Conference, this the 1st day of March, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of March, 2018.

s/Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

STATE v. AMERSON

[370 N.C. 567 (2018)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Lee County
	)	
PIERRE AMERSON	)	

No. 45P18

ORDER

Defendant's Emergency Petition for Writ of Certiorari is allowed; the orders entered by the trial court denying defendant's motion to continue on 15 December 2017 and denying defendant's reconsideration motion on 24 January 2018 are vacated; and this case is remanded to the Superior Court, Lee County, for the entry of an order allowing a reasonable continuance from the scheduled 19 March 2018 trial date and further proceedings not inconsistent with this order.

By order of the Court in conference, this the 27th day of February, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 27th day of February, 2018.

CHRISTIE S. CAMERON ROEDER
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
Assistant Clerk, Supreme Court of
North Carolina

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Mecklenburg County
	)	
CHARLES AUGUSTUS SHORE, JR.	)	

No. 339P17

ORDER

Upon consideration of the Petition for Discretionary Review filed by the Defendant on the 10th day of October, 2017, the Court allows the Defendant's Petition for Discretionary Review for the limited purpose of remanding this case to the Court of Appeals for consideration of the merits of the Defendant's argument concerning the issue of mistrial. Except as specifically allowed, the petition is denied.

By Order of the Court, this the 1st day of March, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 2nd day of March, 2018.

AMY L. FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
Assistant Clerk, Supreme Court
of N.C.

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

1 MARCH 2018

003P18	State v. Jason Carmona	1. Def's *Pro Se* Motion for Appropriate Relief 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Union County 3. Def's *Pro Se* Motion to Withdraw Plea of Guilty	1. Dismissed 2. Dismissed 3. Dismissed
004P18	State v. Travis Rashad Mitchell	1. Def's Motion for Temporary Stay (COA17-369) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/08/2018** 2. 3.
006P18	James Allen Minyard v. Erik A. Hooks, Secretary of Public Safety, Carlos Hernandez, Superintendent of Avery-Mitchell Correctional Institution	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **01/10/2018**
007P18	Julian Andres Valdivieso v. Donnie Harrison	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **01/08/2018**
008P18	State v. Bernardo Roberto Pena a/k/a Martin Rangel Pena	1. State's Motion for Temporary Stay (COA16-1075) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **01/09/2018** 2.
009P18	In the Matter of A.L.Z.	1. Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA17-507) 2. Respondent-Mother's Motion for Temporary Stay 3. Respondent-Mother's Petition for *Writ of Supersedeas*	1. 2. Allowed **02/27/2018** 3.
010P18	State v. Mark Burwell	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-89) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
011P18	State v. David Michael Costin	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COA17-521)	Denied

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

1 MARCH 2018

012PA17	Eli Global, LLC and Greg Lindberg v. James A. Heavner	1. Plts' Motion to Dismiss Appeal as Settled 2. Def's Motion to Vacate Ruling of COA as Part of Dismissing Appeal	1. Special Order 2. Special Order **Jackson, J., recused**
012P18	Harrison Hall, Employee v. U.S. Xpress, Inc., Employer and Liberty Mutual Insurance Company, Carrier	1. Defs' Motion for Temporary Stay 2. Defs' Petition for *Writ of Supersedeas*	1. Allowed **01/09/2018** 2.
013P18	Rene Jhovany Rodrigues Bustos v. Donnie Harrison	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **01/11/2018**
014P18	Pender County and The Town of Atkinson v. Donald Sullivan and Marion P. Sullivan	Defs' *Pro Se* Motion for Notice of Appeal (COA17-1160)	Dismissed *ex mero motu*
015P18	In the Matter of Estate of Ernestine E. Stephens	1. Petitioner's *Pro Se* Petition for *Writ of Mandamus* 2. Petitioner's *Pro Se* Motion for Default Judgment for Failure to Answer/ Respond	1. Dismissed 2. Dismissed
021P18	State v. Brad Cayton Norwood	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **01/19/2018** 2.
022P18	State v. Samuel Tyler Potter	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **01/19/2018** 2.
023A18	State v. Angela Marie Rankin	1. State's Motion for Temporary Stay (COA17-396) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **01/22/2018** 2. Allowed 3. ---

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

1 MARCH 2018

024A18	State v. Jerry Giovani Thompson	1. State's Motion for Temporary Stay (COA17-477) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **01/19/2018** 2. Allowed **02/08/2018** 3. ---
026PA17	David Wichnoski, O.D., P.A., et al. v. Piedmont Fire Protection Systems, LLC, et al.	Joint Motion to Continue Oral Argument	Allowed **01/08/2018**
026P18	State v. Stephen Kyprianides	1. Def's *Pro Se* Motion for Notice of Appeal (COA17-1261) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* Motion to Amend Notice of Appeal Based Upon a Constitutional Question 4. Def's *Pro Se* Motion to Amend PDR	1. Dismissed 2. Dismissed 3. Allowed 4. Allowed **Ervin, J., recused**
028P18	State v. Eugene Matthews	1. Def's *Pro Se* Motion for Notice of Concern for Constructive Ineffective Assistance of Counsel Claim (COAP17-619) 2. Def's *Pro Se* Motion to Demand Lower Appellate Court to Send Copy of Motion	1. Dismissed 2. Dismissed
029P18	Francoise Mededji v. Ferdinand Ikende Bongolo	1. Def's *Pro Se* Motion for Notice of Appeal (COA17-957, P17-918) 2. Def's *Pro Se* Motion for PDR	1. Dismissed *ex mero motu* 2. Denied
035P18	State v. Timothy Lee Creed	1. Def's *Pro Se* Motion for Leave to File Petition for *Writ of Erro[r]*, *Coram Nobis* in Moore County Superior Court 2. Def's *Pro Se* Motion for *Writ of Erro[r]*, *Coram Nobis* 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed 3. Allowed

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

1 MARCH 2018

045P18	State v. Pierre Amerson (DEATH)	1. Def's Emergency Petition for *Writ of Certiorari* in a Death Case 2. Def's Motion to Consider Supplemental *Ex Parte* Transcript and Argument Related to Emergency Petition for *Writ of Certiorari*	1. Special Order **02/27/2018** 2. Allowed **02/27/2018**
052A95-2	State v. Kjellyn Orlando Leary	1. Def's *Pro Se* Motion for Mandamus Mandate Mandatory Injunction Appeals 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP16-188)	1. Dismissed 2. Dismissed
052PA17-2	Cooper v. Berger, et al.	1. Plt's Motion to Expedite Mandate 2. Plt's Motion to Lift Stay	1. Denied **02/02/2018** 2. Denied **02/02/2018**
055A18	State v. James Howard Terrell, Jr.	1. State's Motion for Temporary Stay (COA17-268) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **02/23/2018** 2.
056P18	In the Matter of B.E.M., a Minor Juvenile	1. Petitioners' (David L. Coldren and Michelle) Motion for Temporary Stay 2. Petitioners' (David and Michelle Coldren) Petition for *Writ of Supersedeas*	1. Denied **02/26/2018** 2.

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091P14-4	State v. Salim Abdu Gould	1. Def's *Pro Se* Motion for Stay	1. Denied **11/16/2017**
		2. Def's *Pro Se* Petition for *Writ of Supersedeas*	2. Dismissed
		3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	3. Denied
		4. Def's *Pro Se* Motion for Discretionary Review	4. Dismissed
		5. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	5. Dismissed as moot
		6. Def's *Pro Se* Motion for Notice of Appeal	6. Dismissed
		7. Def's *Pro Se* Motion for Dismissal	7. Dismissed
		8. Def's *Pro Se* Motion for Notice to Higher Court of Demand for Default Judgment	8. Dismissed
		9. Def's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	9. Dismissed
		10. Def's *Pro Se* Motion for Leave to File *In Forma Pauperis*	10. Dismissed as moot
109P17-3	In re Olander R. Bynum	Petitioner's *Pro Se* Motion for Reconsideration	Dismissed
110A17	Steven Harris v. North Carolina Department of Public Safety	Petitioner's Motion to Dismiss Appeal	Dismissed as moot **12/22/2017**
118P09-3	State v. Titus Germaine Williams	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, New Hanover County	Dismissed **Ervin, J., recused**
130A03-2	State v. Quintel Martinez Augustine (DEATH)	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Cumberland County	Allowed **Ervin, J., recused**
131P16-6	State v. Somchoi Noonsab	1. Def's *Pro Se* Motion to Dismiss	1. Dismissed
		2. Def's *Pro Se* Motion to Arrest Judgment	2. Dismissed
		3. Def's *Pro Se* Motion to Amend	3. Allowed
		4. Def's *Pro Se* Motion for Petition Upon the Due Process Clause	4. Dismissed *ex mero motu*
133P15-2	State v. William Earl Askew	Def's *Pro Se* Motion for PDR (COAP17-908)	Denied

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146P13-2	Richmond County Board of Education v. Janet Cowell, North Carolina State Treasurer, in her Official Capacity Only, Linda Combs, North Carolina State Controller, in her Official Capacity Only, Lee Roberts, North Carolina State Budget Director, in his Official Capacity Only, Frank L. Perry, Secretary of the North Carolina Department of Public Safety, in his Official Capacity Only, Roy Cooper, Attorney General of the State of North Carolina, in his Official Capacity Only	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA17-112) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
163P16-2	State v. Arkeem Hakim Jordan	Def's *Pro Se* Motion for Fourth Amendment Violation	Dismissed **Ervin, J., recused**
168A17	In re Southeastern Eye Center	Court Order	Appeal Dismissed **03/01/2018**
182A15-3	In re Adam Jarmal Hodge	Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis* with the Register of Deeds	Dismissed **12/22/2017**
189P17-3	State v. Robert A.D. Waldrup	1. Def's *Pro Se* Motion for Evidentiary Hearing (COAP17-295) 2. Def's *Pro Se* Petition for Rehearing *En Banc*	1. Dismissed 2. Dismissed
193P15-2	State v. Allen Ray West	Def's *Pro Se* Motion for PDR (COAP17-620)	Denied
200P07-7	Kenneth Earl Robinson v. Erik A. Hooks, N.C.D.P.S. Secretary	1. Petitioner's *Pro Se* Petition for *Writ of Mandamus* 2. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* 3. Petitioner's *Pro Se* Motion to Appoint Counsel	1. Dismissed **12/13/2017** 2. Denied **12/13/2017** 3. Dismissed as moot **12/13/2017**

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200P07-8	Kenneth E. Robinson v. Erik A. Hooks, N.C.D.P.S. Secretary	Petitioner's *Pro Se* Motion for Notice of Appeal	Dismissed
202A17	Locklear v. Cummings, et al.	Motion to Admit H. Asby Fulmer, III *Pro Hac Vice*	Allowed **12/12/2017**
203P17	Shaun Weaver, Employee v. Daniel Glenn Dedmon d/b/a Dan the Fence Man d/b/a Bayside Construction, Employer, Noninsured, and Daniel Glenn Dedmon, Individually, and Seegars Fence Company, Inc. of Elizabeth City, Employer, and Builders Mutual Insurance Company, Carrier	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA16-55) 2. Defs' (Seegars Fence Company, Inc. of Elizabeth City and Builders Mutual Insurance Company) PDR Under N.C.G.S. § 7A-31 3. Plt's and Defs' (Seegars Fence Company, Inc. of Elizabeth City and Builders Mutual Insurance Company) Joint Motion to Hold PDRs in Abeyance 4. Plaintiff and Defendants' Consent Motion for Leave to Withdraw PDRs	1. — 2. — 3. Allowed **11/01/2017** 4. Allowed **02/27/2018**
230P17-2	State v. Anthony Lee McNair	1. Def's *Pro Se* Motion for Final Defense 2. Def's *Pro Se* Motion to Submit Memorandum in Support of Motion for Summary Judgment	1. Dismissed 2. Dismissed
251A17	State v. Omar Jalam Cook	Def's Provisional Petition for *Writ of Certiorari* to Review Decision of COA (COA16-883)	Dismissed as moot
252PA14-3	State v. Thomas Craig Campbell	1. State's Motion for Temporary Stay (COA13-1404-3) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **02/16/2018** 2.
254P09-3	David Reed Wilson v. Mark Carver, Superintendent of Caswell Correctional Center #4415	Petitioner's *Pro Se* Motion to Reconsider	Dismissed
259A17	In re Southeastern Eye Center	Court Order	Appeal Dismissed **03/01/2018**

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272P17	State v. Clarence Joseph Trent	1. Def's Motion for Temporary Stay (COA16-839) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/11/2017** Dissolved **03/01/2018** 2. Denied 3. Denied **Morgan, J., recused**
278P17	State v. John Andrew Maddux	1. State's Motion for Temporary Stay (COA16-1248) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/18/2017** 2. Allowed 3. Allowed
285P17	State of North Carolina *ex rel.* North Carolina Department of Environmental Quality, Plaintiff, and Roanoke River Basin Association, Sierra Club, Waterkeeper Alliance, Cape Fear River Watch, Inc., Sound Rivers, Inc., and Winyah Rivers Foundation, Plaintiff-Intervenors v. Duke Energy Progress, LLC, Defendant ——————— State of North Carolina *ex rel.* North Carolina Department of Environmental Quality, Plaintiff and Catawba Riverkeeper Foundation, Inc., Waterkeeper Alliance, Mountaintrue, Appalachian Voices, Yadkin Riverkeeper, Inc., Dan River Basin Association, Roanoke River Basin Association, and Southern Alliance for Clean Energy, Plaintiff-Intervenors v. Duke Energy Carolinas, LLC, Defendant	1. Defs' PDR Prior to Determination of COA (COA17-893) 2. Defs' Motion to Supplement Record	1. Denied 2. Dismissed as moot

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289P17	Charlene Hogue v. Brown & Patten, P.A., Donald N. Patten	Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-103)	Denied
296P15-2	Ernest James Nichols v. Richard Terry, Superintendent – Craggy Correctional Center; Frank L. Perry, Secretary of the North Carolina Department of Public Safety	Petitioner's *Pro Se* Motion for Reconsideration	Denied **12/19/2017**
296P17	In re: Foreclosure of Real Property Under Deed of Trust from Melvin R. Clayton and Jackie B. Clayton, in the original amount of $165,000.00, and dated June 13, 2008 and Recorded on June 18, 2008 in Book 2083 at Page 506, Henderson County Registry Trustee Services of Carolina, LLC, Substitute Trustee	1. Appellant's (Jackie B. Clayton) PDR Under N.C.G.S. § 7A-31 (COA16-960) 2. Appellant's (Jackie B. Clayton) Petition for *Writ of Certiorari* to Review Decision of COA 3. Motion (Appellant's) for Temporary Stay 4. Appellant's (Jackie B. Clayton) Petition for *Writ of Supersedeas*	1. Denied 2. Denied 3. Allowed **09/18/2017** Dissolved **03/01/2018** 4. Denied
301P17-2	Valerie Arroyo v. Daniel J. Zamora, Zamora Law Firm, PLLC	Plt's *Pro Se* Motion for PDR (COAP17-510)	Denied **Ervin, J., recused**
306P04-5	State v. Dwight Parker, Sr.	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Pitt County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed **Ervin, J., recused**
317P17	Julia Nichols v. University of North Carolina at Chapel Hill	1. Petitioner's Notice of Appeal Based Upon a Constitutional Question (COA16-1117) 2. Petitioner's PDR Under N.C.G.S. § 7A-31 3. Respondent's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed

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320P17-2	In the Matter of the Imprisonment of Ryan Lamar Parsons	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **12/12/2017**
322P15-5	Raymond Alan Griffin v. Deborah Shandles, Assistant District Attorney of Wake County and Paul C. Ridgeway, Senior Resident Superior Court Judge v. John and Jane Doe _____ Raymond Alan Griffin v. Deborah Shandles, Assistant District Attorney of Wake County and Donald W. Stephens, Senior Resident Superior Court Judge v. John and Jane Doe	1. Petitioner's *Pro Se* Motion for Notice of Appeal (COAP17-860) 2. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA 3. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	1. Denied **12/29/2017** 2. Denied **12/29/2017** 3. Denied **12/29/2017**
322P15-6	Griffin v. Shandles, et al.	1. Petitioner's *Pro Se* Motion for Notice of Appeal 2. Petitioner's *Pro Se* Petition for *Writ of Mandamus*	1. Denied **01/09/2018** 2. Denied **01/09/2018**
328P06-3	State v. Robert Walter Huffman	Def's *Pro Se* Motion to Reconsider	Dismissed
335A17	Patricia Pine, Employee v. Walmart Associates, Inc. #1552, Employer and National Union Fire Insurance Co., Carrier, Claims Management, Inc., Third-Party Administrator	1. Defs' Notice of Appeal Based Upon a Dissent (COA16-203) 2. Plt's Notice of Appeal Based Upon a Constitutional Question 3. Plt's PDR Under N.C.G.S. § 7A-31	1. --- 2. Dismissed *ex mero motu* 3. Allowed
339P17	State v. Charles Augustus Shore, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1243)	Special Order
340P17	Nash Hospitals, Inc. v. State Farm Mutual Automobile Insurance Co.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-532) 2. Plt's Motion to Admit Robert L. Allgood *Pro Hac Vice*	1. Denied 2. Allowed

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341P12-5	State v. Donald Durrant Farrow	1. Def's *Pro Se* Motion for PDR (COAP16-888) 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	1. Dismissed 2. Dismissed **Ervin, J., recused**
343P17	Ronnie Edward Moore v. Priscilla Ann McKenzie, Individually, and Priscilla Ann McKenzie, as Executor of the Estate of Bobby Jenkins Boyd	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-53)	Denied
345P17-3	Eddricco Li'Shaun Brown v. State of North Carolina	1. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Petitioner's *Pro Se* Motion for Averment of Jurisdiction	1. Denied **12/19/2017** 2. Dismissed **12/19/2017**
351P04-6	State v. Robert Lee Thacker	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP17-907)	Dismissed
353P17	State v. Jeremy Lee Stephens	Def's Petition for *Writ of Certiorari* to Review Order of COA (COAP16-714)	Denied
354P17	State v. Quentin Odell Mathis	Def's PDR Under N.C.G.S. § 7A-31 (COA17-126)	Denied
356P17	State v. Brandon Lee	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
358A16	In re Southeastern Eye Center	1. Plts' Motion to Dismiss Appeals 2. Plts' Motion to Supplement Motion to Dismiss Appeals	1. Dismissed as moot 2. Dismissed as moot
358A16	In re Southeastern Eye Center	Court Order	Appeal Dismissed **03/01/2018**
358P17	State v. Marvin Burton Harris, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1115)	Denied
363PA17	In the Matter of J.M. & J.M.	Petitioner and GAL's Motion to Dismiss Appeal	Allowed **01/09/2018**

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365A16-2	State v. David Michael Reed	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **02/02/2018** 2
372P17	In the Matter of Kenneth Kelly Duvall v. State of N.C., et al.	1. Petitioner's *Pro Se* Motion for Default Judgment (COAP17-711) 2. Petitioner's *Pro Se* Motion for Injunctive Relief and *De Novo* Review and Answers to Constitutional Questions 3. Petitioner's *Pro Se* Motion to Appoint Counsel 4. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis* 5. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	1. Denied **11/07/2017** 2. Denied **01/24/2018** 3. Dismissed as moot **01/24/2018** 4. Allowed **01/24/2018** 5. Denied **01/24/2018**
375P17	North Carolina Farm Bureau Mutual Insurance Company, Inc. v. Beverly Lee Phillips, Victoria Phillips, and John Doe 236	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA16-620) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
378P17	State v. Deon Quintin McDonald	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-246) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
379A17	State v. Brandon Malone	1. State's Motion for Temporary Stay (COA16-1290) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent 4. State's PDR as to Additional Issues	1. Allowed **11/09/2017** 2. Allowed 3. — 4. Allowed
381P17	Francisco K. Avoki and Veronique K. Pongo v. Eagle Adjusting Serv. Inc., Josh Taylor, & Does XX-I	1. Plts' Motion for Notice of Appeal (COA17-600) 2. Defs' (Eagle Adjusting Services, Inc. and Josh Taylor) Motion to Dismiss Appeal	1. Dismissed 2. Dismissed as moot

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382P10-8	State v. John Lewis Wray, Jr.	1. Def's *Pro Se* Motion for Appropriate Relief 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed **Beasley, J., recused**
382P17	State v. Lonnie Bernard Davis	1. Def's *Pro Se* Motion for Notice of Appeal 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's Motion for Notice of Appeal of COA Order Dated 20 November 2017	1. Dismissed 2. Allowed 3. Dismissed
384P17	James Gregory Armistead v. Timothy Ware/ Jennie Bowen	Petitioner's *Pro Se* Motion for PDR (COAP17-726)	Dismissed **Ervin, J., recused**
389P17	State v. James Issac Faulk	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA17-429) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
390P17	State v. Maurice Alan Craig	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP17-754)	Dismissed **Ervin, J., recused**
391P17	Corey Lavon Spell v. James Floyd Ammons, Jr., Senior Resident Superior Court Judge	Petitioner's *Pro Se* Motion for Appeal of Clerk's Order Dismissing Petition for *Writ of Certiorari* (COAP17-797)	Dismissed
392P17	In the Matter of E.J.V.	1. Petitioner-Grandmother's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA17-365) 2. Petitioner-Grandmother's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Petitioner-Grandmother's *Pro Se* Motion to Amend Notice of Appeal and PDR	1. Dismissed *ex mero motu* 2. Denied 3. Allowed
395A17	Walker, et al. v. Driven Holdings, LLC	Plts' Motion to Amend Record on Appeal	Allowed **01/23/2018**

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395A17	Walker, et al. v. Driven Holdings, LLC	1. Motion to Admit Kimberly A. Haviv *Pro Hac Vice* 2. Motion to Admit Glenn M. Kurtz *Pro Hac Vice*	1. Allowed 2. Allowed
399P17	State v. Jason Eric Taylor	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1291)	Denied
404P17-2	Nancy Rogers, et al. v. Claudia Metcalf, et al.	Defs' Motion for Petition for Rehearing	Denied **12/21/2017**
406P17	State v. Daniel Luna	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel 4. Def's *Pro Se* Motion to Withdraw	1. --- 2. Allowed 3. Dismissed as moot 4. Allowed
407P17	Sheldon Straite v. North Carolina Department of Public Safety	Plt's *Pro Se* Motion for Notice of Appeal	Dismissed
408A17	State v. Antonio Lamar Stimpson	State's Motion to Substitute Counsel	Allowed **12/20/2017**
409P17	Roy A. Cooper, III, in his Official Capacity as Governor of the State of North Carolina v. Philip E. Berger, in his Official Capacity as President Pro Tempore of the North Carolina Senate; Timothy K. Moore, in his Official Capacity as Speaker of the North Carolina House of Representatives	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA17-367) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Retained 2. Allowed 3. Denied

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410P17	Estate of Taylor A. Peyton, by and through Administrator John Peyton, and John Peyton, Individually v. North Carolina Department of Transportation ——— John Peyton, as Guardian Ad Litem for John Peyton, II, and John Peyton, Individually v. North Carolina Department of Transportation	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-257) Plt's PDR Under N.C.G.S. § 7A-31 (COA17-257)	1. Denied **Jackson, J., recused** 2. Denied **Jackson, J., recused**
411A94-6	State v. Marcus Reymond Robinson (DEATH)	1. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Cumberland County 2. North Carolina Advocates for Justice's Motion for Leave to File *Amicus* Brief 3. Charles Becton, Charles Day, Valerie Johnson, Irving L. Joyner, Floyd B. McKissick, Jr., Cressie H. Thigpen, Jr., and Fred J. Williams' Motion for Leave to File *Amicus* Brief 4. Retired Members of the North Carolina Judiciary's Motion for Leave to File *Amicus* Brief	1. Allowed 2. Allowed 3. Allowed 4. Allowed
412P13-4	State v. Henry Clifford Byrd, Sr.	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-288)	Denied **Ervin, J., recused**
412P17	State v. Raul Pachicano Diaz	1. State's Motion for Temporary Stay (COA17-444) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **12/08/2017** 2.
414A17	Ron David Metcalf v. Susan Hyatt Call	1. Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA17-418) 2. Def's Motion to Dismiss Appeal	1. — 2. Allowed

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415P17	Michael Scott Davis v. Pia Law	1. Plt's *Pro Se* Motion to Lift Temporary Stay (COAP17-848) 2. Plt's *Pro Se* Petition for *Writ of Supersedeas* 3. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA 4. Plt's *Pro Se* Motion for Suspension of the Rules Under Rule 2	1. Denied **12/12/2017** 2. Denied **12/12/2017** 3. Denied **12/12/2017** 4. Denied **12/12/2017**
423P17	In the Matter of A.C-H.	Petitioner and Guardian Ad Litem's PDR Under N.C.G.S. § 7A-31 (COA17-466)	Denied
424P17	Marshall B. Pitts, Jr. v. John Wayne Tart; Investigative Solutions, ISNC, LLC; Jimmy Lamar Henley, Jr.; and Chrystal Nicole Justesen	Plt's PDR Under N.C.G.S. § 7A-31 (COA16-830)	Denied
426P17	Annah Awartani; Gilma Varina Bonilla; Crystal Kim Parker, Individually and for Others Similarly Situated v. The Moses H. Cone Memorial Hospital Operating Corporation	1. Plts' PDR Prior to a Determination by COA (COA17-1300) 2. Plts' Motion in the Alternative Requesting Court Exercise Its Supervisory Authority 3. Def's Conditional PDR Prior to a Determination by COA	1. Denied 2. Denied 3. Dismissed as moot
427P17	State v. Jermaine Antwan Tart	1. State's Motion for Temporary Stay (COA17-561) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **12/15/2017** 2.

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428P17	Martin E. Rock v. Executive Office Park of Durham Association, Inc.	1. Respondent's *Pro Se* Motion for Temporary Stay 2. Respondent's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Durham County 3. Petitioner's Petition for Writ of Prohibition 4. Petitioner's Motion to Dismiss Petition for *Writ of Certiorari* 5. Petitioner's Motion for Sanctions 6. Respondent's *Pro Se* Motion for Leave to File Reply 7. Respondent's *Pro Se* Motion to Reconsider 8. Respondent's *Pro Se* Motion for Temporary Stay 9. Respondent's *Pro Se* Petition for *Writ of Supersedeas* 10. Respondent's *Pro Se* Motion to Amend Supplemental Reply Response and Motions	1. Denied **12/15/2017** 2. Dismissed **12/15/2017** 3. Dismissed as moot 4. Allowed **12/15/2017** 5. Denied 6. Dismissed as moot 7. Denied **12/21/2017** 8. Denied **12/22/2017** 9. Denied 10. Allowed
430P17	In re Rodney Koon	Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Buncombe County	Dismissed
431P17	In re Maud Edwin Elliot Ingram	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied **01/08/2018**
431P17-2	In re Maud Edwin Elliot Ingram	1. Petitioner's *Pro Se* Motion for Objection to Order 2. Petitioner's *Pro Se* Motion for Full Evidentiary Hearing 3. Petitioner's *Pro Se* Motion to Make Written Findings and Facts Concluding Law 4. Petitioner's *Pro Se* Motion for Trial by Jury	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed

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433A17	Eugene K. Ehmann, N. William Shiffli, Jr., and Thad A. Throneburg v. Medflow, Inc.; Greg E. Lindberg; Eli Global, LLC; Eli Research, LLC; Eli Equity, LLC; SNA Capital, LLC; Southland National Holdings, LLC; Southland National Insurance Corporation; DJRTC, LLC; and Medflow Holdings, LLC	Defs' (Medflow, Inc. and Medflow Holdings, LLC) Motion for Extension of Time to Serve Objections and Amendments to the Proposed Record on Appeal	Allowed **12/22/2017** **Jackson, J., recused**
433A17	Eugene K. Ehmann, N. William Shiffli, Jr. and Thad A. Throneburg v. Medflow, Inc.; Greg E. Lindberg; Eli Global, LLC; Eli Research, LLC; Eli Equity, LLC; SNA Capital, LLC; Southland National Holdings, LLC; Southland National Insurance Corporation; DJRTC, LLC; and Medflow Holdings, LLC	1. Plts' Petition for *Writ of Certiorari* to Review Order of Business Court, Mecklenburg County 2. Defs' Motion for Extension of Time to Respond to Petition for *Writ of Certiorari*	1. 2. Allowed **02/12/2018** **Jackson, J., recused**
434P17	State v. Michael Leon Green, Jr.	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-375)	Denied
436A17	State v. Gregory Anthony Gardner	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-511) 2. State's Motion to Dismiss Appeal	1. — 2. Allowed
438P17	Anthony M. Kyles v. The Goodyear Tire & Rubber Co., Employer, Liberty Mutual Ins. Co.	1. Plt's Motion for Temporary Stay 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's PDR	1. Allowed **12/29/2017** 2. 3.
440P17	State v. Carlouse Latour Allbrooks	Def's PDR Under N.C.G.S. § 7A-31 (COA16-741)	Denied

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441A98-4	State v. Tilmon Charles Golphin (DEATH)	1. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Cumberland County 2. Def's Motion to Address Double Jeopardy as a Threshold Issue Prior to Consideration of the Other Issues Raised in the Petition for *Writ of Certiorari* 3. North Carolina Advocates for Justice's Motion for Leave to File *Amicus* Brief 4. Def's Motion to Amend Petition for *Writ of Certiorari*	1. Allowed 2. 3. Allowed 4. **Beasley, J., recused**
444P14	Estate of Timothy Alan Hurst, by and through Christian P. Cherry as Collector; Jeffery Wayne Henley a/k/a Jeffrey Wayne Henley; and Beverly Henley v. Moorehead I, LLC; Cramer Mountain Development Company, LLC a/k/a Cramer Mountain Development LLC; Park West Premier Properties, LLC; Park West Investments, Inc.; Park West-Stone, LLC; Park West Development Company, Inc.; Cobblestone Builders, LLC; Frank DeSimone a/k/a Frank Desimone; Bruce B. Blackmon, Jr., a/k/a Bruce Blackmon a/k/a Bruce B. Blackman; Gregory A. Mascaro a/k/a Greg Mascaro	Plts' Petition for *Writ of Mandamus*	Dismissed

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

1 MARCH 2018

449P11-17	In re Charles Everette Hinton	1. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Petitioner's *Pro Se* Motion for Full Evidentiary Hearing	1. Denied **01/12/2018** 2. Denied **01/12/2018** **Ervin, J., recused**
451A16	Karen W. Flynn, Individually and in Her Representative Capacity as Trustee for: 2002 Irrevocable Trust for Family of Martha P. Wilson; and Her Capacity as Account Custodian for: Brynley Elizabeth Wylde, Jake William Flynn, Jeffrey E. Flynn III, Joshua R. Flynn, Keegan B. Wall, Makenna Kathleen Wylde, and Riley Page Wall v. David Wayne Schamens; Piliana Moses Schamens, Individually and in Her Capacity as a Member of Invictus Asset Management, LLC; Invictus Asset Management, LLC, Individually and in Its Capacity as the General Partner of Invictus Capital Growth & Income Fund, LLP, and Invictus Income Fund, LLP; Invictus Funds, LLC; and Tradedesk Financial Group, Inc. d/b/a Tradestream Analytics, Ltd.	1. Defs' (David Wayne Schamens & Piliana Moses Schamens) *Pro Se* Notice Of Appeal Based Upon a Constitutional Question (COA16-410) 2. Plt's Motion to Dismiss Appeal 3. Plt's Motion for Sanctions	1. — 2. Allowed 3. Allowed
480P12-2	In re Charles Hollenback	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Dismissed

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

1 MARCH 2018

548A00-2	State v. Christina Shea Walters (DEATH)	1. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Cumberland County	1. Allowed
		2. North Carolina Advocates for Justice's Motion for Leave to File Amicus Brief	2. Allowed
		3. Charles Becton, Charles Daye, Valerie Johnson, Irving L. Joyner, Floyd B. McKissick, Jr., Cressie H. Thigpen, Jr., and Fred J. Williams' Motion for Leave to File Amicus Brief	3. Allowed
		4. Retired Members of the North Carolina Judiciary's Motion for Leave to File Amicus Brief	4. Allowed
580P05-15	In re David L. Smith	1. Petitioner's *Pro Se* Motion to Amend *Pro Se* Petition	1. Denied **12/13/2017**
		2. Petitioner's *Pro Se* Petition for *Writ of Mandamus*	2. Denied **12/13/2017**
		3. Petitioner's *Pro Se* Petition for *Writ of Mandamus*	3. Denied **12/13/2017**
		4. Petitioner's *Pro Se* Petition for *Writ of Mandamus*	4. Denied **12/13/2017**

THE CITY OF ASHEVILLE, PETITIONER
v.
ROBERT H. FROST, RESPONDENT

No. 170A17

Filed 6 April 2018

Public Officers and Employees—termination—police officer—right to request jury trial

The Court of Appeals erred in a police officer termination case by concluding that only petitioner City of Asheville had the right to request a jury trial. A respondent, just as much as a petitioner, may demand a jury trial in a superior court appeal of an Asheville Civil Service Board decision. The case was reversed and remanded to the Court of Appeals for further remand to the superior court.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 800 S.E.2d 118 (2017), reversing an order entered on 22 December 2015 by Judge William H. Coward in Superior Court, Buncombe County. Heard in the Supreme Court on 12 December 2017.

McGuire, Wood & Bissette, P.A., by Sabrina Presnell Rockoff; and City of Asheville City Attorney's Office, by Robin Currin, Kelly Whitlock, and John Maddux, for petitioner-appellee.

John C. Hunter for respondent-appellant.

MARTIN, Chief Justice.

Appellant Robert H. Frost, a police officer in the Asheville Police Department, was accused of using excessive force against a citizen. The Asheville Police Department began an administrative investigation into the incident and suspended Officer Frost during the course of the investigation. After the investigation had been completed, a panel of supervisors in Officer Frost's chain of command unanimously recommended to the City Police Chief that Officer Frost be terminated. The City Police Chief agreed with the panel's recommendation and terminated Officer Frost. Officer Frost appealed his termination to the Asheville Civil Service Board, which conducted a three-day hearing. The Civil Service Board concluded that the City had "failed to show that [excessive force] was used" and had "failed to provide the employee, Robert Frost, with

adequate due process protections in this matter." The Civil Service Board concluded that Officer Frost's termination was not justified, that his termination should be rescinded, and that his employment should be reinstated with back pay and benefits.

Pursuant to the Asheville Civil Service Law, the City filed a petition for a trial de novo in the Superior Court of Buncombe County to determine whether Officer Frost's termination was justified. Officer Frost—who, because the City had filed the petition in the case, was the respondent—filed a timely response to the petition, requesting a jury trial. The City moved to strike Officer Frost's request for a jury trial, claiming that Officer Frost had no constitutional or statutory right to a jury trial. The superior court denied the City's motion, concluding that the Civil Service Law incorporates Rule 38 of the North Carolina Rules of Civil Procedure and that a respondent has the right to request a jury trial by following the procedures set out in that rule.

By interlocutory appeal, the City appealed this denial to the Court of Appeals. The Court of Appeals reversed the superior court, concluding that "only petitioner City of Asheville had the right to request a jury trial." *City of Asheville v. Frost*, ___ N.C. App. ___, ___, 800 S.E.2d 118, 123 (2017). Judge Robert N. Hunter, Jr. dissented, concluding that "either a petitioner or a respondent has a right to a jury trial following the [Civil Service] Board's determination." *Id.* at ___, 800 S.E.2d at 126 (Hunter, J., dissenting). Based on Judge Hunter's dissent, Officer Frost exercised his statutory right to appeal to this Court.

The right to a jury trial exists only if provided for in the North Carolina Constitution or by statute. *Kiser v. Kiser*, 325 N.C. 502, 507-08, 385 S.E.2d 487, 490 (1989). The parties do not dispute that there is no constitutional right to a jury trial in this case. So this Court must determine whether a respondent such as Officer Frost has a statutory right to a jury trial in an appeal of an Asheville Civil Service Board decision to superior court.

We review questions of statutory interpretation de novo. *In re Foreclosure of Vogler Realty, Inc.*, 365 N.C. 389, 392, 722 S.E.2d 459, 462 (2012). The statutory provision at issue in this case is section 8(g) of the Asheville Civil Service Law, which states:

> Within ten days of the receipt of notice of the decision of the [Asheville Civil Service] Board, either party may appeal to the Superior Court Division of the General Court of Justice for Buncombe County for a trial de novo. The appeal shall be effected by filing with the Clerk of the

> Superior Court of Buncombe County a petition for trial in superior court, setting out the fact[s] upon which the petitioner relies for relief. If the petitioner desires a trial by jury, the petition shall so state. Upon the filing of the petition, the Clerk of the Superior Court shall issue a civil summons as in [a] regular civil action, and the sheriff of Buncombe County shall serve the summons and petition on all parties who did not join in the petition for trial. It shall be sufficient service upon the City for the sheriff to serve the petition and summons upon the clerk of the City. Therefore, the matter shall proceed to trial as any other civil action.

Act of Aug. 3, 2009, ch. 401, sec. 7, 2009 N.C. Sess. Laws 780, 784 (captioned "An Act to Revise the Laws Relating to the Asheville Civil Service Board").

The City argues that the General Assembly intended only the petitioner to have the right to a jury trial because section 8(g) says that, "[i]f the petitioner desires a trial by jury, the petition shall so state." The City maintains that this specific instruction for how a petitioner can exercise the right to a jury trial without an equally specific instruction for a respondent implies that a respondent does not have the right to a jury trial. This conclusion might make sense if section 8(g) said, for example, that "the petitioner has the right to a jury trial." Then we might infer that, by expressly saying that one party has the right, section 8(g) was implying that the other party does not. But the sentence in question does not say that. It says only that, "[i]f the petitioner desires a trial by jury, the petition shall so state." In other words, it says *how* a petitioner can request a jury trial. One can, of course, infer that a petitioner has the right to a jury trial; it would not make any sense to specify how to assert a right that does not exist. But it is wrong to infer the opposite—that is, to infer that a respondent *lacks* the right to a jury trial—from the fact that this sentence speaks only about a petitioner.

When read in its statutory context, moreover, this sentence does not indicate that the right belongs to a petitioner only. In interpreting a statute, a court must consider the statute as a whole and determine its meaning by reading it in its proper context and giving its words their ordinary meaning. *See State v. Jones*, 305 N.C. 520, 531, 290 S.E.2d 675, 681 (1982). Within section 8(g), the sentence that requires a petitioner to request a jury trial in its petition sits in the middle of three other sentences about the petition. The sentence right before the sentence in question tells the petitioner how to file the appeal and what to include in the petition. The

two sentences right after the sentence in question describe how parties will be served with the petition and the accompanying summons. So it makes sense that the sentence in question is likewise about—and only about—the petitioner and the petition. Conversely, it would *not* make sense, given where the sentence appears in section 8(g), to say anything about a respondent, a respondent's pleading, or a respondent's demand for a jury trial. It is no surprise, then, that this sentence says nothing about how a respondent can request a jury trial, and it would be illogical to infer from this sentence that a respondent does not have the right to a jury trial.

Of course, it is not enough to say that a respondent is not barred from having the right to a jury trial. For Officer Frost to prevail in this appeal, the law must actually confer that right on a respondent. As we have already said, the parties agree (and they are correct in agreeing) that there is no constitutional right to a jury trial in this case. So Officer Frost must have a statutory right to a jury trial in order to prevail.

And he does. Considering section 8(g) as a whole and reading its sentences in context with one another, section 8(g) effectively grants a respondent the right to a jury trial.

The final sentence of section 8(g) states that "the matter shall proceed to trial as any other civil action." A civil action is governed by the North Carolina Rules of Civil Procedure, so section 8(g) incorporates, among other things, Rule 38(b) of those Rules. Rule 38(b) does not confer any substantive right to a jury trial in any particular case; that right must come from somewhere else. But under Rule 38(b), the right to a jury trial is generally determined by the type of issue that a lawsuit presents, not by which party is requesting the jury trial. *See* N.C. R. Civ. P. 38(b) ("Any party may demand a trial by jury of any *issue* triable of right by a jury . . . ." (emphasis added)).

Section 8(g) indicates that issues arising in section 8(g) appeals are indeed issues on which a party may demand a jury trial. As we have already discussed, by saying that, "[i]f the petitioner desires a trial by jury, the petition shall so state," section 8(g) makes it clear that a petitioner has the right to a jury trial. Because section 8(g) allows "either party" to appeal an Asheville Civil Service Board decision, the petitioner in any given appeal could be either the City or the employee. The issue being appealed could therefore be an issue that either the City or the employee wishes to appeal. This means that any issue related to an Asheville Civil Service Board decision is an "issue triable of right by a jury" in an appeal to superior court. Under Rule 38(b), moreover, "*[a]ny*

party may demand a trial by jury of any issue triable of right by a jury." (Emphasis added.)

Thus, a respondent, just as much as a petitioner, may demand a jury trial in a superior court appeal of an Asheville Civil Service Board decision. We therefore reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for further remand to the superior court for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

IN THE MATTER OF THE FORECLOSURE UNDER THE POWERS GRANTED IN CHAPTER 47F OF THE NORTH CAROLINA GENERAL STATUTES AND IN THE DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR ADDISON RESERVE AT THE PARK AT PERRY CREEK SUBDIVISION RECORDED AT BOOK 9318, PAGE 369, ET SEQ., WAKE COUNTY REGISTRY CONCERNING GINA A. ACKAH

No. 334A17

Filed 6 April 2018

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 804 S.E.2d 794 (2017), affirming in part, reversing in part, and remanding an order setting aside a foreclosure sale issued by Judge Kendra D. Hill, and reversing an order for possession of real property issued by an Assistant Clerk of Superior Court, both entered on 30 December 2015 in Superior Court, Wake County. Heard in the Supreme Court on 14 March 2018.

No brief for petitioner-appellee Addison Reserve Homeowners Association, Inc.

Adams, Howell, Sizemore & Lenfestey, P.A., by Ryan J. Adams, for respondent-appellant Gina Ackah.

Law Office of Edward Dilone, PLLC, by Edward D. Dilone, for third-party appellee Jones Family Holdings, LLC.

PER CURIAM.

AFFIRMED.

IN RE SHIPLEY

[370 N.C. 595 (2018)]

IN RE INQUIRY CONCERNING A DEPUTY COMMISSIONER, NO. 15-057
WILLIAM HENRY SHIPLEY, RESPONDENT

No. 425A17

Filed 6 April 2018

Attorneys—disciplinary hearing—public reprimand—conduct prejudicial to administrative of justice

A deputy commissioner of the North Carolina Industrial Commission was publicly reprimanded for conduct in violation of Canons 1 and 2A of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brought the judicial office into disrepute in violation of N.C.G.S. § 7A-376.

This matter is before the Court pursuant to N.C.G.S. §§ 7A-376 and -377 upon a recommendation by the Judicial Standards Commission entered 29 November 2017 that Respondent William Henry Shipley, a Deputy Commissioner of the North Carolina Industrial Commission, be publicly reprimanded for conduct in violation of Canons 1 and 2A of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376.[1] This matter was calendared for argument in the Supreme Court on 10 January 2018 but determined on the record without briefs or oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure and Rule 3(c) of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission.

No counsel for Judicial Standards Commission or Respondent.

ORDER

The issue before this Court is whether Deputy Commissioner William Henry Shipley (Respondent) should be publicly reprimanded for violations of Canons 1 and 2A of the North Carolina Code of Judicial Conduct amounting to conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S.

1. Pursuant to N.C.G.S. § 97-78.1, "[t]he Code of Judicial Conduct for judges of the General Court of Justice and the procedure for discipline of judges in Article 30 of Chapter 7A of the General Statutes shall apply to commissioners and deputy commissioners" of the North Carolina Industrial Commission. N.C.G.S. § 97-78.1 (2017).

§ 7A-376(b). Respondent has not challenged the findings of fact made by the Judicial Standards Commission (the Commission) or opposed the Commission's recommendation that he be publicly reprimanded by this Court.

On 10 February 2017, the Commission Counsel filed a Statement of Charges against Respondent alleging that he had "engaged in conduct inappropriate to his office when, on April 2, 2015, Respondent wrecked his vehicle while driving under the influence of an impairing substance, putting at risk his own life and the lives of others." According to the allegations in the Statement of Charges, on that night Respondent's vehicle struck another moving vehicle after Respondent failed to yield the right of way when attempting to turn left. Neither Respondent nor the other driver appeared injured; both declined EMS attention. The Statement of Charges further stated that Respondent registered a blood alcohol level of .08 when tested at the local detention center. He was charged with driving while impaired and failing to yield, charges which were later dismissed. Respondent voluntarily reported these charges to the Commission and fully cooperated with the Commission's inquiry into this matter. In the Statement of Charges, the Commission Counsel asserted that Respondent's actions on 2 April 2015 "constitute[d] conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or otherwise constitutes grounds for disciplinary proceedings pursuant to Chapter 7A, Article 30 and Chapter 97, Article 1 of the General Statutes of North Carolina."

On 24 March 2017, Respondent filed an answer in which he admitted in part and denied in part the allegations in the Statement of Charges. Specifically, he denied that he had failed to yield the right of way when turning left and that his blood alcohol level had been .08. On 2 October 2017, Respondent and the Commission Counsel filed a number of joint evidentiary, factual, and disciplinary stipulations as permitted by Commission Rule 22 that tended to support a decision to publicly reprimand Respondent. On 13 October 2017, the Commission heard this matter.

On 29 November 2017, the Commission filed a Recommendation of Judicial Discipline, in which it made the following findings of fact:

> 1. Around 9:00 p.m. on 2 April 2015, Respondent was travelling northbound on U.S. Route 70 (Glenwood Avenue), a public street/highway in Raleigh, North Carolina. As Respondent reached the area of Glenwood Avenue north of downtown Raleigh known as Five

Points, he attempted a left-hand turn onto Fairview Road. While engaged in the turn, another vehicle travelling on Glenwood Avenue collided with Respondent's vehicle.

2. Shortly after the vehicle collision occurred, Deputy Sheriff Josh Legan of the Wake County Sheriff's [Office] arrived at the scene. After Respondent voluntarily submitted to several standardized field sobriety tests, Deputy Legan formed the opinion that Respondent had consumed a sufficient quantity of alcohol so that his mental and physical faculties were appreciably impaired.

3. At the local detention center, Respondent submitted to two (2) Intoximeter Intox EC/IR II tests. Respondent's alcohol concentration was reported as .08 grams of alcohol per 210 liters of breath. Deputy Legan then cited Respondent for driving while impaired and failing to yield the right of way.

4. On 7 April 2015, Respondent voluntarily reported the charges to the Commission and fully cooperated with the Commission's inquiry into this matter.

5. Respondent's charges were set for trial in Wake County District Court on 8 September 2016. The prosecution failed to produce Deputy Legan as a witness, and Respondent's charges were dismissed by the Wake County District Attorney's Office after their motion to continue was denied by the presiding judge.

(Citations omitted.) Based upon these findings of fact, the Commission concluded as a matter of law that:

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

2. Canon 2 of the Code of Judicial Conduct generally mandates that "[a] judge should avoid impropriety in all the judge's activities." Canon 2A specifies that "[a] judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes

public confidence in the integrity and impartiality of the judiciary."

