NORTH CAROLINA REPORTS

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SUPREME COURT OF NORTH CAROLINA

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CITE THIS VOLUME

371 N.C.

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THE SUPREME COURT

OF

NORTH CAROLINA

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[1] Sworn in 1 March 2018.

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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.[1]	Wilson
	Walter H. Godwin, Jr.[2]	Tarboro
	Lamont Wiggins[3]	Rocky Mount
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3B	Benjamin G. Alford[4]	New Bern
	John E. Nobles, Jr.[5]	Morehead City
	Joshua W. Wiley	New Bern
	Paul M. Quinn[6]	Atlantic Beach
4A	Albert D. Kirby, Jr.[7]	Clinton
4B	Charles H. Henry	Jacksonville
	Henry L. Stevens[8]	Warsaw
5	Jay D. Hockenbury[9]	Wilmington
	Phyllis M. Gorham[10]	Wilmington
	R. Kent Harrell	Burgaw
	Frank Jones[11]	Wilmington
8A	Imelda J. Pate	Kinston
8B	William W. Bland	Goldsboro
	Third Division	
9	Robert H. Hobgood[12]	Louisburg
	Henry W. Hight, Jr.[13]	Henderson
	Carolyn Thompson[14]	Creedmoor
	John Dunlow[15]	Oxford
	Cindy Sturges[16]	Louisburg
9A	W. Osmond Smith, III[17]	Semora
10	Paul C. Ridgeway	Raleigh
	G. Bryan Collins, Jr.	Raleigh
	A. Graham Shirley	Raleigh
	Rebecca W. Holt	Raleigh
	Vinston M. Rozier	Raleigh
	Keith O. Gregory[18]	Raleigh

DISTRICT	JUDGES	ADDRESS
14	Orlando F. Hudson, Jr.	Durham
	James E. Hardin, Jr.	Hillsborough
	Elaine M. O'Neal.[19]	Durham
	Michael O'Foghludha	Durham
	Josephine Kerr Davis[20]	Durham
15A	James Roberson[21]	Burlington
	D. Thomas Lambeth[22]	Burlington
	Andy Hanford[23]	Graham
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[24]	Laurinburg
	Tanya T. Wallace[25]	Rockingham
	Stephan R. Futrell[26]	Rockingham
16B	Robert F. Floyd, Jr.	Fairmont
	James Gregory Bell	Lumberton
19D	James M. Webb	Southern Pines
	Michael A. Stone[27]	Laurinburg
	Fifth Division	
17A	Edwin Graves Wilson, Jr.	Eden
	Stanley L. Allen	Sandy Ridge
17B	Andy Cromer[28]	King
	Angela B. Puckett[29]	Westfield
18	Lindsay R. Davis, Jr.[30]	Greensboro
	John O. Craig, III[31]	High Point
	R. Stuart Albright	Greensboro
	Susan Bray	Greensboro
	Patrice A. Hinnant[32]	Greensboro
	William Wood[33]	Greensboro
	Lora C. Cubbage[34]	Greensboro
19B	Vance Bradford Long	Asheboro
	James P. Hill[35]	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

DISTRICT	JUDGES	ADDRESS
	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
22B	Mark E. Klass	Lexington
	Lori Hamilton	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
	Eric L. Levinson	Charlotte
	Hugh Lewis	Charlotte
	Lisa C. Bell	Charlotte
	Carla Archie	Charlotte
	Karen Eady-Williams[36]	Charlotte
	Donnie Hoover[37]	Charlotte
	Louis A. Trosch[38]	Charlotte
	George Bell[39]	Charlotte
27A	Jesse B. Caldwell, III	Gastonia
	Robert T. Sumner[40]	Gastonia
	David Phillips[41]	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[42]	Hendersonville
	Peter B. Knight[43]	Hendersonville
30A	William H. Coward	Highlands
30B	Bradley B. Letts	Hazelwood

SPECIAL JUDGES

Louis A. Bledsoe, III	Charlotte
Athena Brooks[44]	Fletcher
J. Stanley Carmical[45]	Lumberton

JUDGES	ADDRESS
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Richard L. Doughton[47]	Sparta
Beecher Gray	Durham
Andrew Heath	Raleigh
Jeffrey P. Hunt[48]	Brevard
Gregory P. McGuire	Raleigh
Michael L. Robinson	Winston-Salem
Casey M. Viser	Charlotte
Ebern T. Watson, III[49]	Wilmington

EMERGENCY JUDGES

Benjamin G. Alford[50]	New Bern
Sharon T. Barrett	Asheville
Beverly T. Beal	Lenoir
Michael E. Beale	Rockingham
C. Preston Cornelius	Mooresville
Richard L. Doughton[51]	Sparta
Yvonne M. Evans[52]	Charlotte
James L. Gale	Greensboro
Thomas D. Haigwood	Greenville
A. Robinson Hassell[53]	Greensboro
Clarence E. Horton, Jr.	Kannapolis
Robert F. Johnson	Burlington
Paul L. Jones	Kinston
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Jerry Cash Martin	Pilot Mountain
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Kenneth C. Titus	Durham
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W. Douglas Albright	Greensboro
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Anthony M. Brannon	Durham
Frank R. Brown	Tarboro
Stafford G. Bullock	Raleigh
H. William Constangy	Charlotte

JUDGES	ADDRESS
Lindsay R. Davis[55]	Greensboro
B. Craig Ellis	Laurinburg
Larry G. Ford	Salisbury
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Robert H. Hobgood[56]	Louisburg
Robert D. Lewis	Asheville
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Julius A. Rousseau, Jr.	Wilkesboro
Thomas W. Seay	Spencer
W. Ervin Spainhour	Concord
James C. Spencer	Burlington
Ralph A. Walker, Jr.	Raleigh

[1]Retired 15 February 2018. [2]Became Senior Resident Judge 16 February 2018. [3]Sworn in 27 April 2018. [4]Retired 31 July 2018. [5]Became Senior Resident Judge 1 August 2018. [6]Sworn in 1 January 2019. [7]Resigned 31 December 2018. [8]Sworn in 1 January 2019. [9]Retired 30 September 2018. [10]Became Senior Resident Judge 1 October 2018. Retired 31 December 2018. [11]Sworn in 1 January 2019. [12]Retired 30 April 2018. [13]Became Senior Resident Judge 1 May 2018. Retired 31 December 2018. [14]Sworn in 1 May 2018. Resigned 31 December 2018. [15]Sworn in and became Senior Resident Judge 1 January 2018. [16]Sworn in 1 January 2019. [17]Retired 31 December 2018. [18]Sworn in 24 May 2018. [19]Retired 15 July 2018. [20]Sworn in 1 January 2019. [21]Retired 30 June 2018. [22]Became Senior Resident Judge on 1 July 2018. [23]Sworn in 1 January 2019. [24]Retired 31 October 2018. [25]Became Senior Resident Judge 1 November 2018. [26]Sworn in 13 November 2018. [27]Sworn in 1 January 2019. [28]Retired 31 December 2018. [29]Became Senior Resident Judge 1 January 2019. [30]Retired 31 March 2018. [31]Became Senior Resident Judge 31 March 2018. [32]Retired 31 August 2018. [33]Sworn in 5 June 2018. [34]Sworn in 22 October 2018. [35]Sworn in 1 January 2019. [36]Sworn in 5 January 2018. [37]Sworn in 19 January 2018. [38]Sworn in 1 January 2019. [39]Sworn in 1 January 2019. [40]Retired 13 April 2018. [41]Sworn in 10 August 2018. [42]Retired 30 September 2018. [43]Became Senior Resident Judge 2 November 2018. [44]Sworn in 29 June 2018. [45]Sworn in 6 July 2018. [46]Sworn in 2 January 2019. [47]Retired 1 March 2018. [48]Resigned 15 May 2018. [49]Retired 30 June 2018. [50]Sworn in 11 March 2019. [51]Sworn in 28 June 2018. [52]Sworn in 11 April 2018. [53]Resigned 16 August 2018. [54]Resigned in 15 May 2018. [55]Sworn in 21 March 2018. [56]Sworn in 26 April 2018.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	Edgar L. Barnes (Chief)	Manteo
	Amber Davis	Wanchese
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	Robert P. Trivette	Kitty Hawk
	Meader W. Harris, III	Edenton
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	Regina Rogers Parker[2]	Williamston
	Christopher B. McLendon	Williamston
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3A	Patricia Gwynett Hilburn[3]	Greenville
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	Clinton Rowe	New Bern
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	James L. Moore	Jacksonville
	William B. Sutton	Clinton
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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
6	Brenda G. Branch (Chief)	Roanoke Rapids
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	Teresa R. Freeman	Roanoke Rapids
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	Curtis Stackhouse	Goldsboro
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	Jonathon Sergeant[14]	Kinston
9	John W. Davis (Chief)	Louisburg
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	John H. Stultz, III	Roxboro
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	Benjamin S. Hunter	Louisburg
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	Anna Elena Worley	Raleigh
	Ned Wilson Mangum	Raleigh
	Margaret Eagles	Raleigh
	Keith O. Gregory[20]	Raleigh
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	Louis B. Meyer, III	Raleigh
	Daniel J. Nagle	Raleigh
	Vartan A. Davidian	Raleigh
	Jefferson G. Griffin	Raleigh
	Sam S. Hamadani	Raleigh
	Ashleigh P. Dunston	Raleigh
	J. Brian Ratledge[21]	Raleigh
11	Jacquelyn L. Lee (Chief)	Smithfield
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	O. Henry Willis, Jr.	Dunn
	Addie M. Harris-Rawls	Clayton
	Resson O. Faircloth, II	Erwin
	Robert W. Bryant, Jr.	Selma
	Paul A. Holcombe	Smithfield
	Caron H. Stewart	Smithfield
	Mary H. Wells	Smithfield
	Joy A. Jones	Smithfield
	Jerry F. Wood	Selma
12	Robert J. Stiehl, III (Chief)	Fayetteville
	Edward A. Pone	Parkton

DISTRICT	JUDGES	ADDRESS
	Talmage Baggett[22]	Fayetteville
	David H. Hasty	Fayetteville
	Toni S. King	Fayetteville
	Lou Oliveria	Fayetteville
	Cheri Siler-Mack	Fayetteville
	Stephen C. Stokes	Fayetteville
	April M. Smith	Fayetteville
	Tiffany M. Whitfield	Fayetteville
	Caitlin Evans[23]	Fayetteville
13	Scott Ussery (Chief)	Elizabethtown
	William F. Fairley	Southport
	Pauline Hankins	Tabor City
	Willie Fred Gore	Whiteville
	Jason C. Disbrow	Southport
	C. Ashley Gore	Whiteville
14	James T. Hill[24]	Durham
	Brian C. Wilks	Durham
	Patricia D. Evans (Chief)[25]	Durham
	Doretta Walker	Durham
	Fred Battaglia, Jr.[26]	Durham
	Shamieka L. Rhinehart	Durham
	Amanda L. Maris	Durham
	Clayton Jones[27]	Durham
	Dave Hall[28]	Durham
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	Kathryn W. Overby	Burlington
	Steven H. Messick	Burlington
	Larry D. Brown	Graham
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	James T. Bryan	Hillsborough
	Samantha Cabe	Chapel Hill
	Sherri T. Murrell	Chapel Hill
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	Lisa D. Thacker[30]	Polkton
	Amanda L. Wilson (Chief)[31]	Rockingham
	Regina M. Joe[32]	Raeford
	Michael A. Stone[33]	Laurinburg
	Christopher W. Rhue	Laurinburg
	Sophie G. Crawford[34]	Wadesboro
	Chevonne R. Wallace[35]	Rockingham
16B	J. Stanley Carmical[36]	Lumberton
	Herbert L. Richardson[37]	Lumberton
	Judith Milsap Daniels (Chief)[38]	Lumberton
	William J. Moore	Maxton
	Dale G. Desse	Maxton
	Brooke L. Clark[39]	Lumberton
	Angelica C. McIntyre[40]	Lumberton
17A	James A. Grogan (Chief)	Reidsville
	Chris Freeman	Wentworth
	Christine F. Strader	Reidsville
	L. Michael Gentry[41]	Pelham

DISTRICT	JUDGES	ADDRESS
17B	William F. Southern III (Chief)	King
	Spencer Gray Key, Jr.	Elkin
	Marion M. Boone	Dobson
	Gretchen H. Kirkman[42]	Mt. Airy
	Thomas B. Langan[43]	King
18	H. Thomas Jarrell, Jr. (Chief)	High Point
	Susan R. Burch	High Point
	Theresa H. Vincent	Summerfield
	Kimberly Michelle Fletcher	Greensboro
	Angela C. Foster	Greensboro
	Avery Michelle Crump[44]	Browns Summit
	Betty J. Brown	Greensboro
	Angela B. Fox	Greensboro
	Tabatha Holliday	Greensboro
	David Sherrill	Greensboro
	Jonathan G. Kreider[45]	Greensboro
	Lora C. Cubbage[46]	Greensboro
	Mark Cummings	Greensboro
	Tonia A. Cutchin	Greensboro
	William B. Davis	Greensboro
	Marcus Shields[47]	Greensboro
	Larry L. Archie[48]	Greensboro
19A	William G. Hamby, Jr.[49]	Kannapolis
	Donna G. Hedgepeth Johnson[50]	Concord
	Brent Cloninger	Mount Pleasant
	Christy E. Wilhelm (Chief)[51]	Concord
	Nathaniel E. Knust	Concord
	Juanita Boger-Allen[52]	Concord
	Steve Grossman[53]	Concord
19B	Jayrene Russell Maness[54]	Carthage
	Lee W. Gavin (Chief)[55]	Asheboro
	Scott C. Etheridge	Asheboro
	James P. Hill, Jr.[56]	Asheboro
	Donald W. Creed, Jr.[57]	Asheboro
	Robert M. Wilkins	Asheboro
	Steve Bibey[58]	Carthage
	Sarah N. Lanier[59]	Asheboro
19C	Charles E. Brown (Chief)	Salisbury
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	Kevin G. Eddinger	Salisbury
	Roy Marshall Bickett, Jr.	Salisbury
	James Randolph	Salisbury
19D	Donald W. Creed, Jr. (Chief)[60]	Asheboro
	Regina M. Joe[61]	Raeford
	Warren McSweeney[62]	Carthage
20A	William Tucker (Chief)	Albemarle
	John R. Nance	Albemarle
	Thai Vang[63]	Montgomery
20B	N. Hunt Gwyn (Chief)	Monroe
	Joseph J. Williams	Monroe
	William F. Helms	Matthews
	Stephen V. Higdon	Monroe

DISTRICT	JUDGES	ADDRESS
21	Lisa V. L. Menefee (Chief)	Winston Salem
	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
	David Sipprell	Winston-Salem
	Gordon A. Miller	Winston-Salem
	Theodore Kazakos	Winston-Salem
	Carrie F. Vickery	Winston-Salem
22A	L. Dale Graham (Chief)	Taylorsville
	H. Thomas Church[64]	Statesville
	Deborah Brown	Mooresville
	Edward L. Hendrick, IV	Taylorsville
	Christine Underwood	Olin
	Carole A. Hicks[65]	Statesville
22B	Wayne L. Michael (Chief)	Lexington
	Jimmy L. Myers	Advance
	April C. Wood	Lexington
	Mary C. Paul	Thomasville
	Carlton Terry	Advance
	Carlos Jané	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
	Hal Gene Harrison	Spruce Pine
	Rebecca E. Eggers-Gryder	Boone
	Larry B. Leake	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.[66]	Charlotte
	Rickye McKoy Mitchell	Charlotte
	Becky Thorne Tin[67]	Charlotte
	Christy Townley Mann	Charlotte
	Ronald C. Chapman	Charlotte
	Donnie Hoover[68]	Charlotte
	Paige B. McThenia	Charlotte
	Kimberly Y. Best-Staton	Charlotte
	Elizabeth Thornton Trosch	Charlotte
	Jena P. Culler	Charlotte
	Tyyawdi M. Hands	Charlotte

DISTRICT	JUDGES	ADDRESS
	Karen Eady-Williams[69]	Charlotte
	Donald Cureton, Jr.[70]	Charlotte
	Sean Smith	Charlotte
	Matt Osman	Charlotte
	Gary Henderson	Charlotte
	David Strickland	Charlotte
	Alicia D. Brooks[71]	Charlotte
	Aretha V. Blake	Charlotte
	Tracy H. Hewett	Charlotte
	Faith Fickling[72]	Charlotte
	Roy H. Wiggins[73]	Charlotte
	Karen D. McCallum[74]	Charlotte
	Michael J. Standing[75]	Charlotte
	Paulina N. Havelka[76]	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.[77]	Shelby
	Meredith A. Shuford	Lincolnton
	Jeanette R. Reeves	Shelby
	Justin K. Brackett	Shelby
	Micah J. Sanderson[78]	Denver
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)[79]	Fletcher
	Thomas M. Brittain, Jr.[80]	Mills River
	Peter Knight[81]	Hendersonville
	Emily Cowan	Hendersonville
	Charles W. McKeller[82]	Brevard
30	Richard K. Walker (Chief)	Hayesville
	Monica Hayes Leslie	Waynesville
	Donna Forga	Clyde
	Roy Wijewickrama	Waynesville
	Kristina L. Earwood	Waynesville
	Tessa S. Sellers	Murphy

JUDGES	ADDRESS

EMERGENCY JUDGES

Sherry Fowler Alloway	Greensboro
Charles T. L. Anderson[83]	Chapel Hill
C. Christopher Bean	Edenton
Rebecca W. Blackmore	Wilmington
Joseph A. Blick	Greenville
Robert M. Brady	Lenoir
David B. Brantley[84]	Goldsboro
Jacqueline L. Brewer[85]	Apex
John B. Carter, Jr.	Lumberton
Samuel Cathey	Charlotte
Albert A. Corbett, Jr.	Smithfield
Shelly H. Desvousges	Raleigh
Thomas G. Foster, Jr.	Pleasant Green
David K. Fox	Hendersonville
Nancy E. Gordon	Durham
Jane Powell Gray[86]	Raleigh
Joyce A. Hamilton	Raleigh
P. Gwynnett Hilburn[87]	Greenville
Richlyn D. Holt	Waynesville
Shelly S. Holt	Wilmington
James M. Honeycutt[88]	Lexington
F. Warren Hughes	Burnsville
Jerry A. Jolly	Tabor City
A. Elizabeth Keever	Fayetteville
William C. Lawton	Raleigh
David A. Leech	Greenville
William L. Long[89]	Chapel Hill
Harold Paul McCoy, Jr.	Halifax
Lawrence McSwain	Greensboro
Charles M. Neaves	Elkin
Thomas R.J. Newbern	Aulander
L. Suzanne Owsley[90]	Hickory
Dennis J. Redwing	Gastonia
Anne B. Salisbury	Cary
J. Larry Senter	Raleigh
Joseph E. Setzer, Jr.	Franklinton
William G. Stewart	Wilson
Robert D. Stubbs	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[91]	Elizabeth City
Sarah P. Bailey	Rocky Mount

JUDGES	ADDRESS
Jacqueline L. Brewer[92]	Apex
Chester C. Davis	Winston-Salem
M. Patricia DeVine[93]	Hillsborough
Daniel Fredrick Finch	Oxford
Louis F. Foy, Jr.	Pollocksville
James R. Fullwood	Raleigh
Samuel G. Grimes	Washington
Lawrence Hammond, Jr.[94]	Asheboro
Jane V. Harper	Charlotte
Joseph J. Harper	Tarboro
John H. Horne, Jr.	Laurinburg
Philip F. Howerton, Jr.[95]	Charlotte
William K. Hunter	High Point
Jerry A. Jolly	Tabor City
Lillian B. Jordan[96]	Randleman
James E. Martin	Greenville
Fritz Y. Mercer, Jr.	Summerfield
Thomas F. Moore[97]	Charlotte
J. Bruce Morton	Greensboro
Otis M. Oliver[98]	Dobson
J. Rodwell Penry[99]	Lexington
Nancy C. Phillips	Elizabethtown
Jan H. Samet	Greensboro
Margaret L. Sharpe	Greensboro
R. Dale Stubbs[100]	Clayton
Charles M. Vincent	Greenville
J. Kent Washburn	Burlington
Charles W. Wilkinson, Jr.[101]	Oxford

[1]Retired 28 February 2018. [2]Became Chief District Court Judge 1 March 2018. [3]Retired 28 February 2018. [4]Became Chief District Court Judge 1 March 2018. [5]Sworn in 18 May 2018; resigned 31 December 2018. [6]Sworn in 16 July 2018. [7]Sworn in 1 January 2019. [8]Resigned 31 December 2018. [9]Resigned 31 December 2018. [10]Retired 31 March 2018. [11]Became Chief District Court Judge 1 April 2018; died 16 May 2018. [12]Became Chief District Court Judge 11 June 2018. [13]Sworn in 5 November 2018. [14]Sworn in 24 July 2018. [15]Resigned 30 April 2018. [16]Sworn in 17 October 2018. [17]Retired 30 September 2018. [18]Became Chief District Court Judge 1 October 2018. Redistricted from 9A to 9 on 31 December 2018. [19]Resigned 31 December 2018. [20]Resigned 23 May 2018. [21]Sworn in 1 January 2019. [22]Resigned 31 December 2018. [23]Sworn in 1 January 2019. [24]Retired 31 December 2018. [25]Became Chief District Court Judge 1 January 2019. [26]Resigned 31 December 2018. [27]Sworn in 1 January 2019. [28]Sworn in 1 January 2019. [29]Retired 31 November 2018. [30]Retired 28 February 2018. [31]Became Chief District Court Judge 1 December 2019. [32]Redistricted from 16A to 19D. [33]Resigned 31 December 2018. [34]Sworn in 27 February 2018. [35]Sworn in 1 January 2019. [36]Resigned 5 July 2018. [37]Retired 31 December 2018. [38]Became Chief District Court Judge 6 July 2018. [39]Sworn in 1 August 2018. [40]Sworn in 1 January 2019. [41]Sworn in 1 January 2019. [42]Sworn in 30 January 2018; resigned 31 December 2018. [43]Sworn in 1 January 2019. [44]Resigned 27 February 2018. [45]Resigned 31 December 2018. [46]Resigned 30 November 2018. [47]Sworn in 15 June 2018. [48]Sworn in 1 January 2019. [49]Retired 31 December 2018. [50]Retired 31 December 2018. [51]Became Chief District Court Judge 1 January 2019. [52]Sworn in 1 January 2019. [53]Sworn in 1 January 2019. [54]Retired 31 December 2018. [55]Became Chief District Court Judge 1 January 2019. [56]Resigned 31 December 2018. [57]Redistricted from 19B to 19D. [58]Resigned 31 December 2018. [59]Sworn in 1 January 2019. [60]Moved from 19B to 19D on 1 January 2019. Became Chief District Court Judge 1 January 2019. [61]Moved from 16A to 19D on 1 January 2019. [62]Sworn in 1 January 2019. [63]Sworn in 1 January 2019. [64]Retired 31 December 2018. [65]Sworn in 1 January 2019. [66]Resigned 31 December 2018. [67]Retired 31 December 2018. [68]Resigned 19 January 2018. [69]Resigned 5 January 2018. [70]Resigned 31 December 2018. [71]Resigned 31 December 2018. [72]Sworn in 11 June 2018. [73]Sworn in 15 June 2018. [74]Sworn in 1 January 2019. [75]Sworn in 1 January 2019. [76]Sworn in 1 January 2019. [77]Retired 31 December 2018. [78]Sworn in 1 January 2019. [79]Resigned 28 June 2018. [80]Became Chief District Court Judge 29 June 2018. [81]Resigned 1 November 2018. [82]Sworn in 2 November 2018. [83]Resigned in 31 December 2018. [84]Became Emergency Judge 11 March 2019. [85]Sworn in 27 October 2017. [86]Resigned 31 December 2018. [87]Sworn in 9 August 2018. [88]Resigned 31 December 2018. [89]Recalled 2 November 2018. [90]Resigned 7 May 2018. [91]Resigned 8 March 2018. [92]Retired 31 July 2017. [93]Resigned 8 May 2018. [94]Resigned 12 April 2018. [95]Resigned 12 December 2017. [96]Resigned 25 July 2018. [97]Resigned 11 November 2017. [98]Resigned 25 April 2018. [99]Died 25 January 2019. [100]Retired 31 December 2016. [101]Died 6 May 2018.

ATTORNEY GENERAL OF NORTH CAROLINA

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Christine Wright
Wayne Yancey
Nicholas Yates
Ryan Zellar

DISTRICT ATTORNEYS

District	District Attorney	Address
1	Andy Womble	Elizabeth City
2	Seth Edwards	Washington
3	Faris Dixon	Greenville
4	Scott Thomas	New Bern
5	Ernie Lee	Jacksonville
6	Ben David	Wilmington
7	Valerie Asbell	Winton
8	Robert Evans	Rocky Mount
9	Matt Delbridge	Goldsboro
10	Lorrin Freeman	Raleigh
11	Mike Waters	Oxford
12	Vernon Stewart	Lillington
13	Susan Doyle	Smithfield
14	Billy West	Fayetteville
15	Jon David	Bolivia
16	Satana Deberry	Durham
17	Sean Boone	Graham
18	Jim Woodall	Hillsborough
19	Kristy Newton	Raeford
20	Matt Scott	Lumberton
21	Reece Saunders	Rockingham
22	Jason Ramey	Wentworth
23	Ricky Bowman	Dobson
24	Avery Crump	Greensboro
25	Roxann Vaneekhoven	Concord
26	Spencer Merriweather	Charlotte
27	Brandy Cook	Salisbury
28	Lynn Clodfelter	Albemarle
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30	Trey Robison	Monroe
31	Jim O'Neill	Winton-Salem
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34	Tom Horner	Wilkesboro
35	Seth Banks	Boone
36	Scott Reilly	Newton
37	Andy Gregson	Asheboro
38	Locke Bell	Gastonia
39	Mike Miller	Shelby
40	Todd Williams	Asheville
41	Ted Bell	Rutherfordton
42	Greg Newman	Hendersonville
43	Ashley Hornsby Welch	Franklin

PUBLIC DEFENDERS

District	Public Defender	Address
1	Thomas P. Routten	Elizabeth City
2	Thomas P. Routten	Washington
3A	Robert C. Kemp, III	Greenville
3B	James Q. Wallace, III	Beaufort
5	Jennifer Harjo	Wilmington
10	Charles F. Caldwell	Raleigh
12	Bernard P. Condlin	Fayetteville
14	Lawrence M. Campbell	Durham
15B	Susan Seahorn	Hillsborough
16A	Jonathan L. Mcinnis	Laurinburg
16B	Ronald H. Foxworth	Lumberton
18	Frederick G. Lind	Greensboro
21	Paul James	Winston-Salem
26	Kevin P. Tully	Charlotte
27A	Kellum Morris	Gastonia
28	M. Leann Melton	Asheville
29B	Paul B. Welch	Brevard

CASES REPORTED

ORDERS

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

The following persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners in February 2018 and have been issued a certificate by the Board.

Nicholas Ross Anderson ..... Belmont
Emily Barr Andrews ..... Sparta
Lee Ellen Bagley ..... Columbia, SC
Trisha Lynn Barfield ..... Greensboro
Katherine Marie Barkley ..... Chapel Hill
Luis Fernando Benavides ..... Charlotte
Arthur Dwight Blanton ..... Charlotte
Ashley Nicole Boaz ..... Christiansburg, VA
Britney Michelle Boles ..... Greensboro
Jonathon Ellis Boljesic ..... Cary
Sarah Brooke Bosse ..... Charlotte
Carlton Daniel Bowers ..... Mount Pleasant, SC
Lena Elizabeth Elliott Bowman ..... Lancaster, CA
Kelyn Marie Brame ..... Wilmington
Danielle Nicole Brent-Bownes ..... Greensboro
Craig Warren Brinckerhoff ..... Winterville
Taryn Ariel Bristol ..... Charlotte
Matthew Stanley Brown ..... Charlotte
Alesha Shanta Brown ..... Charlotte
Shelia Marie Brown ..... Raleigh
Brian Kevin Buckley ..... Durham
Alejandro BuenRostro ..... Durham
Pahola Katherine Burgos ..... Greensboro
David Busch ..... Charlotte
Pardis Camarda ..... Wurtsboro, NY
Habekah Brittion Cannon ..... Dudley
James Robert Capps ..... Greensboro
Karen Bell Carpenter ..... Indian Trail
Michael Donnell Casterlow ..... Greensboro
Raemi Frances Cobb ..... High Point
Michael Richard Coleman ..... Kernersville
Phoenix Coleman ..... Raleigh
Eric Everett Connon ..... Charlotte, VT
Aryn Ashley Conrad ..... Carrboro
Tanya P. Craig ..... Waxhaw
David George Delaney ..... Chapel Hill
Sarah Frances DePalma ..... Dunedin, FL
Chauncey W Depew ..... Raleigh
Eric Matthew Ditmore ..... Linden
Kristina Drozdowski ..... Raleigh
Kevin Gerard Edwards II ..... Norfolk, VA
Sarah Elizabeth Eyssen ..... Charlotte
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Jason Michael Fedo ..... Denver

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Ana Jemec Friedman ..... Winston-Salem
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Joshua Graybeal Gresham ..... Charlotte
Cody Spence Griffin ..... Newton
Whitney Cherrelle Griffin ..... Durham
Daren Wesley Gum ..... Durham
Gagan Gupta ..... Brooklyn, NY
Khalil Amin Haddad ..... Wake Forest
Kortni Miran Hadley ..... Charlotte
Christalyn Clements Hair ..... Charlotte
Minard Michael Halverson II ..... Fayetteville
Alexander Jeffrey Harper ..... Charlotte
Allison Nicole Harrell ..... Charlotte
Kimberly Harris ..... Winston Salem
Brittany Hart ..... Greensboro
Samuel Harrison Helton ..... Cary
Kimberly Anne Hicks ..... Windsor
Lauren Danielle Hossfeld ..... Kernersville
Brittany Paige Houston ..... Matthews
Eric Richard Hunt ..... Cary
Fielding E Huseth ..... Charlotte
Zachary Ryan Infinger ..... Raleigh
Joseph John ..... Wake Forest
Francis A. Jurovich III ..... Hendersonville
Samuel Carson Keenan ..... Indianapolis, IN
Benjamin Gregory King ..... Knoxville, TN
Heryka Rodriguez Knoespel ..... Mint Hill
Zheng Li ..... Cary
Stephanie Cothren Lloyd ..... Raleigh
Richard Vance Lockridge ..... Charlotte
Najla Takreem Long ..... Charlotte
Cara Nateal Ludwig ..... Raleigh
Samuel O'Neill Lumpkin ..... Baton Rouge, LA
Uzoamaka Jane Maduabuchukwu ..... Zebulon
Arthur Barlow Treadwell Mann, Jr ..... Charlotte
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Joshua Alan Martinkovic ..... Charlotte
Todd Robertson Maultsby ..... McAdenville
Bradley Russell Maxwell ..... Little River, SC
Suzanne Elizabeth McArdle ..... Rock Hill, SC
Peter Noble McClelland ..... Burlington
Kathryn Ann McCullough ..... Greensboro
Ebuni JuJuan McFall-Roberts ..... Cary
Stephanie Teague McKeon ..... Murphy
Molly Madison McLawhorn ..... Raleigh
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Lorne Elizabeth McManigle ..... Durham
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Andreas James Mosby ..... Greensboro
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William Richard Myers ..... Charlotte
Jaylyn Dallas Noble ..... Kernersville
Elizabeth Claire Nye ..... Raleigh
Thomas Olik ..... Charlotte
Shannon Eide O'Neil ..... Washington, DC
Sanyam Dinesh Parikh ..... Raleigh
Khusbu Patel ..... Monroe
Jeishminta Riha Pathak ..... Stallings
Suzanne Marie Patinella ..... Kernersville
Nicholas Joseph Patrick ..... Greensboro
Hillary Forney Patterson ..... North Prince George, VA
Jakeana Paul ..... Rural Hall
Stephanie Ann Pazulski ..... Greensboro
Emily Christin Pera ..... Charlotte
Anthony Moon Pettes ..... Cary
Emily Polanco-Barahona ..... Durham
Stephanie Renee Poston ..... Durham
Chandra McClearn Quaye ..... Morrisville
Elizabeth Townsend Laughlin Raymond ..... Raleigh
Tara Nicolette Regimand ..... Raleigh
Amy Lyn Rickers ..... Charlotte
George Harriss Ricks III ..... Charlotte
Ravenna Elizabeth Romack ..... Holly Ridge
Jacqueline Ann Roney ..... Greenville
Marquitta McClendon Rouse ..... Winston Salem
Seth Benjamin Royster ..... Portsmouth, VA
Regina Cherice Rudisill ..... Fayetteville
William Paul Sefcik ..... Dunedin, FL
Cheri Jenine Selby Pearson ..... Durham
Amelia Leigh Shen ..... New London
David Edward Sloan ..... Chapel Hill
Paul Reed Smith ..... Wilmington
Sallie Elizabeth Snyder ..... Charlotte
Kristin Ali Somich ..... Rock Hill, SC
Amanda Ruth Spears ..... Sanford
Sheila Renee Spence ..... Spring Lake
Amber Stephens ..... Decatur, GA
Amanda Westergard Stoufflet ..... Morehead City
Corey Evan Strauss ..... Charlotte
Darlena Holly Subashi ..... Cary
Cassondra Patricia Suttle ..... Charlotte

Jessica Yount Swaim ..... Sherrills Ford
Zachary Sylvester..... Lexington
John Boone Tarlton ..... Asheville
Margaret Paige Teich..... Asheville
Shemik A. Thompson ..... Charlotte
Aaron Joseph Tierney ..... Concord
Ethan Constantin Timmins..... Raleigh
Donald Joseph Torino ..... Durham
Robert Charles Trimble..... Calabash
Neal Steven Van Vynckt ..... Charlotte
Elizabeth Rachel Vanek ..... Sneads Ferry
Kelly Suzanne Walker..... Greensboro
Laura Robin Walker..... Cleveland, SC
Adam Blake Watkins ..... Rougemont
Katherine Jean Watlington..... Charlotte
Dylan Sorge Webster ..... Garner
Danielle Jones Wilson ..... Winston Salem
Miranda Alyn Wodarski..... Chapel Hill
Molly Anne Woodcock ..... Charlotte
Ashley Danielle Wright..... Whitsett
Chang Yu ..... Raleigh

The following persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners in July 2018 and have been issued a certificate by the Board.

Francis Michel Ahia..... Carrboro
Turner Rice Albernaz ..... Raleigh
Isabel Alele ..... Cinncinati, OH
Zachary Scott Anstett..... Raleigh
Audrey Grace Anthony..... Greenville
Raven Cardelia Ash ..... Winston-Salem
Tomomi Atamas ..... Apex
Alexander Kyle Auriti..... Durham
Austin Andrew Backus..... Mocksville
Tara Nicole Baitsholts..... Raleigh
Kelcey Laine Baker..... Charlotte
Stephanie Barickman ..... Durham
Delton Wayne Barnes..... Shelby
Chelsea Kay Barnes..... Hope Mills
Jordan Palmer Barnette..... Piney Flats, TN
Ashley Erica Barton ..... Winston-Salem
Hoi Yee Baxter ..... San Antonio, TX
Taylor Alexander Beamon..... Charlotte
Rachel Marie Benge..... Norman, OK
Campbell Brett Bentson..... Summerfield
Savannah Kay Hansen Best ..... Durham
Megan Elizabeth Allore Bishop..... Durham
Matthew Stephen Bissette ..... Raleigh
Sophia Valerie Blair ..... Winston-Salem

Alexander Steven Blake.....Shelby
Ethan Carl Blumenthal.....Charlotte
Benjamin Lee Bollinger.....Mocksville
Peter Nicholas Borden.....Knighdale
Amanda Wilson Bost.....Durham
Bernard Nortey Botchway.....Chapel Hill
Melissa Ann Botiglione.....Raleigh
Kevin Everett Bowie.....Chapel Hill
Malcolm Sayres Boyd.....Winston Salem
Jacky Lee Brammer.....Eden
Katrina Marie Braun.....Durham
Austin Craig Braxton.....Carrboro
Megan Ann Broad.....Morrisville
Joseph Morrison Brook.....Columbia, SC
John Grant Brown.....Sanford
Aviance Destinee Brown.....Raleigh
Ronald David Paul Bruckmann.....Charlotte
Brianna Danielle Buchanan.....Durham
Alexander Joseph Buckley.....Raleigh
Natalio Daniel Budasoff.....Fairfax, VA
Danielle Lynn Bunten.....Goldsboro
Christopher Sean Burks.....Norfolk, VA
Monica Marie Burks.....Durham
Sarah Margaret Burnick.....Burlington
Katrina Burton-Nichols.....Charlotte
Adam Garrett Campbell.....Raleigh
Alexa Mae Cannon.....Raleigh
Matthew Joel Carpenter.....Raleigh
Jessica Carol Carter.....Four Oaks
Brian Florencio Castro.....High Point
Mercy Changwesha.....Chapel Hill
Edward Fry Chase.....Angier
Emma Montgomery Chase.....Charlotte
Julianna Kaylyn Jeffries Cherry.....Durham
Chia-Hsuan Chien.....Greenville
William Hampton Choate III.....Raleigh
Kelly Anne Chrisman.....Charlotte
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Nicholas Brooke Clark Jr.....Virginia Beach, VA
Randy Joseph Clark.....Charlotte
Sarah Reilly Clark.....Wilmington
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Madison Clark Coleman.....Tampa, FL
Alexander Joseph Collette.....Durham
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Ashton Lee Cooke.....Apex
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Emily Kristina Davidson ..... Columbia, SC
Cody Jennings Davis ..... Raleigh
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Kenan Lee Wilkinson Drum ..... Rocky Mount
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Brian Dwayne Duncan ..... Fuquay Varina
Ethan Dobyns Dunn ..... Charlotte
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Drew Tyler Erdmier ..... Raleigh
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Alexandra Suzanne Falls ..... Lincolnton
Alexandra Marie Fenno ..... Winston Salem
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Stephanie Corriher Fields ..... Garner
Adam Daniel Firestone ..... Gaithersburg, MD
Franklin Harley Fischer ..... Asheville
Carol Lane Fleming ..... Clayton
Montgomery Tavenner Fletcher ..... Cornelius
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Lance Michael Foster ..... Durham
Michael Kosrow Franchi ..... Raleigh

Katherine Elizabeth Freeman ..... Morganton
Spencer Smith Fritts..... Raleigh
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Julia Valerie Gallagher ..... Winston-Salem
Joshua Scott Garrett..... Durham
Vanessa Nicole Garrido..... Raleigh
Matthew Robert Gauthier..... Charlotte
Ryan Michael Gaylord.....Richmond
Andriana Michelle Glover.....St. Matthews, SC
Danielle Leah Goldberger..... Raleigh
Patrice Shawne Goldmon ..... Durham
Nicole Liams Gomez Diaz.....Greensboro
Eric Steven Goodheart..... Raleigh
Sophie Marissa Goodman.....Charlotte
Mel Andrea Simonetti Goodwin..... Durham
Matthew Leonard Grabinski.....Naples, FL
John William Graebe ..... Raleigh
Christopher Scott Graham.....Leicester
Caleb Michael Gregory..... Benson
Jasmine Hazelton Gregory..... Winston-Salem
Laura Anne Gregory .....Charlotte
David Alan Griffin .....Charlotte
Ryan Charles Grover .....Charlotte
Spencer Joseph Guld..... Raleigh
Stephanie Lynn Gumm.....Fuquay Varina
Jaren Anthony Hagler.....Charlotte
Evans Joseph Haile.....Clayton
Rachel Burgess Hairr .....Dunn
James Edgar Halstead III .....Charlotte
Isaac Christian Halverson..... Grovetown, GA
Maureen Lida Harmon .....Charlotte
Keith Ennis Hartley .....Hillsborough
Allison Colleen Hawkins.....Washington, DC
Kristin Lee Hendrickson .....Greensboro
Brady Nicholas Herman..... Raleigh
Donald Scott Hester .....Mooresville
Kyle Francis Heuser ..... Winston-Salem
Brianna Rose Hexom .....Southern Pines
Karen Marie Hinkley.....Charlotte
Joseph Erik Hjelt ..... Durham
Martin G Hodgins..... Cary
Ceylon Leshawn Holsey.....Greensboro
Peter Honnef .....Carrboro
David Benjamin Houck ..... Washington
Matthew Brian Hoyt .....Greensboro
Benjamin Kays Hukill..... Winston-Salem
Madeline Hurley.....Morrisville
Cory Alexandra Hutchens .....East Bend
Maia Danaid Hutt.....Carrboro
Paul Z. Ikalowych ..... Raleigh

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Destiny Heart Jenkins ..... Raleigh
Elizabeth Branch Jenkins ..... Greenville
Nicholas Rafael Graham Jimenez ..... Carrboro
Charles James Johnson ..... Raleigh
Sally Anne Johnson ..... Wilmington
Spencer Alexander Jones ..... Shelby
Maxwell Thomas Jordan ..... Charlotte
Cydney Paige Joyner ..... Walnut Cove
Tiarra Lashay Keesee ..... Reidsville
Anthony Michael Kehoe ..... Apex
Shahzad Khan ..... High Point
Evan King ..... Charlotte
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LICENSED ATTORNEYS

Jeffrey Allan Wothers ..... Applied from the State of Pennsylvania
Kathryn E. Yates ..... Applied from the State of Massachusetts
Jessica Ann Youngs ..... Applied from the State of Virginia

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

ATLANTIC COAST PROPERTIES, INC., A DELAWARE CORPORATION, PETITIONER
v.
ANGERONA M. SAUNDERS AND HUSBAND, ALGUSTUS O. SAUNDERS, JR., LUCY M. TILLETT, PATRICIA W. MOORE–PLEDGER, GENEVIVE M. GOODMAN, LYNETTE C. WINSLOW, AND CARLTON RAY WINSLOW, RESPONDENTS

No. 365A15-2

Filed 11 May 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 182 (2017), affirming an order granting summary judgment entered on 16 November 2016 by Judge Milton F. Fitch, Jr. in Superior Court, Currituck County. Heard in the Supreme Court on 16 April 2018.

Hornthal, Riley, Ellis & Maland, LLP, by M. H. Hood Ellis and Casey L. Peaden, for petitioner-appellant.

Nexsen Pruet PLLC, by Brian T. Pearce and Norman W. Shearin, for respondent-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.

KAREN HEAD
v.
GOULD KILLIAN CPA GROUP, P.A. AND G. EDWARD TOWSON, II, CPA

No. 27A17

Filed 11 May 2018

1. Accountants and Accounting—delinquent tax returns—fraudulent concealment

Where plaintiff sued defendant Certified Public Accountant and his firm for fraudulent concealment and punitive damages, alleging that defendants failed to properly prepare and file her delinquent tax returns and intentionally deceived her about the status of those returns, plaintiff presented sufficient evidence of both actual and constructive fraud to survive summary judgment. Plaintiff had an ongoing professional relationship with defendants related to the preparation and filing of her delinquent tax returns, and defendants knowingly misrepresented the status of the returns and negotiations with the IRS.

2. Accountants and Accounting—delinquent tax returns—professional negligence—statute of repose

Where plaintiff sued defendant Certified Public Accountant and his firm for professional negligence, alleging that defendants failed to properly prepare and file her delinquent tax returns and intentionally deceived her about the status of those returns, plaintiff presented sufficient evidence of genuine issues of material fact regarding the scope of the parties' contractual relationship and the time the corresponding last act occurred—and thus when the statute of repose began to run—so that her claim for professional negligence should have survived summary judgment.

Justice BEASLEY concurring in part and dissenting in part.

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 142 (2016), affirming in part and reversing in part and remanding an order granting partial summary judgment entered on 31 December 2015 by Judge William H. Coward in Superior Court, Buncombe County. On 16 March 2017, the Supreme Court allowed plaintiff's petition for discretionary review of additional issues. Heard in the Supreme Court on 5 February 2018.

Erwin, Bishop, Capitano & Moss, PA, by J. Daniel Bishop, for plaintiff-appellant/appellee.

Sharpless & Stavola, P.A., by Brenda S. McClearn, for defendant-appellants/appellees.

NEWBY, Justice.

In this case we address a claim for fraudulent concealment and the application of the statute of repose to a claim of professional negligence in the context of summary judgment. Summary judgment is proper if no genuine issue of material fact exists when viewed in the light most favorable to the nonmoving party. The record here, when viewed in that light, presents genuine issues of material fact regarding plaintiff's fraudulent concealment claim and the scope and timing of defendants' duties to plaintiff, thus making summary judgment improper in both instances. Accordingly, we affirm in part and reverse in part the decision of the Court of Appeals.

This case is currently in the summary judgment stage; thus, we review the facts in the light most favorable to plaintiff, the nonmoving party. Plaintiff Karen Head must annually file her federal tax return as well as several returns for different states. Plaintiff first hired G. Edward Towson, II, CPA (Towson) and his firm Gould Killian CPA Group, P.A. (collectively, defendants)[1] to prepare her 2005 tax returns. Defendants prepared and timely filed plaintiff's 2005 tax returns after plaintiff had provided the necessary information and signatures. Plaintiff subsequently engaged defendants for tax years 2006 through 2010. Plaintiff's federal and state tax returns for 2006, 2007, 2008, and 2009 were not filed with the various taxing authorities until 2012, however, giving rise to the present case.

On 11 and 12 August 2011, plaintiff received two notices from the Internal Revenue Service (IRS) stating that she had not filed her 2006 and 2007 tax returns. Plaintiff forwarded the notices to Towson, who responded, "I need to roll up my sleeves and sort out this mess." Towson later stated that he believed the IRS had made an error because he had provided the completed returns and filing instructions to plaintiff.

1. The record reflects that Towson, as a principal at Gould Killian, was the primary actor in the pertinent events.

On 27 September 2011, plaintiff informed Towson that she was "leaving [Towson's] accounting firm. Shortly you will be receiving information from Wayne Roddy [plaintiff's newly hired CPA] to begin the transfer of information." Nevertheless, Towson responded by expressing his intent to keep working on plaintiff's behalf: "We are almost finished with the 2010 income tax returns . . . . I will/should have them ready early next week and will call to coordinate the signing. After that, I will be happy to provide whatever is needed for Wayne Roddy." During his deposition, Towson stated that he understood this exchange to mean that plaintiff terminated him, but he continued to take action for the next twelve months in connection with plaintiff's tax matters because "[w]e were trying merely to assist with resolving the question . . . . [W]e were not her engaged CPA firm at that point." Towson did not have the 2010 returns ready as promised but did file electronically the federal return on 21 November 2011.

In response to repeated requests to transfer the information to Roddy in October and November 2011, Towson responded that they were working on "amendments" to the 2008 and 2009 tax returns, which they would complete before transferring since "it would be more difficult for [Roddy] to step into these." Later plaintiff received additional notices from the IRS for failing to file her 2006 and 2007 tax returns. Towson informed plaintiff that they would respond to and "rebut" these tax assessments and would "keep [plaintiff] up to date on the progress." Towson stated during his deposition, however, that he knew he could not speak directly with an IRS agent on plaintiff's behalf because he did not have a power of attorney from plaintiff at that point, which the IRS required.

Following more IRS notices in March 2012, Roddy directly contacted Towson, specifically noting that "[t]hese notices seem to be saying that a return was never filed for these years. . . . [W]ould it be possible to get a copy of the tax returns that were filed for these years?" In response, Towson did not acknowledge that the returns had not been filed. Instead, Towson stated that he would work with the IRS's Taxpayer Advocate Service to "personally see to it that they get the account straightened out." Additionally, Towson affirmed that they would provide copies of the 2006 and 2007 tax returns to Roddy; defendants did not provide these copies.

Throughout April 2012, Towson represented to plaintiff that he was communicating with the Taxpayer Advocate Service and working on a resolution. Towson nevertheless stated during his deposition that

defendants did not have direct communication at any point with anyone at the Taxpayer Advocate Service, and that organization likewise has no record of communications with Towson.

In July 2012, the IRS sent plaintiff a final notice of intent to levy. Towson requested that plaintiff provide a power of attorney to allow him to communicate with the IRS on her behalf, and plaintiff obliged. During August 2012, Towson used this power of attorney to communicate with the assigned revenue officer at the IRS, but Towson consistently misrepresented these communications to plaintiff. Pertinently, Towson asserted that the revenue officer had "put a hold on collection efforts" and would "help to get the account corrected" once Towson provided additional information; however, the IRS records show that the revenue officer instead communicated the IRS would seek a lien on plaintiff if the returns were not filed by 17 August 2012. On 17 August 2012, Towson requested an extension, which the IRS granted, to "re-prepare" the returns. Towson did not notify plaintiff of this extension but instead implied that the IRS needed more time to complete the necessary corrections.

On 4 September 2012, the IRS filed a lien against plaintiff. On 27 September 2012, plaintiff contacted Towson declaring her intention to "retain[ ] [legal] counsel to help resolve this matter." The same day, Towson responded: "I actually [met] with [the IRS revenue officer] today and I think the administrative remedies will resolve this." Furthermore, Towson asked that plaintiff sign 2006 and 2007 tax return signature pages, without the whole returns, "to facilitate the proper processing." Plaintiff provided the signatures on 27 September 2012. Towson replied that the revenue officer would now have everything she needed to "correct the account by re-imputing [sic] the tax return data." Again, Towson did not mention that he had not yet filed the returns nor that he intended to file the returns. Towson filed the 2006 and 2007 tax returns with the IRS on 28 September 2012. Towson later filed the 2008 and 2009 tax returns on 18 October 2012.

On 4 November 2013, plaintiff filed her complaint asserting claims against defendants for professional negligence and fraudulent concealment, and seeking compensatory and punitive damages. Plaintiff alleged defendants failed to properly prepare and file her delinquent tax returns for tax years 2006 through 2009 and intentionally deceived her about the status of the returns. On 2 May 2014, defendants unsuccessfully moved to dismiss all claims under Rules 9(b) and 12(b)(6) of the North Carolina Rules of Civil Procedure.

On 7 December 2015, defendants filed an amended motion for partial summary judgment, contending that plaintiff could not satisfy the elements of fraudulent concealment regarding the 2006 to 2009 tax returns and that the statute of repose bars the professional negligence claim for the 2006 and 2007 tax returns.[2] Regarding the fraud claim, defendants argued that plaintiff did not reasonably rely on the alleged concealment because plaintiff could have "learned the true facts by exercise of reasonable diligence," such as reading the filing instructions provided by defendants, asking if defendants had filed the returns, contacting the IRS directly, or hiring another CPA. As for the professional negligence claim, defendants argued that the four-year statute of repose began to run upon defendants' last act, which occurred six years before plaintiff filed the complaint, when defendants allegedly provided plaintiff with the filing instructions and copies of the prepared returns.

In opposition, plaintiff argued that several genuine issues of material fact existed, including the scope of the relationship, the delivery and receipt of the filing instructions and prepared returns, and whether plaintiff reasonably relied on Towson's representations. Regarding the statute of repose, plaintiff argued that the operative date for the 2006 return was 15 October 2010, the last day plaintiff could have filed the tax returns and still receive a refund. Plaintiff submitted that Towson continued to represent her in communicating with the IRS about the 2006 and 2007 tax returns and did not actually file the returns until September 2012. Because the timing and nature of the duties of the relationship remained at issue, plaintiff argued her claims related to the years 2006 and 2007 cannot be time-barred. Likewise, plaintiff claimed to present sufficient evidence of fraudulent concealment arising out of an ongoing professional relationship to create genuine issues of material fact.

On 31 December 2015, the trial court allowed defendants' motion for partial summary judgment regarding the fraudulent concealment claim for tax years 2006 through 2009, the corresponding claim for punitive damages, and defendants' statute of repose defense for professional negligence for tax years 2006 and 2007. Plaintiff appealed.

A divided panel of the Court of Appeals affirmed in part and reversed in part the trial court's order on partial summary judgment. *Head v. Gould Killian CPA Grp.*, ___ N.C. App. ___, ___, 795 S.E.2d 142, 150-51 (2016). First, the majority reversed the trial court's decision regarding the statute of repose, concluding that "whether Defendants were responsible

2. Defendants did not move for summary judgment on plaintiff's professional negligence claim relating to her 2008 and 2009 tax returns.

for delivering, mailing, or providing Plaintiff with her tax returns, and whether and when they did so" determined when the statute of repose began to run, and thus constituted genuine issues of material fact. *Id.* at ___, 795 S.E.2d at 148. Next, the court affirmed the trial court's dismissal of plaintiff's claim for fraudulent concealment because plaintiff failed to show defendants had an ongoing relationship with her and that defendants had a corresponding duty to honestly disclose information. *Id.* at ___, 795 S.E.2d at 150.

The court based its finding that defendant owed no duty to plaintiff on its view that the misrepresentations occurred "*after* Plaintiff had already terminated her employment of Defendants on 27 September 2011." *Id.* at ___, 795 S.E.2d at 150. The court explained:

> Defendants owed no *per se* fiduciary duty to Plaintiff at the time the emails were sent because Defendants had already been terminated by Plaintiff and replaced by another accountant. Furthermore, Defendants and Plaintiff were in no way "negotiating at arm's length" about "the subject matter of [a] negotiation[ ]" at the time the emails were sent.
>
> No relationship, fiduciary or otherwise, existed between the parties at that point in time, as Plaintiff had already terminated her relationship with Defendants, hired a new CPA, and was not attempting to hire or pay Defendants for any new work engagement.

Id. at ___, 795 S.E.2d at 150 (first brackets in original) (quoting *Harton v. Harton*, 81 N.C. App. 295, 298, 344 S.E.2d 117, 119, *disc. rev. denied*, 317 N.C. 703, 347 S.E.2d 41 (1986)). Affirming the trial court's grant of summary judgment on plaintiff's fraudulent concealment claim, the court likewise affirmed the grant of summary judgment on plaintiff's related claim for punitive damages. *Id.* at ___, 795 S.E.2d at 150.

The dissent rejected the majority's statute of repose analysis, instead concluding that the last act or omission regarding the "2006 and 2007 tax returns occurred on 12 December 2008, when Defendants hand delivered Plaintiff her 2007 prepared returns." *Id.* at ___, 795 S.E.2d at 151 (Enochs, J., concurring in part and dissenting in part). Thus, the four-year statute of repose barred plaintiff's claims related to these returns. *Id.* at ___, 795 S.E.2d at 152-54. Defendants filed notice of appeal based on the dissenting opinion, and plaintiff sought discretionary review as to her fraudulent concealment claim, which we allowed.

I.

Summary judgment is proper if "there is no genuine issue as to any material fact and . . . any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2017). "The movant is entitled to summary judgment . . . when only a question of law arises based on undisputed facts." *Ussery v. Branch Banking & Tr.*, 368 N.C. 325, 334, 777 S.E.2d 272, 278 (2015) (citation omitted). "All facts asserted by the [nonmoving] party are taken as true and . . . viewed in the light most favorable to that party." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citations omitted). "This Court reviews appeals from summary judgment de novo." *Ussery*, 368 N.C. at 334-35, 777 S.E.2d at 278 (citation omitted). "A genuine issue of material fact 'is one that can be maintained by substantial evidence.' " *Id.* at 335, 777 S.E.2d at 278 (quoting *Dobson*, 352 N.C. at 83, 530 S.E.2d at 835). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' and means 'more than a scintilla or a permissible inference.' " *Id.* at 335, 777 S.E.2d at 278-79 (quoting *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977)).

Plaintiff and defendants disagree about which party should have filed the 2006 and 2007 tax returns. Defendants produced documents allegedly demonstrating that they provided plaintiff the completed 2006 and 2007 returns as well as personalized instructions on how to file those returns. The documents contain handwritten notes by defendants indicating that defendants hand-delivered the forms to plaintiff. Defendants maintain that they only file their clients' returns when specifically requested to do so, as plaintiff did for the 2005 tax returns. Plaintiff, on the other hand, stated in her deposition that she never received the completed returns or instructions from defendants. Because defendants had filed her 2005 tax return and plaintiff trusted that, as paid professionals, defendants would inform her when she needed to act, plaintiff believed defendants were likewise filing her tax returns for 2006 through 2009.

Furthermore, Towson's ongoing work for, and communication with, plaintiff throughout the disputed period of representation until the tax returns were actually filed raise genuine issues of material fact regarding the nature of the relationship between plaintiff and Towson and the corresponding duty. Thus, the claim for fraudulent concealment survives summary judgment. The parties dispute the scope of defendants' contracted-for services and what constitutes defendants' last act that triggered the running of the statute of repose. Thus, summary judgment on the application of the statute of repose under the circumstances presented here is improper as well.

II.

[1] "Fraud can . . . be broken into two categories, actual and constructive. Actual fraud is the more common type, arising from arm's length transactions." *Terry v. Terry*, 302 N.C. 77, 82, 273 S.E.2d 674, 677 (1981). Arm's-length transactions encompass "dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power; not involving a confidential relationship." [*A*]*rm's-length*, *Black's Law Dictionary* 116 (8th ed. 2007). "Transaction" read broadly encompasses an "act or an instance of conducting business or other dealings," especially "the formation, performance, or discharge of a contract." *Transaction*, *id.* at 1535. To successfully assert an allegation of actual fraud, the plaintiff must plead five elements: "(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Watts v. Cumberland Cty. Hosp. Sys., Inc.*, 317 N.C. 110, 116-17, 343 S.E.2d 879, 884 (1986) (quoting *Terry*, 302 N.C. at 83, 273 S.E.2d at 677). "Additionally, any reliance on the allegedly false representations must be reasonable." *Forbis v. Neal*, 361 N.C. 519, 527, 649 S.E.2d 382, 387 (2007) (citation omitted). Whether each of the elements of actual fraud and reasonable reliance are met are ordinarily questions for the jury "unless the facts are so clear that they support only one conclusion." *See id.* at 527, 649 S.E.2d at 387 (citation omitted).

"Constructive fraud arises where a confidential or fiduciary relationship exists, and its proof is less 'exacting' than that required for actual fraud." *Watts*, 317 N.C. at 115-16, 343 S.E.2d at 884 (quoting *Terry*, 302 N.C. at 83, 273 S.E.2d at 677). "When a fiduciary relation exists between parties to a transaction, equity raises a presumption of fraud when the superior party obtains a possible benefit." *Id.* at 116, 343 S.E.2d at 884 (citation omitted). To assert a cause of action for constructive fraud, the plaintiff must allege facts and circumstances "(1) which created the relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950).

"Though difficult to define in precise terms, a fiduciary relationship is generally described as arising when 'there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.' " *Dallaire v. Bank of Am.*, 367 N.C. 363, 367, 760 S.E.2d 263, 266 (2014) (quoting *Green v. Freeman*, 367 N.C. 136, 141, 749 S.E.2d 262,

268 (2013) (citations omitted)). All fiduciary relationships are characterized by "a heightened level of trust and the duty of the fiduciary to act in the best interests of the other party." *Dallaire*, 367 N.C. at 367, 760 S.E.2d at 266. Specifically, a fiduciary relationship arises whenever "there is confidence reposed on one side[ ], and resulting domination and influence on the other." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931) (quoting 25 C.J. *Fiduciary* § 9, at 1119 (1921)).

Here plaintiff's evidence, viewed in the light most favorable to plaintiff, raises genuine issues of material fact regarding the fraudulent concealment claim based on theories of both actual and constructive fraud. The record is replete with evidence that indicates an ongoing professional relationship between plaintiff and defendants until the tax returns were actually filed in September and October 2012. Despite the continued requests and inquiries from plaintiff and Roddy, defendants failed to provide the completed 2006 or 2007 tax returns for a year. Even after plaintiff notified Towson of her intent to change accountants, at Towson's request, plaintiff and Towson proceeded as if the relationship were unchanged regarding the disputed tax returns. Significantly, Towson electronically filed plaintiff's 2010 federal return on 21 November 2011, well after 27 September 2011 when plaintiff informed him she was leaving the accounting firm. Towson even requested that plaintiff execute a power of attorney to facilitate the continued representation, which she did. Furthermore, at Towson's request, plaintiff signed signature pages for the 2006 and 2007 tax returns so Towson could file them. Moreover, for months, Towson engaged in communications with the IRS on plaintiff's behalf, but falsely represented to plaintiff and Roddy the nature, frequency, and content of those conversations. Yet throughout these communications, Towson never informed plaintiff that the 2006 and 2007 tax returns were never filed, maintaining until the end that IRS processing errors caused the problems. Plaintiff continued to place trust in Towson to work with the IRS on her behalf to resolve the problems. Absent these misrepresentations, plaintiff may have been able to resolve the failure to file the returns sooner and without injury.

Taking the facts in the light most favorable to her, plaintiff has presented adequate evidence of both actual and constructive fraud to survive summary judgment. Plaintiff had an ongoing professional relationship with defendant related to the preparation and filing of her delinquent tax returns. Defendants knowingly misrepresented the status of the returns and negotiations with the IRS. The evidence could support a heightened relationship of trust needed for constructive fraud. At a minimum, even if the parties' dealings were determined to be at "arm's-length," plaintiff

has presented evidence to support her actual fraud claim. Her evidence shows she reasonably relied on Towson to perform and complete his professional services. Thus, taking the evidence in the light most favorable to the nonmoving party, genuine issues of material fact exist. Because plaintiff's claim for fraudulent concealment survives summary judgment so does her claim for punitive damages. Therefore, we reverse the decision of the Court of Appeals affirming the trial court's grant of summary judgment to defendants on plaintiff's claims for fraudulent concealment and punitive damages.

III.

[2] We next consider whether the statute of repose bars plaintiff's professional negligence claim. We have consistently recognized that a party must initiate an action within the time frame designated by a statute of repose. *E.g.*, *Hargett v. Holland*, 337 N.C. 651, 653, 447 S.E.2d 784, 786 (1994). "Unlike statutes of limitations, which run from the time a cause of action accrues, '[s]tatutes of repose . . . create time limitations which are not measured from the date of injury.' " *Id.* at 654, 447 S.E.2d at 787 (alterations in original) (quoting *Trs. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 234 n.3, 328 S.E.2d 274, 277 n.3 (1985)); *accord Christie v. Hartley Constr., Inc.*, 367 N.C. 534, 539, 766 S.E.2d 283, 287 (2014) ("The time of the occurrence or discovery of the plaintiff's injury is not a factor in the operation of a statute of repose.").

A statute of repose establishes "a condition precedent" which must be satisfied "for a cause of action to be recognized. If the action is not brought within the specified period, the plaintiff 'literally has *no* cause of action. The harm that has been done is . . . a wrong for which the law affords no redress.' " *Hargett*, 337 N.C. at 655, 447 S.E.2d at 787 (quoting *Boudreau v. Baughma*n, 322 N.C. 331, 340-41, 368 S.E.2d 849, 857 (1988) (quoting *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 199, 293 A.2d 662, 667 (1972))). "Thus, the repose serves as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue . . . ." *Hargett*, 337 N.C. at 655, 447 S.E.2d at 788 (quoting *Black v. Littlejohn*, 312 N.C. 626, 633, 325 S.E.2d 469, 475 (1985)). "The plaintiff has the burden of proving that a statute of repose does not defeat the claim." *Christie*, 367 N.C. at 539, 766 S.E.2d at 287 (citing *Hargett*, 337 N.C. at 654, 447 S.E.2d at 787).

For professional negligence claims, the statute of repose begins running at "the last act of the defendant giving rise to the cause of action." N.C.G.S. § 1-15(c) (2017). To determine when the last act occurred, we consider the contractual relationship between the parties and when the

contracted-for services were completed. *See Hargett*, 337 N.C. at 658, 447 S.E.2d at 789 ("[T]he contractual arrangement between attorney and client . . . determine[s] the extent of the attorney's duty to the client and the end of the attorney's professional obligation."). *Compare id.* at 655, 657-58, 447 S.E.2d at 788-89 (Attorney's contracted-for duty involved simply preparing and supervising the execution of a will.), *with Sunbow Indus., Inc. v. London*, 58 N.C. App. 751, 753, 294 S.E.2d 409, 410, *disc. rev. denied*, 307 N.C. 272, 299 S.E.2d 219 (1982) (Attorney's contracted-for services imposed a duty to represent the plaintiff during closing and a continuing duty to perfect plaintiff's security interest by filing the financing statement.).

Here plaintiff presented substantial evidence raising a genuine issue of material fact regarding the scope of the parties' contractual relationship and when the corresponding last act occurred. Viewed in the light most favorable to the nonmoving party, the parties' agreement included both preparing and filing plaintiff's tax returns and negotiations with the IRS. Viewing the evidence of the contracted-for services in the light most favorable to plaintiff, defendants' last act did not occur until September 2012 when Towson filed the 2006 and 2007 returns. Additionally, plaintiff presented substantial evidence that defendants did not even prepare or complete the 2006 and 2007 tax returns until defendants filed them. Thus, because plaintiff presented substantial evidence of genuine issues of material fact regarding when the statute of repose began to run, plaintiff's professional negligence claim survives summary judgment, and we affirm the holding of the Court of Appeals on that issue.

IV.

We therefore conclude that genuine issues of material fact exist regarding the fraudulent concealment claim and the accompanying punitive damages claim, as well as the triggering event for the running of the statute of repose, and that the trial court erred in granting defendants' motion for partial summary judgment. Accordingly, the decision of the Court of Appeals is reversed in part and affirmed in part, and this case is remanded to that court for further remand to the trial court for proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Justice BEASLEY concurring in part and dissenting in part.

I agree with the holding of the majority that there are genuine issues of material fact regarding (1) when plaintiff's professional negligence

claim accrued under the statute of repose and (2) plaintiff's fraudulent concealment claim under a theory of actual fraud. Because plaintiff failed to plead a constructive fraud theory supporting her claim for fraudulent concealment in her complaint, however, I would hold that plaintiff is procedurally barred from asserting a constructive fraud theory on remand from this Court.

While North Carolina is a "notice pleading" jurisdiction, requiring generally that complaint allegations provide 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), plaintiff's allegations were insufficient to put defendants on notice of a constructive fraud theory supporting plaintiff's fraudulent concealment claim. Pleading standards for fraud claims under North Carolina law are even more exacting. *See id.* Rule 9(b) (2017) (requiring plaintiffs asserting fraud claims to plead "the circumstances constituting fraud . . . with particularity"). As the majority recognizes, "[t]o assert a cause of action for constructive fraud, the plaintiff must allege facts and circumstances '(1) which created the relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.' " *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950). Here, plaintiff failed to plead facts *with or without* particularity supporting the existence of a relationship of trust and confidence between plaintiff and defendants: she did not plead the existence of a fiduciary relationship, or that she placed any special trust or confidence in defendants beyond that which any client places in his or her accountant, or that defendants owed her an independent duty to disclose that her returns were not filed. Instead, plaintiff pleaded that defendant Towson "concealed the fact that [her] 2006 and 2007 federal tax returns had not been filed with the IRS," that the "concealment was reasonably calculated to deceive" and "made with the intent to deceive," that she actually was deceived, and that, consequently, she was damaged by defendants' concealment. These are the classic elements of an actual fraud theory for fraudulent concealment, but they fall short of putting defendants on notice that plaintiff was claiming a constructive fraud theory.

Thus, when defendants moved for summary judgment on the plaintiff's claim for fraudulent concealment, plaintiff had no constructive fraud theory properly before the trial court. Despite defendants' repeated efforts to extinguish this would-be claim on grounds of

plaintiff's procedural default, both in their arguments before the trial court in response to plaintiff's summary judgment arguments and in their briefs to the Court of Appeals and this Court, the majority erroneously allows plaintiff to raise a new, unpleaded cause of action in response to defendant's summary judgment motion. Although I concur with the remainder of the majority's reasoning and holding, I dissent from the majority's holding that plaintiff may proceed on a constructive fraud theory of fraudulent concealment on remand.

IN THE MATTER OF A.P.

No. 145PA17

Filed 11 May 2018

Child Abuse, Dependency, and Neglect—standing to file petition—not limited to director of county DSS where juvenile resides or is found

The Court of Appeals erred by holding that the Mecklenburg County Department of Social Services, Youth and Family Division, lacked standing when it filed a petition alleging that juvenile A.P., who was living in Cabarrus County, was abused, neglected, or dependent. The legislature did not intend to limit the class of parties who may invoke the court's subject matter jurisdiction in juvenile adjudication actions only to directors of county departments of social services in the county where the juvenile at issue resides or is found.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 800 S.E.2d 77 (2017), vacating an order entered on 29 June 2016 by Judge Ty Hands in District Court, Mecklenburg County. Heard in the Supreme Court on 12 March 2018.

Matthew D. Wunsche, GAL Appellate Counsel, for appellant Guardian ad Litem, and Keith Roberson for petitioner-appellant Mecklenburg County Department of Social Services, Youth and Family Services Division.

Anné C. Wright for respondent-appellee mother.

BEASLEY, Justice.

In this case we consider whether the Juvenile Code mandates that a petition alleging a juvenile is abused, neglected, or dependent must be filed *only* by the director or authorized agent of the department of social services of the county "in which the juvenile resides or is found." Because we conclude that the legislature did not intend to constrain departments of social services in this way and because such a constraint would not be in the best interests of children or families in North Carolina, we reverse the decision of the Court of Appeals holding that the Mecklenburg County Department of Social Services, Youth and Family Division did not have standing to file the juvenile petition in this case.

A.P. was born on 2 August 2015. When A.P. was born, she lived with respondent mother (respondent) in a group home for teen mothers located in Cabarrus County. On 22 September 2015, when A.P. was less than two months old, respondent was taken to an emergency room and subsequently involuntarily committed to a mental health facility in Mecklenburg County. A social worker from Cabarrus County Department of Human Services (CCDHS) met with respondent at the hospital, and respondent agreed to a safety plan with CCDHS that provided, *inter alia*, that A.P. would live in Rowan County with Ms. B., respondent's case worker from the group home, while respondent was in the residential mental health facility.

Respondent indicated that she planned to move with A.P. to live with her grandfather in Mecklenburg County after her release from the treatment facility, and CCDHS requested that the Mecklenburg County Department of Social Services, Youth and Family Division (YFS), investigate the appropriateness of the grandfather's home for A.P.'s placement. YFS found the home appropriate. Respondent was discharged from the treatment facility on 23 October 2015, and she and A.P. moved in with respondent's grandfather. CCDHS transferred the case to YFS to provide services to respondent in Mecklenburg County. Respondent agreed to cooperate with services from YFS and reside with A.P. in her grandfather's home. According to a CCDHS employee, CCDHS "was no longer involved [with the case] after November 2, 2015."

On 25 November 2015, YFS received a report alleging that respondent was living with A.P. in an abandoned house in Mecklenburg County without heat or electricity. The report also alleged that respondent did not have food, clothing, or diapers for A.P. and that respondent was using

cocaine and marijuana. Respondent's sister took A.P. back to Ms. B.'s home in Rowan County. Ms. B. observed that A.P. had not been bathed recently and that her clothes were "very dirty." Ms. B. also found drug paraphernalia in A.P.'s diaper bag. Around 4 December 2015, respondent submitted to a substance abuse assessment at the request of YFS and tested positive for benzodiazepines and marijuana. Respondent admitted to Ms. B. that she had been living in the abandoned house and that she had used marijuana.

On 18 December 2015, respondent mother agreed that A.P. would remain with Ms. B. temporarily while respondent lived with a family friend in South Carolina. Respondent returned to Mecklenburg County in January 2016 and was later jailed in Mecklenburg County on unidentified criminal charges in February 2016. Respondent also notified YFS that she received inpatient treatment at a mental health facility in Mecklenburg County from 18 to 20 February 2016. She later indicated to a YFS social worker that she had been residing with her sister in Cabarrus County as of 22 March 2016.

On 23 March 2016, Ms. B. informed YFS that she was no longer able to provide care for A.P. YFS contacted CCDHS and requested to transfer the case back to Cabarrus County. CCDHS declined the transfer. On 29 March 2016, YFS obtained a non-secure custody order for A.P. from a Mecklenburg County magistrate and retrieved A.P. from Ms. B.'s home. The following day, YFS filed a juvenile petition with the District Court in Mecklenburg County alleging that A.P. was a neglected and dependent juvenile.

The trial court conducted a hearing on 17 May 2016 and entered an adjudication and disposition order on 29 June 2016 in which it concluded that A.P. is a neglected and dependent juvenile. At the hearing, respondent moved to dismiss the case, arguing, *inter alia*, that YFS lacked standing to file the juvenile petition under the relevant provisions of the Juvenile Code, and therefore, the trial court lacked subject matter jurisdiction to hear the case. The trial court denied respondent's motion at the hearing. Respondent appealed from the trial court's adjudication and disposition order.

The Court of Appeals held that YFS lacked standing because it was not the proper party to file the juvenile petition under N.C.G.S. § 7B-401.1(a), and it vacated the trial court's order on that basis.[1] *In re*

1. In addition to her subject matter jurisdiction argument on appeal, respondent challenged the sufficiency of evidence supporting the trial court's conclusions that A.P.

A.P., ___ N.C. App. ___, ___, ___, 800 S.E.2d 77, 80, 82 (2017). We now reverse the decision of the Court of Appeals.

Generally, "[j]urisdiction 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) (second alteration in original) (quoting *Judicial Jurisdiction*, *Black's Law Dictionary* 856 (7th ed. 1999)). Subject matter jurisdiction, more specifically, is "the power to pass on the merits of [a] case." *Boyles v. Boyles*, 308 N.C. 488, 491, 302 S.E.2d 790, 793 (1983); *see also* 6A Strong's North Carolina Index 4th: *Courts* § 8, at 423-27 (2013) (discussing subject matter jurisdiction generally). "Subject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act . . . ." *In re T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 790.

Chapter 7B of the North Carolina General Statutes (the Juvenile Code) governs subject matter jurisdiction over abuse, neglect, and dependency actions. *E.g.*, *id.* at 591, 636 S.E.2d at 790; *see also* N.C.G.S. § 7B-200(a) (2017). Section 7B-200 provides that the district court division of the General Court of Justice[2] "has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent." N.C.G.S. § 7B-200(a). Once properly obtained, "jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first." *Id.* § 7B-201(a) (2017). "A trial court's subject matter jurisdiction over all stages of a juvenile case is established when the action is initiated with the filing of a properly verified petition." *In re T.R.P.*, 360 N.C. at 593, 636 S.E.2d at 792 (holding that a verified petition is a prerequisite to the trial court's exercise of subject matter jurisdiction); *see also* N.C.G.S. § 7B-405 (2017) ("An action is commenced by the filing of a petition in the clerk's office when that office is open or by the acceptance of a juvenile petition by a magistrate when the clerk's office is closed, which shall constitute filing.").

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was a neglected and dependent juvenile and further argued that the Court of Appeals should have remanded the case to the trial court for additional factual inquiry regarding the applicability of the Indian Child Welfare Act. The Court of Appeals did not address these arguments because its holding that the trial court lacked subject matter jurisdiction was dispositive. *In re A.P.*, ___ N.C. App. at ___, 800 S.E.2d at 82.

2. While section 7B-200(a) states that it is "[t]he court" that has jurisdiction, the Juvenile Code defines "[c]ourt" as "[t]he district court division of the General Court of Justice." N.C.G.S. § 7B-101(6) (2017).

Respondent argues—and the Court of Appeals held—that the only party that may file a petition alleging a juvenile is abused, neglected, or dependent is the "director of the county department of social services in the county in which the juvenile resides or is found, or the director's [authorized] representative." N.C.G.S. § 7B-101(10) (2017) (defining "[d]irector" for purposes of the Juvenile Code); *see id.* § 7B-401.1(a) (2017) (providing that "[o]nly a county director of social services or the director's authorized representative may file a petition alleging that a juvenile is abused, neglected, or dependent"); *see also id.* § 7B-400(a) (2017) (providing that "[a] proceeding in which a juvenile is alleged to be abused, neglected, or dependent may be commenced in the district in which the juvenile resides or is present"). But this rigid interpretation of isolated provisions in the Juvenile Code is unsupported by the whole of the statutory text and creates jurisdictional requirements beyond those which the legislature intended to impose[3] "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." *N.C. Dep't of Transp. v. Mission Battleground Park, DST*, ___ N.C. ___, ___, 810 S.E.2d 217, 222 (2018) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012)).