3. The Commission's findings of fact show that Respondent was involved in a vehicle accident on 2 April 2015, after which breath alcohol testing resulted in a report showing that Respondent's alcohol concentration was .08 grams of alcohol per 210 liters of breath. As a result, Respondent was cited for driving under the influence of an impairing substance and failing to yield the right of way in connection with that accident, although the criminal case was ultimately dismissed for procedural reasons.

4. The Commission concludes that by driving under the influence of an impairing substance and thereafter becoming involved in a vehicle accident, Respondent put his own life and the lives of others at risk, and thus failed to personally observe appropriate standards of conduct necessary to preserve the integrity of the judiciary in violation of Canon 1 of the North Carolina Code of Judicial Conduct and failed to comply with the law and conduct himself in a manner that promotes public confidence in the integrity of the judiciary in violation of Canon 2A of the North Carolina Code of Judicial Conduct.

5. Upon the agreement of Respondent and the Commission's independent review of the Stipulation and the record, the Commission further concludes that Respondent's violations of Canon 1 and Canon 2A of the Code of Judicial Conduct amount to conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of N.C. Gen. Stat. § 7A- 376(b).

(Brackets in original and citations omitted.) Based upon these findings of fact and conclusions of law, the Commission recommended that this Court publicly reprimand Respondent for "driving under the influence of an impairing substance and thereafter becoming involved in a vehicle accident." The Commission based this recommendation on the Commission's earlier findings and conclusions and the following additional dispositional determinations:

1. Respondent agreed to enter into the Stipulation and Agreement for Stated Disposition to bring closure to

this matter and because of his concern for protecting the integrity of the judiciary and the Industrial Commission.

2. Respondent has a good reputation in his community.

3. Respondent voluntarily completed an alcohol education program.

4. The actions identified by the Commission as misconduct by Respondent appear to be isolated and do not form any sort of recurring pattern of misconduct.

5. Respondent self-reported the incident of 2 April 2015 to the Commission and has been fully cooperative with the Commission's investigation, voluntarily providing information about the incident.

6. Respondent's record of service to the Industrial Commission, the profession, and the community at large is otherwise exemplary.

7. Respondent agrees to accept a recommendation from the Commission that the North Carolina Supreme Court publicly reprimand him for his conduct and acknowledges that the conduct set out in the Stipulation establishes by clear and convincing evidence that his conduct is in violation of the North Carolina Code of Judicial Conduct and is prejudicial to the administration of justice that brings the judicial office into disrepute in violation of North Carolina General Statute § 7A-376(b).

8. Pursuant to N.C. Gen. Stat. § 7A-377(a5), which requires that at least five members of the Commission concur in a recommendation of public discipline to the Supreme Court, all six Commission members present at the hearing of this matter concur in this recommendation to **publicly reprimand** Respondent.

(Citations omitted.)

When reviewing a recommendation from the Commission in a judicial discipline proceeding, "the Supreme Court 'acts as a court of original jurisdiction, rather than in its typical capacity as an appellate court.' " *In re Mack*, 369 N.C. 236, 249, 794 S.E.2d 266, 273 (2016) (order) (quoting *In re Hartsfield*, 365 N.C. 418, 428, 722 S.E.2d 496, 503 (2012) (order)). In

conducting an independent evaluation of the evidence, "[w]e have discretion to 'adopt the Commission's findings of fact if they are supported by clear and convincing evidence, or [we] may make [our] own findings.' " *Id.* at 249, 794 S.E.2d at 273 (quoting *In re Hartsfield*, 365 N.C. at 428, 722 S.E.2d at 503 (second and third sets of brackets in original)). "The scope of our review is to 'first determine if the Commission's findings of fact are adequately supported by clear and convincing evidence, and in turn, whether those findings support its conclusions of law.' " *Id.* at 249, 794 S.E.2d at 274 (quoting *In re Hartsfield*, 365 N.C. at 429, 722 S.E.2d at 503).

After careful review, this Court concludes that the Commission's findings of fact, including the dispositional determinations set out above, are supported by clear, cogent, and convincing evidence in the record. In addition, we conclude that the Commission's findings of fact support its conclusions of law. As a result, we accept the Commission's findings and conclusions and adopt them as our own. Based upon those findings and conclusions and the recommendation of the Commission, we conclude and adjudge that Respondent should be publicly reprimanded.

Therefore, pursuant to N.C.G.S. §§ 7A-376(b) and -377(a5), it is ordered that Respondent William Henry Shipley be PUBLICLY REPRIMANDED for violations of Canons 1 and 2A of the North Carolina Code of Judicial Conduct amounting to conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b).

By order of the Court in Conference, this the 6th day of April, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of April, 2018.

Amy Funderburk
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

THOMAS JACKSON AND KORLETTER HORNE JACKSON
v.
CENTURY MUTUAL INSURANCE COMPANY

No. 337A17

Filed 6 April 2018

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 868 (2017), affirming an order of summary judgment entered on 3 June 2016 by Judge Susan E. Bray in Superior Court, Forsyth County. Heard in the Supreme Court on 12 March 2018.

Botros Law, PLLC, by Tony S. Botros, for plaintiff-appellants.

Cranfill Sumner & Hartzog LLP, by Susan K. Burkhart, for defendant-appellee.

PER CURIAM.

AFFIRMED.

MICHAEL KRAWIEC, JENNIFER KRAWIEC, AND HAPPY DANCE, INC./CMT DANCE, INC. (D/B/A FRED ASTAIRE FRANCHISED DANCE STUDIOS)
v.
JIM MANLY, MONETTE MANLY, METROPOLITAN BALLROOM, LLC, RANKO BOGOSAVAC, AND DARINKA DIVLJAK

No. 252A16

Filed 6 April 2018

1. Torts, Other—tortious interference with contract—knowledge of contract

Where plaintiffs, who owned a dance studio, allegedly entered into contracts with defendant dancers pursuant to which plaintiffs procured visas for defendant dancers in exchange for the dancers' express promise to work exclusively for plaintiffs, and thereafter defendant dancers began working for defendant dance studio, the N.C. Business Court did not err by dismissing plaintiffs' claim against defendant dance studio for tortious interference with contract. None of the factual allegations in plaintiffs' amended complaint demonstrated how the defendant dance studio could have known of the alleged exclusive employment agreement.

2. Trade Secrets—misappropriation of—sufficient particularity in pleadings

Where plaintiffs, who owned a dance studio, allegedly entered into contracts with defendant dancers pursuant to which plaintiffs procured visas for defendant dancers in exchange for the dancers' express promise to work exclusively for plaintiffs, and thereafter defendant dancers began working for defendant dance studio, the N.C. Business Court did not err by dismissing plaintiffs' claim against defendants for misappropriation of trade secrets. Plaintiffs' description in their amended complaint of their trade secrets as their "original ideas and concepts for dance productions, marketing strategies and tactics, as well as student, client and customer lists and their contact information" failed to provide sufficient particularity to enable defendants to delineate what they were accused of misappropriating and a court to determine whether misappropriation had or was threatened to occur.

3. Unfair Trade Practices—underlying claims dismissed

Where plaintiffs, who owned a dance studio, allegedly entered into contracts with defendant dancers pursuant to which plaintiffs procured visas for defendant dancers in exchange for the dancers'

express promise to work exclusively for plaintiffs, and thereafter defendant dancers began working for defendant dance studio, the N.C. Business Court did not err by dismissing plaintiffs' claim against defendants for unfair and deceptive practices (UDP). Because plaintiffs failed to state a valid claim for tortious interfere with contact or misappropriation of trade secrets, plaintiffs necessarily also failed to adequately state a claim for UDP.

4. Torts, Other—civil conspiracy—dismissed

Where plaintiffs, who owned a dance studio, allegedly entered into contracts with defendant dancers pursuant to which plaintiffs procured visas for defendant dancers in exchange for the dancers' express promise to work exclusively for plaintiffs, and thereafter defendant dancers began working for defendant dance studio, the N.C. Business Court did not err by dismissing plaintiffs' claims against defendants for civil conspiracy. Plaintiffs' amended complaint lacked sufficient detail to state a claim for civil conspiracy based on defendants' unlawful behavior, and the other acts alleged were held by the N.C. Supreme Court to be pled insufficiently.

5. Unjust Enrichment—benefit of work visa

Where plaintiffs, who owned a dance studio, allegedly entered into contracts with defendant dancers pursuant to which plaintiffs procured visas for defendant dancers in exchange for the dancers' express promise to work exclusively for plaintiffs, and thereafter defendant dancers began working for defendant dance studio, the N.C. Business Court did not err by dismissing plaintiffs' claims against defendant dance studio for unjust enrichment. While plaintiffs' amended complaint alleged that defendant dance studio received the benefit of plaintiffs' procurement of their O1-B work visas for defendant dancers, this allegation was contradicted by documents attached to plaintiffs' amended complaint that indicated that the visas authorized defendant dancers to be employed only by plaintiffs.

6. Corporations—piercing the veil—not a theory of liability

Where plaintiffs, who owned a dance studio, allegedly entered into contracts with defendant dancers pursuant to which plaintiffs procured visas for defendant dancers in exchange for the dancers' express promise to work exclusively for plaintiffs, and thereafter defendant dancers began working for defendant dance studio, the Supreme Court rejected plaintiffs' argument that defendant dance studio owners (the Manlys) could be held liable in their individual

capacities for the tort claims brought against defendant dance studio (Metropolitan Ballroom). Because plaintiffs failed to state a valid, underlying claim against defendants, it was immaterial whether Metropolitan Ballroom or the Manlys, in their individual capacities, would be liable for those claims.

Justice BEASLEY dissenting.

Appeal pursuant to N.C.G.S. § 7A-27(a)(3)(a) from an order dated 22 January 2016 entered by Judge Louis A. Bledsoe, III, Special Superior Court Judge for Complex Business Cases appointed by the Chief Justice pursuant to N.C.G.S. § 7A-45.4, in Superior Court, Mecklenburg County. Heard in the Supreme Court on 30 August 2017.

Hatcher Legal, PLLC, by Erin B. Blackwell and Nichole M. Hatcher, for plaintiff-appellants.

Brock & Scott, PLLC, by Renner St. John, for defendant-appellees.

JACKSON, Justice.

In this case we consider whether plaintiffs have stated claims for tortious interference with contract, misappropriation of trade secrets, unfair and deceptive practices, civil conspiracy, and unjust enrichment sufficient to survive defendants' motions to dismiss pursuant to North Carolina Rule of Civil Procedure 12(b)(6). *See* N.C.G.S. § 1A-1, Rule 12(b)(6) (2017). Because we conclude that plaintiffs' amended complaint reveals the absence of law or facts essential to these claims, or alleges facts that necessarily defeat these claims, we affirm the portions of the North Carolina Business Court's 22 January 2016 Order and Opinion on Defendants' Motions to Dismiss Amended Complaint dismissing the claims listed above.

According to the factual allegations in plaintiffs' amended complaint, which we take as true for purposes of reviewing an order on a motion to dismiss pursuant to Rule 12(b)(6), *see State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 442, 666 S.E.2d 107, 114 (2008) (quoting *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 325, 626 S.E.2d 263, 266 (2006)), plaintiffs Michael Krawiec and Jennifer Krawiec are residents and citizens of North Carolina who own plaintiff Happy Dance, Inc./CMT Dance, Inc. (Happy Dance)—a North Carolina corporation doing business as Fred Astaire Franchised Dance Studios in Forsyth County. Defendants Jim Manly and Monette Manly own

defendant Metropolitan Ballroom, LLC (Metropolitan Ballroom) (collectively, the Metropolitan defendants), which is a North Carolina limited liability company doing business in Mecklenburg County. Defendants Ranko Bogosavac, a citizen of Bosnia and Herzegovina, and Darinka Divljak, a Serbian citizen, (the dancer defendants) were employed by plaintiffs pursuant to O1-B nonimmigrant work visas.

On or about 18 July 2011, plaintiffs entered into contracts with Bogosavac and Divljak pursuant to which plaintiffs procured the visas in exchange for each dancer's express promise to work exclusively for plaintiffs as a dance instructor and performer. Bogosavac, who previously had been employed by plaintiffs, was to work exclusively for plaintiffs from 31 January 2012 to 3 January 2013, and Divljak was to do the same from 1 September 2011 to 31 August 2014. The dancer defendants also agreed not to work for any other company that offered dance instruction or competed against Happy Dance for one year after either the expiration or termination of their employment with Happy Dance.

On or about 7 February 2012, the dancer defendants began working as dance instructors for the Metropolitan defendants in violation of their respective employment agreements with plaintiffs. In support of this allegation, plaintiffs attached to their amended complaint copies of Bogosavac's and Divljak's biographies as they appeared on a list of Metropolitan Ballroom's staff on Metropolitan Ballroom's website on 7 February 2012. In addition, according to plaintiffs, the dancer defendants shared confidential information with the Metropolitan defendants, specifically, plaintiffs' "ideas and concepts for dance productions, marketing strategies and tactics, as well as . . . customer lists [containing] contact information." From this information, the Metropolitan defendants produced and marketed plaintiffs' dance shows as their own, original productions. The dancer defendants also lured away plaintiffs' customers, resulting in a significant loss of revenue for plaintiffs.

Based on these factual allegations, plaintiffs asserted various causes of action against all defendants. The Metropolitan defendants and dancer defendants all filed motions to dismiss the amended complaint in its entirety pursuant to Rule 12(b)(6). In its order and opinion regarding the motions to dismiss, the Business Court granted defendants' motions as to all of plaintiffs' claims except for plaintiffs' claims for breach of contract, fraudulent misrepresentation, unjust enrichment, and punitive damages against the dancer defendants. Plaintiffs filed a notice of appeal from the Business Court's order and opinion to this Court pursuant to N.C.G.S. § 7A-27(a)(2)-(3). In their appeal, plaintiffs challenge the Business Court's dismissal of their claims against the Metropolitan

defendants for tortious interference with contract, misappropriation of trade secrets, unfair and deceptive practices, civil conspiracy, and unjust enrichment. Plaintiffs also contest the Business Court's dismissal of their claims against the dancer defendants for misappropriation of trade secrets and civil conspiracy. We consider each of plaintiffs' dismissed claims in turn.

On appeal from an order dismissing an action pursuant to Rule 12(b)(6), we conduct de novo review. *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 8 (2015) (citing *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013)). A Rule 12(b)(6) dismissal "is appropriate when the complaint 'fail[s] to state a claim upon which relief can be granted.' " *Id.* at 448, 781 S.E.2d at 7 (alteration in original) (quoting N.C.G.S. § 1A-1, Rule 12(b)(6) (2013)). We have determined that a complaint fails in this manner when: "(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." *Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citing *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985)). "When reviewing a complaint dismissed under Rule 12(b)(6), we treat a plaintiff's factual allegations as true." *Ridgeway Brands*, 362 N.C. at 442, 666 S.E.2d at 114 (quoting *Stein*, 360 N.C. at 325, 626 S.E.2d at 266). In conducting our analysis, we also consider any exhibits attached to the complaint because "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." N.C.G.S. § 1A-1, Rule 10(c) (2017).

[1] The Business Court dismissed plaintiffs' claim against the Metropolitan defendants for tortious interference with contract on the basis that plaintiffs failed to allege that the Metropolitan defendants knew of the exclusive employment agreement between plaintiffs and the dancer defendants. Plaintiffs contend that the Business Court was in error because plaintiffs' factual allegations included the statement that the Metropolitan defendants had "knowledge of the contracts." We disagree.

Whether plaintiffs sufficiently alleged that the Metropolitan defendants had knowledge of the exclusivity agreement is essential because a claim for tortious interference with contract requires proof of five elements:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right

> against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

United Labs., Inc. v. Kuykendall, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988) (citing *Childress v. Abeles*, 240 N.C. 667, 674, 84 S.E.2d 176, 181-82 (1954)).

The entirety of the relevant allegation in plaintiffs' amended complaint is that "Defendants Metropolitan and Manlys, as well as Defendants Bogosavac and Divljak, all had knowledge and/or should have had knowledge of the existing contracts pursuant to the O1-B work visas between Plaintiffs and Defendants Bogosavac and Divljak." That the Metropolitan defendants allegedly knew of the existing contract "pursuant to the O1-B work visas" does not satisfy plaintiffs' Rule 12(b)(6) burden because the amended complaint is devoid of any allegation that the work visas themselves constituted or contained any reference to an exclusivity agreement. In fact, elsewhere in the amended complaint, plaintiffs only alleged that "[p]ursuant to the second I-129 Petition . . . Defendant Bogosavac agreed to work exclusively for Plaintiffs . . . . The agreement did not authorize Defendant Bogosavac to engage in other part-time or concurrent work with other dance studios." Regarding Divljak, plaintiffs stated, in even more general terms, "Pursuant to the contract with Plaintiffs, Defendant Divljak was to work exclusively for Plaintiffs . . . . The agreement did not authorize Defendant Divljak to engage in other part-time or concurrent work with other dance studios." Neither of these factual allegations demonstrates how the Metropolitan defendants could have known of the alleged exclusive employment agreement through knowledge of the O1-B work visas. Therefore, we conclude that "the complaint on its face reveals the absence of facts sufficient to make a good claim" for tortious interference with contract because the plaintiffs failed to allege that the Metropolitan defendants had knowledge of the exclusivity provision. *Wood*, 355 N.C. at 166, 558 S.E.2d at 494 (citing *Oates*, 314 N.C. at 278, 333 S.E.2d at 224).

[2] We now turn to plaintiffs' claims for misappropriation of trade secrets against all defendants. The Business Court dismissed these claims on the basis that plaintiffs both failed to identify the alleged trade secrets with sufficient particularity and to allege the specific acts of misappropriation in which defendants engaged. On appeal, plaintiffs contend that their description of their trade secrets as "original ideas and concepts for dance productions, marketing strategies and tactics, as

well as student, client and customer lists and their contact information," was legally sufficient. Plaintiffs also argue that customer lists and contact information are protectable trade secrets as a matter of law. Finally, plaintiffs maintain that they adequately described the act of misappropriation by stating that the dancers learned of the pertinent information in confidence while employed by plaintiffs, that the dancers shared that information with the Metropolitan defendants without plaintiffs' consent, and the Metropolitan defendants used that information to benefit their own business. Consequently, plaintiffs contend that the Business Court erred in dismissing their claim. We disagree with plaintiffs and reach the same conclusion as the Business Court, albeit based upon a somewhat different rationale.

Section 66-153 of the General Statutes provides that an "owner of a trade secret shall have remedy by civil action for misappropriation of his trade secret." N.C.G.S. § 66-153 (2017). For purposes of the Trade Secrets Protection Act, misappropriation is the "acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret." *Id.* § 66-152(1) (2017). A trade secret consists of

> business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
>
> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Id. § 66-152(3) (2017). As to the burden of proof, the General Statutes further direct:

> Misappropriation of a trade secret is prima facie established by the introduction of substantial evidence that the person against whom relief is sought both:
>
> (1) Knows or should have known of the trade secret; and

(2) Has had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner.

Id. § 66-155 (2017).

This Court has not considered the requirements for pleading a claim for misappropriation of trade secrets previously, but we conclude that the reasoning of our Court of Appeals, which mirrors the notice-pleading standard set forth in North Carolina Rule of Civil Procedure 8,[1] is persuasive on this topic. The Court of Appeals has stated, "To plead misappropriation of trade secrets, a plaintiff must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur." *Washburn v. Yadkin Valley Bank & Tr. Co.*, 190 N.C. App. 315, 326, 660 S.E.2d 577, 585 (2008) (quoting *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 510-11, 606 S.E.2d 359, 364 (2004)) (internal quotation marks omitted), *disc. rev. denied*, 363 N.C. 139, 674 S.E.2d 422 (2009); *see Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 897 (Del. 2002) (concluding that a defendant had sufficient notice of a claim for misappropriation of trade secrets to survive a motion to dismiss when the court could identify the trade secret as "the allegedly unique combination of marketing strategies and processes for the implementation of a program under which consumers would be able to use rebates from their qualified purchases to fund a 529 Plan"); *see also SmithKline Beecham Pharm. Co. v. Merck & Co.*, 766 A.2d 442, 447 (Del. 2000) (noting that a plaintiff "must disclose the allegedly misappropriated trade secrets with reasonable particularity" in order to, *inter alia*, "ensure that defendants are put on notice of the claimed trade secrets early in the litigation, preventing defendants from being subject to unfair surprise on the eve of trial"). This standard also has been applied by federal courts in our state. *See Prometheus Grp. Enters. v. Viziya Corp.*, No. 5:14-CV-32-BO, 2014 WL 3854812, at *7 (E.D.N.C. Aug. 5, 2014) ("In order to adequately plead misappropriation of trade secrets, a plaintiff 'must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether misappropriation has or is threatened

1. Rule 8(a)(1) requires "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief." N.C.G.S. § 1A-1, Rule 8(a)(1) (2017).

to occur.' " (quoting *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 468, 579 S.E.2d 449, 453 (2003))); *Asheboro Paper & Packaging, Inc. v. Dickinson*, 599 F. Supp. 2d 664, 676 (M.D.N.C. 2009) ("The alleged trade secret information must be identified 'with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur.' " (quoting *Analog Devices*, 157 N.C. App. at 468, 579 S.E.2d at 453)). In contrast, "a complaint that makes general allegations in sweeping and conclusory statements, without specifically identifying the trade secrets allegedly misappropriated, is 'insufficient to state a claim for misappropriation of trade secrets.' " *Washburn*, 190 N.C. App. at 327, 660 S.E.2d at 585-86 (quoting *VisionAIR*, 167 N.C. App. at 511, 606 S.E.2d at 364).

Provided that the information meets the two requirements for a trade secret as defined in subsection 66-152(3), we agree with the determination of the Court of Appeals that "[i]nformation regarding customer lists, pricing formulas and bidding formulas can qualify as a trade secret under G.S. § 66-152(3)." *Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc.*, 160 N.C. App. 520, 525, 586 S.E.2d 507, 511 (2003) (citation omitted). We are persuaded by the fact that other jurisdictions have reached the same conclusion. *See, e.g.*, *Home Pride Foods, Inc. v. Johnson*, 262 Neb. 701, 709, 634 N.W.2d 774, 781 (2001) ("We agree [with other cited jurisdictions] and hold that a customer list can be included in the definition of a trade secret . . . ."); *Ed Nowogroski Ins., Inc. v. Rucker*, 137 Wash. 2d 427, 440, 971 P.2d 936, 943 (1999) (en banc) ("A customer list is one of the types of information which can be a protected trade secret if it meets the criteria of the Trade Secrets Act." (citing *Am. Credit Indem. Co. v. Sacks*, 213 Cal. App. 3d 622, 262 Cal. Rptr. 92 (1989))); *Fred's Stores of Miss., Inc. v. M & H Drugs, Inc.*, 96-CA-00620-SCT, 96-CA-00633-SCT (¶¶ 21, 28), 725 So. 2d 902, 910-11 (1998) (en banc) (holding that the information on a customer list qualified as a trade secret when evidence showed that it had independent economic value, was not known or readily ascertainable, and was subject to reasonable efforts to maintain its secrecy). However, in light of the requirements of subsection 66-152(3), a customer database did not constitute a trade secret when "the record show[ed] that defendants could have compiled a similar database through public listings such as trade show and seminar attendance lists." *Combs & Assocs. v. Kennedy*, 147 N.C. App. 362, 370, 555 S.E.2d 634, 640 (2001) (citation omitted). Similarly, a plaintiff failed to allege sufficiently that its "customer lists and other compilations of customer data" were protected trade secrets when it "ha[d] not come forward with any evidence to show that the company took any special

precautions to ensure the confidentiality of its customer information" and "any information used to contact the clients would have been easily accessible to defendant through a local telephone book." *NovaCare Orthotics & Prosthetics E., Inc. v. Speelman*, 137 N.C. App. 471, 478, 528 S.E.2d 918, 922 (2000); *see also Asheboro Paper*, 599 F. Supp. 2d at 676 (noting that "[c]ustomer names and addresses may not be protected as a 'trade secret' inasmuch as they can be readily ascertained through independent development" (citing *UBS PaineWebber, Inc. v. Aiken*, 197 F. Supp. 2d 436 (W.D.N.C. 2002))).

In their amended complaint, plaintiffs described their trade secrets only as their "original ideas and concepts for dance productions, marketing strategies and tactics, as well as student, client and customer lists and their contact information." Plaintiffs provided no further detail about these ideas, concepts, strategies, and tactics sufficient to put defendants on notice as to the precise information allegedly misappropriated. In addition, plaintiffs' failure to describe a specific idea, concept, strategy, or tactic with respect to their marketing plan or to provide any detail about their dance productions renders their claim too general for this Court to determine—even taking plaintiffs' factual allegations as true—whether there is a "formula, pattern, program, device, compilation of information, method, technique, or process" at issue that "[d]erives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering." N.C.G.S. § 66-152(3)(a). Similarly, plaintiffs' amended complaint, on its face, does not show that plaintiffs' customer lists constituted a protected trade secret because plaintiffs failed to allege that the lists contained any information that would not be readily accessible to defendants. Like the Ohio Court of Common Pleas in an often cited case involving a dispute between a dance studio and its former employee, we recognize that "[t]here is no presumption that a thing is a secret," and emphasize the shortcomings of "general allegations" in making a case for misappropriation of trade secrets. *Arthur Murray Dance Studios of Cleveland, Inc. v. Witter*, 105 N.E.2d 685, 709-10 (Ohio Ct. Com. Pl. 1952) (citing *Super Maid Cook-Ware Corp. v. Hamil*, 50 F.2d 830, 832 (5th Cir. 1931)).

In light of the concern inherent in any misappropriation of trade secrets claim that, in pursuing litigation, the alleged trade secret not be revealed in a public document such as the complaint, *see Glaxo Inc. v. Novopharm Ltd.*, 931 F. Supp. 1280, 1301 (E.D.N.C. 1996), we note at this point that our analysis of plaintiffs' claim is entirely dependent upon the extremely general nature of plaintiffs' allegations. There exists a wide

gulf between plaintiffs' description of its alleged trade secrets as "original ideas and concepts for dance productions" and "marketing strategies and tactics," and exposure or compromise of the critical details of those alleged trade secrets. If plaintiffs had provided additional descriptors to put defendants and the courts on notice as to which "original ideas and concepts for dance productions" and "marketing strategies and tactics," were allegedly misappropriated, then we would have a different claim before us with the potential for a different outcome.

Additionally, the only allegation of secrecy in plaintiffs' amended complaint is that "Plaintiffs shared this information with Defendants Bogosavac and Divljak in confidence." That plaintiff shared the information at issue with the dancer defendants with nothing more than an expectation of confidentiality is insufficient to establish that the information was the "subject of efforts that [were] reasonable under the circumstances to maintain its secrecy." *Id.* § 66-152(3)(b). Plaintiffs' amended complaint is devoid of any allegation of a method, plan, or other act by which they attempted to maintain the secrecy of the alleged trade secrets. For all of these reasons, plaintiffs failed to allege the existence of a trade secret in their amended complaint.

[3] We next address the Metropolitan defendants' motion to dismiss plaintiffs' claim for unfair and deceptive practices (UDP). The Business Court concluded that plaintiffs failed to allege egregious or aggravating circumstances essential to the claim because plaintiffs did not sufficiently plead their claim for tortious interference with contract or misappropriation of trade secrets. On appeal from the dismissal of their UDP claim, plaintiffs argue only that the Business Court should not have dismissed the claim because they pleaded valid claims for tortious interference with contract and misappropriation of trade secrets. We disagree.

We have recognized an action for UDP based on the provision of the General Statutes that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." *Id.* § 75-1.1(a) (2017); *see Dalton v. Camp*, 353 N.C. 647, 655-56, 548 S.E.2d 704, 710 (2001). To plead a valid claim for UDP, "a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton*, 353 N.C. at 656, 548 S.E.2d at 711 (citing *Spartan Leasing Inc. v. Pollard*, 101 N.C. App. 450, 461, 400 S.E.2d 476, 482 (1991)). "The determination of whether an act or practice is an unfair or deceptive practice that violates N.C.G.S. § 75-1.1 is a question of law for the court." *Gray*

v. N.C. Ins. Underwriting Ass'n, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000) (citing *Ellis v. N. Star Co.*, 326 N.C. 219, 226, 388 S.E.2d 127, 131 (1990)).

Here the unfair or deceptive acts alleged in the amended complaint were that the Metropolitan defendants had "maliciously, deliberately, secretly, wantonly, recklessly, and unlawfully solicit[ed] and subsequently hir[ed] Plaintiffs' employees, Bogosavac and Divljak, and misappropriat[ed] Plaintiffs' trade secrets for their own benefit." Plaintiffs made no further allegations of specific unfair or deceptive acts. Because we determined that plaintiffs failed to state a valid claim for tortious interference with contract or misappropriation of trade secrets, we necessarily must conclude that plaintiffs also failed to adequately allege that the Metropolitan defendants "committed an unfair or deceptive act or practice." *Dalton*, 353 N.C. at 656, 548 S.E.2d at 711. Consequently, plaintiffs have not stated a valid claim for UDP.

[4] We turn next to plaintiffs' claims for civil conspiracy against all defendants. The Business Court dismissed the claim against the dancer defendants on the grounds that a civil conspiracy claim must be based on an underlying claim and the underlying claim for fraudulent misrepresentation—the only applicable, surviving claim—was based on allegations of fraud completely unrelated to the alleged, conspiratorial agreement between the dancer defendants and Metropolitan defendants. The Business Court then dismissed the civil conspiracy claim against the Metropolitan defendants on the grounds that all underlying tort claims against the Metropolitan defendants also had been dismissed. On appeal, plaintiffs argue that they pleaded a valid claim for civil conspiracy because that claim rested on plaintiffs' legitimate claims against all defendants based on the underlying tort of misappropriation of trade secrets. We disagree.

"A civil action for conspiracy is an action for damages resulting from acts committed by one or more of the conspirators pursuant to the formed conspiracy, rather than the conspiracy itself." *Burton v. Dixon*, 259 N.C. 473, 476, 131 S.E.2d 27, 30 (1963). "To create civil liability for conspiracy there must have been a wrongful act resulting in injury to another committed by one or more of the conspirators pursuant to the common scheme and in furtherance of the objective." *Ridgeway Brands*, 362 N.C. at 444, 666 S.E.2d at 115 (quoting *Henry v. Deen*, 310 N.C. 75, 87, 310 S.E.2d 326, 334 (1984)). This is because a "conspiracy charged does no more than associate the defendants together and perhaps liberalize the rules of evidence to the extent that under the proper circumstances the acts of one may be admissible against all." *Henry*, 310 N.C. at 87, 310 S.E.2d at 334 (first citing *Shope v. Boyer*, 268 N.C. 401, 150

S.E.2d 771 (1966); then citing *Muse v. Morrison*, 234 N.C. 195, 66 S.E.2d 783 (1951)). Therefore, we have determined that a complaint sufficiently states a claim for civil conspiracy when it alleges "(1) a conspiracy, (2) wrongful acts done by certain of the alleged conspirators in furtherance of that conspiracy, and (3) injury as a result of that conspiracy." *Ridgeway Brands*, 362 N.C. at 444, 666 S.E.2d at 115 (citing *Muse*, 234 N.C. at 198, 66 S.E.2d at 785).

Two examples from our case law are instructive. We have held that a plaintiff "fail[ed] to allege any overt, tortious, or unlawful act which any defendant committed in furtherance of the conspiracy" when the defendants' attempt to bankrupt the plaintiff by "subscribing to stock" from a third-party supplier did not breach their agreement to "from time to time [ ] purchase *some* of [their] requirements of such parts and other articles as are warehoused and sold by [plaintiff]." *Shope*, 268 N.C. at 404-05, 150 S.E.2d at 773. In contrast, we also have held that a plaintiff sufficiently pleaded a cause of action for civil conspiracy when the plaintiff specifically alleged that the parties to the conspiracy concealed and falsified medical records—acts that "would amount to the common law offense of obstructing public justice." *Henry*, 310 N.C. at 87, 310 S.E.2d at 334 (citation omitted).

Plaintiffs here alleged in their amended complaint that the Metropolitan defendants reached an agreement with the dancer defendants according to which the latter "would unlawfully leave Plaintiffs' dance studio to come work for Defendants Metropolitan and Manlys, unlawfully solicit Plaintiffs' customers, and unlawfully disclose Plaintiffs' trade secrets to Metropolitan and Manlys in order to cripple or eliminate Plaintiffs as a competitor in the dance industry." Plaintiffs asserted that, as a result of the conspiracy, "Plaintiffs' business and reputation were significantly damaged."

Regarding the allegations that the dancer defendants unlawfully left plaintiffs to work for the Metropolitan defendants and that all defendants unlawfully solicited plaintiffs' customers, plaintiffs' amended complaint must fail because it lacks sufficient detail. It is unclear from the face of the amended complaint which laws were allegedly violated and how defendants violated them. To the extent these allegations of unlawfulness may be read to invoke plaintiffs' claim for tortious interference with contract as to the dancer defendants' alleged exclusive employment agreement and plaintiffs' claim for misappropriation of trade secrets as to the customer lists, we already have determined that plaintiffs failed to plead either of those claims sufficiently. The only remaining allegation of a wrongful act in furtherance of the conspiracy

is that the dancer defendants unlawfully disclosed plaintiffs' trade secrets to the Metropolitan defendants. As we have already determined that plaintiffs failed to allege a viable claim for misappropriation of trade secrets, we now conclude that plaintiffs did not plead any wrongful acts that were done in furtherance of the alleged conspiracy. Accordingly, the claims for civil conspiracy against all defendants necessarily fail.

[5] Next, we consider plaintiffs' claim for unjust enrichment against the Metropolitan defendants. The Business Court dismissed plaintiffs' unjust enrichment claim against the Metropolitan defendants on two grounds. First, the Business Court determined that plaintiffs could not seek a remedy in equity through their unjust enrichment claim while seeking the exact same damages at law through their breach of contract claim against the dancer defendants—a claim that survived defendants' motions to dismiss. Second, the Business Court determined that plaintiffs failed to plead that the Metropolitan defendants took any action to solicit or induce plaintiffs to incur the expenses alleged, which the Business Court found to be a necessary element of an unjust enrichment claim. On appeal, plaintiffs argue that they adequately stated a claim for unjust enrichment by alleging that the Metropolitan defendants accepted the benefit of employing the dancers without obtaining new visas and that plaintiffs did not procure the visas gratuitously. We disagree with plaintiffs' argument, and although we agree with the conclusion the Business Court reached, we base our decision on different grounds.

"The general rule of unjust enrichment is that where services are rendered and expenditures made by one party to or for the benefit of another, without an express contract to pay, the law will imply a promise to pay a fair compensation therefor." *Atl. Coast Line R.R. Co. v. State Highway Comm'n*, 268 N.C. 92, 95-96, 150 S.E.2d 70, 73 (1966) (first citing *Beacon Homes, Inc. v. Holt*, 266 N.C. 467, 146 S.E.2d 434 (1966); then citing *Dean v. Mattox*, 250 N.C. 246, 108 S.E.2d 541 (1959)). A claim for unjust enrichment "is neither in tort nor contract but is described as a claim in quasi contract or a contract implied in law." *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988). "The claim is not based on a promise but is imposed by law to prevent an unjust enrichment." *Id.* at 570, 369 S.E.2d at 556. "In order to establish a claim for unjust enrichment, a party must have conferred a benefit on the other party," and "[t]he benefit must not be gratuitous and it must be measurable." *Id.* at 570, 369 S.E.2d at 556 (citing *Britt v. Britt*, 320 N.C. 573, 359 S.E.2d 467 (1987)).

Plaintiffs stated in their amended complaint that "Defendants Metropolitan and Manlys have [ ] received the benefit of Plaintiffs' procurement of the O1-B work visas for Defendants Bogosavac and Divljak,

because they were able to employ Defendants Bogosavac and Divljak, though unlawfully, without paying for their O1-B work visas." This allegation is contradicted by the Form I-797A and Form I-797B from the United States Citizenship and Immigration Services, which plaintiffs attached to their amended complaint. Both forms indicate that petition approval for a nonimmigrant worker visa applies only to the employment outlined in the petition and that any change in a nonimmigrant worker's employment requires the filing of a new I-129 visa petition. Accordingly, if the Metropolitan defendants employed the dancer defendants without filing new petitions, no benefit was conferred on the Metropolitan defendants by plaintiffs because their petitions did not authorize the dancers' employment with the Metropolitan defendants. As a conferred benefit is a necessary element of a claim for unjust enrichment, plaintiffs' "complaint discloses some fact that necessarily defeats the plaintiff[s'] claim." *Wood*, 355 N.C. at 166, 558 S.E.2d at 494 (citing *Oates*, 314 N.C. at 278, 333 S.E.2d at 224).

[6] Finally, plaintiffs argue on appeal that the Manlys can be held liable in their individual capacities for the tort claims brought against Metropolitan Ballroom as a corporate entity. In the order and opinion below, the Business Court dismissed all claims against the Manlys that were based on the theory of piercing the corporate veil. Citing to our decision in *Green v. Freeman*, the Business Court correctly observed that "[t]he doctrine of piercing the corporate veil is not a theory of liability," 367 N.C. 136, 146, 749 S.E.2d 262, 271 (2013), and consequently that the theory is rendered inapposite when, as here, all underlying claims have been or should be dismissed. Indeed, in the absence of an underlying claim, "evidence of domination and control is insufficient to establish liability." *Id.* at 146, 749 S.E.2d at 271. Because plaintiffs have failed to state a valid, underlying claim for relief against the Metropolitan defendants, we agree with the Business Court that it is immaterial whether Metropolitan Ballroom or the Manlys, in their individual capacities, would be liable for those claims.

Pursuant to Rule 12(b)(6), we dismiss a complaint or any claim therein when the plaintiff "fail[s] to state a claim upon which relief can be granted." *Arnesen*, 368 N.C. at 448, 781 S.E.2d at 7 (alteration in original) (quoting N.C.G.S. § 1A-1, Rule 12(b)(6)). For the reasons stated above, we hold that plaintiffs failed to state valid claims for tortious interference with contract, unfair and deceptive practices, and unjust enrichment against the Metropolitan defendants. We also hold that plaintiffs failed to state valid claims for misappropriation of trade secrets and civil conspiracy against all defendants. Accordingly, we affirm, as modified

herein, the portions of the Business Court's order and opinion dismissing those claims and remand this case to that court for further proceedings consistent with this Court's opinion.

MODIFIED AND AFFIRMED; REMANDED.

Justice BEASLEY dissenting.

I dissent from the majority opinion to specifically highlight the problematic and muddled standards for North Carolina plaintiffs seeking to properly plead a claim for misappropriation of trade secrets. In this case this Court considered whether plaintiffs' description of their trade secrets as "original ideas and concepts for dance productions, marketing strategies and tactics, as well as student, client and customer lists and their contact information" was sufficient to put defendants on notice of trade secrets allegedly misappropriated. I believe that a complaint alleging the above is sufficient under our liberal pleading standards to put defendants on notice of the transactions and occurrences at issue.

The majority's reasoning and reliance on various authority conflate the North Carolina standards for Rule 12(b)(6) motions to dismiss, motions for preliminary injunction, and motions for summary judgment as well as other jurisdictions' standards regarding discovery. Notably, the majority relies on cases that are in various procedural postures, and in doing so, the majority validates a heightened pleading standard for a claim in which public disclosure of confidential information is a real concern for plaintiffs. Further, the majority's erroneous affirmation of the trial court's dismissal of this single claim is also the basis for the majority's affirmation of the trial court's dismissal of plaintiffs' unfair and deceptive trade practices and civil conspiracy claims against Metropolitan Ballroom and the Manlys in their individual capacities.[1] Therefore, I respectfully dissent.

The sufficiency of a claim for misappropriation of trade secrets is a matter of first impression for this Court. Generally, the North Carolina pleading standards require a "*short and plain* statement of the claim sufficiently particular to give the court and the parties *notice* of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief." N.C.G.S. § 1A-1, Rule 8(a)(1) (2017) (emphases added). This is not a difficult standard

1. Even if the misappropriation of trade secrets claim was sufficiently pleaded, I express no opinion regarding the sufficiency of the pleadings for these additional claims.

for plaintiffs to meet: "The complaint is construed liberally," *U.S. Bank Nat'l Ass'n v. Pinkney*, 369 N.C. 723, 726, 800 S.E.2d 412, 415 (2017), "view[ing] the allegations as true and . . . in the light most favorable to the non-moving party," *id.* at 726, 800 S.E.2d at 415 (alterations in original) (quoting *Kirby v. NC DOT*, 368 N.C. 847, 852, 786 S.E.2d 919, 923 (2016)), and the claim is not dismissed "unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief," *Holloman v. Harrelson*, 149 N.C. App. 861, 864, 561 S.E.2d 351, 353 (2002) (alteration in original) (quoting *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987)), *disc. rev. denied*, 355 N.C. 748, 565 S.E.2d 665 (2002). Rule 12(b)(6) "generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery," *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 166 (1970) (quoting *Am. Dairy Queen Corp. v. Augustyn*, 278 F. Supp. 717, 721 (N.D. Ill. 1967)), such as "(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," *Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted).

To sufficiently plead a prima facie claim for misappropriation of trade secrets, a plaintiff must allege defendant (1) "[k]nows or should have known of the trade secret," and (2) "[h]as had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner." N.C.G.S. § 66-155 (2017). There is no statutory heightened pleading standard for misappropriation of trade secrets, *see id.* § 1A-1, Rule 9 (2017), and additional guidance from the Court of Appeals on pleading this particular claim rests on cases evaluating the issue from an entirely different procedural posture than a motion to dismiss. In *Washburn v. Yadkin Valley Bank & Trust*, our Court of Appeals quoted language from *VisionAIR, Inc. v. James* to establish a pleading standard now propounded by the majority of this Court: "a plaintiff must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating," *Washburn*, 190 N.C. App. 315, 326, 660 S.E.2d 577, 585 (2008) (quoting *VisionAIR*, 167 N.C. App. 504, 510, 606 S.E.2d 359, 364 (2004)), *disc. rev. denied*, 363 N.C. 139, 674 S.E.2d 422 (2009), and "a complaint that makes general allegations in sweeping and conclusory statements, without specifically identifying the trade secrets allegedly misappropriated, is 'insufficient to state a claim for misappropriation of trade secrets,' " *id.* at 327, 660 S.E.2d at 585-86 (quoting *VisionAIR*, 167 N.C. App. at 511, 606 S.E.2d at 364).

There are two problems with relying on this language from *Washburn* to establish a pleading standard: (1) this language from *VisionAIR* is dicta because *VisionAIR* evaluated the merits of the misappropriation of trade secrets claim for the purposes of issuing a preliminary injunction, *see VisionAIR*, 167 N.C. App. at 510-11, 606 S.E.2d at 364, and (2) this language from *VisionAIR* quotes another preliminary injunction case for this proposition, *see id.* at 511, 606 S.E.2d at 364 (citing *Analog Devices, Inc. v. Michalksi*, 157 N.C. App. 462, 468-70, 579 S.E.2d 449, 453-54 (2003)).

It is important to note that

> [t]he standards under Rule 12(b)(6) are dramatically different than those for issuance of a preliminary injunction. While a motion for a preliminary injunction requires a showing of a likelihood of success on the merits, requiring more than conclusory allegations, it is well established that "[w]ith the adoption of 'notice pleading,' mere vagueness or lack of detail is no longer ground for allowing a motion to dismiss."

Barbarino v. Cappuccine, Inc., 219 N.C. App. 400, 722 S.E.2d 211, 2012 WL 698373, at *4 (unpublished) (second alteration in original) (quoting *Gatlin v. Bray*, 81 N.C. App. 639, 644, 344 S.E.2d 814, 817 (1986)), *aff'd per curiam*, 366 N.C. 330, 734 S.E.2d 570 (2012). Yet much of the majority's reasoning on this issue conflates not only these two standards, but its reasoning also conflates cases evaluating motions for summary judgment with the issue at hand. *See VisionAIR*, 167 N.C. App. at 510-11, 606 S.E.2d at 364 (evaluating whether a plaintiff was likely to succeed on the merits of its misappropriation of trade secrets claim in an appeal from an order denying a preliminary injunction); *see also Asheboro Paper & Packaging, Inc. v. Dickinson*, 599 F. Supp. 2d 664, 676-78 (M.D.N.C. 2009) (preliminary injunction); *UBS PaineWebber, Inc. v. Aiken*, 197 F. Supp. 2d 436, 446-48 (W.D.N.C. 2002) (preliminary injunction); *Washburn*, 190 N.C. App. at 325-27, 660 S.E.2d at 585-86 (applying standard from *VisionAIR* to a Rule 12(b)(6) motion to dismiss); *Analog Devices*, 157 N.C. App. at 468-70, 472, 579 S.E.2d at 453-54, 455 (preliminary injunction); *Combs & Assocs., v. Kennedy*, 147 N.C. App. 362, 370-71, 555 S.E.2d 634, 640 (2001) (summary judgment); *NovaCare Orthotics & Prosthetics E., Inc. v. Speelman*, 137 N.C. App. 471, 477-78, 528 S.E.2d 918, 922 (2000) (preliminary injunction). Beyond announcing a heightened pleading requirement, the majority now requires *evidence* at the pleading stage showing the plaintiff took steps to keeps its trade secrets confidential. That has never been the law in North Carolina; the only

cases requiring a plaintiff to affirmatively *prove* efforts to maintain the secrecy of a trade secret were decided at the preliminary injunction or summary judgment stage.

Succeeding on motions for both summary judgment and preliminary injunction require *proof* on the merits of the claim, while our pleading standards merely require a plaintiff to allege a "short and plain statement of the claim" giving the trial court and the defendant *notice* of the transactions or occurrences the plaintiff *intends to prove*. *Compare* N.C.G.S. § 1A-1, Rule 8(a)(1) *with id.* § 1A-1, Rule 56(c) (2017) (stating summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law"), *and Ridge Cmty. Inv'rs, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (explaining a preliminary injunction will issue only upon the movant's showing a "*likelihood* of success on the merits of his case").

By definition, trade secrets are

> business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that . . . [d]erives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use[,] and . . . [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.C.G.S. § 66-152(3) (2017). Our Court of Appeals has held that "customer lists and their contact information" constitute trade secrets under the definition established in subsection 66-152(3). *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 174 N.C. App. 49, 55, 620 S.E.2d 222, 227 (2005) (stating that "customer information, preferred customer pricing, employees' salaries, equipment rates, fleet mix information, budget information and structure of the business" constitute trade secrets under the Trade Secrets Protection Act), *petition for disc. rev. dismissed*, 360 N.C. 296, 629 S.E.2d 289 (2006); *Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc.*, 160 N.C. App. 520, 525, 586 S.E.2d 507, 511 (2003) (noting that "information regarding customer lists, pricing formulas and bidding formulas can qualify as" a trade secret); *State ex rel. Utils. Comm'n v. MCI Telecomms. Corp.*, 132 N.C. App. 625, 634, 514 S.E.2d 276, 282 (1999) (concluding that a "compilation of information"

involving customer data and business operations which has "actual or potential commercial value from not being generally known" is sufficient to constitute a trade secret); *Drouillard v. Keister Williams Newspaper Servs.*, 108 N.C. App. 169, 174, 423 S.E.2d 324, 327 (1992) (concluding customer lists and pricing and bidding formulas can constitute trade secrets), *disc. rev. denied and cert. dismissed*, 333 N.C. 344, 427 S.E.2d 617 (1993). Because these decisions have recognized that customer lists can constitute trade secrets, it is unreasonable to conclude that a plaintiff cannot rely on these holdings to plead its claims. Nonetheless, the majority again conflates the summary judgment standard, *see Combs & Assocs., Inc.*, 147 N.C. App. at 368-71, 555 S.E.2d at 639-40, and the preliminary injunction standard, *see NovaCare Orthotics*, 137 N.C. App. at 477-78, 528 S.E.2d at 922, with the Rule 12(b)(6) motion to dismiss standard by requiring plaintiffs to "come forward with . . . evidence to show that [they] took . . . special precautions to ensure the confidentiality of [their] customer information."

Further, the Court of Appeals, North Carolina business bourts, and federal courts exercising diversity jurisdiction applying North Carolina law have also treated "marketing" strategies as trade secrets. *See Med. Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 658-59, 670 S.E.2d 321, 328-29 (2009); *Bldg. Ctr., Inc. v. Carter Lumber, Inc.*, No. 16 CVS 4186, 2016 WL 6142993, at *4 (N.C. Super. Ct. Mecklenburg County (Bus. Ct.) Oct. 21, 2016) (unpublished); *see also Olympus Managed Health Care, Inc. v. Am. Housecall Physicians, Inc.*, 853 F. Supp. 2d 559, 572 (W.D.N.C. 2012); *Merck & Co. v. Lyon*, 941 F. Supp. 1443, 1456-57 (M.D.N.C. 1996). The majority's dismissal of this part of the allegation without additional consideration of these cases is error.

Though there is no support in North Carolina for the premise that "original ideas and concepts for dance productions" constitute trade secrets, there is no authority that they are decidedly not, and similar information has been valued and protected when former employees accept similar employment from competitors. *See Amdar, Inc. v. Satterwhite*, 37 N.C. App. 410, 413, 416, 246 S.E.2d 165, 166, 168, *disc. rev. denied*, 295 N.C. 645, 248 S.E.2d 249 (1978) (affirming trial court's award of preliminary injunctive relief prohibiting defendant-dance instructor from accepting employment in any capacity in any dance studio or school, giving instruction on dancing in any form whatsoever, and from competing with the business of the plaintiff in any other way, which included prohibiting the defendant from using or disclosing the plaintiff's trade secrets which included teaching techniques and sales methods). A forecast of the merits of a case like this reveals that

performers and businessmen in the variety arts are not likely to receive protection under the Trade Secrets Protection Act because once performed, the productions can be re-created through reverse engineering and are observable by the public. *See* N.C.G.S. § 66-155; *see also* Sara J. Crasson, *The Limited Protections of Intellectual Property Law for the Variety Arts: Protecting Zacchini*, *Houdini*, *and Cirque du Soleil*, 19 Vill. Sports & Ent. L.J. 73, 77, 111-12 (2012). But in liberally construing the complaint in this case, there is no indication that these productions had actually been performed. The majority is correct that "[t]here is no presumption that a thing is a secret," *Arthur Murray Dance Studios of Cleveland*, *Inc. v. Witter*, 105 N.E.2d 685, 709 (Ohio Ct. Com. Pl. 1952); however, there is also no presumption that any particular idea has been disclosed.

In *Washburn*, a case cited by the majority that actually evaluated a complaint under a Rule 12(b)(6) standard (though a heightened standard as per its reliance on *VisionAIR*), the complaint's description of trade secrets that led the court to conclude that the claim was not pleaded with sufficient particularity consisted of "confidential client information" and "confidential business information." *Washburn*, 190 N.C. App. at 327, 660 S.E.2d at 586. These are examples of "sweeping and conclusory" statements that the court intended to fail under Rule 12(b)(6). In contrast, the allegations here provided more specific details regarding both client and business information to more particularly describe the trade secrets as "original ideas and concepts for dance productions, marketing strategies and tactics, as well as student, client and customer lists and their contact information." Because this description is sufficient to put defendants on notice of the transactions and occurrences at issue, I cannot join the majority.

With this case this Court had an opportunity to correct the faulty logic that for over a decade has resulted in the substitution of a preliminary injunction standard for our general pleading standard governing this particular claim. Instead, the majority has validated a heightened pleading standard for a misappropriation of trade secrets claim with no discussion as to why it believes it is necessary to do so. " '[T]he term trade secret is one of the most elusive and difficult concepts in the law to define' and the 'question of whether an item taken . . . constitutes a trade secret is of the type normally resolved by a fact finder after a full presentation of evidence from each side.' " Eric D. Welsh, *Betwixt and Between: Finding Specificity in Trade Secret Misappropriation Cases* (Am. Bar Ass'n, Aug. 20, 2015), http://apps.americanbar.org/litigation/committees/businesstorts/articles/

summer2015-0815-specificity-trade-secret-misappropriation-cases.html [hereinafter *Betwixt and Between*] (ellipses in original) (quoting *Furmanite Am., Inc. v. T.D. Williamson, Inc.*, 506 F. Supp. 2d 1134, 1141 (M.D. Fla. 2007) (internal quotation marks omitted). Because I believe we should not reject plaintiffs' misappropriation of trade secrets claim at this early stage in the proceeding given our notice pleading standard,[2] I respectfully dissent.

2. An alternative to requiring a heightened pleading standard to protect defendants from unwarranted discovery, while also allowing plaintiffs to proceed with their claim at this early stage, may be to require plaintiffs to identify the trade secret with more specificity prior to discovery. Instead of using Rule 12(b)(6), defendants could challenge the claim "either through a re-sequencing of discovery or a motion for a more definite statement coupled with a stay of discovery." *Betwixt and Between*.

TATITA M. SANCHEZ	)	
	)	
v.	)	From Johnston County
	)	
COBBLESTONE HOMEOWNERS ASSOCIATION OF CLAYTON, INC., A NORTH CAROLINA NON-PROFIT CORPORATION	)	
_____	)	
	)	
FRANK CHRISTOPHER	)	
	)	
v.	)	From Johnston County
	)	
COBBLESTONE HOMEOWNERS ASSOCIATION OF CLAYTON, INC., A NORTH CAROLINA NON-PROFIT CORPORATION	)	
_____	)	
	)	
VINCENT FRANKS, JR.	)	
	)	
v.	)	From Johnston County
	)	
COBBLESTONE HOMEOWNERS ASSOCIATION OF CLAYTON, INC., A NORTH CAROLINA NON-PROFIT CORPORATION	)	
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	)	
ROBERT SAIN AND JENNIFER SAIN	)	
	)	
v.	)	From Johnston County
	)	
COBBLESTONE HOMEOWNERS ASSOCIATION OF CLAYTON, INC., A NORTH CAROLINA NON-PROFIT CORPORATION	)	
_____	)	
	)	
DENNIS DRAUGHON AND MEGAN DRAUGHON	)	
	)	
v.	)	From Johnston County
	)	
COBBLESTONE HOMEOWNERS ASSOCIATION OF CLAYTON, INC., A NORTH CAROLINA NON-PROFIT CORPORATION	)	

Appeal and Error—sparse record—Supreme Court's constitutional and inherent authority—Court of Appeals decision—no precedential value

Where the record in a case was too sparse for adequate judicial review, the Supreme Court expressed no opinion on the merits of the case and exercised its constitutional and inherent authority to order that the decision of the Court of Appeals in the case had no precedential value.

No. 374A16

ORDER

The Court determines that the record in this case is too sparse for adequate judicial review and provides an insufficient basis upon which to create binding precedent. We note that appellants have not challenged any of the trial court's findings of fact, and we decline to upset the ruling of the trial court on this record. We express no opinion on the merits of the issues presented in this case but instead dismiss the appeal and exercise our constitutional and inherent authority to order that the decision of the Court of Appeals in this case, *Sanchez v. Cobblestone Homeowners Ass'n of Clayton, Inc.*, ___ N.C. App. ___, 791 S.E.2d 238 (2016), has no precedential value.

By order of the Court in Conference, this the 6th day of April, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of April, 2018.

s/Amy Funderburk

AMY FUNDERBURK
Clerk of the Supreme Court

STATE OF NORTH CAROLINA
v.
DYQUAON KENNER BRAWLEY

No. 370A17

Filed 6 April 2018

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 807 S.E.2d 159 (2017), vacating a judgment entered on 21 September 2016 by Judge Christopher W. Bragg in Superior Court, Rowan County. Heard in the Supreme Court on 12 March 2018.

Joshua H. Stein, *Attorney General*, *by Teresa M. Postell*, *Assistant Attorney General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by Amanda S. Zimmer*, *Assistant Appellate Defender*, *for defendant-appellee.*

PER CURIAM.

The decision of the Court of Appeals is reversed for the reasons stated in the dissenting opinion, and this case is remanded to the Court of Appeals for consideration of defendant's argument regarding the restitution ordered by the trial court.

REVERSED AND REMANDED.

STATE v. CHINA

[370 N.C. 627 (2018)]

STATE OF NORTH CAROLINA
v.
NATHANIEL MALONE CHINA

No. 95A17

Filed 6 April 2018

Kidnapping—restraint—actions after sexual assault

The trial court did not err by denying defendant's motion to dismiss a second-degree kidnapping charge, because there was sufficient evidence of restraint that was separate and apart from that inherent in the commission of the first-degree sex offense to support the kidnapping conviction. Taken in the light most favorable to the State, the evidence showed that defendant positioned himself on top of the victim on a bed, punched him until he was stunned, and penetrated him. The victim then swung and kicked at the defendant, defendant jumped off the victim, grabbed him by the ankles, yanked him off the bed, and kicked and stomped the victim with an accomplice without a further attempt at sexual assault. Defendant's actions after the victim swung at him constituted an additional restraint.

Justice BEASLEY dissenting.

Justice MORGAN dissenting.

Justice BEASLEY 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, ___ N.C. App. ___, 797 S.E.2d 324 (2017), finding no error in part and vacating and remanding in part judgments entered on 5 February 2016 by Judge Henry W. Hight, Jr. in Superior Court, Durham County. Heard in the Supreme Court on 12 December 2017.

Joshua H. Stein, Attorney General, by Grady L. Balentine, Jr., Special Deputy Attorney General, for the State-appellant.

Richard Croutharmel for defendant-appellee.

HUDSON, Justice.

Defendant Nathaniel Malone China was convicted by a jury on 1 February 2016 of a number of offenses, including felonious breaking or entering, first-degree sexual offense, second-degree kidnapping, misdemeanor assault inflicting serious injury, and intimidating a witness. Here we must decide whether there was sufficient evidence of restraint that was separate and apart from that inherent in the commission of the first-degree sex offense to support the kidnapping conviction. The Court of Appeals concluded that there was not and vacated defendant's conviction for second-degree kidnapping. *State v. China*, ___ N.C. App. ___, ___, 797 S.E.2d 324, 328-30 (2017). Because we conclude that the evidence of restraint beyond that inherent in the commission of the sex offense did suffice, we reverse the decision of the Court of Appeals.

Factual and Procedural Background

In 2008 defendant began a romantic relationship with Nichelle Brooks. At some point thereafter, defendant was sent to prison. During his incarceration, until the summer of 2013, defendant continued to talk occasionally with Ms. Brooks by telephone. On one of these phone calls, Ms. Brooks, who was then involved with Mark,[1] informed defendant that she had begun a new relationship. Nonetheless, defendant called Ms. Brooks after his release from prison seeking to resume their prior relationship. Ms. Brooks agreed to meet with defendant at her apartment, hoping to make clear that their relationship was over. Later that day, defendant met Ms. Brooks at her apartment, spent the night, and then left the following morning.

During this time, Ms. Brooks asked Mark not to visit her for a few days so that she could "get things in order" with defendant. Believing that she had successfully ended her relationship with defendant, Ms. Brooks told Mark that he could return to her apartment. Mark visited Ms. Brooks on 14 October 2013 and spent the night at her apartment. The following morning, 15 October, Mark was still asleep when Ms. Brooks left to take her daughter to the bus stop and to go to school at Durham Beauty Academy.

Mark awoke when he heard people outside of the apartment. He looked out the window and, not seeing anything of concern, returned to bed. Moments later, Mark heard a knock; he went to the door, looked through the peephole, and saw two men he did not recognize. At trial, Mark identified one of these men as defendant. As Mark made his way

1. Like the Court of Appeals, we refer to the victim here by the pseudonym "Mark" for simplicity and to protect his privacy.

back to the bedroom, he heard banging on the door, enough to cause the door to shake. Mark began to dress in his work uniform, when he heard a loud boom as the door was kicked in.

Defendant rushed into the apartment and ran towards the bedroom, cursing at Mark. Before Mark had a chance to defend himself, defendant punched him in the face, knocking him sideways onto the bed. Defendant then got on the bed and on top of Mark, continuing to curse and strike Mark in the face with his fist. Defendant was hitting Mark solely in the face up to this point, and the last blow caused Mark to roll over completely onto his stomach. At that point, defendant punched Mark in the back of the head, stunning him. Defendant then pulled down Mark's pants and anally penetrated him three times with his penis.

Mark then swung his right arm to get defendant off of him, and defendant "jumped off of" Mark. While Mark was "kicking away" at defendant, defendant grabbed him by the ankles, yanking him off the bed and causing the back of Mark's head to hit the floor. Defendant called to his companion, who came into the room; together they began "kicking and stomping" Mark, who was on the floor with his back pressed against a dresser. Mark testified that the two men were kicking and stomping "[m]y face, my head, my back, my ribs, my legs, my knees. . . . It was everywhere." During this time, Mark "was balling [his body] up" trying to protect himself. Eventually, defendant and the other man stopped kicking, and Mark quickly got up and ran out of the apartment. Mark still had his keys in his pocket, and although he was dizzy and bleeding badly, he ran to his car and was able to drive to his place of employment for help. Mark woke up at Duke Hospital in a significant amount of pain. In addition to the injuries to his face, Mark testified that his "ribs were really sore" and his knees were "really messed up," that he "couldn't walk, really," and that he was forced "to crawl to the bathroom at home to go to the bathroom" for the next two to three weeks. Mark also suffered emotional injuries as a result of the incident.

On 4 November 2013, defendant was indicted in Durham County on charges of felonious breaking or entering, felonious assault inflicting serious bodily injury, and first-degree kidnapping. The indictment for kidnapping alleged that defendant "unlawfully, willfully and feloniously did kidnap [Mark], a person over the age of sixteen years, without his consent, by unlawfully restraining him for the purpose of facilitating the commission of a felony, doing serious bodily harm to [Mark], and terrorizing [Mark]." On 7 April 2014, defendant was indicted on charges of first-degree sexual offense, crime against nature, and intimidating a witness. A separate indictment on 1 June 2015 charged defendant as

an habitual felon. The district attorney dismissed the indictment for intimidating a witness, and defendant agreed to proceed on that charge under a criminal bill of information. Additionally, the State dismissed the charge of crime against nature before trial.

Defendant was tried in the Superior Court in Durham County during the criminal session that began on 26 January 2016 before Judge Henry W. Hight, Jr. At trial, the State chose to proceed on second-degree kidnapping instead of first-degree kidnapping. At the close of the State's evidence, defendant moved for dismissal of the charges. The trial court agreed to submit to the jury the charge of misdemeanor assault inflicting serious injury, as opposed to felonious assault inflicting serious bodily injury, and denied defendant's motion with respect to the other charges. On the charge of kidnapping, the trial court instructed the jury:

> Count number three. Under counter [sic] number three, the Defendant has been charged with second degree kidnaping. For you to find the Defendant guilty of this offense, the State must prove three things beyond a reasonable doubt.
>
> First, that the Defendant unlawfully restrained [Mark], that is, restricted his freedom of movement,
>
> Second, that [Mark] did not consent to this restraint,
>
> And, third, the Defendant did this for the purpose of terrorizing [Mark]. Terrorizing means more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension.

On 1 February 2016, the jury found defendant guilty of felonious breaking or entering, misdemeanor assault inflicting serious injury, second-degree kidnapping, first-degree sexual offense, and intimidating a witness. Defendant then admitted to having attained habitual felon status. Judge Hight sentenced defendant to consecutive terms of 150 days for misdemeanor assault inflicting serious injury, 78 to 106 months for breaking and entering, 88 to 118 months for second-degree kidnapping, 336 to 416 months for first-degree sex offense, and 88 to 118 months for intimidating a witness. At the State's request, the trial court conducted a resentencing proceeding on 5 February 2016, at which Judge Hight arrested judgment on the misdemeanor assault inflicting serious injury conviction. Defendant appealed to the Court of Appeals.

At the Court of Appeals, defendant first argued that the trial court erred in allowing the jury to hear that he had been recently released from prison. *China*, ___ N.C. App. at ___, 797 S.E.2d at 327. The panel unanimously held that defendant did not preserve that issue for appeal; therefore, they did not reach the merits of his argument on that issue. *Id.* at ___, ___, 797 S.E.2d at 327-28, 330.

Defendant next argued that the trial court erred in denying his motion to dismiss the kidnapping charge because the evidence was insufficient to prove that any confinement or restraint was separate and apart from the force necessary to facilitate the sex offense. The Court of Appeals majority agreed, noting that this Court has previously opined that "certain felonies . . . cannot be committed without some restraint of the victim" and the statutory offense of kidnapping "was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes." *Id.* at ___, 797 S.E.2d at 329 (quoting *State v. Ripley*, 360 N.C. 333, 337, 626 S.E.2d 289, 292 (2006)). The majority concluded that the evidence here "describe[d] a sudden attack" that "took no more than a few minutes." *Id.* at ___, 797 S.E.2d at 329. Further, the majority rejected the State's contention that removal of the victim from the bed to the floor and the subsequent stomping and kicking of Mark was an action separate from the assaults themselves. *Id.* at ___, 797 S.E.2d at 329. The majority then concluded that "there is no evidence in the record that Mark was subjected to any restraint beyond that inherent in defendant's commission of first-degree sex offense and misdemeanor assault inflicting serious injury." *Id.* at ___, 797 S.E.2d at 329. Accordingly, the majority concluded that the trial court erred by denying defendant's motions to dismiss the kidnapping charge. *Id.* at ___, 797 S.E.2d at 329. The majority instructed the trial court on remand to vacate defendant's conviction for second-degree kidnapping and correct the judgments to retain defendant's consecutive sentences for his remaining convictions. *Id.* at ___, 797 S.E.2d at 329-30.

Writing separately, Judge Dillon concurred in part and dissented in part; he disagreed with the majority that there was insufficient evidence that defendant "restrained the victim *beyond* the restraint inherent to the sexual assault." *Id.* at ___, 797 S.E.2d at 330 (Dillon, J., concurring in part and dissenting in part). Judge Dillon noted that the removal of the victim from the bed to the floor occurred after defendant completed his sexual assault on the victim. *Id.* at ___, 797 S.E.2d at 330. Judge Dillon added, "*Then*, while the victim was on the floor, Defendant restrained the victim by beating and kicking the victim, preventing the victim

from getting up." *Id.* at ___, 797 S.E.2d at 330. In his dissent, Judge Dillon opined, "Granted, this separate restraint did not last long. But this restraint which occurred while the victim was on the floor was *not* inherent to the sexual assault which was completed while the victim was on the bed." *Id.* at ___, 797 S.E.2d at 330. The dissenting opinion also noted that while defendant was also convicted of assault, the trial court arrested judgment on the assault conviction. *Id.* at ___, 797 S.E.2d at 330 n.3. Accordingly, Judge Dillon would have held that the verdict and judgment for kidnapping should stand. *Id.* at ___, 797 S.E.2d at 330.

The State filed its appeal of right based on the dissent.

Analysis

The State argues that the trial court did not err in denying defendant's motion to dismiss the kidnapping charge because there was sufficient evidence of restraint that was separate and apart from that inherent in the commission of the sex offense. We agree.

When ruling on a defendant's motion to dismiss for sufficiency of the evidence, the trial court must determine "whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (first citing *State v. Roseman*, 279 N.C. 573, 580, 184 S.E.2d 289, 294 (1971); then citing *State v. Mason*, 279 N.C. 435, 439, 183 S.E.2d 661, 663 (1971)). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Turnage*, 362 N.C. 491, 493, 666 S.E.2d 753, 755 (2008) (quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)). Furthermore, "the trial court must consider the evidence in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009) (citing *State v. McCullers*, 341 N.C. 19, 28-29, 460 S.E.2d 163, 168 (1995)). Whether the State has presented substantial evidence is a question of law, which we review de novo. *State v. Cox*, 367 N.C. 147, 150-51, 749 S.E.2d 271, 274-75 (2013) (citations omitted).

The elements of kidnapping are defined by statute. *See Ripley*, 360 N.C. at 337, 626 S.E.2d at 292 ("The offense of kidnapping, as it is now codified in N.C.G.S. § 14-39, did not take form until 1975, when the General Assembly amended section 14-39 and abandoned the traditional common law definition of kidnapping for an element-specific definition."). Section 14-39 now provides, in relevant part:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . . .
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person[.]

N.C.G.S. § 14-39 (2017). Accordingly, to obtain a conviction for second-degree[2] kidnapping the State is required to prove that a defendant (1) confined, restrained, or removed from one place to another any other person, (2) unlawfully, (3) without consent, and (4) for one of the statutorily enumerated purposes.

Following the 1975 amendment to N.C.G.S. § 14-39, this Court addressed in *State v. Fulcher* whether application of the statute on the theory of "restraint" could result in a violation of the constitutional prohibition against double jeopardy. 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). There the Court explained:

> Such restraint, however, is not kidnapping unless it is . . . for one of the purposes specifically enumerated in the statute. One of those purposes is the facilitation of the commission of a felony.
>
> It is self-evident that certain felonies (*e.g.*, forcible rape and armed robbery) cannot be committed without some restraint of the victim. We are of the opinion, and so hold, that G.S. 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable

2. First-degree kidnapping is defined in N.C.G.S. § 14-39(b), which requires the State to prove, in addition to the elements set forth in subsection (a), at least one of the elements listed in subsection (b): "that the victim was not released in a safe place, was seriously injured, or was sexually assaulted." *State v. Bell*, 311 N.C. 131, 137, 316 S.E.2d 611, 614 (1984).

> feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy. . . . [W]e construe the word "restrain," as used in G.S. 14-39, to connote a restraint separate and apart from that which is inherent in the commission of the other felony.

Id. at 523, 243 S.E.2d at 351.[3] The Court recognized, however, that "two or more criminal offenses may grow out of the same course of action" and concluded that there is "no constitutional barrier . . . provided the restraint, which constitutes the kidnapping, is a separate, complete act, independent of and apart from the other felony." *Id.* at 523-24, 243 S.E.2d at 351-52. Furthermore, "[s]uch independent and separate restraint need not be, itself, substantial in time, under G.S. 14-39 as now written." *Id.* at 524, 243 S.E.2d at 352; *see also id.* at 522, 243 S.E.2d at 351 ("It is equally clear that the Legislature rejected our determinations . . . that, where the State relies upon . . . 'restraint,' such must continue 'for some appreciable period of time.' Thus, it was clearly the intent of the Legislature to make resort to a tape measure or a stop watch unnecessary in determining whether the crime of kidnapping has been committed.").

The Court has since elaborated on this issue, stressing in *State v. Pigott* that the "key question" is whether there is sufficient evidence of restraint, such that the victim is " 'exposed . . . to greater danger than that inherent in the [other felony] itself, . . . [or] is . . . subjected to the kind of danger and abuse the kidnapping statute was designed to prevent.' " 331 N.C. 199, 210, 415 S.E.2d 555, 561 (1992) (third, fourth, and fifth alterations in original) (quoting *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981)). In *Pigott* the defendant visited the victim (his employer) after midnight asking for a loan. *Id.* at 202, 415 S.E.2d at 557. After the victim refused, the defendant returned to the victim's apartment that same night with a gun. *Id.* at 202, 415 S.E.2d at 557. The

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3. Notably, the Court in *Fulcher* was specifically addressing the purposes enumerated in N.C.G.S. § 14-39(a)(2) ("Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony"), which contemplates another crime (the "other felony") that typically will be charged concurrently with the kidnapping. 294 N.C. at 523-24, 243 S.E.2d at 351-52. Nonetheless, this Court has applied the same principle to the enumerated purpose of "terrorizing" in N.C.G.S. § 14-39(a)(3). *See State v. Prevette*, 317 N.C. 148, 155-58, 345 S.E.2d 159, 164-66 (1986) (vacating the defendant's conviction for kidnapping for the purpose of terrorizing because the only evidence of restraint was an inherent and inevitable feature of the victim's murder, for which the defendant was separately convicted).

defendant threatened the victim with the gun and then "forced him to lie on his stomach and tied his hands behind his back." *Id.* at 210, 415 S.E.2d at 561. After searching the apartment for money, the defendant returned to the victim and asked him whether he had any more money. *Id.* at 210, 415 S.E.2d at 561. The victim responded that he did not, and the defendant then bound the victim's feet to his hands. *Id.* at 210, 415 S.E.2d at 561. The defendant then shot the victim in the head. *Id.* at 202, 210, 415 S.E.2d at 557, 561. At trial, the defendant was convicted of first-degree murder, armed robbery, first-degree arson, and first-degree kidnapping. *Id.* at 202, 415 S.E.2d at 556-57.

The defendant appealed directly to this Court, arguing that there was insufficient evidence of a restraint separate and apart from that inherent in the armed robbery. *Id.* at 208, 415 S.E.2d at 560. The Court disagreed, holding that

> all the restraint necessary and inherent to the armed robbery was exercised by threatening the victim with the gun. When defendant bound the victim's hands and feet, he "exposed [the victim to a] greater danger than that inherent in the armed robbery itself." This action, which had the effect of increasing the victim's helplessness and vulnerability beyond the threat that first enabled defendant to search the premises for money, constituted such additional restraint as to satisfy that element of the kidnapping crime.

Id. at 210, 415 S.E.2d at 561 (alteration in original) (quoting *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446). Accordingly, the Court affirmed the defendant's conviction for kidnapping. *Id.* at 210, 215, 415 S.E.2d at 561, 564.

Similarly, Mark's testimony here presented evidence which, taken in the light most favorable to the State, showed that "all the restraint necessary and inherent to the [sex offense] was exercised by" defendant's getting on the bed, positioning himself on top of Mark, and punching Mark in the face and head until Mark was stunned. *Id.* at 210, 415 S.E.2d at 561. In contrast, once Mark swung at defendant and defendant jumped off of Mark, defendant took additional action, "which had the effect of increasing [Mark's] helplessness and vulnerability beyond" the initial blows to Mark's head that enabled defendant to commit the sex offense. *Id.* at 210, 415 S.E.2d at 561. Specifically, while Mark was "kicking away" at defendant, defendant grabbed Mark by the ankles and yanked him off the bed, causing Mark's head to hit the floor. Then defendant did not attempt to further sexually assault Mark, who

was now on the floor pressed against a dresser, but instead defendant called to his companion, who came into the room, where the two of them proceeded to kick and stomp Mark over his entire body. Mark did not attempt to kick or swing at defendant again, but remained balled up on the floor until the kicking ceased. Defendant's actions after Mark swung at him constituted an additional restraint, *see Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351 (describing "restraint" as a "restriction upon freedom of movement"); *see also State v. Beatty*, 347 N.C. 555, 559, 495 S.E.2d 367, 370 (1998) (describing "binding *and kicking*" as "forms of restraint" (emphasis added)), which "exposed [Mark] to greater danger than that inherent in the [sex offense] itself," *Irwin*, 304 N.C. at 103, 282 S.E.2d at 446. For example, Mark testified that, as a result of the kicking and stomping on his knees and legs, which had not been targeted or harmed during the commission of the sex offense, his knees were "really messed up," rendering him unable to walk and forcing him "to crawl to the bathroom at home" for two to three weeks afterwards. Accordingly, we conclude that this additional restraint by defendant constituted "a restraint separate and apart from that which [was] inherent in the commission of the" sex offense. *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351.

In his brief before this Court, defendant largely focuses his argument not on whether there was evidence of restraint separate and apart from that inherent in the sex offense, but whether there was evidence of restraint separate and apart from that inherent in the commission of misdemeanor assault.[4] Defendant argues that although the decision in *Fulcher* contemplated "certain *felonies* [that] cannot be committed without some restraint of the victim," *id.* at 523, 243 S.E.2d at 351 (emphasis added), *Fulcher* should be equally applicable to *misdemeanor* offenses because the rationale was that principles of double jeopardy prohibit a defendant from being punished twice for the same conduct. *Id.* at 523, 243 S.E.2d at 351 ("[N.C.G.S. §] 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the

4. It is unclear whether defendant is conceding that the restraint involved in his kicking and stomping the victim on the floor was separate and apart from that inherent in the commission of the sex offense. In his brief, defendant asserts that "[i]f the trial court had left out the stomping of the feet from the misdemeanor assault inflicting serious injury jury charge, the evidence would have supported a guilty verdict on the kidnapping charge. This is because the misdemeanor assault inflicting serious injury charge would be based totally on punches with fists, which all occurred before or during the sexual assault." On the other hand, defendant also alleges in his brief that "the force necessary to restrain [Mark] was an integral part of the sexual and physical assaults."

constitutional prohibition against double jeopardy."); *see also State v. Sparks*, 362 N.C. 181, 186, 657 S.E.2d 655, 659 (2008) ("The [Double Jeopardy] [C]lause protects against three distinct abuses: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, *and multiple punishments for the same offense.*" (alterations in original) (emphasis added) (quoting *State v. Thompson*, 349 N.C. 483, 495, 508 S.E.2d 277, 284 (1998))). Assuming *arguendo*, however, that *Fulcher* applies equally to misdemeanor offenses, here there was no double punishment, and no violation of the prohibition against double jeopardy, because judgment was arrested on the misdemeanor assault conviction.[5] *See*, *e.g.*, *State v. Freeland*, 316 N.C. 13, 23-24, 340 S.E.2d 35, 40-41 (1986) (stating that when the defendant's multiple convictions did unconstitutionally subject him to double punishment, the trial court on remand could remedy the violation by arresting judgment on either of the conflicting convictions).

We are careful to note that defendant's sole argument on appeal with regard to the conviction for kidnapping, both below and before this Court, is that the State presented insufficient evidence of the element of "restraint."[6] On this narrow issue, we conclude that the State presented sufficient evidence of the element of restraint that was separate and apart from that inherent in the commission of the sex offense.

For the reasons stated, we hold that the trial court did not err in denying defendant's motions to dismiss the charge of second-degree kidnapping. On this issue, we reverse the Court of Appeals and instruct that

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5. In spite of this, defendant argues that judgment was arrested on the misdemeanor assault conviction not because of any conflict with the kidnapping conviction, but because of a conflict with the "serious injury" element of the sex offense conviction. Yet, defendant cites to no case law, and we are not aware of any, regarding the relevance of this contention.

6. Defendant does not, for example, argue that the State presented insufficient evidence that any restraint by defendant, which was separate and apart from that inherent in the sex offense, was also for the purposes of terrorizing Mark. *See*, *e.g.*, *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986) ("Since kidnapping is a specific intent crime, the State must prove that the defendant unlawfully confined, restrained, or removed the person for one of the eight purposes set out in the statute."); *id.* at 745-46, 340 S.E.2d at 405-06 (concluding that when the defendant, in addition to making threats against the victim's life, "held the victim at gunpoint for almost three hours after inflicting a serious head injury upon her, during which time he threatened to shoot himself in her presence and in the presence of their three-year-old son, and he tried to get her to shoot him," the evidence was sufficient to support a finding that the defendant's purpose was to terrorize the victim).

court to reinstate the judgment of the trial court. The remaining issues addressed by the Court of Appeals are not before this Court and its decision as to these issues remains undisturbed.

REVERSED AND REMANDED.

Justice BEASLEY dissenting.

While I join in Justice Morgan's dissenting opinion, I write separately to discuss the majority's continued expansion of what constitutes sufficient evidence to support a conviction for kidnapping under N.C.G.S. § 14-39. The majority's reasoning permits the State, in future prosecutions, to sustain a conviction for second-degree kidnapping (a Class E felony)[1] with proof that the defendant engaged in an assault (ranging from a Class 2 to Class A1 misdemeanor)[2] which also had the effect of restraining the victim. Because I believe the majority's interpretation of N.C.G.S. § 14-39 transcends the bounds of the legislature's expressed intent, the statute's purpose, and notions of fundamental fairness, I respectfully dissent.

A person is guilty of kidnapping if he or she "unlawfully confine[s], restrain[s], or remove[s] from one place to another, any other person 16 years of age or over without the consent of such person," when "such confinement, restraint or removal is for the purpose of," *inter alia*, "[f]acilitating the commission of any felony or facilitating flight of any person following the commission of a felony," N.C.G.S. § 14-39(a)(2) (2017), or "terrorizing the person so confined, restrained or removed," *id.* § 14-39(a)(3) (2017).[3] However, recognizing that "certain felonies . . . cannot be committed without some restraint of the victim," this Court

1. N.C.G.S. § 14-39(b) (2017) (classifying second-degree kidnapping as a Class E felony).

2. *Compare* N.C.G.S. § 14-33(a) (2017) (classifying simple assault as a Class 2 misdemeanor) *with id.* § 14-33(c) (2017) (classifying various forms of aggravated assaults, including assault that inflicts serious injury, as Class A1 misdemeanors).

3. While N.C.G.S. § 14-39 provides other means of supporting a conviction for kidnapping, only subdivisions 14-39(a)(2) and (a)(3) are relevant to this discussion. While the jury was instructed under only subdivision 14-39(a)(3), restraint for the purpose of "terrorizing" the victim, our precedent analyzing situations in which the "restraint" used to establish kidnapping is inherent in the commission of other offenses committed by a defendant has developed under subdivision (a)(2), *see State v. Fulcher*, 294 N.C. 503, 523-24, 243 S.E.2d 338, 351-52 (1978), and has been applied to convictions under subdivision (a)(3), *see State v. Prevette*, 317 N.C. 148, 157-58, 345 S.E.2d 159, 165-66 (1986) (applying *Fulcher* to prohibit the State from using the same conduct to support a conviction for murder *and* the "restraint" element of kidnapping for the purpose of "terrorizing" the victim under subdivision (a)(3)).

has held that a restraint which is *inherent to* the commission of the felony which would otherwise supply the predicate felony under subdivision 14-39(a)(2) cannot also support a conviction for kidnapping. *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). Additionally, this Court has held that a restraint which *is inherent to another criminal offense committed by the defendant and for which the defendant is punished* cannot support a conviction for kidnapping even when the State proceeds under another provision of subsection 14-39(a) which does not require that the defendant restrain the victim for the purpose of committing a felony. *See State v. Prevette*, 317 N.C. 148, 157-58, 345 S.E.2d 159, 165-66 (1986).

In *Prevette* the defendant was convicted of first-degree murder and first-degree kidnapping. *Id.* at 149, 345 S.E.2d at 160. The State presented evidence that the victim died as a result of suffocation after she was bound and gagged and her hands and feet were also restrained. *Id.* at 150-52, 345 S.E.2d at 161-62. Although the State proceeded on a theory of kidnapping based on the argument that the defendant restrained the victim for the purpose of terrorizing her, *see* N.C.G.S. § 14-39(a)(3), *and not* for the purpose of committing the murder, *see id.* § 14-39(a)(2), this Court held that the binding of the victim's hands and feet, "which prevented the removal of the gag," was *inherent to* the murder and could not support a separate conviction for kidnapping because "the restraint of the victim which resulted in her murder [was] indistinguishable from the restraint used by the State to support the kidnapping charge." *Prevette*, 317 N.C. at 157-58, 345 S.E.2d at 165-66. The Court in *Prevette* "examin[ed] the subject, language, and history" of the kidnapping and murder statutes and concluded that the legislature did not "intend[ ] to authorize punishment for kidnapping when the restraint necessary to accomplish the kidnapping was an inherent part of the first degree murder." *Id.* at 158, 345 S.E.2d at 165-66.

While *Fulcher* and *Prevette* were premised *in part* on the constitutional prohibition against double jeopardy,[4] *see Fulcher*, 294 N.C. at 523, 525, 243 S.E.2d at 351, 352; *Prevette*, 317 N.C. at 158, 345 S.E.2d at 166, both cases were actually decided on grounds of statutory interpretation.

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4. Of course, there is no double jeopardy violation associated with using defendant's assaultive conduct to supply the "restraint" element for kidnapping because, as the majority points out, the trial court arrested judgment on defendant's conviction for misdemeanor assault inflicting serious injury. The error instead stems from the fact that this conduct is insufficient under the statute to support a conviction for kidnapping *regardless* of whether defendant was convicted or sentenced for the assault offense

The Court in *Fulcher* and *Prevette* applied the long-accepted canon of statutory interpretation that, "[w]here one of two reasonable constructions of a statute will raise a serious constitutional question, it is well settled that our courts should adopt the construction that avoids the constitutional question." *State v. T.D.R.*, 347 N.C. 489, 498, 495 S.E.2d 700, 705 (1998) (first citing *In re Arthur*, 291 N.C. 640, 642, 231 S.E.2d 614, 616 (1977); then citing *In re Arcadia Dairy Farms, Inc.*, 289 N.C. 456, 465-66, 223 S.E.2d 323, 328-29 (1976); and then citing *Kent v. United States*, 383 U.S. 541, 557, 86 S. Ct. 1045, 1055 (1966)); *see also*, *e.g.*, *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (per curiam) (explaining that North Carolina courts "will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds"). Thus, the requirement that the "restraint" under subsection 14-39(a) used to support a kidnapping conviction must not be the same as the restraint inherent to another charged offense for which a defendant receives a sentence is contained within the statute itself under *Fulcher* and *Prevette*.

A proper construction of section 14-39, in light of this Court's concerns regarding the expansion of the crime of kidnapping beyond the legislature's intent, would also require that the restraint necessary to support a conviction for kidnapping go beyond an assault that has the incidental effect of restraining the victim. The statute, in relevant part, requires that the defendant restrain the victim *for the purpose* of "facilitating" a felony or "terrorizing" the victim. *See* N.C.G.S. § 14-39(a)(2), (3). Here the majority's interpretation permits defendant's assaultive conduct (pulling the victim off the bed and kicking the victim while he was on the floor) to satisfy the "restraint" element but makes no argument that defendant used this "restraint" *for the purpose of terrorizing the victim* beyond its recitation that the assaultive conduct "exposed [the victim] to [a] greater danger than that inherent in the [sex offense]" or "increas[ed] the victim's helplessness and vulnerability" beyond the earlier restraint used to commit the sex offense. *See State v. Pigott*, 331 N.C. 199, 210, 415 S.E.2d 555, 561 (1992). The majority's reasoning is tautological; assaultive conduct that takes place after a completed felony and has the effect of restraining the victim will *always* "expose[ ] [the victim] to [a] greater danger" or "increas[e] the victim's helplessness and vulnerability" because such conduct *is the greater danger*.

Undoubtedly, the defendant's reprehensible criminal conduct (breaking and entering into the residence, restraining the victim in order to commit the sex offense, and then later kicking the victim) had the effect of terrorizing the victim; "[t]his Court should not, however, permit

these 'bad facts' to lure it into making 'bad law.' " *N.C. Baptist Hosps., Inc. v. Mitchell*, 323 N.C. 528, 539, 374 S.E.2d 844, 850 (1988) (Meyer, J., dissenting). Importantly, the majority is only relying on the assaultive conduct defendant committed against the victim *after* the sex offense to support the "restraint" element. Although most assaults have the effect of terrorizing the victim, not all assaults are specifically engaged in for the purpose of terrorizing the victim, and—more importantly—not all assaults constitute kidnapping. Yet the majority's opinion would permit any assault that has the effect of confining or restraining the victim to be charged as kidnapping. *See State v. Dix*, 282 N.C. 490, 501, 193 S.E.2d 897, 903-04 (1973) (warning that an expansive definition of kidnapping which "overruns other crimes for which the prescribed punishment is less severe" may "create[ ] the potential for abusive prosecutions" by giving a prosecutor " 'naked and arbitrary power' to choose the crime [to] prosecute" (quoting *People v. Adams*, 34 Mich. App. 546, 560, 192 N.W.2d 19, 26 (1971), *aff'd in part and rev'd in part*, 389 Mich. 222, 205 N.W.2d 415 (1973))), *superseded by statute*, Act of June 25, 1975, ch. 843, 1975 N.C. Sess. Laws 1198 (rewriting N.C.G.S. § 14-39), *as recognized in Fulcher*, 294 N.C. at 521-23, 243 S.E.2d at 350-51.[5]

I would hold that defendant's assaultive conduct (pulling the victim off the bed and kicking him while he was on the floor) is insufficient to support a conviction for kidnapping. This factual scenario is not "the kind of danger and abuse the kidnapping statute was designed to prevent." *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981) (citing *Dix*, 282 N.C. 490, 193 S.E.2d 897); *cf. State v. Moore*, 315 N.C. 738, 745-46, 340 S.E.2d 401, 405-06 (1986) (holding that the evidence was sufficient to show that the defendant's restraint of the victim supported a conviction under N.C.G.S. § 14-39(a)(3) for "terrorizing" the victim when the defendant (1) had previously beaten the victim, (2) moved the victim from his car to his trailer, (3) threatened to shoot the victim if she tried to run, (4) stated he would kill the victim "before letting her take his children away from him," and (5) intermittently pointed a gun at himself or the victim during her confinement in his trailer for almost three hours); *State v. Rodriguez*, 192 N.C. App. 178, 187-89, 664 S.E.2d 654, 660-61 (2008) (holding that evidence was sufficient to show that the defendant's restraint of the victims supported a conviction under N.C.G.S. § 14-39(a)(3) when the defendant (1) "physically abused some of the victims" in

5. While *Dix* interpreted an earlier enactment of the kidnapping statute, *see Dix*, 282 N.C. at 492, 193 S.E.2d at 898 (citing N.C.G.S. § 14-39 (1969)), the thrust of the quoted language recognizing the unjust consequences of expanding the definition of the offense applies with equal force under the current statute.

close proximity to and within the earshot of other victims, (2) dunked one of the victims under water, (3) burned that victim "so severely that his skin was peeling," and (4) threatened other victims that they would suffer a similar fate if they did not follow his commands or if they contacted law enforcement). Therefore, I respectfully dissent.

Justice MORGAN dissenting.

I respectfully dissent from my learned colleagues in the majority who have determined that there was sufficient evidence of restraint beyond that which was inherent in defendant's commission of the first-degree sex offense to support the second-degree kidnapping conviction. In my view, the Court of Appeals was correct in its determination that the trial court erred in denying defendant's motion to dismiss the charge of second-degree kidnapping because the victim was not subjected to any restriction upon his freedom of movement that was separate and apart from the restraint which was an element of the first-degree sex offense. Accordingly, I would affirm the opinion of the majority of the Court of Appeals in this matter.

I agree with the majority's starting premise that in order to obtain a conviction for second-degree kidnapping, the State must prove that a defendant (1) confined, restrained, or removed from one place to another any other person (2) unlawfully, (3) without consent and (4) for one of the statutory purposes enumerated elsewhere in N.C.G.S. § 14-39, including the provisions in N.C.G.S. § 14-39(a)(2) that the "confinement, restraint or removal is for the purpose of . . . [f]acilitating the commission of any felony or facilitating flight of any person following the commission of a felony," and in N.C.G.S. § 14-39(a)(3) that the "confinement, restraint or removal is for the purpose of . . . [d]oing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person." N.C.G.S. § 14-39(a) (2017).

The crime of first-degree sex offense, as it was codified in N.C.G.S. § 14-27.4 at the time that defendant committed the criminal act,[1] was described in the statute as follows:

> (a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:

1. N.C.G.S. § 14-27.4 was rewritten and recodified as N.C.G.S. § 14-27.26 by Act of July 29, 2015, ch. 181, sec. 8, 2015 NC. Sess. Laws 460, 462 (applying to all offenses committed on or after Dec. 1, 2015).

(1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim; or

(2) With another person by force and against the will of the other person, and:

a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or

b. Inflicts serious personal injury upon the victim or another person; or

c. The person commits the offense aided and abetted by one or more other persons.

(b) Any person who commits an offense defined in this section is guilty of a Class B1 felony.

N.C.G.S. § 14-27.4 (2013).

The majority expressly acknowledges that the Court of Appeals referenced this Court's guidance rendered in *State v. Ripley*, 360 N.C. 333, 626 S.E.2d 289 (2006), regarding the criminal offense of kidnapping and the proper recognition of its elements as relates to other criminal offenses that may be committed during the same transaction of events in which an act of kidnapping occurs. As quoted by the appellate court majority below, we said in *Ripley*:

> It is self-evident that certain felonies (*e.g.*, forcible rape and armed robbery) cannot be committed without some restraint of the victim. We are of the opinion, and so hold, that G.S. 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. . . . [W]e construe the word "restrain," as used in G.S. 14-39, to connote a restraint separate and apart from that which is inherent in the commission of the other felony.

Id. at 337, 626 S.E.2d at 292 (italics and alterations in original) (quoting *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978)).

Our analysis in *Ripley* of this area of substantive criminal law governing the commission of multiple criminal offenses continued as follows:

> Additionally, this Court noted that more than one criminal offense can grow out of the same criminal transaction, but specifically held "the restraint, which constitutes the kidnapping, [must be] a separate, complete act, independent of and apart from the other felony." [*Fulcher*, 294 N.C.] at 524, 243 S.E.2d at 352; *see also State v. Beatty*, 347 N.C. 555, 559, 495 S.E.2d 367, 369 (1998) (noting "a person cannot be convicted of kidnapping when the only evidence of restraint is that 'which is an inherent, inevitable feature' of another felony such as armed robbery"[ ] (quoting *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351)[)].

Id. at 337-338, 626 S.E.2d at 292 (first alteration in original).

In the present case, it is clear that there is sufficient evidence in the trial record to support the jury's verdict that defendant is guilty of first-degree sex offense. In perpetrating this offense, defendant satisfied its elements by engaging in a sexual act with the victim by force and against the victim's will. Lifting the salient facts from the majority opinion on this point, defendant punched the victim in the face, knocking him sideways onto the bed. Defendant then got on the bed and on top of the victim, with defendant again using his fist to strike the victim in the face. After a blow from defendant caused the victim to roll over onto his stomach, defendant then stunned the victim with a punch to the back of the head, followed by defendant pulling down the victim's pants and anally penetrating the victim with his penis three times.

Though not a statutory element of the criminal offense of first-degree sex offense, restraint is the means by which defendant effectuated the crime by implementing the force that subverted the will of the victim. The criminal offense of second-degree kidnapping expressly includes restraint as one of the crime's elements delineated in N.C.G.S. § 14-39. Unfortunately, the majority is so occupied with the need to emphasize that a second-degree kidnapping can occur in conjunction with a first-degree sex offense—because restraint is required in the kidnapping offense but not inherent in the first-degree sex offense—that the majority fails to realize, under the unique facts and circumstances of the case at bar, that the restraint utilized to constitute the force and subvert the will of the victim is the same restraint employed in the full transaction of events that also yielded the miscalculated finding of second-degree kidnapping.