When read holistically with other provisions in the Juvenile Code, the statutory sections governing "[p]arties," N.C.G.S. § 7B-401.1(a), and "[v]enue," *id.* § 7B-400(a), do not mandate dismissal of the juvenile petition in this case. Although subsection 7B-401.1(a) states that "[o]nly a county director of social services or the director's authorized representative may file a petition alleging that a juvenile is abused, neglected, or dependent," the statute does not identify *which* county director of social services must file the petition. *Id.* § 7B-401.1(a) (emphasis added). Nor does the statute limit the class of proper petitioners to only a subset of county directors of social services. *See id.* Respondent's interpretation imports the definition of "[d]irector" from N.C.G.S. § 7B-101(10) to substitute for "a county director of social services" in subsection 7B-401.1(a). But the General Assembly's use of the indefinite article, "a" before "county director of social services" in subsection 7B-401.1(a)

3. We note that at least one other unanimous panel of the Court of Appeals has, prior to this appeal, rejected arguments essentially identical to those made by respondent in this case. *See In re J.R.B.*, 182 N.C. App. 528, 642 S.E.2d 549, 2007 WL 968735, at *1-2 (2007) (unpublished) ("Respondent argues that petitioner, Stokes County Department of Social Services, did not have standing to file the action in Stokes County District Court because neither she nor the child were residing or present in Stokes County at the time of the filing of the petition. Respondent's argument, however, confuses jurisdiction with venue.").

belies the notion that the provision limits standing to any *one* county director of social services. The introductory clause for the definitions section of the Juvenile Code states that the defined words "have the listed meanings" for the purposes of the Code "*unless the context clearly requires otherwise*." N.C.G.S. § 7B-101 (emphasis added). Here, context requires otherwise.

Throughout the Juvenile Code, the legislature intentionally differentiates between references to a director of a department of social services and *a particular* director of a department of social services. *Compare* N.C.G.S. § 7B-300 (2017) (requiring "[*t*]*he director of the department of social services in each county of the State*" to establish protective services for juveniles alleged to be abused, neglected, or dependent (emphasis added)), *id.* § 7B-301 (2017) (imposing a duty to report suspicions of abuse, neglect, or dependency to "*the director of the department of social services in the county where the juvenile resides or is found*" (emphasis added)), *id.* § 7B-302 (2017) (requiring "*the director of the department of social services*" who receives a report alleging abuse, neglect, or dependency to investigate the report (emphasis added)), *id.* § 7B-307 (2017) (requiring "*the director*" to report findings of abuse, neglect, or dependency to "the district attorney" and "the appropriate local law enforcement agency" (emphasis added)), *id.* § 7B-308 (2017) (requiring a physician or facility administrator who retains custody of a juvenile pursuant to that section to notify "*the director of social services for the county in which the facility is located*" (emphasis added)), *id.* § 7B-320 (2017) (requiring "*the director*" to provide notice to an person identified as a "responsible individual" under N.C.G.S. § 7B-101(18a) after the director has completed an investigation and determined the existence of abuse or serious neglect (emphasis added)), *id.* § 7B-403 (2017) (requiring that all reports alleging a juvenile is abused, neglected, or dependent be screened by "*the director of the department of social services*" (emphasis added)), *and id.* § 7B-505.1(a) (2017) (permitting "*the director*" to "arrange for, provide, or consent to" certain medical procedures for a juvenile in the director's custody (emphasis added)), *with id.* § 7B-311(a) (2017) (requiring "county directors of social services" to furnish certain data to the Department of Health and Human Services), *id.* § 7B-324(a) (2017) (prohibiting certain persons who have been identified as a "responsible individual" under N.C.G.S. § 7B-101(18a) "by *a director*" from petitioning for judicial review of such determinations (emphasis added)), *and id.* § 7B-401.1(a) (authorizing only "*a county director of social services or the director's authorized representative*" to file a juvenile petition (emphasis added)). We presume that the legislature is capable of utilizing articles and other contextual clues to distinguish between directors of county departments

of social services *generally* and specific directors of specific county departments. *See State v. Buckner*, 351 N.C. 401, 408, 527 S.E.2d 307, 311 (2000) ("If possible, a statute must be interpreted so as to give meaning to all its provisions." (citing *State v. Bates*, 348 N.C. 29, 35, 497 S.E.2d 276, 279 (1998))); *see also Hall v. Simmons*, 329 N.C. 779, 784, 407 S.E.2d 816, 818 (1991) ("[S]ignificance and effect should, if possible, . . . be accorded every part of the act, including every section, paragraph, sentence or clause, phrase, and word." (alterations in original) (quoting *State v. Williams*, 286 N.C. 422, 432, 212 S.E.2d 113, 120 (1975))).

Other provisions of the Juvenile Code suggest that there may be instances when the party filing the juvenile petition is the director of a department of social services for a county that is not the juvenile's county of residence. *See* N.C.G.S. § 7B-400(b) (2017) ("When the director in one county conducts an assessment pursuant to G.S. 7B-302 in another county because a conflict of interest exists, the director in the county conducting the assessment may file a resulting petition in either county."); *see also id.* § 7B-302(a2) ("If the director, at any time after receiving a report that a juvenile may be abused, neglected, or dependent, determines that the juvenile's legal residence is in another county, the director shall promptly notify the director in the county of the juvenile's residence, and the two directors shall coordinate efforts to ensure that appropriate actions are taken."); *id.* § 7B-402(d) (2017) ("If the petition is filed in a county other than the county of the juvenile's residence, the petitioner shall provide a copy of the petition and any notices of hearing to the director of the department of social services in the county of the juvenile's residence.").

Because the language of section 7B-401.1(a) identifies "a county director of social services" as the proper petitioner in a juvenile adjudication action rather than "the director" (importing the definition from N.C.G.S. § 7B-101(10)) or similar language singling out particular directors, we hold that the legislature did not intend to limit the class of parties who may invoke the court's subject matter jurisdiction in juvenile adjudication actions to only directors of county departments of social services in the county where the juvenile at issue resides or is found. Respondent suggests, under her interpretation of the Juvenile Code, that YFS would have had standing in this case if it had simply asked Ms. B. to bring A.P. to Mecklenburg County before YFS filed the juvenile petition. Respondent's interpretation—tying subject matter jurisdiction to the physical location of the juvenile at the time of filing unless the petition is filed by the director of the county department of social services for the juvenile's county of residence—would permit a parent or

caretaker of a juvenile to prevent a court's otherwise proper exercise of subject matter jurisdiction simply by moving the juvenile from one county to another. Worse still, because subject matter jurisdiction "can be challenged 'at any stage of the proceedings, even after judgment,' " *Willowmere Cmty. Ass'n v. City of Charlotte*, ___ N.C. ___, ___, 809 S.E.2d 558, 564 (2018) (quoting *In re T.R.P.*, 360 N.C. at 595, 636 S.E.2d at 793), respondent's interpretation would "subject countless judgments [in juvenile cases] across North Carolina to attack for want of subject matter jurisdiction," *id.* at ___, 809 S.E.2d at 563, and needlessly delay permanency for juveniles alleged to be abused, neglected, or dependent. Our rejection of respondent's interpretation of the Juvenile Code is guided and supported by our oft-recited recognition 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."[4] *In re M.A.W.*, 370 N.C. 149, 152, 804 S.E.2d 513, 516 (2017) (alteration in original) (quoting *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 251 (1984)); *see also* N.C.G.S. § 7B-100(5) (2017) (directing courts to construe the Juvenile Code in a way that, *inter alia*, "ensur[es] that the best interests of the juvenile are of paramount consideration . . . and that when it is not in the juvenile's best interest to be returned home, the juvenile will be placed in a safe, permanent home within a reasonable amount of time").

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4. Other policy objectives that might be advanced by respondent's interpretation, such as requiring that the deciding court have sufficient connection with the parties, providing parties a convenient forum for litigation, preventing the entry of conflicting orders from duplicative proceedings, or requiring the department filing the petition to be familiar with the facts and allegations prompting intervention, are appropriately and adequately addressed by the General Assembly in other provisions in the Juvenile Code. *See* N.C.G.S. § 7B-200(b) (2017) (explaining the means by which the court in a juvenile proceeding may permissibly exercise "[personal] jurisdiction over the parent, guardian, custodian, or caretaker of a juvenile who has been adjudicated abused, neglected, or dependent"); *id.* § 7B-400(c) (2017) (authorizing the court in which the proceeding is filed to change venue for good cause *without* affecting the identity of the petitioner); *id.* § 7B-200(c)(1) (2017) (staying any other civil action in North Carolina in which the juvenile's custody is at issue pending action by the court in the Chapter 7B juvenile proceeding); *id.* § 7B-200(c)(2) (2017) (providing that any properly entered order in the juvenile proceeding controls over a conflicting order entered in another civil custody action); *id.* § 7B-200(d) (2017) (permitting other civil actions to be consolidated with the juvenile proceeding and permitting the court to stay the juvenile proceeding pending the resolution of another civil action); *id.* § 7B-302(a) (requiring *the director* of the department of social services who receives a report of abuse, neglect, or dependency—rather than *all directors*—to investigate the report and determine whether services should be provided).

The record demonstrates that the juvenile petition in this case was properly verified and filed by an authorized representative of "a county director of social services." N.C.G.S. § 7B-401.1(a). Accordingly, the decision of the Court of Appeals holding otherwise is reversed, and this case is remanded to that court to address respondent's remaining arguments in this appeal.

REVERSED AND REMANDED.

IN THE MATTER OF THE ADOPTION OF C.H.M., A MINOR CHILD

No. 297PA16

Filed 11 May 2018

Adoption—father's consent—unnecessary—failure to show support

An adoption should have proceeded without the consent of the father where he did not demonstrate through an objectively verifiable record that he made the statutorily required reasonable and consistent payments for the support of the minor child before the adoption petition was filed. The father had sporadically put money into a lockbox but did not keep records.

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 decision of the Court of Appeals, ___ N.C. App. ___, 788 S.E.2d 594 (2016), affirming an order entered on 9 February 2015 by Judge Debra Sasser in District Court, Wake County. Heard in the Supreme Court on 9 October 2017.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for petitioner-appellants.

Marshall & Taylor, PLLC, by Travis R. Taylor; and Robert A. Smith for respondent-appellee.

NEWBY, Justice.

In this case we consider whether the evidence was sufficient as a matter of law to support the trial court's order requiring respondent father's consent before proceeding with the adoption of minor child C.H.M. To protect the significant interests of the child, biological parents, and adoptive parents, Chapter 48 of our General Statutes, governing adoption procedures in North Carolina, establishes clear, objective tests to determine whose consent is required before a court may grant an adoption petition. Under section 48-3-601, a putative father may unilaterally protect his paternal rights if he establishes that he has acknowledged his paternity, regularly communicated or attempted to communicate with the biological mother or minor child, and provided reasonable and consistent payments for the support of the biological mother, minor, or both, in accordance with his financial means. All of these measures must be accomplished no later than the filing of the adoption petition. As a matter of law respondent's evidence does not establish that he made reasonable and consistent payments for the support of the biological mother or minor child before the filing of the adoption petition. Because respondent failed to meet his burden of proving that he provided such support within the relevant statutory period, we conclude that the evidence is legally insufficient to support the trial court's order requiring respondent's consent. Accordingly, we reverse the decision of the Court of Appeals that affirmed the trial court's order.

From 2009 through 2012, respondent and the biological mother (Wood) had an "on and off" intimate relationship while they both lived in Illinois. In November 2012, Wood ended her relationship with respondent to resume a relationship with another man, whom she married shortly thereafter in January 2013. As respondent was aware, Wood's husband worked and resided in North Carolina, though she continued to stay in Illinois for several months. After Wood's marriage, respondent and Wood continued to communicate primarily through Facebook.

On 11 February 2013, Wood informed respondent that she was twenty weeks pregnant (or halfway through her pregnancy) with his child, but immediately told respondent to keep everything "as secret as possible." Upon learning he was the child's father, respondent told Wood he intended to "start setting money aside" for the child, but provided neither support at that time nor any details of his plan.

In March, respondent accompanied Wood to her first medical appointment and sonogram. The sonogram confirmed respondent's

understanding of the timing of Wood's pregnancy, showing she was between her second and third trimesters. While respondent expressed his enthusiasm for becoming a father and offered to pay for the office visit, Wood refused respondent's offer because her husband's insurance covered the appointment cost. Out of concern that people in their small hometown would suspect something, respondent did not buy any baby items for C.H.M. during the pregnancy. In their Facebook messages between February and July 2013, respondent and Wood's primary method of communication, respondent offered Wood his emotional support but never stated that he was actually saving money for the child. Respondent did not give Wood any monetary payments for the minor child's support, and Wood rejected respondent's various offers of financial assistance.

After consistent communication between the two throughout February and March, on 9 April 2013, Wood falsely told respondent the child might not be his, contending she had been sexually assaulted around the time of conception. Thereafter, Wood refused respondent's requests for a paternity test.

Sometime in June, Wood moved to North Carolina to join her husband, and near the end of June (around her due date), Wood stopped communicating with respondent. On 28 June 2013, Wood gave birth to C.H.M. After C.H.M.'s birth, Wood contacted an adoption agency through a social worker and thereafter provided her affidavit that the pregnancy resulted from a sexual assault by an unknown assailant. Wood and her husband, the legally presumed father, signed relinquishments placing C.H.M. with the adoption agency. Knowing nothing about the possible involvement of respondent, the agency and petitioners, who wished to adopt C.H.M., proceeded with plans to establish a home for the child. On 9 July 2013, petitioners filed the adoption petition and received eleven-day-old C.H.M. into their home, where the child has been cared for during the almost five years of her life.

Though he was aware of Wood's approximate delivery date, respondent did not attempt to contact Wood via Facebook until the end of July, a month after C.H.M.'s birth and following the adoption petition's filing. Several days later, Wood replied and met respondent during one of her return trips to Illinois, at which point he observed she was no longer pregnant. Later that evening, Wood told respondent that she had given birth to the child but that C.H.M. was still at the hospital. Finally, in September 2013, respondent contacted legal counsel about his potential paternal rights and the possibility of a paternity test. Wood told

respondent in mid-November about C.H.M.'s adoption, at which time she first informed the adoption agency about respondent. The adoption agency contacted respondent and requested a paternity test. On 4 December 2013, respondent took a paternity test, which confirmed he is the biological father.

On 23 December 2013, more than five months after the adoption petition had been filed, respondent filed his formal objection to the adoption. At the hearing on the matter in April 2014, respondent offered evidence attempting to prove that he met all the statutory requirements for his consent to be necessary, including that he had made reasonable and consistent payments for the support of the minor child, thereby entitling him to object to the adoption. Respondent testified that he had set aside money for C.H.M. in a special location in his room, a "lockbox," in which he placed funds withdrawn from ATM transactions or obtained via "cash back" purchases from Walmart. Respondent provided bank statements from 2012 and 2013, which showed some sporadic withdrawals and general purchases from Walmart, though he provided no records showing the purpose of the withdrawals. Respondent produced no receipts indicating that he received cash back from any Walmart purchases within the statutorily relevant time frame, providing only two Walmart receipts from 2014, more than six months after the statutory deadline. Throughout the hearing, respondent offered no definitive testimony on the timing of his placement of any funds, before or after the adoption petition's filing on July 9, which may have resulted in cash for the lockbox.

The lockbox that respondent produced at the April 2014 hearing then contained $3260. Respondent admitted that the placement of funds in the lockbox was sporadic and was not comprised of an "exact amount each time," as the lockbox contained "just whatever [he] could afford here and there." Because respondent did not "keep[ ] records [he did not] really know" how much he was placing in the lockbox, though he thought it was somewhere around $100 to $140 per month. Respondent did not provide any records indicating the dates of any deposits or the amount of money in the lockbox before the statutorily relevant date, 9 July 2013. Respondent stated that he made no specific designation "on paper" or elsewhere regarding the money's purpose nor did he confide in anyone about his plan or the lockbox's existence. Though respondent subpoenaed Wood, who was then back in Illinois, so she could testify, Wood did not appear at the hearing, and respondent did not present any witnesses to confirm that he had placed money in the lockbox before the adoption petition was filed.

The trial court noted that whether respondent met the statutory requirements depended on its resolution of what it deemed to be the major factual dispute in the case, "whether Respondent/Father's testimony regarding putting money aside for the minor child and Mrs. Wood is credible." Based on respondent's evidence, the trial court made the following findings:

> 7(h). During Mrs. Wood's pregnancy and after the child's birth Respondent/Father saved money on a consistent and regular basis and designated this money for the minor child. Respondent/Father also testified that he disclosed to Mrs. Wood that he was saving money for the minor child.
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> . . . .
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> 13(e)(1). Respondent/Father never provided any actual financial payments to Mrs. Wood or to the minor child either prior to the filing of the petition or since the filing of the petition.
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> . . . .
>
> 13(e)(9). From the time Mrs. Wood told him that she was pregnant with his child and continuing through the time of the instant hearing, Respondent/Father made regular and consistent payments into his lock box/safe for the support of the minor child. These payments were made on a monthly (and sometimes more frequent) basis. While these funds were not deposited into a bank or other financial institution, they were deposited into a safe, and these funds were earmarked for the minor child. No other funds were deposited into this safe.
>
> 13(e)(10). At the time of the instant hearing, Respondent/Father had $3,260 in the safe.
>
> 13(e)(11). . . . Prior to the filing of the petition, Respondent/Father earned $32,000 a year from [his] employment. His annual earnings are now around $35,000. . . .
>
> 13(e)(12). Respondent/Father deposited at least $100 - $140 a month into the safe for the benefit of Ms. Wood and the child, and on average, paid approximately $225 per month in support for the minor child.

Ultimately, the trial court concluded that

> Respondent/Father's regular and consistent deposits into the safe were a reasonable method of providing support for the minor child and Mrs. Wood. His testimony regarding monthly deposits into his safe of at least $100 - $140 per month, from the time he learned of Ms. Wood's pregnancy through the instant trial is credible.

Thus, considering evidence of events both before and after the petition filing date of 9 July 2013, the trial court concluded that respondent's "reasonable method" of saving met the requirements of section 48-3-601(2)(b)(4)(II). Moreover, the trial court deemed respondent's lump sum $3260 presented at trial, his uncorroborated testimony, and his production of general bank statements as having created "a legally sufficient payment record of his efforts to provide support." As such, the trial court determined that respondent's consent was required to proceed with the adoption.

The Court of Appeals affirmed, *In re Adoption of C.H.M.*, ___ N.C. App. ___, ___, 788 S.E.2d 594, 601 (2016), opining that this Court's opinion in *In re Adoption of Anderson*, 360 N.C. 271, 624 S.E.2d 626 (2006), "did not purport to provide an exhaustive list of ways for a father to [comply with the statute], nor did it explicitly impose any sort of specific accounting requirements," *In re C.H.M.*, ___ N.C. App. at ___, 788 S.E.2d at 600. The court also determined that whether respondent had presented adequate evidence to meet the payment prong of the statute is a factual finding as opposed to a legal conclusion, making that ruling subject to a deferential standard of review on appeal. *Id.* at ___, 788 S.E.2d at 600 (citing *In re Adoption of Shuler*, 162 N.C. App. 328, 330-31, 590 S.E.2d 458, 460 (2004)). Thus, the court concluded that by considering all of respondent's evidence, in the form of his bank records, Facebook messages, and uncorroborated testimony about events before and after the adoption petition's filing, respondent produced sufficient evidence showing that he complied with the statutory requirements. *Id.* at ___, 788 S.E.2d at 600. We allowed the adoptive parents' petition for discretionary review to determine whether the trial court correctly concluded that respondent complied with the support payment requirement of section 48-3-601.

Because of a pregnancy's natural timetable and the need of a newborn to have a home, the adoption statutes provide a related window of time by which a putative father must meet clear statutory requirements that establish his paternal rights and make his consent to the adoption

necessary. These statutory requirements enumerate objective tests to ensure that all parties involved, including the biological mother, adoptive parents, adoption agency, and the courts, receive adequate notice of the father's intent to assert his paternal rights. One requirement is that a putative father provide reasonable and consistent payments for the support of the biological mother or minor child before, at the latest, the date the adoption petition is filed. Thus, by imposing objective criteria to be met by a deadline consistent with the needs of a newborn child, the statute achieves its overall purpose of providing a final and uninterrupted placement for the child.

It is undisputed that respondent had the burden of proof to establish his compliance with the statutory requirements. Even assuming, without deciding, that respondent's method of placing funds subjectively intended for the minor child in a special location in his home constitutes a statutory "payment," respondent nonetheless failed to prove that such payments met the other statutory criteria. As a matter of law, respondent's evidence was insufficient to establish that he made such payments before the statutory deadline or that each payment was reasonable and consistent in accord with his financial means during the statutory time frame.

In a trial without a jury, a trial court's findings of fact "are conclusive on appeal if there is competent evidence to support them," though "[f]indings not supported by competent evidence are not conclusive and will be set aside on appeal." *In re Estate of Skinner*, 370 N.C. 126, 139, 804 S.E.2d 449, 457-58 (2017) (alteration in original) (first quoting *Bailey v. State*, 348 N.C. 130, 146, 500 S.E.2d 54, 63 (1998); and then quoting *Penland v. Bird Coal Co.*, 246 N.C. 26, 30, 97 S.E.2d 432, 436 (1957)). "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *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)).

"In distinguishing between findings of fact and conclusions of law, '[a]s a general rule, . . . any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law.' " *State v. Sparks*, 362 N.C. 181, 185, 657 S.E.2d 655, 658 (2008) (alterations in original) (quoting *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (internal citations omitted)). "[F]indings of fact [which] are essentially conclusions of law . . . will be treated as such on appeal." *Sparks*, 362 N.C. at 185, 657 S.E.2d at 658 (second and third alterations in original) (quoting *Harris v. Harris*, 51 N.C. App. 103, 107, 275 S.E.2d 273, 276, *disc. rev. denied*, 303 N.C. 180,

280 S.E.2d 452 (1981)). Moreover, determining whether sufficient evidence supports a judgment is a conclusion of law and will be reviewed as such. *See Styers v. Phillips*, 277 N.C. 460, 464, 178 S.E.2d 583, 586 (1971) ("Whether there is enough evidence to support a material issue is always a question of law for the court."); *Rountree v. Fountain*, 203 N.C. 381, 382, 166 S.E. 329, 330 (1932) ("Whether there is enough evidence to support a material issue is a matter of law.").

Chapter 48 of our General Statutes, governing adoption procedures in North Carolina, seeks

> to establish a clear judicial process for adoptions, to promote the integrity and finality of adoptions, to encourage prompt, conclusive disposition of adoption proceedings, and to structure services to adopted children, biological parents, and adoptive parents that will provide for the needs and protect the interests of all parties to an adoption, particularly adopted minors.

N.C.G.S. § 48-1-100(a) (2017). Relevant here, section 48-3-601 requires a man who "may or may not be the biological father" to consent to the adoption of the child if he

> 4. *Before the . . . filing of the petition* . . . has acknowledged his paternity of the minor and
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> . . . .
>
> II. *Has provided*, in accordance with his financial means, *reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy, or the support of the minor*, or both, which may include the payment of medical expenses, living expenses, or other tangible means of support, and has regularly visited or communicated, or attempted to visit or communicate with the biological mother during or after the term of pregnancy, or with the minor, or with both . . . .

Id. § 48-3-601(2)(b)(4)(II) (2017) (emphases added). Thus, based on the statutorily prescribed test, the putative father has the burden of proof to show, by the earlier date of a prebirth hearing or the adoption petition's filing, in addition to the other statutory requirements, that: (1) he provided payments for the support of the biological mother, minor child, or

both; (2) such payments were reasonable in light of his financial means; and (3) such payments were made consistently.

A putative father must present competent evidence showing he complied with each requirement of the statute. If he presents competent evidence that he met some but not all of the statutory requirements, his consent to the adoption is not required.[1] To protect his rights under the objective statutory test, a putative father must fulfill all statutory requirements no later than the filing of the adoption petition. *Id.* § 48-3-601(2)(b)(4) (2017). Any evidence of actions occurring after the adoption petition is filed is irrelevant, and a trial court errs as a matter of law in considering such evidence. *See In re Adoption of Byrd*, 354 N.C. 188, 197-98, 552 S.E.2d 142, 148-49 (2001).

Among the statute's support requirements, first a putative father must present evidence that he has made "payments for the support of the biological mother . . . or . . . the minor, or both." N.C.G.S. § 48-3-601(2)(b)(4)(II). Thus, a putative father must show he has provided real, tangible support through an adequate payment method. *See In re Byrd*, 354 N.C. at 196, 552 S.E.2d at 148; *see also Payment*, *Black's Law Dictionary* (10th ed. 2014) (defining payment as "[p]erformance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of the obligation"). Importantly, a putative father may unilaterally protect his rights, in that the "legislature's deliberate use of 'for' rather than 'to' suggests the payments contemplated by the [support provision] need not always go directly to the mother. So long as the father makes reasonable and consistent payments *for* the support of mother or child, the mother's refusal to accept assistance cannot defeat his paternal interest." *In re Anderson*, 360 N.C. at 279, 624 S.E.2d at 630.

Second, a putative father must present evidence that, during the relevant time period, he has made *reasonable* payments for the support of the biological mother, minor child, or both. *Id.* § 48-3-601(2)(b)(4)(II); *see Reasonable*, *Black's Law Dictionary* (10th ed. 2014) (defining reasonable as "[f]air, proper, or moderate under the circumstances"). A reasonable payment is calculated based upon the earnings or financial

1. This case did not involve a prebirth hearing under section 48-2-206. Given the facts of this case, this opinion will refer to the relevant deadline as the date the adoption petition was filed. In a case involving a prebirth hearing, however, the statute recognizes the deadline as "the earlier of the filing of the petition or the date of a hearing under G.S. 48-2-206." N.C.G.S. § 48-3-601(2)(b)(4) (2017). Furthermore, the statutory requirements of acknowledgement of paternity and visiting or communicating, or attempting to do so, are not at issue in this appeal.

resources of the putative father before the date of the adoption petition's filing.

Third, the statute requires that the putative father demonstrate he has made *consistent* payments. N.C.G.S. § 48-3-601(2)(b)(4)(II). To establish that his payments are consistent under the statute, the putative father must present an objectively verifiable record showing that he consistently made reasonable payments before the statutory deadline. *See The American Heritage Dictionary* 313 (2d coll. ed. 1985) (defining "consistent" as "[c]onforming to the same principles or course of action; uniform"); *see also In re Anderson*, 360 N.C. at 279, 624 S.E.2d at 631 (noting that, if the respondent had opened a bank account or established a trust fund, the biological mother's "intransigence would not have prevented him from *creating a payment record through regular deposits into the account* or trust fund in accordance with his financial resources" (emphasis added)).

Our cases recognize these express statutory requirements, as well as the need for a precise payment record to demonstrate that a putative father consistently made reasonable payments before the statutory deadline. In *In re Byrd* the respondent father delivered a $100 money order and baby clothes to a third party for the benefit of the biological mother and child, but the biological mother did not receive the items until after the adoption petition had been filed. 354 N.C. at 191, 552 S.E.2d at 145. The Court recognized that, as evident from the statutory requirements, "[t]he interests of the child and all other parties are best served by an objective test." *Id.* at 198, 552 S.E.2d at 149. Thus, the Court determined that " 'support' is best understood within the context of the statute as actual, real and tangible support, and . . . attempts or offers of support do not suffice." *Id.* at 196, 552 S.E.2d at 148. Moreover, noting the importance of the statutorily imposed deadline, the Court acknowledged that "the statute is clear in its requirements, and respondent must have satisfied the . . . prerequisites . . . prior to the filing of the adoption petition." *Id.* at 194, 552 S.E.2d at 146. The Court concluded that the respondent need not consent to the adoption proceeding because "the money order and clothes sent to [the biological mother] by respondent . . . arrived too late, as the statute specifically provides for the relevant time period to end at the filing of the adoption petition." *Id.* at 197, 552 S.E.2d at 149.

In *In re Anderson* this Court emphasized the importance of a verifiable payment record to establish that a putative father made reasonable and consistent payments. There the respondent father presented evidence that he saved money and made various offers of support,

including offers of cash to the expectant mother at school and an unsuccessful attempt to deliver an envelope containing $100 to her home. 360 N.C. at 273-74, 624 S.E.2d at 627-28. The respondent also hired an attorney who sent a letter to the expectant mother explicitly offering the respondent's financial support, indicating that the respondent had accumulated money to provide assistance to the mother and child. *Id.* at 274, 624 S.E.2d at 628. Despite the respondent's efforts, the Court concluded that, without an objectively verifiable, independent record showing that he had provided real, tangible support payments, the respondent could not establish that any alleged payments were "reasonable and consistent [as] required under the [statute]." *Id.* at 278, 624 S.E.2d at 630. The Court noted that

> [h]ere, respondent could have supplied the requisite support any number of ways, such as opening a bank account or establishing a trust fund for the benefit of [the biological mother] or their child. Had he done so, [the biological mother's] intransigence *would not have prevented him from creating a payment record through regular deposits into the account or trust fund in accordance with his financial resources*. By doing nothing more than sporadically offering support to [the biological mother], respondent left the support prong of N.C.G.S. § 48-3-601 unsatisfied and himself without standing to obstruct the adoption of [the minor child].

Id. at 279, 624 S.E.2d at 630-31 (emphasis added) (citing N.C.G.S. § 48-3-601(2)(b)(4)(II)).

Here respondent's evidence was insufficient as a matter of law to support the trial court's conclusion that respondent complied with the statutory support payment requirements. Assuming, without deciding, that respondent's actions constituted a "payment for the benefit of" the minor child, respondent failed to present any evidence that could show that, before the statutory deadline of 9 July 2013, he made reasonable and consistent payments. Respondent even admitted that any alleged deposits were not "an exact amount," and the lockbox contained "just whatever [he] could afford here and there." Respondent conceded that he did not "keep[ ] records [so he did not] really know" how much money he placed in the lockbox at any relevant time, instead, simply estimating the average amount of money he may have placed in the lockbox during a given month. Thus, respondent's evidence is insufficient as a matter of law to demonstrate that any payments were reasonable based on his income during the relevant statutory time frame.

Moreover, neither respondent's general bank statements nor the lump sum presented at trial in April 2014 provides an objectively verifiable record showing that he consistently made reasonable payments within the statutorily relevant time period. Because respondent presented no objectively verifiable, independent record to demonstrate his compliance with the statute, the trial court erred as a matter of law in concluding that respondent was required to consent to the adoption.

Significantly, at the hearing, respondent presented comingled financial evidence, which impaired the trial court's ability to identify only the statutorily relevant evidence, namely, that between 11 February 2013, when he was informed of the pregnancy, and 9 July 2013, when the petition was filed. By considering irrelevant evidence, for example, the lump sum of $3260 in the lockbox at the time of the hearing and respondent's earnings, bank records, and receipts spanning the years 2012 to 2014 as a whole, the trial court erred as a matter of law. The Court of Appeals compounded this fundamental error by affirming the trial court's order based on a deferential standard of review, which assumed that respondent's compliance with the statute constituted a purely factual matter, as opposed to a matter of law. That court likewise overlooked the trial court's error in failing to differentiate between relevant and irrelevant evidence in light of the statutory deadline.

The unusual facts of this case cannot overshadow respondent's failure to comply with the statutory requirements to establish his legal rights before the adoption petition was filed. Respondent received undisputed notice that Wood was twenty weeks pregnant with his child in February 2013 and even accompanied her to the first medical appointment which confirmed the timing of the pregnancy and likely date of delivery. Respondent knew Wood was married to another man in a different state, likely moving to that state, using her husband's insurance for medical care, acting in a deceptive and secretive manner, and denying respondent's requests for a paternity test. Given this knowledge, respondent should have recognized the pressing need to protect his paternal interest and acted accordingly. *See Eubanks v. Eubanks*, 273 N.C. 189, 197, 159 S.E.2d 562, 568 (1968) ("When a child is born in wedlock, the law presumes it to be legitimate.").

Respondent's evidence here failed to demonstrate through an objectively verifiable record that he made the statutorily required reasonable and consistent payments for the support of the minor child before the adoption petition was filed. Because respondent's evidence cannot show he complied with the objective statutory requirements, the adoption should proceed without his consent. Thus, 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 proceedings consistent with this opinion.

REVERSED AND REMANDED.

Justice BEASLEY dissenting.

The majority erroneously holds that the evidence in the record is insufficient to support the trial court's ruling that respondent's consent was required before proceeding with the adoption of C.H.M. because of respondent's supposed failure to demonstrate he provided reasonable support within the statutory period. *See* N.C.G.S. § 48-3-601(2)(b)(4)(II) (2017). This conclusion is in direct contradiction of the applicable standard of review: that this Court must defer to the trial court's findings of fact when those findings are based on competent evidence. Here, the trial court made voluminous factual findings establishing that respondent provided the support necessary to protect his parental rights before the filing of the adoption petition. Because there is sufficient evidence in the record to support the trial court's findings of fact and because those findings of fact support its conclusion of law that respondent provided statutorily adequate support prior to the filing of the petition, I respectfully dissent.

Before addressing the substance of the majority's opinion, I provide a more complete recitation of the facts of this case, as well as a description of the trial court's extensive findings, to better characterize respondent's efforts to protect his parental rights and the deception the birth mother inflicted on respondent during her pregnancy and after the birth of C.H.M.

The District Court, Wake County found that respondent, Venson Allen Westgate, the biological father of a child whom petitioners sought to adopt, had a legal right to require that petitioners obtain his consent to the adoption. Petitioners, Michael and Carolyn Morris, appealed to the Court of Appeals, which unanimously affirmed the trial court.

Respondent, a resident of Illinois, is the biological father of C.H.M.,[1] a child born in North Carolina on 28 June 2013. Respondent and the mother had an on-again, off-again relationship in Illinois, before the mother moved to North Carolina. The mother, who declined to

1. C.H.M. is a pseudonym to protect the identity of the juvenile pursuant to N.C. Rule of Appellate Procedure 3.1.

marry respondent, consented to the child's adoption through an agency. Respondent did not consent to the adoption. Petitioners, a Wake County couple, wish to adopt the child. To that end, on 9 July 2013, they filed a Petition for Adoption of a Minor Child in District Court, Wake County. On 23 December 2013, respondent filed a response stating his objection to the adoption.

According to respondent's filing and the trial court's findings, the mother initially told respondent she had been a victim of sexual assault and that she became pregnant as a result. Later, around 25 November 2013, the mother finally told respondent that she had lied about her sexual assault claim. Respondent contended that, although the biological mother finally agreed to respondent's request for a DNA test in November 2013, she told him she had given the child up for adoption without his knowledge. Further, respondent explained that the mother deliberately omitted respondent's name from C.H.M.'s birth certificate, as well as this adoption action, until approximately 24 November 2013. On 27 November 2013, respondent was served by the adoption agency with a Notice of Pendency of Adoption Proceedings and informed of his right to file a response to the Petition. Later, a DNA test paid for by the adoption agency confirmed that respondent is C.H.M.'s biological father.

Respondent's filing included a motion to dismiss the Petition for Adoption, in which he contended that his "lack of custody of the minor child was unknowing and involuntary" and that he "desires to become involved as the parent to the minor child." Respondent asked the court to find that his consent is required for the adoption and dismiss the Petition for Adoption. After respondent filed his response to the Petition, the matter was transferred from the clerk of court to the district court to determine if respondent's consent is necessary.

The trial court heard the matter from 23 to 25 April 2014 and entered an order in District Court, Wake County on 9 February 2015 finding that respondent's "consent is required to proceed with the adoption." The trial court's order contained extensive findings of fact relating to the nature of the relationship between respondent and the birth mother and respondent's actions during the pregnancy and after the birth of C.H.M.

The court's findings of fact relay that the entire relationship between respondent and the mother remained sporadic and that the mother effectively "controlled the relationship and was the only one to initiate break ups." Respondent did not learn that the mother had given birth until almost one month after C.H.M. was born. At the mother's request, respondent met with her in Illinois and he then realized the

mother was no longer pregnant. The meeting between respondent and the mother happened "over two weeks after the adoption petition was filed and almost one month after [the mother] placed the minor child for adoption."

The trial court also found that "[o]n November 15, 2013 [the mother] . . . finally told [respondent] about the [pending] adoption," at which point he "did everything he was asked to do in order to get a DNA test." At no point did the mother tell respondent that she had placed the child for adoption until she finally agreed to respondent's request for a DNA test in late November 2013. Before this time, she made misrepresentations to respondent that she had been the victim of sexual assault, that "she was raising the minor child with her husband," and that "the baby was in the hospital." The adoption agency did not learn that respondent might be the biological father until the mother confessed to the agency and respondent that she had lied about being sexually assaulted. The agency contacted respondent on 26 November 2013 to advise him of his right to have a paternity test.

In its order, the trial court stated that N.C.G.S. § 48-3-601 sets conditions that, if met, require a putative father's consent to an adoption. That statute reads, in pertinent part, that

> a petition to adopt a minor may be granted only if consent to the adoption has been executed by . . . the biological father of the minor . . . who . . . [1] [b]efore the . . . filing of the petition . . . has acknowledged his paternity of the minor and . . . [2] [h]as provided, in accordance with his financial means, reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy, or the support of the minor, or both, which may include the payment of medical expenses, living expenses, or other tangible means of support, and [3] has regularly visited or communicated, or attempted to visit or communicate with the biological mother during or after the term of pregnancy, or with the minor, or with both . . . .

N.C.G.S. § 48-3-601(2)(b)(4) (2017).

The trial court found "that the major fact in dispute is whether [respondent's] testimony regarding putting money aside for the minor child and [the mother] is credible." The court then made findings of fact on the three statutory conditions set out above, correctly concluding

as a matter of law that respondent has met the conditions of section 48-3-601 and thus, his consent for adoption is required.

Specifically, on the second issue, the court found that respondent "provided, in accordance with his financial means, reasonable and consistent payments for the support of the biological mother during or after the term of the pregnancy, or the support of the minor, or both, which may include the payment of medical expenses, living expenses, or other tangible means of support." The court found that *during* the mother's "pregnancy and *after* the child's birth [respondent] saved money on a consistent and regular basis and designated this money for the minor child." (Emphasis added.) Moreover, respondent told the mother "that he was saving money for the minor child." The court reasoned that respondent's "never [having] provided any actual financial payments to" the mother or child, was due to the mother's continued refusal to accept such payments; in fact, respondent "wanted to buy items for the minor child," but the mother "demanded that he not tell anyone about the baby."

In direct contradiction of the majority's conclusion that there was insufficient evidence showing respondent fulfilled the support prong before the filing of the adoption petition, the trial court found that "[f]rom the time [the mother] told him that she was pregnant with his child and continuing through the time of the instant hearing, [respondent] made regular and consistent payments into his lock box/safe for the support of the minor child." The payments of around $100 to $140 "were made on a monthly (and sometimes more frequent) basis." Although respondent did not deposit the funds in a financial institution, he deposited them in a safe and "earmarked [them] for the minor child"; moreover, "[n]o other funds were deposited into this safe." In assessing the credibility of respondent's testimony regarding saving money for the benefit of the mother and C.H.M., the court stated it "gave due regard to all evidence adduced at trial" and that "[n]one of the money [respondent] deposited into the safe prior to the filing of the adoption petition was for legal fees or a DNA test." The court further found that because the mother refused to accept respondent's offers of financial support, his "regular and consistent deposits into the safe were a reasonable method of providing support for the minor child and [the mother]."

Finally, the trial court made additional findings of fact that the mother "intentionally misrepresented to the adoption agency . . . many important facts relating to the conception of this child," including that "[f]or over four months, [she] intentionally failed to disclose to the

agency that [respondent] was a possible father of the child." The court found that all these actions by the mother "prevented [respondent] from having the opportunity to fully exercise his parental rights and obligations." Moreover, the court said that "because of [the mother's] fraudulent and deceptive conduct, [respondent] was prevented from gathering the information necessary to file a custody action prior to the filing of the adoption petition."

On 5 July 2016, the Court of Appeals issued a unanimous opinion affirming the district court. The panel addressed petitioners' specific contention that respondent "failed to satisfy the statutory support requirement imposed by section 48-3-601." *In re Adoption of C.H.M.*, ___ N.C. App. ___, 788 S.E.2d 594, 597 (2016). The panel concluded that, giving due deference to the trial court's determinations of witness credibility and the weight to be given such testimony, "ample evidence . . . support[s] the district court's determination that [respondent] provided reasonable and consistent payments for the support of C.H.M. before the filing of the adoption petition." *Id.* at ___, 788 S.E.2d at 600. Moreover, the panel concluded that the trial court's "determination that [respondent's] regular and consistent deposits into his lockbox were reasonable in accordance with his financial means was adequately supported by competent evidence." *Id.* at ___, 788 S.E.2d at 601. For these reasons, the panel affirmed the district court's order. *Id.* at ___, 788 S.E.2d at 601. This Court granted discretionary review on 16 March 2017.

The Court of Appeals correctly affirmed the trial court's ruling that respondent's consent was required to adopt C.H.M. "All proceedings under this Chapter must be heard by the court without a jury." N.C.G.S. § 48-2-202 (2017). Therefore, when the trial court acts as fact finder and judge, it must determine "whether there was competent evidence to support its findings of fact and whether its conclusions of law were proper in light of such facts." *In re Adoption of Shuler*, 162 N.C. App. 328, 330, 590 S.E.2d 458, 460 (2004) (quoting *In re Adoption of Cunningham*, 151 N.C. App. 410, 413, 567 S.E.2d 153, 155 (2002) (quoting *In re Norris*, 65 N.C. App. 269, 275, 310 S.E.2d 25, 29 (1983), *cert. denied*, 310 N.C. 744, 315 S.E.2d 703 (1984))). "[E]ven if there is evidence to the contrary," this Court is bound by the trial court's findings of fact when they are supported by competent evidence. *Id.* at 330, 590 S.E.2d at 460 (citing *In re Adoption of Byrd*, 137 N.C. App. 623, 529 S.E.2d 465 (2000), *aff'd*, 354 N.C. 188, 552 S.E.2d 142 (2001)). "Finally, in reviewing the evidence, we defer to the trial court's determination of witnesses' credibility and the weight to be given their testimony." *Id.* at 331, 590 S.E.2d at 460 (citing *Leak v. Leak*, 129 N.C. App. 142, 150, 497 S.E.2d 702, 706, *disc.*

rev. denied, 348 N.C. 498, 510 S.E.2d 385 (1998)); *see State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)) ("In reviewing a trial judge's findings of fact, we are 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.' "); *see also Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) ("[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary." (first alteration in original) (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008) (ellipsis in original))).

The majority holds that the trial court erred in its decision by finding that respondent has met the support prong of N.C.G.S. § 48-3-601. I would hold that the Court of Appeals was correct to reject petitioners' argument and uphold the trial court's ruling. In order to satisfy the three prongs of the adoption consent statute, N.C.G.S. § 48-3-601,

> [r]espondent must have acknowledged paternity, *made reasonable and consistent support payments for the mother or child or both in accordance with his financial means*, and regularly communicated or attempted to communicate with the mother and child. Under the mandate of the statute, a putative father's failure to satisfy any of these requirements before the filing of the adoption petition would render his consent to the adoption unnecessary.

In re Byrd, 354 N.C. 188, 194, 552 S.E.2d 142, 146 (2001) (emphasis added).[2]

"The 'support' required under N.C.G.S. § 48-3-601(2)(b)(4)(II) is not specifically defined"; "however, [such] 'support' is best understood within the context of the statute as *actual*, *real and tangible support*, and . . . attempts or offers of support do not suffice." *Id.* at 196, 552 S.E.2d at 148 (emphasis added). For instance, as recognized by this Court five years later, the following facts in *In re Byrd*, this Court's seminal case on this issue, were insufficient to establish actual, real, and tangible support:

> [T]he paternal grandmother [in *In re Byrd*] offered O'Donnell, the expectant mother, a place to live and help

2. In this case, the only part of the consent statute at issue is the "support" prong.

> with medical bills and other costs, all of which O'Donnell declined. On the day O'Donnell gave birth, the putative father purchased a $100 money order for her; however, the money order did not reach O'Donnell until after the petitioners had filed for adoption.

In re Adoption of Anderson, 360 N.C. 271, 276-77, 624 S.E.2d 626, 629 (2006) (discussing and citing *In re Byrd*, 354 N.C. at 190-91, 552 S.E.2d at 144-45). This Court has stated that "attempts or offers of support, made by the putative father or another on his behalf, are not sufficient for purposes of the statute." *In re Byrd*, 354 N.C. at 197, 552 S.E.2d at 148.

Similarly, in *In re Adoption of Anderson* this Court held that numerous offers of support by the father were insufficient to show support under the adoption consent statute. 360 N.C. at 278-79, 624 S.E.2d at 630-31. Furthermore, *In re Anderson* presented additional facts showing that the putative father hired an attorney to send a letter offering financial support to the birth mother. *Id.* at 279, 624 S.E.2d at 630. In these circumstances, this Court held that the father in *In re Anderson* had not satisfied the support prong. *Id.* at 278-79, 624 S.E.2d at 630-31. In doing so, the Court in *In re Anderson* stated that "our resolution of the instant case does not grant biological mothers the power to thwart the rights of putative fathers." *Id.* at 279, 624 S.E.2d at 630. Rather, the Court upheld the legislative purpose of requiring "putative fathers to demonstrate parental responsibility with reasonable and consistent payments '*for* the support of the biological mother.' " *Id.* at 279, 624 S.E.2d at 630 (quoting N.C.G.S. § 48-3-601(2)(b)(4)(II) (2005)). Going on to explain the meaning of "for" in the context of the case, the Court concluded that

> *respondent could have supplied the requisite support any number of ways, such as opening a bank account or establishing a trust fund* for the benefit of [the mother] or their child. Had he done so, [the mother's] intransigence would not have prevented him from creating a payment record through regular deposits into the account or trust fund in accordance with his financial resources.

Id. at 279, 624 S.E.2d at 630-31 (emphasis added).

In contrast, the Court of Appeals upheld a trial court's finding that the father's consent was required in *In re Adoption of K.A.R.*, and this Court denied review. 205 N.C. App. 611, 613, 696 S.E.2d 757, 759 (2010), *disc. rev. denied*, 365 N.C. 75, 706 S.E.2d 236 (2011). In that case, the birth mother was eighteen years old, and the father was twenty years old. *Id.* at 612, 696 S.E.2d at 759. The father continually expressed a

desire to participate in the birth mother's and child's lives, even attending prenatal classes and doctor visits until the birth mother requested that he not accompany her any longer. *Id.* at 612-13, 696 S.E.2d at 759. When the birth mother became pregnant, the father was unemployed and was living with his parents. *Id.* at 612-13, 696 S.E.2d at 759. Before the child was born, the father found a job, and once he had an income, he purchased items for the baby "such as: a car seat, a baby crib mattress, and clothing worth over $200.00." *Id.* at 613, 696 S.E.2d at 759. The trial court concluded that the father provided reasonable and consistent support in accordance with his financial means as required under the statute, and the Court of Appeals affirmed the trial court's conclusion. *Id.* at 613, 696 S.E.2d at 759.

In upholding the trial court's ruling in *In re K.A.R.*, the Court of Appeals discussed the significance of the language in N.C.G.S. § 48-3-601(2)(b)(4)(II) that "obliges putative fathers to demonstrate parental responsibility with reasonable and consistent payments '*for* the support of the biological mother [. . . or the support of the minor, or both, which may include . . . other tangible means of support].' " *Id.* at 617, 696 S.E.2d at 761 (alterations in original) (quoting *In re Anderson*, 360 N.C. at 273, 624 S.E.2d at 627(quoting N.C.G.S. § 48-3-601(2)(b)(4)(II) (2005))). The Court of Appeals concluded that the deliberate "use of the word 'for' rather than 'to' suggests the legislature wanted to ensure that a putative father, who makes reasonable, consistent payments of support, could preserve his parental rights even where the biological mother refuses direct assistance." *Id.* at 617, 696 S.E.2d at 761. The Court of Appeals further explained that, in codifying N.C.G.S. § 48-3-601(2)(b)(4)(II), "the General Assembly sought 'to protect the interests and rights of men who have demonstrated paternal responsibility and to facilitate the adoption process in situations where a putative father for all intents and purposes has walked away from his responsibilities to mother and child . . . .' " *Id.* at 615, 696 S.E.2d at 760 (alteration in original) (quoting *In re Byrd*, 354 N.C. at 194, 552 S.E.2d at 146). The statute strikes a balance between these competing interests by ensuring a putative father can maintain his parental interest and by preventing a mother from unilaterally controlling the adoption process, while also allowing for certainty when a child is put up for adoption. *See id.* at 615, 696 S.E.2d at 760 (" '[A]n objective test that requires unconditional acknowledgment and tangible support' best serves the interests of all parties as well as the child.") (alteration in original) (quoting *In re Byrd*, 354 N.C. at 198, 552 S.E.2d at 149)).

As distinguished from the fathers in *In re Byrd* and *In re Anderson*, the Court of Appeals reasoned that the father in *In re K.A.R.*

"independently provided items of support for the child, even after his efforts to provide support and assistance directly to the mother were rebuffed." *Id.* at 617, 696 S.E.2d at 761. By obtaining tangible items, like clothing and a car seat, the father offered reasonable support based on his financial means, in compliance with N.C.G.S. § 48-3-601(2)(b)(4)(II). The Court of Appeals explained that this Court in "*In re Anderson* suggested one way a father could provide support independently of the mother; the father in the instant case, as determined by the trial court, has shown another." *Id.* at 617, 696 S.E.2d at 762.

Turning to this case, *In re K.A.R.* helps to support the trial court's conclusion that respondent provided the requisite support under N.C.G.S. § 48-3-601(2)(b)(4)(II). In fact, it is hard to distinguish the present facts from those of *In re K.A.R.* Unlike *In re Byrd* and *In re Anderson*, in which the respondents only made offers or attempted offers, here the trial court found that respondent actually set aside money for the benefit of C.H.M., similar to the father in *In re K.A.R.* who actually purchased items for the baby. While the majority in this case discounts respondent's evidence as "insufficient to establish the [respondent] made such payments before the statutory deadline," it is clear from the trial court's findings and this Court's precedent that respondent has indeed fulfilled the statutory requirement. Specifically, the majority finds respondent's evidence incompetent to show both that he fulfilled the support requirement before the deadline and that respondent made *reasonable* payments as required by N.C.G.S. § 48-3-601(2)(b)(4)(II). The majority is able to come to this conclusion not because respondent's evidence was in fact incompetent or insufficient, but because the majority takes issue with the type of support respondent provided—namely, saving cash in a lockbox. This is evident from the majority's requirement that respondent provide a "precise payment record." The majority makes much ado about respondent's inability to recall the exact amounts placed in the lockbox, respondent's lack of records, and respondent's lack of knowledge as to specific dates of his deposits. Ultimately, however, as already addressed earlier in this opinion, all of the majority's contentions are directly addressed and disproved by the trial court's competent findings of fact based on respondent's own testimony, bank statements, and cash back withdrawal receipts.

Furthermore, there are no specific requirements in the consent statute relating to the form that "support" must take. While the father's actions in *In re K.A.R.* are similar in kind to respondent's actions of saving money in a lockbox for the benefit of the child, our case law demonstrates a number of ways to satisfy the support requirement. While

the *In re Anderson* opinion specifically referred to bank accounts and trust funds—which surely are methods that would provide a "precise payment record"—these were only examples of possible ways to provide support. *See In re Anderson*, 360 N.C. at 279, 624 S.E.2d at 630-31. Specifically, this Court stated in *In re Anderson* that

> respondent could have supplied the requisite support *any number of ways*, *such as* opening a bank account or establishing a trust fund for the benefit of [the mother] or their child. Had he done so, [the mother's] intransigence would not have prevented him from creating a payment record through regular deposits into the account or trust fund in accordance with his financial resources.

Id. at 279, 624 S.E.2d at 630-31 (emphasis added). Therefore, the statute contemplates that some putative fathers, because of factors such as limited financial means, type of employment, and lack of access to banks, will not necessarily have the ability to establish bank accounts or trust funds.

Moreover, the plain language of N.C.G.S. § 48-3-601(2)(b)(4)(II) requires only that the putative father "[h]as provided, in accordance with his financial means, reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy, or the support of the minor, or both." No language indicates what form a "payment" must take to satisfy the support prong, what method of recordkeeping (if any) must be used, or if certain forms of payment are required over others. Rather, this Court has determined that to satisfy the support prong, the putative father must provide "actual, real and tangible support, and . . . attempts or offers of support do not suffice." *In re Byrd*, 354 N.C. at 196, 552 S.E.2d at 148. As this Court has not defined the form that "actual, real and tangible support" must take, the assessment of what qualifies as actual support is a question for the trial court to determine when considering all the evidence. It is not the business of this Court to reweigh the factual evidence in the record, and that is exactly what the majority has done here.

Consequently, based on the specific evidence presented in this case, I would hold that the act of saving money in a lockbox, just as purchasing baby items in *In re K.A.R.*, is a valid method of providing support to the birth mother or child. In addition, unlike what the majority contends, the actions by respondent here, as well as those of the respondent in *In re K.A.R.*, establish reasonable support commensurate with their financial means as contemplated by N.C.G.S. § 48-3-601(2)(b)(4)(II). Possibly,

the only distinguishing characteristic between the father's actions in *In re K.A.R.* and respondent's actions here is that the purchased baby items are more readily targeted to directly benefit the child, whereas cash in a lockbox could be used for a myriad of purposes. Yet, despite the differing characteristics between the contributions made on behalf of the child, applying the proper standard of appellate review, this Court must defer to the trial court's findings of fact when those facts are based on competent evidence. Here, the trial court made extensive findings of fact,[3] ultimately finding that respondent made reasonable and consistent payments based on his financial means and earmarked the savings for the benefit of the child.[4]

Finally, this Court has been careful to stress that a birth mother should not be able to completely control the adoption process. *See In re Byrd*, 354 N.C. at 196, 552 S.E.2d at 148 ("We also believe that the General Assembly did not intend to place the mother in total control of the adoption to the exclusion of any inherent rights of the biological father."); *see also In re Anderson*, 360 N.C. at 279, 624 S.E.2d at 630 ("So long as the father makes reasonable and consistent payments for the support of mother or child, the mother's refusal to accept assistance cannot defeat his paternal interest."). This Court's decisions in *In re Byrd* and *In re Anderson* recognize that North Carolina's adoption consent statute is flexible enough to allow for a putative father to maintain his parental rights despite the birth mother's intransigence. In the present case, the birth mother essentially attempted to "thwart" respondent's efforts to provide support. As the trial court found in this case, respondent provided adequate support commensurate with his financial means. The majority's decision—reading into the statute additional requirements of record-keeping or formal accounting—is simply not supported by statute or case law. Accordingly, I would affirm the decision of the Court of Appeals, which affirmed the trial court's order requiring the father's consent for C.H.M.'s adoption.

Justices HUDSON and MORGAN join in this dissenting opinion.

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3. The trial court relied on, *inter alia*, respondent's own testimony, copies of conversations via social media between respondent and the birth mother, bank statements and receipts, and testimony from the adoption agency's personnel.

4. The trial court noted that its findings were limited by the mother's failure to respond to a subpoena to appear at the hearing. The court noted that the mother was then living out of state and was not subject to the court's power to enforce the subpoena.

IN RE HENDERSON

[371 N.C. 45 (2018)]

IN RE INQUIRY CONCERNING A JUDGE, NO. 16-231

GARY L. HENDERSON, RESPONDENT

No. 30A18

Filed 11 May 2018

Judges—failure to issue ruling or respond in a timely manner—public reprimand

Where a district court judge failed to issue a ruling for more than two years on a motion for attorney's fees and expenses, failed to respond or delayed responding to party and attorney inquiries on the status of the pending ruling, and failed to respond in a timely manner to communications from the Judicial Standards Commission's investigator regarding the status of the ruling, the Supreme Court ordered that the judge be publicly reprimanded for violations of Canons 1, 2A, 3A, and 3B of the N.C. Code of Judicial Conduct.

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 20 December 2017 that Respondent Gary L. Henderson, a Judge of the General Court of Justice, District Court Division 26, State of North Carolina, receive a public reprimand for conduct in violation of Canons 1, 2A, 3A(3) and (5), and 3B(1) 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. This matter was calendared for argument in the Supreme Court on 18 April 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 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 District Court Judge Gary L. Henderson (Respondent) should be publicly reprimanded for violations of Canons 1, 2A, 3A, and 3B of the North Carolina Code of Judicial Conduct amounting to conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S.

§ 7A-376(b). Respondent has not challenged the findings of fact made by the Judicial Standards Commission (the Commission) or opposed the Commission's recommendation that he be publicly reprimanded by this Court.

On 2 June 2017, the Commission Counsel filed a Statement of Charges against Respondent alleging that he had engaged in conduct inappropriate to his office when he: "(1) failed to issue a ruling for more than two (2) years on a motion for attorney's fees and expenses . . . ; (2) failed to respond or delayed responding to party and attorney inquiries as to the status of the pending ruling; and (3) failed to respond in a timely manner to numerous communications from the Commission's investigator regarding the status of the ruling during the Commission's investigation into this matter."

On 20 December 2017, the Commission filed a Recommendation of Judicial Discipline, in which it made the following findings of fact:

> 1. On or about August 6, 2013, Respondent began presiding over a trial . . . to determine whether defendant Shaffer was entitled to attorney's fees and costs associated with her claims for post-separation support, permanent child custody, sanctions for purposeful delay, motion for contempt, and expert witness fees and costs. Plaintiff Zurosky was represented by attorney Tamela Wallace and defendant Shaffer was represented by attorney Amy Fiorenza. Unable to complete the hearing in a single session, the parties reconvened on April 23, 2014 and again on November 5, 2014 to conclude the trial. Respondent reserved ruling and directed the attorneys to submit written closing arguments. Attorney Fiorenza submitted the defendant's attorney's fees closing arguments, attachments and exhibits to Respondent on December 12, 2014. Attorney Wallace submitted the plaintiff's attorney's fees closing arguments to Respondent on December 19, 2014.
>
> 2. On June 15, 2015, six months after Respondent reserved judgment on the motion for attorney's fees, Attorney Fiorenza emailed Respondent inquiring as to the status of the ruling on attorney's fees, costs, and expenses. The following day, Respondent emailed the parties with apologies, noting the "matter is on my radar and it is my hope to work on it next week since court will be down for the Judge's Conference."

3. On August 28, 2015, another six weeks later, Attorney Fiorenza again contacted Respondent by email. Attorney Fiorenza asked Respondent what his estimated timeframe might be to issue a ruling and noted her client was anxious to receive a decision sometime in 2015. Respondent told Attorney Fiorenza that he did not anticipate having the order completed in 2015 because he would not have time.

4. On February 8, 2016, Attorney Fiorenza emailed Respondent a third time to inquire as to when a ruling could be expected. Respondent did not respond to this inquiry.

5. On April 7, 2016, attorney Fiorenza emailed Respondent a final time regarding the status of the decision on attorney's fees as all other matters in the case had been concluded. Attorney Fiorenza further advised Respondent that she would be forced to withdraw from the case if a decision was not soon rendered as it had been sixteen (16) months since the hearing concluded. Respondent did not respond to this inquiry.

6. Attorney Fiorenza withdrew from the case on June 6, 2016.

7. On June 20, 2016, Ms. Shaffer, now a pro se defendant, emailed Respondent, and copied the opposing attorney, to inquire when the parties could expect a decision on the attorney's fees motion heard in December 2014. Respondent did not respond. . . .

8. Having heard no response from Respondent, Ms. Shaffer emailed Chief District Court Judge Regan Miller on the morning of July 15, 2016, and copied Respondent, seeking the Chief Judge's assistance in getting a response from Respondent. Ms. Shaffer expressed her frustration with the then eighteen (18) month delay in issuing a decision in her matter. Later that morning, Chief Judge Miller forwarded Ms. Shaffer's email to Respondent. That afternoon, Respondent replied to Chief Judge Miller that he had been "dragging [his] feet" and that he had no excuses for the delay other than his "dread" of the case. Respondent at that time also committed to "making a decision soon." Respondent, however, did not respond to Ms. Shaffer or

otherwise inform the parties as to his intentions or the status of the ruling.

9. On August 26, 2016, over a month after committing to Chief Judge Miller that he would soon issue his decision, Respondent finally emailed the parties to apologize for the tardiness of his decision and informed them that he intended to issue a decision by the end of the week of September 5, 2016. Although Attorney Fiorenza had withdrawn from the case, Respondent included her in the email and notified her that she would be tasked with drafting a proposed order consistent with his anticipated ruling in early September.

10. Respondent failed to issue the ruling the week of September 5, 2016 as he had indicated to the parties and despite his commitment to Chief Judge Miller . . . that he would be "making a decision soon.". . .

11. Ms. Shaffer emailed Respondent again on October 10, 2016, imploring Respondent to issue a decision. Respondent again did not respond.

12. On November 9, 2016, Ms. Shaffer filed a complaint with the Commission regarding the delay in issuing the attorney's fees decision. . . .

. . . .

14. On January 22, 2017, Respondent emailed the attorneys with his decision, tasking attorney Fiorenza with drafting an order for Respondent in accordance with his instructions.

15. On March 15, 2017, . . . Respondent informed the Commission that the attorneys' fees order had still not been issued yet as he was waiting on the draft order from the attorneys. Pursuant to Mecklenberg County Local Rules, the Order had to be drafted by attorney Fiorenza and then provided to attorney Wallace for review and reconciliation.

16. On March 27, 2017, Respondent informed the Commission that the Order had been entered, over 2 years and 3 months after the final hearing on the motion for attorneys' fees.

(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. Canon 3 of the Code of Judicial Conduct governs a judge's discharge of his or her official duties. In so doing, Canon 3A(3) requires a judge to be "patient, dignified and courteous to litigants, witnesses, lawyers and others with whom the judge deals in the judge's official capacity." Canon 3A(5) requires a judge to "dispose promptly of the business of the court." Furthermore, Canon 3B(1) requires a judge to "diligently discharge the judge's administrative responsibilities" and "maintain professional competence in judicial administration."
>
> 4. The Commission's findings of fact, as supported by the Stipulation, show that Respondent failed to issue a ruling for more than two years and three months after the last day of the hearing on the matter, and that such delay was without justification and occurred notwithstanding multiple requests to issue a ruling from the parties, the attorneys and Respondent's Chief Judge. Further, Respondent concedes that there was no excuse for the delay other than his "dread" of the case.
>
> 5. Upon the agreement of the Respondent and the Commission's independent review of the stipulated facts concerning Respondent's unreasonable and unjustified delay . . . , the Commission concludes that Respondent:

a. failed to personally observe appropriate standards of conduct necessary to ensure that the integrity of the judiciary is preserved, in violation of Canon 1 of the North Carolina Code of Judicial Conduct;

b. failed to conduct himself in a manner that promotes public confidence in the integrity of the judiciary, in violation of Canon 2A of the North Carolina Code of Judicial conduct;

c. failed to be courteous to litigants and lawyers with whom he was dealing in his official capacity, in violation of Canon 3A(3) of the North Carolina Code of Judicial Conduct;

d. failed to dispose promptly of the business of the court, in violation of Canon 3A(5) of the North Carolina Code of Judicial Conduct;

e. and failed to diligently discharge his administrative responsibilities and maintain professional competence in judicial administration in violation of Canon 3B(1) of the North Carolina Code of Judicial Conduct.

6. 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 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.) (Citations omitted.) Based upon these findings of fact and conclusions of law, the Commission recommended that this Court publicly reprimand Respondent. The Commission based this recommendation on its earlier findings and conclusions and the following additional dispositional determinations:

1. Respondent freely and voluntarily entered into the Stipulation to bring closure to this matter and because of his concern for protecting the integrity of the court system. Respondent understands the negative impact his actions have had on the integrity and impartiality of the judiciary.

> 2. Respondent has an excellent reputation in his community. 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.
>
> 3. Respondent has been cooperative with the Commission's investigation, voluntarily providing information about the incident and fully and openly admitting error and remorse.
>
> 4. Respondent's record of service to the judiciary, the profession and the community at large is otherwise exemplary. . . .
>
> 5. Upon reflecting upon the circumstances that brought him to this juncture, Respondent 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). Respondent further acknowledges that the appropriate discipline in this matter is public reprimand by the North Carolina Supreme Court.
>
> 6. 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 and boldface type 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. Accordingly, 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 Gary L. Henderson be PUBLICLY REPRIMANDED for violations of Canons 1, 2A, 3A, and 3B 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 11th day of May, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 11th day of May, 2018.

Amy Funderburk
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

IN RE JOHNSON

[371 N.C. 53 (2018)]

IN RE JUDICIAL REVIEW OF FINAL AGENCY DECISION OF THE N.C. BOARD OF CPA EXAMINERS IN THE MATTERS OF BELINDA L. JOHNSON, CPA #31871; AND BELINDA JOHNSON CPA, P.A., DATED JUNE 23, 2016

No. 214A17

Filed 11 May 2018

1. Accountants and Accounting—failure to pay for peer review—discipline by state board—constitutional

Where petitioners—a Certified Public Accountant and her firm—allegedly failed to fulfill the terms of a peer review contract by failing to pay for the peer review, and the N.C. State Board of Certified Public Accountant Examiners revoked the firm's registration for three years or until petitioners fulfilled the terms of the peer review contract, the Supreme Court rejected petitioners' argument that the Board's decision violated the N.C. Constitution by exceeding the judicial powers reasonably necessary for the agency to serve its legislative purpose. The discipline imposed by the Board, based on its determination that petitioners had entered into a peer review contract but then failed to perform the terms of that contract, was consistent with its rules and regulations and appropriate to the purpose of the agency, guided by the standards established by the General Assembly and subject to judicial review.

2. Accountants and Accounting—discipline by state board—incorrect finding on appeal by Business Court—not reversible error

Where the Business Court affirmed the final decision of the N.C. State Board of Certified Public Accountant Examiners that found petitioners had violated rules and standards promulgated by the Board and that suspended the accounting firm's registration, the Supreme Court agreed with petitioners that the Business Court erred in finding that their failure to object to testimony from an expert witness before the Board constituted a waiver of petitioners' right to raise this objection on appeal. This error, however, did not affect the result of the case, and therefore it was not reversible.

3. Accountants and Accounting—discipline by state board—petitioners' refusal to provide records—substantial evidence to support findings

Where petitioners—a Certified Public Accountant and her firm—allegedly failed to fulfill the terms of a peer review contract

by failing to pay for the peer review, and the N.C. State Board of Certified Public Accountant Examiners revoked the firm's registration for three years or until petitioners fulfilled the terms of the peer review contract, the Supreme Court rejected petitioners' argument that the Board lacked substantial evidence to support the finding that petitioners failed to comply with Government Auditing Standards and generally accepted auditing standards. The Board was unable to review petitioners' full work papers only because petitioners refused to provide them. It would undermine a fundamental purpose of a regulatory board for a regulated party to be able to escape review and disciplinary action by refusing to provide records solely in its possession.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an opinion and order dated 1 May 2017 entered by Judge Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases, in Superior Court, Wake County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 6 February 2018.

Heidgerd Law Office, LLP, by Jason E. Spain, C.D. Heidgerd, and Eric D. Edwards, for petitioner-appellants.

Allen & Pinnix, P.A., by Noel L. Allen and Nathan E. Standley; and Frank X. Trainor, III, Staff Attorney, North Carolina State Board of CPA Examiners, for respondent-appellee.

JACKSON, Justice.

In this case we consider whether the North Carolina State Board of Certified Public Accountant Examiners (the Board) can take disciplinary action against an individual or entity regulated by the Board for failure to follow a rule requiring compliance with the terms of a peer review contract. We also consider whether the Board's decision to suspend petitioners' registration in this case was made based on lawful procedure and substantial evidence. Because we conclude that the Board lawfully required a certified professional and her corporation to honor a private peer review contract and that the Board's decision was based on substantial evidence, we affirm the decision of the North Carolina Business Court affirming the Board's disciplining of petitioners.

Petitioner Belinda Johnson is a Certified Public Accountant (CPA) holding a certificate issued by the Board. Petitioner Belinda Johnson

CPA, P.A. (the Firm) is a registered certified public accounting corporation, solely owned by Johnson. On 23 June 2016, the Board issued a final decision in which it unanimously found that petitioners failed to comply with required auditing standards, failed to fulfill the terms of a peer review contract, and failed to timely respond to the Board and its staff during an investigation. The Board concluded that this conduct violated rules and standards promulgated by the Board and suspended the Firm's registration for three years or until petitioners fulfilled the terms of their peer review contract. The Board also imposed monetary penalties on Johnson, issued a five-year revocation of Johnson's CPA certificate, and stayed that revocation "provided Respondent Johnson complie[d] with all North Carolina Accountancy laws and rules during the period of the stayed revocation."

The facts underlying the Board's decision arise from a 2013 peer review of petitioners' accounting and auditing practice. In order to satisfy Board rule 21 NCAC 08M .0105(d), requiring "[p]articipation in and completion of the AICPA Peer Review Program," petitioners entered into a peer review contract with Tina Purvis of Hollingsworth Avent Averre & Purvis, PA. The peer review contract specified that Purvis would bill at a rate of $150 per hour and estimated that the peer review would take between fifteen and twenty-one hours. In part, Purvis performed a detailed review of an audit petitioners had performed for one of their not-for-profit clients (the client audit). Based upon this review, Purvis noted material departures from the relevant standards, issued a failing result, and recommended that the Firm reissue certain documents related to the client audit. Johnson disputed the results of the failed peer review before the North Carolina Association of Certified Public Accountants Peer Review Committee. After an investigation and telephone conference, the Peer Review Committee accepted Purvis's review, including the failing result.

On 30 April 2014, Purvis filed a complaint with the Board alleging that petitioners failed to fulfill the terms of the peer review contract by refusing to pay for the peer review. This complaint was forwarded to the Board's Professional Standards Committee (the committee). The committee informed Johnson that she had not complied with the peer review contract and directed petitioners to resolve the matter with Purvis by 23 October 2014. Petitioners did not resolve their dispute with Purvis and on 28 August 2015, the committee requested that petitioners submit documents related to the Purvis peer review. On 4 September 2015, Johnson sent a letter to the committee declining to send the documents because she considered the information "unnecessary and redundant" and "irrelevant and immaterial to this case."

After providing notice to petitioners, the Board held a hearing to address these matters on 19 May 2016. Petitioners were not represented by counsel at this hearing, but Johnson attended, introduced evidence, and cross-examined witnesses. On 23 June 2016, the Board issued its final decision imposing discipline on petitioners. On 22 July 2016, petitioners filed for judicial review in Superior Court, Mecklenburg County. The case was subsequently designated as a mandatory complex business case by the Chief Justice and venue was transferred to Wake County.

Petitioners were represented by counsel before the Business Court. After receiving briefs from both parties, the Business Court held a hearing and issued a written order upholding the Board's decision. The Business Court noted:

> Here, the Court's task of reviewing the Board's Order is made exceedingly difficult by the Petitioner[s'] failure to support their exceptions with references to the record evidence, or with coherent arguments or citation to legal authority. Petitioner[s'] brief consists primarily of declaratory statements that, for the most part, are not linked to any particular exception in their Petition. Nevertheless, the Court will review the Board's critical findings of fact and conclusions of law to determine whether they are supported by the evidence and free from errors of law.

In re Johnson, No. 16 CVS 12212, 2017 WL 1745650, at *4 (N.C. Super. Ct. Wake County (Bus. Ct.) May 1, 2017). After completing its review of "the Board's critical findings of fact and conclusions of law," *id.*, the Business Court affirmed the Board's decision, *id.* at *8. Petitioners appealed to this Court.

[1] On appeal, petitioners first argue that the Board's decision to revoke the Firm's registration for three years or until petitioners fulfilled the terms of the peer review contract violated the North Carolina Constitution. Maintaining that the decision effectively was an order enforcing a disputed private contract, petitioners contend that such a directive exceeded the judicial powers "reasonably necessary for the agency to serve its legislative purpose."

A claim that the agency acted in violation of constitutional provisions is reviewed de novo, with the reviewing court "consider[ing] the matter anew[ ] and freely substitut[ing] its own judgment for the agency's." *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 659-60, 599 S.E.2d 888, 894-95 (2004) (quoting *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13-14, 565 S.E.2d 9, 17 (2002)

(second alteration in original)). Our state constitution provides that "[t]he General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created." N.C. Const. art. IV, § 3. To determine whether and how an administrative agency can permissibly exercise judicial power, this Court must engage in a fact-specific analysis considering "the purpose for which the agency was established and . . . the nature and extent of the judicial power undertaken to be conferred." *In re Civil Penalty*, 324 N.C. 373, 379, 379 S.E.2d 30, 34 (1989) (emphasis omitted) (quoting *State ex rel. Lanier v. Vines*, 274 N.C. 486, 497, 164 S.E.2d 161, 168 (1968)). This Court has held that when the General Assembly delegated the power to grant and revoke occupational licenses to an administrative agency, it was reasonably necessary for that agency to hold hearings and determine facts relating to the conduct of the licensee when exercising that power, but it was not permissible for that agency to exercise free discretion to impose a civil penalty of up to $25,000 on a licensee for each violation of law. *Lanier*, 274 N.C. at 497, 164 S.E.2d at 168. On the other hand, this Court has determined that the General Assembly may grant an administrative agency the discretion to impose a civil penalty when such discretion is consistent with the purpose of the agency, bound by guiding standards, and subject to judicial review. *In re Civil Penalty*, 324 N.C. at 382-83, 379 S.E.2d at 35-36.

With respect to the Board action at issue in this case, the General Assembly has delegated to the Board the authority to adopt rules of professional ethics and conduct for CPAs. N.C.G.S. § 93-12(9) (2017). Section 93-12 specifies that the Board "may formulate rules and regulations for report review and peer review" and "require remedial action by any firm with a deficiency in the review according to the rules established by the Board." *Id.* § 93-12(8c) (2017). The legislature also has authorized the Board to undertake disciplinary action in response to a "[v]iolation of any rule of professional ethics and professional conduct adopted by the Board." *Id.* § 93-12(9)(e). Subsection 93-12(9) explicitly authorizes the Board to use three forms of discipline: certificate revocation, censure, or assessment of a civil penalty not to exceed one thousand dollars. The Board is further directed to take any disciplinary action in compliance with N.C.G.S. Chapter 150B, the Administrative Procedure Act (APA). *Id.* § 93-12(9). As directed by the APA, a party "aggrieved by the final decision in a contested case . . . is entitled to judicial review of the decision." *Id.* § 150B-43 (2017).

Here petitioners challenge the legal authority of the Board to impose one disciplinary action: "Respondent Firm's registration shall be suspended for three (3) years, or until Respondent Firm provides proof satisfactory to the Board that it has fulfilled the terms of the 2013 Peer Review engagement in compliance with 21 NCAC 08N .0203(b)(4), whichever occurs first." Petitioners take the position that the Board's disciplinary action is an affirmation of a disputed debt, which is in effect a civil judgment outside the judicial powers reasonably necessary to achieve the Board's purpose; however, this is a misapprehension of the nature of the disciplinary action. The Board has not ordered petitioners to pay Purvis a particular amount. It simply determined, based in part on admissions by Johnson at the hearing, that petitioners entered into the peer review contract in accordance with 21 NCAC 08M .0105 but then failed to perform the terms of that contract. Consistent with its rules and regulations, the Board then suspended the Firm's registration for three years or until it demonstrated compliance with the rule. Because this discipline was appropriate to the purpose of the agency, guided by standards established by the General Assembly, and subject to judicial review, it was not an impermissible exercise of judicial power.

[2] Next, petitioners argue that the Business Court erred in finding that their failure to object to testimony from an expert witness before the Board constituted a waiver of petitioners' right to raise this objection on appeal. While we agree with petitioners that the Business Court erred in its reasoning, this error did not affect the result of this case, and therefore, it is not reversible error.

A challenge to an agency decision on the grounds of unlawful procedure is also reviewed de novo. *See Carroll*, 358 N.C. at 659-60, 599 S.E.2d at 894-95. Petitioners are correct insofar as "[i]t shall not be necessary for a party or his attorney to object to evidence at the hearing in order to preserve the right to object to its consideration by the agency in reaching its decision, or by the court of judicial review." N.C.G.S. § 150B-41(a) (2017). Before this Court, petitioners argue that the expert witness did not have sufficient facts to support her opinion. The gravamen of this argument is that because the expert witness did not have petitioner Johnson's complete work papers, she could not form a valid expert opinion, even though the records she did have were those petitioners had provided to the Board to demonstrate their compliance with the rules and regulations at issue in the hearing. The record shows, however, that the expert noted both that documents that a competent auditor would include were missing from the record and that some documents in the record did not meet the standards of competence. If we were to agree

with petitioners' argument that the expert could not properly testify regarding the import of documents missing from the files provided, this would not change the overall result. Petitioners' argument would only limit the evidence this Court would consider in determining if substantial evidence in the record supports the Board's determination.

[3] Finally, petitioners argue that the Board lacked substantial evidence to support the finding that petitioners failed to comply with Government Auditing Standards and generally accepted auditing standards. We disagree.

An argument that an agency action was not supported by substantial evidence is reviewed on the whole record, in which the reviewing court "examine[s] all the record evidence . . . to determine whether there is substantial evidence to justify the agency's decision." *Carroll*, 358 N.C. at 660, 559 S.E.2d at 895 (quoting *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004)). " 'Substantial evidence' is 'relevant evidence a reasonable mind might accept as adequate to support a conclusion.' " *Id.* at 660, 599 S.E.2d at 895 (quoting N.C.G.S. § 150B-2(8b) (2003)). If the expert witness testimony were not allowed, petitioners argue that it would be improper to impose disciplinary action pursuant to 21 NCAC 08N .0203 based solely on a failed peer review. But this rule neither contains the requirement proposed by petitioners nor is it the provision that the Board found petitioners had violated for failing to comply with standards. *Compare* 21 NCAC 08N .0203 (2017) *with id.* 08N .0212, .0403, *and* .0409 (2017). In fact, the Board had before it voluminous uncontested evidence to consider, including the records submitted by petitioners and the report and testimony by Purvis, as well as unchallenged testimony by the expert witness. While it is true that the Board was not in a position to review petitioners' full work papers, petitioners' refusal to provide them—an action for which petitioners were disciplined—was the only reason for this shortcoming. It would undermine a fundamental purpose of a regulatory board for a regulated party to be able to escape review and disciplinary action by refusing to provide records solely in its possession. Therefore, we conclude that the record contained sufficient evidence to support the Board's decision.

The disciplinary actions imposed by the Board and challenged by petitioners were consistent with the purpose of the agency, bound by guiding standards, and subject to judicial review. Therefore, we hold that the Board's action was not an unconstitutional exercise of judicial power. Furthermore, we hold that the Board's decision was supported

by substantial evidence notwithstanding the procedural error alleged by petitioners. Accordingly, for the foregoing reasons, we affirm the decision of the Business Court affirming the Board's imposition of disciplinary actions against petitioners.

AFFIRMED.

QUALITY BUILT HOMES INCORPORATED AND STAFFORD LAND COMPANY, INC.
v.
TOWN OF CARTHAGE

No. 315PA15-2

Filed 11 May 2018

1. Statutes of Limitation and Repose—impact fees—three-year statute of limitations

Plaintiffs' claims against a town arising from impact fees accrued when the fees where paid, not when the ordinance was passed, and the three-year statute of limitations in N.C.G.S. § 1-52(2) was applicable. Plaintiffs' last payment was more than three years after their last payment, and their claim was barred.

2. Estoppel—acceptance of benefits

In a case involving impact fees, the Town's contention that plaintiffs' claims were barred by the doctrine of estoppel by the acceptance of benefits was rejected where it did not appear that plaintiffs received any benefit from the payment of the challenged water and sewer impact fees that they would not have otherwise been entitled to receive.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 795 S.E.2d 436 (2016), reversing and remanding an order allowing summary judgment entered on 17 October 2014 by Judge James M. Webb in Superior Court, Moore County, after the Supreme Court of North Carolina remanded the Court of Appeals' prior decision in this case, *Quality Built Homes Inc. v. Town of Carthage*, 242 N.C. App. 521, 776 S.E.2d 897 (2015) (unpublished). Heard in the Supreme Court on 9 January 2018.

Ferguson, Hayes, Hawkins & DeMay, PLLC, by James R. DeMay; and Scarbrough & Scarbrough, PLLC, by John F. Scarbrough, Madeline J. Trilling, and James E. Scarbrough, for plaintiff-appellees.

Cranfill Sumner & Hartzog LLP, by Susan K. Burkhart, for defendant-appellant.

Ellis & Winters LLP, by Stephen D. Feldman, Steven A. Scoggan, and Paul M. Cox, for North Carolina Water Quality Association and the Municipalities of Apex, Concord, Holly Springs, Jacksonville, Kannapolis, Surf City, and Winston-Salem; and F. Paul Calamita for North Carolina Water Quality Association, amici curiae.

Erwin, Bishop, Capitano & Moss, P.A., by J. Daniel Bishop and Joseph W. Moss, Jr., for Union County, amicus curiae.

ERVIN, Justice.

The issues before us in this case involve when the claims that plaintiffs Quality Built Homes Incorporated and Stafford Land Company, Inc., have asserted against defendant Town of Carthage accrued and whether plaintiffs' claims are barred by the one-, two-, three-, or ten-year statute of limitations and the doctrine of estoppel by the acceptance of benefits. After careful review of the claims asserted against the Town in plaintiffs' complaint and the applicable law, we conclude that plaintiffs' cause of action accrued upon the Town's exaction of the unlawful impact fees against plaintiffs and that plaintiffs' claims against the Town arise from a liability created by statute that is subject to the three-year statute of limitations contained in N.C.G.S. § 1-52(2). In addition, we further conclude that the Town's assertion that plaintiffs' claims are barred by the doctrine of estoppel by the acceptance of benefits lacks merit. As a result, we affirm the Court of Appeals' decision, in part; reverse the Court of Appeals' decision, in part; and remand this case to the Court of Appeals for further remand to the Superior Court, Moore County, for further proceedings not inconsistent with this opinion.

The Town operates a public water and sewer system for the benefit of its residents. In 2003, the Town adopted two ordinances providing for the assessment of water and sewer impact fees known, respectively, as Ordinance § 51.076 and Ordinance § 51.097. According to the Town, the required impact fees were to "be used to cover the cost of expanding

the water [and sewer] system[s]," with fee payments due and owing at the time of final plat approval or at the time at which the payment of a separate fee intended to cover the cost of connecting end-user customers to the Town's water and sewer system was made. As of the time that this action was commenced, Quality Built Homes had paid the Town $66,000.00 in water and sewer impact fees and placed an additional $4,000.00 into an escrow account following the filing of its complaint[1] and Stafford Land had paid the Town $57,000.00 in water and sewer impact fees.

On 28 October 2013, plaintiffs filed a complaint against the Town in the Superior Court, Moore County. In their complaint, plaintiffs asked the trial court "to determine whether [the Town] has authority to enact and enforce portions of its ordinance regulating the collection of [the water and sewer] impact fees" and sought to recover the unlawful impact fees that they had paid to the Town, plus interest, as authorized by N.C.G.S. § 160A-363(e), and attorneys' fees, as authorized by N.C.G.S. § 6-21.7. On 23 June 2014, plaintiffs amended their complaint to include claims asserting that the challenged impact fees violated the equal protection and due process provisions of the North Carolina Constitution, resulted in unreasonable discrimination in violation of N.C.G.S. § 160A-314, and contravened the Town's impact fee ordinances. On 29 August 2014, the Town filed an answer to plaintiffs' amended complaint in which it denied the material allegations of the amended complaint and asserted a number of affirmative defenses, including claims that the challenged impact fees had adequate statutory authorization and that plaintiffs' claims were barred by the applicable statute of limitations and the doctrine of waiver or estoppel through the acceptance of benefits. After the parties filed cross-motions for summary judgment, the trial court entered an order on 17 October 2014 granting summary judgment in favor of the Town. Plaintiffs noted an appeal from the trial court's order to the Court of Appeals.

On 4 August 2015, the Court of Appeals filed an unpublished opinion holding that the Town had "acted within the authority conferred by North Carolina General Statutes, sections 160A[-]312, -313, and -314 to collect a water and sewer impact fee." *Quality Built Homes Inc.*

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1. In spite of the requirement that the water and sewer impact fees be paid at the time of final plat approval, Quality Built Homes was allowed to pay these fees at the time that it received individual development permits. After the filing of plaintiffs' complaint, an additional $4,000.00 in impact fee payments made by Quality Built Homes was placed into escrow by agreement of the parties, with the final disposition of this amount to be determined at the conclusion of the present litigation.

v. Town of Carthage, 242 N.C. App. 521, 776 S.E.2d 897, 2015 WL 4620404, at *5 (2015) (unpublished). On 5 November 2015, this Court allowed discretionary review of the Court of Appeals' decision. On 19 August 2016, this Court filed an opinion reversing the Court of Appeals' decision on the grounds that the challenged impact fee ordinances were unlawful. *Quality Built Homes, Inc. v. Town of Carthage*, 369 N.C. 15, 22, 789 S.E.2d 454, 459 (2016). More specifically, we determined that, "[w]hile the enabling statutes allow [the Town] to charge for the contemporaneous use of its water and sewer systems, the plain language of the Public Enterprise Statutes clearly fails to empower the Town to impose impact fees for future services." *Id.* at 19-20, 789 S.E.2d at 458. In light of this determination, we remanded this case to the Court of Appeals in order to allow it to address whether plaintiffs' claims were barred by the applicable statute of limitations or the doctrine of estoppel by the acceptance of benefits.[2] *Id.* at 18 n.2, 22, 789 S.E.2d at 457 n.2, 459.

On 30 December 2016, the Court of Appeals filed an unpublished opinion holding that plaintiffs' claims against the Town were subject to the ten-year statute of limitations set out in N.C.G.S. § 1-56, *Quality Built Homes Inc. v. Town of Carthage*, __ N.C. App. __, 795 S.E.2d 436, 2016 WL 7984235, at *2 (2016) (unpublished), on the grounds that "North Carolina courts have held that ultra vires claims for charging fees without statutory authority have a ten-year statute of limitations," *id.* (quoting *Tommy Davis Constr. Inc. v. Cape Fear Pub. Util. Auth.*, No. 7:13-CV-2-H, 2014 WL 3345043, at *3 (E.D.N.C. July 8, 2014), *aff'd*, 807 F.3d 62 (2015)). As a result, given that plaintiffs had paid the challenged impact fees within ten years before filing their complaint in this case, the Court of Appeals held that plaintiffs' claims were not time-barred. *Id.* at *3. In addition, the Court of Appeals held that plaintiffs were not estopped from pursuing their claims against the Town on the grounds that "[o]ne cannot be estopped by accepting that which he would be legally entitled to receive in any event" and that the General Assembly "clearly contemplated that even if a party received a 'benefit' . . . in exchange for paying an illegal fee, the party should still receive a recovery of that fee." *Id.* (first alteration in original) (first quoting *Beck v. Beck*, 175 N.C. App. 519, 525, 624 S.E.2d 411, 415 (2006); and then citing N.C.G.S. § 160A-363(e)). As a result, the Court of Appeals reversed the trial court's order and remanded this case to the Superior Court, Moore County, for the purpose of "mak[ing] the appropriate findings

2. Although we had initially granted discretionary review with respect to these issues, we dismissed the discretionary review petition relating to them as having been improvidently granted. *Quality Built Homes Inc.*, 369 N.C. at 22, 789 S.E.2d at 459.

of fact as to (1) whether defendant abused its discretion making attorneys' fee mandatory and (2) a reasonable attorneys' fees award to plaintiff, whether discretionary or mandatory." *Id.* at *4. We granted the Town's request for discretionary review of the Court of Appeals' remand decision.

[1] In seeking relief from the Court of Appeals' decision before this Court, the Town argues that the Court of Appeals had ignored the fundamental legal principle that a claim accrues when the right to maintain an action arises, which, in this case, was the date upon which the challenged ordinances became effective, citing *Williams v. Blue Cross Blue Shield of North Carolina*, 357 N.C. 170, 177-78, 581 S.E.2d 415, 423 (2003). According to the Town, the "continuing wrong" doctrine has no application in this case given that, unlike the situation at issue in *Williams*, "the [p]laintiffs, in this case, who are in the business of developing property, knew at the moment the Ordinances were passed, that they would be subject to the Ordinances' requirement of the payment of water and sewer impact fees." (Emphasis omitted.) In addition, the Town argued that the "continuing wrong" doctrine has no application to ultra vires claims.

In the Town's view, the applicable statute of limitations for purposes of this case is the one-year statute of limitations set out in 1-54(10) and N.C.G.S. §§ 160A-364.1(b), which governs challenges to the validity of zoning and development ordinances. According to N.C.G.S. § 160A-364.1(b), which applies to actions "challenging the validity of any zoning or unified development ordinance or any provision thereof adopted under [Article 19, Planning and Regulation of Development]," N.C.G.S. § 160A-364.1(b) (2017), and N.C.G.S. § 1-54(10), which applies to "[a]ctions contesting the validity of any zoning or unified development ordinance or any provision thereof adopted under . . . Part 3 of Article 19 of Chapter 160A of the General Statutes," *id.* § 1-54(10) (2017), the applicable statute of limitations is one year. The Town contends that N.C.G.S. § 160A-363(e) should be harmonized and construed with N.C.G.S. § 160A-364.1(b) given that they address the same subject matter and that the two statutory provisions establish that a claim for "refund for an illegal exaction in the development process is subject to the one-year statute of limitations in N.C.G.S. § 160A-364.1(b)," citing, *inter alia*, *In re M.I.W.*, 365 N.C. 374, 382, 722 S.E.2d 469, 475 (2012).

In the alternative, the Town asserts that the two-year statute of limitations set out in N.C.G.S. § 1-53(1) operates to bar plaintiffs' claims. More specifically, the Town notes that N.C.G.S. § 1-53(1) provides that "[a]n action against a local unit of government upon a contract, obligation

or liability arising out of a contract, express or implied," must be filed within two years. N.C.G.S. § 1-53(1) (2017). The Town contends that the two-year statute of limitations set out in N.C.G.S. § 1-53(1) applies in this case because plaintiffs' claims are tantamount to a common law claim for breach of an implied contract given that a municipality's proprietary actions mirror those of a business, citing *Town of Spring Hope v. Bissette*, 305 N.C. 248, 250-51, 287 S.E.2d 851, 853 (1982) (stating that "[t]his rate-making function [pursuant to N.C.G.S. § 160A-314(a)] is a proprietary rather than a governmental one, limited only by statute or contractual agreement"). As a result, the Town contends that plaintiffs' claims, which arise from the operation of the Town's public enterprise system, should be subject to the two-year statute of limitations set out in N.C.G.S. § 1-53(1).

In the event that plaintiffs' claims are not subject to the two-year statute of limitations set out in N.C.G.S. § 1-53(1), the Town contends that the applicable statute of limitations is the three-year statute of limitations set out in N.C.G.S. § 1-52(2) applicable to "a liability created by statute," quoting N.C.G.S. § 1-52(2) (2017). According to the Town, plaintiffs' claims are subject to the three-year statute of limitations set out in N.C.G.S. § 1-52(2) because the Town's liability is authorized by N.C.G.S. § 160A-174(b) and arises from the enactment of a pair of ultra vires ordinances. In the alternative, the Town argues that, if the applicable statute of limitations is not found in N.C.G.S. § 1-52(2), this case is governed by N.C.G.S. § 1-52(5), which applies to claims "[f]or criminal conversation, or for any other injury to the person or rights of another, not arising on contract," quoting N.C.G.S. § 1-52(5) (2017).[3]

According to the Town, this Court has only applied the "catch-all" ten-year statute of limitations in cases involving resulting or constructive trusts, first citing *Orr v. Calvert*, 365 N.C. 320, 720 S.E.2d 387 (2011); then citing in the following sequence *Cline v. Cline*, 297 N.C. 336, 255 S.E.2d 399 (1979); *Jarrett v. Green*, 230 N.C. 104, 52 S.E.2d 223 (1949); *Bowen v. Darden*, 241 N.C. 11, 84 S.E.2d 289 (1954); *Sandlin v. Weaver*, 240 N.C. 703, 83 S.E.2d 806 (1954); and *Teachey v. Gurley*, 214 N.C. 288, 199 S.E. 83 (1938). Although the Town concedes that, even though "there

3. In its reply brief, the Town also suggested that the three-year statute of limitations applicable to claims "for the recovery of an unlawful fee, charge, or exaction collected by a county, municipality, or other unit of local government for water or sewer service or water and sewer service" set out in N.C.G.S. § 1-52(15), which had been enacted by the General Assembly after the filing of the Town's initial brief, constituted a clarifying amendment to N.C.G.S. § 1-52 and barred the maintenance of plaintiffs' claims. Act of June 29, 2017, ch. 138, secs. 10(b), 11, 2017-4 N.C. Adv. Legis. Serv. 174, 180 (LexisNexis).

may be a claim that is so unique that it bears no resemblance to any claim presently envisioned by our legislature, thereby falling outside all of the multitudinous statutes of limitations included in Chapter I, Subchapter II, Article 5, of the General Statutes, this is not such a case." (Emphases omitted.)

Finally, the Town argues that plaintiffs' claims are barred by the doctrine of estoppel by the acceptance of benefits. According to the Town, "one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens." *Convent of the Sisters of St. Joseph v. City of Winston-Salem*, 243 N.C. 316, 324, 90 S.E.2d 879, 885 (1956). Allowing plaintiffs to recover the water and sewer impact fees that they have paid to the Town would permit them to receive "an unfair windfall" given that plaintiffs' developments have received needed permits and had access to the Town's water and sewer system for a period in excess of ten years and given that plaintiffs collected the impact fee amounts from their own customers as part of the price paid to purchase land in plaintiffs' developments. As a result, for all of these reasons, the Town contends that the Court of Appeals erred by remanding this case to the trial court for the entry of an order awarding attorneys' fees pursuant to N.C.G.S. § 6-21.7.

Plaintiffs, on the other hand, argue that the General Assembly's decision to rewrite N.C.G.S. § 1-52(15) to provide a three-year statute of limitations for claims "for the recovery of an unlawful fee, charge, or exaction collected by a county, municipality, or other unit of local government for water or sewer service or water and sewer service," Act of June 29, 2017, ch. 138, sec. 10(a), 2017-4 N.C. Adv. Legis. Serv. 174, 180 (LexisNexis), narrows the statute of limitations dispute in this case to whether the rewrite of N.C.G.S.§ 1-52(15) is a "clarifying amendment," which serves to bar plaintiffs' claims, or an "altering amendment" inapplicable to plaintiffs' claims, rendering the "catch-all" ten-year statute of limitations set out in N.C.G.S. § 1-56 applicable to this case. In plaintiffs' view, an amendment is deemed "altering" if it changes the substance of the original law, citing *Ray v. North Carolina Department of Transportation*, 366 N.C. 1, 9, 727 S.E.2d 675, 681 (2012), with the presumption being "that the legislature intended to change the original act by creating a new right or withdrawing any existing one," quoting *Childers v. Parker's Inc.*, 274 N.C. 256, 260, 162 S.E.2d 481, 483 (1968). Plaintiff contends, in view of the fact that N.C.G.S. § 1-52(15) required no clarification, that the subsequent amendment created an addition to, rather than a clarification of, the existing statute, rendering plaintiffs'

claims subject to the "catch-all" ten-year statute of limitations, first citing *Amward Homes Inc. v. Town of Cary*, 206 N.C. App. 38, 59, 698 S.E.2d 404, 419 (2010) (applying the ten-year statute of limitations set out in N.C.G.S. § 1-56 to a claim for the recovery of unlawful school impact fees), *a'ffd per curiam by an equally divided court*, 365 N.C. 305, 716 S.E.2d 849 (2011), then citing, *inter alia*, *Point South Properties LLC v. Cape Fear Public Utility Authority*, 243 N.C. App. 508, 515, 778 S.E.2d 284, 289 (2015) (applying the ten-year statute of limitations set out in N.C.G.S. § 1-56 to a claim for the recovery of unlawful water and sewer impact fees).

In addition, plaintiffs contend that the 2017 amendment to N.C.G.S. § 1-52(15) does not apply to this case because accrued and pending causes of action constitute vested rights, which are constitutionally protected, first citing *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 176, 594 S.E.2d 1, 12 (2004) (explaining that, "[w]ithout question, vested rights of action are property, just as tangible things are property"), then citing, *inter alia*, *Bolick v. American Barmag Corp.*, 306 N.C. 364, 371, 293 S.E.2d 415, 420 (1982) (explaining that, "[w]hen a statute would have the effect of destroying a vested right if it were applied retroactively, it will be viewed as operating prospectively only"). As a result, plaintiffs argue that the effect of retroactively applying the 2017 amendment to N.C.G.S. § 1-52(15) would deprive them of their vested property rights.

In addition, plaintiffs contend that the one-year statute of limitations set out in N.C.G.S. §§ 160A-364.1 and 1-54(10) has no application in this case because plaintiffs' claims do not stem from a zoning or unified development ordinance adopted pursuant to Article 19 of Chapter 160A of the North Carolina General Statutes. Instead, plaintiffs have challenged the validity of the water and sewer impact fees that have been charged by the Town pursuant to the public enterprise authority granted by Article 16 of Chapter 160A of the North Carolina General Statutes. Similarly, the two-year statute of limitations set out in N.C.G.S. § 1-53(1) has no application in this case because plaintiffs' claims rest upon the exaction of unlawful impact fees rather than upon the breach of an implied contract, citing *Point Southern Properties*, 243 N.C. App. at 515, 778 S.E.2d at 289. Moreover, plaintiffs claim that the three-year statute of limitations set out in N.C.G.S. § 1-52(2) does not apply in this case because plaintiffs' claims do not rest upon a liability created by statute. Plaintiffs argue that, instead of arising under N.C.G.S. § 160A-363(e), the Town's liability for the refund of unlawfully exacted impact fees is derived from preexisting common law principles, citing *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 517 S.E.2d 874 (1999)

(requiring the refunding of unlawfully exacted stormwater impact fees paid prior to the adoption of N.C.G.S. § 153A-363(e)); and *Durham Land Owners Ass'n v. County of Durham*, 177 N.C. App. 629, 630 S.E.2d 200 (requiring the refunding of unlawfully exacted school impact fees paid prior to the adoption of N.C.G.S. § 153A-324(b), the analogous statute for counties) *disc. rev. denied*, 360 N.C. 532, 633 S.E.2d 678 (2006)). Finally, plaintiffs argue that their claims are not barred by the three-year statute of limitations set out in N.C.G.S. § 1-52(5) because their claims do not arise from an "injury to the person or rights of another, not arising on contract."

Plaintiffs assert that their claims against the Town accrued at the time of the Town's exaction of the unlawful water and sewer impact fees rather than upon the adoption of the related impact fee ordinances. The Town's argument to the contrary is flawed, in plaintiffs' opinion, because the impact fees that had been exacted from them had been adopted annually rather than in the relevant ordinances. Simply put, since a "plaintiff's injury is the wrong entitling plaintiff to commence a cause of action," quoting *Black v. Littlejohn*, 312 N.C. 626, 639, 325 S.E.2d 469, 478 (1985), plaintiffs sustained no injury until the Town actually exacted the unlawful impact fees.

Finally, plaintiffs argue that a decision to accept the Town's estoppel by the acceptance of benefits argument would encourage the Town to engage in unlawful conduct and unjustly enrich the Town. Plaintiffs contend that they received no "benefit" from the payment of the unlawful impact fees given that their payments were mandatory, citing *Virginia-Carolina Peanut Co. v. Atlantic Coast Line Railroad Co.*, 166 N.C. 62, 74, 82 S.E. 1, 5 (1914) (explaining that, in the event that a party's "only alternative [is] to submit to an illegal exaction or discontinue its business," "[m]oney paid, or rather value parted with, under such pressure has never been regarded as a voluntary act"). As a result, plaintiffs assert that the Court of Appeals' decision should be affirmed.

> Statutes of limitation are intended to afford security against stale claims. With the passage of time, memories fade or fail altogether, witnesses die or move away, [and] evidence is lost or destroyed; and it 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.

Estrada v. Burnham, 316 N.C. 318, 327, 341 S.E.2d 538, 544 (1986) (citation omitted), *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). "[S]tatutes of limitation are procedural, not substantive, and determine not whether an injury has occurred, but whether a party can obtain a remedy for that injury." *Christie v. Hartley Constr., Inc.*, 367 N.C. 534, 538, 766 S.E.2d 283, 286 (2014) (citation omitted). "[T]he statute of limitations begins to run once a cause of action accrues," *McCutchen v. McCutchen*, 360 N.C. 280, 283, 624 S.E.2d 620, 623 (2006) (citation omitted), with "[a] cause of action [having] accrue[d] . . . whenever a party becomes liable to an action," *Matthieu v. Piedmont Nat. Gas Co.*, 269 N.C. 212, 215, 152 S.E.2d 336, 339 (1967); *see also Register v. White*, 358 N.C. 691, 697, 599 S.E.2d 549, 554 (2004) (stating that "a statutory limitations period on a cause of action necessarily cannot begin to run before a party acquires a right to maintain a lawsuit"). "The accrual of the cause of action must therefore be reckoned from the time when the first injury was sustained." *Mast v. Sapp*, 140 N.C. 533, 537, 53 S.E. 350, 351 (1906).

As we understand the record, the first issue related to the statute of limitations that must be addressed is identifying the point in time at which plaintiffs' claims against the Town accrued. In *Williams*, this Court addressed the validity of an Orange County ordinance enacted pursuant to legislation adopted by the General Assembly "authoriz[ing] transfer by the [Equal Employment Opportunity Commission] to Orange County of employment discrimination complaints filed with it originating in the county and transfer by [the Department of Housing and Urban Development] to Orange County of housing discrimination complaints arising in the county." 357 N.C. at 174-75, 581 S.E.2d at 420. After the plaintiff filed a complaint seeking relief for allegedly unlawful discrimination in violation of the ordinance, the defendant filed an answer that included a counterclaim seeking a declaration "that the enabling legislation and the Ordinance violated Article II, Section 24(1)(j) of the North Carolina Constitution." *Id.* at 177, 581 S.E.2d at 421. In holding that the defendant's challenge to the validity of the ordinance in question was not barred by the applicable statute of limitations, *id.* at 178, 581 S.E.2d at 422, predicated upon the plaintiffs' theory that "the time period for [the defendant's] filing of a constitutional challenge to the Ordinance or the enabling legislation began to run on the date the enabling legislation or the Ordinance became effective," *id.* at 178, 581 S.E.2d at 422, we explained that

> [w]hen the enabling legislation and the Ordinance were first enacted, [the defendant] was just another employer in Orange County to which these new laws applied; any harm

> to [the defendant] was both prospective and speculative. The alleged wrongs to [the defendant] became apparent only upon enforcement of the Ordinance through the filing of lawsuits and proceedings against [the defendant].

Id. at 179, 581 S.E.2d at 423. In other words, this Court held in *Williams* that the defendant's challenge to the validity of the ordinance in question accrued when the ordinance was enforced against that party rather than at the time of initial enactment in reliance upon the "continuing wrong" doctrine. *Id.* at 180-81, 581 S.E.2d at 424.

In determining whether a plaintiff is entitled to challenge the validity of an ordinance as subjecting the plaintiff to what is tantamount to a continuing harm, "we examine [the] case under a test that considers '[t]he particular policies of the statute of limitations in question, as well as the nature of the wrongful conduct and harm alleged.' " *Id.* at 179, 581 S.E.2d at 423 (second alteration in original) (quoting *Cooper v. United States*, 442 F.2d 908, 912 (7th Cir. 1971)). For that reason, the reviewing court "must examine the wrong alleged by [the plaintiff] to determine if the purported violation is the result of 'continual unlawful acts,' each of which restarts the running of the statute of limitations, or if the alleged wrong is instead merely the 'continual ill effects from an original violation.' " *Id.* at 179, 581 S.E.2d at 423 (quoting *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981)). "[I]f the same alleged violation was committed at the time of each act, then the limitations period begins anew with each violation . . . ." *Id.* at 179-80, 581 S.E.2d at 423 (alterations in original) (quoting *Perez v. Laredo Junior Coll.*, 706 F.2d 731, 733 (5th Cir. 1983), *cert. denied*, 464 U.S. 1042, 104 S. Ct. 708, 79 L. Ed. 2d 172 (1984)). Although the "continuing wrong" doctrine has been treated, in some instances, as an "exception" to the usual rules governing the operation of statutes of limitations, such a description of the doctrine in question is a misnomer given that the "continuing wrong" doctrine does nothing more than provide that the applicable limitations period starts anew in the event that an allegedly unlawful act is repeated.

A classic example of the "continuing wrong" doctrine can be seen in *Sample v. John L. Roper Lumber Co.*, in which the plaintiffs alleged that the defendant had repeatedly trespassed upon their property by unlawfully harvesting timber there. As this Court stated in *Sample*, "every wrong invasion of plaintiffs' property amounted to a distinct, separate trespass, day by day, and for any and all such trespasses coming within the three years the defendant is responsible." 150 N.C. 161, 166, 63 S.E. 731, 732 (1909). Thus, consistent with the principle espoused in *Williams*, 357 N.C. at 179, 581 S.E.2d at 423 (quoting *Ward*, 650 F. 2d

at 1147), the defendant's repeated trespasses onto the plaintiffs' property constituted " 'continual unlawful acts,' each of which restart[ed] the running of the statute of limitations." *See also Lightner v. City of Raleigh*, 206 N.C. 496, 503-05 174 S.E.2d 272, 276-78 (1934) (applying the continuing wrong doctrine to a situation involving repeated discharges of sewage onto the plaintiffs' property). Similarly, this Court applied the "continuing wrong" doctrine in *Faulkenbury v. Teachers' & State Employees' Retirement System of North Carolina*, in which the plaintiffs alleged that the State had unlawfully reduced their disability retirement payments. 345 N.C. 683, 690, 483 S.E.2d 422, 426 (1997). According to this Court, "the reductions in payments under the new systems were deficiencies which have continued to the present time," so that "the plaintiffs [could] pursue claims for underpayments for three years before they commenced actions," *id.* at 695, 483 S.E.2d at 429-30, given that "the limitations period beg[an] anew," *Williams*, 357 N.C. at 179-80, 581 S.E.2d at 423 (quoting *Perez*, 706 F.2d at 733), with the making of each reduced payment.

On the other hand, in *Jewell v. Price*, the plaintiffs alleged that the defendant building contractor had constructed a home for them that contained a negligently installed a furnace. The Court concluded that the "defendant's negligent breach of the legal duty . . . occurred on November 15, 1958, when he delivered to [the plaintiffs] a house with a furnace lacking a draft regulator and . . . having been installed too close to combustible joists." 264 N.C. 459, 462, 142 S.E.2d 1, 4 (1965). "[A]lthough [the plaintiffs] had no knowledge of the invasion [of their rights] until . . . . [t]he fire which destroyed their home on January 18, 1959, 'the whole injury' resulted proximately from [the] defendant's original breach of duty" "arising out of his contractual relation with [the] plaintiffs . . . when he delivered to them a house with a [negligently installed] the furnace." *Id.* at 462, 142 S.E.2d at 4. As a result, since the alleged violation of the plaintiffs' legal rights was "entire and complete," *Sample*, 150 N.C. at 164, 63 S.E. at 732, when the house containing the negligently installed furnace was delivered to the plaintiffs, there was no repeated violation of their rights sufficient to restart the running of the applicable statute of limitations at the time that the fire occurred.

The essence of plaintiffs' claim against the Town is that the Town has exacted unlawful impact fee payments from them. In other words, "the nature of the wrongful conduct and harm alleged," *Williams*, 357 N.C. at 179, 581 S.E.2d at 423 (quoting *Cooper*, 442 F.2d at 912), in plaintiffs' complaint rests upon the Town's collection of water and sewer impact fees rather than the adoption of the impact fee ordinances. As was the

case in *Williams*, plaintiffs did not sustain any direct injury at the time that the challenged impact fee ordinances were adopted. Instead, plaintiffs sustained the injury upon which their claims rest when plaintiffs were required to make impact fee payments in order to obtain approval for their development proposals. As a result, since plaintiffs' injury occurred when plaintiffs made the required impact fee payments to the Town, we conclude that Quality Built Homes' claims against the Town accrued on various dates between 1 May 2006 through 21 January 2009 and that Stafford Land's claims against the Town accrued on various dates between 20 December 2005 through 30 June 2009.

In identifying the statute of limitations that applies to plaintiffs' claims against the Town, we begin by noting that, according to well-established North Carolina law, "[w]here one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability," *Fowler v. Valencourt*, 334 N.C. 345, 349, 435 S.E.2d 530, 533 (1993) (quoting *Trs. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985)), and that, "[w]hen two statutes apparently overlap, it is well established that the statute special and particular shall control over the statute general in nature, even if the general statute is more recent, unless it clearly appears that the legislature intended the general statute to control," *id.* at 349, 435 S.E.2d at 534 (quoting *Trs. of Rowan Tech.*, 313 N.C. at 238, 328 S.E.2d at 279). According to N.C.G.S. § 1-52(15), as amended by the 2017 General Assembly, an action "[f]or the recovery of taxes paid as provided in [N.C.]G.S. [§] 105-381 or for the recovery of an unlawful fee, charge, or exaction collected by a county, municipality, or other unit of local government for water or sewer service or water and sewer service" must be filed within three years from the date upon which the plaintiff's claim accrued. N.C.G.S. § 1-52(15) (2017). Although the 2017 version of N.C.G.S. § 1-52(15) "deals more directly and specifically" with the nature of the claims that plaintiffs have asserted against the Town, *Fowler*, 334 N.C. at 349, 435 S.E.2d at 533, and, although the General Assembly specifically described the 2017 addition to N.C.G.S. § 1-52(15) as "a clarifying amendment" that "has retroactive effect and applies to claims accrued or pending prior to . . . the date" that the amended version of N.C.G.S. § 1-52(15) became law, Ch. 138, sec. 11, 2017-4 N.C. Adv. Legis. Serv. at 180 (LexisNexis), we need not decide whether the amended version of N.C.G.S. § 1-52(15) is entitled to retroactive effect, despite plaintiffs' contention that they have a vested property right in their claims against the Town, given our determination that plaintiffs' claims against

the Town are governed by N.C.G.S. § 1-52(2), which applies to "a liability created by statute, either state or federal."

The gravamen of our previous decision in this case was that "the Public Enterprise Statutes . . . clearly and unambiguously fail to give [the Town] the essential prospective charging power necessary to assess impact fees" and that, since "the legislature alone controls the extension of municipal authority, the impact fee ordinances on their face exceed the powers delegated to the Town by the General Assembly." *Quality Built Homes*, 369 N.C. at 22, 789 S.E.2d at 459. As a result, the essence of our earlier decision in this case was that the Town had acted unlawfully by assessing a water and sewer impact fee not authorized by N.C.G.S. § 160A-314(a) (2015) (providing that "[a] city may establish and revise . . . rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise"). In light of that fact, we have little difficulty concluding that the claim recognized in our prior decision in this case was, when viewed realistically, one resting upon an alleged statutory violation that resulted in the exaction of an unlawful payment which plaintiffs had an inherent right to recoup.[4] Although the Court of Appeals reached a different conclusion in *Point South Properties* based upon the fact that N.C.G.S. § 162A-88 did not provide an explicit statutory right to seek recovery of the challenged impact fees separate and apart from the statutory provisions governing the defendant's authority to charge the challenged impact fees, we do not believe that the applicability of the three-year statute of limitations set out in N.C.G.S. § 1-52(2) hinges upon such a fine parsing of the relevant statutory language.[5] At an absolute minimum, none of our prior decisions impose the limitation upon the applicability of the three-year statute of limitations set out in N.C.G.S. § 1-52(2) upon which the Court of Appeals' decisions in *Point South Properties* and this case depend. *See Town of Morganton v. Avery*, 179 N.C. 551, 552, 103 S.E. 138, 139 (1920) (applying the three-year statute of limitations for liability created by statute to an action to enforce a lien allegedly arising from a tax assessment on the grounds that, "[w]ithout the creative force of the statute, the charge upon the land could not be made"); *Shackelford v. Staton*, 117 N.C. 73, 75, 23 S.E. 101,

4. In light of this determination, we need not decide whether the monetary payments that the Town exacted from plaintiffs constituted "a tax, fee, or monetary contribution for development or a development permit not specifically authorized by law." N.C.G.S. § 160A-363(e) (2017).

5. Given that determination, we overrule the Court of Appeals' decision with respect to the applicability of the three-year statute of limitations set out in N.C.G.S. § 1-52(2) in *Point South Properties*.

102 (1895) (applying the three-year statute of limitations for liability created by statute in a case arising from the failure of a Clerk of Superior Court to properly index a judgment). As a result, we conclude that the three-year statute of limitations for liabilities set out in N.C.G.S. § 1-52(2)[6] applies in this case.[7] Moreover, given that plaintiffs' claims against the Town accrued between 20 December 2005 and 30 June 2009 and given that plaintiffs filed their complaint against the Town more than three years after the Town exacted its last impact fee payment from plaintiffs, plaintiffs' claims against the Town[8] are barred by the three-year statute of limitations set out in N.C.G.S. § 1-52(2).[9]

[2] Finally, we reject the Town's contention that plaintiffs' claims are barred by the doctrine of estoppel by the acceptance of benefits. In our opinion, *Convent of the Sisters of Saint Joseph v. City of Winston-Salem* has no application to the proper resolution of this case. In *Convent*, the plaintiff's predecessor in interest obtained a special use permit in accordance with the applicable zoning ordinance and received authorization to establish an otherwise prohibited elementary school pursuant to certain agreed-upon conditions set out in the applicable permit. 243 N.C. at 325, 90 S.E.2d at 885. Although we held in *Convent* that, "by accepting the benefits of the provisions of the zoning ordinance" the original purchaser "waived any right he might have had to contest the validity

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6. In light of our determination that the three-year statute of limitations set out in N.C.G.S. § 1-52(2) applies in this instance, we need not address the issue of the applicability of the three-year statute of limitations set out in N.C.G.S. § 1-52(5).

7. Although the Town has asserted that a number of shorter limitations periods should be deemed applicable in this instance, we do not find its arguments to that effect persuasive. For example, we are unable to conclude that the one-year statute of limitations set out in N.C.G.S. §§ 160A-364.1 and 1-54(10) has any application to this case because plaintiffs' claims do not rest upon a challenge to the validity of the Town's zoning or unified development ordinances. Similarly, we are unable to conclude that the two-year statute of limitations set out in N.C.G.S. § 1-53(1) has any application to this case because plaintiffs' claims rest upon a charge for water or sewer service imposed in violation of N.C.G.S. § 160A-314(a) rather than upon breach of an implied contract.

8. In determining that plaintiffs' claims against the Town are time-barred by the three-year statute of limitations set out in N.C.G.S. § 1-52(2), we note that the trial court, with the consent of the parties, allowed Quality Built Homes to place $4,000.00 in impact fee payments in escrow. The proper disposition of these monies is addressed at the conclusion of this opinion.

9. As a result of the fact that the three-year statute of limitations set out in N.C.G.S. § 1-52(2) applies to this case, the Court of Appeals necessarily erred in determining that plaintiffs' claims were subject to the ten-year statute of limitations set out in N.C.G.S. § 1-56.

of the ordinance," *id.* at 325, 90 S.E.2d at 885, the fact that the plaintiff's predecessor obtained the right to engage in an otherwise prohibited activity pursuant to the special use permit does not govern the outcome in this case. Here, plaintiffs do not appear to have received any benefit from the payment of the challenged water and sewer impact fees that they would not have otherwise been entitled to receive. As we held in *Virginia-Carolina Peanut Co.*, in an instance in which "[t]he only alternative was to submit to an illegal exaction or discontinue its business," the payment of money "under such pressure[ ] has never been regarded as a voluntary act." 166 N.C. at 74-75, 82 S.E. at 5 (quoting *Robertson v. Frank Brothers Co.*, 132 U.S. 17, 24, 10 S. Ct. 5, 7, 33 L. Ed. 236, 239 (1889)). Thus, we affirm the Court of Appeals' conclusion that plaintiffs' claims against the Town are not barred by the doctrine of estoppel by the acceptance of benefits. As a result, for the reasons set forth above, the Court of Appeals' decision is affirmed, in part, and reversed, in part, and this case is remanded to the Court of Appeals for further remand to the Superior Court, Moore County, for further proceedings not inconsistent with this opinion, including the entry of an order determining the proper disposition of the water and sewer impact fees that Quality Built Homes paid into escrow in accordance with the consent order and addressing any other outstanding issues.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

STATE v. DUNSTON

[371 N.C. 76 (2018)]

STATE OF NORTH CAROLINA
v.
RICHARD DUNSTON

No. 401A17

Filed 11 May 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. ___, 806 S.E.2d 697 (2017), finding no error in a judgment entered on 14 April 2016 by Judge Paul C. Ridgeway in Superior Court, Wake County. Heard in the Supreme Court on 18 April 2018.

Joshua H. Stein, Attorney General, by Teresa M. Postell, Assistant Attorney General, for the State.

Jarvis John Edgerton, IV for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
HARRY SHAROD JAMES

No. 514PA11-2

Filed 11 May 2018

1. Sentencing—juvenile—first-degree murder

The relevant language in N.C.G.S. §§ 15A-1340.19A to 15A-19D, read contextually and in its entirety, did not create a presumption that juveniles convicted of first-degree murder on a theory other and felony murder should be sentenced to life imprisonment without parole rather than life with parole. The two choices are treated as alternative sentencing options, with the selection to be made on the basis of an analysis of all the relevant facts and circumstances in light of *Miller v. Alabama*, 567 U.S. 460 (2012).

2. Sentencing—first-degree murder—juvenile—no Eighth Amendment violation

There was no merit to a juvenile first-degree murder defendant's argument that the Eighth Amendment was violated by a North Carolina sentencing scheme that did not begin with a presumption in favor of life with parole, and that did not require that a jury find the existence of one or more aggravating circumstances or a finding that the juvenile was irreparably corrupt. The statutory provisions provided sufficient guidance to allow a sentencing judge to make a proper, non-arbitrary sentencing determination.

3. Constitutional Law—sentencing—juvenile—life without parole—not arbitrary or vague

There was no basis for concluding that the absence of a requirement of aggravating circumstances rendered the sentencing process for juveniles convicted of first-degree murder (other than felony murder) arbitrary or vague where defendant was sentenced to life without parole. The statutory provisions required consideration of the factors found in *Miller*, which indicated that life without parole should be exceedingly rare for juveniles.

4. Constitutional Law—ex post facto—juvenile sentencing for murder—revised statute

There was no ex post facto violation in the sentencing of a juvenile for murder where the revised statute under which the juvenile

was sentenced required a choice between life imprisonment, the original sentence, or a lesser punishment.

Justice BEASLEY dissenting.

Justice HUDSON joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 786 S.E.2d 73 (2016), reversing an order entered on 12 December 2014 by Judge Robert F. Johnson in Superior Court, Mecklenburg County, and remanding for additional proceedings. On 16 March 2017, the Supreme Court allowed the State's conditional petition for discretionary review concerning an additional issue. Heard in the Supreme Court on 11 December 2017.

Joshua H. Stein, *Attorney General*, *by Sandra Wallace-Smith*, *Special Deputy Attorney General*, *and Robert C. Montgomery*, *Senior Deputy Attorney General*, *for the State-appellant-appellee.*

Glenn Gerding, *Appellate Defender*, *by David W. Andrews*, *Assistant Appellate Defender*, *for defendant-appellant-appellee.*

Juvenile Law Center, *by Marsha L. Levick*, *pro hac vice*, *and Office of the Juvenile Defender*, *by Eric J. Zogry*, *for Juvenile Law Center*, *Campaign for Fair Sentencing of Youth*, *and Juvenile Sentencing Project*, *amici curiae.*

Mark Dorosin, *Elizabeth Haddix*, *Jennifer Watson Marsh*, *Brent Ducharme*, *and Allen Buansi for Senators Angela Bryant and Erica Smith-Ingram*, *Representatives Kelly Alexander*, *Larry Bell*, *Jean Farmer-Butterfield*, *Rosa Gill*, *George Graham*, *Mickey Michaux*, *Amos Quick III*, *Evelyn Terry*, *and Shelly Willingham*, *and Professor Theodore M. Shaw; and Youth Justice Project of the Southern Coalition for Social Justice*, *by K. Ricky Watson*, *Jr. and Peggy Nicholson*, *for Great Expectations*, *amici curiae.*

ERVIN, Justice.

This case involves the validity of the procedures prescribed in N.C.G.S. §§ 15A-1340.19A to 15A-1340.19D for the sentencing of juveniles convicted of first-degree murder in light of *Miller v. Alabama*,

567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and its progeny and other constitutional provisions. On 19 June 2006, the Mecklenburg County grand jury returned bills of indictment charging defendant with robbery with a dangerous weapon and first-degree murder on the basis of incidents that occurred on 12 May 2006, when defendant was sixteen years old. On 10 June 2010, a jury returned verdicts convicting defendant of robbery with a dangerous weapon and first-degree murder on the basis of both malice, premeditation and deliberation and the felony murder rule. In light of the jury's verdict, the trial court entered judgments sentencing defendant to a term of sixty-four to eighty-six months imprisonment based upon his conviction for robbery with a dangerous weapon and to a concurrent term of life imprisonment without the possibility of parole, a sentence that was, at that time, mandatory for juvenile defendants convicted of first-degree murder. *See* N.C.G.S. 14-17 (2009) (providing that "any person who commits [murder in the first degree] shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to [N.C.]G.S. [§] 15A-2000, except that any such person who was under 18 years of age at the time of the murder shall be punished with imprisonment in the State's prison for life without parole"). Defendant noted an appeal to the Court of Appeals, which filed an opinion on 18 October 2011 finding no error in the proceedings that led to the entry of the trial court's judgments. *State v. James*, 216 N.C. App. 417, 716 S.E.2d 876, 2011 WL 4917045 (2011) (unpublished).

On 22 November 2011, defendant filed a petition seeking discretionary review of the Court of Appeals' decision by this Court. During the pendency of defendant's discretionary review petition, the United States Supreme Court held in *Miller* that mandatory sentences of life imprisonment without the possibility of parole for juveniles convicted of committing criminal homicides violated the Eighth Amendment's prohibition against cruel and unusual punishments and mandated that sentencing judges consider such offenders' "youth and attendant characteristics" before imposing "the harshest possible penalty" for juveniles. *Miller*, 567 U.S. at 479, 483, 489, 132 S. Ct. at 2469, 2471, 2475, 183 L. Ed. 2d at 424, 426, 430. On 25 June 2012, the day upon which *Miller* was decided, defendant sought leave to amend his discretionary review petition for the purpose of bringing *Miller* to our attention. On 12 July 2012, the Governor signed legislation "to amend the state sentencing laws to comply with the United States Supreme Court decision in *Miller v. Alabama*," (all capital and no italicized letters in the original), providing that defendants convicted of first-degree murder for an offense committed when they were under the age of eighteen "shall be

sentenced in accordance with this Article," with this legislation being applicable to any resentencing hearings held for juveniles "sentenced to life imprisonment without parole prior to the effective date of this act." Act of July 3, 2012, ch. 148, secs. 1, 3, 2011 N.C. Sess. Laws (Reg. Sess. 2012) 713, 713-14. On 23 August 2012, this Court entered an order allowing defendant's discretionary review petition "for the limited purpose of remanding to the Court of Appeals for further remand to the trial court for resentencing pursuant to Article 93 of Chapter 15A of the General Statutes of North Carolina."[1]

The case in which defendant had been convicted of first-degree murder came on for resentencing before the trial court at the 5 December 2014 criminal session of the Superior Court, Mecklenburg County. On 12 December 2014, the trial court entered an order determining, among other things, that:

> The Court [ ] has considered the age of the [d]efendant at the time of the murder, his level of maturity or immaturity, his ability to appreciate the risks and consequences of his conduct, his intellectual capacity, his one prior record of juvenile misconduct (which this Court discounts and does not consider to be pivotal against the [d]efendant, but only helpful as to the light the juvenile investigation sheds upon [d]efendant's unstable home environment), his mental health, any family or peer pressure exerted upon defendant, the likelihood that he would benefit from rehabilitation in confinement, the evidence offered by [d]efendant's witnesses as to brain development in juveniles and adolescents, and all of the probative evidence offered by both parties as well as the record in this case. The Court has considered [d]efendant's statement to the police and his contention that it was his co-defendant Adrian Morene who planned and directed the commission of the crimes against Mr. Jenkins, [and] the Court does note that in some of the details and contentions the statement is self-serving and contradicted by physical evidence in the case. In the exercise of its informed discretion, the Court determines that based upon all the circumstances of the offense and the particular circumstances of the [d]efendant that the

1. Although the new legislation was originally intended to be codified in Article 93 of Chapter 15A of the North Carolina General Statutes, it was actually codified in Article 81B of Chapter 15A at Part 2A, sections 15A-1340.19A, -1340.19B, -1340.19C, and -1340.19D.

> mitigating factors found above, taken either individually or collectively, are insufficient to warrant imposition of a sentence of less than life without parole.

As a result, the trial court ordered that "[d]efendant be imprisoned to Life Imprisonment without Parole." Defendant noted an appeal to the Court of Appeals from the trial court's resentencing judgment.

In seeking relief from the trial court's resentencing judgment before the Court of Appeals, defendant argued that the trial court had, by resentencing him pursuant to N.C.G.S. §§ 15A-1340.19A to 15A-1340.19D (the Act), violated the state and federal constitutional prohibition against the enactment of ex post facto laws, that the relevant statutory provisions subjected him to cruel and unusual punishment and deprived him of his rights to a trial by jury and to not be deprived of liberty without due process of law, and that "the trial court failed to make adequate findings of fact to support its decision to impose a sentence of life without parole." *State v. James*, ___ N.C. App. ___, ___, 786 S.E.2d 73, 77-79, 82 (2016). In a unanimous opinion filed on 3 May 2016, the Court of Appeals upheld the constitutionality of the Act while reversing the trial court's resentencing order and remanding it for further proceedings. For the reasons stated below, we modify and affirm the decision of the Court of Appeals and remand this case for further proceedings not inconsistent with this opinion.

In its opinion, the Court of Appeals began by rejecting defendant's ex post facto argument and his contention that he "should have been resentenced 'consistent with sentencing alternatives available as of the date of the commission of the offense[,]' specifically, 'within the range for the lesser-included offense of second-degree murder.' " *Id.* at ___, 786 S.E.2d at 77-78 (alteration in original). In reaching this result, the Court of Appeals noted that the relevant statutory provision "does not impose a different or greater punishment than was permitted when the crime was committed; nor d[id] it disadvantage defendant in any way." *Id.* at ___, 786 S.E.2d at 78. On the contrary, the new legislation merely afforded the trial court the option of imposing a lesser sentence than had been available at the time that judgment was originally entered against defendant. *Id.* at ___, 786 S.E.2d at 78. In addition, the Court of Appeals noted that "there is no indication that the legislatures in [the] states [in which juvenile defendants had been resentenced based upon convictions for lesser offenses in the aftermath of *Miller*] enacted new sentencing guidelines . . . after the mandatory sentences provided in their respective statutes were determined [to be] unconstitutional." *Id.* at ___, 786 S.E.2d at 78 (first citing *State v. Roberts*, 340 So. 2d 263 (La. 1976); then

citing *Jackson v. Norris*, 2013 Ark. 175, 426 S.W.3d 906 (2013); and then citing *Commonwealth v. Brown*, 466 Mass. 676, 1 N.E.3d 259 (2013)). In this state, however, the General Assembly "acted quickly in response to *Miller* and passed the Act, establishing new sentencing guidelines in N.C.[G.S.] § 15A-1340.19A *et seq.* for juveniles convicted of first-degree murder" and making it "clear that [the statute] was to apply retroactively." *Id.* at ___, 786 S.E.2d at 78. As a result, the Court of Appeals concluded that "there is no violation of the constitutional prohibitions on *ex post facto* laws" in this instance. *Id.* at ___, 786 S.E.2d at 79.

Secondly, the Court of Appeals rejected defendant's contention that the presence of "instead of," the inclusion of mitigating factors, and the absence of aggravating factors in N.C.G.S. § 15A-1340.19C(a) indicated that the General Assembly "presumptively favor[ed] a sentence of life without parole for juveniles convicted of first-degree murder" and created a "risk of disproportionate punishment" indistinguishable from that deemed impermissible in *Miller*. *Id.* at ___, 786 S.E.2d at 79. In reaching this conclusion, the Court of Appeals noted that, "to the extent that starting the sentencing analysis with life without parole creates a presumption, we agree with defendant there is a presumption" in N.C.G.S. § 15A-1340.19C. *Id.* at ___, 786 S.E.2d at 79. Although the use of "instead of" did not, standing alone, create any presumption in favor of a sentence of life imprisonment without the possibility of parole, the use of "instead of" in combination with the statutory requirement that sentencing courts consider mitigating factors and the absence of a requirement that sentencing courts consider aggravating factors in making sentencing decisions did indicate that the General Assembly intended for a sentence of life without the possibility of parole to be deemed presumptively correct. *Id.* at ___, 786 S.E.2d at 79 (stating that "the reason for the General Assembly's use of 'instead of' in N.C.[G.S.] § 15A-1340.19C(a), as opposed to 'or,' becomes clear" under those circumstances). As a result, "[b]ecause the statutes only provide for mitigation from life without parole to life with parole and not the other way around," the Court of Appeals determined that "the General Assembly has designated life without parole as the default sentence, or the starting point for the court's sentencing analysis." *Id.* at ___, 786 S.E.2d at 79.

The Court of Appeals did not, however, accept defendant's contention that the existence of such a presumption in favor of a sentence of life imprisonment without the possibility of parole renders the statutory sentencing scheme unconstitutional. In view of the fact that the relevant statutory provisions were enacted in order to "allow the youth of a defendant and its attendant characteristics to be considered in

determining whether a lesser sentence than life without parole is warranted," the Court of Appeals opined that "it seems commonsense that the sentencing guidelines would begin with life without parole, the sentence provided for adults in N.C.[G.S.] § 14-17 that the new guidelines were designed to deviate from." *Id.* at ___, 786 S.E.2d at 80. Moreover, given that "nothing in N.C.[G.S.] § 15A-1340.19A *et seq.* conflicts with the [United States Supreme] Court's belief that sentences of life without parole for juvenile defendants will be uncommon . . . . [w]ith proper application of the sentencing guidelines in light of *Miller*, it may very well be the uncommon case that a juvenile is sentenced to life without parole under [the statute]." *Id.* at ___, 786 S.E.2d at 80. As a result, the Court of Appeals held that it would not be "unconstitutional [ ] for the sentencing analysis in N.C.[G.S.] § 15A-1340.19A *et seq.* to begin with a sentence of life without parole." *Id.* at ___, 786 S.E.2d at 80.

Thirdly, the Court of Appeals rejected defendant's contention that the failure of the Act to "provide for the consideration of aggravating factors," renders the statute "unconstitutionally vague and will lead to arbitrary sentencing decisions" so as to deprive defendant of liberty without due process of law. *Id.* at ___, 786 S.E.2d at 80-81 (citing N.C.G.S. §§ 15A-1340.16, -2000 (2015)). In light of "the presumption that the statute is constitutional" and the fact that statutory provisions are "strictly construe[d]" so as to "allow[ ] the intent of the legislature to control," the Court of Appeals concluded that the relevant statutory provisions, "viewed . . . through the lens of *Miller*," are "not unconstitutionally vague and will not lead to arbitrary sentencing decisions" given that "[t]he discretion of the sentencing court is guided by *Miller* and the mitigating factors provided in N.C.[G.S.] § 15A-1340.19B(c)." *Id.* at ___, 786 S.E.2d at 81-82 (citations omitted). Similarly, the Court of Appeals rejected defendant's argument that the relevant statutory provisions violate a defendant's right to a trial by jury given the absence of any provision requiring the State to prove, and a jury to find, beyond a reasonable doubt, the existence of any aggravating factors as a prerequisite for the imposition of a sentence of life imprisonment without the possibility of parole in the relevant statutory language. *Id.* at ___, 786 S.E.2d at 82.

Finally, the Court of Appeals agreed with defendant's assertion that the trial court had "failed to make adequate findings of fact to support its decision to impose a sentence of life without parole." *Id.* at ___, 786 S.E.2d at 82. According to the Court of Appeals, the trial court's order "simply lists the trial court's considerations and final determination" without identifying "which considerations are mitigating and which are not." *Id.* at ___, 786 S.E.2d at 84. In other words, the trial court made

"inadequate findings as to the presence or absence of mitigating factors to support its determination," thereby "abus[ing] its discretion in sentencing defendant to life without parole." *Id.* at ___, 786 S.E.2d at 84. As a result, the Court of Appeals reversed the trial court's judgment and remanded this case to the Superior Court, Mecklenburg County for further sentencing proceedings.

In seeking further review of the Court of Appeals' decision by this Court, defendant argued that, "[b]y upholding a presumption in favor of life without parole, the Court of Appeals issued a decision that violates *Miller* and would lead to life without parole sentences for juveniles who are not among the worst offenders," contrary to the United States Supreme Court's determination that a sentence of life imprisonment without the possibility of parole would be "excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption,' " quoting *Montgomery v. Louisiana*, ___ U.S. ___ , ___ , 136 S. Ct. 718, 734, 193 L. Ed. 2d 599, 619 (2016) (quoting *Miller*, 567 U.S. at 480-81, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424)). In addition, defendant asserted that "the Court of Appeals erroneously concluded that the sentencing procedures outlined in [the Act] provide sufficient guidance to trial courts," "erroneously upheld a sentencing scheme that could only lead to arbitrary sentencing decisions," and erroneously rejected defendant's ex post facto claim. The State, on the other hand, urged us to refrain from granting further review in this case given that the Court of Appeals had "correctly determined N.C.[G.S.] § 15A-1340.19A *et seq.* did not create an unconstitutional presumption in favor of life without parole," was not unconstitutionally vague or arbitrary, and did not constitute an impermissible ex post facto law. In the event that we decided to grant defendant's discretionary review petition, the State sought further review of the Court of Appeals' determination that the relevant statutory provisions created a presumption in favor of a sentence of life imprisonment without the possibility of parole. We granted defendant's discretionary review petition and the State's conditional discretionary review petition on 16 March 2017.

[1] In his challenge to the validity of its decision, defendant contends that the Court of Appeals erred by holding that a statute establishing a presumption in favor of the imposition of a sentence of life imprisonment without the possibility of parole upon a juvenile convicted of first-degree murder does not subject the juvenile to impermissibly cruel and unusual punishment. In view of the fact that we are unable to appropriately consider this contention without first addressing the State's challenge to the validity of the Court of Appeals' determination

that the relevant statutory provisions embody such a presumption, we will begin our analysis by addressing the State's contention that N.C.G.S. § 15A-1340.19C does not "give[ ] rise to a mandatory presumption" that a juvenile convicted of first-degree murder on the basis of a theory other than the felony murder rule should be sentenced to life imprisonment without the possibility of parole.

In seeking to persuade us that the Court of Appeals had misconstrued N.C.G.S. §§ 15A-1340.19A to 15A-1340.19D, the State contends that, rather than being "interpreted in isolation," the words in which a statute is couched should be read in "context and with a view to their place in the overall statutory scheme," quoting *Sturgeon v. Frost*, ___ U.S. ___, ___, 136 S. Ct. 1061, 1070, 194 L. Ed. 2d 108, 121 (2016). According to the State, the legislative intent underlying the relevant statutory language "must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied," quoting *State v. Oliver*, 343 N.C. 202, 212, 470 S.E.2d 16, 22 (1996) (emphasis added). In view of the fact that the General Assembly enacted N.C.G.S. §§ 15A-1340.19A to 15A-1340.19D "to amend the state sentencing laws to comply with the United State Supreme Court decision in *Miller v. Alabama*," Ch. 148, 2011 N.C. Sess. Laws (Reg. Sess. 2012) at 713 (effective 12 July 2012), the State contends that "any interpretation of the statute must hold that point paramount." As a result of the fact that "*Miller* certainly didn't create a presumption in favor of [life imprisonment without the possibility of parole] but rather one of [life imprisonment with parole] that can only be changed with the requisite hearing," "to juxtapose a sentencing presumption of [life imprisonment without the possibility of parole] on every juvenile convicted of murder . . . would be injurious to *Miller*'s intent, and counter to the General Assembly's articulated intent to enforce *Miller*."[2] For that reason, the State contends that "[i]t is inconceivable that the General Assembly would enact legislation intended to comport with the mandates of *Miller*, which by its very terms offends them." Since "courts presume that the General Assembly would not contradict itself in the same statute," citing *Brown v. Brown*, 353 N.C. 220, 226, 539 S.E.2d 621, 625 (2000), the State asserts that N.C.G.S. § 1340.19(B)(a)(2) "plainly cast[s]

2. In its appellee's brief before this Court, the State argues that "[t]he court's sentencing decision [pursuant to N.C.G.S. § 15A-1340.19C(a)] is binary, life with parole or life without parole"; however, "if the courts were to assume such a presumption *Miller*, as is reinforced by *Montgomery*, would necessitate that such a presumption would favor life without parole," on the grounds that the juvenile "must show that he fits in that protected status" of "juvenile offenders whose crimes reflect the transient immaturity of youth." (Quoting *Montgomery* at ___ U.S. at ___, 136 S. Ct. at 724, 193 L. Ed. 2d at 609).

the sentencing choice between [life imprisonment without the possibility of parole] and [life imprisonment with parole] in the disjunctive."

In arguing that the Court of Appeals "correctly understood how [the Act] operated," defendant asserts that "[t]he two sentencing options available under the sentencing scheme are not equal alternatives" because, "[b]y using the phrase 'instead of,' " rather than requiring a trial court to choose "between" the sentencing options, "the General Assembly created a procedure in which the sentencing court's decision to impose life with parole is dependent upon the court first rejecting life without parole." In view of the fact that the relevant statutory language only refers to "mitigating factors," which "are used by defendants to show that the case 'warrant[s] a less severe sentence,' " quoting *State v. Norris*, 360 N.C. 507, 512, 630 S.E.2d 915, 918, *cert. denied*, 549 U.S. 1064, 127 S. Ct. 689, 166 L. Ed. 2d 535 (2006), and fails to compel a court "to justify a sentence of life without parole by finding any aggravating factors," defendant contends that "the General Assembly created a scheme in which the sole decision is whether to push the sentence down from the default sentence of life without parole to the lesser sentence of life with parole."

In addition, defendant argues that legislative intent "cannot salvage an otherwise unconstitutional statute," with it being "the duty of the courts to give effect to the words actually used in a statute" without "delet[ing] words used or [ ] insert[ing] words not used." *State v. Watterson*, 198 N.C. App. 500, 505, 679 S.E.2d 897, 900 (2009). "The intent of the legislature . . . is to be found not in what the legislature meant to say, but in the meaning of what it did say." *Burnham v. Adm'r, Unemployment Comp. Act*, 184 Conn. 317, 325, 439 A.2d 1008, 1012 (1981). Thus, defendant contends, even though "the General Assembly intended to comply with *Miller*, it nevertheless created a sentencing scheme with a presumption in favor of life without parole" in violation of *Miller*'s requirement that "courts only impose sentences of life without parole for the 'rare' juvenile who exhibits 'irreparable corruption.' " Even if this Court were to examine the legislative intent, that intent "was undoubtedly influenced by its understanding of *Miller* when the opinion in *Miller* was first issued." Defendant contends that, in view of the fact that *Miller* was construed as largely procedural until *Montgomery* was decided, "our General Assembly enacted the new sentencing scheme before the full scope of *Miller* was widely understood and without the deliberation necessary to properly implement a transformative constitutional rule."

"Legislative intent controls the meaning of a statute." *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016) (quoting *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 895 (1998)).

> The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, "the spirit of the act and what the act seeks to accomplish." If the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms so long as it is reasonable to do so.

Id. at 258, 794 S.E.2d at 792 (quoting *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (internal citation omitted). "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." *State v. Fletcher*, ___ N.C. ___, ___, 807 S.E.2d 528, 539 (2017) (citing *Brown v. Brown*, 353 N.C. at 224, 539 S.E.2d at 623). "[E]ven when the language of a statute is plain, 'the title of an act should be considered in ascertaining the intent of the legislature.' " *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 8, 727 S.E.2d 675, 681 (2012) (quoting *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 812, 517 S.E.2d 874, 879 (1999) (citing *State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 764 (1992))). Finally, "a statute enacted by the General Assembly is presumed to be constitutional," *Wayne Cty. Citizens Ass'n v. Wayne Cty. Bd. of Commr's*, 328 N.C. 24, 29, 399 S.E.2d 311, 314-15 (1991) (citation omitted), and "will not be declared unconstitutional unless this conclusion is so clear that no reasonable doubt can arise, or the statute cannot be upheld on any reasonable ground," *id.* at 29, 399 S.E.2d at 315 (citing, *inter alia*, *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 63, 366 S.E.2d 697, 698 (1988)). "Where a statute is susceptible of two interpretations, one of which is constitutional and the other not, the courts will adopt the former and reject the latter." *Id.* at 29, 399 S.E.2d at 315 (citing *Rhodes v. City of Asheville*, 230 N.C. 759, 53 S.E.2d 313 (1949)).

The first section of Part 2A of Article 81B of Chapter 15A of the North Carolina General Statutes is N.C.G.S. § 15A-1340.19A, which is entitled "Applicability" and provides that "a defendant who is convicted of first degree murder, and who was under the age of 18 at the time of the offense, shall be sentenced in accordance with this Part." N.C.G.S. § 15A-1340.19A (2017). N.C.G.S. § 15A-1340.19B, which is entitled

"Penalty determination," requires that juveniles convicted of first-degree murder be sentenced to life imprisonment with parole "[i]f the sole basis for conviction . . . was the felony murder rule." *Id.* § 15A-1340.19B(a)(1) (2017). In all other cases, "the court shall conduct a hearing to determine whether the defendant should be sentenced to life imprisonment without parole, as set forth in [N.C.]G.S. [§] 14-17, or a lesser sentence of life imprisonment with parole." *Id.* § 15A-1340.19B(a)(2) (2017). At the "penalty determination" hearing, "[t]he defendant or the defendant's counsel may submit mitigating circumstances to the court, including, but not limited to, the following factors:

(1) Age at the time of the offense.

(2) Immaturity.

(3) Ability to appreciate the risks and consequences of the conduct.

(4) Intellectual capacity.

(5) Prior record.

(6) Mental health.

(7) Familial or peer pressure exerted upon the defendant.

(8) Likelihood that the defendant would benefit from rehabilitation in confinement.

(9) Any other mitigating factor or circumstance.

Id. § 15A-1340.19B(c) (2017). In addition, N.C.G.S. § 15A-1340.19B provides that "[t]he State and the defendant or the defendant's counsel shall be permitted to present argument for or against the sentence of life imprisonment with parole," with the defendant or the defendant's counsel having "the right to the last argument." Finally, N.C.G.S. § 15A-1340.19C, entitled "Sentencing; assignment for resentencing," provides that:

> The court shall consider any mitigating factors in determining whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole instead of life imprisonment without parole. The order adjudging the sentence shall include findings on the absence or presence of any mitigating

> factors and such other findings as the court deems appropriate to include in the order.

Id. § 15A-1340.19C(a)(2017).[3]

After carefully examining the relevant statutory language, we are unable to conclude that the language in question, when read contextually and in its entirety, unambiguously creates a presumption that juveniles convicted of first-degree murder on the basis of a theory other than the felony murder rule should be sentenced to life imprisonment without the possibility of parole rather than life imprisonment with parole. On the contrary, when read in context, we are inclined to believe that the relevant statutory language treats life imprisonment without the possibility of parole and life imprisonment with parole as alternative sentencing options, with the selection between these two options to be made on the basis of an analysis of all of the relevant facts and circumstances in light of the substantive standard enunciated in *Miller*. *See* 567 U.S. at 479-80, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424 (stating that the sentence of life imprisonment without the possibility of parole should be reserved for "the rare juvenile offender whose crime reflects irreparable corruption" and should not be imposed upon "the juvenile offender whose crime reflects unfortunate yet transient immaturity" (quoting *Roper v. Simmons*, 543 U.S. 551, 573, 125 S. Ct. 1183, 1197, 161 L. Ed. 2d 1, 24 (2005))). In reaching this conclusion, we note that N.C.G.S. § 15A-1340.19B(a)(2), which describes the issue before the sentencing court as "whether the defendant should be sentenced to life imprisonment without parole . . . or a lesser sentence of life imprisonment with parole," does not expressly state or even appear to assume that, all else being equal, any particular sentence is presumptively deemed to be appropriate in any particular case. Similarly, the fact that N.C.G.S. § 15A-1340.19B(b) allows the parties to present evidence concerning "any matter that the court deems relevant to sentencing," including evidence relating to the mitigating factors listed in N.C.G.S. § 15A-1340.19B(c), suggests that a number of factors, including, but not limited to, the statutorily enumerated mitigating factors, must be considered in making the required sentencing determination and that the sentencing court is required to consider the totality of the circumstances in

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3. The remainder of N.C.G.S. § 15A-1340.19C, which governs motions for appropriate relief seeking resentencing, and N.C.G.S. § 15A-1340.19D, which enunciates the circumstances under which a juvenile sentenced to life imprisonment with the possibility of parole for first-degree murder is eligible for parole pursuant to N.C.G.S. § 15A-1340.19B(a)(1), have no relevance to the issues before the Court in this case.

determining whether the defendant should be sentenced to life imprisonment with or without the possibility of parole without relying upon a presumption that either sentence is appropriate in any particular instance. Finally, the fact that N.C.G.S. § 15A-1340.19C requires the sentencing court to determine, after considering "all the circumstances of the offense," "the particular circumstances of the defendant," and "any mitigating factors," whether "the defendant should be sentenced to life imprisonment with parole instead of life imprisonment without parole" reinforces our conclusion that the relevant statutory provisions create two sentencing options, neither of which is deemed to be presumptively appropriate, between which the trial court must choose based upon a consideration of the totality of the circumstances in light of the relevant substantive standard set out in *Miller*. As a result, the relevant statutory language, when read in context, treats the sentencing decision required by N.C.G.S. § 15A-1340.19C(a) as a choice between two equally appropriate sentencing alternatives and, at an absolute minimum, does not clearly and unambiguously create a presumption in favor of sentencing juvenile defendants convicted of first-degree murder on the basis of a theory other than the felony murder rule to life imprisonment without the possibility of parole.

In urging us to determine that the relevant statutory provisions clearly and unambiguously embody a presumption in favor of a sentence of life imprisonment without the possibility of parole, defendant points to a number of expressions that the General Assembly utilized in describing the required sentencing decision. For example, defendant notes that the relevant statutory provisions require the sentencing court to determine whether a juvenile defendant convicted of first-degree murder on the basis of a theory other than the felony murder rule should be "sentenced to life imprisonment with parole *instead of* life imprisonment without parole" (emphasis added) and argues that the statutory expression "instead of" can only be understood to mean that a sentence of life imprisonment with parole is nothing more than an alternative to the presumptively correct sentence of life imprisonment without the possibility of parole. Although the word "instead" can be construed in a number of ways, it is typically understood "as an alternative or substitute." *New Oxford American Dictionary* 900 (3d ed. 2010). In accordance with ordinary English usage, the fact that something is an "alternative or substitute" for something else means nothing more than that both alternatives are available without necessarily suggesting that one is preferred over the other. As a result, we believe that the statutory language requiring the sentencing judge to determine whether the defendant should be sentenced to life imprisonment with parole "instead of"

life imprisonment without the possibility of parole is fully consistent with a construction that treats the language in question as requiring the sentencing judge to choose between two appropriate alternatives to be chosen on the basis of a proper application of the relevant legal standard rather than requiring the sentencing judge to select between a default sentence of life imprisonment without the possibility of parole and a secondary option of life imprisonment with parole.[4]

In addition, defendant directs our attention to the fact that the General Assembly referred to "mitigating factors" in N.C.G.S. § 15A-1340.19C(a) and included a list of potentially available "mitigating circumstances" in N.C.G.S. § 15A-1340.19B(c). Although a mitigating factor or circumstance is commonly understood as a consideration that "make[s something] less severe, serious, or painful" or "lessen[s] the gravity of" something "so as to make [that thing], esp. a crime, appear less serious and thus [to] be punished more leniently," *New Oxford American Dictionary* 1121 (3d ed. 2010), the presence of these references to "mitigating factors" and "mitigating circumstances" in the relevant statutory language does not compel the conclusion that persuading the sentencing court to adopt and credit such mitigating evidence is necessary in order to preclude the imposition of a more severe, and presumptively correct, sentence. On the contrary, the consideration of "mitigating factors" or "mitigating circumstances" is clearly relevant to the determination of whether the less severe of the two available options should be imposed upon a particular defendant in light of the totality of the relevant circumstances and the applicable legal standard, with the State having introduced evidence of the circumstances surrounding the commission of the crime during the guilt-innocence phase of the trial and with the defendant having introduced evidence of mitigating circumstances in addition to those arising from the commission of the crime at the sentencing hearing. For that reason, a requirement that the sentencing judge consider evidence tending to show the existence of "mitigating factors" or "circumstances" is in no way inconsistent with a requirement that the sentencing authority make a choice between two equally appropriate alternatives based upon an analysis of the relevant evidence and the applicable law. Thus, the primary arguments that

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4. The same logic precludes us from concluding that the language contained in N.C.G.S. § 15A-1340.19B(d) allowing both "[t]he State and the defendant or the defendant's counsel" "to present argument for or against the sentence of life imprisonment with parole" was intended to create a presumption in favor of a sentence of life imprisonment without parole which should be given effect unless the defendant establishes that a sentence of life imprisonment with parole should be imposed.

defendant has advanced in support of his assertion that the relevant statutory provisions create a presumption to the effect that, all other things being equal, a sentencing judge should sentence a juvenile convicted of first-degree murder on the basis of a theory other than the felony murder rule to life imprisonment without the possibility of parole simply do not demonstrate that the relevant statutory language necessarily reflects reliance upon such a presumption and appear to view certain statutory provisions in isolation rather than analyzing the relevant statutory language in its entirety. *See N. Carolina Dep't of Transp. v. Mission Battleground Park, DST*, ___ N.C. ___, ___, 810 S.E.2d 217, 222 (2018) (reversing the Court of Appeals because that court's approval of the trial court's decision to exclude certain expert testimony was based upon a construction of N.C.G.S. § 93A-83(f) that failed to interpret the language of that subsection "holistically with the rest of the statute," and noting that "[p]erhaps 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," (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012))).