In addition, the majority improperly relied on *State v. Pigott*, 331 N.C. 199, 415 S.E.2d 555 (1992). The majority evaluated the actions of the defendant in *Pigott* in visiting the home of his employer, unsuccessfully

asking the employer for a loan, leaving the employer's home but returning with a gun, forcing the employer to lie on the floor, binding the employer's hands, ransacking the premises for money, subsequently binding the employer's feet to the employer's hands, shooting the employer in the head, looking around for more money, and then subsequently setting the employer's premises on fire. *Id.* at 202, 415 S.E.2d at 557. On appeal of the defendant's first-degree murder conviction to this Court, he unsuccessfully argued that it was error for the trial court to fail to dismiss the charge of first-degree kidnapping. *Id.* at 210, 415 S.E.2d at 561.

We held in *Pigott*, in the context of the armed robbery charge which the defendant also faced, that

> all the restraint necessary and inherent to the armed robbery was exercised by threatening the victim with the gun. When defendant bound the victim's hands and feet, he "exposed [the victim to a] greater danger than that inherent in the armed robbery itself." This action, which had the effect of increasing the victim's helplessness and vulnerability beyond the threat that first enabled defendant to search the premises for money, constituted such additional restraint as to satisfy that element of the kidnapping crime.

Id. at 210, 415 S.E.2d at 561 (alteration in original) (quoting *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981)). Based upon this analysis, this Court affirmed the defendant Pigott's first-degree kidnapping conviction.

In the instant case the majority adapts the factual circumstances of *Pigott* to justify its determination that separate and distinct acts of defendant here constituted "additional restraint": defendant's act of grabbing the victim by the ankles and yanking the victim off of the bed, which in turn caused the victim's head to hit the floor after the sex offense, and defendant's act of summoning his companion to join in kicking and stomping the victim's body. In stating that these actions of defendant amounted to an "additional restraint" which "exposed [Mark][2] to greater danger than that inherent in the [sex offense] itself," the majority concludes that this activity constituted "a restraint separate and apart from that which was inherent to the commission of the sex offense."

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2. This pseudonym was utilized by the appellate courts for simplicity and to protect the victim's privacy.

In attempting to align the case *sub judice* with *Pigott*, the majority buttresses the point of my dissenting view. There was a separate restraint of the victim employer in *Pigott* that went beyond the restraint inherent in the armed robbery offense itself so as to constitute the defendant's commission of first-degree kidnapping, in that the defendant intermittently perpetrated increasingly heightened levels of restrictions on the victim's freedom of movement while committing the armed robbery offense, namely: forcing the victim to lie on the floor after returning to the premises with a gun, looking for money after binding the victim's hands, continuing to look around for more money after binding the victim's feet to his hands and shooting the victim in the head as the victim continued to apparently survive this ordeal until the defendant ignited the fire that burned portions of the premises and generated deadly carbon monoxide fumes. *Id.* at 202, 415 S.E.2d at 560. On the other hand, there was no additional restraint which was employed by defendant to commit the first-degree sex offense because the requisite restraint was inherent in the perpetration of the crime. To the extent that the majority considers defendant's violence against the victim after the completion of the sex offense to constitute an "additional restraint" to justify second-degree kidnapping as a separate offense, such a strained view has no validity for four reasons: (1) N.C.G.S. § 14-39(a)(2) is not applicable, because the felony of first-degree sex offense was already completed such that the commission of second-degree kidnapping after the perpetration of the sex offense could not have facilitated the sex offense; (2) N.C.G.S. § 14-39(a)(2) also does not apply because the additional "restraint" was not for the purpose of "facilitating [defendant's] flight . . . following [his] commission of" the first-degree sex offense; rather, the evidence in the trial record shows that the victim ran out of the residence shortly after the two men stopped kicking him; (3) N.C.G.S. § 14-39(a)(3) likewise is not applicable, because the trial record does not afford this Court an opportunity to determine, on appellate review, at what points in time the victim's successive injuries occurred and when the terror that resulted in his emotional injuries were inflicted; and (4) at trial, the jury found defendant guilty as charged of misdemeanor assault inflicting serious injury which, coupled with the first-degree sex offense indictment and conviction appropriately identified all offenses for which defendant could be charged and convicted as a result of any injuries suffered by the victim during the entire transaction of events, and the trial court arrested judgment on the misdemeanor assault conviction.

As we opined in *Ripley* and its predecessor cases, use of the word "restrain" in N.C.G.S. § 14-39 means that the criminal restriction of one's freedom of movement must be separate and apart from the restraint

that is inherent in the commission of another felony. Under the facts and circumstances of this case, the restraint that was inherent in defendant's commission of the first-degree sex offense did not extend beyond the crime's parameters so as to support the jury's guilty verdict of second-degree kidnapping. Therefore, I would affirm the decision of the Court of Appeals.

Justice BEASLEY joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
WILLIAM SHELDON HOWELL

No. 455PA16

Filed 6 April 2018

Sentencing—misdemeanor possession of marijuana—elevation to felony

Under the reasoning of *State v. Jones*, 358 N.C. 473 (2004), and in light of the plain language of N.C.G.S. § 90-95(e)(3), possession of more than one-half but less than one and one-half ounces of marijuana in violation of N.C.G.S. § 90-95(d)(4) by a defendant with a prior conviction for an offense punishable under the Act is classified as a Class I felony for all purposes. The General Assembly intended for subdivision (e)(3) to establish a separate felony offense rather than merely to serve as a sentence enhancement of the underlying misdemeanor.

Justice BEASLEY dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 792 S.E.2d 898 (2016), reversing a judgment entered on 9 December 2015 by Judge Mark E. Powell in Superior Court, Transylvania County, and remanding for resentencing. Heard in the Supreme Court on 11 December 2017.

Joshua H. Stein, Attorney General, by Tracy Nayer, Assistant Attorney General, for the State-appellant.

Edward Eldred for defendant-appellee.

MORGAN, Justice.

In this case we are called upon to determine whether language in N.C.G.S. § 90-95(e)(3) of the North Carolina Controlled Substances Act ("the Act"), which provides that a Class 1 misdemeanor "shall be punished as a Class I felon[y]" when the misdemeanant has committed a previous offense punishable under the Act, procedurally enhances punishment for the misdemeanor offense or instead creates a substantive felony offense. Relying on our reasoning in *State v. Jones*, 358 N.C. 473, 598 S.E.2d 125 (2004), we conclude that the General Assembly intended for subdivision (e)(3) to establish a separate felony offense rather than merely to serve as a sentence enhancement of the underlying misdemeanor.

On 27 October 2014, defendant William Sheldon Howell was indicted for several offenses alleged to have been committed on 10 October 2014, including possession with intent to sell or deliver approximately fifteen grams of marijuana, maintaining a dwelling used for keeping and selling marijuana, and knowingly possessing with the intent to use drug paraphernalia. Also on 27 October 2014, defendant was indicted for attaining the status of habitual felon. One of the three underlying felonies listed in the habitual felon indictment was a 27 August 2003 conviction in Buncombe County for felonious possession with intent to sell or deliver marijuana. As a result of the events of 10 October 2014, on 15 June 2015, defendant was further indicted for (1) possessing over one-half ounce but less than one and one-half ounces of marijuana, a Class 1 misdemeanor under N.C.G.S. § 90-95(d)(4) of the Act, and (2) having been previously convicted of an offense under the Act, namely, the above-referenced August 2003 conviction in Buncombe County.

On 9 December 2015, defendant entered into a plea agreement with the State, in which defendant would (1) plead guilty to the N.C.G.S. § 90-95(d)(4) marijuana possession charge, (2) acknowledge his prior convictions in violation of the Act, and (3) admit his habitual felon status in exchange for the State's dismissal of other pending charges. In the Superior Court, Transylvania County, Judge Mark E. Powell accepted defendant's plea and entered a consolidated judgment on the charges, noting that, although the marijuana possession charge was "a Class 1 misdemeanor, . . . I'm treating it as a Class I felony because of the prior conviction. And that Class I felony because of the habitual felon status is punished as a Class E felony."[1] The trial court sentenced defendant

1. The habitual felon statute provides that a person convicted of a felony who has attained habitual felon status "must . . . be sentenced and punished as an habitual felon."

to an active term of twenty-nine to forty-seven months, suspended the period of incarceration, and placed defendant on supervised probation for thirty-six months.

Defendant appealed to the North Carolina Court of Appeals, where he argued that the trial court erred by enhancing his sentence for misdemeanor possession of marijuana to a Class I felony due to his prior conviction under the Act and then from a Class I felony to a Class E felony based on his habitual felon status. In an opinion filed on 6 December 2016, the Court of Appeals agreed, reversing and remanding the case for resentencing. *State v. Howell*, ___ N.C. App. ___, 792 S.E.2d 898 (2016). The Court of Appeals reasoned that, "while defendant's Class 1 misdemeanor [was] punishable as a felony under the circumstances present here, the substantive offense remain[ed] a Class 1 misdemeanor" and defendant's "habitual felon [status could not] be used to further enhance a sentence that [wa]s not itself a substantive offense." *Id.* at ___, 792 S.E.2d at 901.

The State sought discretionary review of the Court of Appeals decision, and this Court allowed the State's petition by order entered on 16 March 2017. When this Court looks at a determination of the Court of Appeals by way of discretionary review, our task "is to determine whether there is any error of law in the decision of the Court of Appeals and only the decision of that court is before us for review." *State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994) (citations omitted).

The State contends that, in failing to discuss and apply this Court's opinion in *Jones*, the reasoning of which the State asserts is controlling here, the Court of Appeals erroneously determined that N.C.G.S. § 90-95(e)(3) does not create a substantive felony offense. We agree with the State's interpretation of the applicability of our decision in *Jones* to the case at bar.

An explanation of our resolution of the issue in this appeal is facilitated by a brief review of three subsections of section 90-95 of the Act: N.C.G.S. § 90-95(a), (d), and (e). The first subsection contains general provisions that criminalize making, selling, delivering, and possessing controlled substances and counterfeit controlled substances. N.C.G.S. § 90-95(a)(1), (2) (2017). Pertinent to this case, the third subdivision of

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N.C.G.S. § 14-7.2 (2017). In turn, a defendant punished as an habitual felon receives a sentence four classes higher than the principal felony for which the person was convicted. *Id.* § 14-7.6 (2017).

subsection (a) makes it unlawful "[t]o possess a controlled substance." *Id.* § 90-95(a)(3) (2017).

The second of the cited subsections sets forth how violations of N.C.G.S. § 90-95(a)(3) are punished based upon what type of controlled substance is possessed. Under N.C.G.S. § 90-95(d), "any person who violates G.S. 90-95(a)(3) with respect to:"

> (1) A controlled substance classified in Schedule I shall be punished as a Class I felon. However, if the controlled substance is MDPV and the quantity of the MDPV is 1 gram or less, the violation shall be punishable as a Class 1 misdemeanor.
>
> (2) A controlled substance classified in Schedule II, III, or IV shall be guilty of a Class 1 misdemeanor. If the controlled substance exceeds four tablets, capsules, or other dosage units or equivalent quantity of hydromorphone or if the quantity of the controlled substance, or combination of the controlled substances, exceeds one hundred tablets, capsules or other dosage units, or equivalent quantity, the violation shall be punishable as a Class I felony. If the controlled substance is methamphetamine, amphetamine, phencyclidine, or cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, or any salt, isomer, salts of isomers, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances (except decocanized coca leaves or any extraction of coca leaves which does not contain cocaine or ecgonine), the violation shall be punishable as a Class I felony.
>
> (3) A controlled substance classified in Schedule V shall be guilty of a Class 2 misdemeanor;
>
> (4) A controlled substance classified in Schedule VI shall be guilty of a Class 3 misdemeanor, but any sentence of imprisonment imposed must be suspended and the judge may not require at the time of sentencing that the defendant serve a period of imprisonment as a special condition of probation. If the quantity of the controlled substance exceeds one-half of an

> ounce (avoirdupois) of marijuana or one-twentieth of an ounce (avoirdupois) of the extracted resin of marijuana, commonly known as hashish, the violation shall be punishable as a Class 1 misdemeanor. If the quantity of the controlled substance exceeds one and one-half ounces (avoirdupois) of marijuana, or three-twentieths of an ounce (avoirdupois) of the extracted resin of marijuana, commonly known as hashish, or if the controlled substance consists of any quantity of synthetic tetrahydrocannabinols or tetrahydrocannabinols isolated from the resin of marijuana, the violation shall be punishable as a Class I felony.

Id. § 90-95(d) (2017). Thus, possession of marijuana falls under subdivision (d)(4), which mandates that possession of more than one-half but less than one and one-half ounces of that controlled substance—the amount defendant here pleaded guilty to possessing—is "punishable as a Class 1 misdemeanor." *Id.* § 90-95(d)(4). But, the provisions of subdivision (d)(4) are subject to modification by subsection (e), which specifies different punishments for possession of controlled substances under certain conditions,[2] including when a defendant has been previously convicted for a violation of the Act:

> (e) *The prescribed punishment and degree of any offense under this Article shall be subject to the following conditions*, but the punishment for an offense may be increased only by the maximum authorized under any one of the applicable conditions:
>
> . . .
>
> (3) *If any person commits a Class 1 misdemeanor under this Article and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be punished as a Class I felon.* The prior conviction used to raise the

2. Other conditions listed in subsection (e) include, *inter alia*, that the sale or delivery of the controlled substance was by an adult to a person under age sixteen or to a pregnant woman (subdivision (e)(5)), by an adult near a school or child care center (subdivision (e)(8)), or on the grounds of "a penal institution or local confinement facility" (subdivision (e)(9)). N.C.G.S. § 90-95(e) (2017).

> current offense to a Class I felony shall not be used to calculate the prior record level.

Id. § 90-95(e)(3) (2017) (emphases added). There is no dispute between the parties that, under this subdivision and in light of his plea agreement, defendant was subject to *punishment* as a Class I felon for possession of marijuana. Instead, the contested issue is the effect of subdivision (e)(3) on the *offense* for which defendant was convicted—whether the offense was a Class I felony or only a Class 1 misdemeanor with the sentence enhanced to the level of a Class I felon.

In *Jones* this Court considered an analogous question with regard to possession of a different controlled substance: "whether the North Carolina General Assembly classifie[d] the offense of possession of cocaine as a misdemeanor or a felony under N.C.G.S. § 90-95(d)(2)." 358 N.C. at 474, 598 S.E.2d at 126. The defendant had been indicted for and acknowledged the status of, *inter alia*, being an habitual felon, with one of the three underlying felonies being a 12 November 1991[3] conviction for possession of cocaine. *Id.* at 474, 598 S.E.2d at 126. "Pursuant to his plea agreement, [the] defendant preserved a right to appeal the trial court's denial of his . . . motion to dismiss his habitual felon indictment." *Id.* at 475, 598 S.E.2d at 126. On appeal, the defendant

> contended that his habitual felon indictment was insufficient because . . . the 1991 conviction for possession of cocaine[ ] was classified as a misdemeanor under N.C.G.S. § 90-95(d)(2). A panel of the Court of Appeals unanimously agreed based upon its conclusion that in 1991 N.C.G.S. § 90-95(d)(2) "plainly" classified possession of cocaine as a misdemeanor.

Id. at 475, 598 S.E.2d at 126 (citation omitted). Cocaine is a Schedule II controlled substance. N.C.G.S. § 90-90(1)(d) (2017). As noted above,

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3. As the State notes, the 1991 conviction for possession of cocaine by the defendant in *Jones* "was governed by a prior version of section 90-95(d)(2)." *Jones*, 358 N.C. at 477 n.5, 598 S.E.2d at 127 n.5 (citing N.C.G.S. § 90-95(d)(2) (Supp. 1991) (amended 1993)). However, because "the text of the statute relevant to the issue presented by [the *Jones*] appeal remain[ed] the same . . . as it appeared in November 1991," the Court "refer[red] only to the [then] current version of section 90-95(d)(2) in [its] opinion." *Id.* at 477 n.5, 598 S.E.2d at 127 n.5. Despite additional amendments to section 90-95 in the years since *Jones* was decided, the critical language of subdivision (d)(2)—providing that, generally, a person who possesses a Schedule II controlled substance is "guilty of a Class 1 misdemeanor," but that a conviction for possession of the Schedule II controlled substance cocaine is "punishable as a Class I felony"—has remained unchanged. *See* N.C.G.S. § 90-95(d)(2) (2017).

subdivision 90-95(d)(2) states that, while generally a person in possession of a specified amount of "[a] controlled substance classified in Schedule II . . . shall be guilty of a Class 1 misdemeanor," if the controlled substance possessed is cocaine, "the violation shall be punishable as a Class I felony." *Id.* § 90-95(d)(2).

In *Jones* the defendant made a very similar argument to the one advanced by defendant in the present case:

> that under the plain language of section 90-95(d)(2), the offense of possession of cocaine is a misdemeanor. . . . [because] cocaine [is] a Schedule II controlled substance, and the first sentence of section 90-95(d)(2) . . . states that a person in possession of a "Schedule II, III, or IV" controlled substance is "guilty of a Class 1 misdemeanor." According to [the] defendant, the statute's third sentence, providing that a conviction for possession of cocaine is "punishable as a Class I felony," does not serve to classify possession of cocaine as a felony for determining habitual felon status. Rather, that phrase simply denotes the proper punishment or sentence for a conviction for possession of cocaine.

358 N.C. at 477, 598 S.E.2d at 127-28 (internal citations omitted). This Court firmly rejected that construction of the statute, holding that the more specific exceptions set forth in the third sentence of N.C.G.S. § 90-95(d)(4) controlled over the general rule set out in the first sentence, since "the phrase shall be 'punishable as a Class I felony' does not simply denote a sentencing classification, but rather, dictates that a conviction for possession of the substances listed therein, including cocaine, is elevated to a felony classification for all purposes." *Id.* at 478, 598 S.E.2d at 128. Further, the Court "acknowledge[d] that the General Assembly utilizes differing terminology to classify criminal offenses as felonies," while still rejecting the "defendant's argument that these differences indicate the General Assembly's intent to create a special felony sentencing classification for possession of cocaine." *Id.* at 484, 598 S.E.2d at 132. Pertinent to the instant appeal, the court in *Jones* also observed:

> The General Assembly routinely uses the phrases "punished as" or "punishable as" a "felony" or "felon" to classify certain crimes as felonies. *See*, *e.g.*, N.C.G.S. § 14-18 (2003) (providing that "[v]oluntary manslaughter shall be punishable as a Class D felony, and involuntary manslaughter shall be punishable as a Class F felony"); N.C.G.S.

> § 14-30 (2003) (stating that a person who commits the crime malicious maiming "shall be punished as a Class C felon"); N.C.G.S. § 14-39(b) (2003) (noting that first-degree kidnapping "is punishable as a Class C felony" and that second-degree kidnapping "is punishable as a Class E felony"); N.C.G.S. § 14-52 (2003) (stating that "burglary in the first degree shall be punishable as a Class D felony, and burglary in the second degree shall be punishable as a Class G felony"); N.C.G.S. § 14-58 (2003) (providing that first-degree arson "is punishable as a Class D felony" and that second-degree arson "is punishable as a Class G felony"); N.C.G.S. § 14-202.1(b) (2003) (stating that "[t]aking indecent liberties with children is punishable as a Class F felony"); N.C.G.S. § 20-106 (2003) (providing that a person guilty of receiving or transferring stolen vehicles "shall be punished as a Class H felon"); N.C.G.S. § 20-138.5(a), (b) (2003) (noting, pursuant to the habitual impaired driving statute, that if a person drives while impaired and has been convicted of three or more offenses involving impaired driving as defined by N.C.G.S. § 20-4.01(24a) within the previous seven years, that person "shall be punished as a Class F felon").

Id. at 484-85, 598 S.E.2d at 132 (brackets in original). This Court noted that these examples and "other statutes contain a structure similar to N.C.G.S. § 90-95(d)(2), in which a crime is *classified as a misdemeanor, but elevated to a felony by the language 'punishable' or 'punished' as a 'felony' or 'felon' where special circumstances exist.*" *Id.* at 485, 598 S.E.2d at 132 (emphasis added). This Court then concluded that, under subdivision (d)(2), "the offense of possession of cocaine is classified as a felony for all purposes." *Id.* at 486, 598 S.E.2d at 133.

Here the critical language in subdivision (e)(3) is "shall be punished as a Class I felon." N.C.G.S. § 90-95(e)(3). As we held in *Jones*, the effect of such phrases is to elevate an offense that would otherwise be a misdemeanor to a felony when the specified conditions are met. We further note that the General Assembly's intent is even clearer in this case in light of the explicit wording of the applicable subsection. Subsection (e), by its plain language, addresses how specific conditions, like a misdemeanant's prior convictions under the Act, affect two determinations: "[t]he prescribed punishment *and degree of any offense* under this Article . . . ." *Id.* § 90-95(e) (emphasis added). The emphasized phrase denotes that the subsequent provisions of the statute affect not only the

designated punishment but also the degree of the offenses discussed when the listed conditions are present. Likewise, the final sentence of subdivision (e)(3) states that "[t]he prior conviction used *to raise the current offense to a Class I felony* shall not be used to calculate the prior record level," indicating that the General Assembly intended the effect of the conditions listed in the subdivision to not simply enhance the punishment of a misdemeanor as defendant contends but rather "to raise the current offense to a Class I felony." *See id.* § 90-95(e)(3) (emphasis added).

In conclusion, we hold that, under the reasoning of *Jones* and in light of the plain language of N.C.G.S. § 90-95(e)(3), possession of more than one-half but less than one and one-half ounces of marijuana in violation of N.C.G.S. § 90-95(d)(4) by a defendant with a prior conviction for an offense punishable under the Act "is classified as a [Class I] felony for all purposes." *Jones*, 358 N.C. at 486, 598 S.E.2d at 133. Accordingly, the Court of Appeals erred in determining that "the substantive offense remain[ed] a Class 1 misdemeanor" and that, as a consequence, defendant's "habitual felon [status could not] be used to further enhance a sentence that [wa]s not itself a substantive offense." *Howell*, ___ N.C. App. at ___, 792 S.E.2d at 901. The trial court here properly elevated defendant's possession of marijuana offense to a Class I felony on the basis of his prior conviction under the Act, and then correctly punished that substantive Class I felony as a Class E felony on the basis of defendant's habitual felon status.

Accordingly, we reverse the decision of the Court of Appeals on this issue and instruct that court to reinstate the trial court's judgment.

REVERSED.

Justice BEASLEY dissenting.

In this case the conduct for which defendant was sentenced was his possession of between one-half ounce and one and one-half ounces of marijuana. The majority's statutory interpretation affirms a sentence that first elevates a Class 1 misdemeanor to a Class I felony due to defendant's past conduct and second, based on this "felony," further enhances defendant's sentence to a Class E felony *also* due to defendant's past conduct. I dissent from the majority opinion because I do not believe this Court's opinion in *State v. Jones* controls the interpretation of this statutory provision, and furthermore, under the majority's interpretation

of how these provisions work together, the sentence is not proportional to the crime and is excessive in light of defendant's charged conduct.

First, *Jones* is distinguishable from this case because in *Jones*, the Court interpreted an entirely different provision in N.C.G.S. § 90-95. *See generally State v. Jones*, 358 N.C. 473, 598 S.E.2d 125 (2004) (interpreting N.C.G.S. § 90-95(d)(2) to conclude that the possession of cocaine is classified as a Class I felony rather than enhanced from a Class 1 misdemeanor to a Class I felony). The Court's interpretation in *Jones* of N.C.G.S. § 90-95(d)(2) should not control how we interpret N.C.G.S. § 90-95(e)(3). In *Jones* the provision at issue stated, "*If the controlled substance is . . . cocaine . . . the violation shall be punishable as a Class I felony.*" 358 N.C. at 476-77, 598 S.E.2d at 127 (quoting N.C.G.S. § 90-95(d)(2) (2003) (emphasis added)). The language and structure of subdivision 90-95(d)(2) as analyzed in *Jones* are analogous to subdivision 90-95(d)(4)[1] and, in this case, support the majority's interpretation of subdivision 90-95(d)(4)to elevate defendant's Class 3 misdemeanor to a Class 1 misdemeanor just as *Jones* elevated the defendant's Class 1 misdemeanor to a Class I felony.

But the majority's next analytical step—the elevation of the substantive offense from a Class 1 misdemeanor to a Class I felony under subdivision 90-95(e)(3)[2]—is not controlled by *Jones*. Despite this Court's dicta that the General Assembly "routinely uses the phrases 'punished as' or 'punishable as' a 'felony' or 'felon' to classify certain crimes as felonies," *Jones*, 358 N.C. at 484-85, 598 S.E.2d at 132 (citations omitted),

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1. This provision states, in relevant part, that "[i]f the quantity of the controlled substance exceeds one-half of an ounce (avoirdupois) of marijuana . . . , the violation shall be punishable as a Class 1 misdemeanor." N.C.G.S. § 90-95(d)(4) (2017).

2. This section provides that "[t]he prescribed punishment and degree of any offense under this Article shall be subject to the following conditions, but the punishment for an offense may be increased only by the maximum authorized under any one of the applicable conditions:"

> . . .
>
> (3) If any person commits a Class 1 misdemeanor under this Article and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be punished as a Class I felon. The prior conviction used to raise the current offense to a Class I felony shall not be used to calculate the prior record level.

N.C.G.S. § 90-95(e)(3) (2017).

a statutory provision using the language "punished as" was not at issue in *Jones*. The General Assembly used different language in subdivision 90-95(e)(3) than it used in subdivisions 90-95(d)(2) and 90-95(d)(4). The language at issue in this case reads: "If any person commits a Class 1 misdemeanor under this Article and if he has previously been convicted for one or more offenses . . . punishable under . . . this Article, *he shall be punished* as a Class I felon," N.C.G.S. § 90-95(e)(3) (2017) (emphasis added), while the language at issue in *Jones* was "[i]f the controlled substance is . . . cocaine . . . *the violation shall be punishable as* a Class I felony," *Jones*, 358 N.C. at 476-77, 598 S.E.2d at 127 (emphasis modified from original) (quoting N.C.G.S § 90-95(d)(2) (2003)). The subject of the phrase at issue in Jones indicates the focus of the provision is on the violation itself, namely, possession of cocaine, thus supporting a conclusion that the provision constitutes an escalation of the classification of the offense, namely, "any person" previously convicted of a drug-related violation, *see* N.C.G.S. § 90-95(d)(2) (2017); however, the subject of the language at issue here indicates the focus is on *the defendant*, which supports an analysis that the provision constitutes a sentence enhancement, *see id.* § 90-95(e)(3). Thus, our determination of legislative intent in *Jones* relating to a different provision containing different language is not controlling in this case.[3]

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3. Additionally, in *Jones*, the Court was able to defer to the way in which the crime of cocaine possession has been treated historically; that is, the Court was persuaded that the legislature intended to treat cocaine possession as a felony because possession of cocaine had always been a felony rather than a misdemeanor under the North Carolina Controlled Substances Act, regardless of the quantity of cocaine. *See Jones*, 358 N.C. at 479-84, 598 S.E.2d at 129-32. Due to the fact that this Court in *Jones* spent multiple pages discussing the twenty-five years of legislative deference to our treatment of that crime, I believe this Court was heavily persuaded by the legislative history of the way *cocaine possession* has been treated by the General Assembly. *See id.* at 479-84, 598 S.E.2d at 129-32. The offense of marijuana possession carries a markedly different legislative history that supports a different interpretative result than the one reached in *Jones*. Since the General Assembly enacted the Controlled Substances Act in 1971, marijuana possession offenses have always been classified based on the *quantity* of marijuana possessed, *see, e.g.*, *State v. Mitchell*, 336 N.C. 22, 27, 442 S.E.2d 24, 26 (1994), rather than the defendant's past conduct. Here defendant's conviction was for possession of between one-half and one and one-half ounces of marijuana, a crime that has been considered a misdemeanor since 1985. *See* Act of July 19, 1971, ch. 919, 1971 N.C. Sess. Laws 1477 (enacting the North Carolina Controlled Substances Act, classifying marijuana as a Schedule VI substance, and classifying the first and second offense of possession of marijuana as a misdemeanor regardless of quantity); Act of May 22, 1973, ch. 654, sec. 1, 1973 N.C. Sess. Laws. 967, 968 (changing classification of the offense of marijuana possession to a felony when the defendant possesses more than an ounce); Act of July 10, 1985, ch. 675, sec. 1, 1985 N.C. Sess. Laws 873, 873-84 (classifying marijuana possession as "a general misdemeanor" unless the quantity *exceeds* one and one-half ounces); *see also* N.C.G.S. § 90-95(d)(4) (classifying the offense of marijuana possession as a Class 1 misdemeanor if the quantity does not exceed one and one-half ounces).

Because *Jones* does not control, I believe the interpretation of N.C.G.S. § 90-95(e)(3) is a matter of first impression. The plain language of subdivision 90-95(e)(3)—that "[defendant] shall be punished as a Class I felon"— is subject to two competing interpretations: (1) the provision serves as a sentencing enhancement, meaning defendant should receive the sentence associated with a Class I felony; or (2) the provision elevates the substantive conviction from a misdemeanor to a felony. *See* N.C.G.S. § 90-95(e)(3). Reasonable minds could differ regarding the meaning of this provision, based on its plain language. The ambiguity is not helped by the fact that the final sentence in subdivision (e)(3) states that "[t]he prior conviction [is] *used to raise the current offense to a Class I felony.*" *Id.* The former interpretation is the argument defendant makes in this case and the view taken by the Court of Appeals, *see State v. Howell*, ___ N.C. App. ___, ____, 792 S.E.2d 898, 901 (2016) (only analyzing the plain language to support the conclusion that the provision is a sentencing enhancement), while the latter is the interpretation of the State and the majority of this Court.

When the provision at issue is read along with other provisions within section 90-95, it is apparent that the General Assembly used three separate phrases to reflect how defendants should be punished—"the violation shall be punishable as"; "[defendant] shall be punished as"; and "[defendant] shall be guilty of." *See* N.C.G.S. § 90-95 (2017). The General Assembly used varying language within subdivision (e)(3) itself and across its eight provisions, indicating there should be some difference in how subdivisions (e)(3), (e)(5), (e)(8), and (e)(10) should operate versus subdivisions (e)(4), (e)(7) and (e)(9). *See id.* § 90-95(e). Because "different words used in the same statute should be assigned different meanings," *In re M.I.W.*, 365 N.C. 374, 379, 722 S.E.2d, 469, 473 (2012) (quoting *Ferrell v. Express Check Advance of SC LLC*, 591 F.3d 698, 704 (4th Cir. 2010)), I conclude that the General Assembly chose these specific phrases for different operational purposes, though it is unclear exactly what was intended. Because the interpretation of these phrases has implications affecting other statutes, such as the habitual felon statute in this case, we should not assume they can be used interchangeably. *See*, *e.g.*, N.C.G.S. §§ 14-7.1 to -7.76 (2017). Since it is not clear what the General Assembly meant by using these various phrases, and the dueling interpretations create widely differing results—specifically, this defendant's potential maximum punishment of twenty-four versus eighty-eight months of active jail time—the rule of lenity should apply.

"The rule of lenity requires interpreters to resolve ambiguity in criminal laws in favor of defendants. Deferring to the prosecuting branch's

expansive views of these statutes 'would turn [their] normal construction . . . upside-down, replacing the doctrine of lenity with a doctrine of severity." *Whitman v. United States*, 135 S. Ct. 352, 353, 190 L. Ed. 2d 381, 382 (2014) (mem.) (statement of Scalia, J.) (alterations in original) (quoting *Crandon v. United States*, 494 U.S. 152, 178, 108 L. Ed. 2d 132, 152 (1990) (Scalia, J., concurring in the judgment)) *denying cert. to United States v. Whitman*, 555 F. App'x 98 (2d Cir. 2004); *accord State v. Hinton*, 361 N.C. 207, 211, 639 S.E.2d 437, 440 (2007) ("In construing ambiguous criminal statutes, we apply the rule of lenity, which requires us to strictly construe the statute."). The General Assembly's choice to separate sub-section 90-95(e) from sub-section 90-95(d) in the statutory structure indicates the legislature intended these two provisions to operate differently. In contrast to the language in subdivision 90-95(d)(4), subdivision 90-95(e)(3) focuses on a defendant's past conduct—specifically, the defendant's previous convictions. Construing the statute according to the rule of lenity, I read subdivision 95-90(e)(3) to have no effect on the substantive classification of the violation (as subdivision 90-95(d)(4) does). Rather, its sole effect is to enhance a defendant's sentence.

Moreover, under the majority's interpretation of the provision, subdivision 90-95(e)(3) is duplicative of the habitual felon statute when applied to defendant's case. *Compare* N.C.G.S. § 14-7.6 (providing that habitual felons[4] are "sentenced at a felony class level that is four classes higher than the principal felony for which the person was convicted") *with id.* § 90-95(e)(3) ("If any person commits a Class 1 misdemeanor under this Article and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be punished as a Class I felon."). Both statutes target recidivists, raising the level at which a defendant is sentenced based on the defendant's past conduct, and reflect the intent of the legislature "to segregate that person from the rest of society for an extended period of time" when the individual displays a propensity for recidivism. *State v. Kirkpatrick*, 345 N.C. 451, 454, 480 S.E.2d 400, 402 (1997) (quoting *Rummel v. Estelle*, 445 U.S. 263, 284, 63 L.Ed.2d 382, 397 (1980)).

Here, however, because the majority's reasoning allows both the N.C.G.S. § 90-95(e)(3) and the habitual felon recidivist provisions to apply, defendant is punished doubly for his past conduct—specifically,

4. An "habitual felon," under the statute, is "[a]ny person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof." N.C.G.S. § 14-7.1(a).

his 27 August 2003 conviction for felonious possession with intent to sell or deliver marijuana—in the instant case. Also, though not at issue in this case, one could anticipate a situation in which the majority's reasoning is applied to a defendant not yet qualified as an habitual felon, to convert that defendant into an habitual felon by treating a misdemeanor drug offense as a third and qualifying felony under subdivision 90-95(e)(3). Therefore, in considering the statutory framework as a whole, subdivision 90-95(e)(3) may have been intended to increase the punishment for those recidivist defendants who have committed multiple drug offenses, with the effect of assigning a defendant the same punishment as that imposed on a felon but not elevating his substantive conviction to a felony.

Finally, what is troubling about the majority's interpretation of how these various sentencing provisions work together is that this interpretation creates a penalty that is disproportionate in light of defendant's actual conduct reflected in this offense. The "deeply rooted" proportionality principle of sentencing, *Solem v. Helm*, 463 U.S. 277, 284-86, 77 L. Ed. 2d 637, 645-57 (1983) (explaining the history behind the principle), dictates that "the punishment should fit the crime," *Ewing v. California*, 538 U.S. 11, 31, 155 L. Ed. 2d 108, 124 (2003) (Scalia, J. concurring in the judgment) (defining the principle before disagreeing with the majority that the Framers included a proportionality principle within the Eighth Amendment that applies to noncapital cases).[5] "[T]he punishment ought to reflect the degree of moral culpability associated with the offense for which it is imposed. Trivial offenses should attract only minor punishment and the most despicable offenses should be punished severely,

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5. The U.S. Supreme Court has held that the principle of proportionality is contained within the Eighth Amendment's proscription of cruel and unusual punishments, and thus, the Federal Constitution prohibits sentences that are disproportionate to the crime committed. *Helm*, 463 U.S. at 284, 77 L. Ed. 2d at 645; *see generally Ewing*, 538 U.S. 11, 155 L. Ed. 2d 108 (despite the lack of a majority opinion, seven members of the Court agreed that a sentence is cruel and unusual within the meaning of the Eighth Amendment if the court finds it to be grossly disproportionate to the crime). Notably, in *Ewing*, *Helm*, and *Rummel* (cases all considering recidivists' sentences under the Eighth Amendment), the underlying crimes triggering the recidivist statute were substantively felonies. *Ewing*, 538 U.S. at 18-19, 155 L. Ed. 2d at 115-16; *Helm*, 463 U.S. at 279-81, 77 L. Ed. 2d at 642-44; *Rummel*, 445 U.S. at 265-66, 63 L. Ed. 2d at 385-86. There may be an even more persuasive Eighth Amendment argument when a crime typically classified and punished as a misdemeanor is escalated to a felony, triggering the recidivist statute and resulting in a disproportionate sentence. *See Helm*, 463 U.S. at 290-92, 77 L. Ed. 2d at 649-50 (applying a three-factor test to strike down a sentence as significantly disproportionate after considering (1) the gravity of the offense versus the harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction, and (3) the sentences imposed for the commission of the same crime in other jurisdictions).

with punishment appropriately graduated for offenses that fall between these extremes." Ian P. Farrell, *Gilbert & Sullivan & Scalia: Philosophy, Proportionality, & The Eighth Amendment*, 55 Vill. L. Rev. 321, 337 (2010). Logically, because defendant's past conduct does not change the nature of the current crime for which he is being punished, his past criminal history should operate as a sentencing enhancement under subdivision 90-95(e)(3) rather than to reclassify a misdemeanor offense as a felony offense.

In this case the Court of Appeals majority was correct to conclude defendant's Class 1 misdemeanor should have been punished as a Class I felony, but the substantive offense should remain a Class 1 misdemeanor, and therefore, defendant's habitual felon status has no effect on his sentence. *Howell*, ___ N.C. App. at ___, 792 S.E.2d at 901. Because the quantity of the marijuana, and not defendant's past conduct, is what controls the classification of the substantive offense under this statutory framework, and because this punishment does not "fit [defendant's] crime," I respectfully dissent.

STATE OF NORTH CAROLINA
v.
JOHN OWEN JACOBS

No. 126PA17

Filed 6 April 2018

Evidence—Rape Shield Law—STDs in complainant absent in defendant

In defendant's trial for sexual offenses committed against his daughter, the trial court erred by excluding evidence of the complainant's history of sexually transmitted diseases (STDs) pursuant to Rule of Evidence 412. The excluded evidence—which included expert testimony regarding the presence of STDs in the complainant and the absence of those STDs in defendant and the inference that defendant did not commit the charged crimes—fell within the exception to the Rape Shield Law set forth in Rule of Evidence 412(b)(2), as "evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant." There was a reasonable probability that, had

this error not been committed, a different result would have been reached at trial.

Justice MORGAN dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 798 S.E.2d 532 (2017), finding no error after appeal from a judgment entered on 28 July 2015 by Judge Reuben F. Young in Superior Court, Bladen County. Heard in the Supreme Court on 10 January 2018.

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

Paul F. Herzog for defendant-appellant.

Anne Bleyman and North Carolina Prisoner Legal Services, Inc., by Christopher J. Heaney, for North Carolina Advocates for Justice, amicus curiae.

JACKSON, Justice.

In this case we consider whether the exception outlined in North Carolina Rule of Evidence 412(b)(2) applies to evidence of the complainant's history of sexually transmitted diseases (STDs) such that the trial court erred in excluding that evidence pursuant to Rule 412 when other evidence showed that defendant was not infected with those STDs. Because we conclude that the relevant evidence in defendant's offer of proof fell within the Rule 412(b)(2) exception, we reverse the decision of the Court of Appeals holding that the trial court did not err in excluding the STD evidence and remand this case for a new trial.

On 6 May 2013, complainant "Betty"[1] was taken to the hospital after reporting that defendant, her father, had been having sexual relations with her. As part of her examination, she was tested for STDs. The test results revealed that Betty had contracted Trichomonas vaginalis and the Herpes simplex virus, Type II. On that same day, defendant was arrested for first-degree rape of a child and first-degree sex offense with a child. Three days after defendant's arrest, pursuant to a search

1. The pseudonym "Betty" is used throughout this opinion to protect the identity of the minor child.

warrant, defendant was tested for STDs and the test results showed no evidence of either Trichomonas or the Herpes simplex virus, Type II.

Prior to trial, the State filed multiple motions *in limine* asserting that no Rule 412 exceptions applied to evidence related to STDs in this case and that, as a result, the trial court should prohibit the defense from mentioning such evidence during the trial. Subsequently, defendant filed a notice of intent to call an expert witness, Keith Ramsey, M.D. of the East Carolina University School of Medicine, to testify that Betty had STDs that were not present in defendant and to testify as to the implications of this information. After hearing arguments on the State's Rule 412 motions at the beginning of the July 2015 trial, the trial court concluded that defendant could not introduce any STD evidence unless the State "open[ed] the door" to such evidence.[2]

At trial, Betty testified that defendant had been having sexual relations with her over a period of several years beginning with an incident in 2011, when Betty was eight or nine years old. Betty described the first incident with some particularity. During her testimony Betty also described three specific instances in which defendant engaged in sexual acts with her in 2013, when Betty was eleven years old. First, Betty testified that on 5 May 2013, after she had showered, eaten, and gone to bed, she woke up to defendant's pulling the bed covers off of her. She testified that defendant then pulled her shorts down and had sex with her. Betty also recounted that the week before the previous incident, defendant had sex with her in the kitchen of their home. This incident occurred while her mother was at work and her younger brother was outside the home. Finally, Betty testified that defendant had sex with her on 25 April 2013 in her bedroom. She noted that she remembered the date because defendant had picked her up early from school after she had been disciplined for kicking another student. On cross-examination, Betty indicated that defendant had sex with her approximately twice per week for about three years. Over the course of subsequent days, both the State and defense called several other witnesses, and defendant even testified on his own behalf. Of particular relevance to our decision here, during defendant's case-in-chief, defense counsel submitted to the trial court an offer of proof pursuant to Rule 412 that contained, *inter alia*, the "Medical Expert Report" prepared by Dr. Ramsey to preview

2. The trial judge stated that the parties might need to address the possibility of introducing the STD evidence prior to the first witness' taking the stand. The transcript reveals that there was a bench conference off the record before Betty took the stand, but there is no indication in the record as to what was discussed during this bench conference.

his potential testimony regarding the implications of the STD evidence. After considering the offer of proof, the trial court reaffirmed its earlier decision that evidence regarding Betty's STDs must be excluded from trial for violating the Rape Shield Law.

On 28 July 2015, a jury returned a verdict finding defendant guilty of first-degree sex offense with a child. The jury deadlocked on the remaining rape charges. For the conviction of first-degree sex offense with a child, the trial court imposed a sentence of 420 to 564 months of imprisonment. After sentencing, defendant gave oral notice of appeal.

Regarding the issue of the STD evidence, defendant argued before the Court of Appeals that the trial court erred by excluding the evidence because its inclusion would have made sexual contact between Betty and defendant less likely, thereby qualifying for the Rule 412(b)(2) exception. The Court of Appeals majority disagreed and instead concluded that the STD evidence was properly excluded from trial because that exception was not applicable here. *State v. Jacobs*, ___ N.C. App. ___, ___, 798 S.E.2d 532, 536 (2017). In reaching this conclusion, the Court of Appeals majority noted defendant's reliance on this Court's application of the Rule 412(b)(2) exception in *State v. Ollis* but distinguished *Ollis* from the present case on the basis that defendant here "offer[ed] no such alternative explanation or specific act to prove that any sexual act committed was by someone other than him." *Id.* at ___, 798 S.E.2d at 536 (citing *Ollis*, 318 N.C. 370, 376, 348 S.E.2d 777, 781 (1986)). Based upon this distinction, the Court of Appeals then reasoned that defendant offered the STD evidence "to raise speculation and insinuate that Betty must have been sexually active with someone else." *Id.* at ___, 798 S.E.2d at 536. On appeal, defendant also argued that the trial court's decision to exclude the STD evidence violated his constitutional right to present a defense. The Court of Appeals declined to reach the substance of this argument after determining that defendant had not raised this issue at trial and therefore had waived it. *Id.* at ___, 798 S.E.2d at 534.

Judge Robert N. Hunter, Jr. concurred in the result only. He wrote separately to emphasize that STD evidence should not "be included wholesale" within the coverage of Rule 412. *Id.* at ___, 798 S.E.2d at 536 (Hunter, Jr., J. concurring in result only). Nonetheless, he further explained that if a defendant can offer relevant and exculpatory medical evidence that "does not necessarily speak to the past sexual behavior of the victim, such evidence should be admissible regardless of whether it fits within" a Rule 412 exception. *Id.* at ___, 798 S.E.2d at 536.

On appeal to this Court, defendant reiterates his argument that the trial court misinterpreted Rule 412(b)(2) in excluding the proffered STD

evidence. Defendant specifically asserts that the medical evidence that was to be presented by Dr. Ramsey was within the exception set forth in Rule 412(b)(2). We agree. Because this disposes of the case in defendant's favor, we do not address whether he preserved the constitutional question below.

As stated by this Court, "[t]he Rape Shield Statute provides that 'the sexual behavior of the complainant is irrelevant to any issue in the prosecution' except in four very narrow situations." *State v. Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 370 (1988) (quoting N.C.G.S. § 8C-1, Rule 412 (1986)). "Sexual behavior" is statutorily defined as "sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial." N.C.G.S. § 8C-1, Rule 412(a) (2017). The narrow exception defendant relies upon in this case depends on whether the evidence at issue was "evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant." *Id.* § 8C-1, Rule 412(b)(2) (2017). Generally, Rule 412 "stands for the realization that prior sexual conduct by a witness, *absent some factor which ties it to the specific act which is the subject of the trial*, is irrelevant due to its low probative value and high prejudicial effect." *State v. Younger*, 306 N.C. 692, 698, 295 S.E.2d 453, 456 (1982) (emphasis added).[3]

"Before any questions pertaining to [evidence of sexual behavior] are asked of any witness, the proponent of such evidence shall first apply to the court for a determination of the relevance of the sexual behavior to which it relates." N.C.G.S. § 8C-1, Rule 412(d) (2017). Then the court must conduct a transcribed *in camera* hearing "to determine the extent to which such behavior is relevant." *Id.* If the court determines that the proffered evidence is relevant, "it shall enter an order stating that the evidence may be admitted and the nature of the questions which will be permitted." *Id.*

Here defendant both submitted the necessary offer of proof and argued that the evidence fell within the exception stated in Rule 412(b)(2) because the evidence was "evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant." N.C.G.S. § 8C-1, Rule 412(b)(2). Defendant's proffered evidence included the results of STD panels administered to both Betty and defendant, as well as a report from a

3. *Younger* was decided pursuant to N.C.G.S. § 8-58.6, which was the predecessor statute to Rule 412. Notwithstanding differences in wording, the exceptions set forth in section 8-58.6 are substantively the same as those contained in the current version of Rule 412.

proposed expert witness. Defendant's proposed expert, Dr. Ramsey, is a certified specialist in infectious diseases. The medical expert report Dr. Ramsey prepared for this case included the following observations regarding the implications of the STD test results with respect to the likelihood of defendant's guilt:

> Based upon my review of the medical records, [Betty] had a Trichomonas infection at the time of exam on 5/6/2013, and has been infected with *Herpes simplex*[.] If the latter is due to HSV-2, neither the Trichomonas nor the *Herpes simplex* would have been acquired as non-sexually transmitted diseases[.] [Defendant] had a negative KOH Wet Prep test for Trichomonas, and a negative culture for *Herpes simplex* on 5/9/2013, indicating that he had no evidence of either infection[.] Based upon the results of these tests, it is in my expert opinion that it is not likely that the plaintiff and defendant engaged in unprotected sexual activity over a long period of time without transmitting either the Trichomonas, the *Herpes simplex* infection, or both, to the defendant.