As we have already noted, the legislation in which the relevant statutory provisions appear is captioned "[a]n act to amend the state sentencing laws to comply with the . . . decision in *Miller v. Alabama*," Ch. 148, 2011 N.C. Sess. Laws (Reg. Sess. 2012) at 713, in which the United States Supreme Court stated that the imposition of sentences of life imprisonment without the possibility of parole upon such juvenile offenders would be "uncommon" and should be reserved for "the rare juvenile offender whose crime reflects irreparable corruption" rather than being imposed upon "the juvenile offender whose crime reflects unfortunate yet transient immaturity." *Miller*, 567 U.S. at 479-80, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424 (quoting *Roper*, 543 U.S. at 573, 125 S. Ct. at 1197, 161 L. Ed. 2d 1, 24 (2005)); *see Montgomery v. Louisiana*, ___ U.S. at ___, 136 S. Ct. at 734, 193 L. Ed. 2d at 619-20 (reiterating that "*Miller* determined that sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption' " and "rendered life without parole an unconstitutional penalty" for "juvenile offenders whose crimes reflect the transient immaturity of youth" (first quoting *Miller*, 567 U.S. at 479-80, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424; then citing *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S. Ct. 2934, 2953, 106 L. Ed. 2d 256, 285 (1989))). In view of the fact "that a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect 'irreparable corruption,' " a statutory sentencing scheme embodying a presumption in favor of a sentence

of life imprisonment without the possibility of parole for a juvenile convicted of first-degree murder on the basis of a theory other than the felony murder rule would be, at an absolute minimum, in considerable tension with the General Assembly's expressed intent to adopt a set of statutory provisions that complied with *Miller* and with the expressed intent of the United States Supreme Court that, as a constitutional matter, the imposition of a sentence of life imprisonment without the possibility of parole upon a juvenile be a rare event. *Montgomery*, ___ U.S. at ___, 136 S. Ct. at 726, 193 L. Ed. 2d at 611 (quoting *Miller*, 576 U.S. at 479-80, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424); *see also People v. Gutierrez*, 58 Cal. 4th 1354, 1382, 1387, 324 P.3d 245, 264, 267 (2014) (holding that construing a sentencing statute as establishing "a presumption in favor of life without parole [for juvenile homicide offenders] raises serious constitutional concerns under the reasoning of *Miller* and the body of precedent upon which *Miller* relied"). Thus, the relevant canons of statutory construction to the effect that statutory language should, where reasonably possible, be construed so as to reflect the legislative intent stated in the statutory caption and to avoid constitutional difficulties clearly militate against the adoption of a construction of the relevant statutory language like that adopted by the Court of Appeals and contended for by defendant.

As a result, given that the statutory language contained in N.C.G.S. §§ 15A-1340.19A to 15A- 1340.19D is devoid of any express provision creating a presumption in favor of sentencing juveniles convicted of first-degree murder on the basis of a theory other than the felony murder rule to life imprisonment without the possibility of parole, given that the relevant statutory language is fully consistent with the view that the available sentencing options should be treated as alternatives to be adopted based upon an analysis of the relevant evidence in light of the applicable legal standard rather than as preferred and secondary alternatives, and given that construing the statutory language at issue in this case to incorporate a presumption in favor of the imposition of a sentence of life without the possibility of parole would conflict with the General Assembly's stated intent to comply with *Miller* and raise serious doubts about the constitutionality of the challenged statutory provisions, we hold that the Court of Appeals erred by construing the relevant statutory language to incorporate such a presumption.[5] On the contrary,

5. In view of our determination that the relevant statutory provisions do not, contrary to the Court of Appeals' decision, incorporate a presumption in favor of the imposition of a sentence of life imprisonment without the possibility of parole, we need not definitely resolve the issue of whether the Court of Appeals erred by deeming such a presumption to be constitutionally permissible in the juvenile sentencing context.

trial judges sentencing juveniles convicted of first-degree murder on the basis of a theory other than the felony murder rule should refrain from presuming the appropriateness of a sentence of life imprisonment without the possibility of parole and select between the available sentencing alternatives based solely upon a consideration of "the circumstances of the offense," "the particular circumstances of the defendant," and "any mitigating factors," N.C.G.S. § 15A-1340.19C(a), as they currently do in selecting a specific sentence from the presumptive range in a structured sentencing proceeding, in light of the United States Supreme Court's statements in *Miller* and its progeny to the effect that sentences of life imprisonment without the possibility of parole should be reserved for those juvenile defendants whose crimes reflect irreparable corruption rather than transient immaturity.

[2] In his second challenge to the Court of Appeals' decision, defendant contends that, even if the relevant statutory provisions do not incorporate a presumption in favor of a sentence of life imprisonment without the possibility of parole, the Act violates the Eighth Amendment given that a "sentencing scheme [for juveniles convicted of first-degree murder] must begin with a presumption in favor of life with parole" in light of the United States Supreme Court's recognition of the differences between adult and juvenile offenders and the rarity with which the United States Supreme Court believes that sentences of life imprisonment without parole should be imposed upon juveniles convicted of first-degree murder. In addition, defendant contends that a sentencing scheme that is devoid of any requirement that a jury find the existence of one or more aggravating circumstances or that a sentencing judge find the juvenile to be "irreparably corrupt" or "permanently incorrigible" before the juvenile can be sentenced to life imprisonment without the possibility of parole and, instead, merely requires a sentencing judge to "consider" mitigating factors and make findings based on the "absence or presence" of such factors "hinders the trial court's ability to winnow the class of juvenile defendants to those who might qualify for a sentence of life without parole" so as to be "unconstitutionally vague" and create an impermissible risk of the imposition of arbitrary sentences of life without the possibility of parole upon a juvenile defendant convicted of first-degree murder. The State, on the other hand, argues that, because *Miller* provided "boundaries sufficiently distinct for judges to interpret and administer [the statutes] uniformly" and because the relevant statutory provisions require use of "the precise method and procedure that is set out" in *Miller*, the Court of Appeals correctly held that the Act "is not unconstitutionally vague and will not lead to arbitrary sentencing decisions."

A statute is unconstitutionally vague in the event that it "(1) fails to 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited;' or (2) fails to 'provide explicit standards for those who apply [the law].' " *State v. Green*, 348 N.C. 588, 597, 502 S.E.2d 819, 824 (1998) (alteration in original) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298-99, 33 L. Ed. 2d 222, 227 (1972)), *cert. denied*, 525 U.S. 1111, 119 S. Ct. 883, 142 L. Ed. 2d 783 (1999). In upholding the validity of the legislation at issue in *Green*, this Court construed the relevant statutory language *in pari materia* with other parts of the Juvenile Code, including the statutory specification of the factors that must be weighed in making juvenile dispositional decisions; considered "the evolving standards and will of the majority in society," which suggested support for more stringent treatment of juvenile offenders; and determined that the relevant statutory language, when considered "in light of the entire Juvenile Code, provides sufficient guidance to juvenile court judges in making transfer decisions and does not on its face violate due process principles." *Id.* at 599-600, 502 S.E.2d at 826. Similarly, a trial judge required to sentence a juvenile convicted of first-degree murder on the basis of a theory other than the felony murder rule must consider "all the circumstances of the offense," "the particular circumstances of the defendant," and the mitigating circumstances enumerated in subsection 15A-1340.19B(c), N.C.G.S. § 15A-1340.19C, and comply with *Miller*'s directive that sentences of life imprisonment without the possibility of parole for juveniles convicted of first-degree murder should be the exception, rather than the rule, with the "harshest prison sentence" to be reserved for "the rare juvenile offender whose crime reflects irreparable corruption," rather than "unfortunate yet transient immaturity." *Miller*, 567 U.S. at 479-80, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424. In our view, the statutory provisions at issue in this case, when considered in their entirety and construed in light of the constitutional requirements set out in *Miller* and its progeny as set out in more detail above, provide sufficient guidance to allow a sentencing judge to make a proper, non-arbitrary determination of the sentence that should be imposed upon a juvenile convicted of first-degree murder on a basis other than the felony murder rule to satisfy due process requirements.

[3] Similarly, we conclude that defendant's arbitrariness argument, which rests upon the assertion that the sentencing authority must either find the existence of aggravating circumstances or make other "narrowing" findings before sentencing a juvenile convicted of first degree murder to life imprisonment without the possibility of parole, lacks merit. Although the United States Supreme Court did hold in *Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983), that a

capital sentencing statute that utilized statutory aggravating factors for the sole purpose of "categorical narrowing at the definition stage" so as to "circumscribe the class of persons eligible for the death penalty" was constitutional, *id.* at 878-79, 103 S. Ct. at 2743-44, 77 L. Ed. 2d at 250-51, nothing in either *Zant* or *Miller* suggests that such a formalized narrowing process is constitutionally required prior to the imposition of a valid sentence of life imprisonment without the possibility of parole upon a juvenile convicted of first-degree murder on the basis of a theory other than the felony murder rule.[6] Aside from the fact that "the penalty of death is qualitatively different from a sentence of imprisonment, however long," *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 2991, 49 L. Ed. 2d 944, 961 (1976), *Miller* and its progeny focus upon the necessity for requiring sentencing authorities "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," *Miller*, 567 U.S. at 479-80, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424, with these differences including "chronological age and its hallmark features," such as "immaturity, impetuosity, and failure to appreciate risks and consequences"; "the family and home environment that surrounds" the juvenile; "the circumstances of the homicide offense" committed by the juvenile, "including the extent of his participation in the conduct and the way familial and peer pressures may have affected him"; and any "incompetencies associated with youth – for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys," while preventing a court from "disregard[ing] the possibility of rehabilitation even when the circumstances most suggest it," *id.* at 477-78, 132 S. Ct. at 2468, 183 L. Ed. 2d at 422-23. According to *Miller*, a sentencing authority is required to "follow a certain process – considering an offender's youth and attendant characteristics" and other "mitigating circumstances before imposing the harshest penalty for juveniles," *id.* at 483, 489, 132 S. Ct. at 2471, 2475, 183 L. Ed. 2d at 426, 430, in light of the applicable legal standard. As a result of the fact that the statutory provisions at issue in this case require consideration of the factors enunciated in *Miller* and its progeny and the fact that *Miller* and its progeny indicate that life without parole sentences

6. Although we hold that a formal narrowing process is not required by *Miller* and its progeny, N.C.G.S. § 15A-1340.19B and N.C.G.S. § 15A-1340.19C do, as construed above, serve a narrowing function by precluding the imposition of a sentence of life imprisonment without the possibility of parole upon a juvenile convicted of first-degree murder on the basis of the felony murder rule and limiting the extent to which juveniles convicted of first-degree murder on the basis of other legal theories can be sentenced to life imprisonment without the possibility of parole.

for juveniles should be exceedingly rare and reserved for specifically described individuals, we see no basis for concluding that the absence of any requirement that the sentencing authority find the existence of aggravating circumstances or make any other narrowing findings prior to determining whether to impose a sentence of life without parole upon a juvenile convicted of first-degree murder on a basis other than the felony murder rule renders the sentencing process enunciated in N.C.G.S. §§ 15A-1340.19A to 15A-1340.19D unconstitutionally arbitrary or vague. [7]

[4] Finally, defendant urges this Court to reverse the Court of Appeals' decision to reject his challenge to the relevant statutory provisions on ex post facto law grounds on the theory that the sentences of life imprisonment without the possibility of parole and life imprisonment with parole permitted by the Act "were more severe than the sentence [that defendant] could have received if he had been sentenced based on the lawful provisions in effect" when the murder for which he was convicted occurred. In defendant's view, the fact that the pre-*Miller* statutory provisions authorizing the imposition of a mandatory sentence of life imprisonment without the possibility of parole upon juveniles convicted of first-degree murder lacked a "savings clause" authorizing the imposition of an alternative punishment in the event that the applicable mandatory life without parole sentence was declared to be unconstitutional means that "there was no constitutional sentence for first-degree murder committed by a juvenile on the offense date for this case." As a result, defendant asserts that he "could not be sentenced for" first-degree murder and must be sentenced as if he had been convicted of second-degree murder, which was "the most severe constitutional penalty established by the legislature for criminal homicide at the time the offense was committed," first quoting *State v. Roberts*, 340 So. 2d 263, 263 (La. 1976), and then citing, *inter alia*, *State v. Kirkman*, 293 N.C. 447, 460-61, 238 S.E.2d 456, 464 (1977) (noting that a life imprisonment sentence did not violate the ex post facto clause when the statute mandating the death penalty

7. Although defendant has not questioned the correctness of the Court of Appeals' rejection of his challenge to the relevant statutory provisions as violative of his Sixth Amendment right to a jury trial, he did argue before this Court that the failure of N.C.G.S. § 15A-1340.19B and N.C.G.S. § 15A-1340.19C to require a narrowing finding violates the principles enunciated in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Blakely v. Washington*, 542 U.S 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), by failing to require that a jury find the aggravating circumstances that he believes to be necessary in order to avoid a finding of arbitrariness. However, we need not address this argument given our conclusion that a valid statutory scheme for the sentencing of juveniles convicted of first-degree murder does not require the sentencing authority to find the existence of aggravating circumstances before imposing a sentence of life imprisonment without the possibility of parole.

for first-degree murder also set out life imprisonment as the applicable punishment should death sentences be determined unconstitutional); *also citing United States v. Under Seal*, 819 F.3d 715, 726 (4th Cir. 2016); and *Commonwealth v. Brown*, 466 Mass. 676, 1 N.E.3d 259 (2013). The State, on the other hand, contends that the Act imposes the "same legal consequence of life imprisonment without parole as the sentencing statute at the time of the murder" and does not, for that reason, impermissibly disadvantage defendant and asserts that defendant's ex post facto law claim is foreclosed by the United States Supreme Court's rejection of a similar argument in *Dobbert v. Florida*, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977).

The federal and state constitutions prohibit the enactment and enforcement of ex post facto laws, which "allow[ ] imposition of a different or greater punishment than was permitted when the crime was committed." *State v. Barnes*, 345 N.C. 184, 233-34, 481 S.E.2d 44, 71 (1997) (quoting *State v. Vance*, 328 N.C. 613, 620-21, 403 S.E.2d 495, 500 (1991)), *cert. denied*, 523 U.S. 1024, 118 S. Ct. 1024, 140 L. Ed. 2d 473 (1998). "There are two critical elements to an *ex post facto* law: that it is applied to events occurring before its creation and that it disadvantages the accused that it affects." *Id.* at 234, 481 S.E.2d at 71 (citing *Vance*, 328 N.C. at 620-21, 403 S.E.2d at 500). As the Court of Appeals noted, "[t]here is no dispute concerning the [existence of the] first element in this case," since the law pursuant to which defendant was resentenced was enacted years after the commission of the crime for which he was being sentenced. *James*, ___ N.C. App. at ___, 786 S.E.2d at 77. The Court of Appeals was also correct in holding that the relevant statutory provisions did not "allow[ ] imposition of a different or greater punishment than was permitted when the crime was committed," *Vance*, 328 N.C. at 620, 403 S.E.2d at 500 (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L. Ed. 648, 650 (1798) (opinion of Chase, J.)), so as to impermissibly disadvantage defendant. Instead, N.C.G.S. §§ 15A-1340.19A to 15A-1340.19D allows the trial court to choose between the same punishment required by prior law and a less severe punishment.

The Court of Appeals correctly rejected defendant's contention that he should have been resentenced as if he had been convicted of second-degree murder on the basis of *Dobbert*, which held that a new sentencing statute that was enacted to address constitutional defects in an earlier sentencing statute and that preserved the availability of the same punishment authorized by the earlier, unconstitutional statute did not result in an ex post facto violation given that the earlier statute "provided fair warning as to the degree of culpability which the State ascribed to the

act of murder." *Dobbert*, 432 U.S. at 297, 97 S. Ct. at 2300, 53 L. Ed. 2d at 359. Although defendant attempts to distinguish *Dobbert* as a procedural, rather than a substantive, decision, we believe that *Dobbert* is not subject to the sort of parsing that defendant urges us to conduct. Instead of resting on a substance – procedure dichotomy, *Dobbert* hinged upon both the ameliorative nature of the challenged statutory change and the fact that the changes were procedural in nature. *Id.* at 292, 97 S. Ct. at 2298, 53 L. Ed. 2d at 355. As a result, given that N.C.G.S. §§ 15A-1340.19A to 15A-1340.19D make a reduced sentence available to defendant and specify procedures that a sentencing judge is required to use in making the sentencing decision, we believe that defendant's challenge to the validity of the relevant statutory provisions as an impermissible ex post facto law is without merit.

Thus, for the reasons set forth above, we conclude that the Court of Appeals decision to the effect that N.C.G.S. §§ 15A-1340.19A to 15A-1340.19D incorporated a presumption in favor of the imposition of a sentence of life imprisonment without the possibility of parole upon juveniles convicted of first-degree murder on the basis of a theory other than the felony murder rule was erroneous, that the relevant statutory provisions do not incorporate a presumption in favor of a sentence of life without parole, and that the Court of Appeals correctly rejected defendant's challenge to N.C.G.S. §§ 15A-1340.19A to 15A-1340.19D as impermissibly vague, conducive to the imposition of arbitrary punishments, or an unconstitutional ex post facto law. On remand, the required further sentencing proceedings must be conducted in a manner that is not inconsistent with this opinion and the decisions of the United States Supreme Court in *Miller* and *Montgomery*. As a result, we hold that the Court of Appeals decision should be modified and affirmed, and that this case should be remanded to the Court of Appeals for further remand to the Superior Court, Mecklenburg County, for further proceedings not inconsistent with this opinion, including further sentencing proceedings.

MODIFIED AND AFFIRMED; REMANDED.

Justice BEASLEY dissenting.

While I agree with the majority that defendant is entitled to resentencing and that the statute does not constitute an ex post facto law or violate due process protections, I disagree with the majority's judicial construction of N.C.G.S. § 15A-1340.19C(a). The majority finds seemingly ambiguous language within N.C.G.S. § 15A-1340.19C(a), in order to read it as constitutionally complying with *Miller v. Alabama*, 567 U.S.

460, 183 L. Ed. 2d 407 (2012); however, N.C.G.S. § 15A-1340.19C(a) is clear and unambiguous, and I would hold the plain meaning of this section unconstitutional under *Miller* because it creates a presumption in favor of sentencing a juvenile to life without parole. Therefore, I respectfully dissent.

Here, defendant challenges, *inter alia*, N.C.G.S. § 15A-1340.19C(a) as creating a presumptive sentence of life without parole for juveniles in direct opposition to the Supreme Court of the United States' interpretation of the Eighth Amendment's prohibition of cruel and unusual punishments in *Miller*. *See Miller*, 567 U.S. at 470, 183 L. Ed. 2d at 418; *see also Montgomery v. Louisiana*, 577 U.S. ___, ___, 193 L. Ed. 2d 599, 622 (2016) (holding that *Miller* is a substantive rule of constitutional law and thus applying its standard retroactively to juveniles sentenced to life without parole by allowing "juvenile homicide offenders to be considered for parole, rather than by resentencing them"). "Although *Miller* did not foreclose a sentencer's ability to impose life without parole on a juvenile, the Court explained that a lifetime in prison is a disproportionate sentence for all but the *rarest of children*, those whose crimes reflect 'irreparable corruption.' " *Montgomery*, 577 U.S. at ___, 193 L. Ed. 2d at 611 (emphasis added) (quoting *Miller*, 567 U.S. at 479-80, 183 L. Ed. 2d at 424 (quoting *Roper v. Simmons*, 543 U.S. 551, 573, 161 L. Ed. 2d 1, 24 (2005))). Therefore, a presumption in favor of sentencing a juvenile to life without parole would contravene *Miller*'s admonition to only sentence the "rarest" of juveniles to such a punishment.

"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." *King v. Albemarle Hosp. Auth.*, ___ N.C. ___, ___, 809 S.E.2d 847, 852 (2018) (Beasley, J., dissenting) (brackets in original) (quoting *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974)); *see also Dep't of Transp. v. Adams Outdoor Advert. of Charlotte Ltd. P'ship*, 370 N.C. 101, 107, 804 S.E.2d 486, 492 (2017) ("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." (quoting *State Highway Comm'n v. Hemphill*, 269 N.C. 535, 539, 153 S.E.2d 22, 26 (1967))). In fact, "[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." *King*, ___

N.C. at ___, 809 S.E.2d at 852 (alterations two through five in original (quoting Ernest Bruncken, *Interpretation of the Written Law*, 25 Yale L.J. 129, 130 (1915))).

N.C.G.S. § 15A-1340.19C(a), with respect to sentencing a juvenile upon a conviction for first-degree murder based on a theory of premeditation and deliberation, provides that "[t]he court shall consider any *mitigating* factors in determining whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole *instead of* life imprisonment without parole." N.C.G.S. § 15A-1340.19C(a) (2017) (emphases added). In interpreting the plain meaning of this section, defendant argues that the language " 'instead of' strongly suggests that a sentence of life with parole is simply a secondary alternative to the default sentence of life without parole." Defendant further contends that "the court's decision under the sentencing scheme is guided almost exclusively by the existence of mitigating factors" and "does not require evidence of any aggravating factors that would render a juvenile eligible for the higher sentence of life without parole." Defendant notes that mitigating factors are used by defendants only to show that their case "warrant[s] a less severe sentence." *State v. Norris*, 360 N.C. 507, 512, 630 S.E.2d 915, 918, *cert. denied*, 549 U.S. 1064, 166 L. Ed. 2d 535 (2006).

Here, the Court of Appeals found "that the use of 'instead of' [in N.C.G.S. § 15A-1340.19C(a)], considered alone, does not show there is a presumption in favor of life without parole." *State v. James*, ___ N.C. App. ___, ___, 786 S.E.2d 73, 79 (2016). Nonetheless, the Court of Appeals also deduced that

> the reason for the General Assembly's use of "instead of" in N.C. Gen. Stat. § 15A-1340.19C(a), as opposed to "or," becomes clear when considered in light of the fact that the sentencing guidelines require the court to consider only mitigating factors. *Because the statutes only provide for mitigation from life without parole to life with parole and not the other way around, it seems the General Assembly has designated life without parole as the default sentence, or the starting point for the court's sentencing analysis.* Thus, to the extent that starting the sentencing analysis with life without parole creates a presumption, we agree with defendant there is a presumption.

Id. at ___, 786 S.E.2d at 79 (emphasis added).

In this case, the legislature expressed its meaning unambiguously in N.C.G.S. § 15A-1340.19C(a) to require a presumption for life without parole, and I agree with the Court of Appeals' conclusion that this provision creates a presumption for life without parole. *Id.* at ___, 786 S.E.2d at 79. Unlike the Court of Appeals, however, I would find the existence of a presumption in favor of sentencing a juvenile to life without parole unconstitutional under *Miller*.

A presumptive sentence of life without parole for juveniles sentenced under this statute contradicts *Miller*. "*Miller* determined that sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption.' " *Montgomery*, 577 U.S. at ___, 193 L. Ed. 2d at 619 (quoting *Miller*, 567 U.S. at 479-80, 183 L. Ed. 2d at 424). Furthermore, *Miller* and its predecessors, *Roper v. Simmons* and *Graham v. Florida*, have emphatically established "that children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471, 183 L. Ed. 2d at 418; *see Roper*, 543 U.S. at 568, 161 L. Ed. 2d at 21-22 (holding that the death penalty may not be constitutionally imposed on juveniles because to do so would violate the Eighth Amendment); *see also Graham v. Florida*, 560 U.S. 48, 74, 176 L. Ed. 2d 825, 845 (2010) ("This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole."). Juveniles "are less deserving of the most severe punishments," *Miller*, 567 U.S. at 471, 183 L. Ed. 2d at 418 (quoting *Graham*, 560 U.S. at 68, 176 L. Ed. 2d at 841), and "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.* at 472, 183 L. Ed. 2d at 419. A presumption in favor of life without parole—the harshest sentence that a juvenile may receive constitutionally under the Eighth Amendment—flouts *Miller* and should not be upheld by this Court.[1]

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1. Other state courts have looked at this issue similarly, in light of the United States Supreme Court's directive that the sentence of life without parole must be reserved for only the rarest of juvenile offenders. For example, some jurisdictions have read *Miller* to require the sentencing court to make a more individualized finding that the sentence of life without parole is warranted. *See. e.g.*, *Commonwealth v. Batts*, 163 A.3d 410, 452 (Pa. 2017) ("The United States Supreme Court did not outlaw a sentence of life in prison without the possibility of parole for all juveniles convicted of first-degree murder; it is only a disproportionate (illegal) sentence for those offenders who may be capable of rehabilitation. Therefore, the presumption against the imposition of this punishment is rebuttable by the Commonwealth upon proof that the juvenile is removed from this generally recognized class of potentially rehabilitable offenders." (citations omitted)); *People v. Hyatt*, 316 Mich. App. 368, 419, 891 N.W.2d 549, 574 ("The cautionary language employed by the Court in *Roper*, *Graham*, *Miller*, and *Montgomery* must be honored by this Court. In light

Here, the presumption of life without parole is apparent when considering that, in combination with its use of the phrase "instead of," N.C.G.S. § 15A-1340.19C(a) only requires the trial court to evaluate mitigating factors. While the majority aptly demonstrates that "instead of" is defined as "an alternative or substitute," rather than a categorical indication of one preferred method over another, the majority fails to properly consider the role of weighing aggravating versus mitigating factors and the effect of this balancing process on the trial court's choice to sentence a defendant to "life imprisonment with parole *instead of* life imprisonment without parole." N.C.G.S. § 15A-1340.19C(a) (emphasis added). Specifically, after recognizing that mitigation makes a sentence "less severe, serious, or painful," the majority merely concludes that requiring consideration of only mitigating factors "does not compel the conclusion that persuading the sentencing court to adopt and credit

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of this language and our need to review defendant Hyatt's sentence under *Miller*, we conclude that when sentencing a juvenile offender, a trial court must begin with the understanding that in all but the rarest of circumstances, a life-without-parole sentence will be disproportionate for the juvenile offender at issue."), *appeal denied sub nom.*, *People v. Williams*, 500 Mich. 921, 888 N.W.2d 64 (2016); *Aiken v. Byars*, 410 S.C. 534, 543, 765 S.E.2d 572, 577 (2014) ("*Miller* does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered."), *cert. denied*, ___ U.S. ___, 192 L. Ed. 2d 179 (2015).

Furthermore, some states have taken the admonition that these sentences must truly be a rare occurrence even further by entirely abolishing the penalty of life without parole for juvenile offenders. In fact, according to an Associated Press study conducted in July 2017, the following states have entirely abolished life without parole for juveniles: Alaska, Connecticut, District of Columbia, Hawaii, Iowa, Kansas, Kentucky, Massachusetts, Minnesota, Montana, Nevada, New Jersey, North Dakota, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wyoming. The Associated Press, *A State-By-State Look at Juvenile Life Without Parole*, U.S. News (July 31, 2017, 5:28 p.m.), https://www.usnews.com/news/best-states/utah/articles/2017-07-31/a-state-by-state-look-at-juvenile-life-without-parole. Of particular relevance here, of these states abolishing life without parole for juveniles after *Miller*, Iowa and Massachusetts did so through judicial rulings. *See State v. Sweet*, 879 N.W.2d 811, 832 (Iowa 2016) (holding the sentence of life without parole for juvenile offenders unconstitutional under the Iowa Constitution, but also noting that "in Iowa, the United States Constitution as interpreted by the Supreme Court prevents the state from imposing life without the possibility of parole in most homicide cases involving juveniles. If life without the possibility of parole may be imposed at all under federal law, which is unclear at this point, *it may be imposed only in cases where irretrievable corruption has been demonstrated by the "rarest" of juvenile offenders*." (emphasis added)); *Diatchenko v. Dist. Att'y for Suffolk Dist.*, 466 Mass. 655, 667-71, 1 N.E.3d 270, 282-85 (2013) (invalidating a mandatory juvenile life without parole scheme as unconstitutional under *Miller* and the Massachusetts State Constitution and also holding a discretionary sentencing system to impose life without parole on a juvenile unconstitutional under the state constitution).

such mitigating evidence is necessary in order to preclude the imposition of a more severe, and presumptively correct, sentence." Given the majority's provided definition of mitigating (namely, reducing the severity of a sentence), the consideration of mitigating circumstances can only operate to move from a harsher to a lesser sentence. Therefore, in this context, mitigation can only mean one thing—moving from imposing a life sentence without the possibility of parole to a life sentence with the possibility of parole.

The statute's language, viewed both independently and in conjunction with the other portions of the North Carolina structured sentencing statutes codified in Article 81B of Chapter 15A, in which trial courts weigh not only mitigating factors but also aggravating factors, compels the conclusion that N.C.G.S. § 15A-1340.19C(a) creates a presumption in favor of sentences of life without parole. *See*, *e.g.*, N.C.G.S. § 15A-1340.16 (2017) (describing the general procedures for consideration of aggravating and mitigating factors when moving beyond the presumptive range for sentencing, and including a list of both types of factors); *id.* § 15A-1340.16B(a) (requiring imposition of a life imprisonment without parole sentence "[i]f a person is convicted of a Class B1 felony and it is found as provided in this section that: (i) the person committed the felony against a victim who was 13 years of age or younger at the time of the offense and (ii) the person has one or more prior convictions of a Class B1 felony," unless there are mitigating factors present); *id.* § 15A-1340.16E (requiring the State to prove criminal gang activity in the same manner as an aggravating factor in order to impose enhanced sentence); *id.* § 15A-1340.17(c) (containing the classification of offenses and prior record level charts and explaining how to consider aggravating and mitigating factors when sentencing). If the statute required both a consideration of aggravating and mitigating circumstances, it would be possible to see how a juvenile's sentence could be elevated from life with parole to life without parole, the harshest of sentences possible for juvenile offenders. *Cf. Circumstance*, *Black's Law Dictionary* (10th ed. 2014) (defining "aggravating circumstance" as "[a] fact or situation that relates to a criminal offense or defendant and that is considered by the court in imposing punishment (esp. a death sentence)"). A consideration of aggravating circumstances would allow the trial court to better decide when to move from sentencing a defendant to life with parole to life without parole. Particularly, a trial court's consideration of aggravating circumstances may help to identify "those whose crimes reflect permanent incorrigibility." *Montgomery*, ___ U.S. at ___, 193 L. Ed. 2d at 620.

Additionally, the consideration of aggravating circumstances in this context makes sense when considering that the Supreme Court has compared a juvenile's sentence of life without parole with an adult's sentence of the death penalty. In *Graham*, the court said that

> life without parole is "the second most severe penalty permitted by law." It is true that a death sentence is "unique in its severity and irrevocability," yet life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence. As one court observed in overturning a life without parole sentence for a juvenile defendant, this sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days."

560 U.S. at 69-70, 176 L. Ed. 2d at 842 (brackets in original) (citations omitted).

Importantly, for the death penalty "[t]o pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.' " *Lowenfield v. Phelps*, 484 U.S. 231, 244, 98 L. Ed. 2d 568, 581 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877, 77 L. Ed. 2d 235, 249-50 (1983)). Just as the Supreme Court has required narrow tailoring for capital sentencing, the Court in the *Graham–Roper–Miller–Montgomery* line of cases mandated that sentencing jurisdictions provide sufficient safeguards to account for the unique position of juveniles and reserve juvenile sentences of life without parole to only the rarest of circumstances.

Here, the plain meaning of N.C.G.S. § 15A-1340.19C(a) starts with a presumption of life without parole and only allows a juvenile to mitigate to a reduced sentence of life with parole. Starting with a presumption of life without parole means juveniles will always have to demonstrate that they are not the "rare" case. Because the plain meaning of this statute

does not comply with the Supreme Court's interpretation of the Eighth Amendment in *Miller*, I respectfully dissent.

Justice HUDSON joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
AMANDA GAYLE REED

No. 331A16

Filed 11 May 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. ___, 789 S.E.2d 703 (2016), vacating defendant's convictions after appeal from a judgment entered on 6 October 2014 by Judge Charles H. Henry in Superior Court, Onslow County. Heard in the Supreme Court on 17 April 2018.

Joshua H. Stein, Attorney General, by Derrick C. Mertz, Special Deputy Attorney General, for the State-appellant.

Mark R. Sigmon for defendant-appellee.

PER CURIAM.

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

REVERSED.

STATE v. VARNER

[371 N.C. 107 (2018)]

STATE OF NORTH CAROLINA
v.
DEAN MICHAEL VARNER

No. 115PA17

Filed 11 May 2018

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 834 (2017), reversing and remanding a judgment entered on 14 January 2016 by Judge Thomas H. Lock in Superior Court, Lee County. Heard in the Supreme Court on 18 April 2018.

Joshua H. Stein, Attorney General, by Kathleen N. Bolton, Assistant Attorney General, and Anne M. Middleton, Special Deputy Attorney General, for the State-appellant.

Glenn Gerding, Appellate Defender, by John F. Carella and Katherine Whitney Dickinson-Schultz, Assistant Appellate Defender, for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA
v.
ASAIAH BEN YISRAEL

No. 304A17

Filed 11 May 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 742 (2017), finding no error after appeal from a judgment entered on 13 April 2016 by Judge Paul C. Ridgeway in Superior Court, Wake County. Heard in the Supreme Court on 16 April 2018.

Joshua H. Stein, Attorney General, by Mary L. Lucasse, Special Deputy Attorney General, for the State.

Craig M. Cooley for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE EX REL. UTILS. COMM'N v. N.C. WASTE AWARENESS & REDUCTION NETWORK

[371 N.C. 109 (2018)]

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; PUBLIC STAFF – NORTH CAROLINA UTILITIES COMMISSION; DUKE ENERGY CAROLINAS, LLC; DUKE ENERGY PROGRESS, LLC; VIRGINIA ELECTRIC AND POWER COMPANY D/B/A DOMINION NORTH CAROLINA POWER

v.

NORTH CAROLINA WASTE AWARENESS AND REDUCTION NETWORK

No. 350A17

Filed 11 May 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. ___, 805 S.E.2d 712 (2017), affirming an order of the North Carolina Utilities Commission entered on 15 April 2016 in Docket No. SP-100, Sub 31. Heard in the Supreme Court on 17 April 2018.

Robert B. Josey, Jr. and David T. Drooz, Staff Attorneys for defendant-appellee Public Staff – North Carolina Utilities Commission.

Allen Law Offices, PLLC, by Dwight W. Allen; and Lawrence B. Somers, Deputy General Counsel, Duke Energy Corporation; for defendant-appellees Duke Energy Progress, LLC and Duke Energy Carolinas, LLC.

McGuireWoods, LLP, by E. Brett Breitschwerdt, Andrea R. Kells, and Valyce M. Davis, for defendant-appellee Virginia Electric and Power Company d/b/a Dominion Energy North Carolina.

Law Offices of F. Bryan Brice, Jr., by Matthew D. Quinn; and John D. Runkle for plaintiff-appellant North Carolina Waste Awareness and Reduction Network.

Perrin W. de Jong for Center for Biological Diversity, Food and Water Watch, Friends of the Earth, Greenpeace, Inc., and Institute for Local Self-Reliance; and Howard M. Crystal, pro hac vice, and Anchun Jean Su, pro hac vice, for Center for Biological Diversity, amici curiae.

Burns, Day & Presnell, P.A., by Daniel C. Higgins, for North Carolina Eastern Municipal Power Agency, North Carolina Municipal Power Agency Number 1, and ElectriCities of North Carolina, Inc., amici curiae.

PER CURIAM.

AFFIRMED.

SWAN BEACH COROLLA, L.L.C.; OCEAN ASSOCIATES, LP; LITTLE NECK TOWERS, L.L.C.; GERALD FRIEDMAN; NANCY FRIEDMAN; CHARLES S. FRIEDMAN; 'TIL MORNING, LLC; AND SECOND STAR, LLC

v.

COUNTY OF CURRITUCK; THE CURRITUCK COUNTY BOARD OF COMMISSIONERS; AND JOHN D. RORER, MARION GILBERT, O. VANCE AYDLETT, JR., H.M. PETREY, J. OWEN ETHERIDGE, PAUL MARTIN, AND S. PAUL O'NEAL AS MEMBERS OF THE CURRITUCK COUNTY BOARD OF COMMISSIONERS

No. 397A17

Filed 11 May 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. ___, 805 S.E.2d 743 (2017), reversing an order entered on 25 November 2014 by Judge Cy A. Grant denying defendants' motion to set aside entry of default and vacating a default judgment entered on 9 May 2016 by Judge Milton F. Fitch, Jr., both in Superior Court, Currituck County. Heard in the Supreme Court on 17 April 2018.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Mitchell Armbruster and Lacy H. Reaves, for plaintiff-appellants.

Brough Law Firm, PLLC, by G. Nicholas Herman; and Donald I. McRee, Jr., Currituck County Attorney, for defendant-appellees.

Conner Gwyn Schenck PLLC, by James S. Schenck, IV; and Amy Bason, General Counsel, for North Carolina Association of County Commissioners, amicus curiae.

Simonsen Law Firm, P.C., by Lars P. Simonsen and Micah R. Simonsen, for Northern Currituck Outer Banks Association, and Roger W. Knight, P.A., by Roger W. Knight, for Fruitville Beach Civic Association, amici curiae.

PER CURIAM.

AFFIRMED.

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

9 MAY 2018

008P16-2	State v. Teon Jamell Williams	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP17-713)	1. Dismissed
		2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	2. Allowed
008P18	State v. Bernardo Roberto Pena a/k/a Martin Rangel Pena	1. State's Motion for Temporary Stay (COA16-1075)	1. Allowed **01/09/2018** Dissolved **05/09/2018**
		2. State's Petition for *Writ of Supersedeas*	2. Denied
		3. State's PDR Under N.C.G.S. § 7A-31	3. Denied
012P18	Harrison Hall, Employee v. U.S. Xpress, Inc., Employer and Liberty Mutual Insurance Company, Carrier	1. Defs' Motion for Temporary Stay (COA17-333)	1. Allowed **01/09/2018** Dissolved **05/09/2018**
		2. Defs' Petition for *Writ of Supersedeas*	2. Denied
		3. Defs' PDR Under N.C.G.S. § 7A-31	3. Denied
		4. Plt's Conditional PDR Under N.C.G.S. § 7A-31	4. Dismissed as moot
021P18	State v. Brad Cayton Norwood	1. Def's Motion for Temporary Stay (COA17-301)	1. Allowed **01/19/2018** Dissolved **05/09/2018**
		2. Def's Petition for *Writ of Supersedeas*	2. Denied
		3. Def's PDR Under N.C.G.S. § 7A-31	3. Denied
022P18	State v. Samuel Tyler Potter	1. State's Motion for Temporary Stay (COA17-677)	1. Allowed **01/19/2018** Dissolved **05/09/2018**
		2. State's Petition for *Writ of Supersedeas*	2. Denied
		3. State's PDR Under N.C.G.S. § 7A-31	3. Denied
		4. Def's Conditional PDR Under N.C.G.S. § 7A-31	4. Dismissed as moot

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027P18	The North Carolina State Bar v. Christopher W. Livingston, Attorney	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA17-277) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA 4. Plt's Motion to Dismiss Appeal	1. — 2. Denied 3. Denied 4. Allowed
034P18	Alexis Santos v. North Carolina Mutual, Life Insurance Company	Plt's Petition for *Writ of Certiorari* to Review Order of COA	Denied **Ervin, J., recused**
039P18	Russell F. Walker v. Knats Creek Nursery, Inc.	Plt's *Pro Se* Motion for PDR (COAP18-21)	Denied
040P17-2	Arthur O. Armstrong v. North Carolina, et al.	Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	Denied
041P18	Raymond Clifton Parker v. Michael de Sherbinin and wife, Elizabeth de Sherbinin	Defs' PDR Under N.C.G.S. § 7A-31 (COA17-377)	Denied
042P04-10	State v. Larry McLeod Pulley	Def's *Pro Se* Motion to a Formal Complaint	Denied
043P18	Jonathan H. Bynum v. Lincolnton Housing Authority, Lincoln County Tax Office, Lincoln County Animal Shelter, and Super Service	1. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Lincoln County (Lincolnton Housing Authority) 2. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Lincoln County (Lincoln County Tax Office) 3. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Lincoln County (Lincoln County Animal Shelter) 4. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Lincoln County (Super Service) 5. Plt's *Pro Se* Motion for Rehearing 6. Plt's *Pro Se* Motion to Affirm 7. Plt's *Pro Se* Petiton for *Writ of Certiorari* (*Bynum v. VA*)	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed 6. Dismissed 7. Dismissed

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		8. Plt's *Pro Se* Motion to Rehear (*Bynum v. VA*)	8. Dismissed
		9. Plt's *Pro Se* Petition for *Writ of Certiorari* (*Bynum v. N.C. State National Guard*)	9. Dismissed
		10. Plt's *Pro Se* Petition for *Writ of Certiorari* (*Bynum v. Dep't of Corrections, State of North Carolina*)	10. Dismissed
		11. Plt's *Pro Se* Petition for *Writ of Certiorari* (*Bynum v. Social Services/ DSS, State of North Carolina)*	11. Dismissed
		12. Plt's *Pro Se* Petition for *Writ of Certiorari* (*Bynum v. Lincoln County, State of North Carolina*)	12. Dismissed
		13. Plt's *Pro Se* Petition for *Writ of Certiorari* (*Bynum v. Social Security Office*)	13. Dismissed
		14. Plt's *Pro Se* Motion for Rehearing (*Bynum v. Social Security Office*)	14. Dismissed
		15. Plt's *Pro Se* Petition for *Writ of Certiorari* (*Bynum v. U.S. Post Office*)	15. Dismissed
		16. Plt's *Pro Se* Motion for Rehearing (*Bynum v. Clerk of Lincoln County*)	16. Dismissed
		17. Plt's *Pro Se* Motion for Appeal (*Bynum v. Clerk of Lincoln County*)	17. Dismissed
		18. Plt's *Pro Se* Motion for Rehearing (*Bynum v. BB&T Bank*)	18. Dismissed
		19. Plt's *Pro Se* Motion for Appeal (*Bynum v. BB&T Bank*)	19. Dismissed
052P18	Nathaniel Sargent and Kristin Sargent v. Austin Edwards, Shawn Stephenson, and Bloom Construction	Plts' PDR Under N.C.G.S. § 7A-31 (COA17-623)	Denied
053P18	State v. Anthony Worth Wyrick	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1244)	Denied
056P18	In the Matter of B.E.M.	1. Respondents' (David and Michelle Coldren) *Pro Se* Motion for Temporary Stay (COA17-663)	1. Denied **02/26/2018**
		2. Respondents' (David and Michelle Coldren) *Pro Se* Petition for *Writ of Supersedeas*	2. Denied
		3. Respondents' (David and Michelle Coldren) *Pro Se* PDR Under N.C.G.S. § 7A-31	3. Denied

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057P18	State v. Derek Antonio Smith, Jr.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-153) 2. Def's Motion to Amend Certificate of Service of PDR	1. Denied 2. Allowed
061P18	State v. David Ernest Malinzak	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Forsyth 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
062P18	State v. Sylvester Ray Andrews, Jr. and Trayvon Markel Powell Moody	1. Def's (Sylvester Ray Andrews, Jr.) PDR Under N.C.G.S. § 7A-31 (COA16-925) 2. Def's (Trayvon Markel Powell Moody) PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied
063P18	State v. Eric J. Hendrickson	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1019)	Denied
066P18	State v. Freddie David Paige	Def's *Pro Se* Motion for Notice of Appeal	Dismissed
068A18	State v. Jermel Toron Krider	1. State's Motion for Temporary Stay (COA17-272) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **03/08/2018** 2. Allowed 3. ---
072P18	State v. Christopher Dorsey	Def's PDR Under N.C.G.S. § 7A-31 (COA17-684)	Denied
077P18	The Cherry Community Organization v. The City of Charlotte; The City Council for the City of Charlotte; and Midtown Area Partners II, LLC	Plt's PDR Under N.C.G.S. § 7A-31 (COA16-1292)	Denied
087P18	State v. Jimmy Orlando Littlejohn	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-551)	Dismissed **04/27/2018**

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088P18	In the Matter of S.G.V.S. and D.D.R.S.	1. Petitioner's Notice of Appeal Based Upon a Constitutional Question 2. Petitioner's PDR Under N.C.G.S. § 7A-31 3. Respondent-Mother's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
091P18	State v. Jerome Johnson	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-412)	Denied
098P18	State v. Clarence Adrian Royster	Def's PDR Under N.C.G.S. § 7A-31 (COA17-823)	Denied
100P18	David A. Perez v. Laurie S. Perez	1. Plt's *Pro Se* Motion for Temporary Stay (COA17-512) 2. Plt's *Pro Se* Petition for *Writ of Supersedeas* 3. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Allowed **04/05/2018** 2. 3.
104P18	Nathaniel R. Webb v. North Carolina Office of Indigent Defense Services, et al.	Plt's *Pro Se* Petition for *Writ of Mandamus*	Denied **04/17/2018**
105P18	Nathaniel R. Webb v. North Carolina State Highway Patrol, et al.	Plt's Pro Se Petition for *Writ of Mandamus*	Denied **04/17/2018**
107P18	State v. Jamal M. Watson	1. Def's Motion for Temporary Stay (COA17-253) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/10/2018** 2. 3.
109P17-4	In re Olander R. Bynum	Petitioner's *Pro Se* Motion for Petition for Rehearing	Dismissed
114P18	State v. Rotonya Russell	Def's PDR Under N.C.G.S. § 7A-31 (COA17-427)	Denied
116P18	State v. Nicholas Nacoleon Harding	1. Def's Motion for Temporary Stay (COA17-448) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **04/11/2018** 2.
118P18	State v. Maurice L. Stroud	Def's *Pro Se* Motion for PDR	Dismissed

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119P18	State v. Christopher B. Smith	1. Def's Motion for Temporary Stay (COA17-680) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **04/19/2018** 2.
131P16-8	State v. Somchoi Noonsab	Def's *Pro Se* Motion for Review of Constitutional Questions	Dismissed
131P18	State v. Zachary Allen Blankenship	1. State's Motion for Temporary Stay (COA17-713) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **05/03/2018** 2.
133P18	Harris Emanuel Ford v. Erik A. Hooks Secretary of NC Department of Public Safety	Petition for *Writ of Habeas Corpus*	Denied **05/07/18** **Hudson, J., recused**
186P17-2	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**
209P17	Christian G. Plasman, in his Individual Capacity and derivatively for the benefit of, on behalf of and right of nominal party Bolier & Company, LLC v. Decca Furniture (USA), Inc., Decca Contract Furniture, LLC, Richard Herbst, Wai Theng Tin, Tsang C. Hung, Decca Furniture, Ltd., Decca Hospitality Furnishings, LLC, Dongguan Decca Furniture Co. Ltd., Darren Hudgins, Decca Home, LLC, and Elan by Decca, LLC, and Bolier & Company, LLC, nominal defendant v. Christian J. Plasman a/k/a Barrett Plasman, third-party defendant	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA16-777) 2. Plt's Petition for *Writ of Certiorari* to Review Order of COA	1. Denied 2. Denied

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210P17	Christian G. Plasman, in his Individual Capacity and derivatively for the benefit of, on behalf of and right of nominal party Bolier & Company, LLC v. Decca Furniture (USA), Inc., Decca Contract Furniture, LLC, Richard Herbst, Wai Theng Tin, Tsang C. Hung, Decca Furniture, Ltd., Decca Hospitality Furnishings, LLC, Dongguan Decca Furniture Co. Ltd., Darren Hudgins, Decca Home, LLC, and Elan by Decca, LLC, and Bolier & Company, LLC, nominal defendant v. Christian J. Plasman a/k/a Barrett Plasman, third-party defendant	Plt's Petition for *Writ of Certiorari* to Review Order of COA (COA16-1156)	Denied
221PA17	State v. Willie James Langley	Def's Motion to Withdraw as Private Assigned Counsel and to Appoint Appellate Defender	Allowed **04/30/2018**
249P11-6	State v. Bobby Ray Grady	Def's *Pro Se* Petition for *Writ of Mandamus* (COAP17-914)	Dismissed as moot
281P17	State v. Christopher Scott Ellis	1. State's Motion for Temporary Stay (COA16-938) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/18/2017** Dissolved **05/09/2018** 2. Denied 3. Denied
283P17	State v. Willie James Bolder	Def's PDR Under N.C.G.S. § 7A-31 (COA16-814)	Denied
290P15-2	State v. Jeffrey Tryon Collington	1. State's Motion for Temporary Stay (COA17-726) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **04/27/2018** 2.

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309P15-4	State v. Reginald Underwood Fullard	1. Def's *Pro Se* Motion for Appeal (COAP17-103) 2. Def's *Pro Se* Motion for Petition for Review 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed *ex mero motu* 2. Dismissed 3. Allowed
322P15-7	Raymond Alan Griffin v. N. Lorrin Freeman, Wake County District Attorney and Paul Ridgeway, Senior Resident Superior Court Judge	Petitioner's *Pro Se* Motion for Notice of Appeal of *Writ of Mandamus* Denial	Dismissed
322P15-8	State v. Raymond Alan Griffin	Def's *Pro Se* Motion for Appeal of Motion for Appropriate Relief by *Certiorari*	Dismissed
331A16	State v. Amanda Gayle Reed	Def's Conditional Petition for *Writ of Certiorari* to Review Decision of COA (COA15-363)	Dismissed as moot
359P17	In the Matter of Anthony Rayshon Bethea	1. Petitioner's Notice of Appeal Based Upon a Constitutional Question (COA17-459) 2. Petitioner's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
368P17	Geneva T. Bullard, Administratrix of the Estate of Vonnie Lee Bullard v. Prime Building Company, Inc. of North Carolina	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA16-1279) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
383P17	Karen L. Dillard v. Thomas T. Dillard, Jr.	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COA17-85) 2. Def's *Pro Se* Motion to Procure Original Record 3. Def's *Pro Se* Motion to File and Proceed *In Forma Pauperis*	1. Denied 2. Dismissed 3. Allowed

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393P17	State v. Byron Jerome Parker	1. State's Motion for Temporary Stay (COA17-108)	1. Allowed **11/21/2017** Dissolved **05/09/2018**
		2. State's Petition for *Writ of Supersedeas*	2. Denied
		3. State's PDR Under N.C.G.S. § 7A-31	3. Denied
396P17	State v. Michael Lee White	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-945)	1. ---
		2. Def's PDR Under N.C.G.S. § 7A-31	2. Allowed
		3. State's Motion to Dismiss Appeal	3. Allowed
400P17	State v. Patty Meadows	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-1207)	1. ---
		2. Def's PDR Under N.C.G.S. § 7A-31	2. Allowed
		3. State of North Carolina's Motion to Dismiss Appeal	3. Allowed
412P17	State v. Raul Pachicano Diaz	1. State's Motion for Temporary Stay (COA17-444)	1. Allowed **12/08/2017**
		2. State's Petition for *Writ of Supersedeas*	2. Allowed
		3. State's Notice of Appeal Based Upon a Constitutional Question	3. Dismissed *ex mero motu*
		4. State's Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31	4. Allowed
414A17-2	Ron David Metcalf v. Susan Hyatt Call	Plt's Pro Se Motion to Reconsider	Dismissed
417P17	In the Matter of P.S.	1. Respondent's Notice of Appeal Based Upon a Constitutional Question (COA17-234)	1. ---
		2. Respondent's PDR Under N.C.G.S. § 7A-31	2. Denied
		3. State's Motion to Dismiss Appeal	3. Allowed
418P17	In the Matter of L.T.	1. Respondent's Notice of Appeal Based Upon a Constitutional Question (COA17-235)	1. ---
		2. Respondent's PDR Under N.C.G.S. § 7A-31	2. Denied
		3. State's Motion to Dismiss Appeal	3. Allowed

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419P17	In the Matter of R.J.	1. Respondent's Notice of Appeal Based Upon a Constitutional Question (COA17-237)	1. ---
		2. Respondent's PDR Under N.C.G.S. § 7A-31	2. Denied
		3. State's Motion to Dismiss Appeal	3. Allowed
420P17	Stephanie T. Trejo v. N.C. Department of State Treasurer Retirement Systems Division	1. Petitioner's Notice of Appeal Based Upon a Constitutional Question Under N.C.G.S. § 7A-30(1) (COA16-1182)	1. ---
		2. Petitioner's PDR Under N.C.G.S. § 7A-31	2. Denied
		3. State's Motion to Dismiss Appeal	3. Allowed
		4. Petitioner's Motion for Temporary Stay	4. Denied **01/23/2018**
		5. Petitioner's Petition for *Writ of Supersedeas*	5. Dismissed as moot
		6. State Employees Association of North Carolina Inc's Motion for Leave to File Amicus Brief in Support of PDR	6. Denied
421P17	State v. Juan Foronte McPhaul	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-924)	1. Allowed
		2. State's Conditional PDR Under N.C.G.S. § 7A-31	2. Allowed
427P17	State v. Jermaine Antwan Tart	1. State's Motion for Temporary Stay (COA17-561)	1. Allowed **12/15/2017**
		2. State's Petition for *Writ of Supersedeas*	2. Allowed
		3. State's PDR Under N.C.G.S. § 7A-31	3. Allowed
		4. Def's Conditional PDR Under N.C.G.S. § 7A-31	4. Allowed
		5. State's Motion to Amend	5. Allowed
429P17	Jacquelyn Brown, Employee v. N.C. Department of Public Instruction (Macon County Schools), Employer, Self-Insured (Corvel Corporation, Third-Party Administrator)	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA17-276)	1. ---
		2. Plt's Motion to Deem PDR Timely Filed	2. Denied
		3. Plt's Alternative Petition for *Writ of Certiorari*	3. Denied
		4. Def's Motion to Dismiss PDR	4. Allowed

BRACKETT v. THOMAS

[371 N.C. 121 (2018)]

WAYNE T. BRACKETT, JR., PETITIONER
v.
KELLY J. THOMAS, COMMISSIONER OF THE NORTH CAROLINA DIVISION OF MOTOR VEHICLES, RESPONDENT

No. 146PA17

Filed 8 June 2018

Motor Vehicles—driving while impaired—license revocation—standard of review

Where the N.C. Department of Motor Vehicles (DMV) revoked defendant's driving privileges for his refusal to submit to a chemical analysis, and the superior court reversed the DMV hearing officer's decision, the Court of Appeals erred on review by making witness credibility determinations and resolving contradictions in the evidence when it determined that the DMV hearing officer's conclusion was "not supported by the record evidence or the findings." Based on the unchallenged findings of fact, petitioner's repeated failure to follow the chemical analyst's instructions on how to provide a sufficient breath sample, after being warned that a refusal to comply would be recorded if such failure continued, constituted willful refusal to submit to a chemical analysis.

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 778 (2017), affirming an order signed on 14 June 2016 by Judge Susan E. Bray in Superior Court, Guilford County. Heard in the Supreme Court on 13 March 2018.

Joel N. Oakley for petitioner-appellee.

Joshua H. Stein, Attorney General, by Christopher W. Brooks, Special Deputy Attorney General, for respondent-appellant.

MORGAN, Justice.

In this matter, we reaffirm the well-established standard of review when a court reviews a final agency decision by the North Carolina Division of Motor Vehicles (DMV) to revoke a driver's license for willful refusal to submit to a chemical analysis. In determining that the DMV erred in concluding that such a willful refusal had occurred, the Court of Appeals here overstepped its role by making witness

credibility determinations and resolving contradictions in the evidence presented during the DMV's administrative hearing concerning the license revocation. Utilizing the proper standard of review, we conclude that the unchallenged findings of fact made by the DMV support the only disputed legal conclusion, thus requiring us to uphold the DMV's decision to revoke the driving privileges at issue. Accordingly, we reverse the decision of the Court of Appeals in this matter.

On 13 August 2015, petitioner Wayne T. Brackett, Jr. was arrested in Guilford County and charged with the offense of driving while impaired. Thereafter, respondent Kelly J. Thomas, Commissioner of the DMV, notified petitioner that, effective 20 September 2015, petitioner's driving privileges would be suspended and revoked based on petitioner's refusal to submit to a chemical analysis. In response, petitioner requested an administrative hearing before the DMV pursuant to the Uniform Driver's License Act. *See* N.C.G.S. § 20-16.2(d) (2017). That hearing was conducted on 7 January 2016, after which the DMV hearing officer upheld the revocation of petitioner's driving privileges, making numerous findings of fact and conclusions of law in his written decision. Petitioner has never challenged the hearing officer's findings of fact,[1] which are therefore binding on each reviewing court. *See e.g.*, *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962) ("Where no exceptions have been taken to the findings of fact, such findings are presumed to be supported by competent evidence and are binding on appeal." (citations omitted)); *see also Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). These findings therefore provide the factual record of the events underlying this appeal:

> 1. On August 13, 2015, Officer Brent Kinney, Guilford County Sheriff's Office, was stationary in the Food Lion parking lot at 7605 North NC Hwy 68 when he observed the petitioner and a female walking to the connecting parking lot of a bar, Stoke Ridge, between 9:30-9:40 [p.m.]. He noted the petitioner had a dazed appearance and was unsure on his feet.
>
> 2. Officer Brent Kinney observed the petitioner enter the driver's seat of a gold Audi, back out of the parking space, and quickly accelerate to about 26 mph in the Food Lion parking [lot].

1. In his 19 January 2016 petition for judicial review of the DMV's final agency decision in the superior court, petitioner challenged only "the conclusion of the [DMV] that [he] willfully and unlawfully refused to submit to a chemical test."

3. Officer Brent Kinney got behind the petitioner until the petitioner stopped in the parking lot. At that point Officer Brent Kinney observed both doors open and the petitioner and the female exit the vehicle.

4. Officer Brent Kinney lost sight of the vehicle when he exited the parking lot. Then he got behind the vehicle when it exited the parking lot.

5. Officer Brent Kinney observed the gold Audi cross the yellow line twice and activated his blue lights and siren.

6. The female was driving and Officer Brent Kinney determined she was not impaired.

7. Officer Brent Kinney detected a strong odor of alcohol on the petitioner, whom he saw driving in the PVA of Food Lion and observed he had slurred speech, glassy eyes and was red-faced.

8. The petitioner put a piece of candy in his mouth even after Officer Brent Kinney told him not to do so. He subsequently removed the piece of candy when asked to do so.

9. Officer Brent Kinney asked the petitioner to submit to the following tests: 1) Recite alphabet from E-U—Petitioner recited E, F, G, H, I, J, K, L, M, N, O, P and stopped; and 2) Recite numbers backwards from 67-54—Petitioner recited 67, 66, 65, 4, 3, 2, 1, 59, 8, 7, 6, 5, 4, 3, 2, 1.

10. Officer Brent Kinney arrested the petitioner, charging him with driving while impaired, and transported him to the Guilford County jail control for testing.

11. Officer Brent Kinney, a currently certified chemical analyst with the Guilford County Sheriff's Office, read orally and provided a copy of the implied consent rights at 10:30 [p.m.] The petitioner refused to sign the rights form and did not call an attorney or witness.

12. Officer Brent Kinney explained and demonstrated how to provide a sufficient sample of air for the test.

13. Officer Brent Kinney requested the petitioner submit to the test at 10:49 [p.m.] The petitioner did not take a deep breath as instructed and faked blowing as the instrument gave no tone and the [gauge] did not move, indicating no air was being introduced.

14. Officer Brent Kinney warned the petitioner that he must blow as instructed or it would be determined he was refusing the test and explained again how to provide a sufficient sample.

15. The petitioner made a second attempt to submit to the test. This time he did take a breath but then gave a strong puff and then stopped; and then gave a second strong puff and stopped.

16. The petitioner's second attempt concluded at 10:50 [p.m.] at which time Officer Brent Kinney determined he was refusing the test by failing to follow his instructions and marked the refusal at that time.

17. The petitioner's second attempt resulted in a detection of mouth alcohol. With that, Officer Brent Kinney had to reset the instrument, not to provide another opportunity for the petitioner to take the test, but to enter the refusal into the instrument.

18. In spite of the test ticket recording the refusal at 10:56 [p.m.], the DHHS 4081 indicates the refusal was actually at 10:50 [p.m.]

19. The doctor's note indicates the petitioner's asthma appears to be stabilized with medication and anxiety disorder is managed by Xanax.

Based upon these findings of fact, the hearing officer made the following conclusions of law and upheld the revocation of petitioner's driver's license:

1. [Petitioner] was charged with an implied-consent offense.

2. Officer Brent Kinney had reasonable grounds to believe that [petitioner] had committed an implied-consent offense.

3. The implied-consent offense charged involved no death or critical injury to another person.

4. [Petitioner] was notified of his rights as required by N.C.G.S. 20-16.2(a).

5. [Petitioner] willfully refused to submit to a chemical analysis.

See N.C.G.S. § 20-16.2(d) (providing that the hearing before the DMV "shall be limited to consideration of" five matters: whether a driver was charged with an implied-consent offense, whether a law enforcement officer had reasonable grounds to believe the driver committed an implied-consent offense, whether the implied-consent offense charged involved death or critical injury to another person, whether the driver was notified of his rights, and whether the driver "willfully refused to submit to a chemical analysis").

On 19 January 2016, petitioner filed a petition for judicial review in the Superior Court, Guilford County, challenging the hearing officer's final conclusion of law: that petitioner had willfully refused to submit to a chemical analysis. *See id.* § 20-16.2(e) (2017) (providing that a "person whose license has been revoked has the right to file a petition [for judicial review] in the superior court"). The superior court heard the matter on 6 June 2016, ultimately reversing the DMV hearing officer's decision because "[t]he record does not support the conclusion under N.C.G.S. § 20-16.2(d)(5). Therefore, the [DMV] Hearing Officer should not have found that the petitioner willfully refused to submit to a chemical analysis of his breath."

The Commissioner appealed that decision to the Court of Appeals, arguing that the superior court failed to conduct the type of review mandated by statute, *see id.* § 20-16.2(e) ("superior court review shall be limited to whether there is sufficient evidence in the record to support the Commissioner's findings of fact and whether the conclusions of law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license"), that sufficient evidence in the record supports the hearing officer's findings of fact, and that those findings of fact in turn support the hearing officer's conclusion of law that petitioner willfully refused to submit to a chemical analysis test. The Court of Appeals agreed that the superior court did not employ the correct standard of review and did "not explain which of the agency's fact findings were unsupported." *Brackett v. Thomas*, ___ N.C. App. ___, ___, 798 S.E.2d 778, 781 (2017).

Citing this Court's per curiam opinion in *Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjustment*, 355 N.C. 269, 559 S.E.2d 547 (2002), in which this Court reversed the decision of the Court of Appeals for

the reasons stated in the dissenting opinion, including that "an appellate court's obligation to review a superior court order for errors of law . . . can be accomplished by addressing the dispositive issue(s) before the agency and the superior court without examining the scope of review utilized by the superior court," 146 N.C. App. 388, 392, 552 S.E.2d 265, 268 (2001) (Greene, J., dissenting) (internal citation omitted), the Court of Appeals stated it would "consider the issue under the applicable statutory standard of review, without remanding the case to the superior court." *Brackett*, ___ N.C. App. at ___, 798 S.E.2d at 781. But, the Court of Appeals then utilized the same flawed analysis that it identified in the superior court's review, namely: considering whether *the evidence in the record* supported the hearing officer's conclusion of law that petitioner willfully refused a chemical analysis,[2] rather than determining whether *the uncontested findings of fact* supported the hearing officer's legal conclusion that petitioner willfully refused a chemical analysis.[3]

The General Assembly has explicitly directed that for a driver's license revocation based upon a person's refusal to submit to a chemical analysis, "[t]he superior court review shall be limited to whether there is sufficient evidence in the record to support the Commissioner's findings of fact and whether the conclusions of law are supported by the findings of fact and whether the Commissioner committed an error of law in revoking the license." N.C.G.S. § 20-16.2(e). Factual findings that are supported by evidence are conclusive, "even though the evidence might sustain findings to the contrary." *Seders v. Powell*, 298 N.C. 453, 460-61, 259 S.E.2d 544, 549 (1979) (citations omitted). It is the role of the agency,

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2. Petitioner may have contributed to the confusion experienced by the reviewing courts in this matter by suggesting in his original petition for judicial review in the superior court that the willful refusal "conclusion is not sustained by the evidence presented." Petitioner has continued to make this argument in his briefs to the Court of Appeals and this Court.

3. Although not directly pertinent to the matter before this Court, we observe that the Court of Appeals also erred in undertaking an analysis of the hearing officer's first four conclusions of law—whether petitioner was charged with an implied-consent offense, whether Officer Kinney had reasonable grounds to believe petitioner had committed an implied-consent offense, whether the implied-consent offense charged involved death or critical injury, and whether petitioner was notified of his rights—even though, in seeking judicial review in the superior court, petitioner challenged only the conclusion that he willfully refused chemical analysis. Further, in that analysis, the Court of Appeals stated that it considered whether "substantial" evidence supported the hearing officer's factual findings, rather than the proper standard under N.C.G.S. § 20-16.2(e) of whether "sufficient" evidence in the record supports challenged findings of fact. *See Brackett*, ___ N.C. App. at ___, 798 S.E.2d at 781.

rather than a reviewing court, "to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence." *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 406, 269 S.E.2d 547, 565 (1980) (citations omitted); *see also Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 202, 593 S.E.2d 764, 771 (2004). In the present case, the Court of Appeals engaged in the prohibited exercises of reweighing evidence and making witness credibility determinations, essentially making its own findings of fact in several areas where evidence presented to the hearing officer was conflicting.

As previously noted, unchallenged findings of fact are binding on appeal; therefore, the only question for the Court of Appeals was whether the hearing officer's findings of fact supported the legal conclusion that petitioner willfully refused chemical analysis. As the court acknowledged in its opinion,

> Officer Kinney testified that: (1) he instructed Petitioner on how to provide a valid sample of breath for testing; (2) Petitioner failed to follow the officer's instructions on the first Intoximeter test, as the pressure gauge on the instrument did not indicate that air was being breathed by Petitioner; (3) Officer Kinney provided Petitioner a second opportunity to provide an air sample; and (4) contrary to Officer Kinney's instructions, Petitioner finished blowing before being told to stop and then followed up with another puff of air.
>
> Petitioner urges us to affirm the superior court's decision and asserts the admitted evidence in the record shows: (1) the results of Petitioner's second Intoximeter test registered "mouth alcohol;" (2) the operating manual and procedures for the EC/IR II Intoximeter requires that if the machine detects "mouth alcohol," then a subsequent test should be administered after a 15-minute observation period; (3) Petitioner testified that he blew as long and hard as he could into the Intoximeter; (4) Petitioner testified he told the arresting officer before being administered the Intoximeter that he suffered from asthma.

Brackett, ___ N.C. App. at ___, 798 S.E.2d at 783. With these observations, the Court of Appeals recognized that petitioner had asked that court and the superior court to (1) make witness credibility determinations about Officer Kinney and petitioner concerning their conflicting

accounts whether petitioner followed the officer's direction to blow without stopping in order to give a valid breath sample, (2) evaluate evidence from the operating manual and procedures for the EC/IR II Intoximeter about which the hearing officer made no findings, and (3) weigh those factual determinations to decide whether they support a legal conclusion of willful refusal by petitioner to submit to a chemical analysis. The court's opinion then states:

> Here, the findings of fact show and it is undisputed that when Petitioner blew a second time, the Intoximeter registered "mouth alcohol" as the result of the sample. The arresting officer asserted Petitioner failed to follow instructions by blowing insufficiently into the machine and he marked it as a willful refusal. *Rather than indicating Petitioner blew insufficiently to provide a sample on his second attempt, Petitioner provided an adequate sample for the Intoximeter to read and register "mouth alcohol". The arresting officer's testimony that Petitioner blew insufficiently is directly contradicted by the Intoximeter's registering a sample with a "mouth alcohol" test result.*
>
> Respondent did not produce any evidence to demonstrate the EC/IR II Intoximeter will produce a "mouth alcohol" reading if the test subject fails to submit a sufficient sample. The undisputed evidence shows *the EC/IR II Intoximeter registered "mouth alcohol" and did not indicate an inadequate sample or refusal from Petitioner's failure to blow sufficiently.*
>
> *Officer Kinney's testimony asserting Petitioner willfully refused is contradicted by the machine's acceptance of Petitioner's sample. The indicated procedure to follow from this result of "mouth alcohol" is for a subsequent EC/IR II Intoximeter test to be administered after a 15-minute observation period elapses.* This procedure was not followed here. The DMV Hearing Officer's conclusion that "[Petitioner] willfully refused to submit to a chemical analysis" is not supported by the record evidence or the findings.

Id. at ___, 798 S.E.2d at 784 (emphases added).

Thus, instead of rejecting petitioner's request to invade the province of the fact-finder in this case—the hearing officer—and correctly

focusing solely on whether the unchallenged findings of fact support the conclusion of law of a willful refusal, the Court of Appeals first impermissibly reviewed the record evidence to make new factual determinations about, *inter alia*, the meaning of a "mouth alcohol" reading on the Intoximeter, the adequacy of a breath sample, and the procedures to be followed when a "mouth alcohol" reading is produced. Thereupon, the appellate court improperly determined the weight that such a reading should be given in determining whether an adequate breath sample has been produced and resolved contradictions in the evidence regarding whether petitioner followed Officer Kinney's directions. These unnecessary and superfluous steps by the Court of Appeals constitute error.

To properly review the hearing officer's determination of a willful refusal to submit to a chemical analysis test by petitioner, we must determine whether that conclusion of law is supported by the following findings of fact pertinent to that issue:

> 12. Officer Brent Kinney explained and demonstrated how to provide a sufficient sample of air for the test.
>
> 13. Officer Brent Kinney requested the petitioner submit to the test at 10:49 [p.m.] The petitioner did not take a deep breath as instructed and faked blowing as the instrument gave no tone and the [gauge] did not move, indicating no air was being introduced.
>
> 14. Officer Brent Kinney warned the petitioner that he must blow as instructed or it would be determined he was refusing the test and explained again how to provide a sufficient sample.
>
> 15. The petitioner made a second attempt to submit to the test. This time he did take a breath but then gave a strong puff and then stopped; and then gave a second strong puff and stopped.
>
> 16. The petitioner's second attempt concluded at 10:50 [p.m.] at which time Officer Brent Kinney determined he was refusing the test by failing to follow his instructions and marked the refusal at that time.
>
> 17. The petitioner's second attempt resulted in a detection of mouth alcohol. With that, Officer Brent Kinney had to reset the instrument, not to provide another opportunity for the petitioner to take the test, but to enter the refusal into the instrument.

18. In spite of the test ticket recording the refusal at 10:56 [p.m.], the DHHS 4081 indicates the refusal was actually at 10:50 [p.m.]

19. The doctor's note indicates the petitioner's asthma appears to be stabilized with medication and anxiety disorder is managed by Xanax.

These factual findings indicate that petitioner was instructed on how to provide a sufficient breath sample, did not follow the instructions on the first blow, was warned that failing to follow the instructions on providing a sufficient breath sample would constitute a refusal, was reinstructed on providing a sufficient breath sample, failed again to follow the instructions during the second blow, was then recorded as refusing to submit to a chemical analysis on the basis of his failure to follow instructions, had a breathing condition that his doctor indicated was "stabilized with medication," and was ultimately marked as willfully refusing to submit to a chemical analysis based upon his failure to follow Officer Kinney's repeated instructions despite being warned. Based on these unchallenged facts, we hold that the repeated failure to follow the chemical analyst's instructions on how to provide a sufficient breath sample, after being warned that a refusal to comply would be recorded if such failure continues, constitutes willful refusal to submit to a chemical analysis.

Section 20-16.2 has consistently included the phrase "willful refusal" to submit to a chemical analysis as a basis for revocation of one's driving privileges over the course of its original enactment and numerous amendments spanning more than five decades. This Court has held that, as provided in N.C.G.S. § 20-16.2, "*refusal* is defined as 'the declination of a request or demand, or the omission to comply with some requirement of law, as the result of a positive intention to disobey.' " *Joyner v. Garrett*, 279 N.C. 226, 233, 182 S.E.2d 553, 558 (1971) (quoting *refusal*, *Black's Law Dictionary* (4th ed. 1951)). For such a refusal to be willful, the driver's actions must reflect "a conscious choice purposefully made." *Seders*, 298 N.C. at 461, 259 S.E.2d at 550; *see also Etheridge v. Peters*, 301 N.C. 76, 81, 269 S.E.2d 133, 136 (1980) (citing *Seders* for the same proposition). Our discussion of the driver's willful refusal in *Seders* is illustrative of the enunciated principle.

In *Seders* the driver was informed of his right to consult an attorney but was also warned that, in any event, testing could be delayed for no longer than thirty minutes. 298 N.C. at 461, 259 S.E.2d at 549; *see* N.C.G.S. § 20-16.2(a)(6) (2017) (stating that a driver must be informed

of his right to "call an attorney for advice . . . , but the testing may not be delayed for [this] purpose[ ] longer than 30 minutes from the time you are notified of these rights. You must take the test at the end of 30 minutes even if you have not contacted an attorney . . . ."). The chemical analyst in *Seders*, who was also a North Carolina state trooper,

> warned [the driver] on three occasions that his time was running out and told [the driver] how many minutes he had remaining. The trooper also stated that he told [the driver] that the test could not be delayed for more than 30 minutes and that if [the driver] did not take the test within that time it would be noted as a refusal.

Id. at 461, 259 S.E.2d at 549. This Court observed that the driver "was told the consequences of his failure to submit to the test within the 30 minute time limitation yet still elected to run the risk of awaiting his attorney's call," and held that the driver's "action constituted a *conscious choice purposefully made* and his omission to comply with this requirement of our motor vehicle law amounts to a willful refusal." *Id.* at 461, 259 S.E.2d at 549 (emphasis added) (citations omitted).

Both the driver in *Seders* and petitioner in the instant case were instructed repeatedly about the process of submitting to a valid chemical analysis. In *Seders*, the instruction at issue was the requirement that the chemical analysis test be implemented no longer than thirty minutes from the time that a vehicle operator is informed of his or her rights to consult an attorney regarding the test. In the case at bar, the instruction at issue is the proper method by which to provide a breath sample sufficient for a chemical analysis. Both the driver in *Seders* and petitioner here were warned that continued failure to comply with instructions repeatedly given by law enforcement officers would result in a determination of a willful refusal to submit to a chemical analysis. Despite these warnings, both the driver in *Seders* and petitioner here remained noncompliant with the pertinent instructions, "action[s] constitut[ing] a conscious choice purposefully made" not to submit to chemical testing. *See id.* at 461, 259 S.E.2d at 550. Petitioner here was instructed about how to produce a sufficient breath sample, but he instead chose to give an initial "faked" blow and then a "puff-stop-puff-stop," both of which were insufficient for analysis. A motor vehicle operator who intentionally and repeatedly fails to follow the instructions that have been explained in order for a chemical analysis to be performed, therefore thwarting the execution of the test, commits willful refusal to submit to a chemical analysis under N.C.G.S. § 20-16.2.

The superior court and the Court of Appeals both employed an incorrect standard of review and thus erred in reversing the administrative decision of the DMV hearing officer revoking petitioner's operator's license. Accordingly, the Court of Appeals decision is reversed and this matter is remanded to that court for further remand to the superior court with instructions to reinstate the order of the DMV dated 7 January 2016.

REVERSED AND REMANDED.

IN THE MATTER OF J.M. AND J.M.

No. 363PA17

Filed 8 June 2018

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 804 S.E.2d 830 (2017), affirming in part, vacating in part, and reversing and remanding in part an order entered on 21 November 2016 by Judge William A. Marsh, III in District Court, Durham County. Heard in the Supreme Court on 16 May 2018 in session in the Buncombe County Courthouse in the City of Asheville, pursuant to section 18B.8 of Chapter 57 of the 2017 North Carolina Session Laws.

Matthew D. Wunsche, GAL Appellate Counsel, for appellee Guardian ad Litem; and Cathy L. Moore, Senior Assistant County Attorney, for petitioner-appellee Durham County Department of Social Services.

Joyce L. Terres, Assistant Appellate Defender, for respondent-appellant father.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

THE KIMBERLEY RICE KAESTNER 1992 FAMILY TRUST
v.
NORTH CAROLINA DEPARTMENT OF REVENUE

No. 307PA15-2

Filed 8 June 2018

Taxation—out-of-state trust—beneficiary residing in N.C.—minimum contacts

Where the N.C. Department of Revenue taxed the income of The Kimberly Rice Kaestner 1992 Family Trust—which was created in New York and governed by the laws of New York—pursuant to N.C.G.S. § 105-160.2 solely based on the North Carolina residence of the beneficiaries during tax years 2005 through 2008, the Trust did not have sufficient minimum contacts with the State of North Carolina to satisfy the due process requirements of the Fourteenth Amendment to the U.S. Constitution and Article I, Section 19 of the N.C. Constitution. Therefore, N.C.G.S. § 105-160.2 was unconstitutional as applied to collect the disputed income taxes from the Trust.

Justice ERVIN dissenting.

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 645 (2016), affirming an opinion and order of summary judgment dated 23 April 2015 entered by Judge Gregory P. McGuire, 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, Wake County. Heard in the Supreme Court on 11 October 2017.

Moore & Van Allen PLLC, by Thomas D. Myrick, Neil T. Bloomfield, Jonathan M. Watkins, and Kara N. Bitar, for plaintiff-appellee.

Joshua H. Stein, Attorney General, by Matthew W. Sawchak, Solicitor General, Tenisha S. Jacobs, Special Deputy Attorney General, and James W. Doggett, Deputy Solicitor General; and Law Office of Robert F. Orr, by Robert F. Orr, for defendant-appellant.

JACKSON, Justice.

In this case we consider whether defendant North Carolina Department of Revenue could tax the income of plaintiff The Kimberly

Rice Kaestner 1992 Family Trust pursuant to N.C.G.S. § 105-160.2 solely based on the North Carolina residence of the beneficiaries during tax years 2005 through 2008. Because we determine that plaintiff did not have sufficient minimum contacts with the State of North Carolina to satisfy due process requirements of the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the Constitution of North Carolina, we conclude that the taxes at issue were collected unconstitutionally and, therefore, affirm the decision of the Court of Appeals affirming the North Carolina Business Court's 23 April 2015 Opinion and Order on Motions for Summary Judgment in favor of plaintiff.

As the Business Court noted, the underlying, material facts of this case as established by the evidence in the record are not in dispute. The Joseph Lee Rice, III Family 1992 Trust was created in New York in 1992 for the benefit of the children of the settlor Joseph Lee Rice, III pursuant to a trust agreement between Rice and the initial trustee, William B. Matteson. In 2005 Matteson was replaced as trustee by David Bernstein, who was a resident of Connecticut. Bernstein remained in the position of trustee and remained a Connecticut resident during the entire period of time relevant to this case. The trust was and is governed by the laws of the State of New York, of which Rice was a resident. No party to the trust resided in North Carolina until Rice's daughter and a primary beneficiary of the trust, Kimberly Rice Kaestner, moved to North Carolina in 1997.

On 30 December 2002, the trust was divided into three share sub-trusts one each for the benefit of Rice's three children, including Kaestner. The sub-trusts were divided into three separate trusts in 2006 by Bernstein for administrative convenience. Plaintiff is the separate share trust formed for the benefit of Kaestner and her three children, all of whom resided in North Carolina during the tax years at issue.

During the tax years at issue, the assets held by plaintiff consisted of various financial investments, and the custodians of those assets were located in Boston, Massachusetts. Documents related to plaintiff such as ownership documents, financial books and records, and legal records were all kept in New York. All of plaintiff's tax returns and accountings were prepared in New York.

None of the beneficiaries of plaintiff had an absolute right to any of plaintiff's assets or income because distributions could only be made at the discretion of Bernstein, who had broad authority to manage the property held by plaintiff. No distributions were made to beneficiaries in

North Carolina, including Kaestner, during the tax years at issue; however, in January 2009, plaintiff loaned $250,000 to Kaestner at Bernstein's discretion to enable her to pursue an investment opportunity. This loan was repaid.

The terms of the original trust provided that the trustee was to distribute the trust assets to Kaestner when she reached the age of forty. Before her fortieth birthday on 2 June 2009, Kaestner had conversations with her father and Bernstein about whether she wished to receive the trust assets on that date. Ultimately, she requested to extend the trust, and accordingly, Bernstein transferred the assets of plaintiff into a new trust, the KER Family Trust, in 2009. That transfer occurred after the tax years at issue, and KER Family Trust is not a party to this case.

In managing plaintiff, Bernstein provided Kaestner with accountings of trust assets, and she received legal advice regarding plaintiff from Bernstein and his firm. Kaestner and her husband also met with Bernstein in New York to discuss investment opportunities for the trust and whether Kaestner desired to receive income distribution as set forth in the original trust agreement.

During tax years 2005 through 2008, defendant taxed plaintiff on income accumulated each year, regardless of whether any of that income was distributed to any of the North Carolina beneficiaries. Plaintiff sought a refund of those taxes totaling more than $1.3 million, including $79,634.00 paid for 2005, $106,637.00 paid for 2006, $1,099,660.00 paid for 2007, and $17,241.00 paid for 2008. Defendant denied the refund request on 11 February 2011.

On 21 June 2012, plaintiff filed a complaint in Superior Court, Wake County, alleging that defendant wrongfully denied plaintiff's request for a refund because N.C.G.S. § 105-160.2 is both unconstitutional on its face and as applied to collect income taxes from plaintiff during those tax years. Plaintiff claimed that the taxes collected pursuant to section 105-160.2 violate the Due Process Clause because plaintiff did not have sufficient minimum contacts with the State of North Carolina. Plaintiff also claimed that the taxes violate the Commerce Clause on several grounds, including that the tax was not applied to an activity with a substantial nexus to the taxing state. Plaintiff claimed that consequently, the tax also violated Article I, Section 19 of the state constitution. Based on these claims, plaintiff requested a declaration that section 105-160.2 is unconstitutional and an order from the court requiring defendant to refund any taxes, penalties, and interest paid by plaintiff for tax years 2005 through 2008, and enjoining defendant from enforcing any future

assessments against plaintiff pursuant to section 105-160.2. Subsequent evidence indicated that penalties were assessed against plaintiff for tax years 2005 and 2006. These penalties were not paid by plaintiff and were ultimately waived at plaintiff's request, rendering moot that specific portion of plaintiff's claim for relief.

In accord with N.C.G.S. § 7A-45.4(b), this case was designated as a mandatory complex business case by the Chief Justice on 19 July 2012. On 11 February 2013, the Business Court issued an Opinion and Order on Defendant's Motion to Dismiss in which it granted the motion as to plaintiff's claim for injunctive relief, but denied the motion as to plaintiff's constitutional claims.

Relevant to this appeal, plaintiff filed a motion for summary judgment on its constitutional claims on 8 July 2014, and defendant filed its own motion for summary judgment on 4 September 2014. In its Opinion and Order on Motions for Summary Judgment, the Business Court observed that when a taxed entity such as plaintiff is not physically present in the taxing state, the taxed entity must "purposefully avail[ ] itself of the benefits of an economic market in the forum state" for the tax to satisfy due process requirements. *Kimberley Rice Kaestner 1992 Family Trust v. N.C. Dep't of Revenue*, No. 12 CVS 8740, 2015 WL 1880607, at *4 (N.C. Super. Ct. Wake County (Bus. Ct.) Apr. 23, 2015), *aff'd*, ___, N.C. App. ___, 789 S.E.2d 645 (2016) (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 307, 112 S. Ct. 1904, 1910 (1992)). Determining that plaintiff did not purposefully avail itself of the benefits of the taxing state based solely on the beneficiaries' residence in North Carolina, the Business Court concluded that the provision of section 105-160.2 allowing taxation of trust income "that is for the benefit of a resident of this State," N.C.G.S. § 105-160.2 (2005), violated both the Due Process Clause and Article I, Section 19 of the state constitution as applied to plaintiff. Applying the four-pronged analysis for determining the constitutionality of a tax pursuant to the Commerce Clause as set forth by the United States Supreme Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 1079 (1977), the Business Court also determined that the same provision of section 105-160.2 violated the Commerce Clause as applied to plaintiff. Therefore, the Business Court denied defendant's motion for summary judgment, granted plaintiff's motion for summary judgment, and ordered that any taxes and penalties paid by plaintiff pursuant to section 105-160.2 be refunded with interest.

Defendant noticed its appeal to the Court of Appeals on 22 May 2015. Before that court, defendant challenged the substantive conclusions of the Business Court that taxation of the trust based solely on

the residency of the beneficiaries violated both the Due Process and Commerce Clauses as applied to plaintiff. *Kaestner 1992 Family Tr. v. N.C. Dep't of Revenue*, ___ N.C. App. ___, ___, 789 S.E.2d 645, 647-48 (2016). Like the Business Court, the Court of Appeals also reasoned from the United States Supreme Court's guidance that "[t]he Due Process Clause requires [(1)] some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax, and [(2)] that the income attributed to the State for tax purposes must be rationally related to values connected with the taxing State." *Id.* at ___, 789 S.E.2d at 649 (second and third alterations in original) (quoting *Quill*, 504 U.S. at 306, 112 S. Ct. at 1909-10 (citations and internal quotation marks omitted)). Noting that a trust has a separate legal existence for the purpose of income taxes pursuant to *Anderson v. Wilson*, 289 U.S. 20, 27, 53 S. Ct. 417, 420 (1933), *Kaestner 1992 Family Tr.*, ___ N.C. App. at ___, 789 S.E.2d at 650, the Court of Appeals held that the connection between North Carolina and the trust based solely on the residence of the beneficiaries was insufficient to satisfy due process requirements, *id.* at ___, 789 S.E.2d at 651. Consequently, the Court of Appeals affirmed the Business Court's order granting summary judgment for plaintiff. *Id.* at ___, 789 S.E.2d at 651. The Court of Appeals chose not to address whether taxation of plaintiff also violated the Commerce Clause. *Id.* at ___, 789 S.E.2d at 651.

On appeal to this Court from the decision of the Court of Appeals, defendant continues to argue that plaintiff had minimum contacts with the State of North Carolina sufficient to satisfy due process based on the presence of the beneficiaries in the state. Defendant also argues that plaintiff had sufficient minimum contacts with North Carolina through certain acts of the trustee whereby plaintiff benefitted from "the ordered society maintained by taxation in North Carolina." We disagree.

"Our standard of review of an appeal from summary judgment is de novo." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citing *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). "Under the *de novo* standard of review, the [Court] 'consider[s] the matter anew[ ] and freely [substitutes] its own judgment for' [that of the lower court]." *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 257, 794 S.E.2d 785, 791 (2016) (first and fifth alterations in original) (quoting *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004) (second and third alterations in original)). On a motion for summary judgment, "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is

no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A 1, Rule 56(c) (2017).

The relevant provision of section 105-160.2 has remained substantively unchanged since the tax years at issue and states that income tax on an estate or trust "is computed on the amount of the taxable income of the estate or trust that is for the benefit of a resident of this State." *Id.* § 105-160.2 (2017). In its complaint and motion for summary judgment, plaintiff maintained that this section is both unconstitutional on its face and as applied to plaintiff. We presume "that any act passed by the legislature is constitutional, and [we] will not strike it down if [it] can be upheld on any reasonable ground." *State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 486 (2005) (quoting *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 281 82 (1998) (second alteration in original)). Consequently, "[a]n individual challenging the facial constitutionality of a legislative act 'must establish that no set of circumstances exists under which the [a]ct would be valid.' " *Thompson*, 349 N.C. at 491, 508 S.E.2d at 282 (second alteration in original) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987)). Given this exacting standard and that the allegations and evidence appear relevant solely to whether defendant unconstitutionally collected income taxes from plaintiff for tax years 2005 through 2008, we consider only whether section 105-160.2 is unconstitutional as applied to plaintiff to collect the taxes at issue.

In considering an as-applied challenge to the constitutionality of a statute, we look to whether the statute is constitutional in the limited context of the facts of the case before us. Then, as with any constitutional challenge, "[i]f there is a conflict between a statute and the Constitution, this Court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation." *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 690, 249 S.E.2d 402, 406 (1978) (quoting *Nicholson v. State Educ. Assistance Auth.*, 275 N.C. 439, 447, 168 S.E.2d 401, 406 (1969)).

The Fourteenth Amendment directs that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV. Similarly, our state constitution declares that "[n]o person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. Indeed, we have determined that "[t]he term 'law of the land' as used in Article I, Section 19, of the Constitution of North Carolina, is synonymous with 'due process of law' as used in the Fourteenth Amendment to the Federal Constitution."

Rhyne v. K-Mart Corp., 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004) (quoting *In re Moore*, 289 N.C. 95, 98, 221 S.E.2d 307, 309 (1976)). Accordingly, our analysis of plaintiff's due process challenge below also applies to plaintiff's state constitutional claim.

When applied to taxation, "[t]he Due Process Clause 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' " *Quill*, 504 U.S. at 306, 112 S. Ct. at 1909 (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45, 74 S. Ct. 535, 539 (1954)). Due process also requires that "the 'income attributed to the State for tax purposes must be rationally related to values connected with the taxing State,' " *id.* at 306, 112 S. Ct. at 1909-10 (internal quotation marks omitted) (quoting *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273, 98 S. Ct. 2340, 2344 (1978)); however, in this case we are concerned only with the first requirement. This "minimum connection," which is more commonly referred to as "minimum contacts," *see id.* at 307, 112 S. Ct. at 1910 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945)), exists when the taxed entity "purposefully avails itself of the benefits of an economic market" in the taxing state "even if it has no physical presence in the State," *id.* at 307, 112 S. Ct. at 1910 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S. Ct. 2174, 2184 (1985)). The Court in *Quill Corporation* therefore declared: "[T]o the extent that our decisions have indicated that the Due Process Clause requires physical presence in a State" for imposition and collection of a tax, "we overrule those holdings as superseded by developments in the law of due process." *Id.* at 308, 112 S. Ct. at 1911. Applying that standard, the Court went on to hold that the plaintiff in *Quill Corporation* "purposefully directed its activities at North Dakota residents, that the magnitude of those contacts [was] more than sufficient for due process purposes, and that the use tax [was] related to the benefits Quill receive[d] from access to the State," *id.* at 308, 112 S. Ct. at 1911, when the plaintiff generated revenue of almost $1 million annually from selling office equipment and supplies to approximately 3,000 customers in North Dakota even though all merchandise was delivered from out of state by mail or common carriers, *id.* at 302, 112 S. Ct. at 1907-08.

We have similarly determined that a finding of minimum contacts sufficient to satisfy due process "will vary with the quality and nature of the [party's] activity, but it is essential in each case that there be some act by which the [party] purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Skinner v. Preferred Credit*, 361 N.C. 114, 123,

638 S.E.2d 203, 210-11 (2006) (quoting *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 705, 208 S.E.2d 676, 679 (1974)). In light of *Quill Corporation* and our understanding of minimum contacts analysis, we therefore consider defendant's first argument in terms of whether plaintiff can be said to have minimum contacts with North Carolina based on the presence of its beneficiaries in our State.

The Supreme Court has observed that even though a "trust is an abstraction . . . . the law has seen fit to deal with this abstraction for income tax purposes as a separate existence, making its own return under the hand of the fiduciary and claiming and receiving its own appropriate deductions." *Anderson*, 289 U.S. at 27, 53 S. Ct. at 420. The Internal Revenue Code imposes a separate tax on the income of trusts, *see* 26 U.S.C. § 1(e) (2012), implicitly recognizing, at least for tax purposes, that a trust is a separate entity to which income is separately attributed. Any tax on that income is physically paid by the fiduciary or trustee, with the amount of the tax being "computed in the same manner as in the case of an individual." *Id.* § 641(a)-(b). In North Carolina "[t]he taxable income of an estate or trust is the same as taxable income for such an estate or trust under the provisions of the Code." N.C.G.S. § 105-160.2. Neither the Code nor Chapter 105 conflates the income of the trust with the income of a beneficiary.

In *Brooke v. City of Norfolk* the Supreme Court considered whether the City of Norfolk and Commonwealth of Virginia had violated the Due Process Clause by taxing the body of a Maryland trust when none of the property held by the trust had ever been present in Virginia. 277 U.S. 27, 28, 48 S. Ct. 422, 422 (1928). Although the Supreme Court applied presence-focused due process analysis that has since been supplanted by the minimum contacts test, *see Quill*, 504 U.S. at 308, 112 S. Ct. at 1911, the Court also recognized that a trust and its beneficiary are legally independent entities when it observed that the property held by the trust "is not within the State, does not belong to the [beneficiary] and is not within her possession or control. The assessment is a bare proposition to make the [beneficiary] pay upon an interest to which she is a stranger," *Brooke*, 277 U.S. at 29, 48 S. Ct. at 422.

That plaintiff and its North Carolina beneficiaries have legally separate, taxable existences is critical to the outcome here because a taxed entity's minimum contacts with the taxing state cannot be established by a third party's minimum contacts with the taxing state. *See Walden v. Fiore*, ___ U.S. ___, ___, 134 S. Ct. 1115, 1122 (2014) (stating that "unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts

with a forum State" (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417, 104 S. Ct. 1868, 1873 (1984))); *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1239-40 (1958) ("The unilateral activity of those who claim some relationship with a nonresident [party] cannot satisfy the requirement of contact with the forum State."). Here it was plaintiff's beneficiaries, not plaintiff, who reaped the benefits and protections of North Carolina's laws by residing here. Because plaintiff and plaintiff's beneficiaries are separate legal entities, due process was not satisfied solely from the beneficiaries' contacts with North Carolina.

Defendant challenges this conclusion by citing to two decisions in which foreign jurisdictions allegedly reached the opposite result. The Supreme Court of Connecticut held that taxation of an *inter vivos* trust did not violate due process because the beneficiary of the trust was a Connecticut domiciliary. *Chase Manhattan Bank v. Gavin*, 249 Conn. 172, 204, 733 A.2d 782, 802, *cert. denied*, 528 U.S. 965, 120 S. Ct. 401 (1999). Describing the domicile of the beneficiary as the "critical link," the Court in *Gavin* went on to reason that the beneficiary "enjoyed all of the protections and benefits afforded to other domiciliaries. Her right to the eventual receipt and enjoyment of the accumulated income was, and so long as she is such a domiciliary will continue to be, protected by the laws of the state." *Id.* at 204, 733 A.2d at 802. Therefore, the Court concluded in *Gavin*:

> [J]ust as the state may tax the undistributed income of a trust based on the presence of the trustee in the state because it gives the trustee the protection and benefits of its laws; it may tax the same income based on the domicile of the sole noncontingent beneficiary because it gives her the same protections and benefits.

Id. at 205, 733 A.2d at 802 (internal citation omitted). Defendant also cites to a decision of the Supreme Court of California for the similar proposition that a "beneficiary's state of residence may properly tax the trust on income which is payable in the future to the beneficiary, although it is actually retained by the trust, since that state renders to the beneficiary that protection incident to his eventual enjoyment of such accumulated income." *McCulloch v. Franchise Tax Bd.*, 61 Cal. 2d 186, 196, 390 P.2d 412, 419 (1964) (emphasis omitted).

We do not find either *Gavin* or *McCulloch* persuasive in deciding the present case. The Court in *Gavin* erroneously failed to consider that a trust has a legal existence apart from the beneficiary and that,

consequently, for taxation to satisfy due process pursuant to *Quill*, the trust itself must have "some definite link, some minimum connection" with the taxing state by "purposefully avail[ing] itself of the benefits of an economic market" in that state. *Quill*, 504 U.S. at 306-07, 112 S. Ct. at 1909-10. Furthermore, both the Court in *Gavin* and defendant, in its arguments before this Court, misconstrue a trust's existence as "a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person," *Wescott v. First & Citizens Nat'l Bank of Elizabeth City*, 227 N.C. 39, 42, 40 S.E.2d 461, 462-63 (1946) (quoting Restatement (First) of Trusts § 2 (Am. Law Inst. 1935)), to mean that any possible benefit received by the beneficiary may be imputed to the trust. That conclusion simply does not follow.

In contrast to *Gavin*, several other jurisdictions have applied reasoning similar to our analysis here in the context of deciding whether taxation of a given trust violated due process. *See Linn v. Dep't of Revenue*, 2013 IL App (4th) 121055, ¶ 33, 2 N.E.3d 1203, 1211 (2013) (applying *Quill* and holding that there was insufficient contact between Illinois and the taxed trust to satisfy due process when the trust, *inter alia*, "had nothing in and sought nothing from Illinois" and conducted all of its business in Texas), *appeal dismissed*, 387 Ill. Dec. 512, 22 N.E.3d 1165 (2014); *Fielding v. Comm'r of Revenue*, File Nos. 8911–R, 8912–R, 8913–R, 8914–R, 2017 WL 2484593, at *19-20 (Minn. T.C. May 31, 2017) (deciding that taxation of an *inter vivos* trust based solely on the in-state domicile of the grantor at the time the trust became irrevocable violated due process); *Residuary Tr. A v. Director, Div. of Taxation*, 27 N.J. Tax 68, 72-73, 78 (2013) (holding that neither the New Jersey domicile of a deceased testator nor the New Jersey business interests of several corporations in which the testamentary trust held stock justified New Jersey's taxation of "undistributed income from sources outside New Jersey" pursuant to the due process minimum contacts standard), *aff'd per curiam*, 28 N.J. Tax 541 (2015); *T. Ryan Legg Irrevocable Tr. v. Testa*, 149 Ohio St. 3d 376, 2016-Ohio-8418, 75 N.E.3d 184, at ¶ 68 (2016) (applying *Quill* and holding that a tax assessment by Ohio against a Delaware trust did not violate due process when the trust was created by an Ohio resident to dispose of his interest in a corporation that "conducted business in significant part in Ohio" and the settlor's "Ohio contacts [were] still material for constitutional purposes"), *cert. denied*, ___ U.S. ___, 138 S. Ct. 222 (2017).

McCulloch, on the other hand, was decided before *Quill Corporation*, and therefore has a limited ability to inform our application of the Court's

due process analysis in *Quill*. Moreover, we find *McCulloch* to be factually distinguished from the present case because the taxed entity in that case was both a beneficiary and a trustee of the trust and also resided in the taxing jurisdiction. Indeed, in holding that the taxes at issue did not violate due process, the Court in *McCulloch* particularly relied on the fact that the trustee was a domiciliary of the taxing jurisdiction. *See McCulloch*, 61 Cal. 2d at 194, 390 P.2d at 418. However, that circumstance is not present in this case.

As an alternative to its argument that due process was satisfied based on the North Carolina residence of the beneficiaries, defendant also presents the theory that taxation satisfied due process here because plaintiff "reached out to North Carolina by purposefully taking on a long-term relationship with the trust's beneficiaries, even though the trustees . . . never entered the state." In support, defendant notes that Bernstein restructured the original trust for Kaestner's benefit, regularly communicated with her about management of plaintiff, and directed a loan to Kaestner from plaintiff's assets—all actions that, according to defendant, indicated that plaintiff would have a continuing relationship with Kaestner while she was in North Carolina.

This argument stems from misapprehension of both the facts and law relevant to this case. The undisputed evidence in the record shows that contact between Bernstein and Kaestner regarding administration of the trust was infrequent—consisting of only two meetings during the tax years in question, both of which occurred in New York. Any connection between plaintiff and North Carolina based on the loan is also irrelevant given that the loan was issued in January 2009, after the tax years at issue. Additionally, the United States Supreme Court has directed that " 'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Walden*, ___ U.S. at ___, 134 S. Ct. at 1122 (citations omitted). As we have already stated, for due process purposes plaintiff, as a separate legal entity in the context of taxation, would have needed to purposefully avail *itself* of the benefits and protections offered by the State. *See Quill*, 504 U.S. at 306-07, 112 S. Ct. at 1909-10. Mere contact with a North Carolina beneficiary does not suffice.

For taxation of a foreign trust to satisfy the due process guarantee of the Fourteenth Amendment and the similar pledge in Article I, Section 19 of our state constitution, the trust must have some minimum contacts with the State of North Carolina such that the trust enjoys the benefits and protections of the State. When, as here, the income of a foreign trust is subject to taxation solely based on its beneficiaries'

availing themselves of the benefits of our economy and the protections afforded by our laws, those guarantees are violated. Therefore, we hold that N.C.G.S. § 105-160.2 is unconstitutional as applied to collect income taxes from plaintiff for tax years 2005 through 2008. Accordingly, we affirm the decision of the Court of Appeals that affirmed the Business Court's order granting summary judgment for plaintiff and directed that defendant refund to plaintiff any taxes paid by plaintiff pursuant to section 105-160.2 for tax years 2005 through 2008.

AFFIRMED.

Justice ERVIN dissenting.

As the majority correctly indicates, the proper resolution of this case hinges upon the extent, if any, to which the taxpayer had sufficient minimum contacts with North Carolina to satisfy federal due process requirements. Although we are required to make what I believe to be a close call in this case, I feel compelled to conclude, after careful scrutiny of the record in light of the applicable relevant legal standard, that taxpayer "purposefully avail[ed] itself of the benefits of an economic market" in North Carolina despite having "no physical presence in the State." *Quill Corp. v. North Dakota*, 504 U.S. 298, 307, 112 S. Ct. 1904, 1910, 119 L. Ed. 2d 91, 102-03 (1992) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S. Ct. 2174, 2184, 85 L. Ed. 2d 528, 543 (1985)). As a result, I respectfully dissent from my colleagues' decision.

According to the undisputed facts contained in the record as identified by the trial court, Joseph Lee Rice, III, established the Rice Family 1992 Trust for the benefit of his children in 1992. The Family Trust was created in New York, with the trust instrument providing that the Family Trust was to be governed by New York law. In 2005, David Bernstein, a resident of Connecticut, was appointed trustee of the Family Trust and continued to act in that capacity throughout the time period at issue in this case. In 2006, Mr. Bernstein, physically divided the Family Trust into three trusts, one of which, plaintiff Kimberly Rice Kaestner 1992 Family Trust, was intended to benefit Kimberly Rice Kaestner and her three children, "all of whom were residents and domiciliaries of North Carolina in the tax years at issue." Mr. Bernstein served as the trustee of the Kaestner Trust following the division of the Family Trust into its three constituent parts.

Throughout the entire interval from 2005 through 2008, which are the tax years at issue in this case, the documents related to the Kaestner

Trust were kept in New York, while the custodian of the Kaestner Trust's assets was located in Boston, Massachusetts. No distributions were made to any beneficiary of the Kaestner Trust during the 2005 through 2008 tax years. During the period from 2005 through 2008, Mr. Bernstein communicated with Ms. Kaestner regarding the Kaestner Trust and provided her with accountings relating to the Kaestner Trust covering the periods from 22 December 2005 through 31 December 2006 and 23 June 2006 through 8 October 2009. In addition, Mr. Bernstein and the law firm with which he was affiliated provided Ms. Kaestner with legal advice regarding matters relating to the Kaestner Trust.

As the entire Court appears to agree, the resolution of this case hinges upon a proper understanding of the decision of the United States Supreme Court in Quill, which involved a Delaware corporation that sold office equipment and had physical offices and warehouses in Illinois, California, and Georgia. *Quill*, 504 U.S. at 302, 112 S. Ct. at 1907, 119 L. Ed. at 100. *Quill* solicited business by using catalogs, flyers, and telephone calls and placing advertisements in national periodicals. *Id.* at 302, 112 S. Ct. at 1907, 119 L. Ed. at 100. As a result of its business activities, Quill had about 3,000 customers and made $1 million in sales in North Dakota during the relevant period. *Id.* at 302, 112 S. Ct. at 1908, 119 L. Ed. at 100. A North Dakota statute provided that retailers, including mail-order companies, were subject to a use tax "even if they maintain no property or personnel in North Dakota." *Id.* at 303, 112 S. Ct. at 1908, 119 L. Ed. at 100. The State argued that, despite Quill's lack of a physical presence within North Dakota, the State "had created 'an economic climate that fosters demand for' Quill's products, maintained a legal infrastructure that protected that market, and disposed of 24 tons of catalogs and flyers mailed by Quill into the State every year." *Id.* at 304, 112 S. Ct. at 1908-09, 119 L. Ed. at 101.

According to the United States Supreme Court, "[t]he Due Process Clause 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax' and that the 'income attributed to the State for tax purposes must be rationally related to values connected with the taxing State.' "[1] *Id.* at 306, 112 S. Ct. at 1909-10, 119 L. Ed. 2d at 102 (first quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45, 74 S. Ct. 535, 539, 98 L. Ed. 744 (1954);

1. The extent to which the second prong of the due process analysis has been satisfied does not appear to be before us in this case at this time.

then quoting *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273, 98 S. Ct. 2340, 2344, 57 L. Ed. 2d 197 (1978)). As the United States Supreme Court noted, it has "abandoned more formalistic tests that focused on [an entity's] 'presence' within a State in favor of a more flexible inquiry into . . . [an entity's] contacts with the forum." *Id.* at 307, 112 S. Ct. at 1910, 119 L. Ed. 2d at 102 (citing, *inter alia*, *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945)). "Applying these principles, we have held that if a foreign [entity] purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's" collection of taxes "even if it has no physical presence in the State." *Id.* at 307, 112 S. Ct. at 1910, 119 L. Ed. 2d at 103 (citing *Burger King Corp.*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528). As a result, given that Quill had "purposefully directed its activities at North Dakota residents," its contacts with North Dakota were "more than sufficient for due process purposes." *Id.* at 308, 112 S. Ct. at 1911, 119 L. Ed. 2d at 104.

The parties have spent considerable time and effort debating the extent, if any, to which the fact that the beneficiaries of the Kaestner Trust resided in North Carolina during the relevant tax years has any bearing on the required due process analysis. In reaching the conclusion that the residence of the beneficiaries has no bearing upon the proper resolution of this case, my colleagues have deemed *Chase Manhattan Bank v. Gavin*, 249 Conn. 172, 733 A.2d 782, *cert. denied*, 528 U.S. 965, 120 S. Ct. 401, 145 L. Ed. 2d 312 (1999), and *McCulloch v. Franchise Tax Board*, 61 Cal. 2d 186, 390 P.2d 412 (1964), to be essentially irrelevant. I am not inclined to completely disregard either of those decisions, which, to the best of my knowledge, appear to be the only cases decided by state courts of last resort to address the question that is before us in this case, while recognizing that there are distinguishing features which may serve to render them somewhat less persuasive than they might otherwise be.

Admittedly, the assertion of taxing authority over the inter vivos trust at issue in *Gavin* arose from a situation in which "the settlor of the trust was a Connecticut domiciliary when the trust was established and the beneficiary is a Connecticut domiciliary." *Gavin*, 249 Conn. at 183, 733 A.2d at 790. However, in upholding the taxability of the undistributed income held in an inter vivos trust, the Connecticut Supreme Court specifically stated that, "just as the state may tax the undistributed income of a trust based on the presence of the trustee in the state because it gives the trustee the protection and benefits of its laws," "it may tax the same income based on the domicile of the sole noncontingent beneficiary because it gives her the same protections and benefits."

Id. at 205, 733 A.2d at 802. As a result, the Connecticut Supreme Court's decision with respect to the taxability of the undistributed income held in the inter vivos trust appears to me to hinge upon the residence of the beneficiary rather than the fact that the settlor had been a resident of Connecticut at the time that the inter vivos trust had been created.

I am loath to completely disregard *McCulloch* for similar reasons. Although the beneficiary of the trust at issue in *McCulloch* also served as one of the trustees, the California Supreme Court's analysis in that case clearly relies upon the status of the person in question as a beneficiary rather than upon his status as a trustee, with this fact being evidenced by the California Supreme Court's statement that "the beneficiary's state of residence may properly tax the trust on income which is payable in the future to the beneficiary, although it is actually retained by the trust, since that state renders to the beneficiary that protection incident to his eventual enjoyment of such accumulated income." *McCulloch*, 61 Cal. 2d at 196, 390 P.2d at 419 (emphasis omitted). Similarly, while *McCulloch* antedates *Quill* and *Burger King*, the logic utilized by the California Supreme Court appears to me to rest upon the same considerations that underlie the United States Supreme Court's modern due process jurisprudence. For example, the California Supreme Court states that "[t]he tax imposed by California upon the beneficiary is constitutionally supported by a sufficient connection with, and protection afforded to, plaintiff as such beneficiary." *Id.* at 196, 390 P.2d at 419. As a result, I am unable to agree with my colleagues' determination that neither *Gavin* nor *McCulloch* has any bearing upon the proper resolution of this case and am inclined to be persuaded by their logic to believe that, while not dispositive, the presence of the beneficiaries of the Kaestner Trust in North Carolina has some bearing on the proper performance of the required due process analysis.

I also cannot concur in the argument adopted by the Court of Appeals to the effect that the United States Supreme Court has already made our decision for us in *Brooke v. City of Norfolk*, 277 U.S. 27, 48 S. Ct. 422, 72 L. Ed. 767 (1928). Although *Brooke* has not been overruled, it antedates *Quill* and *Burger King* and rests upon the sort of formalistic, presence-focused approach that the United States Supreme Court rejected in those cases in favor of a less rigid "minimum connections" approach. *See Quill*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91; *Burger King*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528. In addition, *Brooke* involved an attempt by one state to tax a trust corpus held in another state, which is a very different undertaking than an attempt to tax the undistributed income of a non-North Carolina trust that is held for the benefit of a

North Carolina resident.[2] The same logic renders the Kaestner Trust's reliance upon the decision of the United States Supreme Court in *Safe Deposit & Trust Co. of Baltimore v. Commonwealth of Virginia*, 280 U.S. 83, 50 S. Ct. 59, 74 L. Ed. 180 (1929), which involved an attempt to tax the corpus, rather than the undistributed income, of a non-jurisdictional trust based upon the existence of a resident beneficiary that the Court rejected on the basis of a pre-*Quill* method of analysis, unpersuasive. As a result, neither of these cases supports, much less compels, a decision in the Kaestner Trust's favor. Instead, my review of the decisions cited by both parties compels me to conclude that the only way to properly resolve this case involves reliance upon a very fact-specific analysis of the extent, if any, to which the Kaestner Trust "purposefully avail[ed] itself of the benefits of an economic market in the forum State," *see Quill*, 504 U.S. at 307, 112 S. Ct. at 1910, 119 L. Ed. 2d at 103, with this analysis deeming the presence of the beneficiary in North Carolina to be relevant, but not dispositive.

As the Supreme Court explained in *Burger King*,

> it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, we have consistently rejected the notion that an absence of physical contact can defeat personal jurisdiction there.

471 U.S. at 476, 105 S. Ct. at 2184, 85 L. Ed. 2d at 544 (citations omitted). Although the assets contained in the Kaestner Trust were held in Boston, and the relevant documents were held in New York and although the trustee worked in New York and resided in Connecticut during the tax years at issue in this case, "business [was] transacted . . . by mail and wire communications across state lines," including those of North Carolina. *See id.* at 476, 105 S. Ct. at 2184, 85 L. Ed. 2d at 544.

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2. Admittedly, this Court has not adopted the Court of Appeals' treatment of *Brooke* as dispositive in its opinion. Instead, the Court simply cites *Brooke* for the unexceptionable proposition that "a trust and its beneficiary are legally independent entities." For the reasons set forth in the text of this dissenting opinion, I believe that a proper due process analysis focused upon the activities of the Kaestner Trust in light of Ms. Kaestner's residence suffices to establish sufficient "minimum contacts" to support the Department of Revenue's attempt to tax the undistributed income applicable to Ms. Kaestner.

Among other things, Ms. Kaestner was known to be a resident of North Carolina at the time that the Kaestner Trust was created for her benefit. In addition, the trustee transmitted information to Ms. Kaestner, provided advice to Ms. Kaestner, and communicated with Ms. Kaestner in other ways with full knowledge of the fact that she resided in North Carolina. The Kaestner Trust could not have successfully carried out these functions in the absence of the benefits that North Carolina provided to Ms. Kaestner during the time that she lived here. As a result, I am unable to conclude, given the applicable standard of review, that the Kaestner Trust lacked sufficient contacts with North Carolina to permit the State to tax the undistributed income held by the Kaestner Trust for Ms. Kaestner's benefit. Therefore, I see no due process violation. As a result, for all of these reasons, I respectfully dissent from my colleagues' decision to affirm the Court of Appeals' decision.

NORTH CAROLINA STATE BOARD OF EDUCATION
v.
THE STATE OF NORTH CAROLINA AND THE NORTH CAROLINA RULES REVIEW COMMISSION

No. 110PA16-2

Filed 8 June 2018

1. Schools and Education—State Board of Education rules—review by Rules Review Commission—plain language of N.C. Constitution

The plain language of Article IX, Section 5 of the N.C. Constitution authorized the General Assembly to require the State Board of Education to submit its proposed rules to the Rules Review Commission for review because this procedure was statutorily enacted and the Board's prescribed constitutional duties are subject to laws enacted by the General Assembly.

2. Schools and Education—State Board of Education rules—review by Rules Review Commission—delegation of authority

The General Assembly properly delegated authority to the Rules Review Commission to review the State Board of Education's proposed rules. The statutes at issue included sufficient restrictions on the Commission and safeguards to ensure the Board's continued ability to fulfill its mandates as set forth in the state constitution.

Further, the Commission was tasked only with the responsibility to review the Board's rules from a procedural perspective for clarity and to ensure that the rules were adopted in compliance with the Administrative Procedure Act.

Chief Justice MARTIN dissenting.

Justice HUDSON joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 805 S.E.2d 518 (2017), reversing and remanding an order granting summary judgment entered on 2 July 2015 by Judge Paul G. Gessner in Superior Court, Wake County. Heard in the Supreme Court on 7 February 2018.

Robert F. Orr, PLLC, by Robert F. Orr; and Poyner Spruill LLP, by Andrew H. Erteschik, Saad Gul, and John M. Durnovich, for plaintiff-appellant.

Joshua H. Stein, Attorney General, by Olga Vysotskaya de Brito, Special Deputy Attorney General, and Amar Majmundar, Senior Deputy Attorney General, for defendant-appellee State of North Carolina.

Troutman Sanders LLP, by Christopher G. Browning, Jr., for defendant-appellee North Carolina Rules Review Commission.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Christopher G. Smith and Taylor M. Dewberry, for North Carolina Chamber Legal Institute; P. Andrew Ellen, General Counsel for North Carolina Retail Merchants Association; and J. Michael Carpenter, General Counsel for North Carolina Home Builders Association, amici curiae.

MORGAN, Justice.

This appeal arises from proceedings instituted by the State Board of Education (the Board) seeking a declaratory ruling that laws requiring the Board to submit the rules and regulations it proposes to a statutorily created committee for review and approval are unconstitutional. We determine that the General Assembly lawfully delegated authority to the

Rules Review Commission (the Commission) to review rules adopted by the Board. Therefore, we affirm the opinion of the Court of Appeals.

The Board's complaint listed seven challenges to the Commission's interpretation and application of N.C.G.S. § 150B-2(1a) (definition of "Agency") to the Board. The complaint alleged two as-applied challenges to the Commission's interpretation and application of N.C.G.S. § 150B-2(1a), one joint as-applied and facial challenge regarding the application of the Administrative Procedure Act (the APA), and four facial challenges to the Commission's enabling legislation. The complaint asserted that since the establishment of the Commission in 1986, the Commission "has objected to or modified every rule adopted by the Board and submitted to the [Commission] for approval." The Board claimed in its complaint that it had "declined to adopt a number of rules that it otherwise would have adopted" but for the Commission's actions and that the review process "typically takes a minimum of six months," which has "erode[d] the Board's ability to timely address critical issues facing our State in the area of education." In addition, the Board maintained that it would no longer voluntarily submit its rules to the Commission, and would instead independently deem its rules to have the force and effect of law.

On 12 January 2015, the State of North Carolina and the Commission moved to dismiss the Board's complaint. The Board voluntarily dismissed without prejudice five of its seven claims, leaving the two as-applied challenges for determination. The Board moved for summary judgment as to its remaining claims. In addition to their motion to dismiss the Board's action, the State and the Commission opposed the Board's motion for summary judgment and argued that they were entitled to summary judgment in their favor. On 2 July 2015, the trial court allowed summary judgment for the Board.

The State and the Commission appealed the trial court's summary judgment order to the North Carolina Court of Appeals. On 19 September 2017, the Court of Appeals filed a divided opinion reversing the trial court's order and remanding the matter to the trial court for entry of judgment in favor of defendants, the State and the Commission. *N. C. State Bd. of Educ. v. State*, ___ N.C. App. ___, 805 S.E.2d 518, (2017). The majority determined that "[t]he General Assembly, by enacting laws adopting a uniform statutory scheme governing administrative procedure, including the establishment of the Commission to review administrative rules, has imposed the requirement that the Board's rules be reviewed and approved prior to becoming effective." *Id.* at ____, 805 S.E.2d at 529. After detailing the history surrounding the creation

and evolution of the Board, the majority stated that the 1942 amendment to the North Carolina Constitution, which included the last substantive changes to the constitution pertaining to the Board, removed the Board's "full power to legislate" but authorized the Board to "make all needful rules and regulations in relation" to specific powers given to the Board, including the ability "generally to supervise and administer the free public school system of the State." *Id.* at ____, 805 S.E.2d at 523. The court's majority further noted that the 1942 amendment made the Board's exercise of its authority "wholly subject to laws enacted by the General Assembly" by stating that "[a]ll the powers enumerated in this section shall be exercised in conformity with this Constitution and subject to such laws as may be enacted . . . by the General Assembly." *Id.* at ____, 805 S.E.2d at 527. The majority also concluded that the legislative delegation to the Commission of the review and approval process over the Board's administrative rules is exercised subject to proper limitations on the Commission's authority. *Id.* at ____, 805 S.E.2d at 531. Such limitations include a recognition that the "Commission's review is limited to determining whether a proposed rule" meets the four criteria listed in N.C.G.S. § 150B-21.9(a). *Id.* at ____, 805 S.E.2d at 531.

The Court of Appeals majority amplified this recognition by further noting that the "General Assembly has also expressly protected its legislative authority from encroachment by the Commission" via subsection 150B-21.9(a) by prohibiting the Commission from "consider[ing] questions relating to the quality or efficacy of the rule" at issue and limiting the Commission's review "to determination of the standards set forth in this subsection." *Id.* at ____, 805 S.E.2d at 532. Therefore, as found by the majority, the General Assembly has "restrict[ed] the Commission from providing substantive review of proposed rules." *Id.* at ____, 805 S.E.2d at 532. The majority observed that by allowing for judicial review of a Commission decision regarding an agency's proposed rule, "the General Assembly has provided adequate procedural safeguards" for agencies. *Id.* at ____, 805 S.E.2d at 532. Accordingly, the court held that "the review and approval authority delegated to the Commission is an appropriate delegable power and that the General Assembly has adequately directed the Commission's review of the Board's proposed rules and limited the role of the Commission to evaluating those proposed rules to ensure compliance with the APA." *Id.* at ____, 805 S.E.2d 532. Moreover, the majority concluded that "[b]y providing adequate guidelines for rules review, the General Assembly has ensured that the Commission's authority as it relates to the rules promulgated by the Board is not 'arbitrary and unreasoned' and is sufficiently defined to maintain the separation of powers required by our state constitution." *Id.* at ____, 805 S.E.2d at 532

(quoting *In re Declaratory Ruling*, 134 N.C. App. 22, 33, 517 S.E.2d 134, 142, *appeal dismissed and disc. rev. denied*, 351 N.C. 105, 540 S.E.2d 356 (1999)). The majority ultimately summarized its holding as:

> (1) the 1942 amendment to Article IX of the North Carolina Constitution rebalanced the division of power between the Board and the General Assembly by limiting the Board's authority to be subject more broadly to enactments by the General Assembly; (2) the General Assembly, by enacting the APA and creating the Commission, acted within the scope of its constitutional authority to limit the Board's rulemaking authority by requiring approval of rules prior to enactment; (3) the General Assembly's delegation to the Commission of the authority to review and approve Board rules does not contravene the Board's general rulemaking authority; and (4) the General Assembly has delegated review and approval authority to the Commission without violating the separation of powers clause by providing adequate guidance and limiting the Commission's review and approval power.

Id. at ____, 805 S.E.2d at 532.

In contrast, the dissenting opinion viewed the delegation of authority by the General Assembly to the Commission to review and approve the Board's rules as improper, characterizing that delegation as an act in contravention of the constitutional authority that "granted and conveyed to the State Board powers, which are not intended to be, and cannot be, removed from the State Board and subordinated to or overruled by an executive agency review body." *Id.* at ____, 805 S.E.2d at 534 (Tyson, J., dissenting). The dissent described the Commission, as an entity "created by statute in 1986, long subsequent to the ratification of the current version of Article IX, § 5, and consist[ing] of ten non-elected members appointed by the General Assembly," to be a body of individuals who have "purported to act on their own accord in delaying and striking down 'needed rules and regulations' established under constitutionally mandated policy of the State Board, without bicameral review and presentment of a bill." *Id.* at ____, 805 S.E.2d at 533. Opining that "[t]he General Assembly cannot either usurp [or] delegate the specific constitutional authority vested in the State Board" regarding "educational policy and rulemaking authority," *id.* at ___, 805 S.E.2d at 533, the dissent here adopted a stance that "[b]y enacting the [APA], the General Assembly could not and did not transfer the State Board's constitutionally specified rulemaking power to an agency rule oversight

commission under the [APA]," *id.* at ____, 805 S.E.2d at 534. As a result, the dissenting judge at the Court of Appeals would affirm the trial court's summary judgment determination in favor of the Board in light of a perceived failure by the State and the Commission to show error by the trial court and in light of the dissent's interpretation of the relevant law. *Id.* at ____, 805 S.E.2d at 536.

I. History of the Board of Education

In their 1868 constitution, the people of North Carolina created the Board to supervise and administer the State's free public school system. The Constitution of North Carolina established the State Board of Education using the following language:

> The Board of Education shall succeed to all the powers and trusts of the President and Directors of the Literary Fund of North Carolina, and shall have full power to legislate and make all needful rules and regulations in relation to free public schools and the educational fund of the State; but all acts, rules and regulations of said Board may be altered, amended or repealed by the General Assembly, and when so altered, amended or repealed, they shall not be re-enacted by the Board.

N.C. Const. of 1868, art. IX, § 9. In 1937 the General Assembly directed Governor Clyde R. Hoey to appoint a commission to examine North Carolina's public educational system and recommend improvements to lawmakers. Act of Mar. 22, 1937, ch. 379, 1937 N.C. Pub. Sess. Laws, 709. The resulting Commission on Education determined that North Carolina's public education system was being governed not only by the State Board of Education but by several other boards as well. *Report and Recommendations of the Governor's Commission on Education* 30 (Dec. 1, 1938) [hereinafter 1938 Report]. The Commission recommended that the General Assembly transfer all duties and work from the various other education-related boards and commissions to the State Board of Education. *Id.* at 30-31. In 1942 the voters of North Carolina adopted a constitutional amendment proposed by the General Assembly making several changes to the governance and authority of the Board as follows:

> The State Board of Education shall succeed to all the powers and trusts of the President and Directors of the Literary Fund of North Carolina and the State Board of Education as heretofore constituted. The State Board of Education shall have power to divide the State into a convenient number of school districts; to regulate the

> grade, salary and qualifications of teachers; to provide for the selection and adoption of the textbooks to be used in the public schools; to apportion and equalize the public school funds over the State; and generally to supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto. All the powers enumerated in this section shall be exercised in conformity with this Constitution and subject to such laws as may be enacted from time to time by the General Assembly.

N.C. Const. of 1868, art. IX, § 9 (1942). These were the last material changes to the Board's power.

The constitution was rewritten again in 1970 and included the following language, which remains unchanged:

> The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

N.C. Const. art. IX, § 5. The plain language of the constitution does not expressly mention a review process for the Board's rules.

II. Review of the General Assembly's Constitutional Authority Regarding the State Board of Education

A cursory review of the history of the North Carolina Constitution indicates that the General Assembly has always been authorized to check the Board's power to some degree. The 1868 constitution provided that acts, rules, and regulations enacted by the Board could be "altered, amended or repealed" by the General Assembly. N.C. Const. of 1868, art. IX, § 9. Each change to the constitution thereafter stated in more general terms that the Board's authority over the State's public education system is "subject to laws enacted by the General Assembly." *Id.*; N.C. Const. of 1868, art. IX, § 9 (1942); N.C. Const. art. IX, § 5. This review of the provisions of the North Carolina Constitution and its changes to these dictates clearly shows that the General Assembly currently has the power to enact laws with respect to education that govern the Board's rules and regulations. In light of this authority of the General Assembly, which is derived from Article IX, Section 5 of the North Carolina Constitution and is consistent with this Court's analysis of

further relevant considerations, we conclude that the General Assembly is empowered to delegate authority to the Commission to review the Board's rules.

III. History of the APA and the Rules Review Commission

In 1973 the General Assembly enacted the APA in response to the United States Supreme Court's grant of "extensive remedial relief from state and federal bureaucratic action through an expansive interpretation of the constitutional right to an administrative hearing." Julian Mann, III, *Administrative Justice: No Longer Just A Recommendation*, 79 N.C. L. Rev. 1639, 1642 (2001); see N.C.G.S. § 150A-1(b) (Supp. 1977). As noted by the Court of Appeals majority in the present case, "[t]he APA provides a comprehensive statutory scheme for procedures to allow and require, *inter alia*, notice to the public of proposed rules, public input regarding proposed rules, and due process for individuals affected by administrative rules and decisions." *State Bd. of Educ.*, ___ N.C. App. at ___, 805 S.E.2d at 524 (majority opinion). The APA was rewritten and recodified as Chapter 150B of the North Carolina General Statutes, effective 1 January 1986, with the stated purpose of "establish[ing] a uniform system of administrative rule making and adjudicatory procedures for agencies. The procedures 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). When the APA was recodified, the General Assembly enacted an additional statute that established the Administrative Rules Review Commission. Act of July 16, 1986, ch. 1028, sec. 32, 1985 N.C. Sess. Laws (Reg. Sess. 1986) 640, 642-45 (codified at N.C.G.S. § 143B-30.1). As currently provided in N.C.G.S. § 143B-30.1(a), "[t]he Commission shall consist of 10 members to be appointed by the General Assembly, five upon the recommendation of the President Pro Tempore of the Senate, and five upon the recommendation of the Speaker of the House of Representatives." N.C.G.S. § 143B-30.1(a) (2017). An agency must submit all temporary and permanent rules it adopts to the Commission before any such rules can be published in the North Carolina Administrative Code. *Id.* § 150B-21.8 (2017).[1] If the Commission objects to an agency's adopted rule, then the

1. "Agency" is defined by the APA as

> an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency.

rule is not deemed acceptable for inclusion in the Administrative Code unless the agency revises the rule and the revised version is approved by the Commission. *See id.* §§ 150B-21.10(2), -21.12(a)(1), -21.19(4) (2017).

The Commission is subject to oversight by the Joint Legislative Administrative Procedure Oversight Committee. *Id.* §§ 120-70.100 to -70.102 (2017). Among other things, the Committee is specifically responsible for reviewing each rule objected to by the Commission "to determine if statutory changes are needed to enable the agency to fulfill the intent of the General Assembly." *Id.* § 120-70.101(1). The Committee also receives a report regarding each rule approved by the Commission. *Id.* § 120-70.101(2).

IV. Standard of Review

This Court construes and applies the provisions of the Constitution of North Carolina with finality. *E.g.*, *Hart v. State*, 368 N.C. 122, 130, 774 S.E.2d 281, 287 (2015); *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989). We review constitutional questions de novo. *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 reasonable doubt. *Baker v. Martin*, 330 N.C. 331, 334-35, 410 S.E.2d 887, 889 (1991) (citations omitted). In other words, the constitutional violation must be plain and clear. *Preston*, 325 N.C. at 449, 385 S.E.2d at 478. 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 constitutional provision at issue, and our precedents. *See id.* at 449, 385 S.E.2d at 479 ("In interpreting our Constitution—as in interpreting a statute—where the meaning is clear from the words used, we will not search for a meaning elsewhere."); *Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 613, 264 S.E.2d 106, 110 (1980) ("Inquiry must be had into the history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation."); *Elliott v. State Bd. of Equalization*, 203 N.C. 749, 753, 166 S.E. 918, 921 (1932) ("Likewise, we may have recourse to former decisions, among which are several dealing with the subject under

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N.C.G.S. § 150B-2(1a) (2017). Although some government agencies are partially or fully exempt from the APA, the Board is not one of these agencies.

consideration."). With these principles in mind, we now examine the issues raised by the Board's appeal.

V. Issues of First Impression

This case concerns issues of first impression in the jurisprudence of North Carolina. Prior cases decided by this Court that addressed issues resembling those presented in the current case, namely *Guthrie v. Taylor* and *State v. Whittle Communications*, have been cited here by the Board, the State, and the Commission, and their applicability to the instant matter was addressed by the Court of Appeals.

In *Guthrie* the plaintiff school teacher disagreed with a regulation of the State Board of Education requiring "a teacher in the public school system to procure the renewal of his or her teachers' certificate each five years by earning, at the teacher's expense, credits, at least some of which must be earned by the successful completion of additional college or university courses." *Guthrie v. Taylor*, 279 N.C. 703, 709, 185 S.E.2d 193, 198 (1971) *cert. denied*, 406 U.S. 920 (1972). The General Assembly had passed several statutes requiring all teachers in the public schools of North Carolina to hold such certificates. *Id.* at 711, 185 S.E.2d at 199. The Board was authorized to "control [the] certificating [of] all applicants for teaching, supervisory, and professional positions in all public elementary and high schools of North Carolina." *Id.* at 711, 185 S.E.2d at 199. The plaintiff in *Guthrie* contended that the authority to determine teacher certification requirements was not properly delegated to the Board because the applicable statutes did not set forth standards to govern the Board in the exercise of its duty to promulgate and administer rules related to the certification of teachers. *Id.* at 711, 185 S.E.2d at 199. We determined that this argument was meritless because the statutes at issue "neither enlarge[d] nor restrict[ed] the authority to make rules and regulations concerning the certification of teachers conferred by the Constitution of North Carolina upon the State Board of Education. Thus, [the statutes] are not delegations of power to the State Board of Education by the General Assembly." *Id.* at 711, 185 S.E.2d at 199. *Guthrie* is therefore not particularly helpful in resolving the present case, which concerns the General Assembly's delegation of authority to the Commission related to reviewing administrative rules of the Board.

Likewise, in *Whittle* the defendant Whittle Communications, L.P. developed a short video news program, known as *Channel One*, that was designed to keep students abreast of current affairs. *State v. Whittle Commc'ns*, 328 N.C. 456, 458, 402 S.E.2d 556, 557 (1991). The Board sought to adopt a temporary rule barring contracts between companies

such as Whittle and local school boards for the use of supplementary materials like *Channel One* to educate children. *Id.* at 459-60, 402 S.E.2d at 558. The dispute in *Whittle* was prompted by the Commission's disapproval of the temporary rule on the ground that it exceeded the Board's statutory authority. *Id.* at 460, 402 S.E.2d at 558. The trial court reviewed the matter and found that the Board's rule was adopted in violation of the APA making it invalid. *Id.* at 462, 402 S.E.2d at 559. On appeal, this Court noted that the Board's temporary rule concerned an area which the General Assembly had "specifically placed under the control and supervision of the local school boards." *Id.* at 458, 402 S.E.2d at 557. We opined that

> [s]ince *Channel One* is a supplementary instructional material and since the General Assembly placed the procurement and selection of supplementary instructional materials under the control of the local school boards, the State Board acted in excess of its authority in enacting this rule because the State Board had no authority to enact a rule on this subject.

Id. at 466, 402 S.E.2d at 562. As with *Guthrie*, the *Whittle* case does not address the issue presently before the Court because *Whittle* involved the Board's attempt to enact a rule on a subject that had specifically been delegated to local school boards by the General Assembly. *Whittle* states the principle that "Article IX, § 5 of the North Carolina Constitution, which grants the State Board the authority to 'make all needed rules,' also limits this authority by making it 'subject to the laws enacted by the General Assembly.' " *Id.* at 464, 402 S.E.2d at 560. While that principle certainly applies here, neither *Guthrie* nor *Whittle* specifically addresses the issue presented in this case.

VI. Plain Language and Intent of Article IX, Section 5

[1] Turning to the issues presently before the Court, the Board first contends that the plain language of Article IX, Section 5 of the North Carolina Constitution does not allow the Commission to review the Board's rules. Constitutional interpretation begins with the plain language as it appears in the text. *E.g.*, *Coley v. State*, 360 N.C. 493, 498, 631 S.E.2d 121, 125 (2006). Article IX, Section 5 states:

> The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all

> needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

The plain language of this provision expressly indicates that the Board's prescribed power is subject to laws enacted by the General Assembly. The pertinent issue framed by the Board in this appeal concerns its ability to promulgate rules and regulations free of scrutiny from the Commission. While the plain language of the cited constitutional passage does not mention the Commission or its power to review the Board's rules, the Commission's authority to do so derives from laws enacted by the General Assembly—laws to which the Board is unequivocally subject under Article IX, Section 5. The constitution therefore grants the General Assembly the power to enact a law to delegate its authority to the Commission, even though such a law could directly affect the Board's exercise of its constitutionally recognized duties.

Additionally, while a review of the intent of the framers of the North Carolina Constitution provides welcome guidance about the extent of authority reposed in the Board with relation to the General Assembly, there is no indication that the Commission is somehow inhibited from reviewing and approving the Board's rules and regulations. Questions regarding construction of a constitution "are . . . governed by the same general principles which control in ascertaining the meaning of all written instruments, and '[t]he fundamental principle of constitutional construction is to give effect to the intent of the framers of the organic law and [the individuals] adopting it.' " *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953) (first citing and then quoting 11 Am. Jur. *Construction of Constitutions* § 49, at 658 (1937); *id.* § 61, at 674; then citing *Branch Banking & Tr. v. Hood*, 206 N.C. 268, 173 S.E. 601 (1934); and then citing *Atlas Supply Co. v. Maxwell*, 212 N.C. 624, 194 S.E. 117 (1937); and then citing *State v. Emery*, 224 N.C. 581, 31 S.E.2d 858 (1944)). Likewise, in interpreting our state's constitution, we are bound to "give effect to the intent of the framers of the organic law and of the people adopting it." *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 363 N.C. 500, 505, 681 S.E.2d 278, 282 (2009) (quoting *Perry*, 237 N.C. at 444, 75 S.E.2d at 514). Moreover, "[w]here one of two reasonable constructions will raise a serious constitutional question, the construction which avoids this question should be adopted." *In re Arthur*, 291 N.C. 640, 642, 231 S.E.2d 614, 616 (1977).

In 1931, while the 1868 constitution was still in effect, the General Assembly established a Constitutional Commission to study the need for various constitutional amendments. *Report of the North Carolina Constitutional Commission, as reprinted in* 11 N.C. L. Rev. 5 (1932).

In preparation for considering amendments involving the implementation and oversight of the public education system in North Carolina, the Constitutional Commission requested the Department of Legislative Research and Drafting at Duke University Law School to prepare a narrowly focused report on constitutional provisions involving public education governance. *See* Dep't. of Legis. Research & Drafting, Duke Univ. Law Sch., *Report on the Subject of the Existing Constitutional Provisions Relating to Public Education in North Carolina* 1 (May 1932) [hereinafter Education Report]. The purpose of the Education Report was to "set[ ] forth the actual workings of those provisions in the present Constitution of North Carolina relating to public education," and its objective was "to discover, if possible, wherein these existing constitutional provisions hamper the proper development of the State's educational system, and thus to indicate what changes may be desirable." *Id.*

The Education Report detailed an alleged abuse of legislative power that ultimately led to a constitutional amendment in 1942. *Id.* at 9-10. The Education Report described how the General Assembly used the then-existing language of the constitution "as a means of stripping the Board of its authority over the public schools" rather than "as a mere reserved veto or amending power." *Id.* at 9. The report noted that the General Assembly "from time to time t[ook] certain powers of control from . . . [the] Board and vested them in new boards created by legislative authority." *Id.* at 9-10. The Education Report added that "it appears to be a fact that the Legislature has thus taken the control of the State's public school system from the Board of Education set up in the Constitution and vested the same in a board of its own creation." *Id.* at 10-11. Ultimately, the report recommended amendments to strengthen the public education system aimed at, *inter alia*, remedying the alleged abuse of power exercised by the General Assembly. *Id.* at 31-32. The Education Report suggested that "[c]omplete control over the State's public school system [be] vested in this one Board, subject only to general supervision by the General Assembly.' " *Id.* at 32. Nonetheless, the constitution was not amended at that time.

Subsequently, in 1937 the General Assembly directed the Governor to appoint a commission to review the public education system again. Ch. 379, 1937 N.C. Pub. [Sess.] Laws 709. The report issued by the commission reiterated some of the problems discussed in the earlier Education Report. For example, the latter report discussed how three commissions were created to tackle the specific administrative duties related to textbooks, namely the State Textbook Commission, the

Elementary Textbook Commission and the State Committee for High School Textbooks. See 1938 Report at 30. The 1938 Report concluded that "[t]here seems to be much duplication and some dual control in the workings of these various boards and unnecessary duplication in the work of school administrators." *Id.* Thus, the Commission on Education concluded that "all these boards should be consolidated under [the Board]," and "the direction of all activities of the teaching profession should come from this central board" and not from other administrative agencies. *Id.* The Commission encouraged the General Assembly to accomplish the amendment's purpose *statutorily* in advance of the constitutional amendment, as a means of providing "immediate relief . . . rather than wait[ing]." *Id.* at 31.

In 1942 the constitution was amended[2] in response to concerns identified by the two reports from the 1930s. Specifically, the 1942 version of the constitution clarified the Board's authority stating, in pertinent part, that the Board

> shall have power to divide the State into a convenient number of school districts; to regulate the grade, salary and qualifications of teachers; to provide for the selection and adoption of the textbooks to be used in the public schools; to apportion and equalize the public school funds over the State; and generally to supervise and administer the free public school system of the State. . . .

N.C. Const. of 1868 art. IX, § 9 (1942). As noted earlier, the Board's constitutional authority was preserved when the constitution was amended again in 1971. The General Assembly's authority to enact laws to which the Board's rules and regulations are subject has remained throughout every version of the constitution.

While this review of the history of the Board's constitutional authority reveals a concerted effort to mollify the General Assembly's alleged attempt to dilute the Board of its power in the past, the Board's present contention that the Commission's review of the Board's rules is "consistent with the mischief sought to be remedied" from the 1930s is without merit. There are major differences between the General Assembly's actions regarding the Board in the past and the General Assembly's more recent delegation to the Commission in relation to the Board's rulemaking. As detailed above, in the past the General Assembly created new

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2. The amendment was authorized to be submitted to a vote of the people by Act of Mar. 13, 1941, ch. 151, 1941 N.C. Pub. [Sess.] Laws 240.

boards that allegedly stripped the Board of much of its power in response to unflattering reports about the Board's administrative shortcomings; in the present, the General Assembly has delegated authority to a sole entity—the Commission—that has a well-defined role, subject to legislative oversight, regarding the Board's and other agencies' rulemaking procedures. In the 1930s multiple state boards had the power to exercise authority over various aspects of public educational matters; now, that power has been consolidated into the Board. The Commission's authority to review the Board's proposed rules is not a corrective measure, but a process that applies uniformly to numerous state agencies like the Board. Lastly, the Commission does not review the Board's rules from a substantive standpoint. Section 150B-21.9 states that "[t]he Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to a determination of the standards set forth in this subsection" which are procedural in nature. N.C.G.S. § 150B-21.9(a) (2017).

We conclude that the plain language of Article IX, Section 5 of the North Carolina Constitution authorizes the General Assembly to enact laws that delegate authority to the Commission to review rules adopted by the Board. Moreover, a review of the history of the relevant amendments to the constitution does not indicate that the document's framers intended that the Board would have the unbridled power to adopt rules and regulations of its own volition. We therefore conclude that the General Assembly has lawfully required the Board to submit its proposed rules to the Commission for review because this procedure was statutorily enacted and the Board's prescribed constitutional duties are subject to laws enacted by the General Assembly. The Board's proposed rules which are subject to this mandated submission to the Commission for review and approval are those which fall within the purview of the Administrative Procedure Act in order to ensure compliance with the provisions of this legislative enactment.

VII. Delegation of Authority

[2] The General Assembly properly delegated authority to the Commission to review the Board's rules.[3] Article I, Section 6 of

3. At the outset the Commission contends that the Board dismissed all counts in its complaint except Counts 2 and 3. It is the Commission's view that these counts presented an exceedingly narrow issue before the Court: whether the Commission correctly interpreted N.C.G.S. § 150B-2(1a) as requiring the Board to comply with the APA's rulemaking provisions. Thus, the Commission attempts to limit the issues before this Court to statutory construction as opposed to constitutional issues. However, a review of the complaint

the North Carolina Constitution mandates that the State's three branches of government "shall be forever separate and distinct from each other." Nonetheless, in *Adams v. North Carolina Department of Natural & Economic Resources*, the cornerstone case concerning the General Assembly's ability to delegate authority to agencies, we acknowledged that a literal interpretation of the

> Constitution would absolutely preclude any delegation of legislative power. However, it has long been recognized by this Court that the problems which a modern legislature must confront are of such complexity that strict adherence to ideal notions of the non-delegation doctrine would unduly hamper the General Assembly in the exercise of its constitutionally vested powers.

295 N.C. 683, 697, 249 S.E.2d 402, 410 (1978) (citations omitted). "[W]e have repeatedly held that the constitutional inhibition against delegating legislative authority does not preclude the legislature from transferring adjudicative and rule-making powers to administrative bodies provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers." *Id.* at 697, 249 S.E.2d at 410 (first citing *State ex rel. Dorothea Dix Hosp. v. Davis*, 292 N.C. 147, 232 S.E.2d 698 (1977); then citing *Guthrie*, 279 N.C. 703, 185 S.E.2d 193).

"In the search for adequate guiding standards the primary sources of legislative guidance are declarations by the General Assembly of the legislative goals and policies which an agency is to apply when exercising its delegated powers. We have noted that such declarations need be only 'as specific as the circumstances permit.' " *Id.* at 698, 249 S.E.2d at 411 (first quoting *N.C. Tpk. Auth. v. Pine Island, Inc.*, 265 N.C. 109, 115, 143 S.E.2d 319, 323 (1965) then citing *Jernigan v. State*, 279 N.C. 556, 184 S.E.2d 259 (1971)). The General Assembly is required only to articulate "general policies and standards . . . which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances." *Id.* at 698, 249 S.E.2d at 411. Procedural safeguards are also an indication that a particular delegation of authority is supported by adequate guiding standards. As previously stated by this Court in *Adams*, "[p]rocedural safeguards tend to encourage adherence to legislative standards by the agency to which power has been delegated." *Id.* at 698, 249 S.E.2d at 411.

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and the superior court's decision clearly shows that the Board raised constitutional arguments as opposed to statutory challenges. We therefore conclude that the Commission's statutory construction argument is meritless.

In the current case, the Commission was given adequate guidance to enable it to properly review the administrative rules of other agencies. First, the Commission must determine whether a rule meets all of the following criteria:

> (1) It is within the authority delegated to the agency by the General Assembly.
>
> (2) It is clear and unambiguous.
>
> (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
>
> (4) It was adopted in accordance with Part 2 of this Article.

N.C.G.S. § 150B-21.9(a). Second, "[t]he Commission shall not consider questions relating to the quality or efficacy of the rule." *Id.* Under the rubric of its constitutional authority enunciated in Article IX, Section 5, the General Assembly has enacted laws to which the Board is subject and, in accord with this constitutional authority, has provided clear and ample statutory direction concerning the Commission's powers and restrictions. The Commission is directed to initially determine whether the agency has the authority to adopt a given rule. The Commission next determines whether the agency followed the proper procedure to promulgate the rule. The Commission is charged with reviewing all previous rules related to the specific purpose for which the current rule is proposed in order to determine if the rule under scrutiny is necessary. The Commission reviews the rule for clarity to ensure that it is understandable. While the General Assembly's authority is clearly established by way of the North Carolina Constitution and the Commission's authority is clearly established by way of statutory law, if an agency such as the Board desires to challenge the Commission's exercise of its delineated duties, "[w]hen the Commission returns a permanent rule to an agency . . . the agency may file an action for declaratory judgment in Wake County Superior Court." N.C.G.S. § 150B-21.8(d) (2017). In light of these observations, we therefore hold that the General Assembly has enacted appropriate statutes to Article IX, Section 5 of the North Carolina Constitution that properly and clearly delegate to the Commission the authority to review the Board's rules and that include sufficient restrictions on the

Commission and safeguards to ensure the Board's continued ability to fulfill its mandates as set forth in the state constitution.

The Board also asserts that the Commission is not equipped to properly assess public education legislation and rules adopted thereunder in response to complex conditions that the General Assembly cannot directly confront. The Board's argument might have some merit if the Commission were tasked with reviewing the rules from a substantive standpoint. But, in its delegation of authority to the Commission regarding its review of the Board's rulemaking the General Assembly has expressly eliminated such involvement by the Commission via N.C.G.S. § 150B-21.9(a). The Commission is tasked only with the responsibility to review the Board's rules from a procedural perspective for clarity and to ensure that the rules are adopted in compliance with the APA. Such a review does not require special expertise pertaining to public education.

We hold that Article IX, Section 5 of the North Carolina Constitution authorizes the General Assembly to statutorily delegate authority to the Rules Review Commission to review and approve the administrative rules that are proposed by the State Board of Education for codification. We therefore affirm the majority opinion of the Court of Appeals.

AFFIRMED.

Chief Justice MARTIN dissenting.

The plain language of our state constitution and an analysis of that language in light of the delegation doctrine both point to a particular result in this case. But they both point to the opposite of the result that the majority reaches. As a result, I respectfully dissent.[1]

Article IX, Section 5 of the North Carolina Constitution says:

> The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules

1. The Superintendent of Public Instruction serves as the Secretary and Chief Administrative Officer of the Board of Education. N.C. Const. art. IX, § 4(2). This case does not concern the respective duties of the Superintendent and the Board under our state constitution, and nothing in this dissent should be construed to express any opinion on the merits of *North Carolina State Board of Education v. State of North Carolina, et al.*, Case No. 333PA17.

> and regulations in relation thereto, *subject to laws enacted by the General Assembly*.

(Emphasis added.) The issue here, in a nutshell, is whether the italicized language allows the General Assembly to subject the Board of Education's proposed rules and regulations to review and approval by the Rules Review Commission.

The plain language of Article IX, Section 5 gives us an answer, but not the one that the majority provides. The words "subject to" tell us that the phrase that comes after those words will specify something that can restrict the Board of Education's constitutional authority to make rules and regulations. Because only the "subject to" clause qualifies the Board's authority, only that thing—outside of the constitution itself—can restrict the Board's authority. That thing is "laws enacted by the General Assembly." N.C. Const. art. IX, § 5. And a "law[ ] enacted by the General Assembly" must go through the bicameral legislative approval process and be presented to the Governor. *Id.* art. II, § 22. If the Governor vetoes a bill that has been presented to him, the General Assembly has to override that veto for the bill to become a law. *Id.* But a determination by the Rules Review Commission—which does not go through this enactment process—is not a law. It follows from this, as sure as spring follows winter, that the phrase "subject to laws enacted by the General Assembly" does not mean—and cannot mean—"subject to determinations by the Rules Review Commission."

The majority, however, does not merely disagree with this conclusion. The majority does not say, for instance, that the pertinent language is ambiguous and that our Court must therefore seek guidance outside of the constitutional text. Instead, it says that the *plain language* of Article IX, Section 5 *affirmatively permits* the Rules Review Commission to exert control over the Board of Education's power to make rules and regulations. I, for one, cannot see how this construction is even plausible. Remember, for a legal provision to have a plain-language meaning, its text must be so clear and unambiguous that it cannot be read any other way. *See*, *e.g.*, *Lanvale Props., LLC v. County of Cabarrus*, 366 N.C. 142, 154, 731 S.E.2d 800, 809-10 (2012). So the majority's plain-language argument would be right only if Article IX, Section 5 said something like "subject to laws enacted by the General Assembly *or to a body created by laws enacted by the General Assembly*." Alas, it does not. In essence, the majority is adding words to the constitution in the guise of interpreting it, and is violating a canon of construction so basic that it doesn't even have a name: the "don't add twelve words to a legal text"

canon. If this is a plain-language interpretation, then the phrase "plain language" no longer has any meaning in our jurisprudence.

The majority also holds that "[t]he General Assembly properly delegated authority to the Commission to review the Board's rules." But this is not a delegation case because it does not concern our state constitution's delegation *provision*. The delegation doctrine, after all, arises out of Article II, Section 1, which states that "[t]he legislative power of the State shall be vested in the General Assembly." *See*, *e.g.*, *Northampton County Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 747-48, 392 S.E.2d 352, 356 (1990) (alteration in original) (quoting N.C. Const. art. II, § 1). Our caselaw interpreting this provision undoubtedly indicates that, as a practical matter, "[t]he legislative power of the State" includes the power to delegate rulemaking and regulatory authority to administrative bodies. *See*, *e.g.*, *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 696-97, 249 S.E.2d 402, 410-11 (1978). This case, though, arises out of the much more specific language of Article IX, Section 5—which, as I have said, speaks of "laws enacted by the General Assembly." And we have never held that the General Assembly can delegate *the power to enact laws*. In fact, "[i]t is well settled that the Legislature *may not* delegate its power to make laws[,] even to an administrative agency." *Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro*, *Inc.*, 285 N.C. 467, 475, 206 S.E.2d 141, 147 (1974) (emphasis added); *see also Adams*, 295 N.C. at 696, 249 S.E.2d at 410 ("[T]he legislature may not abdicate its power to make laws . . . ." (quoting *N.C. Tpk. Auth. v. Pine Island*, *Inc.*, 265 N.C. 109, 114, 143 S.E.2d 319, 323 (1965))). Well settled, that is, until today. What's next? Are we going to hand over our power to decide cases to the Rules Review Commission, too?

But there is another, equally compelling reason that the delegation doctrine cannot permit the Rules Review Commission to exert the power that it claims to have in this context. Bear in mind that the delegation doctrine, as relevant here, pertains to the General Assembly's ability to delegate the power *to make rules and regulations*. In the realm of education, Article IX, Section 5 has already assigned that power exclusively to the Board of Education. See N.C. Const. art. IX, § 5 ("The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make *all needed rules and regulations* in relation thereto . . . ." (emphasis added)). So what exactly is left for the General Assembly to delegate?

This analysis reveals an additional problem with the majority's position. When the Rules Review Commission reviews the Board

of Education's proposed rules and regulations, the Commission is exercising power that the constitution has already granted to the Board. Let's look at the Commission's statutory powers. The Commission can object to rules or regulations, delay rules or regulations, and suggest changes to rules or regulations on a number of highly discretionary grounds. *See* N.C.G.S. §§ 150B-2(8a), -21.9(a)(1)-(4), -21.10 (2017). Ultimately, the Commission can decide to block the Board of Education's adoption of a rule or regulation unless and until the Board changes the rule or regulation to conform to the Commission's wishes. *See id.* §§ 150B-21.12, -21.19(4) (2017). The Board's only recourse, if it does not change the rule or regulation, is to bring a declaratory judgment action in superior court. *See id.* § 150B-21.8(d) (2017). In effect, then, the Commission controls the final step in the process of adopting rules and regulations, and keeps the Board from adopting rules and regulations of which the Commission disapproves unless the Board gets a favorable ruling from a court. That cannot be constitutional, given that the Board has the sole constitutional authority to make rules and regulations in this area of the law, subject only to "laws enacted by the General Assembly." N.C. Const. art. IX, § 5.

The majority rests its holding on the assertion that "[t]he Commission is tasked only with the responsibility to review the Board's rules from a procedural perspective" and is not "tasked with reviewing the rules from a substantive standpoint." But the plain language of Article IX, Section 5, which subjects the Board's power to make rules and regulations only to "laws enacted by the General Assembly," does not draw any distinction between procedural and substantive restrictions on the Board's power. Once again, the majority is simply adding words to the constitution that are not there.

Anyway, checking for compliance with procedural requirements is inherently part of the process of making rules and regulations. And, in the education context, the General Assembly cannot delegate procedural rulemaking authority any more than it can delegate substantive rulemaking authority. So even procedural rulemaking authority cannot be delegated to the Rules Review Commission.