Based on the materials presented in defendant's offer of proof, the STD evidence was an essential part of the proposed expert testimony. The proposed expert's conclusions regarding the presence of STDs in the victim and the absence of those same STDs in defendant affirmatively permit an inference that defendant did not commit the charged crime. Furthermore, such evidence diminishes the likelihood of a three-year period of sexual relations between defendant and Betty. Therefore, the trial court erred in excluding this evidence pursuant to Rule 412 and there is "a reasonable possibility that, had the error not been committed, a different result would have been reached at trial." *State v. Webster*, 324 N.C. 385, 393, 378 S.E.2d 748, 753 (1989) (citing N.C.G.S. § 15A-1443 (1988)).

The State's primary argument on appeal is that defendant offered this evidence for inappropriate purposes because "[t]he speculative nature of defendant's evidence reduces it to nothing more than a naked inference of sexual activity," serving to unnecessarily humiliate and embarrass the victim. This characterization is based neither on defendant's stated reason for offering the evidence nor the evidence in defendant's offer of proof. The purpose of this evidence appears to be precisely what defendant stated it to be: to support his claim that he did not commit the criminal acts for which he was charged. That purpose aligns completely with the exception carved out in Rule 412(b)(2).

Next, given the references to our prior decision in *State v. Ollis* by the Court of Appeals and by both parties throughout the history of this case, we observe that our decision in that case does not determine the outcome here. In *Ollis* this Court reasoned that evidence of specific prior sexual acts should be admitted because the evidence offered an alternative explanation for medical evidence presented by the State that could otherwise be misleading to the jury and therefore fell within the exception to the general prohibition against the admission of evidence concerning other sexual activity involving the victim set out in Rule 412(b)(2). *See Ollis*, 318 N.C. at 377, 348 S.E.2d at 781-82 (noting that the witness "made reference in her testimony on at least two occasions to multiple rapes of the victim, which in the absence of evidence that they were committed by some other male, the jury clearly would infer were acts committed by the defendant"). Although *Ollis* does describe one set of circumstances in which the Rule 412(b)(2) exception applies, that decision does not describe the only set of circumstances in which this exception applies. In the instant case defendant offers medical evidence that directly supports an inference "that the act or acts charged were not committed by the defendant." N.C.G.S. § 8C-1, Rule 412(b)(2). Defendant's proffered evidence falls within the text of the Rule 412(b)(2) exception without directly implicating this Court's specific reasoning in *Ollis*.

The record shows that the trial court excluded defendant's evidence solely based on Rule 412. The exception set forth in Rule 412(b)(2) exists to limit the blanket exclusion of evidence related to sexual behavior pursuant to Rule 412. Because we hold that defendant's offer of proof indicated that the STD evidence in this case fell within the Rule 412(b)(2) exception, we conclude that the Court of Appeals erred by holding that there was no error in the trial court's exclusion of the evidence. For the foregoing reasons, we reverse the decision of the Court of Appeals and remand this case to that court with instructions to vacate defendant's conviction for first-degree sex offense with a child and to further remand this case to Superior Court, Bladen County for a new trial.

REVERSED AND REMANDED; NEW TRIAL.

Justice MORGAN dissenting.

Based upon application of the rudimentary principles of statutory construction, I respectfully disagree with the decision of my learned colleagues. In reaching the result in this case, the majority has devalued, and essentially ignored, the operation of the descriptive word "specific"

in its interpretation of North Carolina General Statutes Section 8C-1, Rule 412(b)(2) and this provision's usage in the present case.

"Statutory interpretation properly begins with an examination of the plain words of the statute." *Three Guys Real Estate v. Harnett County*, 345 N.C. 468, 472, 480 S.E.2d 681, 683 (1997) (quoting *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992)). "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it plain and definite meaning . . . ." *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980) (first citing *State ex rel. Utils. Comm'n v. Edmisten*, 291. N.C. 451, 232 S.E.2d 184 (1977), and then citing *Peele v. Finch*, 284 N.C. 375, 200 S.E.2d 635 (1973)); *see also In re Tr. of Charnock*, 358 N.C. 523, 528, 597 S.E.2d 706, 709-10 (2004) (stating that "the Court looks first to the language of the statute and gives the words their ordinary and plain meaning" (citing *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999))).

Rule 412(b)(2) contains the following language:

> (b) Notwithstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:
>
> . . . .
>
> (2) Is evidence of *specific* instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant . . . .

N.C.G.S. § 8C-1, Rule 412(b)(2) (2017) (emphasis added).

The majority here has determined that defendant's offer of proof at trial indicated that the Rule 412(b)(2) exception of the "Rape Shield Law" was properly invoked so as to justify the admission into evidence of the alleged victim's sexually transmitted diseases, or STDs. The majority expressly focused upon (1) the observations of defendant's proposed medical expert that the minor alleged victim had two different STDs at the time of her medical examination on 6 May 2013; neither of which "would have been acquired as non-sexually transmitted diseases," and that defendant "had no evidence of either infection" on 9 May 2013; and (2) the "expert opinion that it is not likely that the [complainant][1] and defendant engaged in unprotected sexual activity over a long period

1. This reference is to the alleged victim, "Betty."

of time without transmitting either the Trichomonas, the *Herpes simplex* infection, or both, to the defendant." Based upon the presence of STDs in the alleged victim and the absence of the same STDs in defendant, the majority reasons that such evidence would afford defendant a permissible inference that he was not guilty and "diminishes the likelihood of a three-year period of sexual relations" between defendant and the alleged victim, to which she testified at trial. Therefore, the majority concludes in the instant case that "the relevant evidence in defendant's offer of proof fell within the Rule 412(b)(2) exception" and that defendant had correctly argued this point "because the evidence was 'evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant,' " thus making the evidence admissible under that provision.

Nestled within the cited words of the opinion offered by defendant's proposed medical expert was his observation that the alleged victim would not have contracted the identified STDs in any non-sexual manner. This conclusion obviously conveyed that the alleged victim had engaged in "sexual behavior" as that term is used in Rule 412, which therefore activates this Rape Shield Law's dictate that "the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless" one of the exceptions under Rule 412(b) applies so as to permit such proscribed evidence to be admitted at trial. Although the majority views the observations of defendant's proposed medical expert as satisfying the exception embodied in Rule 412(b)(2), there is no "evidence of *specific* instances of sexual behavior offered" by defendant through this offer of proof to "show[ ] that the . . . acts charged were not committed by him. N.C.G.S. § 8C-1, Rule 412(b)(2) (emphasis added). While the disputed evidence at issue tends to show at least one instance of sexual behavior in which the alleged victim engaged, as demonstrated by her acquisition of STDs, nonetheless, the proposed medical expert's opinion in particular, and defendant's offer of proof in general, are bereft of any "instances of sexual behavior" by the alleged victim that contain any specific details as required by the clear and plain language of Rule 412(b)(2). Indeed, in my view, defendant's offer of proof references no instance of sexual behavior by the alleged victim for which he provided sufficient specificity, in light of the three-year time period placed in issue by the alleged victim's trial testimony, to qualify for the evidentiary exception under Rule 412 and hence to overcome the inherent protections afforded to a complainant by the Rape Shield Law.

Ironically, the majority demonstrates a recognition of exemplars of "specific instances" when it employs that statutory phrase to describe

the details conveyed by the alleged victim when relating the sexual acts in which she claimed defendant engaged her. The alleged victim's narration of the sexual encounters to which she testified depicts a truer representation of the term "specific instances" in Rule 412(b)(2) than the generalities present in defendant's proffered STD evidence. While I would not require a defendant seeking to employ the "specific instances" exception to present a level of particularity approaching the alleged victim's list of vivid descriptions, an accused should nonetheless have to identify a time, place or circumstance in which a complainant was involved in "specific instances of sexual behavior" rather than merely complying with the majority's permissive substitution of a medical opinion referencing a diagnosis suggesting some instance of sexual behavior by the complainant. The majority unfortunately conflates the presence of the alleged victim's STDs, which could be the *result* of specific instances of her sexual behavior if any specific instances had been shown by defendant, with specific instances themselves.

"Since a legislative body is presumed not to have used superfluous words, our courts must accord meaning, if possible, to every word in a statute." *N.C. Bd. of Exam'rs v. N.C. State Bd. of Educ.*, 122 N.C. App. 15, 21, 468 S.E.2d 826, 830 (1996) (citing 2A Norman Singer, *Sutherland Statutory Construction* § 47.37 (5th ed. 1992)), *aff'd per curiam in part and disc. rev. improvidently allowed*, 345 N.C. 493, 480 S.E.2d 50 (1997). In the case at bar, the majority has not applied this Court's well-established principles of statutory construction, especially with regard to the essential word "specific," that purposefully appears in N.C.G.S. § 8C-1, Rule 412(b)(2). For the reasons indicated, I would affirm the trial court's ruling that excluded the evidence of STDs pursuant to Rule 412 and affirm defendant's conviction, consistent with the outcome of this case in the Court of Appeals but based upon a different rationale.

STATE v. LEE

[370 N.C. 671 (2018)]

STATE OF NORTH CAROLINA
v.
GYRELL SHAVONTA LEE

No. 335PA16

Filed 6 April 2018

Criminal Law—jury instruction—self-defense—omission of stand-your-ground provision

The trial court erred in a first-degree murder case by giving its self-defense jury instruction that omitted the relevant stand-your-ground provision. Defendant showed a reasonable possibility that, had the trial court given the required stand-your-ground instruction, a different result would have been reached at trial. Defendant was entitled to a new trial with proper self-defense and stand-your-ground instructions.

Chief Justice MARTIN concurring.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 789 S.E.2d 679 (2016), finding no error after appeal from a judgment entered on 12 July 2015 by Judge J. Carlton Cole in Superior Court, Pasquotank County. Heard in the Supreme Court on 6 November 2017.

Joshua H. Stein, Attorney General, by Amy Kunstling Irene, Special Deputy Attorney General, for the State.

Glenn Gerding, Appellate Defender, by Paul M. Green, Assistant Appellate Defender, for defendant-appellant.

Williams Mullen, by Camden R. Webb; and Ilya Shapiro, pro hac vice, for Cato Institute, amicus curiae.

NEWBY, Justice.

This case is about whether the trial court erroneously instructed the jury when it omitted the relevant stand-your-ground provision from its instructions on self-defense, and, if so, whether such error was preserved. By omitting the relevant stand-your-ground provision, the trial court's jury instructions were an inaccurate and misleading statement of the law. Such error is preserved when the trial court deviates from an agreed-upon

pattern instruction. Defendant has shown a reasonable possibility that, had the trial court given the required stand-your-ground instruction, a different result would have been reached at trial. Accordingly, we reverse the decision of the Court of Appeals. Defendant is entitled to a new trial with proper self-defense and stand-your-ground instructions.

On 31 December 2012, defendant celebrated New Year's Eve at a neighbor's home in Elizabeth City. Shortly after midnight, defendant left his neighbor's home on foot and encountered several people convened around a car, including Quinton Epps (Epps) and defendant's cousin, Jamieal Walker (Walker). Epps and Walker were engaged in a heated argument. Epps ultimately left in the car, and defendant went inside his home. About twenty minutes later, another car approached defendant's home. Defendant and Walker were standing "beside the house and in the front yard." Defendant saw Epps exit the car's back passenger side. Walker and Epps began arguing, and Epps became verbally abusive and aggressive. Epps got back into the car and left the scene. Soon thereafter, another car drove alongside defendant's backyard, stopping briefly. Defendant retrieved his pistol and concealed it on his person, "[out of] instinct," though defendant believed "[Epps] wasn't a threat at th[at] time." The car ultimately parked three houses down from defendant's residence. Epps and several others exited the car.

Defendant and Walker walked down the street to talk to Epps. Epps and Walker again argued in the street and sidewalk area as defendant watched from a short distance. Defendant saw that Epps had a gun behind his back. The argument escalated, and Walker punched Epps in the face. Epps grabbed Walker's hoodie, shot him twice in the stomach, and continued shooting as Walker turned to flee. Walker was later found dead nearby.

After Epps fired his last shot at Walker, Epps turned and pointed his gun at defendant. Before Epps could fire, defendant fatally shot Epps. Defendant stated that it happened quickly, lasting approximately four seconds, and added that he would have shot Epps to protect Walker but could not get a clear shot because Epps and Walker were too close together during the struggle. Defendant was ultimately indicted for first-degree murder.

At trial defendant asserted that he fired the fatal shot in self-defense, maintaining that he shot Epps only after Epps turned the gun on him and denying that he continued to shoot after Epps fell to the ground. Defendant introduced evidence supporting his version of events, including, *inter alia*, an eyewitness, his police interview, and taped telephone calls from the jail. The State argued defendant did not shoot in

self-defense and introduced, *inter alia*, a witness who testified that while Epps was "on the ground," defendant "came out of nowhere" and "[ran] up and [kept] shooting [Epps]." During closing arguments, the State contended that defendant should have retreated because a reasonable person in defendant's shoes would have "removed himself from the situation" and "run[ ] away."

At the trial court's request, the parties agreed to the delivery of N.C.P.I.–Crim. 206.10, the pattern jury instruction on first-degree murder and self-defense. This instruction provides, in relevant part: "Furthermore, the defendant has no duty to retreat in a place where the defendant has a lawful right to be." N.C.P.I.–Crim. 206.10 (June 2014). In addition, N.C.P.I.–Crim. 308.10, which is incorporated by reference in footnote 7 of N.C.P.I.–Crim. 206.10 and is entitled "Self-Defense, Retreat," states that "[i]f the defendant was not the aggressor and the defendant was . . . [at a place the defendant had a lawful right to be], the defendant could stand the defendant's ground and repel force with force." *Id.* 308.10 (June 2012) (brackets in original).

Though the trial court agreed to instruct the jury on self-defense according to N.C.P.I.–Crim. 206.10, it ultimately omitted the "no duty to retreat" language of N.C.P.I.–Crim. 206.10 from its actual instructions without prior notice to the parties and did not give any part of the "stand-your-ground" instruction. Defense counsel did not object to the instruction as given. Though the jury reported that it was deadlocked, it ultimately convicted defendant of second-degree murder, following approximately nine hours of deliberation. Defendant appealed.

At the Court of Appeals, defendant argued that the trial court's "omission of a jury instruction that a person confronted with deadly force has no duty to retreat but can stand his ground" was error, preserved by the trial court's deviation from the agreed-upon pattern instruction, *see State v. Withers*, 179 N.C. App. 249, 255, 633 S.E.2d 863, 867 (2006), or plain error, regardless, *see State v. Wilson*, 197 N.C. App. 154, 164-65, 676 S.E.2d 512, 518-19, *disc. rev. denied*, 363 N.C. 589, 684 S.E.2d 158 (2009). The Court of Appeals affirmed defendant's conviction, reasoning that the law limits a defendant's right to stand his ground to "any place he or she has the lawful right to be," *State v. Lee*, ___ N.C. App. ___, ___, 789 S.E.2d 679, 685 (2016) (emphasis omitted) (quoting N.C.G.S. § 14-51.3(a) (2015)), which did not include the public street where the incident occurred. We allowed defendant's petition for discretionary review.

Defendant contends the trial court erroneously omitted the relevant stand-your-ground provision and that such error is preserved by the

trial court's deviation from the pattern instruction. We conclude that, by omitting the relevant stand-your-ground provision from the agreed-upon instructions on self-defense, the trial court's jury instructions constituted preserved error.

"The jury charge is one of the most critical parts of a criminal trial." *State v. Walston*, 367 N.C. 721, 730, 766 S.E.2d 312, 318 (2014). "[W]here competent evidence of self-defense is presented at trial, the defendant is entitled to an instruction on this defense, as it is a substantial and essential feature of the case . . . ." *State v. Morgan*, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986) (citations and emphasis omitted); *see State v. Guss*, 254 N.C. 349, 351, 118 S.E.2d 906, 907 (1961) (per curiam) ("The jury must not only consider the case in accordance with the State's theory but also in accordance with defendant's explanation.").

Our statutes provide two circumstances in which individuals are justified in using deadly force, thus excusing them from criminal culpability. Section 14-51.3 of North Carolina's General Statutes, entitled "Use of force in defense of person; relief from criminal or civil liability," provides:

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

N.C.G.S. § 14-51.3 (2017) (emphases added).

Section 14-51.2, entitled "Home, workplace, and motor vehicle protection; presumption of fear of death or serious bodily harm," provides that "[a] lawful occupant within his . . . home, motor vehicle, or workplace does not have a duty to retreat from an intruder,"

id. § 14-51.2(f) (2017), and "is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself . . . or another when using defensive force" in the case of "an unlawful and forcible entry," *id.* § 14-51.2(b) (2017). The relevant distinction between the two statutes is that a rebuttable presumption arises that the lawful occupant of a home, motor vehicle, or workplace reasonably fears imminent death or serious bodily harm when using deadly force at those locations under the circumstances in N.C.G.S. § 14-51.2(b). This presumption does not arise in N.C.G.S. § 14-51.3(a)(1).[1]

Under either statutory provision, a person does not have a duty to retreat, but may stand his ground.[2] Accordingly, when, as here, the defendant presents competent evidence of self-defense at trial, the trial court must instruct the jury on a defendant's right to stand his ground, as that instruction informs the determination of whether the defendant's actions were reasonable under the circumstances, a critical component of self-defense. *See State v. Blevins*, 138 N.C. 668, 670-71, 50 S.E. 763, 764 (1905) ("[The] necessity, real or apparent, [is] to be determined by the jury" and the defendant "can have that necessity determined in view of the fact that he has a right to stand his ground . . . ."); N.C.P.I.–Crim. 206.10 (A successful self-defense claim requires, *inter alia*, a showing that "the defendant believed it was necessary to kill the victim . . . to save [himself] from death or great bodily harm.").

Though the trial court here agreed to instruct the jury on self-defense under N.C.P.I.–Crim. 206.10, it omitted the "no duty to retreat" language of N.C.P.I.–Crim. 206.10 without notice to the parties and did not give any part of N.C.P.I.–Crim. 308.10, the "stand-your-ground" instruction. While defendant offered ample evidence at trial that he acted in self-defense

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1. Contrary to the opinion below, the phrase "any place he or she has the lawful right to be" is not limited to one's home, motor vehicle, or workplace, but includes any place the citizenry has a general right to be under the circumstances. *See, e.g.*, *Guss*, 254 N.C. at 351, 118 S.E.2d at 907; *see also* Research Div., N.C. Gen. Assembly, *Summaries of Substantive Ratified Legislation* 2011, at 48 (Dec. 2011) ("A person, *wherever located*, has no duty to retreat, and may use what force is necessary . . . ." (emphasis added)).

2. In 2011 the General Assembly amended the law of self-defense in North Carolina, Act of June 17, 2011, ch. 268, sec. 1, 2011 N.C. Sess. Laws 1002, 1002-04, to clarify that one who is not the initial aggressor may stand his ground, regardless of whether he is in or outside the home. *Compare State v. Godwin*, 211 N.C. 419, 422, 190 S.E. 761, 763 (1937) ("When an attack is made with a murderous intent, the person attacked . . . may stand his ground and kill his adversary, if need be."), *with State v. Pennell*, 231 N.C. 651, 654, 58 S.E.2d 341, 342 (1950) ("[W]hen a person . . . is attacked in his own dwelling, or home, or place of business . . . the law imposes upon him no duty to retreat before he can justify his fighting in self-defense . . . .").

while standing in a public street where he had a right to be when he shot Epps, the trial court did not instruct the jury that defendant could stand his ground. The State nonetheless contends that defendant did not object to the instruction as given, thereby failing to preserve the error below and rendering his appeal subject to plain error review only.

When a trial court agrees to give a requested pattern instruction, an erroneous deviation from that instruction is preserved for appellate review without further request or objection.

> [A] request for an instruction at the charge conference is sufficient compliance with the rule to warrant our full review on appeal where the requested instruction is subsequently promised but not given, notwithstanding any failure to bring the error to the trial judge's attention at the end of the instructions.

State v. Ross, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988). Because the trial court here agreed to instruct the jury in accordance with N.C.P.I.–Crim. 206.10, its omission of the required stand-your-ground provision substantively deviated from the agreed-upon pattern jury instruction, thus preserving this issue for appellate review under N.C.G.S. § 15A-1443(a).

Moreover, the record reflects a reasonable possibility that, had the trial court given the required stand-your-ground instruction, a different result would have been reached at trial. *See State v. Ramos*, 363 N.C. 352, 355-56, 678 S.E.2d 224, 227 (2009) (applying "reasonable possibility" of "different result" standard to determine whether erroneous instruction was prejudicial). During closing argument the State contended that defendant's failure to retreat was culpable. As such, the omission of the stand-your-ground instruction permitted the jury to consider defendant's failure to retreat as evidence that his use of force was unnecessary, excessive, or unreasonable. *See State v. Smith*, 360 N.C. 341, 346, 626 S.E.2d 258, 261 (2006) (The purpose of a jury instruction "is to give a clear instruction which applies the law to the evidence" and thus "assist the jury in understanding the case and in reaching a correct verdict." (quoting *State v. Williams*, 280 N.C. 132, 136, 184 S.E.2d 875, 877 (1971))). Accordingly, defendant is entitled to a new trial with proper instructions on self-defense.[3]

In sum, we conclude that by omitting the stand-your-ground provision from the agreed-upon instructions on self-defense, the trial court's jury

3. Because we resolve defendant's appeal on this issue, we do not address his remaining arguments.

instructions constituted preserved error. Defendant has shown a reasonable possibility that, had the trial court included the stand-your-ground provision in its instructions, a different result would have been reached at trial. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court with instructions to vacate defendant's conviction and further remand this case to the trial court for a new trial with proper instructions on self-defense and stand-your-ground.

REVERSED AND REMANDED; NEW TRIAL.

Chief Justice MARTIN concurring.

This case is about what a man did in the few seconds after he saw his cousin get shot. We now have to consider that man's response to this violent event in light of the doctrines of self-defense and defense of another under our stand-your-ground statutes.

I agree with the majority's ruling that the trial court erred by not instructing the jury on defendant's ability to lawfully stand his ground in self-defense. I therefore fully join in the majority opinion. I write separately to note that defendant has also argued that the trial court should have instructed the jury on defense of another, and to observe that the trial court's omission of an instruction on that defense also constituted error.

"[A] judge has an obligation to fully instruct the jury on all substantial and essential features of the case . . . arising on the evidence." *State v. Harris*, 306 N.C. 724, 727, 295 S.E.2d 391, 393 (1982). This obligation arises "[r]egardless of requests by the parties," *id.*, and a trial court commits error if it fails to meet this obligation, *see State v. Todd*, 264 N.C. 524, 531, 142 S.E.2d 154, 159 (1965). Our Court has applied this standard specifically to jury instructions on both self-defense and defense of another. *See id.*; *State v. Montague*, 298 N.C. 752, 755, 259 S.E.2d 899, 902 (1979). Articulating a principle that should apply equally to defense of another, this Court has stated that, "[w]here there is evidence that [a] defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in [the] defendant's evidence." *State v. Dooley*, 285 N.C. 158, 163, 203 S.E.2d 815, 818 (1974); *see also State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988) (citing *State v. McCray*, 312 N.C. 519, 529, 324 S.E.2d 606, 614 (1985)) ("When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense . . . , courts must consider the evidence in the light most favorable to [the] defendant.").

Under our State's common law, one could "kill in defense of another if one believe[d] it to be necessary to prevent death or great bodily harm to the other 'and ha[d] a reasonable ground for such belief.' " *State v. Perry*, 338 N.C. 457, 466, 450 S.E.2d 471, 476 (1994) (quoting *State v. Terry*, 337 N.C. 615, 623, 447 S.E.2d 720, 724 (1994)). The reasonableness of the defender's belief was "to be judged by the jury in light of the facts and circumstances as they appeared to the defender at the time of the killing." *Id.* (quoting *Terry*, 337 N.C. at 623, 447 S.E.2d at 724).

Two additional common law rules limited the scope of this doctrine. This Court stated the first rule in *State v. Gaddy*: "[T]he right to defend another [could] be no greater than the latter's right to defend himself." *See State v. Gaddy*, 166 N.C. 341, 346-47, 81 S.E. 608, 610 (1914). Under the second rule, which appeared in *State v. McAvoy* and other cases, the initial aggressor in a conflict could not claim perfect self-defense. *See, e.g.*, *State v. McAvoy*, 331 N.C. 583, 595-96, 417 S.E.2d 489, 497 (1992) (citing *State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981)). An aggressor who started a fight without murderous intent, however, would still have been entitled to claim *imperfect* self-defense. *Id.* at 596, 417 S.E.2d at 497 (citing *Norris*, 303 N.C. at 530, 279 S.E.2d at 573). As a result, under the common law rules in *Gaddy* and *McAvoy*, a defendant who intervened to defend someone who had started a fight without murderous intent would have been entitled to a jury instruction only on imperfect defense of another. If a defendant established imperfect defense of another, a jury could not have acquitted him but could have convicted him of voluntary manslaughter instead of murder. *See id.* (citing *Norris*, 303 N.C. at 530, 279 S.E.2d at 573).

In 2011, however, the General Assembly enacted N.C.G.S. §§ 14-51.3 and 14-51.4, which at least partially abrogated—and may have completely replaced—our State's common law concerning self-defense and defense of another.

Subsection 14-51.3(a) states that a person's use of non-deadly force is justified "when and to the extent that the person reasonably believes that the conduct is necessary to defend himself or herself or another against [someone else's] imminent use of unlawful force." N.C.G.S. § 14-51.3(a) (2017). That subsection then establishes that a person is justified in using *deadly* force when that person is in a place that "he or she has the lawful right to be," *id.*, and "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another," *id.* § 14-51.3(a)(1).

N.C.G.S. § 14-51.4 provides exceptions to the justifications for defensive force set forth in subsection 14-51.3(a), stating that "[t]he

justification[s] described in . . . [section] 14-51.3 [are] not available to a person who used defensive force" in certain enumerated circumstances. *Id.* § 14-51.4 (2017). Subsection 14-51.4(2) then gives one of these circumstances; it states that a person's use of defensive force is not justified when that person "[i]nitially provoke[d] the use of force against himself or herself." *Id.* § 14-51.4(2). This subsection does *not* create an exception to section 14-51.3, however, when a defendee—the person that a defendant acts to protect—provokes a fight with non-deadly force and a defendant then intervenes to protect that defendee *from* deadly force. In other words, when a defendant uses deadly force to protect an initial aggressor who used non-deadly force against an attacker who responds with deadly force, that defendant's actions are still fully justified under subsections 14-51.3(a)(1) and 14-51.4(2).

This statutory framework thus appears to contradict the common law rules in *Gaddy* and *McAvoy* when those rules are applied together, because it does not reduce a defendant's justification to imperfect defense of another in this context. That defendant can rightly claim *perfect* defense of another. Nor does the only other exception in section 14-51.4 reduce a defendant's justification for the use of deadly force stated in subsection 14-51.3(a)(1) from perfect to imperfect defense of another; that exception states only that a person is not justified in using defensive force under section 14-51.3 if the person "[w]as attempting to commit, committing, or escaping after the commission of a felony." *Id.* § 14-51.4(1). So, under this statutory framework, a defendant who uses deadly force to protect an initial aggressor who used non-deadly force against an attacker who responds with deadly force should be entitled to perfect self-defense, as long as that defendant was not attempting to commit or committing a felony, or escaping after committing a felony, in the process.

It is important to note the statutory limits of the justification defense in subsection 14-51.3(a). At first glance, one might think that a defendant could defend another against deadly force even when that other had initially provoked a fight *with* deadly force. But that is not so. Because the second sentence of subsection 14-51.3(a), in context, describes a heightened variant of the justification discussed by the first sentence—a justification sufficient to cover deadly as well as non-deadly force—the requirement from the first sentence that the hostile force being opposed be "unlawful" should be imputed to the second sentence. Thus, no justification is available for using deadly force to defend another against *lawful* force. If a defendee provokes a fight with deadly force, then the use of deadly force by the opposing combatant would be lawful.

It follows that a defendant would not be justified under subsection 14-51.3(a)(1) in using deadly force himself against that opposing combatant to protect the defendee, as the defendant in that scenario would not be defending another against *unlawful* force. The justification for deadly force set forth in subsection 14-51.3(a)(1) is inherently limited in this way. *Cf. State v. Holloman*, 369 N.C. 615, 628-29, 799 S.E.2d 824, 833 (2017) (concluding that, when an initial aggressor provokes a fight using deadly force and the opposing combatant responds with deadly force, that aggressor is not justified in using deadly force in response under N.C.G.S. § 14-51.4(2)(a)).

Turning to the case at hand, defendant was entitled to a jury instruction on perfect defense of another. Based on the evidence at trial, a jury could reasonably conclude the following: Defendant saw his cousin, Jamieal Walker, being repeatedly shot by Quinton Epps, after Walker had punched Epps in the face. Walker began to run away, with Epps still shooting at him, and then Epps immediately turned his gun toward defendant. At that point, defendant shot Epps "to get him to drop his weapon." The fact that Epps momentarily turned his gun away from Walker did not mean that Walker was instantly removed from mortal danger. Both Charles Bowser, an eyewitness, and defendant himself testified that the entire sequence of Epps' turning his gun away from Walker and toward defendant and defendant's shooting of Epps took, at most, "four seconds." While the Court of Appeals leaned heavily on the fact that Walker was already fatally wounded before defendant shot Epps, *State v. Lee*, ___ N.C. App. ___, ___, 789 S.E.2d 679, 689 (2016), defendant could not have known at that moment whether Walker's injuries were fatal or what chance Walker had of survival. Also, as the majority notes, defendant stated that he would have shot Epps sooner if Epps and Walker had not been so close together during their fight. I accept all of these facts as true for the purpose of deciding this issue.

Given these facts, Epps used deadly force against Walker after Walker had merely thrown a punch. That punch did not justify a reasonable belief on Epps' part that shooting Walker was necessary to prevent Epps from suffering death or great bodily harm, so Epps himself did not act in lawful self-defense under subsection 14-51.3(a)(1) when he shot Walker. This means that Epps' use of deadly force was unlawful, and defendant therefore could have defended Walker from it with deadly force. Defendant was in a public street, where he had a lawful right to be, and, because Epps had already shot Walker multiple times, defendant could have reasonably believed that his own use of deadly force was necessary to save Walker from death or further serious bodily

injury. This satisfies the standard for the use of deadly force in defense of another under subsection 14-51.3(a)(1). Thus, the trial court erred by omitting a jury instruction on defense of another.

In sum, the trial court did not instruct the jury on perfect defense of another, even though defense of another under N.C.G.S. § 14-51.3(a)(1) was a "substantial and essential feature[ ] . . . arising on the evidence" in this case. *See Harris*, 306 N.C. at 727, 295 S.E.2d at 393. The trial court erred by not instructing the jury on this defense. Defendant concedes that this issue was not properly preserved below, so this Court should review the issue only for plain error. I do not need to address whether the omission of this instruction rose to the level of plain error, however, as defendant will receive a new trial under the majority's ruling regardless. If the same or substantially similar evidence is presented at a future trial of defendant, the trial court should instruct the jury on the law concerning perfect defense of another. The jury should not be precluded from considering any reasonable explanation of defendant's actions right after he saw his cousin get shot.

STATE OF NORTH CAROLINA
v.
SEID MICHAEL MOSTAFAVI

No. 199A17

Filed 6 April 2018

False Pretense—motion to dismiss—sufficiency of indictment—amount of money obtained not required

The trial court properly denied defendant's motion to dismiss the charges of obtaining property by false pretenses. The indictment was facially valid and fulfilled the purpose of the Criminal Procedure Act of 1975. The indictment did not need to include the amount of money obtained because it adequately advised defendant of the conduct that was the subject of the accusation. Further, the State presented sufficient evidence at trial regarding defendant's false representation of ownership.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 802 S.E.2d 508 (2017), affirming in part and vacating in part judgments entered on 9 June 2016

by Judge Anderson D. Cromer in Superior Court, Forsyth County. Heard in the Supreme Court on 9 January 2018.

Joshua H. Stein, Attorney General, by Brent D. Kiziah, Assistant Attorney General, for the State-appellant.

Joseph P. Lattimore for defendant-appellee.

NEWBY, Justice.

In this case we decide whether an indictment charging defendant with obtaining property by false pretenses is fatally flawed because it described the property obtained as "United States Currency" and whether the State presented sufficient evidence of defendant's false representation of ownership to support his conviction for those charges. An indictment for obtaining property by false pretenses must describe the property obtained in sufficient detail to identify the transaction by which defendant obtained money. The indictment here sufficiently identifies the crime charged because it describes the property obtained as "United States Currency" and names the items conveyed to obtain the money. As such, the indictment is facially valid; it gives defendant reasonable notice of the charges against him and enables him to prepare his defense. Furthermore, we conclude that the State presented sufficient evidence of defendant's false representation that he owned the stolen property he conveyed. Therefore, we reverse the decision of the Court of Appeals.

The State presented evidence at trial showing that in July 2015, a homeowner hired a family friend to housesit for her while she was on vacation. On 10 July 2015, the house sitter contacted police to report that during the time she was housesitting someone had broken into the home. That same day, the house sitter and police contacted the homeowner to tell her about the alleged break-in. The next day, however, the house sitter confessed that she and defendant had stolen the items from the home.

Earlier in the week, the house sitter stole certain items from the home and conveyed them to a local pawnshop in exchange for cash to pay for drugs. She confided in defendant, and defendant requested to go to the victim's home. Defendant visited the home, then later returned with the house sitter, pulled his car into the garage, closed the door, and loaded various items into his vehicle before leaving the premises. Defendant obtained, *inter alia*, an Acer laptop, a Vizio television, a

computer monitor, and jewelry, all belonging to the homeowner. Later, defendant conveyed the stolen items to several local stores, including a pawnshop.

Defendant was charged by indictment with, *inter alia*, two counts of obtaining property by false pretenses. The indictment at issue stated in relevant part:

> I. The jurors for the State upon their oath present that . . . the defendant . . . knowingly and designedly with the intent to cheat and defraud obtain[ed] UNITED STATES CURRENCY from CASH NOW PAWN by means of a false pretense which was calculated to deceive and did deceive. The false pretense consisted of the following: BY PAWNING AN ACER LAPTOP, A VIZIO TELEVISION AND A COMPUTER MONITOR AS HIS OWN PROPERTY TO SELL, when in fact the property had been stolen from [the homeowner] and the defendant was not authorized to sell the property.
>
> II. [T]he jurors for the State upon their oath present that . . . the defendant . . . knowingly and designedly with the intent to cheat and defraud obtain[ed] UNITED STATES CURRENCY from CASH NOW PAWN by means of a false pretense which was calculated to deceive and did deceive. The false pretense consisted of the following: BY PAWNING JEWELRY AS HIS OWN PROPERTY TO SELL when in fact the property had been stolen from [the homeowner] and the defendant was not authorized to sell the property.

At trial the house sitter testified that at no point had she told defendant that she owned the house or the items, or that she purported to sell them to defendant. Defendant testified, however, that the house sitter claimed she owned the stolen items and that he had purchased the items from the house sitter at an agreed upon price.

The pawnshop employee who completed defendant's transaction testified that, consistent with every loan or sale transaction, he requested defendant's identification. The State introduced two pawn tickets, initialed by the employee but unsigned by defendant, that described the specific items defendant conveyed and included defendant's name, address, driver's license number, and date of birth. Both tickets contained language indicating that, by conveying the items, "[y]ou are giving a security interest in the below described goods."

Defendant unsuccessfully moved to dismiss all charges but did not challenge the indictment at issue as fatally defective. Ultimately, the trial court found defendant guilty of, *inter alia*, two counts of obtaining property by false pretenses, and defendant appealed.

A divided panel of the Court of Appeals vacated defendant's convictions for two counts of obtaining property by false pretenses. *State v. Mostafavi*, ___ N.C. App. ___, ___, 802 S.E.2d 508, 514 (2017). The Court of Appeals opined that, when an indictment charges a defendant with obtaining money by false pretenses, the indictment is fatally defective unless it also includes, at a minimum, the amount of money obtained. *Id.* at ___, 802 S.E.2d at 511-12. The Court of Appeals further reasoned that even "where the amount of money is *not* known to the pleader, our Supreme Court instructs that describing the money by the name of the victim from whom it was obtained, the date it was obtained, and the false pretense used to obtain the money is still not sufficiently specific." *Id.* at ___, 802 S.E.2d at 512. Thus, though the indictment here included "United States Currency" and the specific property defendant conveyed to the pawnshop, the Court of Appeals concluded that the description still "f[ell] short of the specificity" required. *Id.* at ___, 802 S.E.2d at 511.

The dissent argued that the indictment was facially valid because it included all essential elements of the crime, gave defendant sufficient notice of the charged crimes, and protected defendant against double jeopardy. *Id.* at ___, 802 S.E.2d at 515-17 (Tyson, J., concurring in part and dissenting in part) (citing *State v. Ricks*, 244 N.C. App. 742, 754, 781 S.E.2d 637, 645 (2016) (upholding as valid a false pretenses indictment charging defendant with obtaining a quantity of United States Currency)). After concluding the indictment was facially valid, the dissent further determined the evidence was sufficient to support the charges for obtaining property by false pretenses. *Id.* at ___, 802 S.E.2d at 517-18. The State filed notice of appeal based on the dissenting opinion.

Here defendant contends, as held by the Court of Appeals, that the indictment is fatally defective because it fails to allege the amount of money obtained by conveying the items, as required by existing precedent. We disagree.

As this Court has consistently recognized, "a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981) (citations omitted). In seeking "to simplify criminal proceedings," *State v. Freeman*, 314 N.C. 432, 436, 333 S.E.2d 743, 746 (1985), the Criminal Procedure Act of 1975 requires that an indictment contain "[a] plain and

concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation," N.C.G.S. § 15A-924(a)(5) (2017). In moving away from the "technical rules of pleading," this statutory framework recognizes the purpose of indictments as "identify[ing] clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime." *Sturdivant*, 304 N.C. at 311, 283 S.E.2d at 731 (citation omitted). Thus, an indictment must allege "all the essential elements of the offense endeavored to be charged," *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (quoting *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953)), *cert. denied*, 539 U.S. 985, 124 S. Ct. 44, 156 L. Ed. 2d 702 (2003), but "an indictment couched in the language of the statute is generally sufficient to charge the statutory offense," *State v. Palmer*, 293 N.C. 633, 638, 239 S.E.2d 406, 410 (1977).

A person commits the crime of obtaining property by false pretenses if he or she (1) "knowingly and designedly by means of any kind of false pretense"; (2) "obtain[s] or attempt[s] to obtain from any person . . . any money, goods, property, services, chose in action, or other thing of value"; (3) "with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value." N.C.G.S. § 14-100(a) (2017). In an indictment for the larceny of money, including indictments alleging obtaining property by false pretenses, "it is sufficient to describe such money, or treasury note, or bank note, simply as money, without specifying any particular coin, or treasury note, or bank note." *Id.* § 15-149 (2017).

Here the indictment charged defendant with two counts of obtaining property by false pretenses and mirrors the language of the controlling statute, N.C.G.S. § 14-100(a), by stating that defendant, through false pretenses, knowingly and designedly obtained "United States Currency from Cash Now Pawn" by conveying specifically referenced personal property, which he represented as his own. The indictment describes the personal property used to obtain money, referencing an Acer laptop, a Vizio television, a computer monitor, and jewelry, the inclusion of which is sufficient to identify the specific transactions at issue. Moreover, it is clear from the transcript that defendant was not confused at trial regarding the property conveyed. Had defendant "need[ed] more information to mount his preferred defense," he could have requested

a bill of particulars under N.C.G.S. § 15A-925. *State v. Spivey*, 368 N.C. 739, 743, 782 S.E.2d 872, 874-75 (2016) (alteration in original) (quoting *State v. Jones*, 367 N.C. 299, 310, 758 S.E.2d 345, 353 (2014) (Martin, J., concurring in part and dissenting in part)). The legislature enacted the aforementioned Criminal Procedure Act of 1975, which, *inter alia*, sought to eliminate the technical pleading requirements previously recognized for criminal pleadings. *Freeman*, 314 N.C. at 436, 333 S.E.2d at 746. Thus, in light of the current pleading requirements set forth in the Criminal Procedure Act of 1975, the indictment did not need to include the amount of money obtained because it adequately advised defendant of the conduct that is the subject of the accusation.[1]

Nonetheless, defendant argues, and the Court of Appeals agreed, that this Court's precedent in *State v. Jones*, 367 N.C. 299, 758 S.E.2d 345 (2014), requires that any indictment charging defendant with obtaining money by false pretenses include the amount of money obtained. In *Jones* this Court held that a false pretenses indictment merely stating that defendant obtained "services" at certain automobile service centers was fatally defective in that the term "services," without more, failed to "describe with reasonable certainty the property obtained by false pretenses." *Id.* at 307-08, 758 S.E.2d at 351 (stating the distinct but analogous proposition "that simply describing . . . property obtained as 'money' or 'goods and things of value' is insufficient to allege the crime of obtaining property by false pretenses" (first quoting *State v. Reese*, 83 N.C. 637, 640 (1880); and then quoting *State v. Smith*, 219 N.C. 400, 401, 14 S.E.2d 36, 36 (1941))); *see also Smith*, 219 N.C. at 401-02, 14 S.E.2d at 36-37 (concluding that the indictment was fatally defective because it failed to reference any "money" obtained and because the State presented evidence at trial that differed from that alleged in the indictment). *Jones*, therefore, is not only factually distinguishable because it did not involve obtaining "money" through false pretenses, but the cited language in *Jones* is dicta and not binding on our decision here.

Moreover, the State presented substantial evidence at trial that defendant falsely represented he owned the stolen property sufficient to withstand defendant's motion to dismiss the two counts of obtaining property by false pretenses. To survive a motion to dismiss for insufficient evidence, the State must present "substantial evidence [ ] of each essential element of the offense charged, or of a lesser offense included

1. Our view is consistent with N.C.G.S. § 14-100(a), which contemplates an attempt crime. A person may be indicted for obtaining property by false pretenses under an attempt theory even though no money or property is exchanged.

therein, and [ ] of defendant's being the perpetrator of such offense." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted). The trial court must consider the evidence "in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *Id.* at 99, 261 S.E.2d at 117 (citations omitted). When an indictment alleges a defendant has obtained property by false pretenses, "[t]he [S]tate must prove, as an essential element of the crime, that [the] defendant made [a] misrepresentation as alleged [in the indictment]." *State v. Linker*, 309 N.C. 612, 615, 308 S.E.2d 309, 311 (1983) (citations omitted). "If the [S]tate's evidence fails to establish that defendant made this misrepresentation but tends to show some other misrepresentation was made, then the [S]tate's proof varies fatally from the indictment[ ]." *Id.* at 615, 308 S.E.2d at 311 (footnote and citations omitted). "[T]he false pretense need not come through spoken words, but instead may be by act or conduct." *State v. Parker*, 354 N.C. 268, 284, 553 S.E.2d 885, 897 (2001) (citations omitted), *cert. denied*, 535 U.S. 1114, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002).

Here the State's evidence at trial tended to prove all the elements alleged in the indictment. The pawnshop employee who completed the transaction verified the pawn tickets, which described the conveyed items and contained defendant's name, address, driver's license number, and date of birth. The tickets included language explicitly stating that defendant was "giving a security interest in the . . . described goods." Considered in the light most favorable to the State, here the State presented sufficient evidence of defendant's false representation that he owned the stolen property he conveyed.[2]

We therefore conclude that, by tracking the language of N.C.G.S. § 14-100(a) and clearly identifying "the conduct which is the subject of the accusation," N.C.G.S. § 15A-924(a)(5), the indictment is facially valid and fulfills the purpose of the Criminal Procedure Act of 1975. The indictment gives defendant reasonable notice of the charges against him, including the specific property he allegedly conveyed to obtain the money referenced in the indictment, so that he may prepare his defense

2. Because we conclude that the State presented sufficient evidence of defendant's false representation of ownership, we find it unnecessary to address whether defense counsel provided ineffective assistance of counsel by failing to make such an argument before the trial court. Therefore, remanding this case to the Court of Appeals to address defendant's ineffective assistance of counsel claim is unnecessary.

and protect himself against double jeopardy. Moreover, the State presented sufficient evidence at trial regarding defendant's false representation of ownership to survive defendant's motion to dismiss the two counts of obtaining property by false pretenses. Accordingly, the indictment charging defendant with obtaining property by false pretenses is facially valid, and the trial court properly denied defendant's motion to dismiss. The decision of the Court of Appeals vacating defendant's two convictions for obtaining property by false pretenses is reversed.

REVERSED.

VOGLER REYNOLDA ROAD, LLC
v.
SCI NORTH CAROLINA FUNERAL SERVICES, INC.

No. 312A17

Filed 6 April 2018

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an opinion and final judgment entered on 3 April 2017 by Judge James L. Gale, Chief Special Superior Court Judge for Complex Business Cases, in Superior Court, Forsyth 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 14 March 2018.

Ward and Smith, P.A., by John M. Martin, for plaintiff-appellee.

Moore & Van Allen PLLC, by Anthony T. Lathrop and Glenn E. Ketner, III, for defendant-appellant.

PER CURIAM.

AFFIRMED.

SANDHILL AMUSEMENTS, INC. AND GIFT SURPLUS, LLC	)	
	)	
v.	)	From Onslow County
	)	
STATE OF NORTH CAROLINA, EX REL. ROY COOPER, GOVERNOR, IN HIS OFFICIAL CAPACITY; BRANCH HEAD OF THE ALCOHOL LAW ENFORCEMENT BRANCH OF THE STATE BUREAU OF INVESTIGATION, MARK J. SENTER, IN HIS OFFICIAL CAPACITY; SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, ERIK A. HOOKS, IN HIS OFFICIAL CAPACITY; AND DIRECTOR OF THE NORTH CAROLINA STATE BUREAU OF INVESTIGATION, BOB SCHURMEIER, IN HIS OFFICIAL CAPACITY	)	

No. 363A14-3

ORDER

The following order was entered:

Plaintiffs' Motion to Withdraw Pending Petitions, filed on 9 March 2018, is allowed as to plaintiffs' Petition for Writ of Certiorari, filed on 30 October 2017, and as to plaintiffs' Petition for Writ of Supersedeas, filed on 30 October 2017.

Plaintiffs' Motion to Vacate as Moot the 13 October 2017 order of the Court of Appeals allowing petitioners' 21 September 2017 Petition for Writ of Prohibition is remanded to the Court of Appeals of North Carolina for its consideration.