Not every constitutional provision has a plain meaning. But Article IX, Section 5 does. It prevents the Rules Review Commission from conducting its statutorily prescribed review of the Board of Education's proposed rules and regulations. I therefore respectfully dissent.

Justice HUDSON joins in this dissenting opinion.

NORTH CAROLINA STATE BOARD OF EDUCATION
v.
THE STATE OF NORTH CAROLINA AND MARK JOHNSON, IN HIS OFFICIAL CAPACITY

No. 333PA17

Filed 8 June 2018

Schools and Education—State Board of Education and Superintendent of Public Instruction—powers and duties

Legislation that amended numerous provisions of N.C.G.S. Chapter 115C—eliminating certain aspects of the N.C. State Board of Education's oversight of a number of the Superintendent of Public Instruction's powers and duties, and assigning several powers and duties that had formerly belonged to the Board or the Governor to the Superintendent—did not, on its face, violate Article IX, Section 5 of the N.C. Constitution. The Board's continued ability to exercise its constitutional authority to generally supervise and administer the public school system was preserved by both the explicit statutory language affording the Board continued responsibility for the supervision and administration of the public school system and the explicit ability to adopt appropriate rules and regulations governing the duties assigned to the Superintendent. The Court further determined that the "needed rules and regulations" to which the legislation referred were not subject to the rulemaking requirements of the Administrative Procedure Act.

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

Justice HUDSON concurring in result.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of an order granting summary judgment entered on 14 July 2017 by a three-judge panel of the Superior Court, Wake County, appointed by the Chief Justice pursuant to N.C.G.S. § 1-267.1. Heard in the Supreme Court on 7 February 2018.

Robert F. Orr, PLLC, by Robert F. Orr; and Poyner Spruill LLP, by Andrew H. Erteschik, Saad Gul, and John M. Durnovich, for plaintiff-appellant.

Joshua H. Stein, Attorney General, by Olga Vysotskaya de Brito, Special Deputy Attorney General, and Amar Majmundar, Senior Deputy Attorney General, for defendant-appellee State of North Carolina.

Blanchard, Miller, Lewis & Isley, P.A., by E. Hardy Lewis and Philip R. Isley, for defendant-appellee Mark Johnson.

ERVIN, Justice.

This case requires us to determine whether legislation amending portions of Chapter 115C and other provisions of the North Carolina General Statutes violates Article IX, Section 5 of the Constitution of North Carolina. Plaintiff North Carolina State Board of Education is an entity established by the North Carolina Constitution that consists of the Lieutenant Governor, State Treasurer, and eleven additional members, including one member from each of the State's eight educational districts, who are appointed by the Governor, subject to confirmation by the General Assembly, and serve eight-year overlapping terms. N.C. Const. art. IX, § 4. The Superintendent of Public Instruction is a popularly elected official who holds an office established by Article III, Section 7 of the North Carolina Constitution.

On 8 November 2016, defendant Mark Johnson was elected Superintendent of Public Instruction for a four-year term commencing on 1 January 2017. On 16 December 2016, the General Assembly enacted House Bill 17, which is captioned, in part, "An Act to Clarify the Superintendent of Public Instruction's Role as the Administrative Head of the Department of Public Instruction." Act of Dec. 19, 2016, ch. 126, 2017-1 N.C. Adv. Legis. Serv. 37 (LexisNexis) (Session Law 2016-126). House Bill 17, which amended numerous provisions of N.C.G.S. Chapter 115C, eliminated certain aspects of the Board's oversight of a number of the Superintendent's powers and duties, and assigned several powers and duties that had formerly belonged to the Board or the Governor to the Superintendent. Former Governor Patrick L. McCrory signed House Bill 17, which became Session Law 2016-126, into law on 19 December 2016.

On 29 December 2016, the Board filed a complaint in the Superior Court, Wake County, in which it sought a declaratory judgment to the effect that certain provisions of Session Law 2016-126 are unconstitutional and to have the challenged statutory provisions temporarily restrained and preliminarily and permanently enjoined. According to

the allegations set out in the Board's complaint, Session Law 2016-126 unconstitutionally transferred the authority conferred upon the Board in Article IX, Section 5 to "supervise . . . the free public school system," to "administer the free public school system," to "supervise . . . the educational funds provided for [the free public school system's] support," and to "administer . . . the educational funds provided for [the free public school system's] support" to the Superintendent. On the same date, Judge Donald W. Stephens entered a temporary restraining order in which he concluded, among other things, that, "when a constitution expressly confers certain powers and duties on an entity, those powers and duties cannot be transferred to someone else without a constitutional amendment" and that "the [challenged] provisions of [House Bill 17] . . . attempt to transfer these constitutional powers and duties . . . from the Board to the Superintendent of Public Instruction." As a result, Judge Stephens enjoined the State and its "officers, agents, servants, employees, and attorneys" from "taking any action to implement or enforce" Session Law 2016-126.

On 30 December 2016, Judge Stephens entered an order transferring this case to a three-judge panel of the Superior Court, Wake County, on the grounds that N.C.G.S. § 1-267.1 and N.C.G.S. § 1-1A, Rule 42(b)(4) require that facial challenges to the constitutionality of statutes, such as the one advanced by the Board in this case, be heard and determined by such an entity. On 6 January 2017, the three-judge panel entered a consent order extending Judge Stephens' temporary restraining order "until a preliminary injunction hearing can be consolidated with the parties' dispositive motions." On 20 January 2017, the Superintendent indicated that he intended to intervene in this case. On 30 January 2017, the Board filed a summary judgment motion. On 1 March 2017, the three-judge panel entered an order that, among other things, recognized the Superintendent's intervention. On 12 April 2017, the Superintendent filed a summary judgment motion and the State filed a motion seeking to have the Board's complaint dismissed on subject matter and personal jurisdiction grounds and for failure to state a claim for which relief could be granted.

On 14 July 2017, the three-judge panel entered an order converting the State's dismissal motion into a summary judgment motion and granting summary judgment in favor of the State and the Superintendent. On the same day, the three-judge panel filed a memorandum of opinion explaining its decision to grant summary judgment in favor of the State and the Superintendent in which it concluded, in pertinent part, that:

[M]any of the provisions of [Session Law 2016-126], particularly those which were not specifically addressed by the [p]laintiffs in their briefs and oral arguments, simply shift the details of day-to-day operations, such as hiring authority, from the State Board to the Superintendent. This court further concludes that those aspects of the legislation appear to fall well within the constitutional authority of the General Assembly to define specifics of the relationship between the State Board of Education and the Superintendent of Public Instruction.

North Carolina's Constitution establishes two entities responsible for the governance of the public school system: the State Board and the Superintendent. The allocation of powers and duties between these two constitutional entities has changed over time such that there has been an ebb and flow of the powers of each entity over the years, depending on various acts of legislation. Nevertheless, it appears to be the clear intent of the Constitution that the State Board shall have the primary authority to supervise and administer the free public school system and the educational funds provided for the support thereof, and that the State Board is empowered to make all needed rules and regulations related to each of those functions, subject to laws passed by the General Assembly. It also appears clear that as secretary to the State Board and chief administrative officer of the State Board, the Superintendent is primarily responsible for overseeing the day-to-day management and operations of the state's free public school system.

While the parties disagree as to what, if any, limits are placed on the power of the General Assembly to shift responsibilities back and forth between the State Board and Superintendent, this Court does not consider it necessary to articulate a precise definition on that boundary. Suffice it to say, it is at least abundantly clear to this Court that this action by the General Assembly in enacting [Session Law 2016-126] is not such a pervasive transfer of powers and authorities so as to transfer the inherent powers of the State Board to supervise and administer the public schools, nor does it render the State Board an "empty shell," nor does this action, which [p]laintiffs contend to

> be an infringement upon the constitutional powers and duties of the State Board of Education, operate to "unnecessarily restrict[ ] [the State Board of Education's] engaging in constitutional duties."

N.C. State Bd. of Educ. v. State, No. 16 CVS 15607 (N.C. Super. Ct. Wake County July 14, 2017), at 4-5 (unpublished) [hereinafter *Memorandum*] (last alteration in original) (quoting *State v. Camacho*, 329 N.C. 589, 596, 406 S.E.2d 868, 872 (1991)). The three-judge panel paid particular attention to a provision of the newly enacted legislation providing that the Superintendent will "have under his or her direction and control, all matters relating to the direct supervision and administration of the public school system," ch. 126, sec. 4, 2017-1, N.C. Adv. Legis. Serv. at 39 (amending N.C.G.S. § 115C-21(a)(5)), and concluded that, rather than transferring authority from the Board to the Superintendent, the provision in question gives the Superintendent the ability "to manage the day-to-day operations of the school system, subject to general oversight by the State Board," and noted that other provisions of Session Law 2016-126, including those providing that the Board "shall establish all needed rules and regulations for the system of free public schools," *id.*, sec. 2, at 38 (amending N.C.G.S. § 115C-12), and that the Superintendent "shall administer all needed rules and regulations adopted by the [Board,]" *id.*, serve to "place[ ] a limit on the Superintendent's power, leaving the ultimate authority to supervise and administer the public school system with the State Board." *Memorandum* at 6. Similarly, the three-judge panel concluded that the provision of Session Law 2016-126 authorizing the Superintendent to "administer funds appropriated for the operations of the State Board of Education and for aid to local school administrative units," *id.*, sec. 4, at 40 (enacting N.C.G.S. § 115C-21(b)(1b)), is subject to "a limiting principle" given that Section 5 of Session Law 2016-126 requires the Superintendent to "administer any available educational funds through the Department of Public Instruction in accordance with all needed rules and regulations adopted by the State Board of Education," "thereby leaving the ultimate authority to supervise and administer the school system's funds with the State Board." *Memorandum* at 6. Finally, the three-judge panel concluded that replacement of the word "policy" with the phrase "all needed rules and regulations" in N.C.G.S. § 115C-12 "does not change the constitutional role of the State Board of Education" or "conflict with the roles of the parties as defined by the state constitution" given the Board's constitutional authority to establish rules and regulations for the purpose of supervising and administering the public school system. *Id.* at 6-7. As a result, given that Session Law 2016-126 allows the Board to continue

to "supervise and administer the public schools and make all necessary rules and regulations" and subjects the Superintendent's duties to the "power of the State Board," the three-judge panel concluded that statutory changes worked by Session Law 2016-126 do not contravene the relevant provisions of the North Carolina Constitution. *Id.* at 7.

On 20 July 2017, the Board noted an appeal to the Court of Appeals from the three-judge panel's order. On 5 September 2017, the Board requested the three-judge panel to continue to stay its decision pending completion of all proceedings on appeal. On 11 September 2017, the three-judge panel entered an order allowing the existing stay to remain in effect until a hearing on the extension motion could be held. On 20 September 2017, the Board sought a temporary stay and a writ of supersedeas from the Court of Appeals, which, on 5 October 2017, granted the requested temporary relief "to the extent that the challenged provisions of [Session Law 2016-126] empower the Superintendent of Public Instruction to enter into statewide contracts for the public school system which could not be terminated by the Board immediately upon any decision by our Court in this matter which determines that the Board has the authority under our State Constitution to enter into such contracts." On 5 October 2017, the Board sought a temporary stay and the issuance of a writ of supersedeas from this Court, which granted a temporary stay on 16 October 2017 and allowed the Board's supersedeas petition on 7 December 2017. On 15 November 2017, the Board filed a petition with this Court seeking discretionary review of the three-judge panel's order prior to determination by the Court of Appeals. We allowed the Board's discretionary review petition on 7 December 2017.

In seeking relief from the three-judge panel's decision from this Court, the Board argues that the panel erroneously concluded that Session Law 2016-126 did not impermissibly transfer authority from the Board to the Superintendent given the newly enacted statutory language providing that "[i]t shall be the duty of the Superintendent" to "have under his or her direction and control, all matters relating to the direct supervision and administration of the public school system" and to "administer funds appropriated for the operations of the State Board of Education and for aid to local school administrative units." Ch. 126, sec. 4, 2017-1 N.C. Adv. Legis. Serv. at 38-40 (amending N.C.G.S. § 115C-21(a)(5) and enacting N.C.G.S. § 115C-21(b)(1b)). According to the Board, these provisions clearly "attempt[ ] to transfer to the [Superintendent] the same powers that the people of North Carolina in their Constitution vested in the Board." In the Board's view, Session Law 2016-126's "attempt[ ] to statutorily reassign the Board's constitutional powers to

the" Superintendent runs afoul of the Board's "constitutional power to supervise and administer the public school system and its funds" on the grounds that, "when a constitution expressly commits certain powers and duties to an entity, those powers and duties cannot be reassigned to a different entity without a constitutional amendment," citing *Camacho*, 329 N.C. at 594, 406 S.E.2d at 871; *Mial v. Ellington*, 134 N.C. 131, 162, 46 S.E. 961, 971 (1903); *Wilmington, Columbia & Augusta Railroad Co. v. Board of Commissioners of Brunswick County*, 72 N.C. 10, 13 (1875); and *King v. Hunter*, 65 N.C. 603, 612 (1871).

The Board contends that a decision to transfer its constitutional authority to the Superintendent "defies the intent of the framers" of the North Carolina Constitution, who included the Board and its powers in the constitution in order to effectuate Article I, Section 15 of the same document, which provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." Although the constitutional provisions establishing the Board and defining its authority have been amended on a number of occasions, the authority granted to the Board by the 1868 constitution, which provided that "[t]he Board of Education . . . shall have full power to legislate and make all needful rules and regulations in relation to Free Public Schools," and that "all acts, rules and regulations of said Board may be altered, amended or repealed by the General Assembly, and when so altered, amended or repealed, . . . shall not be re-enacted by the Board," N.C. Const. of 1868 art. IX, § 9, have been carried forward in subsequent revisions to the educational provisions of the North Carolina Constitution. For example, the 1942 amendments to the relevant constitutional provisions state that the Board "shall succeed to all the powers . . . of the State Board of Education as heretofore constituted," while the drafters of the 1971 constitution indicated that the proposed revisions, among other things, "restate[ ], in much abbreviated form, the duties of the State Board of Education, but without any intention that its authority be reduced." *Report of the North Carolina State Constitution Study Commission* 34 (1968). In view of the fact that the framers of the North Carolina Constitution intended that "[t]he general supervision and administration of the free public school system, and of the educational funds provided for the support thereof . . . shall . . . be vested in the State Board of Education," N.C. Const. of 1868, art. IX, § 8 (1944), with the Superintendent to fill the narrow role of serving as a non-voting "secretary and chief administrative officer of the [Board]," *id.* art. IX, § 4(2), the attempt made in Session Law 2016-126 to transfer the Board's authority to the Superintendent so as to empower him or her to administer the public schools conflicts with the intent underlying the relevant constitutional provisions.

This Court should not, according to the Board, interpret the constitutional reference in Article IX, Section 5, subjecting the Board's authority "to laws enacted by the General Assembly," to allow the General Assembly to reassign the Board's authority to the Superintendent. According to the Board, such an interpretation ignores the principle set out by this Court in *State v. Lewis*, 142 N.C. 626, 631, 55 S.E. 600, 602 (1906), to the effect that state constitutions must be construed "as limitations upon the power of the state Legislature" and fails to give effect to each and every word contained in the text of the constitutional provisions that delineate the Board's authority rather than "lean[ing] in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory," first citing *Town of Boone v. State*, 369 N.C. 126, 132, 794 S.E.2d 710, 715 (2016); then quoting *Board of Education of Macon County v. Board of Com'rs of Macon County*, 137 N.C. 310, 312, 49 S.E. 353, 354 (1904). Furthermore, the Board points out that such an interpretation has no limiting principle and would allow the General Assembly to "remove constitutional entities or officers, replace them with individuals who better suit its political agenda, and effectively remake state government in its image."

The Superintendent argues that the trial court correctly ruled that Session Law 2016-126, which was intended, in part, to "reinforce[ ] the State Board's traditional role as the chief policy-setting, general administrative body for the schools," did not violate the Constitution by "disenfranchising" the Board. According to the Superintendent, nearly every statutory provision reworked in Session Law 2016-126 contains language subjecting the Superintendent's actions to "rules and regulations adopted by the State Board of Education." In addition, the Superintendent argues that the provision making the assignment of responsibilities contained in Article IX, Section 5 "subject to laws enacted by the General Assembly," makes both the Board and the Superintendent "wholly subservient and auxiliary to the General Assembly." The Superintendent claims that this interpretation has support in the constitutional text, which provided in 1868, and continues to provide today, that the Superintendent's duties "shall be prescribed by law" and which has consistently made the Board's authority subject to that of the General Assembly. In fact, the General Assembly's authority over the Board has increased over time, with the 1868 Constitution having limited the General Assembly to reacting to rules and regulations adopted by the Board while the 1942 amendments authorized the General Assembly to take "preemptive measures to exercise its control over the public schools" and made the Board's authority subject to "such laws as may be enacted from time to time by the General Assembly," quoting N.C. Const. of 1868, art. IX, § 9 (1942). The

Superintendent further contends that this Court's opinions in *Guthrie v. Taylor*, 279 N.C. 703, 712, 185 S.E.2d 193, 200 (1971), *cert. denied*, 406 U.S. 920, 92 S. Ct. 1774, 32 L. Ed. 2d 119 (1972), and *State v. Whittle Communications*, 328 N.C. 456, 464, 402 S.E.2d 556, 561 (1991), establish that the General Assembly "has plenary power to limit and revise even the express authority conferred" upon the Board. As a result, the Superintendent asserts that Session Law 2016-126 is nothing more than "a legitimate exercise of the constitutionally-conferred plenary authority of the General Assembly."

The Superintendent further argues that the General Assembly has the authority to allocate education-related responsibilities to the Superintendent, who is an elective constitutional officer who "stands on an equal constitutional footing with the State Board" and whose power stems from Article IX, Section 4, and Article III, Section 7(2), which provide that the Superintendent's "duties shall be prescribed by law" and whose office has "inherent functions" relating to public education, just like the Board. Prior to 1995, the relevant provisions of the General Statutes indicated that the Superintendent was the "chief day-to-day, or *direct*, administrator of the State's public schools," with the Board serving as the "chief policy-setting, *general* administrative body for the schools," with this structure clearly recognizing that the Superintendent occupies a full-time position while the Board meets for a "a total of 18 days a year." According to the Superintendent, Session Law 2016-126 is nothing more than "the latest of a series of efforts by the General Assembly over at least the past 50 years to attain an optimal allocation of authority and duties among the entities charged with overseeing the State's public school system."

In the Superintendent's view, "the People of North Carolina have chosen what is essentially a bicameral approach to the operation of the State's public school system," having "provid[ed] for two entities to exercise powers and duties simultaneously within a single field of government activity." In light of the unique nature of this constitutional assignment of authority, it makes sense that each entity's authority would be "subject to laws enacted" by the General Assembly. In the event that the Board's authority to "supervise and administer" was not "subject to laws enacted by the General Assembly," there would be no point in having an elective Superintendent. As a result, "[t]he citizens of North Carolina have decreed that a Superintendent and a State Board shall oversee the public school system, have granted the General Assembly the authority to allocate powers and duties among them, and have empowered the General Assembly to make changes to such allocations of powers and duties to meet the changing priorities of the People over time."

Similarly, the State argues that Session Law 2016-126 has not imposed an unconstitutional limitation upon the Board's authority over the public education system because it specifies that "[t]he general supervision and administration of the free public school system shall be vested in the State Board of Education," provides that the Board "shall establish all needed rules and regulations for the system of free public schools," and retains much of the Board's existing authority over public education, including, among other things, the Board's authority to make budgets, apportion funds, determine standard course of study and graduation requirements, adopt textbooks, and establish and regulate teacher salaries. Ch. 126, sec. 2, 2017-1 N.C. Adv. Legis. Serv. at 38 (amending N.C.G.S. § 115C-12). In addition, the State contends that Session Law 2016-126 preserves the Board's general fiscal powers by leaving those portions of N.C.G.S. § 115C-408(a) recognizing that "[t]he Board shall have general supervision and administration of the educational funds provided by the State and federal governments" unchanged, by allowing the Board to adopt rules and regulations regarding "available educational funds," and by leaving certain of the specific financial powers granted the Board by the existing statutory provisions intact. In the State's view, "[t]he Board's general supervisory and administrative powers over the public school system" and the "Board's power to supervise educational funds provided for the system's support" have not been unconstitutionally impaired.

According to the State, most of the changes that Session Law 2016-126 makes to the existing educational laws constitute statutory changes that have no constitutional significance. The State asserts that the "Board does not contend that the General Assembly must be restrained in its allocation of statutory, rather than constitutional, duties," with "the General Assembly's allocation of the statutory duties to the Superintendent [being] within its legislative authority." The State argues that the General Assembly's authority over the public schools, which antedates that of both the Board or the Superintendent, represents the "sturdiest leg of the three-legged design created by the framers" to govern the operation of the public schools, with the General Assembly having the authority "to shape [the] particulars of [the] relationship" between the Board and the Superintendent and to "enact laws that may limit and define the extent of the Board's and the Superintendent's authority over public education." In addition, the State joins the Superintendent in asserting that the Superintendent has "inherent constitutional authority" by virtue of his role as "chief administrative officer of the State Board of Education." In view of the fact that the Superintendent is required to "administer all needed rules and regulations adopted by the State Board of Education

through the Department of Public Instruction," the General Assembly has appropriately limited the Superintendent's authority to that authorized by the relevant constitutional provisions, citing N.C.G.S. § 115C-12 (as amended by S.L. 2016-126).

"[A] statute enacted by the General Assembly is presumed to be constitutional," *Wayne Cty. Citizens Ass'n v. Wayne Cty. Bd. of Commr's*, 328 N.C. 24, 29, 399 S.E.2d 311, 314-15 (1991) (citation omitted), and "will not be declared unconstitutional unless this conclusion is so clear that no reasonable doubt can arise, or the statute cannot be upheld on any reasonable ground," *id.* at 29, 399 S.E.2d at 315 (citing, *inter alia*, *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 63, 366 S.E.2d 697, 698 (1988)). Put another way, since "[e]very presumption favors the validity of a statute," that statute "will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt." *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) (quoting *Gardner v. City of Reidsville*, 269 N.C. 581, 595, 153 S.E.2d 139, 150 (1967)). "[A] facial challenge to the constitutionality of an act . . . is the 'most difficult challenge to mount successfully,' " *Hart v. State*, 368 N.C. 122, 131, 774 S.E.2d 281, 288 (2015) (quoting *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009)), with the challenger being required to show "that there are no circumstances under which the statute might be constitutional," *Beaufort Cty. Bd. of Educ.*, 363 N.C. at 502, 681 S.E.2d at 280 (citations omitted). "Where a statute is susceptible of two interpretations, one of which is constitutional and the other not, the courts will adopt the former and reject the latter." *Wayne Cty. Citizens Ass'n*, 328 N.C. at 29, 399 S.E.2d at 315 (citing *Rhodes v. City of Asheville*, 230 N.C. 759, 53 S.E.2d 313 (1949)). Before noting that, "[i]n respect to legislative offices, it is entirely within the power of the Legislature to deal with them as public policy may suggest and public interest may demand," *Mial*, 134 N.C. at 162, 46 S.E. at 971, this Court stated that, "in respect to offices created and provided for by the Constitution, the people in convention assembled alone can alter, change their tenure, duties, or emoluments, or abolish them," *id.* at 162, 46 S.E. at 971.

The Board asserts that several provisions of Session Law 2016-126 contravene the provisions of Article IX, Section 5 of the North Carolina Constitution, which provides that the Board "shall supervise and administer the free public school system and the educational funds provided for its support," with the exception of certain funds enumerated in Article IX, Section 7, "and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly." In addition,

however, Article IX, Section 4 provides that "[t]he Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education," while Article III, Sections 7 and 8 provide that the Superintendent is an "elective officer[ ]" and member of the Council of State whose "duties shall be prescribed by law." As a reading of the plain language of the relevant constitutional provisions clearly suggests, the Board, the Superintendent, and the General Assembly all have constitutionally based roles in the governance and operation of the public school system in North Carolina. On the one hand, the Board has the authority to "supervise and administer the free public school system and the educational funds provided for its support" and to "make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly." N.C. Const. art. IX, § 5. The Superintendent, on the other hand, serves as "the secretary and chief administrative officer of the State Board of Education," *id.* art. IX, § 4, and performs other "duties [as] shall be prescribed by law," *id.* art. III, § 7(2). A "plain meaning" construction of the relevant constitutional provisions seems to us to clearly provide that the Board has the constitutionally based responsibility for the general supervision and administration of the public school system; that the Superintendent has the constitutionally based responsibility for directly administering the operations of the public school system; and that the General Assembly has the authority to make ultimate educational policy determinations and to enact legislation providing for the management and operation of the public school system, so long as that legislation does not deprive the Board of responsibility for the general supervision and administration of the public school system or deprive the Superintendent of the responsibility for directly administering the operations of that system. As a result, in order to evaluate the validity of the Board's challenge to the relevant provisions of Session Law 2016-126, we must determine whether the legislation in question does, in fact, interfere with the Board's constitutionally based authority to generally supervise and administer North Carolina's system of public education.

Session Law 2016-126 made several changes to the "administrative duties" of the Superintendent as enumerated in N.C.G.S. § 115C-21. Among other things, the General Assembly deleted language from N.C.G.S. § 115C-21(a) making performance of the Superintendent's duties "[s]ubject to the direction, control, and approval of the State Board of Education"; removed various references to direction, approval, or delegation by the Board from various specific provisions contained in N.C.G.S. § 115C-21(a); and modified the descriptions of the administrative duties that were assigned to the Superintendent set out in N.C.G.S.

§ 115C-21(a). Pursuant to the modifications to N.C.G.S. § 115C-21(a) worked by Session Law 2016-126, the Superintendent was authorized to:

- "organize and establish a Department of Public Instruction which shall include divisions and departments for supervision and administration of the public system"
- "administer the funds appropriated for the operation of the Department of Public Instruction, in accordance with all needed rules and regulations adopted by the State Board of Education"
- "enter into contracts for the operations of the Department of Public Instruction;"
- "control and manag[e]" "all appointments of administrative and supervisory personnel to the staff of the Department of Public Instruction and the State Board of Education, except for certain personnel appointed by the State Board of Education," and to "terminate these appointments in conformity with . . . the North Carolina Human Resources Act"
- "have under his or her direction and control, all matters relating to the direct supervision and administration of the public school system"
- "[c]reate and administer special funds within the Department of Public Instruction to manage funds received as grants from nongovernmental sources in support of public education in accordance with G.S. 115C-410"
- "administer, through the Department of Public Instruction, all needed rules and regulations established by the State Board of Education"
- "have under his or her direction and control all matters relating to the provision of staff services, except certain personnel appointed by the State Board as provided in G.S. 115C-11(j)" and
- "have under his or her direction and control all matters relating to the . . . support of the State Board of Education, including implementation of federal programs on behalf of the State Board."

Ch. 126, sec. 4, 2017-1 N.C. Adv. Legis. Serv. at 38-39 (amending N.C.G.S. § 115C-21(a)(1), (5), (8), and (9)). Similarly, Session Law 2016-126 deleted the language "[s]ubject to the direction, control, and approval of the State Board of Education" from the statutory provision defining the Superintendent's duties "as Secretary to the Board of Education" contained in N.C.G.S. § 115C-21(b); deleted various references to the necessity for compliance with "the instructional policies and procedures of" and the assignment of duties and responsibilities by the Board specified in certain subparagraphs contained in N.C.G.S. § 115C-21(b); and amended specific duties assigned to the Superintendent set out in N.C.G.S. § 115C-21(b) so as to provide that the Superintendent, while acting as Secretary to the Board, must:

- "communicate to the public school administrators all information and instructions regarding needed rules and regulations adopted by the Board," and
- "perform such other duties as may be necessary and appropriate for the Superintendent of Public Instruction in the role as secretary to the Board."

Id. at 39-40 (amending N.C.G.S. § 115C-21(b)(6), (9)).

Session Law 2016-126 modified the division of responsibility between the Board and the Superintendent in other ways as well. Aside from making the Superintendent the administrative head of the Department of Public Instruction, *id.*, secs. 9, 10, 11 at 44 (amending N.C.G.S. §§ 143-745(a)(1), 143A-44.1 and repealing N.C.G.S. § 143A-22 (conferring powers and duties upon the State Board of Education)), the General Assembly enacted N.C.G.S. § 115C-11(i), requiring the Superintendent to "provide technical . . . and administrative assistance, including all personnel . . . to the State Board of Education through the Department of Public Instruction," and amended N.C.G.S. § 115C-19, requiring him to

- "carry out the duties prescribed under G.S. 115C-21 as the administrative head of the Department of Public Instruction . . . . [and] administer all needed rules and regulations adopted by the State Board of Education through the Department of Public Instruction."

Id., secs. 1, 3, at 38. In addition, the General Assembly amended N.C.G.S. § 126-5(d) to allow the Superintendent to designate the greater of seventy positions, or two percent of the total number of full-time positions in the Department of Public Instruction, as exempt policymaking positions, and the same number as exempt managerial positions; to request that

additional positions be designated as exempt; to designate as exempt positions created or transferred to a different department or located in a department that has been reorganized; and to reverse the status of positions that had been previously designated as exempt. *Id.*, sec. 8, at 41-44 (amending N.C.G.S. § 126-5(d)(2), (2a), (4), (5), and (6)). The General Assembly further provided that the Superintendent would serve as the Board's Chief Administrative Officer; would administer, along with the Board, the Achievement School District; would appoint, establish the salary for, supervise, and determine the tenure of the Superintendent of the Achievement School District; and "be responsible for the administration, including appointment of staff," for the Governor Morehead School for the Blind, the Eastern North Carolina School for the Deaf, and the North Carolina School for the Deaf, having the authority to reduce the number of positions at those institutions, and at the North Carolina Center for Advancement of Teaching, for the purpose of implementing budget reductions established for the 2015-2017 fiscal biennium. *Id.*, secs. 15, 16, 28, at 44-45, 50 (amending N.C.G.S. §§ 115C-75.6, -150.11, and amending "Section 8.37 of S.L. 2015-241, as amended by Section 8.30 of S.L. 2016-94"). Similarly, Session Law 2016-126 authorized the Superintendent to appoint, establish the salary for, and assign otherwise unenumerated duties to the Executive Director of the Office of Charter Schools, with that individual to serve at the Superintendent's pleasure. *Id.*, sec. 17, at 45-47 (amending N.C.G.S. § 115C-218). Finally, Session Law 2016-126 allows the Superintendent to "establish a division to manage and operate a system of insurance for public school property in accordance with all needed rules and regulations adopted by the State Board of Education," to employ staff "necessary to insure and protect effectively public school property," and to "fix their compensation consistent with the policies of the State Human Resources Commission." *Id.*, sec. 25, at 49 (amending N.C.G.S. § 115C-535).

The General Assembly's description of Session Law 2016-126 as "clarify[ing]" the Superintendent's "role as the administrative head of the Department of Public Instruction" reflects that body's expressly stated intent "to restore authority to the Superintendent of Public Instruction as the administrative head of the Department of Public Instruction and the Superintendent's role in the direct supervision of the public school system," *id.*, sec. 30, at 50, and to assign several duties to the Superintendent that he or she either did not have or carried out subject to the Board's "direction, control, and approval" under prior law. The resulting statutory changes, which make the Superintendent the chief administrative officer for the Department of Public Instruction, give the Superintendent the authority to hire and fire the Department's

employees and a large majority of the Board's employees, and authorize the Superintendent to manage certain funds available for the support of the public schools, also provide that the Superintendent's actions are subject to rules and regulations adopted by the Board. For that reason, these statutory changes do not strike us as inconsistent with the Superintendent's constitutional authority as the "secretary and chief administrative officer of the State Board of Education" and as an "elective officer [ ]" whose "duties shall be prescribed by law." N.C. Const. art. IX, § 4(2), *id.* art. III, § 7(1)(2).[1] The General Assembly's decision to assign additional responsibilities to the Superintendent does not interfere with the Board's constitutional authority to generally supervise and administer the public school system given that the current statutory provisions governing the provision of public education in North Carolina, by providing that "[t]he general supervision and administration of the free public school system shall be vested in the" Board, ch. 126, sec. 2, 2017-1 N.C. Adv. Legis. Serv. at 38, and that the Board "shall establish *all* needed rules and regulations for the system of free public schools," *id.*, subject the Superintendent's authority to directly supervise and administer the public schools to the Board's more general oversight and control. As a result, we conclude that the General Assembly's decision to give greater administrative authority to the Superintendent in Session Law 2016-126 is not, at least on its face, violative of Article IX, Section 5 of the North Carolina Constitution.

The essence of the Board's challenge to the validity of the statutory changes worked by Session Law 2016-126 rests upon a legislative determination that the Superintendent should "have under his or her direction and control, all matters relating to the direct supervision and administration of the public school system." Ch. 126, sec. 4, 2017-1 N.C. Adv. Legis. Serv. at 39 (amending N.C.G.S. § 115C-21(a)(5)). However, as we have previously noted, the Board's argument fails to fully take into account the fact that the constitutional text authorizes the Board to "supervise

1. Our decision to this effect is consistent with the determination that former Judge Robert H. Hobgood made in an order invalidating legislation creating a chief executive officer position within the Department of Public Instruction, the occupant of which was solely responsible to the Board, to the effect that, while "the State Constitution does not prohibit the General Assembly from establishing a position that has the authority and power to administer the day to day operations of the Department of Public Instruction as designated by the State Board of Education," such legislation must provide that "such responsibilities be exercised through the Superintendent of Public Instruction or under her supervision," given the Superintendent's "inherent powers" as an elected officer and as the Board's chief administrative officer. *Atkinson v. State*, No. 09 CVS 006655, 2009 WL 8597173 (N.C. Super. Ct. Wake County July 17, 2009) (order).

and administer" the public school system, N.C. Const. art. IX, § 5, while the newly enacted statutory language provides that the Superintendent shall direct and control "all matters relating to the *direct* supervision and administration" of the public school system, ch. 126, sec. 4, 2017-1 N.C. Adv. Legis. Serv. at 39 (emphasis added). The General Assembly's reference to "direct supervision" suggests that the Superintendent has been assigned responsibility for managing and administering the day-to-day operations of the school system, subject to rules and regulations adopted by the Board, with this allocation of responsibility between the Superintendent and the Board appearing to us to avoid an invasion of the Board's constitutionally based authority to generally supervise and administer the public school system while admittedly giving the Superintendent great immediate administrative authority.

The Board directs a similar argument against the provisions of Session Law 2016-126 transferring the authority to administer the funds provided for the operation of the public school system to the Superintendent, subject to rules and regulations adopted by the Board. More specifically, the Board asserts that section 4 of Session Law 2016-126 (enacting N.C.G.S. § 115C-21(b)(1b)), which provides that the Superintendent shall "administer funds appropriated for the operations of the State Board of Education and for aid to local school administrative units," and sections 3 and 4 of Session Law 2016-126, (amending N.C.G.S. §§ 115C-19 and 115C-21(a)(1)), which provide that, as "administrative head of the Department of Public Instruction," the Superintendent shall "administer the funds appropriated for the operation of the Department of Public Instruction, in accordance with all needed rules and regulations adopted by the State Board of Education," unconstitutionally transfer the Board's constitutional authority to supervise and administer the funds provided for the support of the public schools to the Superintendent. However, given that the Superintendent's authority over the funds to be utilized for public educational purposes is subject to rules and regulations adopted by the Board and given that N.C.G.S. § 115C-408 provides that "[t]he Board shall have general supervision and administration of the educational funds provided by the State and federal governments," we are unable to say that the relevant provisions of Session Law 2016-126 unconstitutionally transfer the Board's constitutionally based authority over the State's educational funds to the Superintendent.

The same logic precludes us from accepting the Board's challenges to other transfers of fiscal authority worked by Session Law 2016-126. Although the Board argues that the newly enacted provisions requiring the Superintendent to "collect and organize information regarding

the public schools, on the basis of which he or she shall furnish the Board such tabulations and reports as may be required by the Board," ch. 126, sec. 4, 2017-1 N.C. Adv. Legis. Serv. at 40 (amending N.C.G.S. § 115C-21(b)(5)), and to "accept, receive, use, or reallocate to local school administrative units any gifts, donations, grants, devises, or other forms of voluntary contributions," *id.*, sec. 6, at 40 (amending N.C.G.S. § 115C-410), each of these additional grants of authority is also limited by the Board's authority to adopt appropriate rules and regulations applicable to these situations. As a result, we hold that the Board's continued ability to exercise its constitutional authority to generally supervise and administer the public school system is preserved by both the explicit statutory language affording the Board continued responsibility for the supervision and administration of the public school system and the explicit ability to adopt appropriate rules and regulations governing the duties that have been assigned to the Superintendent.

Our decision that the statutory changes worked by Session Law 2016-126 do not, at least on their face, invade the Board's constitutional authority under Article IX, Section 5, rests, in considerable part, upon the existence of numerous statutory provisions subjecting the Superintendent's authority to appropriate rules and regulations adopted by the Board. We do not, after carefully reviewing these provisions and considering their likely impact upon the constitutionality of the statutory changes worked by Session Law 2016-126, believe that these references to "rules and regulations" contemplate the exercise of the Board's general supervisory and administrative authority exclusively by means of rules adopted and reviewed in compliance with the formal rule making provisions of the Administrative Procedure Act.[2]

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2. The "rules and regulations" repeatedly mentioned in Session Law 2016-126 are not, in our opinion, necessarily equivalent to the rules and regulations at issue in our contemporaneous decision in *N.C. State Bd. of Educ. v. State*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (June 8, 2018) (110PA16-2), which holds that rules and regulations adopted by the Board are not exempt from the statutory provisions governing the submission of proposed rules for consideration by the Rules Review Commission. The rules and regulations at issue in that case are, generally speaking, subject to the rulemaking procedures specified in Chapter 150B of the General Statutes because they affect and are directed toward third parties, rather than merely seeking to govern the mechanics of the relationship between the Board and the Superintendent, as well as how their respective departments will operate internally. In other words, the rules at issue in *N.C. State Board of Education v. State* are, necessarily, subject to the full panoply of rulemaking procedures, including review by the Rules Review Commission, set out in the Administrative Procedure Act. Otherwise, there would be no need for us to decide the constitutionality of subjecting the Board's proposed rules to review by the Rules Review Commission. The rules and regulations at issue in this case are, on the other hand, directed primarily toward the internal governance of the state-level entities responsible for the governance of the public education system rather

We reach this conclusion for at least two different reasons. First, the General Assembly's repeated use of the phrase "rules and regulations," rather than "rules," in each of the newly enacted provisions transferring authority from the Board to the Superintendent subject to "rules and regulations" adopted by the Board contained in Session Law 2016-126 suggests that the General Assembly did not contemplate that the exercise of the Board's general supervisory and administrative authority over the public education system would be exclusively effectuated through the use of the formal rulemaking process described in the Administrative Procedure Act, which applies to explicitly defined "rules" rather than to "rules and regulations." Secondly, we need not make our decision explicitly dependent upon this logic because, even if the General Assembly intended the repeated references to "rules and regulations" in Session Law 2016-126 to be equivalent to "rules" as defined in the Administrative Procedure Act, we do not believe that the formal rulemaking provisions of the Administrative Procedure Act apply to the "rules and regulations" referenced in Session Law 2016-126.

In reaching the second of these two conclusions, we note that the Administrative Procedure Act excludes a number of agency actions from the ambit of its rulemaking provisions. N.C.G.S. § 150B-2(8a) (2017); *see State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 411, 269 S.E.2d 547, 567-68 (1980), *abrogated on other grounds by In re Redmond*, 369 N.C. 490, 496-97, 797 S.E.2d 275, 279-280 (2017) (distinguishing between procedural rules, legislative rules, and interpretative rules and noting that "interpretative rules and general policy statements of agencies are excluded from the [Administrative Procedure Act's] rulemaking provisions"). More specifically, we note that, while N.C.G.S. § 115C-2 does provide that "[a]ll action of agencies taken pursuant to this Chapter, as agency is defined in G.S. 150B-2, is subject to the requirements of the Administrative Procedure Act, Chapter 150B of the General Statutes," the Administrative Procedure Act excludes from the statutory definition of "rule" "[s]tatements concerning only the internal

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than toward the activities of parties external to those entities. For the reasons set forth in the text, these rules and regulations are not, as a general proposition, subject to the rulemaking procedures set out in the Administrative Procedure Act. As a result, the rules and regulations at issue in the cases we decide today represent distinct categories of Board decisions and are not, generally speaking, both subject to the rulemaking procedures, including the review process conducted before the Rules Review Commission, specified in the Administrative Procedure Act. In the event that a rule adopted by the Commission is subject to the current version of the Administrative Procedure Act, however, it must be adopted and reviewed in accordance with the provisions of Chapter 150B of the General Statutes regardless of the statutory provision authorizing the Board's action.

management of an agency or group of agencies within the same principal office or department" to the extent that "the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies," N.C.G.S. § 150B-2(8a)(a), "[s]tatements of agency policy made in the context of another proceeding," such as "[d]eclaratory rulings," *id.* § 150B-2(8a)(e), and "[s]tatements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases," *id.* § 150B-2(8a)(g). As a result of the fact that the "rules and regulations" repeatedly referenced in Session Law 2016-126 appear to us to apply primarily to internal management or general policy statements than to the sort of rules that are subject to the Administrative Procedure Act's rulemaking requirements and the fact that a decision to treat Board decisions adopted for the purpose of exercising its general supervisory or administrative authority over the public education system as equivalent to formal Administrative Procedure Act-compliant rules could cast serious doubt upon the constitutionality of at least some of the statutory provisions enacted in Session Law 2016-126, we hold that the "needed rules and regulations" to which Session Law 2016-126 refers are not subject to the rulemaking requirements of the Administrative Procedure Act.

Our decision to interpret the relevant statutory language in this fashion is further bolstered by the fact that, in at least two instances, the General Assembly substituted the phrase "needed rules and regulations" for the word "policy." As the three-judge panel noted, this amendment tends to make the relevant statutory language consistent with the language in which Article IX, Section 5, is couched rather than to suggest the existence of a legislative intention to make a substantive change in law. *See* ch. 126, sec. 2, 2017-1 N.C. Adv. Legis. Serv. at 38 (providing that "[t]he State Board of Education shall establish all needed rules and regulations for the system of free public schools, subject to laws enacted by the General Assembly"); *id.*, sec. 4, at 39-40 (amending N.C.G.S. § 115C-21(b)(6) to provide that "it shall be the duty of the Superintendent of Public Instruction . . . to communicate to the public school administrators all information and instructions regarding needed rules and regulations adopted by the Board"). Although we need not delineate with precision each and every instance in which the Board's authority to adopt rules and regulations is and is not subject to the formal rulemaking requirements set out in the Administrative Procedure Act, we do wish to be clearly understood as holding that the Board is not required to exclusively exercise the general supervisory and administrative authority

over the Superintendent set out in Session Law 2016-126 through the promulgation of Administrative Procedure Act-compliant rules.[3]

Thus, for the reasons set forth in greater detail above, we hold that the enactment of Session Law 2016-126 does not, at least on its face, contravene Article IX, Section 5 of the Constitution of North Carolina. As a result, the three-judge panel's decision is affirmed.

AFFIRMED.

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

Justice HUDSON concurring in result.

I agree with the majority that the enactment of Session Law 2016-126 does not on its face contravene Article IX, Section 5, of the North Carolina Constitution because the Board's "constitutional authority to generally supervise and administer the public school system is preserved by both the explicit statutory language affording the Board continued responsibility for the supervision and administration of the public school system and the explicit ability to adopt appropriate rules and regulations governing the duties that have been assigned to the Superintendent." I express no opinion on—and view as unnecessary to the decision here—the majority's discussion of categories of rules that may or may not be subject to the general rulemaking provisions of the APA. Instead, I would conclude only that rules or regulations adopted by the Board, regardless of category, would not be subject to review and approval by the Rules Review Commission. *See N.C. State Bd. of Educ. v. State*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2018) (110PA16-2) (Martin, C.J., dissenting). Therefore, I concur in the result.

3. The textual analysis assumes the continued applicability of the existing version of Chapter 150B of the General Statues and should not be understood to expand or contract the current coverage of the Administrative Procedure Act. We express no opinion concerning the impact of any future change that might be made to the Administrative Procedure Act upon the constitutionality of any of the statutory changes worked by Session Law 2016-126.

STATE v. CLONTS

[371 N.C. 190 (2018)]

STATE OF NORTH CAROLINA
v.
SAM BABB CLONTS, III

No. 222A17

Filed 8 June 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 531 (2017), granting defendant a new trial after appeal from a judgment entered on 19 June 2015 and from orders entered on 29 February and 24 March 2016, all by Judge Jeffrey P. Hunt in Superior Court, Mecklenburg County. On 7 December 2017, the Supreme Court allowed the State's petition for discretionary review as to additional issues. Heard in the Supreme Court on 16 May 2018 in session in the Buncombe County Courthouse in the City of Asheville, pursuant to section 18B.8 of Chapter 57 of the 2017 North Carolina Session Laws.

Joshua H. Stein, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State-appellant.

Hale & Blau, Attorneys at Law, P.C., by Daniel M. Blau, for defendant-appellee.

PER CURIAM.

We affirm the decision of the Court of Appeals. With respect to Issue II raised by the State's petition for discretionary review as to additional issues, we conclude that discretionary review was improvidently allowed.

AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

STATE OF NORTH CAROLINA
v.
DONNA HELMS LEDBETTER

No. 402PA15-2

Filed 8 June 2018

Appeal and Error—petition to Court of Appeals for writ of certiorari—absence of procedural rule

Where defendant pleaded guilty to driving while impaired and petitioned the Court of Appeals for review by writ of certiorari of the denial of her motion to dismiss, the Court of Appeals erroneously concluded that it was procedurally barred from issuing a discretionary writ because there was no procedural process under Rule of Appellate Procedure 21. The Court of Appeals had jurisdiction pursuant to N.C.G.S. § 15A-1444(e) to issue a writ of certiorari, and the absence of a procedural rule did not limit its jurisdiction or authority to do so.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 794 S.E.2d 551 (2016) (per curiam), denying defendant's petition for writ of certiorari to review an order entered on 20 October 2014 by Judge C.W. Bragg and dismissing defendant's appeal from a judgment entered on 27 October 2014 by Judge Jeffrey P. Hunt, both in Superior Court, Rowan County. Heard in the Supreme Court on 17 April 2018.

Joshua H. Stein, Attorney General, by Christopher W. Brooks, Special Deputy Attorney General, for the State.

Meghan Adelle Jones for defendant-appellant.

BEASLEY, Justice.

In this case we consider whether the absence of a procedural rule limits the Court of Appeals' discretionary authority to issue a writ of certiorari. In denying defendant's petition for writ of certiorari, the Court of Appeals held that although it had jurisdiction to issue the writ, it lacked a procedural mechanism under Rule 21 of the North Carolina Rules of Appellate Procedure to do so without further exercising its discretion to invoke Rule 2 to suspend the Rules. *See State v. Ledbetter*, ___ N.C. App. ___, ___, 794 S.E.2d 551, 555 (2016) (per curiam); *see also* N.C. Rs. App.

P. 2, 21. Because we conclude that the absence of a procedural rule limits neither the Court of Appeals' jurisdiction nor its discretionary authority to issue writs of certiorari, we reverse the decision of the Court of Appeals and remand this case for further proceedings.

On 1 January 2013, defendant was charged with driving while impaired. Defendant filed a motion to dismiss the charge on 23 December 2013, arguing that the State violated N.C.G.S. § 20-38.4 (setting forth procedures for magistrates to follow when the arrestee appears to be impaired during the initial appearance) and *State v. Knoll*, 322 N.C. 535, 545-48, 369 S.E.2d 558, 564-66 (1988) (holding that a charge of driving while impaired is subject to dismissal when the defendant was prejudiced by the magistrate's failure to inform the defendant of certain statutory rights). The trial court denied defendant's motion on 20 October 2014.

Following the trial court's denial of her motion, on 27 October 2014, defendant pleaded guilty to driving while impaired.[1] The plea arrangement stated that "[defendant] expressly retains the right to appeal [t]he [c]ourt's denial of her motion to dismiss/suppress her Driving While Impaired charge in this case." Defendant gave notice of appeal and petitioned the Court of Appeals for review by writ of certiorari under N.C.G.S. § 15A-1444(e). The Court of Appeals dismissed the appeal and denied the certiorari petition, holding that defendant did not have a statutory right to appeal from the trial court's denial of her motion to dismiss prior to her guilty plea and that the petition did not assert grounds included in or permitted by Rule 21. *See State v. Ledbetter*, 243 N.C. App. 746, 757, 779 S.E.2d 164, 171 (2015). On 22 September 2016, this Court remanded the case to the Court of Appeals for reconsideration in light of the Court's recent decisions in *State v. Stubbs*, 368 N.C. 40, 770 S.E.2d 74 (2015), and *State v. Thomsen*, 369 N.C. 22, 789 S.E.2d 639 (2016). *State v. Ledbetter*, 369 N.C. 64, 64, 793 S.E.2d 216, 216-17 (2016) (per curiam order).

Upon reconsideration, the same panel of the Court of Appeals issued a unanimous opinion that again denied defendant's petition for writ of certiorari and dismissed her appeal. *See Ledbetter*, ___ N.C. App. at ___, 794 S.E.2d at 555. The Court of Appeals held that

> [a]fter further consideration and review of both *Thomsen* and *Stubbs*, and under the jurisdictional

1. In addition to the charge of driving while impaired, the State charged defendant with simple possession of both a Schedule II and a Schedule IV controlled substance; however, the two possession charges were dismissed pursuant to the plea arrangement.

> authority provided by N.C. Gen. Stat. § 15A-1444(e), [d]efendant's petition for writ of certiorari to review her motion to dismiss, prior to entry of her guilty plea, does not assert any of the procedural grounds set forth in Rule 21 to issue the writ. Although the statute provides jurisdiction, this Court is without a procedural process under either Rule 1 or 21 to issue the discretionary writ under these facts, other than by invoking Rule 2.

Id. at ___, 794 S.E.2d at 555. The court further declined to invoke Rule 2 to suspend the requirements of the rules to issue the writ of certiorari. *Id.* at ___, 794 S.E.2d at 555.

The North Carolina Constitution states that "[t]he Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe." N.C. Const. art. IV, § 12(2). The General Assembly has exercised this constitutional authority by giving the Court of Appeals "jurisdiction . . . to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice." N.C.G.S. § 7A-32(c) (2017). "This statute empowers the Court of Appeals to review trial court rulings . . . by writ of certiorari unless some other statute restricts the jurisdiction that subsection 7A-32(c) grants." *Thomsen*, 369 N.C. at 25, 789 S.E.2d at 641 (citing *Stubbs*, 368 N.C. at 42-43, 770 S.E.2d at 76). Therefore, "[s]ubsection 7A-32(c) . . . creates a default rule that the Court of Appeals has jurisdiction to review a lower court judgment by writ of certiorari. The default rule will control unless a more specific statute restricts jurisdiction in the particular class of cases at issue." *Id.* at 25, 789 S.E.2d at 642.

In *State v. Stubbs* we addressed whether the Court of Appeals has jurisdiction to review a trial court's grant of a defendant's motion for appropriate relief by writ of certiorari. *See* 368 N.C. at 41, 770 S.E.2d at 75. We noted that a separate statute, N.C.G.S. § 15A-1422(c), specifically addresses review of trial court rulings on motions for appropriate relief under section 15A-1415. *Id.* at 42-43, 770 S.E.2d at 76. In *Stubbs* "we were not concerned with whether subsection 15A-1422(c) provided an independent source of jurisdiction for the Court of Appeals to issue the writ. Rather, we focused on the *absence* of language in subsection 15A-1422(c) that would *limit* the court's review." *Thomsen*, 369 N.C. at 25, 789 S.E.2d at 642 (citing *Stubbs*, 368 N.C. at 43, 770 S.E.2d at 76) (citations omitted). Finding no limiting language, we held that the Court of Appeals had jurisdiction to issue the writ. *Id.* at 25, 789 S.E.2d at 642 (citing *Stubbs*, 368 N.C. at 43, 770 S.E.2d at 76).

In *State v. Thomsen* the sole difference from *Stubbs* was that the trial court granted appropriate relief on its own motion pursuant to N.C.G.S. § 15A-1420(d), rather than on defendant's motion pursuant to N.C.G.S. § 15A-1415. *Compare Thomsen*, 369 N.C. at 25, 789 S.E.2d at 642, *with Stubbs*, 368 N.C. at 41, 770 S.E.2d at 75. N.C.G.S. § 15A-1422(c) does not mention review of relief granted "pursuant to" subsection 15A-1420(d); therefore, the parties disagreed on whether the *sua sponte* grant of relief was "pursuant to" subsection 15A-1415(b) or subsection 15A-1420(d). *See Thomsen*, 369 N.C. at 26, 789 S.E.2d at 642. We held that the answer to this question did not matter, and that the Court of Appeals had jurisdiction in either event "because nothing in the Criminal Procedure Act, or any other statute that defendant has referenced, revokes the jurisdiction in this specific context that subsection 7A-32(c) confers more generally." *Id.* at 26, 789 S.E.2d at 642. Therefore, the Court of Appeals maintains broad jurisdiction to issue writs of certiorari unless a more specific statute revokes or limits that jurisdiction.

Although *Stubbs* and *Thomsen* concerned reviews of motions for appropriate relief, the same statutory analysis applies in this case. With respect to guilty pleas, subsection 15A-1444(e) states that

> [e]xcept as provided in subsections (a1) and (a2) of this section and [N.C.]G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari.

N.C.G.S. § 15A-1444(e) (2017). Here, given that none of the other listed exceptions apply, defendant's only method for appeal was by petition for writ of certiorari. *See id.* Subsection 15A-1444(e) specifically addresses review of a defendant's guilty plea through issuance of a writ of certiorari and contains no language limiting the Court of Appeals' jurisdiction or discretionary authority. Therefore, the Court of Appeals correctly acknowledged that it had jurisdiction to issue the writ; however, the court mistakenly concluded that the absence of a specific "procedural process" in the Rules of Appellate Procedure left the court without authority to invoke that jurisdiction.[2]

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2. We note that a separate, unanimous panel of the Court of Appeals correctly followed *Stubbs* to exercise its discretion to grant a defendant's petition for writ of certiorari in essentially identical procedural circumstances. *See State v. Jones*, ___ N.C. App. ___,

The Court of Appeals held that because defendant's petition for writ of certiorari to review her motion to dismiss did not assert any of the procedural grounds set forth in Rule 21, the court was "without a procedural process" to issue the writ other than by invoking Rule 2. *See Ledbetter*, ___ N.C. App. at ___, 794 S.E.2d at 555. Rule 21 states, in relevant part, that

> [t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

N.C. R. App. P. 21(a)(1). Regardless of whether Rule 21 contemplates review of defendant's motion to dismiss, this Court made it clear in both *Stubbs* and *Thomsen* that "if a valid statute gives the Court of Appeals jurisdiction to issue a writ of certiorari, Rule 21 cannot take it away." *Thomsen*, 369 N.C. at 27, 789 S.E.2d at 643 (citing *Stubbs*, 368 N.C. at 43-44, 770 S.E.2d at 76); *see also* N.C. R. App. P. 1(c) ("These rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law.").

By concluding it is procedurally barred from exercising its discretionary authority to assert jurisdiction in this appeal, the Court of Appeals has, as a practical matter, set its own limitations on its jurisdiction to issue writs of certiorari. "The practice and procedure [of issuing the prerogative writs] shall be as provided by statute or rule of the Supreme Court, or, *in the absence of statute or rule*, according to the practice and procedure of the common law." N.C.G.S. § 7A-32(c) (emphasis added). Therefore, in the absence of a procedural rule explicitly allowing review, such as here, the Court of Appeals should turn to the common law to aid in exercising its discretion rather than automatically denying the petition for writ of certiorari or requiring that the heightened standard set out in Rule 2 be satisfied.[3]

___, ___, 802 S.E.2d 518, 520-23, 526 (2017) (holding that the Court of Appeals had jurisdiction and discretionary authority to grant the defendant's petition for writ of certiorari to review a judgment entered upon his plea of guilty, even though Rule 21 did not include the particular circumstance among its enumerated bases for issuance of the writ).

3. *See, e.g.*, *Surratt v. State*, 276 N.C. 725, 726, 174 S.E.2d 524, 525 (1970) (per curiam) (stating that a particular judgment was "reviewable only by way of *certiorari* if the court

Accordingly, the Court of Appeals had both the jurisdiction and the discretionary authority to issue defendant's writ of certiorari. Absent specific statutory language limiting the Court of Appeals' jurisdiction, the court maintains its jurisdiction and discretionary authority to issue the prerogative writs, including certiorari. Rule 21 does not prevent the Court of Appeals from issuing writs of certiorari or have any bearing upon the decision as to whether a writ of certiorari should be issued. Therefore, the Court of Appeals should exercise its discretion to determine whether it should grant or deny defendant's petition for writ of certiorari. The decision of the Court of Appeals is reversed, and this case is remanded to that court for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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in its discretion chooses to grant such writ" (second italics added) (first citing *State v. Lewis*, 274 N.C. 438, 164 S.E.2d 177 (1968); then citing *In re Croom*, 175 N.C. 455, 95 S.E. 903 (1918); and then citing 4 Strong's North Carolina Index 2d: *Habeas Corpus* § 4, at 149-50 (1968))); *State v. Walker*, 245 N.C. 658, 659, 97 S.E.2d 219, 220 (1957) (stating that a writ of certiorari "may be allowed by the Court *in its discretion*, on sufficient showing made, but such writ is not one to which the moving party is entitled as a matter of right" (emphasis added)), cert. denied, 356 U.S. 946 (1958); *Womble v. Moncure Mill & Gin Co.*, 194 N.C. 577, 579, 140 S.E. 230, 231 (1927) ("Certiorari is a *discretionary* writ, to be issued only for good or sufficient cause shown . . . ." (second italics added) (first citing *Waller v. Dudley*, 193 N.C. 354, 137 S.E. 149 (1927); then citing *People's Bank & Tr. v. Parks*, 191 N.C. 263, 131 S.E. 637 (1926); then citing *Finch v. Comm'rs of Nash Cty.*, 190 N.C. 154, 129 S.E. 195 (1925); and then citing *State v. Farmer*, 188 N.C. 243, 124 S.E. 562 (1924))); *Luther v. Seawell*, 191 N.C. App 139, 142, 662 S.E.2d 1, 3 (2008) (stating that the Court of Appeals has "the authority . . . to 'treat the purported appeal as a petition for writ of certiorari' and grant it *in* [*its*] *discretion*" (emphasis added) (quoting *State v. SanMiguel*, 74 N.C. App. 276, 277-78, 328 S.E.2d 326, 328 (1985); and then citing *Guthrie v. Conroy*, 152 N.C. App. 15, 19, 567 S.E.2d 403, 407 (2002))).

STATE v. McNEILL

[371 N.C. 198 (2018)]

STATE OF NORTH CAROLINA
v.
MARIO ANDRETTE McNEILL

No. 446A13

Filed 8 June 2018

1. Appeal and Error—ineffective assistance of counsel—sufficient evidence received at trial—merits addressed on appeal

The merits of an ineffective assistance of counsel claim were heard on appeal (as opposed to through a motion for appropriate relief) where defendant first raised his claim in a motion before trial and again in a hearing on the State's motion in limine. The trial court was able to receive evidence and make findings, and the cold record revealed that no further investigation was required.

2. Constitutional Law—ineffective assistance of counsel—revealing location of missing victim's body

A defendant who was eventually tried for the kidnapping, rape, and murder of a five-year-old girl received effective assistance of counsel where his attorneys disclosed the location of the victim's body. His attorneys had been involved in the case for one day, there was uncertainty over whether the victim was still alive, the weather was cold and rainy, there was a massive law enforcement search in the area, and the attorneys were concerned that the value of the information would diminish if the girl died or was found without defendant's information. There was other heavily incriminating evidence, and attorneys' goal was to avoid the death penalty through a plea bargain or the mitigating circumstances of remorse and cooperation. A plea bargain was not secured before the information was released, but defendant subsequently twice declined plea bargain offers to remove the death penalty.

3. Constitutional Law—ineffective assistance of counsel—investigation of case

A defendant received effective assistance of counsel where he was charged with kidnapping, rape, and murder and alleged that his attorneys did not conduct an adequate investigation before disclosing the location of the victim's body. The investigation was at an early stage, so there was no discovery file to examine, and defendant did not identify anything that the allegedly inadequate investigation failed to uncover which would have had any effect on the reasonableness of the strategic decision to make the disclosure.

4. Constitutional Law—ineffective assistance of counsel—location of victim's body—understanding with counsel

Defendant was not denied the effective assistance of counsel where he was charged with kidnapping, rape, and murder; his attorneys revealed the location of the victim's body; and defendant asserted on appeal that his attorneys erroneously advised him that they would shield his identity as the source of the information. The entire purpose of the disclosure, to which defendant agreed, was to show cooperation by defendant, and the method of disclosure allowed an immediate inference of cooperation but avoided any inadvertent admission of guilt. Whether defendant's attorneys should have advised him to adopt a different strategy is a separate question which defendant did not raise.

5. Constitutional Law—ineffective assistance of counsel—Cronic claim—location of victim revealed

A defendant charged with the kidnapping, rape, and murder of a 5-year-old child received effective assistance of counsel, despite his claim of a breakdown of the adversarial process under *United States v. Cronic*, 466 U.S. 648 (1984), where his attorneys' disclosure of the location of the victim was a reasonable strategic decision.

6. Evidence—attorney-client privilege—revelation of victim's location

Information about the location of the victim in a prosecution for the kidnapping, rape, and murder of a five-year-old child was not protected by the attorney-client privilege because defendant communicated the information to his attorneys with the purpose that it be relayed to law enforcement. The attorney-client privilege and the ethical duty of confidentiality are not synonymous, although the two principles are related.

7. Evidence—hearsay—admission—location of victim—officer's testimony—information received from defendant's attorneys

Testimony from a police officer that he received information about the location of the victim from defendant's attorneys was not inadmissible hearsay where defendant authorized his attorneys to convey the information to law enforcement. Moreover, the officer was not permitted to testify about any feelings as to the source of the information.

8. Constitutional Law—due process—cumulative effect

There was no due process violation in a prosecution for kidnapping, rape, and murder where defendant contended that such a

violation resulted from the cumulative effect of alleged ineffective assistance of counsel, admission of testimony that defendant's lawyers revealed the location of the victim to police, and the evidence driving from the discovery of the body. Defendant did not receive ineffective assistance of counsel, and the trial court did not err in any evidentiary rulings.

9. Criminal Law—prosecutor's arguments—location of victim's body—disclosure by defense

The trial court did not abuse its discretion when it denied defendant's motions for mistrial in a prosecution for kidnapping, rape, and murder and where the prosecutor made two comments in his closing arguments about the victim's location being revealed by the defense. The statement that the body was found where "defendant's lawyer said he put the body" was improper because the statement was couched as a statement of fact, which was not accurate, rather than as an inference. The statement that defendant's "attorney telling law enforcement where to look for the body puts him there" was not improper and was a permissible inference. However, the improper statement was not such a serious impropriety as to make it impossible to attain a fair and impartial verdict. The judge gave curative instructions, and the evidence against defendant was overwhelming.

10. Sexual Offenses—anal penetration—evidence sufficient to submit to jury

The evidence, taken in the light most favorable to the State, was sufficient to submit to the jury the issue of defendant's guilt of sexual offense, as well as the aggravating circumstance related to a sexual offense, based upon a theory of anal penetration.

11. Confessions and Incriminating Statements—defendant's statement to police—confession to one of three crimes—stipulation at trial—effect on credibility—harmless error

The trial court did not err in a prosecution for kidnapping, rape, and murder by admitting defendant's statements to police where defendant admitted only to the kidnapping, a fact to which he stipulated at trial. Any prejudice caused by the admission of his statements was limited to the effect on his credibility, and any effect on defendant's credibility would be harmless error due to the overwhelming evidence of his guilt.

12. Criminal Law—Racial Justice Act—failure to raise issues

A defendant in a kidnapping, rape, and murder prosecution could not complain of the trial court's failure to strictly adhere to the Racial Justice Act's pretrial statutory procedures where he himself failed to follow those procedures. There was no prejudice to defendant's ability to raise a claim in a motion for appropriate relief.

13. Sentencing—capital—prosecutor's closing arguments—defendant's decision not to present mitigating evidence or arguments

The prosecutor's remarks in a capital sentencing proceeding were not so grossly improper that the trial court should have intervened *ex mero motu* where the prosecutor commented on defendant's decision not to present mitigating evidence or closing arguments. The thrust of the argument was an admonition to the jury to make its decision based on the facts and the law presented in the case.

14. Sentencing—capital—proportionality—aggravating circumstances supported by record—sentence not result of passion, prejudice, or arbitrary factors—not disproportionate to similar cases

A sentence of death was not disproportionate where defendant kidnapped a five-year-old child from her home and sexually assaulted her before strangling her and discarding her body under a log in a remote area used for field dressing deer carcasses.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge James Floyd Ammons Jr. on 29 May 2013 in Superior Court, Cumberland County, upon a jury verdict finding defendant guilty of first-degree murder. 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).

Joshua H. Stein, Attorney General, by Anne M. Middleton and Derrick C. Mertz, Special Deputy Attorneys General, for the State.

Glenn Gerding, Appellate Defender, and Andrew DeSimone, Benjamin Dowling-Sendor, and Daniel Shatz, Assistant Appellate Defenders, for defendant-appellant.

HUDSON, Justice.

Defendant Mario Andrette McNeill appeals his conviction and sentence of death for the first-degree murder of Shaniya Davis. Defendant was found guilty of first-degree murder based on malice, premeditation, and deliberation, and under the felony murder rule, with the underlying felonies being sex offense of a child and kidnapping. Defendant was also convicted of related charges of sexual offense of a child by an adult offender, taking indecent liberties with a child, first-degree kidnapping, human trafficking, and subjecting the victim to sexual servitude. We find no error in defendant's trial or sentencing, and we further determine that defendant's sentence of death is not disproportionate to his crimes.

Background

The evidence at trial tended to show that in September 2009, Shaniya Davis was five years old and, along with her mother, Antoinette Davis, and her seven-year-old brother, C.D., lived in the trailer of Antoinette's sister, Brenda Davis, located in Sleepy Hollow Trailer Park (Sleepy Hollow) in Fayetteville, North Carolina. Brenda had previously "been seeing" defendant, who also went by the nickname "Mano,"[1] and he had given her the deposit to move into the Sleepy Hollow trailer. Because defendant spent time at the trailer, he knew Antoinette and had been in the presence of Shaniya and C.D. before, and he also knew how to get into the trailer, even when the door was locked. At the time of the events at issue, Brenda was "seeing" Jeroy Smith, the father of her children. Brenda, Jeroy, and their children stayed in the back bedroom, while Antoinette and her children stayed in the front room of the trailer. Defendant lived with April Autry, the mother of his eighteen-month-old daughter, on Washington Drive in Fayetteville.

On the evening of 9 November and continuing into the early morning hours of 10 November 2009, after ingesting cocaine and "a couple shots of liquor," defendant began "text[ing] all the females in [his] phone." He tried to text Brenda, but her phone was turned off. Another woman, Taisa McClain, who also lived in Sleepy Hollow, began exchanging text messages with defendant and agreed to invite him over; however, by the time defendant arrived at Sleepy Hollow at 2:52 a.m. on 10 November, Taisa had fallen asleep and did not answer defendant's texts. At 3:06 a.m., defendant texted "Goodnight" to Taisa and then at 3:07 a.m., defendant again attempted to text Brenda.

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1. Because defendant is referred to as "Mano" in the transcript, we use that spelling here; however, in a police interview, he explained that he was known as "Mono," which people confused with the "kissing disease."

At around 5:30 a.m., Brenda woke up because she thought she heard the bedroom door open, and she mentioned this to Jeroy. Brenda and Jeroy went back to sleep but were reawakened at around 6:00 a.m. by Antoinette, who came into the room and asked if they had seen Shaniya. When they responded in the negative, Antoinette told them she was going outside to search for Shaniya. While Antoinette was outside, C.D. told Brenda and Jeroy that defendant had been there the previous night. Jeroy asked C.D. if he was sure about this, and C.D. responded, "yeah." Brenda texted and called defendant, but he did not answer his telephone. Jeroy then called April Autry, who told him that defendant was not with her.

Antoinette returned to the trailer and reported that she had knocked on doors in Sleepy Hollow but that no one had seen Shaniya. Brenda told Antoinette to call the police, but Antoinette was hesitant to do so. Brenda and Jeroy went outside and noticed that the stairs and railings of the trailer contained feces that had not been there the night before. There was also what appeared to be illegible yellow writing scribbled within the feces on a railing.

Shortly after 6:00 a.m. that same morning, defendant arrived at the Comfort Inn & Suites (Comfort Suites) in Sanford where he entered the hotel alone, provided identification, and checked into Room 201 under his own name. There was video footage of the transaction because cameras operated continually throughout the hotel.[2] Defendant told the front desk clerk, Jacqueline Lee, that he was traveling with his daughter to take her to her mother in Virginia. Video footage from hotel security cameras showed that after checking in, defendant returned to his vehicle in the back of the parking lot at approximately 6:17 a.m., where he remained for several minutes, before coming back into the hotel carrying a child covered up with a blue blanket. Lee observed defendant carrying the child on the video feed and noticed the texture of her hair, which Lee recalled when she saw an Amber Alert that was issued for Shaniya. Additionally, Seth Chambers, who was staying at the hotel during a business trip, passed defendant in the hallway near Room 201 at 6:24 a.m. and observed defendant carrying a child.

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2. The general manager of the hotel, Angela Thompson, testified at trial and explained that because the cameras are manually programmed, the time varies slightly between separate cameras, but by no more than a minute apart. Additionally, Thompson testified that on 10 November she had not yet changed the time on the recorders to reflect the recent daylight savings time change on 1 November 2009; as a result, the time stamps on the video recordings were one hour ahead of the actual time. For clarity, we refer simply to the actual time.

At the hotel's morning shift change, Regina Bacani replaced Lee at the front desk. During the shift change, defendant came to the breakfast area alone, got a banana, some juice, and a muffin, and took them back to his room. Lee pointed defendant out to Bacani and told her about the recent check-in. Hotel cameras showed defendant walking toward the breakfast area at 6:36 a.m. and returning down the hall and into his room with food and drink in his hands.

Back at Sleepy Hollow, Antoinette called the police at 6:52 a.m. at the urging of Brenda. About ten minutes after Antoinette's telephone call, the police arrived, began searching for Shaniya with canines, and started interviewing people. Fayetteville Police Officer Elizabeth Culver observed a substance that was later determined to be feces on both railings of the front porch. The substance was smooth, like something had been poured on it. Antoinette Davis had a cooking pot in her hand when Officer Culver arrived, and someone said Antoinette had poured water on the railings, so Officer Culver asked her not to do that. In the trash can of unit 1119, police found a blanket that Antoinette Davis identified as hers and which Jeroy Smith recognized as having been in the living room of the trailer recently. The blanket was a thick child's comforter-type blanket, and it had feces on it. Jennifer Slish, a forensic technician for the Fayetteville Police Department at that time, took the blanket into evidence to be processed for fluids, fibers, and hairs.

Officer Culver spoke with Antoinette, Brenda, Jeroy, and C.D. at the scene. C.D. seemed very distracted and would look at his aunt before responding. C.D. said he remembered Shaniya coming to bed but did not remember her leaving the bedroom. At trial, C.D. ultimately testified that he had seen defendant at the trailer that morning. Because Antoinette and Brenda were consistently looking at their phones and texting, Officer Culver had difficulty getting them to focus on the questions being asked, so her Lieutenant agreed to take them downtown to be interviewed. Officer Culver and her partner, Daniel Suggs, went to the main office of the trailer park to view the security video so as to look for a child roaming around the trailer park or for vehicles coming into the area.

At approximately 7:34 a.m., the video cameras at the Comfort Suites showed defendant leaving Room 201 and going to the elevator with a child later identified as Shaniya. At 7:35 a.m., the video shows defendant exiting the side door of the hotel and walking down the sidewalk still carrying Shaniya. Matthew Argyle, the hotel's maintenance worker at the time, appeared on the video one minute later. Argyle later testified that he was outside the side door picking up cigarette butts and trash

when he saw defendant come out with a five- or six-year-old female child on his shoulder. Defendant had her covered, and Argyle thought she was asleep. When Argyle said hello, defendant made eye contact with him before looking away without saying anything in response and continuing walking toward the parking lot. Argyle "noticed something was amiss," and he thus tried to observe defendant without making it obvious that he was doing so. Defendant put the child in the right rear passenger side of his car, got into the driver's seat, and began smoking a cigarette or cigar. Argyle continued to watch defendant while acting like he was doing busy work, because he just felt something was amiss. Defendant then drove to the pavilion at the front entrance of the hotel, extinguished his smoking material, and entered the hotel.

Defendant approached the front desk and asked Bacani for his security deposit, stating that he had to get back on the road to drive his daughter to Virginia to meet her mother. Security cameras show Bacani giving defendant the cash receipt to sign and returning the deposit. The housekeeper who later cleaned Room 201 brought Bacani one or two small, clear, open plastic packets with white residue that she had found in the room, which Bacani believed to be cocaine.

Meanwhile, Argyle watched defendant leave the hotel entrance, get back in his car, drive away, and turn left onto the main road. Argyle did not act on his feeling that something was wrong until the following day when hotel staff saw an Amber Alert and called law enforcement. The hotel security cameras show defendant leaving the hotel's front entrance and getting into his car at 7:40 a.m., after which the car turned left towards Highway 87.

Telephone records indicate that at approximately 7:49 a.m., defendant sent a text saying "Hey" to Brenda Davis, who was at the police station at this time and had texted "Hey" to defendant at 6:53 a.m. after learning from C.D. that defendant had been in the trailer the previous night. At approximately 8:22 a.m., cell phone tower pings showed defendant's phone to be near the intersection of Highway 87, Highway 24, and Highway 27 in an area known as the Johnsonville and Barbeque area of Highway 87. At approximately 8:33 a.m., Brenda sent a text message to defendant stating, "U been 2 my house." At 8:35 a.m., defendant responded to Brenda, "No [wh]y." Brenda sent a return message at 8:37 a.m. stating, "U lyin," to which defendant responded, "No can i come though." At 8:39 a.m., Brenda responded, "Hell no." At 8:40 a.m., defendant sent a message to Brenda stating, "Dam its [sic] like that." At 8:41 a.m., defendant sent a message to Brenda adding, "Him there." At 8:47 a.m., Brenda sent a message to defendant telling him, "Dont text

me no mo [sic].” At 8:50 a.m., defendant sent a message to Brenda saying, “Sure what ever.” At 9:19 a.m., defendant sent a message to Brenda inquiring, “[Wh]y [your] baby dad call my baby ma askin 4 me.” At 9:48 a.m., defendant sent a final message to Brenda asking, “What da hell is going on.” Brenda testified that she did not tell law enforcement she was text messaging defendant during the same time she was at the station because she “didn’t want to assume” anything at that point. For the same reason, she did not immediately tell police what C.D. had said about seeing defendant in the trailer.

Bacani finished working at the Comfort Suites at 3:00 p.m. and reported back for the 7:00 a.m. shift change the next day, 11 November 2009. Bacani and Lee then noticed an Amber Alert on the hotel’s computer screen. Lee thought the picture shown on the screen was that of the same child she had observed with defendant the previous morning, and accordingly, she called the Amber Alert hot line. Slish, the forensic technician, responded to the call and processed Room 201 for evidence. The hotel manager advised Slish that the bedding had not been changed but that the trash had been taken out and a towel had been removed before staff became aware of the situation. Two comforters from the beds in Room 201 were among the evidence Slish collected.