By special order of the Court in Conference, this the 5th day of April 2018. Ervin, J. recused.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of April 2018.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

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

5 APRIL 2018

004P18	State v. Travis Rashad Mitchell	1. Def's Motion for Temporary Stay (COA17-369) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/08/2018** Dissolved **04/05/2018** 2. Denied 3. Denied
005P18	State v. Ricardo Melgar-Argueta	Def's PDR Under N.C.G.S. § 7A-31 (COA17-434)	Denied
009P18	In the Matter of A.L.Z.	1. . Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA17-507) 2. Respondent-Mother's Motion for Temporary Stay 3. Respondent-Mother's Petition for *Writ of Supersedeas*	1. Denied 2. Allowed **02/27/2018** Dissolved **04/05/2018** 3. Denied
014P18	Pender County and the Town of Atkinson v. Donald Sullivan and Marion P. Sullivan	1. Defs' *Pro Se* Motion for Notice of Appeal (COA17-1160) 2. Defs' *Pro Se* Motion to Withdraw Appeal	1. Dismissed *ex mero motu* **03/01/2018** 2. Dismissed as moot
016P18	Barrett C. Baxley v. Jasmine Baxley	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-463)	Denied
017P18	State v. Joseph Burton Mial	1. Def's *Pro Se* Motion for Appropriate Relief 2. Def's *Pro Se* Motion for Copies of Documents Out of Court Record 3. Def's *Pro Se* Motion for Preparation of Stenographic Transcript 4. Def's Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed 3. Dismissed 4. Allowed
018A18	Thomas E. Freeman, Jr. v. NC Department of Health and Human Services, Central Regional Hospital and Whitaker PRTF	Petitioner's *Pro Se* Notice of Appeal Based Upon a Constitutional Question	Dismissed *ex mero motu*

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

5 APRIL 2018

019A18	State v. Charles Thomas Stacks	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-770) 2. State's Motion to Dismiss Appeal	1. --- 2. Allowed
020P18	Vincent J. Mastanduno, Employee v. National Freight Industries, Employer, American Zurich Insurance Company, Carrier	1. Plt's Petition for *Writ of Certiorari* to Review Order of COA 2. Plt's Motion for Expedited Consideration of Plt's Petition for *Writ of Certiorari*	1. Denied 2. Denied
026PA17	David Wichnoski, O.D., P.A., et al. v. Piedmont Fire Protection Systems, LLC, et al.	Plts' Motion to Withdraw Appeal	Allowed **03/08/2018**
037P18	Sony Pictures Entertainment Inc., Kim Russo, Schmid & Voiles, Kathleen McColgan, Esq., Rosen & Saba LLP, James Rosen, Esq., and Adela Carrasco, Esq. v. Glenn Henderson	Def's *Pro Se* Motion for Suspension of the Rules Under Rule 2 (COA15-1217)	Denied
040P18	Amy S. Grissom v. David I. Cohen	Plt's PDR Prior to a Decision of the COA (COA18-66)	Denied
046P18	State v. Richard Thomas Mays	1. Def's *Pro Se* Petition for *Writ of Certiorar*i to Review Order of Superior Court, Mecklenburg County (COAP18-45) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
052PA17-3	Cooper v. Berger, et al.	1. Plt's Motion to Enforce Mandate 2. Plt's Motion for Expedited Response	1. Denied **03/13/2018** 2. Allowed, and Defendants' Response is Due on or Before Monday, March 12, 2018 at 12:00 Noon **03/07/2018**

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

5 APRIL 2018

054P18	State v. Carnell L. Calhoun	Def's *Pro Se* Motion for Writ to Compel Production of Court File Records	Dismissed **Jackson, J., recused** **Ervin, J., recused**
059P18	Nathaniel R. Webb v. Wake County Detention Center	Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Wake County	Dismissed
064P18	State v. Kelvin W. Sellars	Def's *Pro Se* Motion for Discretionary Review (COAP18-100)	Denied **03/08/2018**
067P18	State v. Jonathan Eugene Dixon	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **03/07/2018** 2. **Ervin, J., recused**
068A18	State v. Jermel Toron Krider	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **03/08/2018** 2.
069P18	State v. Nell Monette Baldwin	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **03/13/2018** **Beasley, J., recused** **Morgan, J., recused**
071P18	Ron Metcalf, Head of Household v. Graham County Department of Social Services	1. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Graham County 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Plt's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
080P18	Darron J. Jones v. Mr. Cranford	1. Plt's *Pro Se* Petition for *Writ of Certiorari* 2. Plt's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
081P18	State v. Pete Muhammad	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP18-129) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed

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

5 APRIL 2018

083P18	Marshall Lee Brown, Jr. v. Eric Hooks, Secretary of the Department of Public Safety and Ken Beaver, Superintendent of Alexander Correctional Institution, et al.	Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of North Carolina Court of Appeals (COAP18-44)	Denied **03/19/2018**
084P18	State v. Tyrone Barnes	Def's *Pro Se* Motion to Compel	Dismissed **03/16/2018**
085P18	State v. Gary Michael Prince, Jr.	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	Dismissed
086P18	State v. Frederick John Schumann	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-707)	Denied
087P11-2	Mitchell, Brewer, Richardson, Adams, Burge & Boughman, PLLC; Glenn B. Adams; Harold L. Boughman, Jr., and Vickie L. Burge v. Coy E. Brewer, Jr., Ronnie A. Mitchell, William O. Richardson, and Charles Brittain	Defs' (Coy E. Brewer, Jr. and Ronnie A. Mitchell) *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-1122)	Denied
131P16-7	State v. Somchoi Noonsob	Def's *Pro Se* Motion for Immediate Release	Denied **03/26/2018**
149P17-2	State v. Mohammed N. Jilani	Def's *Pro Se* Motion for Writ of Prohibition	Dismissed
155P17-2	State v. Joe Robert Reynolds	Def's *Pro Se* Motion for PDR	Denied
219P17-2	Courtney NC LLC v. Baldwin	Def's *Pro Se* Petition for *Writ of Certiorari*	Dismissed **03/13/2018** **Beasley, J., recused** **Morgan, J., recused**
227P17	In the Matter of the Will of James Paul Allen, Deceased	Propounder's PDR Under N.C.G.S. § 7A-31 (COA16-1209)	Allowed

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

5 APRIL 2018

284P17	State v. Jonathan Wayne Broyhill	Def's PDR Under N.C.G.S. § 7A-31 (COA16-841)	Denied
300A93-3	State v. Norfolk Junior Best (DEATH)	1. Def's Motion to Hold in Abeyance the Time in Which to File a Petition for *Writ of Certiorari* from Denial of MAR 2. Def's Motion for Extension of Time to File Petition for *Writ of Certiorari*	1. --- **3/08/2018** 2. Allowed **03/08/2018** **Ervin, J., recused**
320P17-3	State v. Ryan Lamar Parsons	1. Def's *Pro Se* Motion for Notice of Appeal (COA17-1192) 2. Def's *Pro Se* Motion for PDR	1. Dismissed *ex mero motu* 2. Denied
328P17	State v. Juan Manuel Villa	1. Def's Motion for Temporary Stay (COA16-1104) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/05/2017** Dissolved **04/05/2018** 2. Denied 3. Denied
334PA16	ACTS Retirement Communities, Inc. v. Town of Columbus	Joint Motion to Dismiss Appeal	Allowed **03/28/2018**
362P17	State v. James C. Howard	Def's PDR Under N.C.G.S. § 7A-31 (COA17-77)	Denied
363A14-3	Sandhill Amusements, Inc., et al. v. Sheriff of Onslow County, et al.	1. Plts' Motion for Temporary Stay (COAP17-693) 2. Plts' Petition for *Writ of Supersedeas* 3. Plts' Petition for *Writ of Certiorari* to Review Order of COA 4. Plts' Motion to Withdraw Pending Petitions 5. Plts' Motion to Vacate Writ of Prohibition as Moot	1. Denied **11/13/2017** 2. --- 3. --- 4. Special Order 5. Special Order **Ervin, J., recused**

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

5 APRIL 2018

366P17	Conleys Creek Limited Partnership, LLP, et al. v. Smoky Mountain Country Club Property Owners Association, et al.	1. Plt's (Conleys Creek Limited Partnership) Notice of Appeal Based Upon a Constitutional Question (COA16-647) 2. Plt's (Conleys Creek Limited Partnership) PDR Under N.C.G.S. § 7A-31 3. Def's (Smoky Mountain Country Club Property Owners Association) Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
369P17	State v. Robert Lewis Bishop	Def's PDR Under N.C.G.S. § 7A-31 (COA17-55)	Denied
371P17	State v. Kenneth James Rouse	Def's PDR Under N.C.G.S. § 7A-31 (COA17-176)	Denied **Jackson, J., recused**
372P17-2	State v. Kenneth Kelly Duvall	1. Def's *Pro Se* Motion for PDR (COAP17-711) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot **Ervin, J., recused**
374P17	Curtis R. Holmes v. David G. Sheppard and Farm Bureau Insurance of North Carolina, Inc.	Def's PDR Under N.C.G.S. § 7A-31 (COA17-125)	Denied
377P17	State v. David Lynn Paige	1. Def's Notice of Appeal Based Upon A Constitutional Question (COA17-102) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
385P17	State v. Bradford Lee Bradshaw	Def's PDR Under N.C.G.S. § 7A-31 (COA17-196)	Denied
388P17	State v. Andwele Willie Eaves	1. Def's Motion for Temporary Stay (COA17-159) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/16/2017** Dissolved **04/05/2018** 2. Denied 3. Denied

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

5 APRIL 2018

398P17	State v. Joanna Roberta Madonna	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1300)	Denied
402P17	Thelma Bonner Booth, Widow and Administratrix of the Estate of Henry Hunter Booth, Jr., Deceased-Employee v. Hackney Acquisition Company, f/k/a Hackney & Sons, Inc., f/k/a Hackney & Sons (East), f/k/a J.A. Hackney & Sons, Employer, North Carolina Insurance Guaranty Association, on behalf of American Mutual Liability Insurance, Carrier, and on behalf of The Home Insurance Company, Carrier	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA17-274) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Def's (NCIGA) Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
411P17	State v. C'Quwan Johnson	Def's Petition for *Writ of Certiorari* to Review Order of COA (COA17-423)	Denied
413P17	State v. Bertylar Peace, Jr.	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	Denied
419P12-2	Michael Dennis Long v. State of North Carolina, Department of Public Safety, et al.	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **04/02/2018**
422P17	State v. James Gregory Armistead	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-323) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
423PA16-2	Cecelia W. Peoples and Ernest A. Robinson, Jr. v. Thomas H. Tuck	Def's PDR Under N.C.G.S. § 7A-31 (COA16-293-2)	Denied
432P17	State v. Daris Lamont Spinks	Def's PDR Under N.C.G.S. § 7A-31 (COA17-413)	Denied

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

5 APRIL 2018

435P17	Surgical Care Affiliates, LLC v. North Carolina Industrial Commission	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA17-78)	Denied
437P17	Lenton C. Brown v. North Carolina Department of Public Safety, an agency of the State of North Carolina, and Division of Adult Correction and Juvenile Justice, a subunit contained within the North Carolina Department of Public Safety	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA16-1298)	Denied
438P17	Anthony M. Kyles v. The Goodyear Tire & Rubber Co., Employer, Liberty Mutual Ins. Co., Carrier	1. Plt's Motion for Temporary Stay (COA17-594) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/29/2017** Dissolved **04/05/2018** 2. Denied 3. Denied
439P17	State v. Kenneth Gore, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA17-267)	Denied
449P11-18	In re Charles Everette Hinton	Petitioner's *Pro Se* Motion for Request and Demand for Final Civil Judgment by Default	Denied **03/09/2018** **Ervin, J., recused**
532P08-2	State v. Frank Durand Tomlin	Def's *Pro Se* Petition for *Writ of Mandamus* (COA17-351, COAP16-846)	Dismissed
629P01-6	State v. John Edward Butler	1. Def's *Pro Se* Motion to Appeal 2. Def's *Pro Se* Motion to Locate and Preserve Evidence 3. Def's *Pro Se* Motion for Preservation of Evidence and Post-Conviction DNA Testing	1. Dismissed 2. Dismissed 3. Dismissed

APPENDIXES

CELEBRATION HONORING
AFRICAN-AMERICAN JUSTICES

CELEBRATION HONORING WOMEN JUSTICES

CHIEF JUSTICES AND JUSTICES OF THE
SUPREME COURT

DISCIPLINE AND DISABILITY OF ATTORNEYS

CERTIFICATION OF PARALEGALS

IOLTA PROGRAM

CLIENT SECURITY FUND

LEGAL SPECIALIZATION

LEGAL SPECIALIZATION

LEGAL SPECIALIZATION

PROFESSIONAL CONDUCT

ADMISSION TO THE PRACTICE OF LAW

CHIEF JUSTICE'S COMMISSION ON PROFESSIONALISM

RULES OF APPELLATE PROCEDURE

RULES OF APPPELLATE PROCEDURE

ORGANIZATION OF THE STATE BAR

CERTIFICATION OF PARALEGALS

PROFESSIONAL CONDUCT

PROFESSIONAL CONDUCT

PROFESSIONAL CONDUCT

ADMINISTRATION OF THE STATE BAR

ADMINISTRATION OF THE STATE BAR

ADMINISTRATION OF THE STATE BAR

CONTINUING LEGAL EDUCATION

CONTINUING LEGAL EDUCATION

LEGAL SPECIALIZATION

LEGAL SPECIALIZATION

Historic Celebration
honoring the

African-American Justices *of the* Supreme Court *of* North Carolina

Thursday, August 31, 2017
11:00 a.m.

Historic Celebration honoring *the* African-American Justices

Presiding

The Honorable Wanda Bryant
Senior Associate Judge, North Carolina Court of Appeals

Invocation

Rev. Dr. Dumas A. Harshaw, Jr.
Senior Pastor, First Baptist Church, Raleigh

Welcome

The Honorable Mark D. Martin
Chief Justice, Supreme Court of North Carolina

Occasion

The Honorable Calvin Murphy
Emergency Judge, Superior Court
Former Judge, North Carolina Business Court
Former President, North Carolina State Bar

Recognition of Guests

Kaye Webb, Esquire
General Counsel, Retired, North Carolina Central University
Former President, North Carolina Association of Black Lawyers

Introduction of African-American Justices

Ken Lewis, Esquire
Nexsen Pruet
Former Law Clerk to Chief Justice Frye

Remarks

The Honorable James B. Hunt, Jr.
Governor, The State of North Carolina, 1977-1985, 1993-2001
Introduction by The Honorable Herbert Richardson
District Court Judge, 16B Judicial District

of the SUPREME COURT *of* NORTH CAROLINA

MICHAEL F. EASLEY, JR.
ON BEHALF OF THE HONORABLE MICHAEL F. EASLEY
GOVERNOR, THE STATE OF NORTH CAROLINA, 2001-2009
INTRODUCTION BY CASSANDRA SKINNER-HOEKSTRA
CHIEF DEPUTY SECRETARY, N.C. DEPARTMENT OF PUBLIC SAFETY
FORMER LAW CLERK TO JUSTICE BUTTERFIELD
FORMER LAW CLERK TO JUSTICE TIMMONS-GOODSON

THE HONORABLE BEVERLY EAVES PERDUE
GOVERNOR, THE STATE OF NORTH CAROLINA, 2009-2013
INTRODUCTION BY THE HONORABLE JESSICA HOLMES
ATTORNEY, NORTH CAROLINA ASSOCIATION OF EDUCATORS
COMMISSIONER, WAKE COUNTY BOARD OF COMMISSIONERS

THE HONORABLE ROY COOPER
GOVERNOR, THE STATE OF NORTH CAROLINA, 2017-PRESENT
INTRODUCTION BY CASSANDRA SKINNER-HOEKSTRA

THE HONORABLE JOSHUA H. STEIN
ATTORNEY GENERAL, THE STATE OF NORTH CAROLINA

THE HONORABLE DANIEL T. BLUE, JR.
NORTH CAROLINA SENATE DISTRICT 14
INTRODUCTION BY THE HONORABLE CHAZ BEASLEY
NORTH CAROLINA HOUSE DISTRICT 92
FORMER INTERN FOR JUSTICE TIMMONS-GOODSON

THE HONORABLE PATRICIA TIMMONS-GOODSON
VICE CHAIR, UNITED STATES COMMISSION ON CIVIL RIGHTS

THE HONORABLE HENRY E. FRYE
CHIEF JUSTICE, RETIRED, SUPREME COURT OF NORTH CAROLINA

BENEDICTION
REV. DR. MAURICE A. HARDEN
PASTOR, RUSH METROPOLITAN AME ZION CHURCH, RALEIGH

1819  2019

Honored Justices

The Honorable Henry E. Frye
Chief Justice, retired
Supreme Court of North Carolina

The Honorable James A. Wynn, Jr.
Judge
U.S. Court of Appeals, Fourth Circuit

The Honorable G.K. Butterfield
United States House of Representatives
First Congressional District of North Carolina

The Honorable Patricia Timmons-Goodson
Vice Chair
United States Commission on Civil Rights

The Honorable Cheri Lynn Beasley
Associate Justice
Supreme Court of North Carolina

The Honorable Michael Rivers Morgan
Associate Justice
Supreme Court of North Carolina

Special Thanks

Chief Justice Mark D. Martin
Rev. Dr. Dumas A. Harshaw, Jr.
First Baptist Church
Mrs. Mary Sharpe
OverSoul and Mrs. Gwendolyn Neale
Empire Eats
Honeybear Concessions & Catering
Rick Crank Photography

Celebrate
NORTH CAROLINA COURTS

HISTORIC CELEBRATION
HONORING THE
WOMEN JUSTICES
of the
SUPREME COURT *of* NORTH CAROLINA

TUESDAY, APRIL 10, 2018
10:00 A.M.

Historic Celebration honoring *the* Women Justices

Presiding

The Honorable Linda M. McGee
Chief Judge, North Carolina Court of Appeals

Invocation

Reverend Dr. Dumas A. Harshaw, Jr.
Senior Pastor, First Baptist Church, Raleigh

Welcome

The Honorable Mark D. Martin
Chief Justice, Supreme Court of North Carolina

Recognition of Guests

The Honorable Linda M. McGee
Chief Judge, North Carolina Court of Appeals

Reception Immediately Following Ceremony

of the
Supreme Court *of* North Carolina

Introduction of Women Justices

The Honorable Susie Sharp
Associate Justice Franklin Freeman

The Honorable Rhoda Billings
Renee Crawford

The Honorable Sarah Parker
Catharine Arrowood

The Honorable Patricia Timmons-Goodson
Jenny Leisten

The Honorable Robin Hudson
Janet Ward Black

The Honorable Barbara Jackson
Judge Donna Stroud

The Honorable Cheri Beasley
Denaa Griffin

Benediction

Reverend Dr. Dumas A. Harshaw, Jr.
Senior Pastor, First Baptist Church, Raleigh

Campbell Law School
225 Hillsborough Street, Raleigh, NC 27603

1819  2019

THE HONORABLE SUSIE SHARP (1907-1996)
FORMER CHIEF JUSTICE
SUPREME COURT OF NORTH CAROLINA

THE HONORABLE RHODA BILLINGS
CHIEF JUSTICE, RETIRED
SUPREME COURT OF NORTH CAROLINA

THE HONORABLE SARAH PARKER
CHIEF JUSTICE, RETIRED
SUPREME COURT OF NORTH CAROLINA

THE HONORABLE PATRICIA TIMMONS-GOODSON
FORMER ASSOCIATE JUSTICE
SUPREME COURT OF NORTH CAROLINA

THE HONORABLE ROBIN E. HUDSON*
ASSOCIATE JUSTICE, SUPREME COURT OF NORTH CAROLINA

THE HONORABLE BARBARA JACKSON*
ASSOCIATE JUSTICE, SUPREME COURT OF NORTH CAROLINA

THE HONORABLE CHERI BEASLEY*
ASSOCIATE JUSTICE, SUPREME COURT OF NORTH CAROLINA

**currently serving the high court*

SPECIAL THANKS

EMPIRE EATS
REVEREND DR. DUMAS A. HARSHAW, JR.
CAMPBELL LAW SCHOOL
NORTH CAROLINA BAR ASSOCIATION

1819  2019

Chief Justices *of the* Supreme Court *of* North Carolina

(in order from past to present) **current Chief Justice*

John Louis Taylor
Leonard Henderson
Thomas Ruffin, Sr.
Frederick Nash
Richmond M. Pearson
William N.H. Smith
Augustus S. Merrimon
James E. Shepherd
William T. Faircloth
David M. Furches
Walter Clark
William A. Hoke
Walter P. Stacy
William A. Devin
M. Victor Barnhill
J. Wallace Winborne
Emery B. Denny
R. Hunt Parker
William H. Bobbitt
Susie Sharp
Joseph Branch
Rhoda Billings
James G. Exum, Jr.
Burley B. Mitchell, Jr.
Henry E. Frye
I. Beverly Lake, Jr.
Sarah Parker
Mark Martin*

Associate Justices *of the* Supreme Court *of* North Carolina

*(in order from past to present) *current Associate Justice; +also served as Chief Justice*

John Hall
Leonard Henderson+
John D. Toomer
Thomas Ruffin, Sr.+
Joseph J. Daniel
William Gaston
Frederick Nash+
William H. Battle
Richmond M. Pearson+
Matthias Manly
Edwin G. Reade
Robert P. Dick
William B. Rodman, Sr.
Thomas Settle
Nathaniel Boyden
William P. Bynum
William T. Faircloth+
Thomas S. Ashe
John H. Dillard
Thomas Ruffin, Jr.
Augustus S. Merrimon+
Joseph J. Davis
Walter Clark+
Alphonso C. Avery
James E. Shepherd+
James C. MacRae
Armistead Burwell
Walter A. Montgomery
David M. Furches+
Robert M. Douglas
Charles A. Cook
Henry G. Connor
Platt D. Walker
William A. Hoke+
George H. Brown
James S. Manning
William R. Allen
William J. Adams
Walter P. Stacy+
Heriot R. Clarkson
George W. Connor
Lycurgus R. Varser
Willis J. Brodgen
Michael Schenck
William A. Devin+
M. Victor Barnhill+
J. Wallace Winborne+
Aaron A.F. Seawell
Emery B. Denny+
Samuel J. Ervin, Jr.
Murray G. James
Jefferson D. Johnson, Jr.
Itimous T. Valentine
R. Hunt Parker+
Carlisle W. Higgins
William H. Bobbitt+
William B. Rodman, Jr.
Clifton L. Moore
Susie Sharp+
I. Beverly Lake, Sr.
Joseph Branch+
J. William Pless, Jr.
J. Frank Huskins
Dan K. Moore
James G. Exum, Jr.+
J. William Copeland
David M. Britt
Walter E. Brock
J. Phil Carlton
Louis B. Meyer
Burley B. Mitchell, Jr.+
Harry C. Martin
Henry E. Frye+
Earl W. Vaughn
Rhoda Billings+
Francis I. Parker
Robert R. Browning
John Webb
Willis P. Whichard
I. Beverly Lake, Jr.+
Sarah Parker+
Robert F. Orr
James A. Wynn, Jr.
Mark Martin+
George L. Wainwright, Jr.
Franklin E. Freeman, Jr.
Robert H. Edmunds, Jr.
G.K. Butterfield, Jr.
Edward Thomas Brady
Paul M. Newby*
Patricia Timmons-Goodson
Robin E. Hudson*
Barbara Jackson*
Cheri Beasley*
Robert N. Hunter, Jr.
Samuel J. Ervin, IV*
Michael R. Morgan*

UPDATED 04102018

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

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 21, 2017.

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

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

.0115 Proceedings Before the Disciplinary Hearing Commission: Pleadings and Prehearing Procedure

(a) Complaint and Service - ...

(i) Settlement - The parties may meet by mutual consent prior to the hearing to discuss the possibility of settlement of the case or the stipulation of any issues, facts, or matters of law. Any proposed settlement of the case will be subject to the approval of the hearing panel. The hearing panel may reject a proposed settlement agreement but only after conducting a conference with the parties. The chairperson of the hearing panel will notify the counsel and the defendant of the date, time, and venue (e.g., in person, telephone, videoconference) of the conference. If, after the conference, the first hearing panel rejects a proposed settlement, another hearing panel must be empanelled to try the case, unless all parties consent to proceed with the original hearing panel. The parties may submit a proposed settlement to a second hearing panel and may, upon the agreement of both parties, request a conference with the panel, but the parties shall not have the right to request a third hearing panel if the proposed settlement is rejected by the second hearing panel. The second hearing panel shall either accept the settlement proposal or hold a hearing upon the allegations of the complaint.

(j) Settlement Conference - ...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 24, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 2017.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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

This the 28th day of September, 2017.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 28th day of September, 2017.

s/Michael R. Morgan
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CERTIFICATION OF PARALEGALS

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 21, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning certification of paralegals, as particularly set forth in 27 N.C.A.C. 1G Section .0100, be amended by adding the following new rule:

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals

.0124 Retired Certified Paralegal Status

(a) Petition for Status Change - The board shall transfer a certified paralegal to Retired Certified Paralegal status upon receipt of a petition, on a form approved by the board, demonstrating that the petitioner has satisfied the following conditions:

(1) Certified for five years or more;

(2) At least 55 years of age or older;

(3) Discontinued all work as a paralegal;

(4) Paid all fees owed to the board at the time of filing the petition; and

(5) The prohibitions on certification specified in Rule .0119(c) of this subchapter are not applicable to or formally alleged against the petitioner.

(b) Designation During Retired Status - During a period of retired status, the certified paralegal may represent that he or she is a "North Carolina State Bar Retired Certified Paralegal" or an appropriate variation thereof.

(c) No Annual Requirements - During a period of retired status, the paralegal shall not be required to file an annual renewal application pursuant to Rule .0120 of this subchapter, to pay an annual renewal fee, or to satisfy the annual continuing education requirements set forth in Rule .0120.

(d) Termination of Status - Retired certified paralegal status may continue for a period of time not to exceed a total of five years (or 60 months). At the end of five years (or 60 months) of retired status, certification will lapse and, to become a certified paralegal, the paralegal must

satisfy all requirements for initial certification set forth in Rule .0119(a). A certified paralegal's status may be changed from active to retired multiple times provided the five-year (60 months) period of retired status is not exceeded.

(e) Return to Active Status - A retired certified paralegal may return to active status at any time during the five-year period set forth in paragraph (d). To reactivate the "certified paralegal" credential, the certified paralegal shall file a petition with the board, on a form approved by the board, and shall pay a reactivation fee of $50. Upon transfer to active status by the board, the certified paralegal may hold herself or himself out as a "North Carolina State Bar Certified Paralegal" or an appropriate variation thereof. Thereafter, the certified paralegal shall complete continuing education and file annual renewal applications as required by Rule .0120 of this subchapter.

(f) Return to Work as Paralegal - A retired certified paralegal must file a petition for return to active status within 30 days of returning to work as a paralegal. Failure to do so will result in revocation of certification.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 21, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 2017.

s/L. Thomas Lunsford II
L. Thomas Lunsford II, Secretary

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

This the 28th day of September, 2017.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 28th day of September, 2017.

s/Michael R. Morgan
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE IOLTA PROGRAM

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 21, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the IOLTA program, as particularly set forth in 27 N.C.A.C. 1D, Section .1300, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar

Section .1300, Rules Governing the Administration of the Plan for Interest on Lawyers' Trust Accounts

Rule .1313 Fiscal Responsibility

All funds of the board shall be considered funds of the North Carolina State Bar, with the beneficial interest in those funds being vested in the board for grants to qualified applicants in the public interest, less administrative costs. These funds shall be administered and disbursed by the board in accordance with rules or policies developed by the North Carolina State Bar and approved by the North Carolina Supreme Court. The funds shall be used only to pay the administrative costs of the IOLTA program and to fund grants approved by the board under

the four categories approved by the North Carolina Supreme Court as outlined above.

(a) Maintenance of Accounts: Audit - ...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 21, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 2017.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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

This the 28th day of September, 2017.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 28th day of September, 2017.

s/Michael R. Morgan
For the Court

AMENDMENT TO THE RULES AND REGULATIONS CONCERNING THE CLIENT SECURITY FUND OF THE NORTH CAROLINA STATE BAR

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 21, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the Client Security Fund, as particularly set forth in 27 N.C.A.C. 1D, Section .1400 be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1400, Rules Governing the Administration of the Client Security Fund of the North Carolina State Bar

.1416 Appropriate Uses of the Client Security Fund

(a) The board may use or employ the Fund for any of only the following purposes within the scope of the board's objectives as heretofore outlined:

(1) to make reimbursements on approved applications as herein provided;

(2) to purchase insurance to cover such losses in whole or in part as is deemed appropriate;

(3) to invest such portions of the Fund as may not be needed currently to reimburse losses, in such investments as are permitted to fiduciaries by the General Statutes of North Carolina;

(4) to pay the administrative expenses of the board, including employment of counsel to prosecute subrogation claims.

(b) ...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 21, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 2017.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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

This the 28th day of September, 2017.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 28th day of September, 2017.

s/Michael R. Morgan
For the Court

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

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 28, 2017.

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

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

.1714 Meetings

The annual meeting of the board shall be held in the spring ~~October~~ of each year ~~in connection with the annual meeting of the North Carolina State Bar~~. The board by resolution may set the annual meeting date and regular meeting dates and places. Special meetings of the board may be called at any time upon notice given by the chairperson, the vice-chairperson or any two members of the board. Notice of meeting shall be given at least two days prior to the meeting by mail, telegram, facsimile transmission, or telephone. A quorum of the board for conducting its official business shall be four or more of the members serving at the time of the meeting.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 28, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 2017.

s/L. Thomas Lunsford II
L. Thomas Lunsford II, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council

of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 28th day of September, 2017.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 28th day of September, 2017.

s/Michael R. Morgan
For the Court

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

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 21, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D Section .1700, be amended by adding the following new rule:

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

.1727 Inactive Status

(a) Petition for Inactive Status. The board may transfer a certified specialist to inactive status upon receipt of a petition, on a form approved by the board, demonstrating that the petitioner satisfies the following conditions:

(1) Certified for five years or more;

(2) Special circumstances unique to the specialist constituting undue hardship or other reasonable basis for exempting the specialist from the substantial involvement standard for continued certification; including, but not limited to, marriage to active-duty military personnel requiring frequent relocation, active duty in the military reserves, disability lasting a total of six months or more over a 12-month period of time, and illness of an immediate family member requiring leaves of absence from work in excess of six months or more over a 12-month period of time; and

(3) Discontinuation of all representations of specialist certification in all communications about the lawyer's practice.

(b) Duration of Inactive Status. If the petitioner qualifies, inactive status shall be granted by the board for a period of not more than one year at a time. No more than three years of inactive status, whether consecutive or periodic, shall be granted to any certified specialist.

(c) Designation During Inactive Status. During the period of inactive status, the certified specialist shall be listed in the board's records as inactive. An inactive specialist shall not represent that he or she is certified during any period of inactive status; however, an inactive specialist may advertise or communicate prior dates of certification (e.g., Board Certified Specialist in Family Law 1987-2003).

(d) Annual Requirements. During the period of inactive status, the specialist shall not be required to satisfy the substantial involvement standard for continued certification in the specialty or to pay any fees; however, the specialist shall be required to satisfy the continuing legal education (CLE) standard for continued certification in the specialty. If a five-year period of certification ends during a year of inactive status, application for continued certification pursuant to Rule .1721 of this subchapter shall be deferred until return to active status.

(e) Return to Active Status. To return to active status as a certified specialist, an inactive specialist shall petition the board on a form approved by the board. The inactive specialist shall be reinstated to active status upon demonstration that he or she satisfied the CLE standard for continued certification in the specialty and the recommendation of the specialty committee. Passage of a written examination in the specialty shall not be required unless the inactive specialist failed to satisfy the CLE standard for continued certification during the period of inactivity.

(f) The right to petition for inactive status pursuant to this rule is in addition to the right to request a waiver of substantial involvement allowed by Rule .1721(c) of this subchapter.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 21, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 2017.

s/L. Thomas Lunsford II
L. Thomas Lunsford II, Secretary

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

This the 28th day of September, 2017.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 28th day of September, 2017.

s/Michael R. Morgan
For the Court

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

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 21, 2017.

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

27 N.C.A.C. 1D, Section .3300 Certification Standards for the Privacy and information Security Law Specialty (New Rule)

.3301 Establishment of Specialty Field

The North Carolina State Bar Board of Legal Specialization (the board) hereby designates privacy and information security law as a specialty for which certification of specialists under the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) is permitted.

.3302 Definition of Specialty

The specialty of privacy and information security law encompasses the laws that regulate the collection, storage, sharing, monetization, security, disposal, and permissible uses of personal or confidential information about individuals, businesses, and organizations, and the security of information regarding individuals and the information systems of businesses and organizations. The specialty also includes legal requirements and risks related to cyber incidents, such as external intrusions into

computer systems, and cyber threats, such as governmental information sharing programs.

.3303 Recognition as a Specialist in Privacy and Information Security Law

If a lawyer qualifies as a specialist in privacy and information security law by meeting the standards set for the specialty, the lawyer shall be entitled to represent that he or she is a "Board Certified Specialist in Privacy and Information Security Law."

.3304 Applicability of Provisions of the North Carolina Plan of Legal Specialization

Certification and continued certification of specialists in privacy and information security law shall be governed by the provisions of the North Carolina Plan of Legal Specialization (see Section .1700 of this subchapter) as supplemented by these standards for certification.

.3305 Standards for Certification as a Specialist in Privacy and Information Security Law

Each applicant for certification as a specialist in privacy and information security law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet following standards for certification in privacy and information security law:

(a) Licensure and Practice - An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement - An applicant shall affirm to the board that the applicant has experience through substantial involvement in privacy and information security law.

(1) Substantial involvement shall mean that during the five years immediately preceding the application, the applicant devoted an average of at least 400 hours a year to the practice of privacy and information security law but not less than 300 hours in any one year.

(2) Practice shall mean substantive legal work in privacy and information security law done primarily for the purpose of providing legal advice or representation, including the activities described in paragraph (3), or a practice equivalent as described in paragraph (4).

(3) Substantive legal work in privacy and information security law includes, but is not limited to, representation on compliance, transactions and litigation relative to the laws that regulate the collection, storage, sharing, monetization, security, disposal, and permissible uses of

personal or confidential information about individuals, businesses, and organizations. Practice in this specialty requires the application of information technology principles including current data security concepts and best practices. Legal work in the specialty includes, but is not limited to, knowledge and application of the following: data breach response laws, data security laws, and data disposal laws; unauthorized access to information systems, such as password theft, hacking, and wiretapping, including the Stored Communications Act, the Wiretap Act, and other anti-interception laws; cyber security mandates; website privacy policies and practices, including the Children's Online Privacy Protection Act (COPPA); electronic signatures and records, including the Electronic Signatures in Global and National Commerce Act (E-SIGN Act) and the Uniform Electronic Transactions Act (UETA); e-commerce laws and contractual legal frameworks related to privacy and data security such as Payment Card Industry Data Security Standards (PCI-DSS) and the NACHA rules; direct marketing, including the CAN-SPAM Act, Do-Not-Call, and Do-Not-Fax laws; international privacy compliance, including the European Union data protection requirements; social media policies and regulatory enforcement of privacy-related concerns pertaining to the same; financial privacy, including the Gramm-Leach-Bliley Act, the Financial Privacy Act, the Bank Secrecy Act, and other federal and state financial laws, and the regulations of the federal financial regulators including the SEC, CFPB, and FinCEN; unauthorized transaction and fraudulent funds transfer laws, including the Electronic Funds Transfer Act and Regulation E, as well as the Uniform Commercial Code; credit reporting laws and other "background check" laws, including the Fair Credit Reporting Act; identity theft laws, including the North Carolina Identity Theft Protection Act and the Federal Trade Commission's "Red Flags" regulations; health information privacy, including the Health Information Portability and Accountability Act (HIPAA); educational privacy, including the Family Educational Rights and Privacy Act (FERPA) and state laws governing student privacy and education technology; employment privacy law; and privacy torts.

(4) "Practice equivalent" shall mean:

(a) Full-time employment as a compliance officer for a business or organization for one year or more during the five years prior to application may be substituted for an equivalent number of the years of experience necessary to meet the five-year requirement set forth in Rule .3305(b)(1) if at least 25% of the applicant's work was devoted to privacy and information security implementation.

(b) Service as a law professor concentrating in the teaching of privacy and information security law for one year or more during the five years prior to application may be substituted for an equivalent number of

years of experience necessary to meet the five-year requirement set forth in Rule .3305(b)(1);

(c) Continuing Legal Education - To be certified as a specialist in privacy and information security law, an applicant must have earned no less than 36 hours of accredited continuing legal education credits in privacy and information security law and related fields during the three years preceding application. The 36 hours must include at least 18 hours in privacy and information security law; the remaining 18 hours may be in related-field CLE or technical (non-legal) continuing education (CE). At least six credits each year must be earned in privacy and information security law. Privacy and information security law CLE includes but is not limited to courses on the subjects identified in Rule .3302 and Rule .3305(b)(3) of this subchapter. A list of the topics that qualify as related-field CLE and technical CE shall be maintained by the board on its official website.

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field to serve as references for the applicant. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice law in North Carolina or another jurisdiction in the United States; however, no more than five references may be licensed in another jurisdiction. References with legal or judicial experience in privacy and information security law are preferred. An applicant consents to confidential inquiry by the board or the specialty committee to the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a colleague at the applicant's place of employment at the time of the application. A lawyer who is in-house counsel for an entity that is the applicant's client may serve as a reference.

(2) Peer review shall be given on standardized forms mailed by the board to each reference. These forms shall be returned to the board and forwarded by the board to the specialty committee.

(e) Examination - An applicant must pass a written examination designed to demonstrate sufficient knowledge, skills, and proficiency in the field of privacy and information security law to justify the representation of special competence to the legal profession and the public.

(1) Terms - The examination shall be given at least once a year in written form and shall be administered and graded uniformly by the specialty

committee or by an organization determined by the board to be qualified to test applicants in privacy and information security law.

(2) Subject Matter - The examination shall test the applicant's knowledge and application of privacy and information security law.

.3306 Standards for Continued Certification as a Specialist

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .3306(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that, for each of the five years preceding application for continuing certification, he or she has had substantial involvement in the specialty as defined in Rule .3305(b) of this subchapter.

(b) Continuing Legal Education - The specialist must earn no less than 60 hours of accredited CLE credits in privacy and information security law and related fields during the five years preceding application for continuing certification. Of the 60 hours of CLE, at least 30 hours shall be in privacy and information security law, and the balance of 30 hours may be in related field CLE or technical (non-legal) CE. At least six credits each year must be earned in privacy and information security law. A list of the topics that qualify as related-field CLE and technical CE shall be maintained by the board on its official website.

(c) Peer Review - The specialist must comply with the requirements of Rule .3305(d) of this subchapter.

(d) Time for Application - Application for continued certification shall be made not more than 180 days, nor less than 90 days, prior to the expiration of the prior period of certification.

(e) Lapse of Certification - Failure of a specialist to apply for continued certification in a timely fashion will result in a lapse of certification. Following such a lapse, recertification will require compliance with all requirements of Rule .3305 of this subchapter, including the examination.

(f) Suspension or Revocation of Certification - If an applicant's certification was suspended or revoked during a period of certification, the application shall be treated as if it were for initial certification under Rule .3305 of this subchapter.

.3307 Applicability of Other Requirements

The specific standards set forth herein for certification of specialists in privacy and information security law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 21, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 2017.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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

This the 28th day of September, 2017.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 28th day of September, 2017.

s/Michael R. Morgan
For the Court

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 21, 2017.

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

27 N.C.A.C. 2, Rules of Professional Conduct

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment

[1] ...

...

Distinguishing Professional Negligence

[6] ...

[7] Conduct ~~sufficient to warrant the imposition of~~ warranting the imposition of professional discipline under the rule is ~~typically~~ characterized by the element of intent ~~or scienter~~ manifested when a lawyer knowingly or recklessly disregards his or her obligations. Breach of the duty of diligence sufficient to warrant professional discipline occurs when a lawyer consistently fails to carry out the obligations that the lawyer has assumed for his or her clients. A pattern of delay, procrastination, carelessness, and forgetfulness regarding client matters indicates a knowing or reckless disregard for the lawyer's professional duties. For example, a lawyer who habitually misses filing deadlines and court dates is not taking his or her professional responsibilities seriously. A pattern of negligent conduct is not excused by a burdensome case load or inadequate office procedures.

Rule 7.2 Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) ...

Comment

[1] ...

[5] "Electronic communication(s)," as used in Section 7 of the Rules of Professional Conduct, refers to the transfer of writing, signals, data, sounds, images, signs or intelligence via an electronic device or over any electronic medium. Examples of electric communications include, but are not limited to, websites, email, text messages, social media messaging and image sharing. A lawyer who sends electronic communications to advertise or market the lawyer's professional services must comply with these Rules and with any state or federal restrictions on such communications. *See, e.g.*, N.C. Gen. Stat. §75-104; Telephone Consumer Protection Act, 47 U.S.C. §227; and 47 CFR 64.

~~[5]~~ [6] ...

[Renumbering remaining paragraphs.]

Rule 7.3 Direct Contact With Potential Clients

(a) A lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment from a potential client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) ...

(c) Targeted Communications. Unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2), every written, recorded, or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the statement, in capital letters, "THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES" (the advertising notice), which shall be conspicuous and subject to the following requirements:

(1) Written Communications. ...

(2) Electronic Communications. The advertising notice shall appear in the "in reference" or subject box of the address or header section of the communication. No other statement shall appear in this block. The advertising notice shall also appear at the beginning and ending of

the electronic communication, in a font as large as or larger than any other printing in the body of the communication or in any masthead on the communication. If more than one color or type of font is used in the electronic communication, then the font of the advertising notice shall match in color, type, and size the largest and widest of the fonts. Nothing in the electronic communication shall be more conspicuous than the advertising notice.

(3) Recorded Communications. ...

(d) ...

Comment

[1] ...

[9] See Rule 7.2, cmt. [5] for the definition of "electronic communication(s)" as used in paragraph (c)(2) of this rule. A lawyer may not send electronic or recorded communications if prohibited by law. *See, e.g.*, N.C. Gen. Stat. §75-104; Telephone Consumer Protection Act 47 U.S.C. §227; and 47 CFR 64. "Real-time electronic contact" as used in paragraph (a) of this rule is distinct from the types of electronic communication identified in Rule 7.2, cmt. [5]. Real-time electronic contact includes, for example, video telephony (e.g., FaceTime) during which a potential client cannot ignore or delay responding to a communication from a lawyer.

~~[9]~~ [10] ...

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) ...

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation that reflects adversely on the lawyer's fitness as a lawyer;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) ...

Comment

[1] ...

[2] ...A lawyer's dishonesty, fraud, deceit, or misrepresentation is not mitigated by virtue of the fact that the victim may be the lawyer's partner or law firm. A lawyer who steals funds, for instance, is guilty of ~~the most~~ **a** serious disciplinary violation regardless of whether the victim is the lawyer's employer, partner, law firm, client, or a third party.

[3] ...

[4] A showing of actual prejudice to the administration of justice is not required to establish a violation of paragraph (d). Rather, it must only be shown that the act had a reasonable likelihood of prejudicing the administration of justice. For example, in *State Bar v. DuMont*, 52 N.C. App. 1, 277 S.E.2d 827 (1981), modified on other grounds, 304 N.C. 627, 286 S.E.2d 89 (1982), the defendant was disciplined for advising a witness to give false testimony in a deposition even though the witness corrected his statement prior to trial. Conduct warranting the imposition of professional discipline under paragraph (d) is characterized by the element of intent or some other aggravating circumstance. The phrase "conduct prejudicial to the administration of justice" in paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings. In *State Bar v. Jerry Wilson*, 82 DHC 1, for example, a lawyer was disciplined for conduct prejudicial to the administration of justice after forging another individual's name to a guarantee agreement, inducing his wife to notarize the forged agreement, and using the agreement to obtain funds.

[5] ...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 21, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of August, 2017.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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

This the 28th day of September, 2017.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 28th day of September, 2017.

s/Michael R. Morgan
For the Court

AMENDMENTS TO THE RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN THE STATE OF NORTH CAROLINA

The following amendments to the Rules Governing Admission to the Practice of Law proposed by the North Carolina Board of Law Examiners were duly approved by the Council of the North Carolina State Bar at its quarterly meeting on July 28, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina be approved as follows (additions are underlined, deletions are interlined):

Rules Governing Admission to the Practice of Law

Section .0100 – Organization

~~.0101 Website~~
~~The Board of Law Examiners of the State of North Carolina shall maintain a public website that shall publish the location of its offices, its mailing address, office hours, telephone number, fax number, e-mail address and such other information as the Board may direct.~~

~~.0102 Purpose~~
~~The Board of Law Examiners of the State of North Carolina was created for the purpose of examining applicants and providing rules and regulations for admission to the bar, including the issuance of licenses therefor.~~

~~.0103 Membership~~
~~The Board of Law Examiners of the State of North Carolina consists of eleven members of the N.C. Bar elected by the council of the North Carolina State Bar. One member of said Board is elected by the Board to serve as chairman for such period as the Board may determine. The Board also employs an executive director to enable the Board to perform its duties promptly and properly. The executive director, in addition to performing the administrative functions of the positions, may act as attorney for the Board.~~

~~Section .0200 - General Provisions~~

~~.0201 Compliance~~
~~No person shall be admitted to the practice of law in North Carolina unless that person has complied with these rules and the laws of the state.~~

~~.0202~~ **.0101 Definitions**
For purposes of this Chapter, the following shall apply:

(1) "Chapter" or "Rules" refers to the "Rules Governing Admission to the Practice of Law in the State of North Carolina."

(2) "Board" refers to the "Board of Law Examiners of the State of North Carolina." A majority of the members of the Board shall constitute a quorum, and the action of a majority of a quorum, present and voting, shall constitute the action of the Board.

(3) "Executive Director" refers to the "Executive Director of the Board of Law Examiners of the State of North Carolina."

(4) "Filing" or "filed" shall mean received in the office of the Board of Law Examiners. Except that applications placed in the United States mail properly addressed to the Board of Law Examiners and bearing sufficient first class postage and postmarked by the United States Postal Service or date-stamped by any recognized delivery service on or before a deadline date will be considered as having been timely filed if all required fees are included in the mailing. Mailings which are postmarked after a deadline or which, if postmarked on or before a deadline ~~and,~~ do not include required fees or which include a check in payment of required fees which is ~~not honored due to~~ dishonored because of insufficient funds will not be considered as ~~timely~~ filed. Applications which are not properly signed and notarized; or which do not include the properly executed Authorization and Release forms; or which are illegible; or ~~which~~ with incomplete answers to the questions are not complete will not be considered filed and will be returned.

(5) Any reference to a "state" shall mean one of the United States, and any reference to a "territory" shall mean a United States territory.

(6) "Panel" means one or more members of the Board specially designated to conduct hearings provided for in these Rules.

.0102 Website
The Board shall maintain a public website that shall publish the location of its offices, its mailing address, office hours, telephone number, fax number, e-mail address and such other information as the Board may direct.

.0103 Purpose
~~The Board was created for the purpose of examining applicants and providing rules and regulations for admission to the bar, including the issuance of licenses therefor.~~

.0104 Membership
The Board consists of eleven members of the North Carolina State Bar elected by the council of the North Carolina State Bar. One member of the Board is elected by the Board to serve as its Chair for such period as the Board may determine. The Board also employs an Executive Director to enable the Board to perform its duties promptly and properly. The Executive Director, in addition to performing the administrative functions of the position, may act as the Board's attorney.

Section .0200 - General Provisions
.0201 Compliance
No person shall be admitted to the practice of law in North Carolina unless that person has complied with these Rules.

~~.0203~~ **.0202 Applicants**
For ~~the purpose of these rules~~ purposes of this Chapter, applicants are classified ~~either~~ as "general applicants," ~~or as~~ "comity applicants, "military spouse comity applicants," or "transfer applicants." To be classified as a "general applicant" and certified as such for admission to practice law, an applicant must satisfy the requirements of Rule .0501 of this Chapter. To be classified as a "comity applicant" and certified as such for admission to practice law, ~~a person shall~~ an applicant must satisfy the requirements of Rule .0502 of this Chapter. To be classified as a "military spouse comity applicant" and certified as such for admission to practice law, an applicant must satisfy the requirements of Rule .0503 of this Chapter. To be classified as a "transfer applicant" and certified as such for admission to practice law, an applicant must satisfy the requirements of Rule .0504 of this Chapter.

~~.0204~~ **.0203 List**
As soon as possible after each ~~filing~~ late-filing deadline for general applications, the Executive Director shall prepare ~~and maintain~~ a list of general applicants for the ensuing examination~~,~~ and all comity, military spouse comity, and transfer applicants whose applications are then pending, for publication in the *North Carolina State Bar Journal.*

~~.0205~~ **.0204 Hearings**
Every applicant may be required to appear before the Board to be examined about any matters pertaining to the applicant's moral character and general fitness, educational background or any other matters set out in Section .0500 of this Chapter.

~~.0206~~ **.0205 Nonpayment of Fees**
~~Failure to pay the~~ No application will be deemed to have been filed until the applicant has paid the fees required by these rules ~~shall cause the~~

~~application not to be deemed filed~~. If the check payable for the application fee is not honored upon presentment for any reason other than error of the bank, the application will be deemed not ~~timely~~ to have been filed and will have to be refiled. All such checks ~~payable to the Board for any fees which are not honored upon presentment~~ shall be returned to the applicant, who shall pay to the Board in cash, cashier's check, certified check or money order any fees payable to the Board including a fee for processing that check.

Section .0300 - Effective Date

These Revised Rules shall apply to all applications for admission to practice law in North Carolina submitted on or after June 30, 2018.

Section .0400 - Applications of General Applicants
.0401 How to Apply
Applications for admission must be made upon forms supplied by the Board and must be complete in every detail. Every supporting document required by the application form must be submitted with each application. The application form may be obtained by submitting a written request to the Board or by accessing the application via the Board's website: www.ncble.org.

.0402 Application Form
(1) The Application for Admission to Take the North Carolina Bar Examination ~~form~~ requires an applicant to supply full and complete information relating to the applicant's background, including family history, past and current residences, education, military service, past and present employment, credit status, involvement in disciplinary, civil or criminal proceedings, substance abuse, current mental and emotional impairment, and bar admission and discipline history. Applicants must list references and submit as part of the application:

- Certificates of Moral Character from four (4) individuals who know the applicant;
- A recent photograph;
- Two (2) sets of clear fingerprints;
- Two executed informational Authorization and Release forms;
- A birth certificate;
- Transcripts from the applicant's undergraduate and graduate schools;
- A copy of all applications for admission to the practice of law that the applicant has filed with any state, territory, or the District of Columbia;

- A certificate from the proper court or agency of every jurisdiction in which the applicant is or has been licensed, that the applicant is in good standing, or the applicant must otherwise satisfy the Board that the applicant falls within the exception provided in Rule .0501(7)(b), and is not under pending charge of misconduct;

- Copies of any legal proceedings in which the applicant has been a party.

The application must be filed in duplicate. The duplicate may be a photocopy of the original.

(2) An applicant who ~~has~~ aptly filed a complete Application for Admission to Take the North Carolina Bar Examination for ~~a particular~~ the February or July bar examination may, after failing or withdrawing from that particular examination, file a Supplemental Application ~~on forms supplied by the board, along,~~ with the applicable fee, for the next subsequent bar examination. ~~An applicant who has filed~~, on forms supplied by the Board, and may continue to file a Supplemental Application ~~as provided by this rule immediately preceding the filing deadline specified in Rule .0403 of this chapter may file a subsequent Supplemental Application along,~~ with the applicable ~~fees for the next~~ fee, for each subsequent examination. ~~The~~ until successful. Each Supplemental Application ~~will~~ must update ~~the~~ any information previously submitted to the Board by the applicant. ~~Said SUPPLEMENTAL APPLICATION~~ Each Supplemental Application must be filed by the deadline set out in Rule .0403 of this Chapter. An applicant who withdraws from or fails any particular administration of the bar examination and does not file a Supplemental Application for the next bar examination will be required to file a new general application before taking the written examination again.

.0403 Filing Deadlines

(1) Applications shall be filed ~~and received by~~ with the Executive Director at the offices of the Board on or before the first Tuesday in January immediately preceding the date of the July written bar examination and on or before the first Tuesday in October immediately preceding the date of the February written bar examination.

(2) Upon payment of a late filing fee of $250 (in addition to all other fees required by these rules), an applicant may file a late application with the Board on or before the first Tuesday in March immediately preceding the July written bar examination and on or before the first Tuesday in November immediately preceding the February written bar examination.

(3) Applicants who fail to timely file their application will not be allowed to take the Bar Examination designated on the application.

(4) ~~Any applicant who has aptly filed a General Application for the February or July written bar examination may make application to take the next immediately following bar examination by filing~~ General Applicants may file a Supplemental Application with the Executive Director of the Board at the offices ~~of the Board~~ on or before the following dates:

(a) If the applicant aptly filed a General Application ~~for the~~ , or a previous Supplemental Application, for the February bar examination, the Supplemental Application for the following July bar examination must be filed on or before the first Tuesday in May immediately preceding the July examination; and

(b) If the applicant aptly filed a General Application, or a previous Supplemental Application, for the July bar examination, the Supplemental Application for the following February bar examination must be filed on or before the first Tuesday in October immediately preceding the February examination.

.0404 Fees for General Applicants
~~Every application by an applicant who:~~

~~(1) is not a licensed attorney in any other jurisdiction shall be accompanied by a fee of $700.00.~~

~~(2) is or has been a licensed attorney in any other jurisdiction shall be accompanied by a fee of $1,500.00.~~

~~(3) is filing to take the North Carolina Bar Examination using a Supplemental Application shall be accompanied by a fee of $400.00.~~

~~(4)~~ (1) The application specified in .0402 (1) shall be accompanied by a fee of $850.00, if the applicant is not, and has not been, a licensed attorney in any other jurisdiction, or by a fee of $1,650.00, if the applicant is or has been a licensed attorney in any other jurisdiction; provided that if the applicant is filing after the deadline set out in Rule .0403(1), but before the deadline set forth in Rule .0403(2), the application shall also be accompanied by a late fee of $250.00 ~~in addition to all other fees required by these rules~~.

(2) A Supplemental Application shall be accompanied by a fee of $400.00.

.0405 Refund of Fees
Except as herein provided, no part of the fee required by Rule .0404(1)~~,~~ or (2)~~, or (3)~~ of this Chapter shall be refunded to the applicant unless the applicant shall file with the Executive Director a written request to withdraw as an applicant, not later than the 15th day of June preceding the July written bar examination and not later than the 15th day of January preceding the February written bar examination, in which event not more than one-half of the applicable fee may be refunded to the applicant at the discretion of the Board. No portion of any late fee will be refunded.

However, when an application for admission by examination is received from an applicant who, in the opinion of the Executive Director after consultation with the Board Chair, is not eligible for consideration under the Rules, the applicant shall be so advised by written notice. Upon receipt of such notice, the applicant may elect in writing to withdraw the application; and, provided the written election is received by the Board within twenty (20) days from the date of the Board's written notice to the applicant, receive a refund of all fees paid.

Section .0500 - Requirements for Applicants

.0501 Requirements for General Applicants
As a prerequisite to being licensed by the Board to practice law in the State of North Carolina, a general applicant shall:

(1) possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law, and be of good moral character and entitled to the high regard and confidence of the public and have satisfied the requirements of Section .0600 of this Chapter ~~both~~ at the time the license is issued ~~and at the time of standing and passing a written bar examination as prescribed in Section .0900 of this Chapter~~;

(2) possess the legal educational qualifications as prescribed in Section .0700 of this Chapter;

(3) be ~~of the age of~~ at least eighteen (18) years of age;

(4) have filed formal application as a general applicant in accordance with Section .0400 of this Chapter;

(5) ~~stand and~~ pass ~~a~~ the written bar examination ~~as~~ prescribed in Section .0900 of this Chapter~~;~~, provided that an applicant who has failed to achieve licensure for any reason within three years after the date of the written bar examination in which the applicant received a passing score will be required to take and pass the examination again before being admitted as a general applicant;

(6) have ~~stood~~ taken and passed the Multistate Professional Responsibility Examination ~~approved by the Board~~ within the twenty-four (24) month period next preceding the beginning day of the written bar examination which applicant passes as prescribed ~~by Section .0900 of this Chapter which the applicant applies to take~~ above, or shall take and pass the Multistate Professional Responsibility Examination within the twelve (12) month period thereafter; the time limits are tolled for a period not exceeding four (4) years for any applicant who is a ~~servicemember~~ service member as defined in the ~~Servicemembers~~ Service Members Civil Relief Act, 50 U.S.C. Appx. § 511, while engaged in active service as defined in 10 U.S.C. § 101, and who provides a letter or other communication from the ~~servicemember's~~ service member's commanding officer stating that the ~~servicemember's~~ service member's current military duty prevents attendance for the examination, stating that military leave is not authorized for the ~~servicemember~~ service member at the time of the letter, and stating when the ~~servicemember~~ service member would be authorized military leave to take the examination.

(7) if the applicant is or has been a licensed attorney ~~then, that the applicant~~ be in good standing ~~in every jurisdiction within~~ each state, territory of the United Sates, or the District of Columbia, in which the applicant is or has been licensed to practice law and not under any charges of misconduct while the application is pending before the Board.

(a) For purposes of this rule, an applicant is "in good standing" in a jurisdiction if:

(i) the applicant is an active member of the bar of the jurisdiction and the jurisdiction issues a certificate attesting to the applicant's good standing therein; or

(ii) the applicant was formerly a member of the jurisdiction and the jurisdiction certifies the applicant was in good standing at the time that the applicant ceased to be a member; and

(b) if the jurisdiction in which the applicant is inactive or was formerly a member will not certify the applicant's good standing solely because of the non-payment of dues, the Board, in its discretion, may waive such certification from that jurisdiction.

(8) have successfully completed the State Specific Component, consisting of the course in North Carolina law prescribed by the Board.

.0502 Requirements for Comity Applicants

The Board in its discretion shall determine whether ~~attorneys~~ an attorney duly licensed to practice law in any state, or territory of the United States, or the District of Columbia, may be licensed to practice

law in the State of North Carolina without written examination, other than the Multistate Professional Responsibility Examination; provided that such attorney's jurisdiction of licensure qualifies as a jurisdiction in comity with North Carolina, in that the conditions required by ~~the~~ such state, or territory of the United States or the District of Columbia, for North Carolina attorneys to be licensed to practice law in that jurisdiction without written examination are not considered by the Board to be unduly or materially greater than the conditions required by the State of North Carolina for licensure to practice law without written examination in this State. A list of "approved jurisdictions," as determined by the Board pursuant to this rule, shall be available upon request.

Any attorney at law duly admitted to practice in another state, or territory of the United States, or the District of Columbia, upon written application may, in the discretion of the Board, be licensed to practice law in the State of North Carolina without written examination provided each such applicant shall:

(1) File with the Executive Director, upon such forms as may be supplied by the Board, a typed application in duplicate which will be considered by the Board after at least six (6) months from the date of filing~~; the~~. Such application ~~requires~~ shall require:

(a) That an applicant supply full and complete information in regard to his background, including family, past residences, education, military, employment, credit status, whether he has been a party to any disciplinary or legal proceedings, whether currently mentally or emotionally impaired, references, and the nature of the applicant's practice of law~~, and familiarity with the code of Professional Responsibility as promulgated by the North Carolina State Bar~~.

(b) That the applicant furnishes the following documentation:

(i) Certificates of Moral Character from four (4) individuals who know the applicant;

(ii) A recent photograph;

(iii) Two (2) sets of clear fingerprints;

(iv) A certification of the Court of Last Resort from the jurisdiction from which the applicant is applying; that:

- the applicant is currently licensed in the jurisdiction;

- the date of the applicant's licensure in the jurisdiction;

- the applicant was of good moral character when licensed by the jurisdiction;

and

- the jurisdiction allows North Carolina attorneys to be admitted without examination;

(v) Transcripts from the applicant's undergraduate and graduate schools;

(vi) A copy of all applications for admission to the practice of law that the applicant has filed with any state, territory, or the District of Columbia;

(vii) A certificate of admission to the bar of any state, territory, or the District of Columbia;

(viii) A certificate from the proper court of every jurisdiction in which the applicant is licensed ~~therein~~ that he is in good standing, or that the applicant otherwise satisfy the Board that the applicant falls within the exception provided in Rule .0501(7)(b), and not under pending charges of misconduct;

(2) Pay to the Board with each typewritten application, a fee of $2,000.00, no part of which may be refunded to:

(a) an applicant whose application is denied; or (b) an applicant who withdraws, unless the ~~withdrawing~~ applicant has filed with the Board a written request to withdraw, in which event, the Board in its discretion may refund no more than one-half of the fee to the withdrawing applicant. However, when an application for admission by comity is received from an applicant who, in the opinion of the Executive Director after consideration with the Board Chair, is not eligible for consideration under the Rules, the applicant shall be so advised by written notice. Upon receipt of such notice, the applicant may elect in writing to withdraw the application, and, provided the written election is received by the Board within twenty (20) days from the date of the Board's written notice to the applicant, receive a refund of all fees paid.

(3) Prove to the satisfaction of the Board that the applicant is duly licensed to practice law in one or more jurisdictions ~~relied upon by the applicant for admission to practice law in North Carolina, that each jurisdiction relied upon by the applicant has been or should be approved by the Board, pursuant to this rule, for admission to practice law in North Carolina, and~~ which are on the list of "approved jurisdictions," or should be on such list, as a comity jurisdiction within the language of the first paragraph of this Rule .0502; that the applicant has been, for at least four out of the ~~last~~ six years~~,~~ immediately preceding the filing of this application with the Executive Director, actively and substantially engaged

in the ~~full-time~~ practice of law pursuant to the license to practice law from one or more jurisdictions relied upon by the applicant; and that the applicant has read the Rules of Professional Conduct promulgated by the North Carolina State Bar. Practice of law for the purposes of this rule when conducted pursuant to a license granted by another jurisdiction shall include the following activities, if performed in a jurisdiction in which the applicant is admitted to practice law, or if performed in a jurisdiction that permits such activity by a licensed attorney not admitted to practice in that jurisdiction:

(a) The practice of law as defined by G.S. 84-2.1; or

(b) Activities which would constitute the practice of law if done for the general public; or

(c) Legal service as house counsel for a person or other entity engaged in business; or

(d) Judicial service, service as a judicial law clerk, or other legal service in a court of record or other legal service with any local or state government or with the federal government; or

(e) Legal ~~Service~~ service with the United States, a state or federal territory, or any local governmental bodies or agencies, including military service; or

(f) A full time faculty member in a law school approved by the Council of the North Carolina State Bar.

For purposes of this rule, the active practice of law shall not include (a) work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which any person receiving the unauthorized service was located, or (b) the practice of law in any additional jurisdiction, pursuant to a license to practice law in that additional jurisdiction, and that additional jurisdiction is not an "approved jurisdiction" as determined by the Board pursuant to this rule.

(4) Be in good standing in ~~every jurisdiction within~~ each State, territory of the United States, or the District of Columbia~~,~~ in which the applicant is or has been licensed to practice law and not under any charges of misconduct while the application is pending before the Board.

(a) For purposes of this rule, an applicant is "in good standing" in a jurisdiction if:

(i) the applicant is an active member of the bar of the jurisdiction and the jurisdiction issues a certificate attesting to the applicant's good standing therein; or

(ii) the applicant was formerly a member of the bar of the jurisdiction and the jurisdiction certifies the applicant was in good standing at the time that the applicant ceased to be a member; and

(b) if the jurisdiction in which the applicant is inactive or was formerly a member will not certify the applicant's good standing solely because of the non-payment of dues, the Board, in its discretion, may waive such certification from that jurisdiction; however, the applicant must not only be in good standing, but also must be an active member of each jurisdiction upon which the applicant relies for admission by comity.

(5) Be of good moral character and have satisfied the requirements of Section .0600 of this Chapter;

(6) Meet the educational requirements of Section .0700 of this Chapter as hereinafter set out if first licensed to practice law after August, 1971;

(7) Not have taken and failed the written North Carolina Bar Examination within five (5) years prior to the date of filing the applicant's comity application;

(8) Have ~~stood and~~ passed the Multistate Professional Responsibility Examination ~~approved by the Board~~.

.0503 Requirements for Military Spouse Comity Applicants

A Military Spouse Comity Applicant, upon written application may, in the discretion of the Board, be granted a license to practice law in the State of North Carolina without written examination provided that:

(1) The Applicant fulfills all of the requirements of Rule .0502, except that:

(a) in lieu of the requirements of paragraph (3) of Rule .0502, a Military Spouse Comity Applicant shall certify that said applicant has read the Rules of Professional Conduct promulgated by the North Carolina State Bar and shall prove to the satisfaction of the Board that the Military Spouse Comity Applicant is duly licensed to practice law in a state, or territory of the United States, or the District of Columbia, and that the Military Spouse Comity Applicant has been for at least four out of the last eight years immediately preceding the filing of this application with the Executive Director, actively and substantially engaged in the ~~full-time~~ practice of law. Practice of law for the purposes of this rule shall be defined as it would be defined for any other comity applicant; and

(b) Paragraph (4) of Rule .0502 shall not apply to a Military Spouse Comity Applicant.

(2) Military Spouse Comity Applicant ~~defined~~ Defined. A Military Spouse Comity Applicant is any person who is

(a) An attorney at law duly admitted to practice in another state or territory of the United States, or the District of Columbia; and

(b) Identified by the Department of Defense (or, for the ~~coast~~ Coast Guard when it is not operating as a service in the Navy, by the Department of Homeland Security) as the spouse of a ~~servicemember~~ service member of the United States Uniformed Services; and

(c) Is residing, or intends within the next six months, to be residing, in North Carolina due to the ~~servicemember's~~ service member's military orders for a permanent change of station to the State of North Carolina.

(3) Procedure. In addition to the documentation required by paragraph (1) of Rule .0502, a Military Spouse Comity Applicant must file with the Board the following:

(a) A copy of the ~~servicemember's~~ service member's military orders reflecting a permanent change of station to a military installation in North Carolina; and

(b) A military identification card which lists the Military Spouse Applicant as the spouse of the ~~servicemember~~ service member.

(4) Fee. A Military Spouse Comity Applicant shall pay a fee of $1,500.00 in lieu of the fee required in paragraph (2) of Rule .0502. This fee shall be non-refundable.

.0504 Requirements for Transfer Applicants

As a prerequisite to being licensed by the Board to practice law in the State of North Carolina, a transfer applicant shall:

(1) possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law, and be of good moral character and entitled to the high regard and confidence of the public and have satisfied the requirements of Section .0600 of this Chapter;

(2) possess the legal educational qualifications as prescribed in Section .0700 of this Chapter;

(3) be at least eighteen (18) years of age;

(4) have filed with the Executive Director, upon such forms as may be supplied by the Board, a typed application in duplicate, containing the same information and documentation required of general applicants under Rule .0402(1);

(5) have paid with the application an application fee of $1,500.00, if the applicant is licensed in any other jurisdiction, or $1,275.00 if the applicant is not licensed in any other jurisdiction, no part of which may be refunded to an applicant whose application is denied or to an applicant who withdraws, unless the withdrawing applicant filed with the Board a written request to withdraw, in which event, the Board in its discretion may refund no more than one-half of the fee to the withdrawing applicant. However, when an application for admission by transfer is received from an applicant who, in the opinion of the Executive Director, after consultation with the Board Chair, is not eligible for consideration under the Rules, the applicant shall be so advised by written notice. Upon receipt of such notice, the applicant may elect in writing to withdraw the application, and, provided the written election is received by the Board within twenty (20) days from the date of the Board's written notice to the applicant, receive a refund of all fees paid.

(6) have, within the three-year period preceding the filing date of the application, taken the Uniform Bar Examination and achieved a scaled score on such exam that is equal to or greater than the passing score established by the Board for the UBE as of the administration of the exam immediately preceding the filing date;

(7) have passed the Multistate Professional Responsibility Examination.

(8) if the applicant is or has been a licensed attorney, be in good standing in each state, territory of the United Sates, or the District of Columbia, in which the applicant is or has been licensed to practice law and not under any charges of misconduct while the application is pending before the Board.

(a) For purposes of this rule, an applicant is "in good standing" in a jurisdiction if:

(i) the applicant is an active member of the bar of the jurisdiction and the jurisdiction issues a certificate attesting to the applicant's good standing therein; or

(ii) the applicant was formerly a member of the jurisdiction and the jurisdiction certifies the applicant was in good standing at the time that the applicant ceased to be a member; and

(b) if the jurisdiction in which the applicant is inactive or was formerly a member will not certify the applicant's good standing solely because of the non-payment of dues, the Board, in its discretion, may waive such certification from that jurisdiction; and

(9) have successfully completed the State-Specific Component, consisting of the course in North Carolina law prescribed by the Board.

Section .0600 - Moral Character and General Fitness

.0601 Burden of Proof
Every applicant shall have the burden of proving that the applicant possesses the qualifications of character and general fitness requisite for an attorney and counselor-at-law and is possessed of good moral character and is entitled to the high regard and confidence of the public.

.0602 Permanent Record
All information furnished to the Board by an applicant shall be deemed material, and all such information shall be and become a permanent record of the Board.

.0603 Failure to Disclose
No one shall be licensed to practice law ~~by examination or comity or be allowed to take the bar examination~~ in this state:

(1) who fails to disclose fully to the Board, whether requested to do so or not, the facts relating to any disciplinary proceedings or charges as to the applicant's professional conduct, whether same have been terminated or not, in this or any other state, or any federal court or other jurisdiction, or

(2) who fails to disclose fully to the Board, whether requested to do so or not, any and all facts relating to any civil or criminal proceedings, charges or investigations involving the applicant~~,~~ (unless expunged under applicable state law), whether the same have been terminated or not in this or any other state or in any of the federal courts or other jurisdictions.

.0604 Bar Candidate Committee
Every applicant shall appear before a bar candidate committee, appointed by the ~~Chairman of the~~ Board Chair, in the judicial district in which the applicant resides, or in such other judicial districts as the Board in its sole discretion may designate to the applicant, to be examined about any matter pertaining to the applicant's moral character and general fitness to practice law. An applicant who has appeared before a hearing Panel may, in the Board's discretion, be excused from making a

subsequent appearance before a bar candidate committee. The Board Chair may delegate to the Executive Director the authority to exercise such discretion. The applicant shall give such information as may be required on such forms provided by the Board. A bar candidate committee may require the applicant to make more than one appearance before the committee and to furnish to the committee ~~the~~ such information and documents as it may reasonably require pertaining to the moral character and general fitness of the applicant to be licensed to practice law in North Carolina. Each applicant will be advised when to appear before the bar candidate committee. There can be no changes once the initial assignment is made.

.0605 Denial; Re-Application
No new application or petition for reconsideration of a previous application from an applicant who has either been denied permission to take the bar examination or has been denied a license to practice law on the grounds set forth in Section .0600 shall be considered by the Board within a period of three (3) years next after the date of such denial unless, for good cause shown, permission for re-application or petition for a reconsideration is granted by the Board.

Section .0700 - Educational Requirements

.0701 General Education
Each applicant must have satisfactorily completed the academic work required for admission to a law school approved by the Council of the North Carolina State Bar.

.0702 Legal Education
Every applicant applying for admission to practice law in the State of North Carolina, before being granted a license to practice law, shall prove to the satisfaction of the Board that said applicant has graduated from a law school approved by the Council of The North Carolina State Bar or that said applicant will graduate within thirty (30) days after the date of the written bar examination from a law school approved by the Council of the North Carolina State Bar. There shall be filed with the Executive Director a certificate of the dean, or other proper official of said law school, certifying the date of the applicant's graduation. A list of the approved law schools is available in the office of the Executive Director.

Section .0800 - Protest

.0801 Nature of Protest
Any person may protest the application of any applicant to be admitted to the practice of law ~~either by examination or by comity~~.

.0802 Format
A protest shall be made in writing, signed by the person making the protest and bearing the person's home and business address, and shall be filed with the Executive Director

(a) if a general applicant, before the date the applicant is scheduled to be examined; or

(b) if a comity, military spouse comity, or transfer applicant, before the date of the applicant's final appearance before a Panel.

.0803 Notification; Right to Withdraw
The Executive Director shall notify immediately the applicant of the protest and of the charges therein made; and the applicant thereupon may file with the Executive Director a written withdrawal as a candidate for admission.

.0804 Hearing
In case the applicant does not withdraw as a candidate for admission to the practice of law, the person or persons making the protest and the applicant in question shall appear before a Panel or the Board at a time and place to be designated by the Board Chair. If the applicant is an applicant for admission by examination and a hearing on the protest is not held before the written examination, the applicant may take the written examination.

.0805 Refusal to License
Nothing herein contained shall prevent the Board on its own motion from refusing to issue a license to practice law until the Board has been fully satisfied as to the moral character and general fitness of the applicant as provided by Section .0600 of this Chapter.

Section .0900 - Examinations

.0901 Written Examination
Two written bar examinations shall be held each year for ~~those applying to be admitted to the practice of law in North Carolina~~ general applicants.

.0902 Dates
The written bar examinations shall be held in ~~the City of Raleigh,~~ Wake County or adjoining counties in the months of February and July on ~~such~~ the dates ~~as the Board may set from year to year~~ prescribed by the National Conference of Bar Examiners.

.0903 Subject Matter
~~The examination may deal with the following subjects: Business Association (including agency, corporations, and partnerships), Civil~~

~~Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Family Law, Legal Ethics, Real Property, Secured Transactions including The Uniform Commercial Code, Taxation, Torts, Trusts, Wills, Decedents' Estates and Equity.~~

The examination shall be the Uniform Bar Examination (UBE) prepared by the National Conference of Bar Examiners and comprising six (6) Multistate Essay Examination (MEE) questions, two (2) Multistate Performance Test (MPT) items, and the Multistate Bar Examination (MBE). Applicants may be tested on any subject matter listed by the National Conference of Bar Examiners as areas of law to be tested on the UBE. Questions will be unlabeled and not necessarily limited to one subject matter.

.0904 Grading and Scoring.
Grading of the MEE and MPT answers shall be strictly anonymous. The MEE and MPT raw scores shall be combined and converted to the MBE scale to calculate written scaled scores according to the method used by the National Conference of Bar Examiners for jurisdictions that administer the UBE.

~~.0904~~ **.0905 Passing Score**
The Board shall determine ~~what shall constitute~~ the passing ~~of an examination~~ UBE score for admission in North Carolina. The UBE passing score shall only be increased on one year's public notice.

Section .1000 - Review of Written Bar Examination

.1001 Review
~~An applicant for admission by~~ After release of the results of the written bar examination, a general applicant who has failed the written examination may, in the Board's offices, ~~examine~~ review the MEE questions and MPT items on the written examination and the applicant's answers ~~to the essay portion of the examination and such other~~ thereto, along with selected answers ~~as~~ by other applicants which the Board determines ~~will be of assistance to the applicant.~~ may be useful to unsuccessful applicants.

~~.1002 Fees~~
The Board will also furnish an unsuccessful applicant ~~a copy of the applicant's essay examination at a cost to be determined by the Executive Director, not to exceed an amount determined by~~ hard copies of any or all of these materials, upon payment of the reasonable cost of such copies, as determined by the Board. No copies of the ~~Board's grading guide will be made or furnished to the applicant.~~ MEE or MPT grading materials prepared by the National Conference of Bar Examiners will

be shown or provided to the applicant unless authorized by the National Conference of Bar Examiners.

~~.1003~~ .1002 Multistate Bar Examination

There is no provision for review of the Multistate Bar Examination. Applicants may, however, request the National Conference of Bar Examiners to hand score their MBE answers.

~~.1004~~ .1003 Release of Scores

(1) ~~Upon written request, the~~ The Board will not release ~~to an unsuccessful applicant the applicant's~~ UBE scores ~~on~~ to the ~~bar examination~~ public.

(2) The Board will inform each applicant in writing of the applicant's scaled score on the UBE. Scores will be shared with the applicant's law school only with the applicant's consent.

(3) Upon written request of an unsuccessful applicant, the Board will furnish the following information about the applicant's score to the applicant: the applicant's raw scores on the MEE questions and MPT items; the applicant's scaled combined MEE and MPT score; the applicant's scaled MBE score; and the applicant's scaled UBE score.

~~(2)~~(4) Upon written request of an applicant, the Board will furnish the Multistate Bar Examination score of said applicant to another jurisdiction's board of bar examiners~~,~~ or like organization that administers the admission of attorneys ~~into~~ for that jurisdiction.

~~.1005~~ .1004 Board Representative

The Executive Director ~~of the Board~~ serves as the Board's representative ~~of the Board during this~~ for purposes of any review of the written bar examination by an unsuccessful applicant. The ~~Secretary~~ Executive Director is not authorized to discuss any specific questions and answers on the bar examination.

.1005 Re-Grading

Examination answers cannot be re-graded once UBE scores have been released.

Section .1100 - Reserved for Future Use

Section .1200 - Board Hearings

.1201 Nature of Hearings

(1) All general applicants may be required to appear before the Board or a hearing Panel at a hearing to answer inquiry about any matter under

these rules. In the event a hearing for an applicant for admission by examination is not held before the written examination, the applicant shall be permitted to take the written examination.

(2) Each comity, military spouse comity, or transfer applicant shall appear before the Board or Panel to satisfy the Board that he or she has met all the requirements of Rule .0502, Rule .0503 or Rule .0504.

.1202 Notice of Hearing
The ~~Chairman~~ Board Chair will schedule the hearings before the Board or Panel, and such hearings will be scheduled by the issuance of a notice of hearing mailed to the applicant or the applicant's attorney within a reasonable time before the date of the hearing.

.1203 Conduct of Hearings
(1) All hearings shall be heard by the Board except that the ~~Chairman~~ Board Chair may designate two or more members or Emeritus Members (as ~~that term is defined by the Policy of the North Carolina~~ recommended by the Board and approved by the State Bar Council ~~creating Emeritus Members to~~) to serve as a Panel to conduct the hearings.

(2) The Panel will make a determination as to the applicant's eligibility for admission to practice law in North Carolina. The Panel may grant the application, deny the application, or refer it to the Board for a de novo hearing. The applicant will be notified in writing of the Panel's determination. In the event of an adverse determination by the Panel, the applicant may request a hearing de novo before the Board by giving written notice to the Executive Director at the offices of the Board within ten (10) days following receipt of the hearing Panel's determination. Failure to file such notice in the manner and within the time stated shall operate as a waiver of the right of the applicant to request a hearing de novo before the Board.

(3) The Board or a Panel may require an applicant to make more than one appearance before the Board or a hearing Panel, to furnish information and documents as it may reasonably require, and to submit to reasonable physical or mental examinations, pertaining to the moral character or general fitness of the applicant to be licensed to practice law in North Carolina.

(4) The Board or a Panel of the Board may allow an applicant to take the bar examination while the Board or a Panel makes a final determination that the applicant possesses the qualifications and general fitness requisite for an attorney and counselor at law, is possessed of good moral character, and is entitled to the confidence of the public.

.1204 Continuances~~; Motions for Such~~
Continuances will be granted to a party only in compelling circumstances, especially when one such disposition has been previously requested by and granted to that party. Motions for continuances should be made to the Executive Director and will be granted or denied by the Board Chair or by a Panel designated for the applicant's hearing.

.1205 Subpoenas
(1) The Board Chair, or the Board Chair's designee, shall have the power to subpoena and to summon and examine witnesses under oath and to compel their attendance and the production of books, papers and other documents and writings deemed by it to be necessary or material to the hearing as set forth in G.S. 84-24.

(2) The Executive Director is delegated the power to issue subpoenas in the Board's name.

.1206 ~~Depositions and Discovery~~ Evidence That May Be Received By the Board
(1) ~~A~~ In addition to live testimony, a deposition may be used in evidence when taken in compliance with the N.C. Rules of Civil Procedure, G.S. 1A-1.

(2) A Panel or the Board may consider sworn affidavits as evidence in a hearing. The Board will take under consideration sworn affidavits presented to the Board by persons desiring to protest an applicant's admission to the North Carolina Bar.

(3) The Board may receive other evidence in its discretion.

.1207 Reopening of a Case
After a final decision has been reached by the Board in any matter, a party may petition the Board to reopen or reconsider a case. Petitions will not be granted except when petitioner can show that the reasons for reopening or reconsidering the case are to introduce newly discovered evidence which was not presented at the initial hearing because of some justifiable, excusable or unavoidable circumstances and that fairness and justice require reopening or reconsidering the case. The Petition must be made within a reasonable time and not more than ninety days after the decision of the Board has been entered.

Section .1300 - Licenses

~~.1302 Licenses for General Applicants~~ .1301 Issuance
Upon compliance with the rules of the Board, and all orders of the Board, the Executive Director, upon order of the Board, shall issue a license to

practice law in North Carolina to each applicant as may be designated by the Board in the form and manner as may be prescribed by the Board, and at such times as prescribed by the Board.

Section .1400 - Judicial Review

.1401 Appeals
An applicant may appeal from an adverse ruling or determination by the Board as to the applicant's eligibility for admission to practice law in North Carolina. Such appeal shall lie to the Superior Court of Wake County.

.1402 Notice of Appeal
Notice of Appeal shall be provided, in writing, within twenty (20) days after notice of such ruling or determination. This Notice shall contain written exceptions to the ruling or determination and shall be filed with the Superior Court for Wake County, North Carolina. A filed copy of said Notice shall be given to the Executive Director. Failure to file such notice of appeal in the manner and within the time stated shall operate as a waiver of the right to appeal and shall result in the decision of the Board becoming final.

.1403 Record to be Filed
Within sixty (60) days after receipt of the notice of appeal, and after the applicant has paid the cost of preparing the record, the Executive Director shall prepare, certify, and file with the Clerk of the Superior Court of Wake County the record of the case, comprising;:

(1) the application and supporting documents or papers filed by the applicant with the Board;

(2) a complete transcription of the testimony ~~when~~ taken at ~~the~~ any hearing;

(3) copies of all pertinent documents and other written evidence introduced at the hearing;

(4) a copy of the decision of the Board; and

(5) a copy of the notice of appeal containing the exceptions filed to the decision. With the permission of the court, the record may be shortened by stipulation of all parties to the review proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for such additional costs as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

.1404 Proceedings on Review in Wake County Superior Court
~~Such~~ The appeal shall ~~lie to the Superior Court of Wake County and shall~~ be heard by the presiding judge or resident judge, without a jury, who may hear oral arguments and receive written briefs, but no evidence not offered at the hearing shall be taken, except that in cases of alleged omissions or errors in the record, testimony thereon may be taken by the court. The findings of fact by the Board, when supported by competent evidence, shall be conclusive and binding upon the court. The court may affirm, reverse, or remand the case for further proceedings. If the court reverses or remands for further proceedings the decision of the Board, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or remand.

.1405 ~~North Carolina Supreme Court~~ Further Appeal
Any party to the review proceeding, including the Board, may appeal to the Supreme Court from the decision of the Superior Court. No appeal bond shall be required of the Board.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina were duly approved by the Council of the North Carolina State Bar at a regularly called meeting on July 28, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of August, 2017.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina as approved by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 8th day of November, 2017.

s/Mark Martin
Mark D. Martin Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of November, 2017.

s/Morgan, J.
For the Court

The Order establishing the Chief Justice's Commission on Professionalism, as amended on 12 January 2016, is further amended to read as follows:

THE CHIEF JUSTICE'S COMMISSION ON PROFESSIONALISM

IN THE SUPREME COURT OF NORTH CAROLINA BY ORDER OF THE COURT

In recognition of the need for the emphasis upon and encouragement of professionalism in the practice of law, the Court hereby creates THE CHIEF JUSTICE'S COMMISSION ON PROFESSIONALISM.

The membership of the Commission shall be as follows:

The Commission's chair will be the Chief Justice or his or her designee. The chair will appoint the Commission's other members. The Commission's members will reflect the profession's four main constituents: practicing lawyers, judges, law school faculty, and the public. The chair will appoint from the constituents as follows:

1. Judges:

   (a) two judges chosen from those who serve actively or have served on the trial benches of the courts of North Carolina or the United States, and

   (b) an appellate court judge chosen from the Supreme Court of North Carolina, the North Carolina Court of Appeals, or the United States Court of Appeals.

2. Law School Faculty: two law school faculty members who are full-time faculty members from accredited North Carolina law schools, chosen on recommendations of the deans thereof.

3. Practicing Lawyers: eight practicing lawyers giving due and appropriate regard for diversity of representation and taking into account such factors as the chair shall deem just.

4. Public Members: Three non-lawyer citizens active in public affairs.

With the exception of the chairman, the members of the Commission shall serve for a term of three years provided, however, in the discretion of the chair, the initial appointments may be for a term of less than three years so as to accomplish staggered terms for the membership of the Commission.

BY THIS ORDER, the Court issues to the Commission the following charge: The Commission's primary charge shall be to enhance professionalism among North Carolina's lawyers. In carrying out its charge, the Commission shall provide ongoing attention and assistance to the task of ensuring that the practice of law remains a high calling, enlisted in the service of clients and in the public good.

The Commission's major responsibilities should include:

1. to consider and encourage efforts by lawyers and judges to improve the administration of justice;

2. to examine ways of making the system of justice more accessible to the public;

3. to monitor and coordinate North Carolina's professionalism efforts in such institutional settings as the bar, the courts, the law schools, and law firms;

4. to monitor professionalism efforts in jurisdictions outside North Carolina;

5. to conduct a study and issue a report on the present state of lawyer professionalism within North Carolina;

6. to plan and conduct Convocations on Professionalism;

7. to provide guidance and support to the Board of Continuing Legal Education and to the various CLE providers accredited by the Board, in the implementation and execution of a CLE professionalism requirement of not less than one hour per year;

8. to implement a professionalism component in bridge-the-gap programs for new lawyers;

9. to make recommendations to the Supreme Court, the State Bar, the voluntary bars, and the Board of Continuing Legal Education concerning additional means by which professionalism can be enhanced among North Carolina lawyers;

10. to receive and administer grants and to make such expenditures therefrom as the Commission shall deem prudent in the discharge of its responsibilities.

Provided, however, the Commission shall have no authority to impose discipline upon any members of the North Carolina State Bar or to

amend, suspend, or modify the rules and regulations of the North Carolina State Bar including the Revised Rules of Professional Conduct.

By order of the Court in Conference, this the 21st day of November, 2017.

s/Morgan, J.
Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of November, 2017.

Christie Speir Cameron Roeder
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

ORDER ADOPTING RULE 31.1 OF THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Pursuant to the authority of Article IV of the Constitution of North Carolina and N.C.G.S. § 7A-33, the North Carolina Rules of Appellate Procedure are amended by adding a new Rule 31.1 to read:

Rule 31.1. Motion for En Banc Consideration by Court of Appeals

(a) **When Hearing or Rehearing En Banc May Be Ordered.** A majority of the judges on the Court of Appeals may order that an appeal be heard or reheard by the court en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the case involves a question of exceptional importance that must be concisely stated.

(b) **Content.** The motion for en banc consideration shall explain with particularity why en banc consideration is necessary.

(c) **Motions for Initial En Banc Hearing.** At any point after the appellant's brief is filed but no later than fifteen days after the filing of the appellee brief, any party may file a motion for en banc consideration. The motion shall be accompanied by proof of service upon all other parties. Within ten days after service of the motion, any party may file a response thereto. The filing shall be accompanied by proof of service upon all other parties. The court will rule upon the motion within thirty days after the case is fully briefed and may rule upon it prior to that time. The filing of the motion will not stay the time for briefs to be filed. When a motion for en banc consideration is allowed, the case will be calendared as soon as practicable.

(d) **Motions for En Banc Rehearing**. A motion to rehear any case en banc may be filed within fifteen days after the opinion of the court has been filed. The motion shall be accompanied by proof of service upon all other parties. Within ten days after service of the motion, any party may file a response thereto. The filing shall be accompanied by proof of service upon all other parties. Within thirty days after the motion is filed, the court will either allow or deny the motion. The denial of the motion will trigger the time for taking an appeal of right to the Supreme Court pursuant to N.C.G.S. § 7A-30 and for filing a petition for discretionary review pursuant to Rule 15. If the motion is allowed, the clerk shall forthwith notify the parties that the motion has been granted. The case will be reconsidered solely upon the record on appeal, the motion

for en banc rehearing and any responses thereto, new briefs of the parties if requested by the court, and oral argument if the court decides to hear oral argument. Entry of the en banc opinion vacates the original panel opinion.

(e) **Stay of Mandate.** When a motion for en banc rehearing is filed, the movant may obtain a stay of the mandate from the court. The procedure is as provided by Rule 8 of these rules for stays pending appeal.

(f) **Rule 31.1 Motions to Be Heard First.** If a party files both a motion pursuant to this rule for en banc rehearing and a Rule 31 petition for rehearing, the court will rule on the motion for en banc rehearing first. The time for ruling on the Rule 31 petition for rehearing shall commence to run from the date of entry by the Court of Appeals of an order denying the en banc motion.

This amendment to the North Carolina Rules of Appellate Procedure shall be effective immediately.

This amendment shall be promulgated by publication in the North Carolina Reports and posted on the Court's web site.

Ordered by the Court in Conference, this the 22nd day of December, 2016.

s/Edmunds, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 22nd day of December, 2016.

s/J. Bryan Boyd

J. BRYAN BOYD
Clerk of the Supreme Court

ORDER AMENDING RULES 28, 29, AND 33.1 OF THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Pursuant to the authority vested in this Court by Article IV of the Constitution of North Carolina, Rules 28, 29, and 33.1 of the North Carolina Rules of Appellate Procedure are amended as follows:

Rule 28. Briefs—Function and Content

(a) **Function.** The function of all briefs required or permitted by these rules is to define clearly the issues presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned. Similarly, issues properly presented for review in the Court of Appeals, but not then stated in the notice of appeal or the petition accepted by the Supreme Court for review and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court, are deemed abandoned. Parties shall protect the identity of juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e) pursuant to said rules.

(b) **Content of Appellant's Brief.** An appellant's brief shall contain, under appropriate headings and in the form prescribed by Rule 26(g) and the appendixes to these rules, in the following order:

(1) A cover page, followed by a subject index and table of authorities as required by Rule 26(g).

(2) A statement of the issues presented for review. The proposed issues on appeal listed in the record on appeal shall not limit the scope of the issues that an appellant may argue in its brief.

(3) A concise statement of the procedural history of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court.

(4) A statement of the grounds for appellate review. Such statement shall include citation of the statute or statutes permitting appellate review. When an appeal is based on Rule 54(b) of the Rules of Civil Procedure, the statement shall show that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. When an appeal is interlocutory,

the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

(5) A full and complete statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all issues presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be.

(6) An argument, to contain the contentions of the appellant with respect to each issue presented. Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.

The argument shall contain a concise statement of the applicable standard(s) of review for each issue, which shall appear either at the beginning of the discussion of each issue or under a separate heading placed before the beginning of the discussion of all the issues.

The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the issue may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal, the transcript of proceedings, or exhibits.

(7) A short conclusion stating the precise relief sought.

(8) Identification of counsel by signature, typed name, post office address, telephone number, State Bar number, and e-mail address.

(9) The proof of service required by Rule 26(d).

(10) Any appendix required or allowed by this Rule 28.

(c) **Content of Appellee's Brief; Presentation of Additional Issues.** An appellee's brief shall contain a subject index and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel, and proof of service in the form provided in Rule 28(b) for an appellant's brief, and any appendix required or allowed by this Rule 28. It does not need to contain a statement of the issues presented, procedural history of the case, grounds for appellate review,

the facts, or the standard(s) of review, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present issues in addition to those stated by the appellant.

Without taking an appeal, an appellee may present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Without having taken appeal or listing proposed issues as permitted by Rule 10(c), an appellee may also argue on appeal whether a new trial should be granted to the appellee rather than a judgment notwithstanding the verdict awarded to the appellant when the latter relief is sought on appeal by the appellant. If the appellee presents issues in addition to those stated by the appellant, the appellee's brief must contain a full, nonargumentative summary of all material facts necessary to understand the new issues supported by references to pages in the record on appeal, the transcript of proceedings, or the appendixes, as appropriate, as well as a statement of the applicable standard(s) of review for those additional issues.

An appellee may supplement the record with any materials pertinent to the issues presented on appeal, as provided in Rule 9(b)(5).

(d) **Appendixes to Briefs.** Whenever the transcript of proceedings is filed pursuant to Rule 9(c)(2), the parties must file verbatim portions of the transcript as appendixes to their briefs, if required by this Rule 28(d). Parties must modify verbatim portions of the transcript filed pursuant to this rule in a manner consistent with Rules 3(b)(1), 3.1(b), or 4(e).

(1) **When Appendixes to Appellant's Brief Are Required.** Except as provided in Rule 28(d)(2), the appellant must reproduce as appendixes to its brief:

a. those portions of the transcript of proceedings which must be reproduced verbatim in order to understand any issue presented in the brief;

b. those portions of the transcript showing the pertinent questions and answers when an issue presented in the brief involves the admission or exclusion of evidence;

c. relevant portions of statutes, rules, or regulations, the study of which is required to determine issues presented in the brief;

d. relevant items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal, the study of which are required to determine issues presented in the brief.

(2) **When Appendixes to Appellant's Brief Are Not Required.** Notwithstanding the requirements of Rule 28(d)(1), the appellant is not required to reproduce an appendix to its brief with respect to an issue presented:

a. whenever the portion of the transcript necessary to understand an issue presented in the brief is reproduced verbatim in the body of the brief;

b. to show the absence or insufficiency of evidence unless there are discrete portions of the transcript where the subject matter of the alleged insufficiency of the evidence is located; or

c. to show the general nature of the evidence necessary to understand an issue presented in the brief if such evidence has been fully summarized as required by Rule 28(b)(4) and (5).

(3) **When Appendixes to Appellee's Brief Are Required.** An appellee must reproduce appendixes to its brief in the following circumstances:

a. Whenever the appellee believes that appellant's appendixes do not include portions of the transcript or items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal that are required by Rule 28(d)(1), the appellee shall reproduce those portions of the transcript or supplement it believes to be necessary to understand the issue.

b. Whenever the appellee presents a new or additional issue in its brief as permitted by Rule 28(c), the appellee shall reproduce portions of the transcript or relevant items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal as if it were the appellant with respect to each such new or additional issue.

(4) **Format of Appendixes.** The appendixes to the briefs of any party shall be in the format prescribed by Rule 26(g) and shall consist of clear photocopies of transcript pages that have been deemed necessary for inclusion in the

appendix under this Rule 28(d). The pages of the appendix shall be consecutively numbered, and an index to the appendix shall be placed at its beginning.

(e) **References in Briefs to the Record.** References in the briefs to parts of the printed record on appeal and to parts of the verbatim transcript or parts of documentary exhibits shall be to the pages where those portions appear.

(f) **Joinder of Multiple Parties in Briefs.** Any number of appellants or appellees in a single cause or in causes consolidated for appeal may join in a single brief even though they are not formally joined on the appeal. Any party to any appeal may adopt by reference portions of the briefs of others.