Charles Kimble, who was at that time a Captain in the Fayetteville Police Department and in charge of its investigation bureau, was responsible for the logistics of trying to find Shaniya. Based on the video from the hotel, police believed that defendant had been with Shaniya and that she was still alive. After obtaining defendant’s cell phone number from his mother, police gave the number to FBI Special Agent Frank Brostrom, who began an analysis of defendant’s phone.

Brostrom testified that the National Center for Missing and Exploited Children had already notified the FBI about the case. According to Brostrom, when the FBI receives a notification of a missing child, agents immediately contact local law enforcement to offer assistance. Brostrom contacted Sergeant Chris Courseon of the Fayetteville Police Department, who quickly invited Brostrom to come and help with the search for Shaniya. Brostrom arrived at Sleepy Hollow on the afternoon of 10 November.

In exigent circumstances, including situations when young children are missing, the FBI can make a showing of imminent danger of serious bodily injury or death and thereby obtain from communications carriers information such as telephone data, “GPS, toll records,” and cell tower records. Brostrom had already telefaxed exigent circumstance requests

to telephone companies to obtain information on phone numbers belonging to Brenda Davis, Antoinette Davis, and an associate of theirs, and on 12 November, Brostrom made a request for information regarding defendant's phone number. Brostrom quickly obtained information associated with defendant's cell phone including call details, cell phone tower locations, and text messaging, with longitudes and latitudes for the cell towers for which the phone number would have pinged.

Defendant's cell phone data were analyzed by Special Agent Michael Sutton of the FBI's Cellular Analysis Survey Team (CAST). CAST assesses cellular telephone records and applies the cell tower and sectors utilized by a particular phone to map its location. When Sutton received the electronic information from defendant's cell phone, he performed an initial analysis, created some rough draft maps, and provided Brostrom an initial search area in the Highway 87 area along Highway 27. Following the FBI's recommendation, police began searching for Shaniya in the area around Highway 87 from Spring Lake toward Sanford. Having received offers of assistance from volunteers and different law enforcement agencies, investigators mobilized a huge search and rescue effort.

After the hotel video showing defendant with a child believed to be Shaniya came to light, Brenda Davis and Jeroy Smith told police that C.D. had seen defendant at the trailer the night Shaniya disappeared. Brenda had also seen defendant try to talk to Antoinette at their aunt's house, to which Antoinette responded, "I don't have shit to say to you. I just want to know where my mother fucking baby's at." Defendant said, "All right," and jumped in his car and sped away. Brenda began to think Antoinette was lying about what she knew, and Brenda and Antoinette argued and did not speak after this. In the evening hours of 12 November, Brenda talked to detectives again, told them about the text messages with defendant, and ultimately gave them her phone to take photos of these texts.

That same day, police found defendant, and he agreed to come to the station to speak with them. Police also located defendant's Mitsubishi Gallant, which was backed into a space at the Mount Sinai apartments, away from his residence on Washington Drive. Police did an exigent circumstances search of the vehicle's trunk and then had the car towed to the police department. The car was processed for forensic evidence, which included taking soil samples from the wheel wells and taking the brake and gas pedal covers for substance analysis.

Beginning at around 9:30 p.m. on the evening of 12 November, several law enforcement officers interviewed defendant in an effort to find

Shaniya. Although Shaniya had now been missing for two days, officers were still hopeful of finding her alive. The officers did not handcuff defendant or place him under arrest, and they specifically informed him that the door to the interview room was unlocked and that he was free to leave the room. Defendant also had his cell phone, on which he continued to receive messages and which he used during breaks in the interview. Defendant admitted he was at Sleepy Hollow just after midnight on 10 November driving around in the black Mitsubishi, but at first he denied going to Brenda Davis's trailer, denied seeing Shaniya or even knowing her, denied having her in the vehicle, and denied leaving the city limits or being in Sanford at a hotel. When police showed defendant a photograph of himself at the hotel, defendant initially denied it was he. When confronted with the information that the same person signed in to the hotel as Mario McNeill showing defendant's identification and listing defendant's home address, defendant suggested that maybe he had lost his identification. Defendant then admitted he had been at the hotel with Shaniya.

About fifty-four minutes into the interview, defendant began telling a story about receiving a text message, which he said he thought came from Brenda Davis's phone, telling him to come to Sleepy Hollow and pick Shaniya up on the porch. Defendant said he got Shaniya and took her to the hotel room, where he ingested cocaine. According to defendant, while he was at the hotel, he got a call or text message from some unknown people to bring Shaniya to a dry cleaning establishment at the corner of Country Club Drive and Ramsey Street. Defendant stated that he delivered Shaniya to these unnamed people and that they were driving a gray Nissan Maxima.

Agent Brostrom testified that the focus of the interview changed when defendant suddenly stated he was waiting to get a call "to come to kill her." The interviewing officers tried to get defendant to expand on this statement, but he would not. The messages on defendant's phone exchanges with Brenda did not pertain to picking up someone waiting on the porch, as defendant claimed during the interview. There were no calls or text messages to defendant's phone from unknown persons, as claimed by defendant; the only messages during this time period were between defendant's and Brenda's phones. At the end of the interview, defendant was arrested for kidnapping Shaniya.

When police later viewed the videotape of the interview, they saw that when they left defendant alone in the interview room during a break, defendant made the sign of the cross, took out a key, got down on the floor, put the key in a wall electrical socket, and appeared to receive

a jolt. Defendant then took off his shoes and put the key in the electrical socket again.

Shaniya had been reported missing on 10 November, and a massive search was continuing along Highway 87 but had not yet located Shaniya. Kimble, the head investigator for the Fayetteville Police Department, later testified in a pretrial hearing that on the morning of 13 November, he met with then-District Attorney Ed Grannis about several cases, including this one. The District Attorney pulled Kimble aside and told Kimble that Allen Rogers, a Fayetteville defense attorney, might have some information that could help them in the case and that Rogers would be calling him. Kimble did not know how Grannis knew Rogers might be able to assist. Rogers had accompanied defendant at his first appearance on Friday morning following his arrest on kidnapping charges, and it was Kimble's understanding that Rogers was defendant's attorney in this matter.

The following day, Kimble received a telephone call from attorney Coy Brewer. Brewer said the information Kimble needed was to look for green porta-potties on Highway 87. Based on the information he received earlier that Allen Rogers would be calling, Kimble assumed after receiving the call from Coy Brewer, that Brewer and Rogers were working together on the case.

Police did look for green porta-potties along Highway 87 and saw numerous porta-potties along the road. Kimble told District Attorney Grannis that the information he had received from Brewer was vague, and Grannis suggested he talk to Rogers. On Sunday, 15 November, Kimble called Allen Rogers and told him that the information he had received from Brewer about looking for green porta-potties along Highway 87 was somewhat vague. Rogers said he was traveling and would talk to his client when he returned to town. Rogers later followed up with Kimble and said police needed "to look for green porta-potties in an area where they kill deer" on Highway 87 between Spring Lake and Sanford. According to Kimble, Rogers stated in a subsequent phone call, "let me talk to my guy" and later called back to say they need to look in an area where hunters field dress deer after they kill them. Kimble called Rogers once more to see if there were additional details, and Rogers said "that's all my guy remembers."[3]

3. Rogers later testified in a pre-trial hearing that he did not recall using the phrase "my guy."

Searchers did not locate Shaniya that day, and the search resumed the following morning, 16 November 2009. A Sanford company training canine officers from the Virgin Islands volunteered to assist in the search. Around 1:00 p.m. that day, one of the officers from the Virgin Islands and his training dog found Shaniya's body lying partially under a log in an area with deer carcasses near the intersection of Highway 87 and Walker Road. Police collected forensic evidence at the scene. On 19 November 2009, defendant was charged with first-degree murder and first-degree rape of the victim. On 5 July 2011, a Cumberland County Grand Jury indicted defendant for first-degree murder, rape of a child by an adult offender, sexual offense of a child by an adult offender, felony child abuse inflicting serious bodily injury, felony child abuse by prostitution, first-degree kidnapping, human trafficking (minor victim), sexual servitude (minor victim), and taking indecent liberties with a child.[4]

Defendant filed various pre-trial motions, several of which are relevant to his contentions on appeal. Before the indictments, on 9 June 2011, defendant filed a Motion To Prohibit The State from Seeking the Death Penalty Pursuant to the North Carolina Racial Justice Act, and on 5 June 2012, defendant filed a supplement to the motion. A Rule 24 conference was held on 5 October 2011, during which the State gave notice of its intent to seek the death penalty. Defendant did not raise his claim under the Racial Justice Act at the Rule 24 conference. The trial court conducted a hearing on numerous pre-trial motions on 11 January 2013, at which time the trial court denied defendant's motions under the Racial Justice Act.

On 9 January 2013, defendant filed a motion to suppress all statements he made to law enforcement officers during his interview on 12 November 2009. The motion was heard on 2 April 2013, and on 4 April 2013, the trial court signed an order denying the motion in part and granting it in part, in which the court suppressed defendant's statements made during a one-minute period near the end of the interview, when Brostrom "answered the Defendant's question by telling the Defendant that he had been free to leave until he had confessed to kidnapping" but had not yet advised defendant of his *Miranda* rights.

The next day, 5 April, defendant filed a document captioned in part a Motion to Require Specific Performance or, Alternatively, to Suppress

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4. On 25 July 2011, the grand jury returned superseding indictments for all the charges. On 11 February 2013, the grand jury again returned superseding indictments for first-degree kidnapping, human trafficking (minor victim), and sexual servitude (minor victim).

Statements and Evidence.[5] The motion alleged that, in exchange for information regarding the location of Shaniya's body as conveyed through defendant's initial attorneys, Allen Rogers and Coy Brewer, the State had agreed not to seek the death penalty. Defendant sought "specific performance" of the purported agreement, suggesting that the trial court should declare the case noncapital or, in the alternative, suppress the evidence that defendant's attorneys had disclosed the location of Shaniya's body as well as all evidence obtained from discovery of the body because defendant had received ineffective assistance of counsel. At the hearing on the motion on 8 April 2013, defendant presented documentary evidence, but offered no testimony. The trial court orally denied defendant's motion at the hearing and entered its written order on 17 April 2013. The trial court found that no agreements existed between the State of North Carolina and defendant in exchange for his information regarding the location of Shaniya and that his attorneys were authorized by him to provide the information to law enforcement. Further, the trial court ruled that the disclosure did not occur at a " 'critical stage' of the proceeding," but that even if such had been the case, defendant did not receive ineffective assistance of counsel.

Additionally, when the trial court became aware at the 8 April hearing that the State was offering defendant a plea of guilty to first-degree murder with a sentence of life imprisonment without parole in lieu of a possible death sentence, the trial court inquired of defendant's counsel if defendant and they were aware of the offer and whether they needed additional time to consider it. Defendant's counsel informed the trial court that defendant had elected to proceed to trial. The trial court required the State to hold the offer open for at least one more day to give defendant and his counsel more time to consider the offer. On 9 April 2013, defendant, through his counsel, rejected the State's offer of life imprisonment and elected to proceed to trial.

Also on 5 April 2013, the State filed a motion *in limine* asking the court to determine the admissibility, under Rule of Evidence 801(d), of statements made by defendant through his counsel to law enforcement concerning the location of the body of Shaniya Davis. When this motion came on for hearing on 26 and 29 April 2013, defendant made oral motions arguing, *inter alia*, that evidence regarding the disclosure of

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5. The full title of defendant's motion was "MOTION TO REQUIRE SPECIFIC PERFORMANCE BY THE STATE OF ITS PROMISE TO DEFENDANT; OR, IN THE ALTERNATIVE, MOTION TO SUPPRESS STATEMENTS OF DEFENDANT THAT LED TO DISCOVERY OF BODY, ALONG WITH SUPPRESSION OF ANY AND ALL EVIDENCE DERIVED FROM THE DISCOVERY OF THE BODY."

Shaniya's location was inadmissible on grounds of: (1) ineffective assistance of counsel; (2) attorney-client privilege, the Sixth Amendment to the United State Constitution, and Article I, Section 23 of the North Carolina Constitution; (3) N.C.G.S. § 8C-1, Rule 801(d); and (4) the Due Process and Law of the Land Clauses of the Federal and North Carolina constitutions. The trial court heard testimony from Kimble, Rogers, and Brewer;[6] defendant again did not testify at this hearing. The trial court entered a written order, which included findings and conclusions and also adopted and incorporated by reference the findings and conclusions set forth in its 17 April 2013 order, concluding that defendant's right to effective assistance of counsel had not been violated and that the attorneys' statements to law enforcement regarding Shaniya's location were admissible through Captain Kimble as an exception to the hearsay rule under N.C.G.S. § 8C-1, Rule 801(d) ("Exception for Admissions by a Party-Opponent").

Defendant was tried before Judge James Floyd Ammons Jr. at the 8 April 2013 criminal session of the Superior Court in Cumberland County. Before trial, the State dismissed the two charges of felony child abuse. At trial, defendant stipulated to four items: (1) that he was at Sleepy Hollow; (2) that he left the trailer park with Shaniya Davis; (3) that he was at the Comfort Suites with Shaniya Davis; and (4) that he left the Comfort Suites with Shaniya Davis. In addition to the evidence previously discussed, the State presented considerable forensic evidence at trial.

Thomas Clark, M.D., Deputy Chief Medical Examiner for the State of North Carolina until his retirement in 2010, conducted the autopsy on Shaniya Davis on 17 November 2009 and testified at trial as an expert in the field of forensic pathology. The autopsy identified a small bruise on the left side of Shaniya's face, injuries to her vaginal area, and two abrasions on her upper thighs. Dr. Clark testified that abrasions are a scraping type of injury in which part or all of the outer layer of skin is removed by a blunt object, and that two linear or line-like abrasions at

6. Brewer asserted the attorney-client privilege as to all questions asked, including whether he represented defendant. After Brewer's testimony the trial court noted that for the privilege to exist, the relationship of attorney and client had to be shown, and defendant had not even established this fact. Defendant then called attorney Allen Rogers, who in similar vein asserted the attorney-client privilege as to each question asked. The trial court noted that Rogers's client was present; the State noted that defendant was asserting ineffective assistance of counsel in the alternative and thus had waived the privilege as to this subject. The trial court ruled defendant had waived the privilege as to the things alleged and ordered Rogers to answer the questions.

the upper part of Shaniya's inner thighs matched the band of the underwear Shaniya was wearing. Dr. Clark noted injuries consistent with sexual assault, specifically, the absence of a hymen and the presence of a ring of abrasion or scraping injury surrounding the entrance to the vagina indicating that a blunt object had penetrated the vagina and left the ring of injury. In addition to preparing a sexual assault kit, Dr. Clark collected several hairs that were found during the external examination and preserved the sheet on which Shaniya was initially examined. Shaniya's lungs showed edema, chronic bronchitis, and focal intra-alveolar hemorrhage. Edema is caused by an imbalance of pressure in the body that causes fluid from capillaries to enter the air spaces in the lung. Dr. Clark concluded that the most likely cause of death was external airway obstruction or asphyxiation.

Special Agent Jody West, a supervisor in the forensic biology section of the State Crime Lab, testified as an expert in the field of forensic serology and forensic DNA analysis. Special Agent West examined the evidence in this case, including performing a Kastle-Meyer or phenolphthalein test, which is a test used to indicate whether blood is present on an item. This chemical analysis indicated the presence of blood on the vaginal swabs, rectal swabs, oral swabs, and the crotch area of Shaniya's panties. Samples from the small blanket recovered from the trash can gave the chemical indication for blood, as did the inside bottom rear portion of the shirt Shaniya was wearing. The white sheet from the medical examiner's office also gave a chemical indication for the presence of blood. Examination of the items failed to produce a chemical indication for the presence of semen, spermatazoa, or human saliva.

DNA analysis on samples taken from the rear seat of defendant's car was consistent with multiple contributors; defendant could not be excluded as a contributor, and no conclusion could be rendered regarding the contribution of Shaniya Davis to this mixture. Special Agent West transferred some items to Jennifer Remy of the trace evidence section at the Crime Lab for DNA hair analysis and to Kristin Hughes of the forensic biology section to perform Y-STR analysis—a type of DNA analysis focusing on the Y chromosome. Analysis of hairs collected in the case ultimately revealed a pubic hair having the same mitochondrial DNA as defendant's pubic hair found on the hotel comforter, and another pubic hair with the same mitochondrial DNA as defendant's pubic hair found on the small blanket found in the trash can of the mobile home park. Defendant could not be excluded as the source of these two hairs. Two head hairs found on the small blanket located in the trash can of the mobile home park had the same mitochondrial DNA sequence as

Shaniya Davis's head hair; therefore, Shaniya could not be excluded as the source of those hairs. Three hairs recovered from Shaniya's right hand by the medical examiner were consistent with Shaniya's own head hair and were not sent for further testing. The Y-STR analysis on the vaginal swabs, the rectal swabs, and the oral swabs revealed no male DNA; Special Agent Hughes testified that this result was not unexpected because DNA begins to degrade or break down over time and that beyond a seventy-two hour window, it becomes more and more likely that investigators will not be able to obtain any DNA profile.

Heather Hanna, a geologist with the North Carolina Geological Survey, testified as an expert in forensic geochemistry and forensic geology. Hanna analyzed soil samples, including those from the roadside near where the body was found, from the body recovery site, and from the gas pedal of defendant's Mitsubishi Gallant. In all three samples she found garnet, a mineral grain that was unique to two geologic units upstream from near where the body was discovered and which would not naturally be found in Fayetteville. Hanna concluded that it was "highly unlikely" that the soil from those three samples did not come from the same source.

Hanna also found a tiny metal fiber in the soil sample taken from the shoulder of the road near the body recovery site and another metal fiber in the soil collected from the gas pedal of defendant's car. These samples were analyzed by Roberto Garcia, an expert in materials characterization and identification who is a materials engineer at N.C. State University in the analytical instrumentation facility. Garcia testified that the measurements of the two pieces of metal were consistent with each other and that their thickness and shape suggested they came from a braided metal wire. Further, a chemical analysis using an energy dispersive spectroscopy (an EDS detector) indicated that the two samples also were chemically consistent. Garcia's conclusion was that the metallic fiber from the gas pedal of defendant's car and the metallic fiber from the soil sample from the body recovery site were consistent with each other and consistent with having the same source.

Following Special Agent Sutton's initial analysis of defendant's cell phone activity, which led to his recommendation to law enforcement to search in the Highway 87 area along Highway 27, he later conducted a more extensive analysis of defendant's cell phone. Based on defendant's cell phone records, Sutton testified where defendant's phone had been at certain times on 10 November 2009: at approximately 2:33 a.m., it was in the area of Fayetteville at and around defendant's residence on Washington Drive; at approximately 2:59 a.m., 3:02 a.m., 3:05 a.m., 3:19

a.m., and 3:57 a.m., it was in the area of and around Shaniya's residence at Sleepy Hollow; at approximately 7:00 a.m., 7:32 a.m., and 7:45 a.m., it was in the Sanford area at or near the Comfort Suites; at approximately 8:22 a.m. and 8:25 a.m., it was south of Walker Road near the intersection of Highway 87, Highway 24, and Highway 27, in an area that is between the Johnsonville and Barbecue area on Highway 87 and is the area in which Shaniya's body was eventually discovered; and during a remaining block of calls beginning at approximately 9:38 a.m., the phone was back in the area of defendant's residence.

Defendant did not present any evidence during the guilt-innocence proceeding of the trial.

On 23 May 2013, a jury found defendant guilty of first-degree murder based on malice, premeditation, and deliberation, and under the felony murder rule, with the underlying felonies being sex offense of a child and kidnapping. The jury also found defendant guilty of all other remaining charges, except for rape of a child by an adult offender.

The trial court then held a capital sentencing proceeding, during which the State introduced evidence that defendant had been convicted on 10 January 2003 of three counts of assault inflicting serious bodily injury. Defendant stipulated that this information was correct.

Shaniya's father and half-sister testified as impact witnesses. Shaniya's father, Bradley Lockhart, testified that he had met Shaniya's mother at a party, had been in a brief relationship with her, and had learned that Antoinette was pregnant only shortly before Shaniya's birth on 14 June 2004. For a little less than two years after Shaniya's birth, Shaniya lived with Antoinette and her family. Mr. Lockhart had frequent contact with Shaniya and would pick her up every weekend for visits.

Toward the end of 2006 or the beginning of 2007, Mr. Lockhart bought a fairly large house in Fayetteville, and Shaniya moved in with him and his four other children. Shaniya had frequent contact with her mother during this time. Shaniya was very close with Mr. Lockhart and the other children; she enjoyed dress-up and prancing around the house in her plastic dress-up shoes but was also a little bit of a tomboy and liked to play basketball with her little brother and ride her little scooter. Shaniya considered herself a singer and desired to join the children's choir at the church they attended.

Shaniya moved back to be with her mother in October 2009. Even when he was out of town for work, Mr. Lockhart talked to Shaniya on the telephone four to five times a week. Mr. Lockhart testified that

Shaniya's death was one of the hardest things he had experienced, that it tears him up every day, and that he still finds it hard to sleep even after three-and-a-half years. He said he suffered two collapsed lungs from the stress, finds it hard to stay focused and to function, and questions if he could have done anything different.

Cheyenne Lockhart, Bradley Lockhart's twenty-one-year-old daughter and Shaniya's half-sister, described Shaniya as her little "mini-me" who followed her everywhere. Shaniya was bubbly and loved to talk and play jokes. She was caring and would always tell them she loved them. Shaniya's loss was very painful, and Cheyenne thinks about Shaniya every day.

Defendant did not present additional mitigation evidence or give closing arguments in the sentencing proceeding; he understood that this decision was against the advice of counsel. The trial court determined that there was an absolute impasse between defendant and his attorneys and ordered the attorneys to acquiesce to defendant's wishes.

On 29 May 2013, the jury returned a binding recommendation that defendant be sentenced to death for the first-degree murder. The trial court accordingly sentenced Mr. McNeill to death for first-degree murder, and to consecutive sentences of 336 to 413 months for sexual offense against a child by an adult offender, 116 to 149 months for first-degree kidnapping, 116 to 149 months for human trafficking of a minor victim, 116 to 149 months for sexual servitude of a minor victim, and 21 to 26 months for taking indecent liberties with a child. Defendant immediately filed his appeal of right to this Court.

Analysis

Ineffective Assistance of Counsel

[1] Defendant first argues that he received ineffective assistance of counsel from his original attorneys because they disclosed to law enforcement where to look for Shaniya. Defendant contends that even though he was asserting his innocence, his attorneys, Rogers and Brewer, made this disclosure only one day into their representation, without seeking any benefit or protection in return, without any deal in place, without receiving or consulting any formal discovery from the State, and after giving defendant erroneous advice.

As an initial matter, we have held that ineffective assistance of counsel claims brought on direct review, as opposed to in a motion for appropriate relief, "will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be

developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citations omitted), *cert. denied*, 535 U.S. 1114, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002). Defendants "should necessarily raise those [ineffective assistance of counsel] claims on direct appeal that are apparent from the record" and are "not required to file a separate [motion for appropriate relief] in the appellate court during the pendency of that appeal." *Id.* at 167, 557 S.E.2d at 525. Accordingly, "on direct appeal we must determine if . . . ineffective assistance of counsel claims have been prematurely brought," in which event "we must 'dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent [motion for appropriate relief] proceeding.' " *State v. Campbell*, 359 N.C. 644, 691, 617 S.E.2d 1, 30 (2005) (second alteration in original) (quoting *Fair*, 354 N.C. at 167, 557 S.E.2d at 525), *cert. denied*, 547 U.S. 1073, 126 S. Ct. 1773, 164 L. Ed. 2d 523 (2006).

Here defendant first raised his ineffective assistance of counsel argument before trial in his Motion to Require Specific Performance or, Alternatively, to Suppress Statements and Evidence. Thus, defendant was able to present evidence and arguments during a hearing on that motion, which the trial court took into consideration in its 17 April 2013 order denying defendant's motion and ruling that defendant did not receive ineffective assistance of counsel. Additionally, in its subsequent ruling on the State's motion *in limine* and defendant's oral motions relating to the admissibility of evidence about the disclosure, the trial court considered further arguments and evidence, including the testimony of Captain Kimble, as well as that of defendant's original attorneys, Rogers and Brewer. Defendant reasserted his ineffective assistance of counsel argument at this hearing. In an order entered on 16 May 2013, the trial court again ruled that defendant's attorneys were not ineffective. Because the trial court was able to receive evidence and make findings on this issue before trial, we conclude that "the cold record reveals that no further investigation is required." *Fair*, 354 N.C. at 166, 557 S.E.2d at 524. Accordingly, we may properly address the merits of defendant's ineffective assistance of counsel claim.

[2] "The right to assistance of counsel is guaranteed by the Sixth Amendment to the Federal Constitution and by Article I, Sections 19 and 23 of the Constitution of North Carolina." *State v. Sneed*, 284 N.C. 606, 611, 201 S.E.2d 867, 871 (1974). A defendant's right to assistance of counsel "includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247-48 (1985) (citing *McMann v. Richardson*, 397 U.S. 759, 771 & n.14, 90 S. Ct. 1441, 1449 &

n.14, 25 L. Ed. 2d 763, 773 & n.14 (1970)).[7] A defendant challenging his conviction on the basis of ineffective assistance of counsel must establish that his counsel's conduct "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). In *Strickland* the United States Supreme Court set out a two-part test that a defendant must satisfy in order to meet his burden:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693; *see also Braswell*, 312 N.C. at 562-63, 324 S.E.2d at 248 ("[W]e expressly adopt the test set out in *Strickland v. Washington* as a uniform standard to be applied to measure ineffective assistance of counsel under the North Carolina Constitution.").

With regard to the first *Strickland* prong, "[r]ather than articulating specific guidelines for appropriate attorney conduct, the Court in *Strickland* emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.' " *State v. Todd*, 369 N.C. 707, 711, 799 S.E.2d 834, 837-38 (2017) (second alteration in original) (quoting *Strickland* 466 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694). We have stated that "[c]ounsel is given wide latitude in matters of strategy, and the burden to show that

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7. The State argues, and the trial court found in its 17 April 2013 order, that because the Sixth Amendment is offense specific, and because defendant had at the time of the disclosure only been charged with kidnapping, defendant's Sixth Amendment right to counsel had not attached for purposes of the subsequent first-degree murder charge. Therefore, the State argues that the trial court correctly found that defendant could not have had an ineffective assistance of counsel claim under the Sixth Amendment. Because we conclude that defendant did not receive ineffective assistance of counsel, we need not address whether defendant's Sixth Amendment right to counsel had attached with respect to the first-degree murder charge at the time of the disclosure.

counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001), *cert. denied*, 537 U.S. 846, 123 S. Ct. 184, 154 L. Ed. 2d 73 (2002); *see also Strickland*, 466 U.S. at 690-91, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."). "Moreover, this Court indulges the presumption that trial counsel's representation is within the boundaries of acceptable professional conduct." *Campbell*, 359 N.C. at 690, 617 S.E.2d at 30 (citing *State v. Fisher*, 318 N.C. 512, 532, 350 S.E.2d 334, 346 (1986)). As the Court stated in *Strickland*:

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .

466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694.

With regard to the second *Strickland* prong, "[p]rejudice is established by showing 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Campbell*, 359 N.C. at 690, 617 S.E.2d at 29 (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). "The fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248 (citing *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Campbell*, 359 N.C. at 690, 617 S.E.2d at 29-30 (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). "[B]oth deficient performance and prejudice are required for a successful ineffective assistance of counsel claim." *Todd*, 369 N.C. at 711, 799 S.E.2d at 837.

When the trial court has made findings of fact and conclusions of law to support its ruling on a defendant's claim of ineffective assistance

of counsel, "we review the trial court's order to determine 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.' " *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)).[8] We review conclusions of law de novo. *E.g.*, *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citing *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993), *cert. denied*, 512 U.S. 1254, 114 S. Ct. 2784, 129 L.E.2d 895 (1994), *judgment vacated*, Nos. 83 CRS 15506-07 (Robeson Co.), 91 CRS 40727 (Cumberland Co.), 2014 WL 4345428 (N.C. Super Ct. Robeson County Sept. 2, 2014)).

Defendant's claim stems from the conduct of his original attorneys, Rogers and Brewer. After defendant was charged with kidnapping, he waived court appointed counsel and engaged the services of Rogers, who had previously represented defendant in 2003 and 2008. Rogers is a former JAG attorney who at that time had practiced law for twenty years, and a large part of his practice was criminal defense work. Rogers immediately associated Brewer, with whom he had a working relationship in criminal cases, to assist in the matter. Brewer is a former assistant district attorney and former district court judge. Additionally, Brewer was a superior court judge for the 12th Judicial District from 1977 until 1998, and he was the senior resident superior court judge for the 12th Judicial District from 1991 to 1998. Brewer had returned to practicing law, and since 1999 a large part of his practice was criminal defense. The trial court made findings that Rogers and Brewer were both experienced criminal defense attorneys.

When Rogers and Brewer undertook representation of defendant on 13 November 2009, Shaniya had been missing since the morning of 10 November. A massive search had been underway since the morning of Shaniya's disappearance, and law enforcement officers, having seen a child resembling Shaniya in the hotel videos, hoped to find her still alive. Defendant had admitted to police that he had taken Shaniya from Sleepy Hollow to the Comfort Suites in Sanford, where he had been observed by hotel cameras and multiple witnesses and was the last person to be seen with Shaniya. By 12 November, multiple law enforcement agencies and

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8. While in *Frogge* the trial court's order addressed a claim of ineffective assistance of counsel brought in a postconviction motion for appropriate relief, 359 N.C. at 230, 607 S.E.2d at 628-29, we can find no reason to apply a different standard in reviewing a trial court's ruling on a claim of ineffective assistance of counsel brought before trial and challenged on direct appeal.

volunteers were searching in the area around Highway 87 near Sanford, where defendant's cell phone data had placed him.

Rogers had conversations with Kimble to gauge the status of the investigation, and he was aware of the evidence against defendant and defendant's admission to taking Shaniya from Sleepy Hollow to the Comfort Suites. Rogers testified that he was also aware of defendant's three felony convictions for assault in 2003, which constituted aggravating circumstances that could be used at a capital sentencing proceeding. Accordingly, when Rogers and Brewer met with defendant, "there was conversation about the search and about the consequences of the child not being found," and they began discussing with defendant the possibility that forthcoming charges could result in a capital case. Defendant "was denying that he was involved in hurting [Shaniya] or killing her," and Rogers asked defendant "if he had any information about the location of [Shaniya]." Defendant told Rogers and Brewer he did have information about Shaniya's location, but according to Rogers, "[defendant] didn't tell me where he got the information from." When Rogers was asked at the hearing whether there was a presumption that Shaniya was alive, he stated:

> Again, didn't know -- really didn't know. As I said, [defendant] denied, you know, causing her harm, assaulting her in any way. There certainly was some concerns with the amount of time, but I can't say that we knew.

Rogers testified that it was in this "atmosphere"—with a five-year-old child missing over several cold and rainy days, with law enforcement performing a massive search, and with defendant being the sole suspect and the last person to be seen with Shaniya—that this conversation came about.

According to Rogers, they discussed the death penalty with defendant, and defendant "agreed that it would be in his best interests to offer information that might be helpful to the location." Rogers explained to defendant that providing this information could be helpful because such action could show cooperation and remorse, which could either help achieve a plea agreement for a life sentence or be presented as mitigating circumstances in a sentencing proceeding, and ultimately "could avert the imposition of the -- and execution of the death penalty." Accordingly, defendant agreed with Rogers and Brewer that they would recommend where to search to law enforcement without specifically stating defendant's name or that he was the source of the information. According to Rogers, he was trying to give defendant the best advice he

could to help save defendant's life, and defendant understood the situation at that point and agreed with the strategy.

Accordingly, Brewer spoke with Captain Kimble on 14 November 2009 and instructed him to "look for green porta-potties on Highway 87." Rogers then spoke with Kimble on 14 and 15 November and told him to "look for green porta-potties in an area where they kill deer . . . . on Highway 87 between Spring Lake and Sanford," and also to "look in an area where they -- where they take the deer after they -- after they've been killed." Captain Kimble narrowed the search, and at approximately 1:00 p.m. on 16 November 2009, one of the searchers found Shaniya's body in the woods "near the area where they were field dressing deer."

Defendant first raised his pretrial ineffective assistance of counsel argument in his 5 April 2013 Motion to Require Specific Performance or, Alternatively, to Suppress Statements and Evidence. In its 17 April 2013 order denying defendant's motion, the trial court found as fact:

> 2. The Court provided the Defendant the opportunity to present evidence and arguments during the hearing on his Motion, and the Defendant did so.
>
> 3. The Defendant offered into evidence without objection four (4) exhibits, Defendant's Exhibits A, B, C, and D.[9] The Court carefully examined the Defendant's exhibits.
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> 4. When the Court provided the Defendant an opportunity to present sworn testimony, the Defendant did not do so.
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> . . . .

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9. Exhibit A was an e-mail apparently from Agent Brostrom in which he stated:

> I think we should monitor the possibility, at the appropriate time, to approach the attorneys for the kidnaper/rapist Mario McNeill and for the mother Antoinette Davis, regarding potential cooperation agreements in order to get the whole story. To date, I [sic] the DA has offered to take the Death Penalty off the table in exchange for the body.

The trial court found that "[n]either the District Attorney nor anyone acting on his behalf" made such an offer and that there existed "no agreement of any kind as to what would happen if the Defendant provided law enforcement with information concerning the location" of Shaniya. Defendant does not challenge the trial court's findings regarding the existence of any agreement, but instead directs his arguments towards his attorneys' purported failure to pursue such an agreement.

6. During Mr. Rogers' representation, the Defendant provided specific information to Mr. Rogers as to the location of Shaniya Davis' body, and the Defendant authorized Mr. Rogers to provide that specific information to law enforcement.

7. Pursuant to the Defendant's authorization, Mr. Rogers provided to law enforcement that specific information as to the location of Shaniya Davis' body.

8. The Defendant's information regarding the location of Shaniya Davis' body did not constitute an admission to a crime.

. . . .

13. Under the totality of the circumstances, Mr. Rogers did not ineffectively assist the Defendant in providing information to law enforcement concerning the location of Shaniya Davis' body without an agreement of some kind as to what would happen should the Defendant provide that information.

14. The Defendant's provision of such information to law enforcement through his attorney at that stage in the search for Shaniya Davis was objectively reasonable in that it provided the State a basis for it to consider future plea negotiations with the Defendant should the Defendant be charged with more offenses related to the missing child during which negotiations the death penalty might be eliminated from the range of possible punishments. The provision of such information was also objectively reasonable in that it provided the Defendant the opportunity to obtain the benefit of a mitigating circumstance should charges be brought against the Defendant for which the death penalty was a possible punishment.

. . . .

17. The Defendant was represented by competent counsel who afforded him effective, reasonable, and professional representation.

From these findings, the trial court made the following conclusions, in relevant part:

3. . . . [E]ven if the exchange of information at issue in this matter occurred at a "critical stage" of the proceeding, the Defendant has not shown that his counsel's performance fell below an objective standard of reasonableness.

4. Likewise, even if the exchange of information at issue in this matter occurred at a "critical stage" of the proceeding, the Defendant has not shown that the alleged deficient performance prejudiced the defense in such a way as will deprive the defendant of a fair trial.

5. The Defendant was represented by competent counsel who afforded him effective, reasonable, and professional representation.

6. None of the Defendant's rights under the United States Constitution, North Carolina Constitution, or the North Carolina General Statutes were violated.

Additionally, in its subsequent ruling on the State's motion *in limine* and defendant's oral motions regarding the admissibility of evidence relating to the disclosure, the trial court considered further arguments and evidence, including the testimony of Captain Kimble, as well as that of defendant's original attorneys, Rogers and Brewer. At this hearing, defendant reasserted his ineffective assistance of counsel argument; however, he did not testify at the hearing. In an order entered on 16 May 2013, the trial court made the following relevant findings:

5. During their representation of the Defendant, Mr. Brewer and Mr. Rogers talked to the Defendant while he was in jail about cooperating with the police in looking for Shaniya Davis. They discussed how the Defendant might benefit from cooperating with the police on this issue by avoiding the imposition and execution of the death penalty. During these discussions, the Defendant specifically authorized his attorneys, Brewer and Mr. Rogers, to give information to the police relating to the location of Shaniya Davis. Nothing about their discussions suggests that the Defendant involuntarily provided the information at issue to his attorneys.

. . . .

9. The Defendant authorized his attorneys to communicate information to the police that would aid them in locating Shaniya Davis. The Defendant did not authorize his attorneys to make any admissions on his behalf, and they did not make any admissions on his behalf. Neither Mr. Rogers nor Mr. Brewer told Captain Kimble the specific source of the information as to the directions where to search. As this Court has previously found and concluded in its prior Order relating to the Defendant's Motion for Specific Performance, the State of North Carolina, through the District Attorney's office, never offered any deal, plea concessions, immunity, or any other incentives to the Defendant for this information, and neither Mr. Brewer nor Mr. Rogers ever communicated any deal, plea concessions, or any other incentives from the State to the Defendant.

. . . .

17. Under the totality of the circumstances, the Defendant's attorneys did not ineffectively assist the Defendant in providing information to law enforcement concerning the location of Shaniya Davis' body without an agreement of some kind as to what would happen should the Defendant provide that information.

18. The Defendant's provision of such information to law enforcement through his attorney at that stage in the search for Shaniya Davis was objectively reasonable in that it provided the State a basis for it to consider future plea negotiations with the Defendant should the Defendant be charged with more offenses related to the missing child during which negotiations the death penalty might be eliminated from the range of possible punishments. The provision of such information was also objectively reasonable in that it provided the Defendant the opportunity to obtain the benefit of a mitigating circumstance should charges be brought against the Defendant for which the death penalty was a possible punishment.

19. The Defendant was represented by competent counsel who afforded him effective, reasonable, and professional representation.

20. In keeping with this Court's prior Order on the Defendant's claim of ineffective assistance of counsel, the Court adopts and incorporates by reference all of its findings of fact and conclusions of law in this Order as if fully set forth herein. In so doing, the Court again does not find or conclude that any ineffective assistance of counsel has occurred. The Defendant has not shown that the advice and conduct of his attorneys fell below an objective standard, and the Defendant has not shown any prejudice. Even if the Defendant is prejudiced by the disclosure of this information, he has also benefited by the disclosure of this information in that the State offered to allow the Defendant to plead guilty and avoid the death penalty. He received that benefit. Further assuming that the Defendant could show prejudice, the Court does not find ineffective assistance of counsel. This finding is without prejudice to the Defendant and may be raised on appeal.

21. Furthermore, the Court finds that the Defendant's attorneys were not ineffective in their representation of the Defendant as the Defendant made a voluntary strategic decision to provide the information at issue so as to obtain the benefit of avoiding the imposition and execution of the death penalty. The Defendant may also receive a future benefit of this disclosure if he is convicted of first degree murder and thereby faces a sentencing hearing in that the disclosure of the information as to the location of Shaniya Davis may be offered as a mitigating circumstance to the jury.

From these findings, the trial court made the following conclusions, in relevant part:

7. Under the totality of the circumstances, the Defendant's attorneys did not ineffectively assist the Defendant in providing information to law enforcement concerning the location of Shaniya Davis' body without an agreement of some kind as to what would happen should the Defendant provide that information.

8. The Defendant's provision of such information to law enforcement through his attorney at that stage in the search for Shaniya Davis was objectively reasonable in that it provided the State a basis for it to consider future plea negotiations with the Defendant should the Defendant be charged with more offenses related to the missing child during which negotiations the death penalty might be eliminated from the range of possible punishments. The provision of such information was also objectively reasonable in that it provided the Defendant the opportunity to obtain the benefit of a mitigating circumstance should charges he brought against the Defendant for which the death penalty was a possible punishment.

9. The Defendant was represented by competent counsel who afforded him effective, reasonable, and professional representation.

10. In keeping with this Court's prior Order on the Defendant's claim of ineffective assistance of counsel, the Court adopts and incorporates by reference all of its findings of fact and conclusions of law in this Order as if fully set forth herein.

11. The Defendant has not shown that the advice and conduct of his attorneys fell below an objective standard, and the Defendant has not shown any prejudice. Even if the Defendant is prejudiced by the disclosure of this information, he has also benefited by the disclosure of this information in that the State offered to allow the Defendant to plead guilty and avoid the death penalty. He received that benefit. Further assuming that the Defendant could show prejudice, there was no ineffective assistance of counsel.

12. Furthermore, the Defendant's attorneys were not ineffective in their representation of the Defendant as the Defendant made a voluntary strategic decision to provide the information at issue so as to obtain the benefit of avoiding the imposition and execution of the death penalty. The Defendant may also receive a future benefit of this disclosure if he is convicted of first degree murder and thereby faces a sentencing hearing in that

> the disclosure of the information as to the location of Shaniya Davis may he offered as a mitigating circumstance to the jury.
>
> . . . .
>
> 14. None of the Defendant's rights under the United States Constitution, North Carolina Constitution, or the North Carolina General Statutes were violated.

Here defendant does not challenge any of the trial court's findings of fact, but rather, he disputes the trial court's ultimate determination that he did not receive constitutionally deficient counsel under *Strickland*.

A. Benefit of Disclosure

Defendant initially attempts to meet his burden under the first *Strickland* prong by arguing that his attorneys' conduct was deficient because they "handed the State the single most incriminating piece of evidence against [defendant] without even seeking any benefit or protection for [defendant] in return." Defendant points out that Rogers testified that he never tried to get any type of agreement from the State before disclosing the information. Defendant asserts that under the "[p]revailing norms of practice," *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694, his attorneys had a duty to seek or secure a benefit for him in exchange for the disclosure, and that their breach of this duty was constitutionally deficient. We disagree.

In making this argument, defendant relies upon the American Bar Association (ABA) Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, as they were applicable at the time. *See id.* at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694 ("Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice 4–1.1 to 4–8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides."). Specifically, Guideline 10.5.B.2 provided:

> Promptly upon entry into the case, initial counsel should communicate in an appropriate manner with both the client and the government regarding the protection of the client's rights against self-incrimination, to the effective assistance of counsel, and to preservation of the attorney-client privilege and similar safeguards.

Additionally, Guideline 10.9.1 provided, in relevant part:

A. Counsel at every stage of the case have an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these Guidelines to achieve an agreed-upon disposition.

B. Counsel at every stage of the case should explore with the client the possibility and desirability of reaching an agreed-upon disposition. In so doing, counsel should fully explain the rights that would be waived, the possible collateral consequences, and the legal, factual, and contextual considerations that bear upon the decision.

Defendant also relies upon the ABA Standards for Criminal Justice, Prosecution Function and Defense Function applicable at that time. Specifically, Standard 4-3.6, entitled "Prompt Action to Protect the Accused," provided, *inter alia*:

> Many important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights.

While these provisions, which undoubtedly furnish sound guidance to defense attorneys in criminal cases, are perhaps broader in scope than the specific duty contemplated by defendant here, they do in general terms tend to support defendant's assertion that defense counsel should protect their client's rights by pursuing benefits in return for the disclosure of potentially incriminating information.

Yet, to the extent that counsel has a duty to seek a benefit in exchange for disclosing such information, it is plain that defendant's attorneys did seek a benefit in exchange for the disclosure of Shaniya's location—the purpose of the disclosure was to show that defendant could demonstrate cooperation and remorse, which would benefit defendant in the form of achieving a plea agreement for a life sentence or as a mitigating circumstance, and ultimately, to avoid the imposition of the death penalty. This was the "agreed-upon disposition," ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.9.1 (Feb. 2003), which defendant later repudiated when he rejected the State's plea offer of life in prison and refused to present mitigating evidence at trial.

Despite defendant's assent at the time of the disclosure, he argues on appeal that a plea agreement for life in prison so as to avoid the death penalty was not a reasonable objective that would justify the disclosure of incriminating information at that stage of the case because his attorneys were aware he had denied causing Shaniya any harm and because, according to defendant, "everything turned" on his innocence defense. This contention, however, is difficult to square with the record, because his attorneys were also aware that he had in essence confessed to kidnapping a five-year-old child from her home in the middle of the night and taking her to a remote hotel where he was the last and only person to be seen with Shaniya. Moreover, they were aware of the fact that he possessed information on the remote location of Shaniya, though he was unwilling to disclose how he had acquired that information, and that this information directed law enforcement to search a more specific area in the same vicinity in which an extensive search tracking defendant's cell phone data was already underway, suggesting that an incriminating discovery could be imminent. Even if defendant possessed a reasonable explanation for his actions that could exculpate him from directly causing harm to Shaniya, he was, at a minimum, likely to face charges of felony murder if, as feared, Shaniya was found deceased. Thus, while the disclosure certainly would be incriminating to defendant and could lead to the discovery of additional incriminating evidence against him, as proved to be the case here, the disclosure must be viewed in light of the already heavily incriminating evidence against defendat, as well as the apparent likelihood that the discovery of further incriminating evidence could be forthcoming.

Similarly, defendant argues that the "agreed-upon disposition" was inadequate in that his attorneys should have endeavored to obtain a more favorable outcome. For example, defendant argues that his attorneys should have attempted to secure an agreement from the State to proceed noncapitally, which he alleges would have both protected him from imposition of the death penalty and preserved his ability to assert a defense of factual innocence. But defendant fails to explain how making the disclosure with such an agreement in place would have in any way affected his ability to assert a defense of factual innocence. Here defendant was not required to plead guilty absent such an agreement; rather, he was free to put on any available evidence of his innocence, just as he would have been had the State proceeded noncapitally.

Additionally, defendant asserts that his attorneys should have attempted to secure a non-attribution agreement, which could have limited the State's use of any evidence regarding the disclosure solely to

impeachment purposes at trial, or a proffer letter, which could have provided that the prosecutors would not use anything that defendant or his lawyers told them against defendant during the case-in-chief. Whether prosecutors would have been amenable to these considerations is speculative, but given the nature of the situation at that time—with the ongoing search for Shaniya and the considerable evidence against defendant—we are deeply skeptical. Moreover, while we recognize that in many situations it would make strategic sense to attempt to negotiate for the best possible agreement before disclosing potentially incriminating information, that is not necessarily true in situations when, as here, time was a substantial factor. Had law enforcement located Shaniya before defendant's disclosure, the opportunity to obtain any benefit in return for defendant's information would have been irrevocably lost. Additionally, given that defendant was denying causing any harm to Shaniya, there was the possibility, however remote, that Shaniya was still alive.

Defendant attempts to minimize the role of time as a factor by suggesting that Shaniya might never have been discovered absent the disclosure, pointing to several of the State's arguments at trial. For instance, defendant notes that the State argued at trial that Shaniya's body was "well hidden," "hardly visible," and "was very difficult to find -- and may not have been found without this information. Authorities had been searching in that general area and had not been able to locate the victim prior to this information." Given that a massive search was underway in the same general area in which Shaniya was ultimately discovered, we are skeptical of defendant's claim. More importantly, however, entertaining this type of speculative argument would be contrary to our mandate that "every effort be made to eliminate the distorting effects of hindsight" and "to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694. The information Rogers and Brewer received from defendant directed law enforcement to search a more specific area in the same vicinity in which an extensive search was already underway at that time, suggesting that a discovery could very well be imminent. Rogers and Brewer could in no way anticipate how well hidden or how difficult to discover the body of Shaniya might be, nor could they have anticipated receiving that information from defendant, who denied causing any harm to Shaniya. *See Sneed*, 284 N.C. at 614, 201 S.E.2d at 872 ("We think that the attorney-client relationship is such that when a client gives his attorney facts constituting a defense, the attorney may rely on the statement given unless it is patently false.").

In sum, we cannot agree with defendant that it was unreasonable for his attorneys to target a plea agreement for life in prison and the avoidance of the death penalty in exchange for making the disclosure. We note that the commentary to Guideline 10.9.1 from the same ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases cited by defendant, states:

> "Death is different because avoiding execution is, in many capital cases, the best and only realistic result possible"; as a result, plea bargains in capital cases are not usually "offered" but instead must be "pursued and won." Agreements are often only possible after many years of effort. Accordingly, this Guideline emphasizes that the obligation of counsel to seek an agreed-upon disposition continues throughout all phases of the case.

(Footnote call number omitted.) Certainly, the decision to consider a client's situation as a potential capital case and seek a disposition accordingly is not one to be taken lightly; on that account, we note that, as found by the trial court, Rogers and Brewer were both experienced criminal defense attorneys. *See Strickland*, 466 U.S. at 681, 104 S. Ct. at 2061, 80 L. Ed. 2d at 689 ("Among the factors relevant to deciding whether particular strategic choices are reasonable are the experience of the attorney . . . ."). We hold only that under the unique and difficult circumstances here—with the already heavily incriminating evidence against defendant, as well as the apparent likelihood that the discovery of further incriminating evidence could be imminent—and "indul[ging] a strong presumption that [defendant's attorneys'] conduct falls within the wide range of reasonable professional assistance," *Id.* at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694, Rogers and Brewer's decision to disclose potentially incriminating information with the sought-after goal of avoiding imposition of the death penalty did not fall below "an objective standard of reasonableness," *id.* at 688, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

Whether defendant's attorneys erred in not first securing, or attempting to secure, a plea agreement for life in prison before making the disclosure is a separate and more difficult question. On the one hand, as we have previously noted, any negotiations with prosecutors may have been an uphill battle and would have been further complicated by the issue of time. On the other hand, a plea agreement for life in prison would likely have been a more attainable benefit than the alternatives proffered by defendant in his brief (a non-attribution agreement or a proffer letter). Additionally, without any agreement firmly in place, defendant's

attorneys exposed him to the possibility of further incrimination without any guaranteed benefit save for the existence of potential mitigating evidence at trial. Yet, we need not answer this question because, given that we have held that a plea agreement for life in prison and avoidance of the death penalty was a reasonable disposition in these circumstances, defendant cannot establish any prejudice when the State did offer defendant a plea agreement for life in prison. That is—even assuming *arguendo* that defendant's attorneys were deficient in disclosing the information without any plea agreement in place, defendant cannot show "a reasonable probability that, but for [his attorneys'] unprofessional errors, the result of the proceeding would have been different" when the very result that was desired did materialize and was rejected by defendant's own choice. *Id.* at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

B. Adequate Investigation

[3] Defendant next argues that his attorneys were deficient in their performance because they failed to conduct an adequate investigation before disclosing to police where to search for Shaniya when they were only one day into their representation of defendant. *See id.* at 691, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.") According to defendant, "everything turned" on his innocence defense, and his attorneys had a duty to adequately investigate that defense before destroying it by disclosing incriminating evidence to the State. Defendant argues that this disclosure was contrary to the applicable ABA guidelines, under which attorneys should investigate issues of guilt regardless of overwhelming evidence against a defendant or the defendant's own admissions or statements constituting guilt.

Defendant's assertions, however, are not borne out by the record. For example, defendant argues that Rogers failed to look at any formal discovery materials before making the disclosure. Yet, Rogers testified that at that early stage in the investigation, there was no discovery file to examine. Similarly, defendant seizes upon Rogers's response that he was unaware that defendant had at one point denied being the person depicted in photographs from the hotel, alleging that this statement demonstrates Rogers's failure to investigate defendant's claims of innocence. But we can find little significance in Rogers's statement. Defendant's "denial" occurred when he was first confronted with photographs of himself and Shaniya taken from the Comfort Suites video

footage. Defendant briefly attempted to claim that the person in the videos was someone who looked just like him, had somehow stolen his I.D. and car, and had signed into the hotel with defendant's name. Defendant quickly admitted it was he in the photographs, and then tried to claim he was delivering Shaniya to an unknown third party at the direction of text messages, which were not on defendant's phone and of which there is no record. Defendant fails to explain how Rogers's ignorance of defendant's short-lived denial of a fact relating to the *kidnapping*—a fact that was plainly apparent from available evidence, to which defendant shortly thereafter admitted and to which he later stipulated at trial—demonstrates any failure by Rogers to adequately investigate issues of defendant's guilt or innocence on the issue of *murder*.

Apart from defendant's brief denial, defendant is unable to identify anything that Rogers's allegedly inadequate investigation failed to uncover and which would have had any effect on the reasonableness of his attorneys' strategic decision to make the disclosure. *See Strickland*, 466 U.S. at 690-91, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."). Nor does defendant suggest precisely what other investigative avenues Rogers and Brewer should have pursued. Rogers and Brewer discussed defendant's situation with him, and Rogers testified that he had conversations with Kimble to gauge the status of the investigation as it related to defendant's involvement. From these investigations, defendant's attorneys learned that defendant had kidnapped Shaniya in the middle of the night, and taken her to a hotel where he was the last person to be seen with her, and that searchers were presently conducting a massive, ongoing attempt to locate Shaniya by combing through the areas revealed by defendant's cell phone data. We conclude that defendant's attorneys' strategic choice here to disclose where to look for Shaniya was "made after thorough investigation of law and facts relevant to plausible options." *Id.* at 690, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695. Even if defendant was able to identify some additional investigative steps his attorneys could have taken and to demonstrate that counsel engaged in a "less than complete investigation," we conclude that, given that time was a significant factor here, "reasonable professional judgments" would have "support[ed] the limitations on investigation." *Id.* at 691, 104 S. Ct. at 2066, 80 L. Ed. 2d at 695.

C. Source of Disclosure

[4] Next, defendant asserts that his attorneys erroneously advised him that they would shield his identity as the source of the information but that their method of disclosure revealed him as the source. Defendant argues that by doing so, his attorneys violated the Rules of Professional Conduct and the applicable ABA guidelines requiring a client's informed consent before lawyers may reveal information acquired during the professional relationship. *See*, *e.g.*, N.C. St. B. Rev. R. Prof'l Conduct r. 1.6(a) (2018 Ann. R. N.C. 1183, 1205) ("A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent . . . .").

In support of his argument, defendant points to this exchange between Terry Alford, defendant's trial attorney, and Rogers at the hearing:

> Q And so the discussion that you had with Mr. McNeill concerning the information, the authority that you had was to convey the information but not to reveal the source; is that correct?
>
> A That was certainly our intent. And my recollection was just conveying the information, not saying Mario McNeill said anything or any specific person.
>
> Q Right. And he never specifically gave you permission to be able to say the information came from him, did he?
>
> A He did not specifically say, convey the information came from me.

Defendant asserts that because they agreed not to explicitly name him as the source of the disclosure, this agreement necessarily implied that his attorneys would not allow evidence from the disclosure to be attributed to him, either directly or by inference. According to defendant, this is reflected in Finding of Fact 9 from the trial court's 16 May 2013 order, in which the trial court found that defendant "did not authorize his attorneys to make any admissions on his behalf."

The record, however, cannot support defendant's characterization of the agreement as being conditioned upon his attorneys' implicit promise that they would prevent the disclosure from being attributed to defendant, even by inference. Indeed, the entire purpose of the disclosure, to which defendant agreed, was that it be attributable to defendant

to show cooperation on his part. Immediately before the portion of the hearing relied upon by defendant, Rogers testified:

> Q That was the way it was done by Mr. Brewer is that he gave it as a recommendation. He didn't say where the information come from; is that correct?
>
> A That is correct. And that is my best recollection of what I did so as well.
>
> Q In other words, the information that you were relaying to the police was intended to be information you received from someone, but you did not want to relay who that came from; is that correct?
>
> A That's correct.
>
> Q At any time when you were talking to the authorities, did you tell them who it came from?
>
> A No. No, I didn't.
>
> Q So any belief that someone may have that information you gave them came from Mr. McNeill would be their speculation. You never specifically said where it came from, did you?
>
> A No, I didn't.
>
> Q That was because you weren't authorized by Mr. McNeill to specifically tell someone where that information came from, were you?
>
> A No, that's not true. We were authorized.
>
> Q You were authorized to do what?
>
> A We were authorized to disclose the information.
>
> Q But were you authorized to disclose the source of the information?
>
> A In our conversation prior to disclosing the information, it was decided that the information would be provided *without specifically stating the sourc*e.
>
> Q And that's the way Mr. Brewer did it, and that was your intention of doing it also, not to provide the source, correct?

A That's correct.

(Emphasis added.) Rogers further explained that while it was agreed to convey the information without "specifically stating the source," they were also not trying to hide defendant's role in furnishing the information. As Rogers testified at the hearing:

> Q And when you're talking about getting mitigating information for the defendant, Mario McNeill, to use or to set him up down the road with having the benefit of having been helpful in providing her body, that sort of thing --
>
> A Yes.
>
> Q -- right? Being cooperative. He could be claimed to be cooperative, right?
>
> A That's correct.
>
> Q You're not hiding from Captain Kimble who you're getting the information from?
>
> A No, I'm not.
>
> Q You won't be able to claim any credit, or he won't be able to claim any credit down the road should he need it if it's a mystery as to where the information is coming from, right?
>
> A That's correct.

In light of Rogers's testimony and the agreed-upon purpose of the disclosure, the fact that defendant and his attorneys agreed not to explicitly name defendant as the source of the disclosure cannot be read as an implicit understanding that his attorneys would shield him as the source but rather must be read in the context of their conversation, in which defendant told his attorneys that he had information about Shaniya's location but did not explain how he had acquired that information, and in which defendant was "denying that he was involved in hurting [Shaniya] or killing her." The method of disclosure allowed an immediate inference of cooperation but avoided any inadvertent admission of guilt. While defendant relies heavily upon a portion of Finding of Fact 9, the trial court's full sentence from that finding states that "[t]he Defendant did not authorize his attorneys to make any admissions on his behalf, *and they did not make any admissions on his behalf*." (Emphasis added.) Similarly, in its previous order from 17 April 2013, the trial court found that defendant "authorized Mr. Rogers to provide that specific

information to law enforcement" and that "[t]he Defendant's information . . . did not constitute *an admission to a crime*." (Emphasis added.) Thus, while the record establishes that defendant's attorneys were not authorized to make any admissions of guilt to any crimes on behalf of defendant, it does not support defendant's assertion that they advised him they would shield his identity as the source of the information.

Certainly, that the information came from defendant's attorneys allowed an inference that defendant was the source, which, while demonstrating immediate cooperation on the part of defendant, was also potentially incriminating as it suggested an inference of guilt. But this trade-off goes to the heart of the agreed-upon strategy—the mounting evidence against defendant was already highly incriminating, and providing this information to the police that could potentially be further incriminating was a strategic decision made to avoid imposition of the death penalty.

Whether defendant's attorneys *should have* advised him to adopt a different strategy that attempted to disclose the information anonymously and to shield defendant's identity as the source—perhaps until the sentencing proceeding of a capital trial—is a separate question not specifically raised by defendant, but on these facts we can see little to be gained, and more importantly, no constitutional deficiency, in failing to take such a course. Defendant's attorneys clearly believed that disclosing the information without hiding his identity was the best way to demonstrate cooperation and receive a benefit for the information while avoiding any overt suggestion of guilt on the part of defendant. Either defendant possessed an exculpatory explanation as to how he had acquired information on Shaniya's location, which he was at that point unwilling to share with his attorneys, or he did not. If he was being truthful with his attorneys in denying causing any harm to Shaniya, then he did possess such an explanation, and his attorneys' overt omission of his name in making the disclosure cleared the path for him to rebut the inference of guilt via any available evidence that an unnamed third party was the ultimate source of the information. This was the scenario defendant argued in his closing, albeit without any evidentiary support.

Ineffective Assistance of Counsel Conclusion

In sum, we conclude that defendant has failed to meet his burden under *Strickland* and we find no error in the trial court's ruling. The strategy employed by Rogers and Brewer here, to which defendant agreed, was a result of their "trying to give [defendant] the best advice [they could] to try to help save his life." Significantly, defendant agreed

with this strategy, and he received the very benefit sought by this strategy when the State later offered him a plea agreement for life in prison, which defendant twice declined. Defendant also declined to present any mitigating evidence in the sentencing proceeding of the trial, thus rejecting a further benefit contemplated by his agreed-upon strategy. Accordingly, defendant's ineffective assistance of counsel claim is overruled.

Cronic claim

[5] In addition to arguing that he received ineffective assistance of counsel under *Strickland*, defendant also argues that he received ineffective assistance under the standard set forth in *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). In *Strickland* the Court considered "claims of ineffective assistance based on allegations of specific errors by counsel—claims which, by their very nature, require courts to evaluate both the attorney's performance and the effect of that performance on the reliability and fairness of the proceeding." *Strickland*, 466 U.S. at 702, 104 S. Ct. at 2072, 80 L. Ed. 2d at 703 (Brennan, J., concurring in the opinion). On the other hand, in *Cronic* the Court considered ineffective assistance of counsel claims in the context of cases in which there is a "complete denial of counsel," "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," or "the surrounding circumstances [make] it so unlikely that any lawyer could provide effective assistance that ineffectiveness [is] properly presumed without inquiry into actual performance at trial." *Cronic*, 466 U.S. at 659-61, 104 S. Ct. at 2047-48, 80 L. Ed. 2d at 668-69.

Defendant argues that his attorneys, by disclosing of the location of Shaniya to police without first securing any benefit in return, were essentially working for the police and that this situation resulted in a breakdown of the adversarial process under *Cronic*. We are unpersuaded. Defendant's challenge is more properly brought as an allegation of a specific error under *Strickland*, which we have already addressed. Moreover, for the reasons previously stated, we conclude that the attorneys' disclosure was a reasonable strategic decision made in the course of their representation of defendant and certainly did not amount to a "breakdown in the adversarial process that would justify a presumption that respondent's conviction was insufficiently reliable to satisfy the Constitution." *Id.* at 662, 104 S. Ct. at 2049, 80 L. Ed. 2d at 670.

Attorney-Client Privilege

[6] Defendant next argues that the information regarding the location of Shaniya was inadmissible by virtue of the attorney–client privilege.

"It is an established rule of the common law that confidential communications made to an attorney in his professional capacity by his client are privileged, and the attorney cannot be compelled to testify to them unless his client consents." *Dobias v. White*, 240 N.C. 680, 684, 83 S.E.2d 785, 788 (1954) (citations omitted). Significantly, however, "not all communications between an attorney and a client are privileged," *In re Investigation of Miller*, 357 N.C. 316, 335, 584 S.E.2d 772, 786 (2003) (citations omitted), but rather, "[o]nly *confidential* communications are protected," *Dobias*, 240 N.C. at 684, 83 S.E.2d at 788 (emphasis added). "For example, . . . if it appears that a communication was not regarded as confidential or that the communication was made for the purpose of being conveyed by the attorney to others, the communication is not privileged." *In re Miller*, 357 N.C. at 335, 584 S.E.2d at 786 (citing *State v. McIntosh*, 336 N.C. 517, 524, 444 S.E.2d 438, 442 (1994)).

The party asserting the privilege has the burden of establishing each of the essential elements of a privileged communication. *Id.* at 336, 584 S.E.2d at 787 (quoting 1 Scott N. Stone & Robert K. Taylor, *Testimonial Privileges* § 1.61, at 1–161 (2d ed. 1994) (citations omitted) ("This burden may not be met by 'mere conclusory or ipse dixit assertions,' or by a 'blanket refusal to testify.' Rather, sufficient evidence must be adduced, usually by means of an affidavit or affidavits, to establish the privilege with respect to each disputed item.")). This Court has held that the elements of a privileged communication are:

> (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.

State v. Murvin, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981) (citation omitted). Finally, "the responsibility of determining whether the attorney-client privilege applies belongs to the trial court." *In re Miller*, 357 N.C. at 336, 584 S.E.2d at 787 (citing *Hughes v. Boone*, 102 N.C. 137, 160, 9 S.E. 286, 292 (1889)).

Here the trial court determined that defendant failed to meet his burden of demonstrating that the information he provided to his attorneys concerning the location of Shaniya was privileged. In its order denying

defendant's Motion to Require Specific Performance or, Alternatively, to Suppress Statements and Evidence, the trial court found as fact:

> 6. During Mr. Rogers' representation, the Defendant provided specific information to Mr. Rogers as to the location of Shaniya Davis' body, and the Defendant authorized Mr. Rogers to provide that specific information to law enforcement.
>
> 7. Pursuant to the Defendant's authorization, Mr. Rogers provided to law enforcement that specific information as to the location of Shaniya Davis' body.
>
> 8. The Defendant's information regarding the location of Shaniya Davis' body did not constitute an admission to a crime.

In its second order, the trial court adopted and incorporated all of its findings from its previous order, and additionally found as fact:

> 5. During their representation of the Defendant, Mr. Brewer and Mr. Rogers talked to the Defendant while he was in jail about cooperating with the police in looking for Shaniya Davis. They discussed how the Defendant might benefit from cooperating with the police on this issue by avoiding the imposition and execution of the death penalty. During these discussions, the Defendant specifically authorized his attorneys, Brewer and Mr. Rogers, to give information to the police relating to the location of Shaniya Davis. Nothing about their discussions suggests that the Defendant involuntarily provided the information at issue to his attorneys.
>
> . . . .
>
> 9. The Defendant authorized his attorneys to communicate information to the police that would aid them in locating Shaniya Davis. The Defendant did not authorize his attorneys to make any admissions on his behalf, and they did not make any admissions on his behalf. Neither Mr. Rogers nor Mr. Brewer told Captain Kimble the specific source of the information as to the directions where to search. . . . .
>
> . . . .

15. Contrary to the Defendant's argument, the Defendant did not meet his burden of demonstrating that the statements at issue were privileged communications. The evidence shows that they do not fall within the protection of the attorney-client privilege because they were not confidential. The statements at issue were not regarded by the Defendant and his attorneys as confidential as they were made for the purpose of being conveyed by the attorney to others and were therefore not privileged.

16. Even assuming that the attorney-client privilege existed, the Defendant waived the privilege in respect to the information given to the police for the sole purpose of allowing his attorneys to share the information with the police. This information was not given in exchange for any plea deal, dismissal of charges, immunity, or any other incentive or inducement offered by the State, and this information was not given during any plea negotiations with the District Attorney or any of his staff under N.C. Gen. Stat. § 8C-1, Rule 410.

. . . .

22. The Defendant waived the attorney-client privilege in that he specifically intended the information that he gave to his attorneys about the location of Shaniya Davis be shared with the authorities for the sole purpose of locating Shaniya Davis, the Defendant authorized the limited disclosure of this information for that limited purpose, there is no evidence of any deal to disclose this information, the disclosure was not the result of plea negotiations, the disclosure was voluntary, and there is no evidence of the Defendant's motive for the disclosure other than an interest on the part of the Defendant that Shaniya Davis would be found and that he might avoid the imposition and execution of the death penalty.

23. The defendant has not waived his privilege in regard to his attorneys testifying in this case on the trial on the merits.

Based upon these findings of fact, the trial court concluded:

> 4. The Defendant waived the attorney-client privilege as to some of this information. As to the information that Mr. Brewer and Mr. Rogers supplied to Captain Kimble, the attorney-client privilege did not exist because the information was not given to the attorneys in confidence as the Defendant voluntarily gave the information to his attorneys for the purpose of his attorneys sharing it with the police, and even if the attorney-client privilege did exist, that the defendant waived the attorney-client privilege so that his attorneys could share that information with the authorities.
>
> . . . .
>
> 13. The Defendant waived the attorney-client privilege in that he specifically intended the information that he gave to his attorneys about the location of Shaniya Davis he shared with the authorities for the sole purpose of locating Shaniya Davis, the Defendant authorized the limited disclosure of this information for that limited purpose, there is no evidence of any deal to disclose this information, the disclosure was not the result of plea negotiations, the disclosure was voluntary, and there is no evidence of the Defendant's motive for the disclosure other than an interest on the part of the Defendant that Shaniya Davis would be found and that he might avoid the imposition and execution of the death penalty.
>
> 14. None of the Defendant's rights under the United States Constitution, North Carolina Constitution, or the North Carolina General Statutes were violated.

We conclude that the trial court correctly determined that the information was not protected by attorney–client privilege. Specifically, the testimony of Rogers and Brewer plainly establishes that defendant communicated the information to them with the purpose that it be relayed to law enforcement to assist in the search for Shaniya. Accordingly, the evidence establishes that defendant's communication of the information to his attorneys "was made for the purpose of being conveyed by the attorney[s] to others," and as a result, "the communication is not privileged." *In re Miller*, 357 N.C. at 335, 584 S.E.2d at 786 (citing *McIntosh*, 336 N.C. at 524, 444 S.E.2d at 442).

Nonetheless, defendant argues on appeal that any waiver of the privilege on his part (or any intention that the information be conveyed to others) was made under the condition that he not be revealed as the source of the information. Defendant contends that his attorneys breached this condition by disclosing the information without protecting his identity as the source, rendering any waiver a nullity and leaving intact the privileged status of the information. Defendant further asserts that, at a minimum, his identity as the source of the information was privileged and should have been protected against any comment or infringement by the State. According to defendant, the trial court, by allowing evidence at trial that the information came from his attorneys and by allowing the State to argue inferences of guilt from that evidence, deliberately invaded the attorney–client relationship and violated his federal and state rights to counsel under the Sixth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution.

Defendant's contentions, however, are again premised on the same portions of the record on which he based his previous argument that his attorneys breached their duty of confidentiality[10] and provided ineffective assistance of counsel. For instance, defendant again refers to the trial court's Finding of Fact 9, which states that defendant "did not authorize his attorneys to make any admissions on his behalf." Yet, as

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10. While the attorney–client privilege and the ethical duty of confidentiality are related principles, they are not synonymous, and the applicability here of the former is questionable given that the disclosure of purportedly confidential information was not made pursuant to compulsion of law over the objection of defendant, but rather was made voluntarily and out of court. *See* N.C. St. B. Rev. R. Prof'l Conduct r. 1.6(a) cmt. 3 (2018 Ann. R. N.C. at 1205) ("The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information acquired during the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law." (citation omitted)); *Dobias*, 240 N.C. at 684, 83 S.E.2d at 788 ("It is an established rule of the common law that confidential communications made to an attorney in his professional capacity by his client are privileged, *and the attorney cannot be compelled to testify to them unless his client consents*." (emphasis added)). In any event, for the reasons stated above, the information defendant communicated to his attorneys was not privileged. Defendant argues that admission of the statements under Rule 801(d) means that they came in as defendant's own statements and were directly attributable to him.

noted above, this finding, in which the trial court continued by stating "and they did not make any admission on his behalf," references *admissions to a crime*. As we have previously concluded, while the record establishes that defendant's attorneys were not authorized to make any admissions of guilt to any crimes on behalf of defendant, and that they made no such admissions, the record does not support defendant's characterization of the agreement as being conditioned upon his attorneys' representation that they would prevent the disclosure from being attributed to defendant, even by inference. Defendant's arguments to the contrary are overruled.

Hearsay - Admissions by a Party–Opponent

[7] Defendant next contends that Captain Kimble's testimony that he received information on the location of Shaniya from defendant's attorneys was inadmissible hearsay and that the trial court erred in denying defendant's motion to suppress this testimony. We disagree.

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (2017); see *also id.* Rule 801(a) (2017) (defining "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion"). "In general, hearsay evidence is not admissible." *State v. Rivera*, 350 N.C. 285, 288-89, 514 S.E.2d 720, 722 (1999) (citing *State v. Wilson*, 322 N.C. 117, 131-32, 367 S.E.2d 589, 598 (1988)). An exception to the hearsay rule exists in Rule 801(d), which provides in pertinent part:

> (d) Exception for Admissions by a Party-Opponent. – A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is . . . (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship[.]

N.C.G.S. § 8C-1, Rule 801(d) (2017).

Here defendant objected to the admission of Kimble's testimony about statements made to him by defendant's attorneys concerning the location of Shaniya on the basis that, *inter alia*, such testimony was inadmissible hearsay. The trial court determined that defendant's

attorneys' statements to Kimble were admissible under N.C.G.S. § 8C-1, Rule 801(d). Accordingly, the trial court ordered that:

> The State may call Assistant Chief Kimble as a witness, and he may testify pursuant to N.C. Gen. Stat. § 8C-1, Rule 801(d) about his conversations with Mr. Brewer and Mr. Rogers inasmuch as these attorneys were the Defendant's agents and were authorized by the Defendant to make the statements at issue . . . .

The trial court did not allow Kimble to testify "as to any feelings about the source of the information."

Defendant argues that because the trial court found that he "did not authorize his attorneys to make any *admissions* on his behalf," and yet admitted into evidence his attorneys' statements to Kimble pursuant to N.C.G.S. § 8C-1, Rule 801(d) under the "*Admissions* by a Party-Opponent" hearsay exception, the trial court erroneously allowed defendant's attorneys' disclosure to be admitted as defendant's own statement and to be attributed to him, resulting in prejudice and requiring a new trial. (Emphases added.) The consonance of the word "admission" may appear contradictory here at first glance, but this argument too is without merit.

As previously discussed, in Finding of Fact 9 the trial court determined that defendant did not authorize his attorneys to make any admissions of guilt *to any crimes* and, on that account, "they did not make any admissions on his behalf." As the trial court specifically found in its earlier order, defendant "authorized Mr. Rogers to provide that specific information to law enforcement" and "[t]he Defendant's information . . . did not constitute *an admission to a crime*." (Emphasis added.) It is clear that the trial court's meaning of "admission" in this respect was more akin to a "confession," which is "an acknowledgement in express[ed] words by [the] accused in a criminal case of his guilt [of] the crime charged or of some essential part of it." *State v. Trexler*, 316 N.C. 528, 531, 342 S.E.2d 878, 880 (1986) (quoting *State v. Fox*, 277 N.C. 1, 25, 175 S.E.2d 561, 576 (1970)).

In contrast, this Court has defined "admission" in the context of Rule 801(d) more broadly as "a statement of pertinent facts which, in light of other evidence, is incriminating." *State v. Lambert*, 341 N.C. 36, 50, 460 S.E.2d 123, 131 (1995) (quoting *Trexler*, 316 N.C. at 531, 342 S.E.2d at 879-80); *see also State v. Chapman*, 359 N.C. 328, 355, 611 S.E.2d 794, 816 (2005) (referring to the Rule 801(d) exception when applied to a defendant's statement as the "*statement* of a party opponent" (emphasis

added)); *Trexler*, 316 N.C. at 531, 342 S.E.2d at 880 ("A confession, therefore, is a type of an admission." (citations omitted)). Under this broad definition, the "Admissions by a Party-Opponent" hearsay exception encompasses more than mere admissions of guilt. *See*, *e.g.*, *Chapman*, 359 N.C. at 355, 611 S.E.2d at 816 (concluding that the defendant's statement to a detective about a threatening telephone call he received the day after the murder of which he was accused was admissible as the statement of a party opponent); *State v. Collins*, 335 N.C. 729, 738, 440 S.E.2d 559, 564 (1994) (opining that the defendant's comments concerning his previous statements about threats he had made to his wife before her death fell within the exception for admissions by a party opponent). As a result, the trial court's admitting of defendant's attorneys' statements under Rule 801(d) did not conflict with Finding of Fact 9, which explicitly found that defendant "did not authorize his attorneys to make any admissions on his behalf, and they did not."

Because, as discussed previously, defendant authorized his attorneys to convey the information to law enforcement, the trial court did not err in admitting the evidence as "statement[s] by a person authorized by [defendant] to make a statement concerning the subject." N.C.G.S. § 8C-1, Rule 801(d)(C). Moreover, consistent with defendant's agreement with his attorneys that he not specifically be named as the source, the trial court did not permit Kimble to testify "as to any feelings about the source of the information."[11] Certainly, one could infer that defendant was the ultimate source of information that came from his attorneys. At trial, the State repeatedly argued this inference; however, as discussed above, this argument was an inevitable result of the agreed-upon strategy in making the disclosure. Defendant's arguments are overruled.