(g) **Additional Authorities.** Additional authorities discovered by a party after filing its brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties. The memorandum may not be used as a reply brief or for additional argument, but shall simply state the issue to which the additional authority applies and provide a full citation of the authority. Authorities not cited in the briefs or in such a memorandum may not be cited and discussed in oral argument. Before the Court of Appeals, the party shall file an original and three copies of the memorandum; in the Supreme Court, the party shall file an original and fourteen copies of the memorandum.

(h) **Reply Briefs.** Within fourteen days after an appellee's brief has been served on an appellant, the appellant may file and serve a reply brief, subject to the length limitations set forth in Rule 28(j). Any reply brief which an appellant elects to file shall be limited to a concise rebuttal of arguments set out in the appellee's brief and shall not reiterate arguments set forth in the appellant's principal brief. Upon motion of the appellant, the Court may extend the length limitations on such a reply brief to permit the appellant to address new or additional issues presented for the first time in the appellee's brief. Otherwise, motions to extend reply brief length limitations or to extend the time to file a reply brief are disfavored.

~~(i) **Amicus Curiae Briefs.** A brief of an amicus curiae may be filed only by leave of the appellate court wherein the appeal is docketed or in response to a request made by that court on its own initiative.~~

~~A person desiring to file an amicus curiae brief shall present to the court a motion for leave to file, served upon all parties. The motion shall state concisely the nature of the applicant's interest, the reasons why an amicus curiae brief is believed desirable, the issues of law to~~

~~be addressed in the amicus curiae brief, and the applicant's position on those issues. The proposed amicus curiae brief may be conditionally filed with the motion for leave. Unless otherwise ordered by the court, the application for leave will be determined solely upon the motion and without responses thereto or oral argument.~~

~~The clerk of the appellate court will forthwith notify the applicant and all parties of the court's action upon the application. Unless other time limits are set out in the order of the court permitting the brief, the amicus curiae shall file the brief within the time allowed for the filing of the brief of the party supported or, if in support of neither party, within the time allowed for filing appellant's brief. Motions for leave to file an amicus curiae brief submitted to the court after the time within which the amicus curiae brief normally would be due are disfavored in the absence of good cause. Reply briefs of the parties to an amicus curiae brief will be limited to points or authorities presented in the amicus curiae brief which are not presented in the main briefs of the parties. No reply brief of an amicus curiae will be received.~~

~~A motion of an amicus curiae to participate in oral argument will be allowed only for extraordinary reasons.~~

(i) **Amicus Curiae Briefs.** An amicus curiae may file a brief with the permission of the appellate court in which the appeal is docketed.

(1) **Motion.** To obtain the court's permission to file a brief, amicus curiae shall file a motion with the court that states concisely the nature of amicus curiae's interest, the reasons why the brief is desirable, the issues of law to be addressed in the brief, and the position of amicus curiae on those issues.

(2) **Brief.** The motion must be accompanied by amicus curiae's brief. The amicus curiae brief shall contain, in a footnote on the first page, a statement that identifies any person or entity—other than amicus curiae, its members, or its counsel—who, directly or indirectly, either wrote the brief or contributed money for its preparation.

(3) **Time for Filing.** If the amicus curiae brief is in support of a party to the appeal, then amicus curiae shall file its motion and brief within the time allowed for filing that party's principal brief. If amicus curiae's brief does not support either party, then amicus curiae shall file its motion and proposed brief within the time allowed for filing appellee's principal brief.

(4) **Service on Parties**. When amicus curiae files its motion and brief, it must serve a copy of its motion and brief on all parties to the appeal.

(5) **Action by Court.** Unless the court orders otherwise, it will decide amicus curiae's motion without responses or argument. An amicus motion filed by an individual on his or her own behalf will be disfavored.

(6) **Reply Briefs.** A party to the appeal may file and serve a reply brief that responds to an amicus curiae brief no later than thirty days after having been served with the amicus curiae brief. A party's reply brief to an amicus curiae brief shall be limited to a concise rebuttal of arguments set out in the amicus curiae brief and shall not reiterate or rebut arguments set forth in the party's principal brief. The court will not accept a reply brief from an amicus curiae.

(7) **Oral Argument.** The court will allow a motion of an amicus curiae requesting permission to participate in oral argument only for extraordinary reasons.

(j) **Word-Count Limitations Applicable to Briefs Filed in the Court of Appeals.** Each brief filed in the Court of Appeals, whether filed by an appellant, appellee, or amicus curiae, shall be set in font as set forth in Rule 26(g)(1) and described in Appendix B to these rules. A principal brief may contain no more than 8,750 words. A reply brief may contain no more than 3,750 words. An amicus curiae brief may contain no more than 3,750 words.

(1) **Portions of Brief Included in Word Count.** Footnotes and citations in the body of the brief must be included in the word count. Covers, captions, indexes, tables of authorities, certificates of service, certificates of compliance with this rule, counsel's signature block, and appendixes do not count against these word-count limits.

(2) **Certificate of Compliance.** Parties shall submit with the brief, immediately before the certificate of service, a certification, signed by counsel of record, or in the case of parties filing briefs pro se, by the party, that the brief contains no more than the number of words allowed by this rule. For purposes of this certification, counsel and parties may rely on word counts reported by word-processing software, as long as footnotes and citations are included in those word counts.

* * *

Rule 29. Sessions of Courts; Calendar of Hearings

(a) **Sessions of Court.**

(1) **Supreme Court.** The Supreme Court shall be in continuous session for the transaction of business. Appeals will be heard in accordance with a schedule promulgated by the Chief Justice.~~Unless otherwise scheduled by the Court, hearings in appeals will be held during the months of February through May and September through December. Additional settings may be authorized by the Chief Justice.~~

(2) **Court of Appeals.** Appeals will be heard in accordance with a schedule promulgated by the Chief Judge. Panels of the Court will sit as scheduled by the Chief Judge. For the transaction of other business, the Court of Appeals shall be in continuous session.

(b) **Calendaring of Cases for Hearing.** Each appellate court will calendar the hearing of all appeals docketed in the court. In general, appeals will be calendared for hearing in the order in which they are docketed, but the court may vary the order for any cause deemed appropriate. On motion of any party, with notice to all other parties, the court may determine without hearing to give an appeal peremptory setting or otherwise to vary the normal calendar order. Except as advanced for peremptory setting on motion of a party or the court's own initiative, no appeal will be calendared for hearing at a time less than thirty days after the filing of the appellant's brief. The clerk of the appellate court will give reasonable notice to all counsel of record of the setting of an appeal for hearing by either e-mailing or mailing a copy of the calendar.

* * *

Rule 33.1. Secure-Leave Periods for Attorneys

~~(a) **Purpose; Authorization**. In order to secure for the parties to actions and proceedings pending in the appellate division, and to the public at large, the heightened level of professionalism that an attorney is able to provide when the attorney enjoys periods of time that are free from the urgent demands of professional responsibility and to enhance the overall quality of the attorney's personal and family life, any attorney may from time to time designate and enjoy one or more secure-leave periods each year as provided in this rule.~~

~~(b) **Length; Number.** A secure-leave period shall consist of one or more complete calendar weeks. During any calendar year, an attorney's~~

~~secure-leave periods pursuant to this rule and to Rule 26 of the General Rules of Practice for the Superior and District Courts shall not exceed, in the aggregate, three calendar weeks.~~

~~(c) **Designation; Effect.** To designate a secure-leave period, an attorney shall file a written designation containing the information required by subsection (d), with the official specified in subsection (e), and within the time provided in subsection (f). Upon such filing, the secure-leave period so designated shall be deemed allowed without further action of the court, and the attorney shall not be required to appear at any argument or other in-court proceeding in the appellate division during that secure-leave period.~~

~~(d) **Content of Designation.** The designation shall contain the following information: (1) the attorney's name, address, telephone number, State Bar number, and e-mail address; (2) the date of the Monday on which the secure-leave period is to begin and of the Friday on which it is to end; (3) the dates of all other secure-leave periods during the current calendar year that have previously been designated by the attorney pursuant to this rule and to Rule 26 of the General Rules of Practice for the Superior and District Courts; (4) a statement that the secure-leave period is not being designated for the purpose of delaying, hindering, or interfering with the timely disposition of any matter in any pending action or proceeding; (5) a statement that no argument or other in-court proceeding has been scheduled during the designated secure-leave period in any matter pending in the appellate division in which the attorney has entered an appearance; and (6) a listing of all cases, by caption and docket number, pending before the appellate court in which the designation is being filed. The designation shall apply only to those cases pending in that appellate court on the date of its filing. A separate designation shall be filed as to any cases on appeal subsequently filed and docketed.~~

~~(e) **Where to File Designation.** The designation shall be filed as follows: (1) if the attorney has entered an appearance in the Supreme Court, in the office of the clerk of the Supreme Court, even if the designation was filed initially in the Court of Appeals; (2) if the attorney has entered an appearance in the Court of Appeals, in the office of the clerk of the Court of Appeals.~~

~~(f) **When to File Designation.** The designation shall be filed: (1) no later than ninety days before the beginning of the secure-leave period, and (2) before any argument or other in-court proceeding has been scheduled for a time during the designated secure-leave period.~~

(a) **Definition; Authorization.** A "secure-leave period" is a period of time that is designated by an attorney in which the appellate courts will not hold oral argument in any case in which that attorney is listed as an attorney of record. An attorney may designate secure-leave periods as provided in this rule.

(b) **Length; Number.** A secure-leave period shall consist of one complete calendar week. During a calendar year, an attorney may designate three different weeks as secure-leave periods.

(c) **Designation.** An attorney shall designate his or her secure-leave periods on the electronic filing site of the appellate courts at https://www.ncappellatecourts.org.

(d) **When to Designate.** An attorney shall designate a secure-leave period at least ninety days before it begins.

* * *

These amendments to the North Carolina Rules of Appellate Procedure shall be effective immediately.

These amendments shall be published in the North Carolina Reports and posted on the Court's web site.

Ordered by the Court in Conference, this the 1st day of March, 2018.

Michael R. Morgan
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 2nd day of March, 2018.

AMY L. FUNDERBURK
Clerk of the Supreme Court

AMENDMENTS TO THE RULES CONCERNING THE ORGANIZATION OF THE STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 27, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning its organization, as particularly set forth in 27 N.C.A.C. 1A, Section .0700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0700, Standing Committees of the Council

Rule .0701, Standing Committees and Boards
(a) Standing Committees. Promptly after his or her election, the president shall appoint members to the standing committees identified below to serve for one year beginning January 1 of the year succeeding his or her election…..

(1) Executive Committee...

(8) ~~Technology and Social Media~~ Communications Committee. It shall be the duty of the Communications Committee to develop and coordinate official North Carolina State Bar communications to its membership and to third parties, including the use of printed publications, emerging technology, and social media. ~~It shall be the duty of this committee to stay abreast of technological developments that might enable the North Carolina State Bar to better serve and communicate with its members and the public, and to develop processes, procedures and policies for the deployment and use of social media and other means of disseminating official information.~~

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 27, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of February, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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

This the 5th day of April, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of April, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CERTIFICATION OF PARALEGALS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 27, 2017.

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

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals

Rule .0119 Standards for Certification of Paralegals
(a) To qualify for certification as a paralegal, an applicant must pay any required fee, and comply with the following standards:

(1) Education...

(2) National Certification. If an applicant has obtained and thereafter maintains in active status at all times prior to application (i) the designation Certified Legal Assistant (CLA)/Certified Paralegal (CP) from the National Association of Legal Assistants; (ii) the designation PACE-Registered Paralegal (RP)/Certified Registered Paralegal (CRP) from the National Federation of Paralegal Associations; or (iii) another national paralegal credential approved by the board, the applicant is not required to satisfy the educational standard in paragraph (a)(1).

(3) Examination...

~~(b) Alternative Qualification Period. For a period not to exceed two years after the date that applications for certification are first accepted by the board, an applicant may qualify by satisfying one of the following:~~

~~(1) earned a high school diploma, or its equivalent, worked as a paralegal and/or a paralegal educator in North Carolina for not less than 5000 hours during the five years prior to application, and, during the 12 months prior to application, completed three hours of continuing legal education in professional responsibility, as approved by the board;~~

~~(2) obtained and maintained at all times prior to application the designation Certified Legal Assistant (CLA)/Certified Paralegal (CP), PACE-Registered Paralegal (RP), or other national paralegal credential approved by the board and worked as a paralegal and /or a paralegal educator in North Carolina for not less than 2000 hours during the two years prior to application; or~~

~~(3) worked as a paralegal and/or a paralegal educator in North Carolina for not less than 2000 hours during the two years prior to application and fulfilled one of the following educational requirements:~~

~~(A) as set forth in Rule .0119(a)(1), or~~

~~(B) earned an associate's or bachelor's degree in any discipline from any institution of post-secondary education that is accredited by an accrediting body recognized by the United States Department of Education and successfully completed at least the equivalent of 18 semester credits at a qualified paralegal studies program, any portion of which credits may also satisfy the requirements for the associate's or bachelor's degree.~~

~~(c)~~(b) Notwithstanding an applicant's satisfaction of the standards set forth in Rule .0119(a) ~~or (b)~~, no individual may be certified as a paralegal if: ...

~~(d)~~(c) ...

~~(e)~~(d) Qualified Paralegal Studies Program. A qualified paralegal studies program is a program of paralegal or legal assistant studies that is an institutional member of the Southern Association of Colleges and Schools or other regional or national accrediting agency recognized by the United States Department of Education, and is either

(1) approved by the American Bar Association;

(2) an institutional member of the American Association for Paralegal Education; or

(3) offers at least the equivalent of 18 semester credits of coursework in paralegal studies as prescribed by the American Bar Association Guidelines for the Approval of Paralegal Education including the equivalent of one semester credit in legal ethics.

~~(f)~~(e) ...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 27, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 22nd day of February, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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

This the 5th day of April, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of April, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 27, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct of the North Carolina State Bar, as particularly set forth in 27 N.C.A.C. 2, Rule 1.15, Safekeeping Property, be amended as follows (additions are underlined, deletions are interlined except where noted):

27 N.C.A.C. 2, North Carolina Rules of Professional Conduct

Rule 1.15 Safekeeping Property

Rule 1.15-1 Definitions
(a)…

(e) "Electronic transfer" denotes a paperless transfer of funds.

[Re-lettering remaining paragraphs.]

Rule 1.15-2 General Rules
(a) …

(s) ~~Signature on Trust Checks~~ Check Signing and Electronic Transfer Authority.

(1) Every trust account check ~~Checks drawn on a trust~~ ~~account~~ must be signed by a lawyer, or by an employee who is not responsible for performing monthly or quarterly reconciliations and who is supervised by a lawyer. ~~Prior to exercising signature authority, a lawyer or supervised employee shall take a one-hour trust account management continuing legal education (CLE) course approved by the State Bar for this purpose. The CLE course must be taken at least once for every law firm at which the lawyer or the supervised employee is given signature authority.~~

(2) Every electronic transfer from a trust account must be initiated by a lawyer, or by an employee who is not responsible for performing monthly or quarterly reconciliations and who is supervised by a lawyer.

(3) Prior to exercising signature or electronic transfer authority, a lawyer or supervised employee shall take a one-hour trust account management continuing legal education (CLE) course approved by the State Bar for this purpose. The CLE course must be taken at least once for every law firm at which the lawyer or the supervised employee is given signature or transfer authority.

(4) Trust account checks may not be signed using signature stamps, preprinted signature lines on checks, or electronic signatures other than "digital signatures" as defined in 21 CFR 11.3(b)(5).

(t) ...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 27, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of February, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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

This the 5th day of April, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of April, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 27, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct of the North Carolina State Bar, as particularly set forth in 27 N.C.A.C. 2, Rule 1.15, Safekeeping Property, be amended as follows (additions are underlined, deletions are interlined except where noted):

27 N.C.A.C. 2, North Carolina Rules of Professional Conduct

Rule 1.15-3 Records and Accountings
(a) Check Format.

...

(i) Reviews.

(1) ...

(2) Each quarter, for each general trust account~~, and~~ dedicated trust account, ~~and fiduciary account,~~ the lawyer shall review the statement of costs and receipts, client ledger, and cancelled checks of a random sample of representative transactions completed during the quarter to verify that the disbursements were properly made. The transactions reviewed must involve multiple disbursements unless no such transactions are processed through the account, in which case a single disbursement is considered a transaction for the purpose of this paragraph. A sample of three representative transactions shall satisfy this requirement, but a larger sample may be advisable.

(3) Each quarter, for each fiduciary account, the lawyer shall engage in a review as described in Rule 1.15-3(i)(2); however, if the lawyer manages more than ten fiduciary accounts, the lawyer may perform reviews on a random sample of at least ten fiduciary accounts in lieu of performing reviews on all such accounts.

~~(3)~~(4) ...

[Re-numbering remaining paragraphs.]

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 27, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 22nd day of February, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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

This the 5th day of April, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of April, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules of Professional Conduct of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 27, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct, as particularly set forth in 27 N.C.A.C. 2, Rule 3.5, Impartiality and Decorum of the Tribunal, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Rules of Professional Conduct

Rule 3.5, Impartiality and Decorum of the Tribunal

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

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

(2) communicate *ex parte* with a juror or member of the jury venire ~~prospective juror~~ except as permitted by law;

(3) unless authorized to do so by law or court order, communicate *ex parte* with the judge or other official regarding a matter pending before the judge or official~~; communicate *ex parte* with a judge or other official except:~~

~~(A) in the course of official proceedings;~~

~~(B) in writing, if a copy of the writing is furnished simultaneously to the opposing party;~~

~~(C) orally, upon adequate notice to opposing party; or~~

~~(D) as otherwise permitted by law;~~

(4) ...

(b) All restrictions imposed by this rule also apply to communications with, or investigations of, family members ~~of the family~~ of a juror or of a member of the jury venire ~~prospective juror~~.

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

(d) For purposes of this rule:

(1) *Ex parte* communication means a communication on behalf of a party to a matter pending before a tribunal that occurs in the absence of an opposing party, without notice to that party, and outside the record.

(2) A matter is "pending" before a particular tribunal when that tribunal has been selected to determine the matter or when it is reasonably foreseeable that the tribunal will be so selected.

Comment

[1] ...

[2] To safeguard the impartiality that is essential to the judicial process, jurors and members of the jury venire ~~prospective jurors~~ should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with members of the jury venire ~~prospective jurors~~ prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with a juror or a member of the jury venire ~~prospective juror~~ about the case.

[3] ...

[4] Vexatious or harassing investigations of jurors or members of the jury venire ~~prospective jurors~~ seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on the lawyer's behalf who conducts an investigation of jurors or members of the jury venire ~~prospective jurors~~ should act with circumspection and restraint.

[5] Communications with, or investigations of, members of the families of jurors or the families of members of the jury venire ~~prospective jurors~~ by a lawyer or by anyone on the lawyer's behalf are subject to the restrictions imposed upon the lawyer with respect to the lawyer's communications with, or investigations of, jurors or members of the jury venire ~~prospective jurors~~.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by

the Council of the North Carolina State Bar at a regularly called meeting on October 27, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 22nd day of February, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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

This the 5th day of April, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of April, 2018.

s/Morgan, J.
For the Court

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

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

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning its organization, as particularly set forth in 27 N.C.A.C. 1A, Section .0500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0500, Meetings of the North Carolina State Bar

.0501 Annual Meetings
The annual meeting of the North Carolina State Bar shall be held at such time and place within the state of North Carolina, after such notice (but not less than 30 days) as the council may determine.

.0502 Special Meetings
(a) A special ~~Special~~ meetings of the North Carolina State Bar may be called to address specific subjects ~~may be called upon 30 days notice,~~ as follows:

(1) ~~by the secretary,~~ upon direction of the council; or~~.~~

(2) ~~by the secretary,~~ upon delivery to the secretary of a written request by no fewer than ~~upon the call addressed to the council, of not less than~~ 25% of the active members of the North Carolina State Bar setting forth the subject(s) to be addressed.

(b) At a special meetings, only ~~no~~ subjects specified in the notice shall be ~~dealt with other than those specified in the notice~~ addressed.

(c) Any special meeting of the North Carolina State Bar will be held at such time and place within the state of North Carolina as the council or president may determine.

.0503 Notice of Meetings
~~Notice of all meetings shall be given by publication in such newspapers of general circulation as the council may select, or, in the discretion of the council, by mailing notice to the secretary of the several district bars or to the individual active members of the North Carolina State Bar.~~

(a) Notice of any meeting of the North Carolina State Bar shall be given by the secretary by posting a notice at the State Bar headquarters and on the State Bar website or as otherwise directed by the council. Notice shall also be provided as required by N.C. Gen. Stat. § 143-318.12 and by any other statutory provision regulating notice of public meetings of agencies of the state.

(b) Notice of the annual meeting will be given at least 30 days before the meeting. Notice of any special meeting will be given at least 48 hours before the meeting or as otherwise required by law.

.0504 Quorum
At ~~all~~ any annual ~~and~~ or special meetings of the North Carolina State Bar those active members of the North Carolina State Bar present shall constitute a quorum. There ~~, and there~~ shall be no voting by proxy or by absentee ballot.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 26, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of February, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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

This the 5th day of April, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of April, 2018.

s/Morgan, J.
For the Court

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

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

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning its organization, as particularly set forth in 27 N.C.A.C. 1A, Section .0600, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0600, Meetings of the Council

.0601 Regular Meetings
Regular meetings of the council shall be held each year in ~~each of the months of~~ January, April, and July, at such times and places ~~after such notice (but not less than 30 days)~~ as the council may determine. A regular meeting of the council shall also be held each year~~; and on the day before~~ in conjunction with the annual meeting of the North Carolina State Bar~~,~~ at the location of ~~said~~ the annual meeting. Any regular meeting may be adjourned from time to time as a majority of members of the council present may determine.

.0602 Special and Emergency Meetings
(a) A special meeting of the council may be called to address specified subjects as follows:

(1) by the president in his or her discretion; or

(2) by a written request, delivered to the secretary, by eight councilors setting forth the subject(s) to be addressed at the meeting. The secretary will schedule a special meeting to be held no more than 30 days after receipt of the request.

(b) An emergency meeting of the council may be called by the president to address circumstances that require immediate consideration by the council.

(c) In the event of incapacity or recusal of the president, the president elect or the vice president may call a special or emergency meeting. In the event of incapacity or recusal of the president elect or the vice president, the immediate past president or secretary may call a special or emergency meeting. In the event of incapacity or recusal of all officers, any member of the council who has served at least two terms may call a special or emergency meeting.

~~The president in his or her discretion may call special meetings of the council. Upon written request of eight councilors, filed with the secretary requesting the president to call a special meeting of the council, the secretary shall, within five days thereafter, call such special meeting. The date fixed for such meeting shall not be less than five days nor more than ten days from the date of such call.~~

.0603 Notice of ~~Called Special~~ Meetings

(a) Notice of any regular meeting of the council will be given by the secretary by posting a notice at the State Bar headquarters and on the State Bar website or as otherwise directed by the council. Notice of any regular meeting will also be provided as required by N.C. Gen. Stat. § 143-318.12 and any other statutory provision regulating notice of public meetings of agencies of the state. Unless otherwise required by law, the secretary will issue notice of any regular meeting of the council at least 30 days before the meeting. ~~Notice of called special meetings shall be signed by the secretary. The notice shall set forth the day and hour of the meeting and the place for holding the same. Any business may be presented for consideration at such special meeting~~.

(b) The secretary will issue notice of any special meeting of the council at least 48 hours before the meeting, or as otherwise required by law. Notices of any special meeting will be sent to each councilor by email, or other electronic means intended to be individually received by each councilor, to the most recent address of record provided to the State Bar by each councilor for such communications. Notice will be given to any councilor who has not provided an email address, or other electronic means to receive notices, by regular mail. Notice may be sent, but is

not required to be sent, by any means authorized for service under the Rules of Civil Procedure. ~~Such notice must be given to each councilor unless waived by him or her. A written waiver signed by any councilor shall be equivalent to notice as herein provided. Notice to councilors not waiving as aforesaid shall be in writing and may be communicated by telegraph, or by letter through the United States Mail in the usual course, addressed to each of said councilors at his or her law office address. Notice by telegraph shall be filed with the telegraph carrier for transmission at least three days, and notice by mail shall be deposited in the United States Post Office at least five days, before the day fixed for the special meeting.~~

(c) The secretary will issue reasonable notice of any emergency meeting in a manner consistent with the purpose of the meeting. Such notice may be given through any appropriate means by which each councilor may receive notice on an expedited basis, including telephone, email, or other electronic means.

(d) The notice for any council meeting shall set forth the day, hour, and location of the meeting.

.0604 Quorum ~~at Meeting of Council~~
At a meeting~~s~~ of the council the presence of ten councilors shall constitute a quorum. There shall be no voting by proxy or by absentee ballot.

.0605 Manner of Meeting of Council
The council will assemble at the time and place provided in the meeting notice. Attendance at a special or emergency council meeting may be by electronic means such as audio or video conferencing. Attendance at a regular council meeting by electronic means may be authorized for an individual councilor in the discretion of the president.

.0606 Parliamentary Rules
Proceedings at any meeting of the council shall be governed by Roberts' Rules of Order.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 26, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 22nd day of February, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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

This the 5th day of April, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of April, 2018.

s/Morgan, J.
For the Court

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

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

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning its organization, as particularly set forth in 27 N.C.A.C. 1A, Section .0700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0700, Standing Committees of the Council

Rule .0701, Standing Committees and Boards

.0701 Standing Committees and Boards

(a) Standing Committees. Promptly after his or her election, the president shall appoint members to the standing committees identified below...

(1) Executive Committee...

(5) Administrative Committee. It shall be the duty of the Administrative Committee to study and make recommendations on policies concerning the administration of the State Bar, including the administration of the State Bar's facilities, automation, personnel, retirement plan, ~~publications,~~ and district bars; to oversee the membership functions of the State Bar, including the collection of dues, the suspension of members for failure to pay dues and other fees, and the transfer of members to active or inactive status in accordance with the provisions of Sections .0900 and .1000 of Subchapter 1D of these rules; and to perform such other duties and consider such other matters as the council or the president may designate. ~~The committee may establish a Publications Board to oversee the regular publications of the State Bar.~~

(6)...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 26, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 28th day of February, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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

This the 5th day of April, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of April, 2018.

s/Morgan, J.
For the Court

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

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

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing legal education, as particularly set forth in 27 N.C.A.C. 1D, Section .1500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1500 Rules Governing the Administration of the Continuing Legal Education Program

.1501 Scope, Purpose and Definitions
(a) Scope...

(c) Definitions

(1) ~~"Accredited sponsor" shall mean an organization whose entire continuing legal education program has been accredited by the Board of Continuing Legal Education.~~

~~(2)~~ "Active member" shall include any person who is licensed to practice law in the state of North Carolina and who is an active member of the North Carolina State Bar.

~~(3)~~(2)...

~~(4)~~(3) "Approved ~~activity~~ program" shall mean a specific, individual ~~legal~~ educational ~~activity~~ program ~~presented by an accredited sponsor or presented by other than an accredited sponsor if such activity is~~ approved as a continuing legal education ~~activity~~ program under these rules by the Board of Continuing Legal Education.

~~(5)~~(4)... [re-numbering subsequent paragraphs through paragraph (13)]

(14) "Registered sponsor" shall mean an organization that is registered by the board after demonstrating compliance with the accreditation standards for continuing legal education programs as well as the requirements for reporting attendance and remitting sponsor fees for continuing legal education programs.

(15)"Rules" shall mean...

.1512 Source of Funds

(a) Funding for the program carried out by the board shall come from sponsor's fees and attendee's fees as provided below, as well as from duly assessed penalties for noncompliance and from reinstatement fees.

(1) ~~Accredited~~ Registered sponsors located in North Carolina (for ~~course programs~~ offered ~~within~~ in or outside North Carolina), ~~or accredited~~ registered sponsors not located in North Carolina (for ~~course~~ programs ~~given~~ offered in North Carolina), ~~or~~ and ~~unaccredited~~ all other sponsors located ~~within~~ in or outside of North Carolina (for ~~accredited courses~~ programs ~~within~~ offered in North Carolina) shall, as a condition of conducting an approved ~~activity~~ program, agree to remit a list of North Carolina attendees and to pay a fee for each active member of the North Carolina State Bar who attends the program for CLE credit. The sponsor's fee shall be based on each credit hour of attendance, with a proportional fee for portions of a program lasting less than an hour. The fee shall be set by the board upon approval of the council. Any sponsor, including ~~an accredited~~ a registered sponsor, ~~which~~ that conducts an approved ~~activity~~ program which is offered without charge to attendees shall not be required to remit the fee under this section. Attendees who wish to receive credit for attending such an approved ~~activity~~ program shall comply with ~~Rule .1512~~ paragraph (a)(2) below of this rule.

(2)...

.1518 Continuing Legal Education Program

(a) Annual Requirement...

(c) Professionalism Requirement for New Members...

(1) Content and Accreditation. The State Bar PNA Program shall consist of 12 hours of training in subjects designated by the State Bar including, but not limited to, professional responsibility, professionalism, and law office management. The chairs of the Ethics and Grievance Committees, in consultation with the chief counsel to those committees, shall annually establish the content of the program and shall publish the required content on or before January 1 of each year. To be approved as a PNA Program, the program must be provided by ~~an accredited~~ a sponsor registered under Rule .1603 of this subchapter and the sponsor must satisfy the annual content requirements, and submit a detailed description of the program to the board for approval at least 45 days prior to the presentation. A registered sponsor may not advertise a PNA Program until approved by the board. PNA Programs shall be specially designated by the board and no ~~course~~ program that

is not so designated shall satisfy the PNA Program requirement for new members.

(2)...

.1519 Accreditation Standards
The board shall approve continuing legal education activities programs which that meet the following standards and provisions.

(a)...

(g) ~~Any accredited~~ A sponsor of an approved program must remit fees as required and keep and maintain attendance records of each continuing legal education program sponsored by it, which shall be furnished to the board in accordance with regulations.

(h)...

.1520 ~~Accreditation~~ Registration of Sponsors and Program Approval
(a) ~~Accreditation~~ Registration of Sponsors. An organization desiring ~~accreditation~~ to be designated as ~~an accredited~~ a registered sponsor of ~~courses,~~ programs, or other continuing legal education activities may apply ~~for accredited sponsor status~~ to the board for registered sponsor status. The board shall ~~approve a sponsor as an accredited~~ register a sponsor if it is satisfied that the sponsor's programs have met the accreditation standards set forth in Rule .1519 of this subchapter and the application requirements set forth in Rule .1603 of this subchapter ~~regulations established by the board~~.

(1) Duration of Status. Registered sponsor status shall be granted for a period of five years. At the end of the five-year period, the sponsor must apply to renew its registration pursuant to Rule .1603(b) of this subchapter.

(2) Accredited Sponsors. A sponsor that was previously designated by the board as an "accredited sponsor" shall, on the effective date of paragraph (a)(1) of this rule, be re-designated as a "registered sponsor." Each such registered sponsor shall subsequently be required to apply for renewal of registration according to a schedule to be adopted by the board. The schedule shall stagger the submission date for such applications over a three-year period after the effective date of this paragraph (a)(2).

(b) Program Approval for ~~Accredited~~ Registered Sponsors.

(1) Once an organization is approved as ~~an accredited~~ a registered sponsor, the continuing legal education programs sponsored by that organization are presumptively approved for credit; however,

application must still be made to the board for approval of each program. At least 50 days prior to the presentation of a program, ~~an accredited~~ a registered sponsor shall file an application, on a form prescribed by the board, notifying the board of the dates and locations of presentations of the program and the sponsor's calculation of the CLE credit hours for the program.

~~(2) The board may at any time revoke the accreditation of an accredited sponsor for failure to satisfy the requirements of Rule .1512 and Rule .1519 of this subchapter, and for failure to satisfy the Regulations Governing the Administration of the Continuing Legal Education Program set forth in Section .1600 of this subchapter.~~

~~(3)~~(2) The board shall evaluate a program presented by ~~an accredited~~ a registered sponsor and, upon a determination that the program does not satisfy the requirements of Rule .1519, notify the ~~accredited~~ registered sponsor that the program is not approved for credit. Such notice shall be sent by the board to the ~~accredited~~ registered sponsor within 45 days after the receipt of the application. If notice is not sent to the ~~accredited~~ registered sponsor within the 45-day period, the program shall be presumed to be approved. The ~~accredited~~ registered sponsor may request reconsideration of an unfavorable accreditation decision by submitting a letter of appeal to the board within 15 days of receipt of the notice of disapproval. The decision by the board on an appeal is final.

(c) ~~Unaccredited~~ Sponsor Request for Program Approval.

(1) Any organization not ~~accredited~~ designated as ~~an accredited~~ a registered sponsor that desires approval of a course or program shall apply to the board. ~~The board shall adopt regulations to administer the accreditation of such programs consistent with the provisions of Rule .1519 of this subchapter.~~ Applicants denied approval of a program for failure to satisfy the accreditation standards in Rule .1519 of this subchapter may request reconsideration of such a decision by submitting a letter of appeal to the board within 15 days of receipt of the notice of disapproval. The decision by the board on an appeal is final.

(2) The board may at any time decline to accredit CLE programs offered by ~~a non-accredited~~ a sponsor that is not registered for a specified period of time, as determined by the board, for failure to comply with the requirements of Rule .1512, Rule .1519 and Section .1600 of this subchapter.

(d) Member Request for Program Approval. An active member desiring approval of a ~~course or~~ program that has not otherwise been approved shall apply to the board. ~~The board that shall adopt regulations to administer approval requests consistent with the requirements Rule .1519 of this subchapter.~~ Applicants denied approval of a program for failure to satisfy the accreditation standards in Rule .1519 of this subchapter may request reconsideration of such a decision by submitting a letter of appeal to the board within 15 days of the receipt of the notice of disapproval. The decision by the board on an appeal is final.

~~(e) Records. The board may provide by regulation for the accredited sponsor, unaccredited sponsor, or active member for whom a continuing legal education program has been approved to maintain and provide such records as required by the board.~~

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 26, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 22nd day of February, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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

This the 5th day of April, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided

by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of April, 2018.

s/Morgan, J.
For the Court

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

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

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing legal education, as particularly set forth in 27 N.C.A.C. 1D, Section .1600, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1600 Regulations Governing the Administration of the Continuing Legal Education Program

.1601 General Requirements for ~~Course~~ Program Approval

(a) Approval. CLE ~~activities~~ programs may be approved upon the written application of a sponsor~~, other than an accredited~~ including a registered sponsor, or of an active member on an individual program basis. An application for such CLE ~~course~~ program approval shall meet the following requirements:

(1) …

(b) ~~Course~~ Program Quality and Materials. The application and materials provided shall reflect that the program to be offered meets the requirements of Rule .1519 of this subchapter. Sponsors, including ~~accredited~~ registered sponsors, and active members seeking credit for an approved ~~activity~~ program shall furnish, upon request of the board, a copy of all materials presented and distributed at a CLE ~~course or~~ program. Written materials consisting merely of an outline without citation or explanatory notations generally will not be sufficient for approval. Any sponsor,

including ~~an accredited~~ a registered sponsor, ~~who~~ that expects to conduct a CLE ~~activity~~ program for which suitable written materials will not be made available to all attendees may obtain approval for that ~~activity~~ program only by application to the board at least 50 days in advance of the presentation showing why written materials are not suitable or readily available for such a program.

(c) Facilities ...

(e) Records. Sponsors, including ~~accredited~~ registered sponsors, shall within 30 days after the ~~course~~ program is concluded

(1) furnish to the board a list ~~in alphabetical order, in an electronic format if available,~~ of the names of all North Carolina attendees together with and their North Carolina State Bar membership numbers; the list shall be in alphabetical order and in a format prescribed by the board;

(2) …

(f) Announcement. ~~Accredited sponsors and sponsors who~~ Sponsors that have advanced approval for ~~course~~ programs may include in their brochures or other ~~course~~ program descriptions the information contained in the following illustration:

This [course, ~~for~~ seminar, or program] has been approved by the Board of Continuing Legal Education of the North Carolina State Bar for continuing legal education credit in the amount of ____ hours, of which ____ hours will also apply in the area of professional responsibility. ~~This course is not sponsored by the board.~~

(g) Notice …

.1603 ~~Accredited~~ Registered Sponsors

(a) Application for Registered Sponsor Status. ~~In order to~~ To be designated ~~receive designation~~ as ~~an accredited~~ a registered sponsor of ~~courses,~~ programs or other continuing legal education activities under Rule .1520(a) of this subchapter, ~~the application of the~~ a sponsor must ~~meet~~ satisfy the following requirements:

(1) ~~The~~ File a completed application for ~~accredited~~ registered sponsor status ~~shall be submitted~~ on a form furnished by the board.

(2) During the three years prior to application, present at least five original programs that were approved for CLE credit by the board.

(3) During the three years prior to application, substantially comply with the requirements in Rule .1601(a) and (e) of this subchapter on application for program approval, remitting sponsor fees, and reporting attendance for every program approved for credit.

~~(2) The application shall contain all information requested on the form.~~

~~(3) The application shall be accompanied by course outlines or brochures that describe the content, identify the instructors, list the time devoted to each topic, show each date and location at which three programs have been sponsored in each of the last three consecutive years, and enclose the actual course materials.~~

~~(4) The application shall include a detailed calculation of the total CLE hours specified in each of the programs sponsored by the organization.~~

~~(5) The application shall reflect that the previous programs offered by the organization in continuing legal education have been of consistently high quality and would otherwise meet the standards set forth in Rule .1519 of this subchapter.~~

~~(6) Notwithstanding the provisions of Rule .1603 (3),(4) and(5) above, any law school which has been approved by the North Carolina State Bar for purposes of qualifying its graduates for the North Carolina bar examination, may become an accredited sponsor upon application to the board.~~

(b) Renewal of Registration.

To retain registered sponsor status, a sponsor must apply for renewal every five years, as required by Rule .1520(a)(1), and must satisfy the requirements of paragraphs (a) of this rule. To facilitate staggered renewal applications, at the time that this rule becomes effective, any sponsor previously designated as an "accredited sponsor" shall be designated a registered sponsor and shall be assigned an initial renewal year which shall be not more than three years later.

(c) Revocation of Registered Sponsor Status. The board may at any time revoke the registration of a registered sponsor for failure to satisfy the requirements of Section .1500 and Section .1600 of this subchapter.

.1606 Fees

(a) Sponsor Fee. The sponsor fee, a charge paid directly by the sponsor, shall be paid by all sponsors of approved ~~activities~~ programs presented in North Carolina and by ~~accredited~~ registered sponsors located in North Carolina for approved ~~activities~~ programs wherever presented,

except that no sponsor fee is required where approved ~~activities~~ programs are offered without charge to attendees. In any other instance, payment of the fee by the sponsor is optional. The amount of the fee, per approved CLE hour per active member of the North Carolina State Bar in attendance, is $3.50….

(b) …

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 26, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of February, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

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

This the 5th day of April, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of April, 2018.

s/Morgan, J.
For the Court

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

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

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

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

.1723 Revocation or Suspension of Certification as a Specialist
(a) Automatic Revocation or Suspension of Specialty Certification Following Professional Discipline. The board shall revoke its certification of a lawyer as a specialist if the lawyer is disbarred or receives a disciplinary suspension, any part of which is or subsequently becomes active, from the ~~North Carolina State Bar~~ Disciplinary Hearing Commission of the North Carolina State Bar, a North Carolina court of law, or, if the lawyer is licensed in another jurisdiction in the United States, from a court of law or the regulatory authority of that jurisdiction. The board shall suspend its certification of a lawyer as a specialist if the lawyer receives a disciplinary suspension, all of which is stayed. If a stayed disciplinary suspension ends without becoming active, the lawyer may be reinstated as a specialist if the lawyer applies for recertification and satisfies all of the requirements for recertification as set forth in the recertification standards for the relevant specialty. During a suspension from specialty certification, application for recertification shall be deferred until the end of the suspension. ~~Revocation shall be automatic without regard for any stay of the suspension period granted by the disciplinary authority.~~ This provision, and any amendment thereto, shall apply to discipline received on or after the effective date of ~~this~~ the provision or the amendment as appropriate.

(b) Discretionary Revocation or Suspension...

.1725, Areas of Practice
There are hereby recognized the following specialties:

(1) bankruptcy law
- (a) consumer bankruptcy law
- (b) business bankruptcy law

(2) estate planning and probate law

(3) real property law
(a) real property - residential
(b) real property - business, commercial, and industrial

(4) family law

(5) criminal law
(a) federal and state criminal law
(b) state criminal law
~~(b)~~(c) juvenile delinquency law

(6) immigration law

(7) workers' compensation

(8) Social Security disability law

(9) elder law

(10) appellate practice

(11) trademark law

(12) utilities law

(13) privacy and information security law

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 26, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 22nd day of February, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council

of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 5th day of April, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of April, 2018.

s/Morgan, J.
For the Court

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

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

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .2300 be amended as follows (additions are underlined , deletions are interlined):

27 N.C.A.C. 1D, Section .2300 Certification Standards for Estate Planning and Probate Law Specialty

.2306 Standards for Continued Certification as a Specialist
The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2306(d) below. No examination will be required for

continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - The specialist must demonstrate that, for each of the five years preceding application, he or she has had substantial involvement in the specialty as defined in Rule .2305(b) of this subchapter; however, for the purpose of continued certification as a specialist, service outside private practice, during which the specialist had duties primarily in the areas of estate planning, estate administration, and/or trust administration, may be substituted for the equivalent years of experience toward the five-year requirement, as determined by the board in its discretion.

(b) Continuing Legal Education ...

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 26, 2018.

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This the 5th day of April, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State

Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 5th day of April, 2018.

s/Morgan, J.
For the Court

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

EMINENT DOMAIN

Condemnation of billboard leasehold—valuation—lease extensions—A Department of Transportation appraiser incorrectly valued a leasehold interest held by a billboard company where the lease included an automatic ten-year extension followed by optional renewal periods. Under the automatic extension, the advertising company essentially had a contractual right to possess the leased property for twenty years and it was a proper factor for the trier of fact to consider. However, the optional ten-year lease extensions should not have been considered. **Dep't of Transp. v. Adams Outdoor Advert. of Charlotte Ltd. P'ship, 101.**

Condemnation of billboard leasehold—valuation—permits—nonconforming use—Evidence of a billboard company's permits that permitted nonconforming use was admissible to help the trier of fact determine the fair market value of the company's condemned leasehold interest. **Dep't of Transp. v. Adams Outdoor Advert. of Charlotte Ltd. P'ship, 101.**

Condemnation of billboard leasehold—valuation—rental income—The rental income from a billboard was admissible in determining the fair market value of the advertising company's leasehold interest in a condemnation action where the advertising company would enter into long-term contracts that gave advertisers the right to occupy and use billboard space on its property. Care must be taken to distinguish between income from the property and income from the business conducted on the property. **Dep't of Transp. v. Adams Outdoor Advert. of Charlotte Ltd. P'ship, 101.**

Condemnation of billboard leasehold—valuation—specific billboard—not considered properly—A Department of Transportation appraiser incorrectly applied the bonus value method of valuing a condemned leasehold interest held by a billboard interest where, in part, he did not account for the value of the specific nonconforming billboard, in its specific location, and the enhanced rental income that it generated, along with the permits that permitted a continuing nonconforming use. **Dep't of Transp. v. Adams Outdoor Advert. of Charlotte Ltd. P'ship, 101.**

Condemnation of billboard leasehold—valuation—value of physical structure not recoverable—In a case involving the condemnation of land which contained a billboard, evidence concerning the value that the billboard added to the leasehold interest held by an outdoor advertising company was admissible to help the trier of fact determine the fair market value of that interest. The value of the physical structure, which was the personal property of the advertising company, was not recoverable. **Dep't of Transp. v. Adams Outdoor Advert. of Charlotte Ltd. P'ship, 101.**

Condemnation—instructions—fair market value—The North Carolina Supreme Court declined to disturb *Carolina Power & Light Co. v. Creasman*, 262 N.C. 390, in a condemnation case, remanded on other grounds, which included an issue involving a fair market value instruction that was likely to recur. **N.C. Dep't of Transp. v. Mission Battleground Park, DST, 477.**

Inverse condemnation—private purpose—Plaintiff homeowners were entitled to assert a statutory inverse condemnation claim pursuant to N.C.G.S. § 40A-51 based upon the extended flooding of their property as the result of actions taken by defendant City to adjust a lake's shore line for an allegedly private purpose. The statute did not make the availability of the remedy dependent upon whether the purpose that led to the taking was public or private. **Wilkie v. City of Boiling Spring Lakes, 540.**

TORTS, OTHER—Continued

claims against defendants for civil conspiracy. Plaintiffs' amended complaint lacked sufficient detail to state a claim for civil conspiracy based on defendants' unlawful behavior, and the other acts alleged were held by the N.C. Supreme Court to be pled insufficiently. **Krawiec v. Manly, 602.**

Tortious interference with contract—knowledge of contract—Where plaintiffs, who owned a dance studio, allegedly entered into contracts with defendant dancers pursuant to which plaintiffs procured visas for defendant dancers in exchange for the dancers' express promise to work exclusively for plaintiffs, and thereafter defendant dancers began working for defendant dance studio, the N.C. Business Court did not err by dismissing plaintiffs' claim against defendant dance studio for tortious interference with contract. None of the factual allegations in plaintiffs' amended complaint demonstrated how the defendant dance studio could have known of the alleged exclusive employment agreement. **Krawiec v. Manly, 602.**

TRADE SECRETS

Misappropriation of—sufficient particularity in pleadings—Where plaintiffs, who owned a dance studio, allegedly entered into contracts with defendant dancers pursuant to which plaintiffs procured visas for defendant dancers in exchange for the dancers' express promise to work exclusively for plaintiffs, and thereafter defendant dancers began working for defendant dance studio, the N.C. Business Court did not err by dismissing plaintiffs' claim against defendants for misappropriation of trade secrets. Plaintiffs' description in their amended complaint of their trade secrets as their "original ideas and concepts for dance productions, marketing strategies and tactics, as well as student, client and customer lists and their contact information" failed to provide sufficient particularity to enable defendants to delineate what they were accused of misappropriating and a court to determine whether misappropriation had or was threatened to occur. **Krawiec v. Manly, 602.**

UNFAIR TRADE PRACTICES

Underlying claims dismissed—Where plaintiffs, who owned a dance studio, allegedly entered into contracts with defendant dancers pursuant to which plaintiffs procured visas for defendant dancers in exchange for the dancers' express promise to work exclusively for plaintiffs, and thereafter defendant dancers began working for defendant dance studio, the N.C. Business Court did not err by dismissing plaintiffs' claim against defendants for unfair and deceptive practices (UDP). Because plaintiffs failed to state a valid claim for tortious interfere with contact or misappropriation of trade secrets, plaintiffs necessarily also failed to adequately state a claim for UDP. **Krawiec v. Manly, 602.**

UNJUST ENRICHMENT

Benefit of work visa—Where plaintiffs, who owned a dance studio, allegedly entered into contracts with defendant dancers pursuant to which plaintiffs procured visas for defendant dancers in exchange for the dancers' express promise to work exclusively for plaintiffs, and thereafter defendant dancers began working for defendant dance studio, the N.C. Business Court did not err by dismissing plaintiffs' claims against defendant dance studio for unjust enrichment. While plaintiffs' amended complaint alleged that defendant dance studio received the benefit of plaintiffs' procurement of their O1-B work visas for defendant dancers, this allegation