Due Process

[8] Next, defendant argues that the cumulative effect of his original attorneys' ineffective assistance of counsel, combined with the trial court's admission into evidence of testimony that his lawyers disclosed the location of Shaniya to police, as well as its admission of all evidence recovered from that location and all evidence derived from the discovery

11. Defendant argues that admission of the statements under Rule 801(d) means that they came in as defendant's own statements and were directly attributable to him. However, the jury was not informed of the manner in which this evidence was admitted—in other words, that the statements were authorized by defendant. The jury could only infer that defendant was the source from the fact that the attorneys who possessed the information represented him. As previously discussed, while inference was incriminating, it was permissible in light of the agreed-upon disclosure.

of Shaniya's body, deprived defendant of a fair trial in violation of his rights to due process of law under the Fourteenth Amendment to the United States Constitution and the Law of the Land Clause of the North Carolina Constitution. Because we have held that defendant did not receive ineffective assistance of counsel and that the trial court did not err in any evidentiary rulings, defendant's contentions are without merit.

Improper Statements During the State's Closing Argument

[9] Defendant's next argument concerns two statements made by the State during closing arguments at the guilt-innocence proceeding of the trial. More specifically, defendant argues that because these two comments severely prejudiced him, the trial court abused its discretion in denying his repeated requests for a mistrial. We do not agree.

A trial court "must declare a mistrial upon the defendant's motion if there occurs during the trial . . . conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." N.C.G.S. § 15A-1061 (2017). The determination "as to whether substantial and irreparable prejudice has occurred lies within the sound discretion of the trial judge and . . . will not be disturbed on appeal absent a showing of abuse of discretion." *State v. Thomas*, 350 N.C. 315, 341, 514 S.E.2d 486, 502 (1999) (citing *State v. McNeill*, 349 N.C. 634, 646, 509 S.E.2d 415, 422 (1998), *cert. denied*, 528 U.S. 838, 120 S. Ct. 102, 145 L. Ed. 2d 87 (1999)), *cert. denied*, 528 U.S. 1006, 120 S. Ct. 503, 145 L. Ed. 2d 388 (1999); *see also State v. Taylor*, 362 N.C. 514, 538, 669 S.E.2d 239, 260 (2008) ("An abuse of discretion occurs when a ruling is 'manifestly unsupported by reason, which is to say it is 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))), *cert. denied*, 558 U.S. 851, 130 S. Ct. 129, 175 L. Ed. 2d 84 (2009). Further, "[t]he decision of the trial judge is entitled to great deference since he is in a far better position than an appellate court to determine the effect of any such error on the jury." *Thomas*, 350 N.C. at 341, 514 S.E.2d at 502 (citing *State v. King*, 343 N.C. 29, 44, 468 S.E.2d 232, 242 (1996)). We also note that "[m]istrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict." *State v. Smith*, 320 N.C. 404, 418, 358 S.E.2d 329, 337 (1987) (quoting *State v. Stocks*, 319 N.C. 437, 441, 355 S.E.2d 492, 494 (1987)).

Defendant's motions for mistrial here were based on statements made by the prosecutor in the State's closing arguments. During closing arguments "an attorney may not become abusive, inject his personal experiences, express his 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) (2017). We have recognized, however, 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. 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). The trial court may ordinarily remedy improper argument with curative instructions "since it is presumed that jurors will understand and comply with the instructions of the court," *State v. Young*, 291 N.C. 562, 573, 231 S.E.2d 577, 584 (1977) (first citing *State v. Sparrow*, 276 N.C. 499, 173 S.E.2d 897 (1970); then citing *State v. Long*, 280 N.C. 633, 187 S.E.2d 47 (1972)), though "[s]ome transgressions are so gross and their effect so highly prejudicial that no curative instruction will suffice to remove the adverse impression from the minds of the jurors," *id.* at 573-74, 231 S.E.2d at 584 (citations omitted).

Here, during its closing argument in the guilt-innocence proceeding of the trial, while commenting on defendant's theory of the crime, the prosecutor stated:

> Where was Shaniya's body found? Off Walker Road, past Spring Lake before you get to Sanford, exactly where the defendant's attorney said you would find the body. So that would mean that her people, her relatives that are going to take her to school that morning, they drive her right back up to Sanford, another 40 minute drive. They just happened to sexually assault her and dump her body where the cell phone analysis, *where the defendant's lawyer said he put the body*, where the metal identification says the body is and where the soil sample identification says the body is. And that's all just coincidence? The defense would have you believe that that's just coincidence.

(Emphasis added.) During the next recess, out of the presence of the jury, defendant's trial attorney objected to the prosecutor's comment and moved for a mistrial. Defendant's attorney argued to the trial court: "You made the lines. You drew the lines and that went way past the line -- way past the line. His statement was the body was found where his lawyer said he put the body." The trial court responded that it did not hear the comment and asked the court reporter to read back that portion of the State's argument. The trial court then stated, "All right. Motion for

mistrial is denied. If you want me to tell them to disregard that, I'll be glad to tell them that. I didn't catch it. I'm not sure how many of them caught it." Defendant's attorney declined, stating, "No, sir. That would just be drawing more attention to the error." The trial court then said:

> All right. Let's bring them in. I have told the jury to remember the evidence for themselves. If the lawyer says something they don't remember from the evidence, they are to disregard that and abide by their own recollection of the evidence. Based on that and in my discretion, the motion for mistrial is denied. And I will give them a cautionary instruction now -- a general cautionary instruction, not about that specifically but to -- in general, about remember the evidence, okay?

When the jury returned, the trial court instructed jurors:

> Let me remind you once again that closing arguments are not evidence. The evidence is what you heard and saw during the presentation of evidence. If, during the course of making a final argument, one or more of the attorneys attempts to restate the evidence or a portion of the evidence and your recollection of the evidence is different from the attorneys', you are to recall and remember the evidence and be guided exclusively by your own recollection of the evidence.

Later in the State's closing argument, the prosecutor asserted:

> He killed and left Shaniya on Walker Road. The cell phone analysis puts him there. The soil sample analysis puts him there. The metal identification analysis puts him there. *And his defense attorney telling law enforcement where to look for the body puts him there.*

(Emphasis added.) Defendant's attorney objected at the next recess and again moved for a mistrial based on the prosecutor's stating "his defense attorney telling law enforcement where to look for the body puts him there." The trial court responded that "I think it's the same as saying the metal and the minerals puts him there. It's an inference from what the attorney said. So your motion for mistrial is denied." Defendant's attorney renewed his motion and asserted that the combination of the two comments should result in a mistrial. The trial court ruled:

> All right. Well, I find nothing wrong with the second incident that you're complaining of. I do find that he did cross

> by saying what I told him -- not what I told him not to but would not allow testimony that the defendant provided the information to the lawyer. He improperly commented on that in the first incident. In my discretion, I denied your request for mistrial. I gave a cautionary instruction to the jury and I do not feel like the comment rises to the point where I should declare a mistrial. I think that clarifies my ruling.

The trial court denied the defense's repeated renewals of its motions for mistrial.

Defendant argues that the prosecutor's statements that Shaniya's body was found "where the defendant's lawyer said he put the body" and that "[defendant's] attorney telling law enforcement where to look for the body puts him there" contravened the trial court's pretrial rulings concerning evidence of the disclosure and were without support in the record. Defendant asserts that these statements were severely prejudicial because they called on the jury to infer that he made confessions to his attorneys, which, if made, would have been privileged and inadmissible, and also to infer that defendant concealed the body, which defendant contends amounts to evidence of malice and of premeditation and deliberation. Additionally, defendant argues that the statements were so prejudicial that the trial court's general curative instructions did nothing to cure the impermissible inferences urged by the State, nor could a more specific curative instruction have remedied the issue. As a result, defendant contends that the trial court abused its discretion in denying his motions for mistrial.

With regard to the second statement, namely, that "[defendant's] attorney telling law enforcement where to look for the body puts him there," we conclude that this statement was not improper. As discussed above, evidence that the information of Shaniya's location was conveyed to law enforcement by defendant's attorneys was properly admitted by the trial court and this evidence permitted reasonable inferences to be drawn that were incriminating to defendant. These inferences are precisely what the prosecutor argued here—that defendant was the ultimate source of the information and had been to that location. Thus, the prosecutor's statement was permissible because he was arguing "the facts in evidence, and . . . reasonable inferences drawn therefrom," *Goss*, 361 N.C. at 626, 651 S.E.2d at 877 (quoting *Alston*, 341 N.C. at 239, 461 S.E.2d at 709-10); *see also*, *e.g.*, *State v. Smith*, 294 N.C. 365, 379, 241 S.E.2d 674, 682 (1978) ("Since the evidence was properly admitted, the prosecutor was entitled to argue the full force of that evidence to

the jury."). Defendant was free to rebut these inferences with any available evidence, as he sought to do in his closing argument. But defendant's objection to the incriminating nature of these inferences is in reality a reiteration of his previous arguments that the disclosure, and the admission of evidence relating to the disclosure, violated his constitutional rights and resulted in prejudice. As we have already considered and rejected these arguments, defendant's contention here must fail as well.

On the other hand, the prosecutor's first statement that Shaniya's body was found "where the defendant's lawyer said he put the body" was improper. This statement was not couched as an inference but rather as an assertion of fact, which was not an accurate reflection of the evidence. Nonetheless, we conclude that this improper statement was not "such [a] serious impropriet[y] as would make it impossible to attain a fair and impartial verdict." *Smith*, 320 N.C. at 418, 358 S.E.2d at 337 (quoting *Stocks*, 319 N.C. at 441, 355 S.E.2d at 494). Given that the prosecutor was allowed to argue the reasonable inferences arising from the evidence of defendant's attorneys' disclosure, and did so repeatedly in his closing argument, this sole misstatement of that evidence did not run far afield of what was permissible. Had we arrived at a different conclusion with respect to defendant's previous arguments, the impropriety of this statement may have been more egregious.

Further, we note that the trial judge agreed the statement was improper once it was read back by the court reporter, but when it was originally uttered he did not notice the statement, which ultimately occupied a single line from an extensive closing argument spanning sixty-nine pages of the record. *See Young*, 291 N.C. at 573, 231 S.E.2d at 583 (noting that the prosecutor's statement at issue "comprises only a few lines from forty-one pages in the record devoted to the closing arguments for the State"). As the trial court stated when offering to give a specific curative instruction, "If you want me to tell them to disregard that, I'll be glad to tell them that. I didn't catch it. I'm not sure how many of them caught it." This excerpt supports the trial court's discretionary ruling relating to the effect the statement may have had on the jury. Moreover, in addition to offering to give a specific curative instruction, the trial court gave a general curative instruction.

Additionally, the evidence against defendant was overwhelming. *See State v. Huey*, 370 N.C. 174, 181, 804 S.E.2d 464, 470 (2017) ("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." (citing *State v. Sexton*, 336 N.C. 321,

363-64, 444 S.E.2d 879, 903, *cert. denied*, 513 U.S. 1006, 115 S. Ct. 525, 130 L. Ed. 2d 429 (1994), *grant of postconviction relief aff'd*, 352 N.C. 336, 532 S.E.2d 179 (2000))). This evidence included, *inter alia:* defendant's initial denial to police of knowing Shaniya or being involved in her disappearance until confronted by photos from the hotel video cameras; the eyewitness and video evidence, as well as defendant's trial stipulation, of defendant taking Shaniya from Sleepy Hollow to the Comfort Suites and leaving the hotel with her; the small blanket that was discovered in the trash can and contained feces, blood, Shaniya's hair, and defendant's pubic hair; the DNA evidence of defendant's pubic hair on the hotel comforter; the cell phone information showing that defendant was near the location where the body was found and contradicting his story of receiving anonymous instructions and taking Shaniya to the dry cleaning establishment in Fayetteville; the soil and metal fragment recovered from defendant's car that was uniquely consistent with the location where Shaniya's body was found; defendant's apparent attempt to kill himself after being confronted with the evidence against him; and the fact that the police received information on where to search for Shaniya from attorneys who were representing defendant. In light of the foregoing reasons, and affording "great deference" to the trial judge "since he is in a far better position than an appellate court to determine the effect of any such error on the jury," *Thomas*, 350 N.C. at 341, 514 S.E.2d at 502 (citing *King*, 343 N.C. at 44, 468 S.E.2d at 242), we conclude that the trial judge did not abuse his discretion in denying defendant's motions for a mistrial based upon the improper remark.

Jury Instruction for Sex Offense and (e)(5) Aggravating Circumstance

[10] Defendant next argues that the trial court erred in the guilt-innocence proceeding by instructing the jury that it could find defendant guilty of sexual offense of a child if it found either vaginal or anal penetration because the State failed to present any evidence of anal penetration and because "it cannot be discerned from the record upon which theory or theories the jury relied in arriving at its verdict." *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990) (citing *State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987)). For the same reasons, defendant contends that the trial court erred in the sentencing proceeding by instructing the jury that it could find the (e)(5) aggravating circumstance that the "capital felony was committed while the defendant was engaged in the commission of, or flight after committing, the act of a sexual offense with a child." We disagree.

"A trial judge should never give instructions to a jury which are not based upon a state of facts presented by some reasonable view of the

evidence." *State v. Sweat*, 366 N.C. 79, 89, 727 S.E.2d 691, 698 (2012) (quoting *State v. Lampkins*, 283 N.C. 520, 523, 196 S.E.2d 697, 699 (1973)). Before a particular charge is submitted to the jury, "the trial court must find substantial evidence has been introduced tending to prove each essential element of the offense charged and that the defendant was the perpetrator of the offense." *State v. Williams*, 308 N.C. 47, 64, 301 S.E.2d 335, 346 (citing *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)), *cert. denied*, 464 U.S. 865, 104 S. Ct. 202, 78 L. Ed. 2d 177 (1983). In determining whether there is sufficient evidence to support every element of the offense charged, "[t]he evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *Powell*, 299 N.C. at 99, 261 S.E.2d at 117 (citations omitted). Similarly, in the sentencing proceeding, "[i]n determining the sufficiency of the evidence to submit an aggravating circumstance to the jury, the trial court must consider the evidence in the light most favorable to the State, with the State entitled to every reasonable inference to be drawn therefrom." *State v. Bell*, 359 N.C. 1, 32, 603 S.E.2d 93, 114 (2004) (quoting *State v. Anthony*, 354 N.C. 372, 434, 555 S.E.2d 557, 596 (2001), *cert. denied*, 536 U.S. 930, 122 S. Ct. 2605, 153 L. Ed. 2d 791 (2002)), *cert. denied*, 544 U.S. 1052, 125 S. Ct. 2299, 161 L. Ed. 2d 1094 (2005).

Defendant asserts that the evidence of anal penetration was insufficient under our decision in *State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987). There the defendant was convicted of first-degree sexual offense based upon a theory of anal penetration. *Id.* at 89-90, 352 S.E.2d at 425, 427. The only evidence of anal penetration was the seven-year-old victim's testimony that the defendant "put his penis in the back of me." *Id.* at 86, 90, 352 S.E.2d at 425, 427. Additionally, the physician who had examined the victim, when asked about evidence of "sexual intercourse anally," testified that there was "[n]one at all." *Id.* at 90, 352 S.E.2d at 427. We reversed the defendant's conviction, concluding that:

> Given the ambiguity of [the victim's] testimony as to anal intercourse, and absent corroborative evidence (such as physiological or demonstrative evidence) that anal intercourse occurred, we hold that as a matter of law the evidence was insufficient to support a verdict, and the charge of first degree sexual offense should not have been submitted to the jury.

Id. at 90, 352 S.E.2d at 427. Defendant argues that *Hicks* is controlling here because while the autopsy revealed injuries to Shaniya's vaginal

area, there was "no evidence of rectal injury;"[12] however, defendant's reliance upon *Hicks* is misplaced.

As an initial matter, we note that evidence of an apparent injury is not dispositive on the issue of penetration. *See, e.g.*, *State v. Smith*, 315 N.C. 76, 102, 337 S.E.2d 833, 850 (1985) (stating that "no medical evidence of penetration, such as bruising or tearing, is required to support" a conviction for first-degree sexual offense); *State v. Norman*, 196 N.C. App. 779, 782, 675 S.E.2d 395, 398 (in which an expert explained that the absence of anal damage does not mean sexual assault did not occur "because the anal area was meant to stretch without tearing"), *disc. rev. denied*, 363 N.C. 587, 683 S.E.2d 382 (2009). More importantly, while the autopsy revealed no apparent injury, here there was sufficient other evidence that was lacking in *Hicks*. In this case, a Kastle-Meyer or phenolphthalein test, which is a test used to give the indication of whether blood is present on an item, indicated the presence of blood in Shaniya's anus. This chemical analysis also revealed a positive indication for the presence of blood in the crotch area of Shaniya's panties, as well on the bottom rear portion of Shaniya's shirt. Additionally, there was the circumstantial evidence on the rail and steps of the trailer of feces which had not been present the previous night. Further, in a nearby trash can, police discovered a child's blanket that had previously been in the living room of the trailer and that also contained feces, as well as blood, Shaniya's hair, and defendant's pubic hair. This trash can was located across the street from the Davis residence and in close proximity to where defendant had parked his car the previous night—after he had texted multiple women and driven to the trailer park with the apparent hope of connecting with one of them. We hold that this evidence, taken in the light most favorable to the State, was sufficient to submit to the jury the issue of defendant's guilt of sexual offense, as well as the (e)(5) aggravating circumstance related to a sexual offense, based upon a theory of anal penetration. Defendant's arguments are overruled.

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12. Defendant also argues that the State's evidence failed to reveal any semen, spermatozoa, or male DNA on the rectal swabs, nor was any found on Shaniya's panties. We note that there was expert testimony from a DNA expert, stating that the absence of DNA was not unexpected because DNA begins to degrade or break down over time and that beyond a 72 hour window it becomes more and more likely that it will not be recoverable. Special Agent Hughes also testified that environmental conditions can affect how quickly DNA breaks down. Here Shaniya was missing for over six days.

Voluntariness of Defendant's Statements to Police

[11] Defendant next argues that the trial court erred in denying his motion to suppress statements he made during his interview with police on 12 November 2009.[13] This argument is without merit.

"The standard of review in evaluating 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." *Biber*, 365 N.C. at 167-68, 712 S.E.2d at 878 (citing *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994)). We review conclusions of law de novo. *Id.* at 168, 712 S.E.2d at 878 (citing *McCollum*, 334 N.C. at 237, 433 S.E.2d at 160).

While defendant's primary contention in the trial court was that he was subjected to custodial interrogation without the requisite *Miranda* warnings, he has abandoned that argument on appeal and instead contends solely that his statements were not voluntarily made, rendering their admission into evidence a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution. The test for voluntariness is whether, under the totality of the circumstances, "the confession [is] the product of an essentially free and unconstrained choice by its maker," in which event it is admissible, or instead whether a defendant's "will has been overborne and his capacity for self-determination critically impaired," in which event "the use of his confession offends due process." *Culombe v. Connecticut*, 367 U.S. 568, 602, 81 S. Ct. 1860, 1879, 6 L. Ed. 2d 1037, 1057-58 (1961) (citing *Rogers v. Richmond*, 365 U.S. 534, 544, 81 S. Ct. 735, 741, 5 L. Ed. 2d 760, 768 (1961)); *see also State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994) ("The test for voluntariness in North Carolina is the same as the federal test." (citing *State v. Jackson*, 308 N.C. 549, 581, 304 S.E.2d 134, 152 (1983),

13. Defendant also argues that certain evidence of his conduct—specifically that, during a break in the interrogation, he twice put a key into a wall electrical socket—should also have been inadmissible as "fruit of the involuntary statements." Defendant, however, did not challenge the admission of this conduct in the trial court and raises this issue for the first time on appeal. Accordingly, "[d]efendant has failed to properly preserve this issue because of his failure to raise it before the trial court." *State v. Gainey*, 355 N.C. 73, 100, 558 S.E.2d 463, 480 (first citing N.C. R. App. P. 10(b)(1); then citing *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991)), *cert. denied*, 537 U.S. 896, 123 S. Ct. 182, 154 L. Ed. 2d 165 (2002). Further, defendant has not requested plain error review of this issue. *See* N.C. R. App. P. 10(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

judgment vacated and remanded, 479 U.S. 1077, 107 S. Ct. 1271, 94 L. Ed. 2d 133 (1987), *aff'd on remand*, 322 N.C. 251, 368 S.E.2d 838 (1988), *cert. denied*, 490 U.S. 1110, 109 S. Ct. 3165, 104 L. Ed. 2d 1027 (1989))).

According to defendant, despite his initial denials to police that he was involved in the disappearance of Shaniya, which demonstrated his will not to make a statement, the detectives made promises, threats, and other coercive comments that overcame defendant's will after fifty-four minutes and caused him to make certain statements, including his admission to taking Shaniya from Sleepy Hollow to the Comfort Suites as well as his story about receiving instructions on his telephone from an unnamed third party. Defendant contends that the trial court erred by finding that the investigating officers did not make any promises or threats and by concluding that his statements were voluntarily made. We need not address these contentions, however, because, as the State argues, even if defendant was able to establish any error by the trial court in admitting these statements, such error would be harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b) (2017) ("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.").

While a confession is prejudicial because it is the "best evidence" of a defendant's guilt, *State v. Fox*, 274 N.C. 277, 289, 163 S.E.2d 492, 501 (1968), defendant did not confess to murder or sexual assault. On the contrary, even after the point at which defendant's will was purportedly overborne, he denied causing any harm to Shaniya. Defendant's sole admission was that he had taken Shaniya from Sleepy Hollow to the Comfort Suites—a fact to which he stipulated at trial and that he does not dispute on appeal.

Any prejudice caused by the admission of defendant's statements would be limited to the effect on his credibility. For example, the State was able to present evidence of defendant's phone records and cellular location data that tended to disprove defendant's story about receiving instructions on his phone from an unnamed third party to take Shaniya to a dry cleaning establishment at the corner of Country Club Drive and Ramsey Street in Fayetteville. Further, towards the end of the interview with police, defendant denied making his earlier statements, which would both contradict his earlier statements and also his stipulation at trial. Yet, this was not the only evidence tending to damage defendant's credibility. For instance, defendant's suppression argument would have no effect on the admissibility of his statements made before the point at

which he contends his will was overborne, including his various denials of being at Brenda Davis's trailer, of seeing Shaniya or even knowing her, of having Shaniya in his car, of taking her to the hotel in Sanford, and of being the person seen on video recordings checking into the hotel under defendant's name and with his identification. Similarly, there was the evidence that defendant had told both of the clerks at the Comfort Suites that he was traveling with his daughter and taking her to her mother in Virginia. Given the overwhelming evidence of defendant's guilt presented at trial, we conclude that any conceivable effect on defendant's credibility caused by the admission of his statements would be harmless beyond a reasonable doubt. *See State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988) ("Significantly, this Court has held that the presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." (citing *State v. Brown*, 306 N.C. 151, 164, 293 S.E.2d 569, 578, *cert. denied*, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982))).

Racial Justice Act Hearing

[12] Defendant next argues that the trial court erred in denying his motion under the Racial Justice Act to prohibit the State from seeking the death penalty without holding an evidentiary hearing.

The Racial Justice Act (RJA) became effective on 11 August 2009 and provided that "[n]o person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race." N.C.G.S. § 15A-2010 (2009); Act of Aug. 6, 2009, ch. 464, 2009 N.C. Sess. Laws 1213. The RJA implemented a hearing procedure authorizing a defendant to raise an RJA claim either at the Rule 24 pretrial conference or in postconviction proceedings. N.C.G.S. § 15A-2012 (2009); Ch. 464, sec. 1, 2009 N.C. Sess. Laws at 1214-15. The RJA provided, in pertinent part:

> (a) The defendant shall state with particularity how the evidence supports a claim that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed.
>
> (1) The claim shall be raised by the defendant at the pretrial conference required by Rule 24 of the General Rules of Practice for the Superior and District Courts or in postconviction

proceedings pursuant to Article 89 of Chapter 15A of the General Statutes.

(2) The court shall schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties.

N.C.G.S. § 15A-2012; Ch. 464, sec. 1, 2009 N.C. Sess. Laws at 1214-15. The RJA was amended in 2012, *see* Act of June 21, 2012, ch. 136, secs. 3-4, 2012 N.C. Sess. Laws (Reg. Sess. 2012) 471, 471-73, and then repealed in its entirety in 2013, *see* Act of June 13, 2013, ch. 154, sec. 5, 2013 N.C. Sess. Laws 368, 372.

Defendant contends that although the RJA was amended, and ultimately repealed, the ex post facto clauses of the United States and North Carolina Constitutions, the Due Process Clause of the Fourteenth Amendment, Article I, Section 19 of the North Carolina Constitution, and North Carolina common law bar the application of the amended RJA or the repeal of the RJA to his rights under the original RJA. Further, defendant argues that despite the mandatory language of the original RJA that "[t]he court *shall* schedule a hearing on the claim and *shall* prescribe a time for the submission of evidence by both parties," N.C.G.S. § 15A-2012(a)(2) (2009) (emphases added), the trial court erroneously denied his RJA motion without holding an evidentiary hearing.

Yet, assuming *arguendo* that any version of the RJA applies to defendant, he neglects to note that he himself did not follow the language of section 15A-2012(a)(1), which mandates that "[t]he claim *shall be raised by the defendant at the pretrial conference required by Rule 24 of the General Rules of Practice for the Superior and District Courts* or in postconviction proceedings pursuant to Article 89 of Chapter 15A of the General Statutes." *Id.* § 2012(a)(1) (2009) (emphasis added). Here defendant did not raise his RJA claim at the Rule 24 conference. Notably, at the Rule 24 conference, the trial court twice asked defendant whether he wanted to be heard, and on both occasions defendant stated that there was nothing to be offered for defendant. Defendant cannot complain of the trial court's failure to strictly adhere to the RJA's pretrial statutory procedures where he himself failed to follow those procedures.

We observe that the RJA authorized a defendant to raise an RJA claim at the Rule 24 pretrial conference "or in postconviction proceedings pursuant to Article 89 of Chapter 15A of the General Statutes." *Id.* Accordingly, while we express no opinion on the substance of any rights or claims defendant may have under any version of the RJA, our

conclusion here is without prejudice to defendant's ability to raise any such claim in postconviction proceedings in the form of a motion for appropriate relief.

Improper Remarks in Closing Arguments at Sentencing Proceeding

[13] Defendant next argues that the trial court erred by failing to intervene *ex mero motu* during the State's closing argument in the sentencing proceeding. We disagree.

Defendant takes exception to two statements made by prosecutors during the State's closing argument which refer to his decision not to present mitigating evidence or closing arguments. First, Assistant District Attorney Cox stated:

> Do not let the actions sway or cause you to sympathize with his course of action in this sentencing phase about argument or evidence -- do not let it manipulate you into feeling sympathy for the defendant. The judge will instruct you that you're not to take that into consideration. Do not let it sway you.

Shortly afterward, District Attorney West stated:

> Now, I ask you, as Ms. Cox did -- we do not know why the defendant has conducted himself in the sentencing hearing as he has; but, I ask you to follow the law when you go through the process. It may be to invoke sympathy. It may be a simple act of defiance, or it may be some type of manipulation. Whatever the reason, I ask you to go through this process and make your decision based on the facts and the law in this particular case.

According to defendant, the remarks were grossly improper because they expressed personal opinions, based solely on speculation and without support in the record, which attributed improper motives to defendant's decision not to present mitigating evidence or give closing arguments at the sentencing proceeding. Defendant did not object on either occasion.

"Where there is no objection, 'the standard of review to determine whether the trial court should have intervened *ex mero motu* is whether the allegedly improper argument was so prejudicial and grossly improper as to interfere with defendant's right to a fair trial.' " *State v. Gaines*, 345 N.C. 647, 673, 483 S.E.2d 396, 412 (quoting *State v. Alford*,

339 N.C. 562, 571, 453 S.E.2d 512, 516 (1995)), *cert. denied*, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997).

We conclude that there was no gross impropriety in the prosecutors' remarks such that the trial court was required to intervene *ex mero motu*. We first note that it was not impermissible for the prosecutors here to comment on defendant's lack of mitigating evidence. *See State v. Taylor*, 337 N.C. 597, 613, 447 S.E.2d 360, 370 (1994)[14] ("It is well established that although the defendant's failure to take the stand and deny the charges against him may not be the subject of comment, the defendant's failure to produce exculpatory evidence or to contradict evidence presented by the State may properly be brought to the jury's attention by the State in its closing argument." (first citing *State v. Reid*, 334 N.C. 551, 555, 434 S.E.2d 193, 196 (1993); then citing *State v. Young*, 317 N.C. 396, 415, 346 S.E.2d 626, 637 (1986); then citing *State v. Mason*, 315 N.C. 724, 732, 340 S.E.2d 430, 436 (1986); and then citing *State v. Tilley*, 292 N.C. 132, 143, 232 S.E.2d 433, 441 (1977))); *see also State v. Brown*, 320 N.C. 179, 204-06, 358 S.E.2d 1, 18-19 (1987) (finding no gross impropriety in prosecutor's arguments during capital sentencing proceeding concerning the defendant's failure to produce siblings who could testify on his behalf), *cert. denied*, 484 U.S. 970, 108 S. Ct. 467, 98 L. Ed. 2d 406 (1987). Further, the thrust of both prosecutors' arguments was a simple admonition to the jury to make its decision based on the facts and the law presented in the case. To the extent that there was any impropriety in the prosecutors' suggestions that defendant's decision not to present mitigating evidence or give closing arguments was an "act of defiance" or a "manipulation" to garner sympathy, we conclude that these comments were not "so prejudicial and grossly improper as to interfere with defendant's right to a fair trial." *Gaines*, 345 N.C. at 673, 483 S.E.2d at 412 (quoting *Alford*, 339 N.C. at 571, 453 S.E.2d at 516).

Preservation Issues

Defendant argues that the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 27 of the North Carolina Constitution, and that North Carolina's capital sentencing scheme is arbitrary, vague, and overbroad. Defendant does not characterize this assertion as a preservation issue, but "we treat the assigned error as such in light of our numerous decisions that

14. In February 2010, a three judge panel of the North Carolina Innocence Inquiry Commission unanimously ruled that Taylor had been wrongly convicted in 1993.

have rejected a similar argument." *State v. Hurst*, 360 N.C. 181, 205, 624 S.E.2d 309, 326, *cert. denied*, 549 U.S. 875, 127 S. Ct. 186, 166 L. Ed. 2d 131 (2006). This Court has previously considered and rejected these arguments, and we decline to depart from our prior precedent. *See*, *e.g.*, *id*. at 205, 624 S.E.2d at 327 ("This Court has held that the North Carolina capital sentencing scheme is constitutional . . . ." (citing *State v. Powell*, 340 N.C. 674, 695, 459 S.E.2d 219, 230 (1995), *cert. denied*, 516 U.S. 1060, 116 S. Ct. 739, 133 L. Ed. 2d 688 (1996))); *see also State v. Maness*, 363 N.C. 261, 294, 677 S.E.2d 796, 816-17 (2009), *cert. denied*, 559 U.S. 1052, 130 S. Ct. 2349, 176 L. Ed. 2d 568 (2010); *State v. Duke*, 360 N.C. 110, 142, 623 S.E.2d 11, 32 (2005), *cert. denied*, 549 U.S. 855, 127 S. Ct. 130, 166 L. Ed. 2d 96 (2006); *State v. Garcia*, 358 N.C. 382, 424-25, 597 S.E.2d 724, 753 (2004), *cert. denied*, 543 U.S. 1156, 125 S. Ct. 1301, 161 L. Ed. 2d 122 (2005); *State v. Williams*, 304 N.C. 394, 409-11, 284 S.E.2d 437, 448 (1981), *cert. denied*, 456 U.S. 932, 102 S. Ct. 1985, 2 L. Ed. 2d 450 (1982); *State v. Barfield*, 298 N.C. 306, 343-54, 259 S.E.2d 510, 537-44 (1979), *cert. denied*, 448 U.S. 907, 100 S. Ct. 3050, 65 L. Ed. 2d 1137 (1980), *disavowed on other grounds*, *State v. Johnson*, 317 N.C. 193, 203-04, 344 S.E.2d 775, 782 (1986).

Defendant raises five additional issues that he concedes have previously been decided by this Court contrary to his position: (1) the trial court erred by ordering defense counsel to defer to defendant's decision not to present mitigating evidence in the sentencing proceeding after finding an absolute impasse between defendant and defense counsel; (2) the trial court committed plain error under the Eighth and Fourteenth Amendments by instructing the jury that it could refuse to give effect to nonstatutory mitigating evidence if the jury deemed the evidence not to have mitigating value; (3) the trial court committed plain error by using the word "satisfies" in capital sentencing instructions to define defendant's burden of persuasion to prove mitigating circumstances; (4) the trial court committed plain error by instructing the jurors for Issues Three and Four that each juror "may" consider mitigating circumstances found in Issue Two; and (5) when charging the commission of murder that is punishable by death, the failure to allege aggravating circumstances in the short-form murder indictment is a jurisdictional defect under North Carolina law.

Having considered defendant's arguments, we see no reason to revisit or depart from our earlier holdings. *See State v. Grooms*, 353 N.C. 50, 84-86, 540 S.E.2d 713, 734-35 (2000) (holding that when the defendant and his counsel had reached an absolute impasse, the trial court properly ordered defense counsel to defer to defendant's wishes not to present

mitigating evidence and that this ruling did not deprive the defendant of effective assistance of counsel),[15] *cert. denied*, 534 U.S. 838, 122 S. Ct. 93, 151 L. Ed. 2d 54 (2001); *State v. Payne*, 337 N.C. 505, 533, 448 S.E.2d 93, 109 (1994) (finding no error in a sentencing instruction that "allowed the jury to decide that a non-statutory circumstance existed but that it had no mitigating value"), *cert. denied*, 514 U.S. 1038, 115 S. Ct. 1405, 131 L. Ed. 2d 292 (1995); *id.* at 531-33, 448 S.E.2d at 108-09 (holding that the use of the term "satisfy" to define a defendant's burden of proof for mitigating circumstances was not plain error); *State v. Lee*, 335 N.C. 244, 286-87, 439 S.E.2d 547, 569-70 (opining that the trial court did not err in instructing the jurors for Issues Three and Four that each juror "may" consider mitigating circumstances found in Issue Two), *cert. denied*, 513 U.S. 891, 115 S. Ct. 239, 130 L. Ed. 2d 162 (1994); *see also State v. Wilkerson*, 363 N.C. 382, 435, 683 S.E.2d 174, 206 (2009) ("This Court has repeatedly held that short-form murder indictments satisfy the requirements of our state and federal constitutions." (citing *State v. Hunt*, 357 N.C. 257, 278, 582 S.E.2d 593, 607, *cert. denied*, 539 U.S. 985, 124 S. Ct. 44, 156 L. Ed. 2d 702 (2003))), *cert. denied*, 559 U.S. 1074, 130 S. Ct. 2104, 176 L. Ed. 2d 734 (2010).

Proportionality Review

[14] Finally, in accordance with our statutory responsibility, we consider whether the record supports the aggravating circumstances found by the jury, whether the death sentence "was imposed under the influence of passion, prejudice, or any other arbitrary factor," and whether the death sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2) (2017).

The jury found all five of the aggravating circumstances submitted for its consideration.[16] The jury found the existence of three aggravating

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15. Defendant asserts that the trial court's order prohibiting his counsel from presenting mitigating evidence deprived him of his Sixth Amendment right to effective assistance of counsel under *Cronic* in that it prevented "meaningful adversarial testing" of the State's penalty case. *Cronic*, 466 U.S. at 659, 104 S. Ct. at 2047, 80 L. Ed. 2d at 668. We note that while the Court in *Grooms* referenced *Strickland* in addressing and rejecting the ineffective assistance of counsel portion of the defendant's mitigating evidence argument, *Grooms*, 353 N.C. at 86, 540 S.E.2d at 735, the defendant there asserted violations of the Sixth Amendment right to counsel under both *Strickland* and *Cronic*.

16. Two statutory mitigating circumstances were submitted—that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, N.C.G.S. § 15A-2000(f)(6), and the catchall mitigating circumstance that any other circumstance arose from the evidence that any juror

circumstances under N.C.G.S. § 15A-2000(e)(3), namely, that in three separate instances defendant had been previously convicted of a felony involving the use of violence to another person. The jury found the existence of two additional aggravating circumstances under N.C.G.S. § 15A-2000(e)(5): first, that the capital felony was committed while the defendant was engaged in the commission of, or flight after committing, the act of first degree kidnapping; and second, that the capital felony was committed while the defendant was engaged in the commission of, or flight after committing, the act of a sexual offense with a child. After careful consideration, we conclude that the jury's finding of these circumstances beyond a reasonable doubt was fully supported by the evidence.

Defendant presents no argument that his sentence of death should be vacated because it "was imposed under the influence of passion, prejudice, or any other arbitrary factors," *id.* § 15A-2000(d)(2), and our careful review of the record and transcripts reveals nothing that would support such a ruling.

Last, we must determine whether "the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *Id.* § 15A-2000(d)(2). "We consider all cases which are roughly similar in facts to the instant case, although we are not constrained to cite each and every case we have used for comparison." *State v. McNeill*, 360 N.C. 231, 254, 624 S.E.2d 329, 344 (citing *State v. al-Bayyinah*, 359 N.C. 741, 760-61, 616 S.E.2d 500, 514 (2005), *cert. denied*, 547 U.S. 1076, 126 S. Ct. 1784, 164 L. Ed. 2d 528 (2006)), *cert. denied*, 549 U.S. 960, 127 S. Ct. 396, 166 L. Ed. 2d 281 (2006). "Whether the death penalty is disproportionate 'ultimately rest[s] upon the "experienced judgments" of the members of this Court.' " *al-Bayyinah*, 359 N.C. at 761, 616 S.E.2d at 514 (alteration in original) (quoting *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046, 115 S. Ct. 642, 130 L. Ed. 2d 547 (1994)).

This Court has held the death penalty to be disproportionate in eight cases: *State v. Kemmerlin*, 356 N.C. 446, 487-89, 573 S.E.2d 870, 897-99 (2002); *State v. Benson*, 323 N.C. 318, 328-29, 372 S.E.2d 517, 522-23

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deems to have mitigating value, *id.* § 15A-2000(f)(9)—but neither was found by the jury. At least one juror found the non-statutory mitigating circumstance that defendant's use of marijuana and or alcohol, and or cocaine affected his decision making, and at least one juror found the nonstatutory mitigating circumstance that defendant is a good father to his children and loves them. The jury found beyond a reasonable doubt that these mitigating circumstances were insufficient to outweigh the aggravating circumstances.

(1988); *State v. Stokes*, 319 N.C. 1, 19-27, 352 S.E.2d 653, 663-68 (1987); *State v. Rogers*, 316 N.C. 203, 234-37, 341 S.E.2d 713, 731-33 (1986), *overruled on other grounds by Gaines*, 345 N.C. at 676-77, 483 S.E.2d at 414, *and by State v. Vandiver*, 321 N.C. 570, 573, 364 S.E.2d 373, 375 (1988); *State v. Young*, 312 N.C. 669, 686-91, 325 S.E.2d 181, 192-94 (1985); *State v. Hill*, 311 N.C. 465, 475-79, 319 S.E.2d 163, 170-72 (1984); *State v. Bondurant*, 309 N.C. 674, 692-94, 309 S.E.2d 170, 181-83 (1983); and *State v. Jackson*, 309 N.C. 26, 45-47, 305 S.E.2d 703, 716-18 (1983). We conclude that this case is not substantially similar to any of those cases.

Here defendant kidnapped a five-year-old child from her home and sexually assaulted her before strangling her and discarding her body under a log in a remote area used for field dressing deer carcasses. We note that this Court "ha[s] never found a death sentence disproportionate in a case involving a victim of first-degree murder who also was sexually assaulted." *State v. Kandies*, 342 N.C. 419, 455, 467 S.E.2d 67, 87 (citing *State v. Payne*, 337 N.C. 505, 537, 448 S.E.2d 93, 112 (1994), *cert. denied*, 514 U.S. 1038, 115 S. Ct. 1405, 131 L. Ed. 2d 292 (1995)), *cert. denied*, 519 U.S. 894, 117 S. Ct. 237, 136 L. Ed. 2d 167 (1996). Further, "[t]his Court has deemed the (e)(3) aggravating circumstance," of which the jury here found three separate instances, "standing alone, to be sufficient to sustain a sentence of death." *al-Bayyinah*, 359 N.C. at 762, 616 S.E.2d at 515 (citing *State v. Bacon*, 337 N.C. 66, 110 n.8, 446 S.E.2d 542, 566 n.8 (1994), *cert. denied*, 513 U.S. 1159, 115 S. Ct. 1120, 130 L. Ed. 2d 1083 (1995)). Similarly, we have held that the (e)(5) aggravating circumstance, of which the jury here found two separate instances based upon the commission, or flight after commission of, kidnapping and sex offense, to be sufficient to affirm a sentence of death. *See State v. Zuniga*, 320 N.C. 233, 274-75, 357 S.E.2d 898, 923-24, *cert. denied*, 484 U.S. 959, 108 S. Ct. 359, 98 L. Ed. 2d 384 (1987). Moreover, the jury found defendant guilty of both felony murder and first-degree murder committed with malice, premeditation, and deliberation. While a conviction based solely upon felony murder is punishable by a sentence of death, "a finding of premeditation and deliberation indicates a more calculated and cold-blooded crime for which the death penalty is more often appropriate." *State v. Phillips*, 365 N.C. 103, 150, 711 S.E.2d 122, 154 (2011) (quoting *Taylor*, 362 N.C. at 563, 669 S.E.2d at 276 (internal quotation marks omitted)), *cert. denied*, 565 U.S. 1204, 132 S. Ct. 1541, 182 L. Ed. 2d 176 (2012).

In comparing defendant's case with those in which this Court has found the death penalty to be proportionate, *al-Bayyinah*, 359 N.C. at 762, 616 S.E.2d at 515, we conclude that defendant's case is more

analogous to these cases. *See, e.g.*, *State v. Lane*, 365 N.C. 7, 39-40, 707 S.E.2d 210, 230 (holding a sentence of death proportionate when the "defendant confessed to taking advantage of a trusting five-year-old child, then raping and sodomizing her before putting her, while still alive, in a garbage bag sealed with duct tape, wrapping her in a tarp, and discarding her body in a creek"), *cert. denied*, 565 U.S. 1081, 132 S. Ct. 816, 181 L. Ed. 2d 529 (2011).

Conclusion

For the foregoing reasons we conclude 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 is not excessive or disproportionate.

NO ERROR.

STATE OF NORTH CAROLINA
v.
JUAN ANTONIA MILLER

No. 2PA17

Filed 8 June 2018

Search and Seizure—appeal of admissibility of evidence—no motion to suppress before or at trial—complete waiver of review on direct appeal

In a case of first impression, where defendant did not move to suppress—before or at trial—evidence of cocaine found in his pocket during a traffic stop, but instead argued for the first time on appeal that the seizure of the cocaine resulted from Fourth Amendment violations, the Supreme Court held that the Court of Appeals erred by conducting plain error review and concluding that the trial court committed plain error by admitting evidence of the cocaine. Defendant's Fourth Amendment claims were not reviewable on direct appeal, even for plain error, because he completely waived them by not moving to suppress the evidence of the cocaine before or at trial.

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

374 (2016), ordering that defendant receive a new trial after appeal from a judgment entered on 4 December 2015 by Judge Eric C. Morgan in Superior Court, Guilford County. Heard in the Supreme Court on 7 February 2018.

Joshua H. Stein, Attorney General, by Derrick C. Mertz and John G. Batherson, Special Deputy Attorneys General, for the State-appellant.

Jason Christopher Yoder for defendant-appellee.

Southern Coalition for Social Justice, by Ian A. Mance and Ivy A. Johnson, for The Beloved Community Center of Greensboro, amicus curiae.

MARTIN, Chief Justice.

During a traffic stop, Officer H.B. Harris of the Greensboro Police Department found cocaine in defendant's coat pocket. Defendant did not move to suppress evidence of the cocaine before or at trial, but instead argued for the first time on appeal that the seizure of the cocaine resulted from various Fourth Amendment violations. We hold that defendant's Fourth Amendment claims are not reviewable on direct appeal, even for plain error, because he completely waived them by not moving to suppress evidence of the cocaine before or at trial. We therefore reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for additional proceedings.

Officer Harris pulled defendant over after a DMV records check indicated that the license plate number for the car that he was driving had been revoked due to unpaid insurance premiums. At the time of the traffic stop, Derick Sutton, the car's owner, was in the passenger's seat. After a brief conversation, Officer Harris asked Sutton and then defendant to step out of the car. Both men complied.

The parties dispute exactly what happened next, including whether defendant consented to be searched. But they do not dispute that Officer Harris ultimately searched defendant. When Officer Harris checked defendant's coat pocket, he found a bag of white powder that was later confirmed to be cocaine and presented as Exhibit 1 at trial. Officer Harris was wearing a body camera that was recording video footage during this traffic stop.

Defendant did not move in limine to suppress evidence of the cocaine, even when the trial court specifically asked if there were pretrial matters to address. Nor did defendant object to the State's use of the cocaine evidence at any point *during* his trial, either when Officer Harris testified about finding cocaine in his pocket or when the cocaine itself was introduced as evidence. Defendant argued to the Court of Appeals that the trial court "plainly erred" by "admitting the cocaine and testimony about the cocaine," and that the seizure of the cocaine resulted from various Fourth Amendment violations. Defendant also argued that his trial counsel was ineffective for not moving to suppress evidence of the cocaine.

Although the Court of Appeals acknowledged that "footage from an officer's body camera may not reveal the totality of the circumstances," *State v. Miller*, ___ N.C. App. ___, ___ n.1, 795 S.E.2d 374, 376 n.1 (2016), it nonetheless considered the evidence that was presented at trial, including Officer Harris' body camera footage, and conducted plain error review, *see id.* at ___, 795 S.E.2d at 376-79. The Court of Appeals determined that Officer Harris unconstitutionally extended the traffic stop and that, even if Officer Harris had not unlawfully extended the stop, defendant's consent to the search of his person was not valid. *Id.* at ___, 795 S.E.2d at 378-79. In the course of its analysis, the Court of Appeals made determinations about the credibility of Officer Harris' testimony. *See id.*

The Court of Appeals ultimately concluded that the trial court committed plain error by admitting evidence of the cocaine. *Id.* at ___, 795 S.E.2d at 376-79. Because the Court of Appeals ordered a new trial based on defendant's Fourth Amendment claims, it did not reach defendant's ineffective assistance of counsel claim. *Id.* at ___, 795 S.E.2d at 379. The State petitioned this Court for discretionary review of two issues: whether defendant's Fourth Amendment claims were susceptible to plain error review and, if so, whether the Court of Appeals correctly found plain error. We allowed review of both issues.

This Court adopted plain error review in *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). As a general rule, "plain error review is available in criminal appeals for challenges to jury instructions and evidentiary issues." *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (citations omitted) (first citing *Odom*, 307 N.C. at 660, 300 S.E.2d at 378; and then citing *State v. Cummings*, 352 N.C. 600, 613, 536 S.E.2d 36, 47 (2000), *cert. denied*, 532 U.S. 997, 121 S. Ct. 1660 (2001)). Even after adopting plain error review, however, we have continued to indicate that the failure to move

to suppress evidence when required by statute constitutes a waiver of those claims on appeal. *See*, *e.g.*, *State v. Hucks*, 332 N.C. 650, 652-53, 422 S.E.2d 711, 713 (1992); *State v. Maccia*, 311 N.C. 222, 227-28, 316 S.E.2d 241, 244 (1984). But we have not squarely addressed whether plain error review is available when a defendant has not moved to suppress. *See*, *e.g.*, *State v. Walters*, 357 N.C. 68, 85, 588 S.E.2d 344, 354, *cert. denied*, 540 U.S. 971, 124 S. Ct. 442 (2003). This issue is therefore one of first impression for this Court.

For guidance, we first turn to the statutory framework that governs the suppression of unlawfully obtained evidence in our trial courts. N.C.G.S. § 15A-974(a)(1) states that, "[u]pon timely motion, evidence must be suppressed if . . . [i]ts exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina." And N.C.G.S. § 15A-979(d) specifies that "[a] motion to suppress evidence made pursuant to this Article is the *exclusive* method of challenging the admissibility of evidence" on constitutional grounds. (Emphasis added.) A defendant generally "may move to suppress evidence only prior to trial," N.C.G.S. § 15A-975(a) (2017), subject to a few, narrow exceptions that permit a defendant to move during trial, *see id.* § 15A-975(b), (c) (2017).

In other words, the governing statutory framework requires a defendant to move to suppress at *some* point during the proceedings of his criminal trial. Whether he moves to suppress before trial or instead moves to suppress during trial because an exception to the pretrial motion requirement applies, a defendant cannot move to suppress for the first time *after* trial. By raising his Fourth Amendment arguments for the first time on appeal, however, that is effectively what defendant has done here. When a defendant files a motion to suppress before or at trial in a manner that is consistent with N.C.G.S. § 15A-975, that motion gives rise to a suppression hearing and hence to an evidentiary record pertaining to that defendant's suppression arguments. But when a defendant, such as defendant here, does *not* file a motion to suppress at the trial court stage, the evidentiary record pertaining to his suppression arguments has not been fully developed, and may not have been developed at all.

To find plain error, an appellate court must determine that an error occurred at trial. *See*, *e.g.*, *State v. Towe*, 366 N.C. 56, 62, 732 S.E.2d 564, 568 (2012). The defendant, additionally, must demonstrate that the error was "fundamental"—meaning that the error "had a probable impact on the jury's finding that the defendant was guilty" and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings."

State v. Grice, 367 N.C. 753, 764, 767 S.E.2d 312, 320-21 (alteration in original) (quoting *State v. Lawrence*, 365 N.C. 506, 518-19, 723 S.E.2d 326, 334-35 (2012)), *cert. denied*, 576 U.S. ___, 135 S. Ct. 2846 (2015). But here, considering the incomplete record and the nature of defendant's claims, our appellate courts cannot conduct appellate review to determine whether the Fourth Amendment required suppression. Defendant asked the Court of Appeals to review the length of an officer's stop to determine whether the officer unnecessarily prolonged it, and to review whether defendant voluntarily consented to a search that resulted in the discovery of incriminating evidence. Fact-intensive Fourth Amendment claims like these require an evidentiary record developed at a suppression hearing. Without a fully developed record, an appellate court simply lacks the information necessary to assess the merits of a defendant's plain error arguments.

When a defendant does not move to suppress, moreover, the State does not get the opportunity to develop a record pertaining to the defendant's Fourth Amendment claims. Developing a record is one of the main purposes of a suppression hearing. At a suppression hearing, both the defendant and the State can proffer testimony and any other admissible evidence that they deem relevant to the trial court's suppression determination. In this case, though, the trial court did not conduct a suppression hearing because defendant never moved to suppress evidence of the cocaine. And because no suppression hearing took place, we do not know whether the State would have produced additional evidence at a suppression hearing, or, if the State had done so, what that evidence would have been. *Cf. Cardinale v. Louisiana*, 394 U.S. 437, 439, 89 S. Ct. 1161, 1163 (1969) ("Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind."). To allow plain error review in a case like this one, therefore, "would 'penalize the [g]overnment for failing to introduce evidence on probable cause for arrest [or other matters bearing on the Fourth Amendment claim] when defendant's failure to raise an objection before or during trial seemed to make such a showing unnecessary.' " 6 Wayne R. LaFave, *Search and Seizure* § 11.7(e), at 584 (5th ed. 2012) (alteration in original) (quoting *United States v. Meadows*, 523 F.2d 365, 368 (5th Cir. 1975), *cert. denied*, 424 U.S. 970, 96 S. Ct. 1469 (1976)).

The Court of Appeals' decision in this case illustrates the problem with conducting plain error review on an incomplete record. Relying primarily on *Rodriguez v. United States*, 575 U.S. ___, 135 S. Ct. 1609 (2015), the Court of Appeals held that Officer Harris unconstitutionally

prolonged the traffic stop in question beyond the time needed to complete the stop's mission. *See Miller*, ___ N.C. App. at ___, 795 S.E.2d at 377-79. The Court of Appeals reviewed Officer Harris' body camera footage and then determined that Officer Harris did not have reasonable suspicion to extend the stop when he asked defendant and Sutton to get out of Sutton's car. *See id.* at ___, 795 S.E.2d at 378. To have reasonable suspicion, "an officer . . . must 'reasonably . . . conclude in light of his experience that criminal activity may be afoot,' " *State v. Bullock*, 370 N.C. 256, 258, 805 S.E.2d 671, 674 (2017) (ellipsis in original) (quoting *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884 (1968)), based on "specific and articulable facts" and "rational inferences from those facts," *id.* (quoting *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880). But Officer Harris never testified at a suppression hearing in this case. As a result, he never gave testimony for the purpose of establishing that, among other things, he had reasonable suspicion to extend the stop. He may have observed something during the traffic stop that was not captured in his body camera footage and that he did not testify about during the guilt/innocence phase of the trial. If he had testified, his testimony may have provided a basis—assuming for the sake of argument that he did not have one otherwise—for constitutionally extending the traffic stop. We just do not know, because no suppression hearing occurred.

If the Court of Appeals or this Court were to conduct plain error review of a suppression issue on an undeveloped record when resolution of that issue required a *developed* record, moreover, a defendant could unfairly use plain error review to his tactical advantage. For instance, a defendant might determine that his chances of winning a motion to suppress before or at trial are minimal because he thinks that, once all of the facts come out, he will likely lose. But if we were to allow plain error review when no motion to suppress is filed and hence no record is created, that same defendant might wait to raise a Fourth Amendment issue until appeal and take advantage of the undeveloped record—a record in which some or all of the important facts may never have been adduced—to claim plain error. *Cf. United States v. Chavez–Valencia*, 116 F.3d 127, 132 (5th Cir.) ("If, at trial, the government assumes that a defendant will not seek to suppress certain evidence, the government may justifiably conclude that it need not introduce the quality or quantity of evidence needed otherwise to prevail."), *cert. denied*, 522 U.S. 926, 118 S. Ct. 325 (1997).

And the State would not have a good way of defending against this tactic. On the one hand, the State could try to present evidence at trial in an attempt to prove the legality of a search or seizure even when the

defendant did not move to suppress evidence derived from the search or seizure. But if the evidence pertinent to suppression were not relevant to the question of the defendant's guilt, then the State could be thwarted by rules that prohibit the admission of evidence not relevant to issues at trial. *See, e.g.*, N.C. R. Evid. 402. And even if the State were permitted to introduce the full range of evidence that pertained to suppression, it would have to expend prosecutorial resources presenting evidence not directly relevant to a defendant's guilt—evidence that supported only the legality of a search or seizure that the defendant may or may not later challenge on appeal. On the other hand, if the State chose not to present evidence supporting an unchallenged search or seizure, it could risk reversal on an undeveloped record under the plain error standard. *Cf. Wainwright v. Sykes*, 433 U.S. 72, 86-91, 97 S. Ct. 2497, 2506-09 (1977) (using a similar rationale to explain why the lack of a contemporaneous objection required under state law creates a procedural bar to federal habeas review). If a defendant must move to suppress to keep from forfeiting even plain error review, however, the incentive for a defendant to underhandedly put the State in this position disappears.

Defendant fails to distinguish between cases like his, on the one hand, and cases in which a defendant has moved to suppress and both sides have fully litigated the suppression issue at the trial court stage, on the other. When a case falls into the latter category but the suppression issue is not preserved for some other reason, our appellate courts may still conduct plain error review. For example, in *State v. Grice*, the defendant moved to suppress evidence of marijuana plants, and the trial court held a suppression hearing on whether the plants had been obtained through an illegal search or seizure. *See* 367 N.C. at 754-55, 764, 767 S.E.2d at 314-15, 320. We conducted plain error review, rather than harmless error review, only because the defendant did not renew his objection to the introduction of the evidence at trial. *Id.* at 755, 764, 767 S.E.2d at 315, 320.

Similarly, in *State v. Bullock*, the defendant moved to suppress evidence of heroin found in the car that he was driving, and his Fourth Amendment claim was fully litigated at the trial court stage. *See* 370 N.C. at 256-57, 805 S.E.2d at 673. So there was a complete record on the suppression issue for our appellate courts to review. *See id.* at 258-61, 805 S.E.2d at 674-76. We thus reviewed video footage from the dash cam of the officer who had stopped the defendant, along with suppression hearing testimony from that same officer, to determine whether the trial court's findings of fact were supported by competent evidence. *See id.* at 260-61, 805 S.E.2d at 675-76. In a few instances, we also used facts that

we independently gleaned from our review of that video footage in our legal analysis to clarify and supplement the trial court's findings of fact. *See id.* at 261-63, 805 S.E.2d at 676-77. In other words, we used video footage for limited purposes after a suppression hearing had occurred and a full evidentiary record had been compiled. That is very different from using video footage to *substitute* for a suppression hearing and an evidentiary record, and making determinations about witness credibility in the process, which is what the Court of Appeals did here.

In sum, because defendant did not file a motion to suppress evidence of the cocaine in question, he deprived our appellate courts of the record needed to conduct plain error review. By doing so, he completely waived appellate review of his Fourth Amendment claims. Because we hold that the Court of Appeals should not have conducted plain error review in the first place, we do not need to address (and, based on our analysis, it would not be possible for us to address) the other issue before us—namely, whether the Court of Appeals reached the right conclusion in its plain error analysis. We therefore reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for consideration of defendant's ineffective assistance of counsel claim.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA
v.
MARVIN EVERETTE MILLER, JR.

No. 217PA17

Filed 8 June 2018

Constitutional Law—Confrontation Clause—statements made by deceased victim—ongoing emergency—nontestimonial

Where the trial court admitted, through the testimony of a police officer, statements made by the murder victim approximately nine months before the murder during a domestic dispute with defendant (her estranged husband), the Court of Appeals erred by holding that admission of the statements violated the Confrontation Clause of the U.S. Constitution. The statements were nontestimonial. They occurred during the course of an ongoing emergency that resulted from defendant entering the victim's apartment, detaining her there, and physically assaulting her; and they led to the officer's decision to

enter the apartment to ensure that defendant had left and no longer posed a threat to the victim.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 801 S.E.2d 696 (2017), vacating judgments entered on 8 April 2016 by Judge Edwin G. Wilson, Jr., in Superior Court, Guilford County, and remanding for further proceedings. On 17 August 2017, the Supreme Court allowed defendant's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 13 March 2018.

Joshua H. Stein, Attorney General, by David J. Adinolfi II, Special Deputy Attorney General, for the State-appellant/appellee.

Mark Montgomery for defendant-appellee/appellant.

ERVIN, Justice.

The issue before this Court in this case is whether the Court of Appeals erred by vacating the judgments entered by the trial court based upon defendant, Marvin Everette Miller, Jr.'s convictions for first-degree murder and attempted first-degree murder on the grounds that certain evidence had been admitted in violation of defendant's constitutional right to confront the State's witnesses against him. After careful consideration of the record in light of the applicable law, we reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for consideration of defendant's remaining challenges to the trial court's judgments.

On 31 August 2013, Lakeshia Wells and her boyfriend, Marcus Robinson, celebrated Ms. Wells's birthday with family and friends at the Shriners nightclub in Greensboro. At some point after 2:00 a.m. on 1 September 2013, Ms. Wells and Mr. Robinson returned to Ms. Wells's apartment on Bulla Street. After the couple entered Ms. Wells's bedroom and had sexual intercourse, Ms. Wells told Mr. Robinson that she had heard something and asked Mr. Robinson to investigate the source of the noise. Upon determining that nothing was amiss on the lower floor of the apartment, Mr. Robinson returned to the upper floor, where he saw an individual, whom he later identified as defendant, standing in the hallway holding a knife.[1]

1. Investigating officers found blood and other items containing defendant's DNA in Ms. Wells's apartment during the course of the ensuing investigation.

After being seen by Mr. Robinson, defendant, who was Ms. Wells's estranged husband, entered Ms. Wells's bedroom, where an altercation occurred. As Mr. Robinson ran back downstairs in order to retrieve his cell phone and car keys, he was followed by defendant,[2] who cut Mr. Robinson's face before Mr. Robinson escaped through the back door while wearing only a tank top. Once he managed to get outside of Ms. Wells's apartment, Mr. Robinson called the police. Following the arrival of investigating officers, Mr. Robinson was transported to the hospital, where he was treated for his injuries.

Detective Benjamin Mitchell of the Greensboro Police Department responded to a call regarding a stabbing at a Bulla Street address at 3:28 a.m. on 1 September 2013. Upon encountering Mr. Robinson, Officer Mitchell learned that someone had broken into Ms. Wells's apartment, that the intruder had begun stabbing the occupants, and that investigating officers needed to check on Ms. Wells, who was apparently still inside the apartment. As he entered the apartment, Officer Mitchell did not observe any signs of a forcible intrusion; however, he did determine that "some type of disturbance had occurred in the kitchen." For that reason, Officer Mitchell and other investigating officers began to search the apartment for both intruders and Ms. Wells. Upon making his way to the second floor, Officer Mitchell discovered the dead body of Ms. Wells at the top of the stairs.

On 10 December 2012, approximately nine months before Ms. Wells was killed, Officer E.R. Kato of the Greensboro Police Department responded to a call at Ms. Wells's Bulla Street apartment relating to a domestic dispute. According to Officer Kato, Ms. Wells stated that she had been held in her apartment against her will for a period of two hours by her estranged husband. Although Officer Kato did not recall having observed any signs that Ms. Wells had sustained a physical injury, he noticed a tear and stress marks in the cotton shirt that Ms. Wells was wearing. At that point, Officer Kato accompanied Ms. Wells to her apartment and checked the premises to make sure that defendant had not remained at that location. Subsequently, defendant was charged with and convicted of domestic criminal trespass.

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2. Although defendant admitted that he had entered Ms. Wells's apartment and that he had stabbed Mr. Robinson, he claimed to have believed that Ms. Wells would be out of town, expressed surprise that Mr. Robinson was present in Ms. Wells's apartment, stated that he was enraged that both Ms. Wells and Mr. Robinson were naked, and asserted that Ms. Wells was "fine when [he] left."

On 4 November 2013, the Guilford County grand jury returned bills of indictment charging defendant with first-degree burglary, attempted first-degree murder, and first-degree murder. The charges against defendant came on for trial before the trial court and a jury at the 4 April 2016 criminal session of the Superior Court, Guilford County. On 8 April 2016, the jury returned verdicts acquitting defendant of first-degree burglary and first-degree murder on the basis of malice, premeditation, and deliberation and convicting defendant of attempted first-degree murder and first-degree murder on the basis of the felony murder rule using either first-degree burglary, attempted murder, or assault with a deadly weapon inflicting serious injury as the predicate felony. Based upon the jury's verdicts, the trial court arrested judgment in the case in which defendant had been convicted of attempted first-degree murder and entered a judgment sentencing defendant to a term of life imprisonment without the possibility of parole based upon defendant's first-degree murder conviction. 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 overruling his confrontation-based objection to the introduction of Officer Kato's testimony concerning the statements that Ms. Wells made to him on 10 December 2012. According to defendant, the statements that Ms. Wells had made to Officer Kato were testimonial in nature given the absence of any ongoing emergency at the time those statements were made, citing *State v. Bodden*, 190 N.C. App. 505, 514, 661 S.E.2d 23, 28 (2008) (explaining that "[s]tatements are testimonial when circumstances objectively indicate there is no ongoing emergency and the primary purpose of the interrogation is to establish or prove past events that will be relevant later in a criminal prosecution"), *appeal dismissed and disc. rev. denied*, 363 N.C. 131, 675 S.E.2d 660, *cert. denied*, 558 U.S. 865, 130 S. Ct. 175, 175 L. Ed. 2d 111 (2009). In addition, defendant argued that the forfeiture doctrine did not extinguish defendant's confrontation rights given the absence of any evidence tending to show that defendant had killed Ms. Wells for the purpose of preventing her from testifying about the domestic criminal trespass case that resulted from the 10 December 2012 incident, citing *Giles v. California*, 554 U.S. 353, 361, 128 S. Ct. 2678, 2684, 171 L. Ed. 2d 488, 497 (2008) (explaining "that unconfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying"). Finally, defendant asserted that the trial court had erred by failing to make findings of fact or conclusions of law in support of its decision to overrule

his objection to the challenged portion of Officer Kato's testimony, (citing *State v. Silva*, 304 N.C. 122, 136, 282 S.E.2d 449, 457-58 (1981)).[3]

The State, on the other hand, argued that Officer Kato's testimony concerning the statements that Ms. Wells made at the time of the 10 December 2012 incident stemmed from an informal conversation that occurred during an ongoing emergency arising from a domestic dispute between defendant and Ms. Wells, citing *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 2273-74, 165 L. Ed. 2d 224, 237 (2006) (explaining that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency" and "are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution"). According to the State, the nontestimonial nature of the challenged statements was established by Officer Kato's observations concerning the damage to Ms. Wells's clothing and Officer Kato's decision to "clear" Ms. Wells's apartment. In the State's view, a reviewing court must consider the degree of "informality of the situation and the interrogation" in deciding whether to treat challenged extra-judicial statements as either testimonial or nontestimonial, quoting *Michigan v. Bryant*, 562 U.S. 344, 377, 131 S. Ct. 1143, 1166, 179 L. Ed. 2d 93, 109 (2011), with the statements at issue in this case being informal rather than formal. Moreover, even if the statements that Ms. Wells made to Officer Kato were testimonial rather than nontestimonial in nature, defendant had previously had an opportunity to cross-examine Ms. Wells concerning those statements when the 10 December 2012 domestic criminal trespass charge came on for trial, citing *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374, 158 L. Ed. 2d 177, 203 (2004) (explaining that, "[w]here testimonial evidence is at issue," "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination"). Finally, the State contends that defendant had forfeited his right to confront Ms. Wells by wrongfully killing her, citing

3. In addition, defendant argued before the Court of Appeals that (1) the trial court had erred or committed plain error by instructing the jury that it should only consider the issue of his guilt of voluntary manslaughter in the event that it found defendant not guilty of either first-degree or second-degree murder and (2) that the trial court had erred by denying defendant's request for the delivery of an instruction defining the concept of a killing in the heat of passion in a situation involving spousal infidelity. As a result of its acceptance of defendant's confrontation-based claim, the Court of Appeals did not reach either of these instructional issues.

United States v. Jackson, 706 F.3d 264, 269 (4th Cir.) (explaining that "defendants might be tempted to murder, injure, or intimidate witnesses before trial and then invoke their constitutional right to confrontation to ensure that those witnesses' statements are never heard in court"), *cert. denied*, 569 U.S. 1024, 133 S. Ct. 2782, 186 L. Ed. 2d 229 (2013), with "[d]efendant's clear intent to prevent Ms. Wells from testifying at any subsequent case [being inferable] from defendant's action of fatally stabbing her in the heart."

After noting that defendant had properly preserved this issue purposes of appellate review, *State. Miller*, ___ N.C. App. ___, ___, 801 S.E.2d 696, 698 (2017), the Court of Appeals pointed out that "[t]he Confrontation Clause of the Sixth Amendment bars admission of testimonial statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness," *id.* at __, 801 S.E.2d at 698 (citing *Bodden*, 190 N.C. App. at 513, 661 S.E.2d at 28). According to the Court of Appeals, the statements that Ms. Wells made to Officer Kato on 10 December 2012 were testimonial in nature because "there was no immediate threat or ongoing emergency when the officer spoke to [Ms.] Wells" given that Ms. Wells had reached a safe location by the time that she called for assistance. *Id.* at __, 801 S.E.2d at 698 (citing *State v. Lewis*, 361 N.C. 541, 547, 648 S.E.2d 824, 828-29 (2007)). In addition, the Court of Appeals concluded that the questions that Officer Kato posed to Ms. Wells "were focused on 'what happened' rather than 'what is happening.' " *Id.* at __, 801 S.E.2d at 698 (quoting *Lewis*, 361 N.C. at 547, 648 S.E.2d at 829). The Court of Appeals rejected the State's contention that defendant had "had an opportunity to cross-examine [Ms.] Wells on these issues at an earlier trial for criminal domestic trespass," reasoning that it had no way to know if Ms. Wells "actually gave this testimony at the earlier trial because the record does not contain any transcripts or evidence from that proceeding," *id.* at ___, 801 S.E.2d at 699, and held that defendant had not forfeited his right to confront Ms. Wells despite having killed her on the theory that "forfeiture [by wrongdoing] applies 'only when the defendant engaged in conduct *designed* to prevent the witness from testifying,' " with the record being devoid of any indication that defendant killed Ms. Wells for that purpose. *Id.* at __, 801 S.E.2d at 699 (quoting *Giles*, 554 U.S. at 359, 128 S. Ct. at 2683, 171 L. Ed. 2d at 496-98). Finally, the Court of Appeals held that the State's failure to argue that the admission of the challenged statements constituted harmless error precluded it from determining that the admission of Officer Kato's testimony concerning Ms. Wells's statements was non-prejudicial. Nonetheless, the Court of Appeals observed that, in light of the presence

of overwhelming evidence of defendant's guilt, the disputed testimony "almost certainly played little if any role in the jury's decision to convict." *Id.* at ___, 801 S.E.2d at 700 (first citing N.C.G.S. § 15A-1443(b) (2017); then citing *State v. Bell*, 359 N.C. 1, 36, 603 S.E.2d 93, 116 (2004), *cert. denied*, 544 U.S. 1052, 125 S. Ct. 2299, 161 L. Ed. 2d 1094 (2005)). As a result, the Court of Appeals vacated the trial court's judgments and remanded this case to the Superior Court, Guilford County for further proceedings. *Id.* at ___, 801 S.E.2d at 700. We granted requests by both the State and defendant for discretionary review.

In seeking to persuade us to overturn the Court of Appeals' decision with respect to the admissibility of the challenged portion of Officer Kato's testimony, the State argues that the Court of Appeals erred by overlooking evidence that Ms. Wells's statements were made during an "ongoing emergency" that rendered those statements nontestimonial in nature. According to the State, a reviewing court must ascertain whether challenged evidence is testimonial or nontestimonial by determining "the primary purpose of the interrogation," quoting *Bryant*, 562 U.S. at 359, 131 S. Ct. at 1156, 179 L. Ed. 2d at 107, with the "primary purpose" inquiry to be focused upon (1) whether the witness "was speaking about events as they were actually happening, rather than describ[ing] past events"; (2) whether a reasonable person, similarly situated to the witness, would have believed that the declarant was "facing an ongoing emergency"; (3) whether "the nature of what was asked and answered" "was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn . . . what had happened in the past"; and (4) the level of formality at which the questioning was conducted, quoting *Davis*, 547 U.S. at 827, 126 S. Ct. at 2276-77, 165 L. Ed. 2d at 240 (internal quotation marks omitted). In the State's view, a reasonable person would conclude that Officer Kato's questions to Ms. Wells were intended to ascertain defendant's current location and whether defendant posed a continuing threat to Ms. Wells on the theory that Officer Kato questioned Ms. Wells in an informal manner in the street adjacent to her apartment and then in her apartment, rather than in a police station, citing, *inter alia*, *Bell*, 359 N.C. 1, 603 S.E.2d 93. According to the State, at the time that Ms. Wells made the challenged statements to Officer Kato, neither participant in the conversation knew defendant's location; the danger that Ms. Wells faced had not obviously abated; and Ms. Wells was engaged in "the provision of information enabling officers immediately to end a threatening situation," quoting *Lewis*, 361 N.C. at 548, 648 S.E.2d at 829. Next, the State contends that the Court of Appeals' requirement that defendant have actually cross-examined Ms. Wells as a precondition for the admission of

the challenged statements reflects an overly restrictive understanding of the relevant confrontation-related jurisprudence, with an opportunity to cross-examine the absent witness being all that is required by the relevant decisions of the United States Supreme Court and this Court, first citing *Bell*, 359 N.C. at 34-35, 603 S.E.2d at 116 (providing that "the Confrontation Clause bars out-of-court testimony by a witness unless the witness was unavailable and the defendant had a prior opportunity to cross-examine him, regardless of whether the trial court deems the statements reliable"); then citing *Crawford*, 541 U.S. at 68, 124 S. Ct. at 1374, 158 L. Ed. 2d at 203 (providing, as we have already noted, that, "[w]here testimonial evidence is at issue," "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination"). As a result of the fact that Ms. Wells was present at defendant's domestic criminal trespass trial and was listed as a witness on defendant's arrest warrant, defendant had an opportunity to cross-examine Ms. Wells. Finally, the State contends that nothing in North Carolina law requires the State to make specific reference to "harmless error" in its appellate brief in order to obtain a finding of harmlessness, citing N.C.G.S. § 15A-1443(b) (2017) (providing that "[t]he burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless"). In view of the fact that "the presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt," quoting *State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988) (citing *State v. Brown*, 306 N.C. 151, 293 S.E.2d 569, *cert. denied*, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982)), and the fact that the Court of Appeals acknowledged that the record contained overwhelming evidence of defendant's guilt, citing *Miller*, ___ N.C. App. at ___, 801 S.E.2d at 700, the Court of Appeals erred by failing to find that any error that the trial court might have committed by admitting the challenged portion of Officer Kato's testimony was non-prejudicial.

On the other hand, defendant argues that the Court of Appeals correctly found that the admission of Officer Kato's testimony concerning the statements that Ms. Wells made at the time of the 10 December 2012 domestic disturbance violated his confrontation rights. According to defendant, there was no ongoing emergency at the time that Ms. Wells made the challenged statements to Officer Kato. More specifically, defendant contends that, even though a statement that defendant was in Ms. Wells's apartment without permission would involve an ongoing event, her assertion that defendant had assaulted her and held her in her apartment involuntarily referred exclusively to past events that had no bearing upon Officer Kato's subsequent actions. In addition, defendant

contends that the Court of Appeals correctly determined that defendant had not had an opportunity to cross-examine Ms. Wells at defendant's domestic criminal trespass trial given the absence of any evidence that defendant had actually questioned Ms. Wells on that occasion. Finally, defendant argues that appellate courts regularly default defendants for failing to properly argue prejudice or plain error and that the State should be held to the same standard. Even if the Court elects to reach the harmless error issue, defendant contends that the evidence of his guilt of first-degree murder, as compared to voluntary manslaughter, was not overwhelming. As a result, defendant argues that the erroneous admission of Officer Kato's testimony concerning Ms. Wells's extrajudicial statements at the time of the 10 December 2012 domestic disturbance cannot be deemed harmless beyond a reasonable doubt.

Pursuant to the Sixth Amendment to the United States Constitution and Article I, Section 23 of the Constitution of North Carolina, "a criminal defendant has the right to confront witnesses against him." *State v. Ray*, 336 N.C. 463, 468, 444 S.E.2d 918, 922 (1994). "The Confrontation Clause prohibits the 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.' " *State v. McKiver*, 369 N.C. 652, 655, 799 S.E.2d 851, 854 (2017) (quoting *Crawford*, 541 U.S. at 53-54, 124 S. Ct. at 1365, 158 L. Ed. 2d at 194 (2004)). "The Confrontation Clause does not, however, apply to nontestimonial statements." *Id.* at 655, 799 S.E. at 854 (citing *Whorton v. Bockting*, 549 U.S. 406, 420, 127 S. Ct. 1173, 1183, 167 L. Ed. 2d 1, 13 (2007)). As a result of the fact that " '[t]estimony' . . . is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact,' " *Crawford*, 541 U.S. at 51, 124 S. Ct. at 1364, 158 L. Ed. 2d at 192 (third alteration in original) (quoting 2 N. Webster, An American Dictionary of the English Language (1828)), " 'testimonial' statements" typically include "*ex parte* in-court testimony or its functional equivalent . . . such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; " 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions' "; and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," *id.* at 51-52, 124 S. Ct. at 1364, 158 L. Ed. 2d at 193 (second ellipses in original) (quoting *White v. Illinois*, 502 U.S. 346, 365, 112 S. Ct. 736, 747, 116 L. Ed. 2d 848, 865 (1992) (Thomas & Scalia, JJ., concurring in part and concurring in the judgment)). "Statements taken

by police officers in the course of interrogations are also testimonial under even a narrow standard." *Id.* at 52, 124 S. Ct. at 1364, 158 L. Ed. 2d at 193.

In *Davis v. Washington*, the United States Supreme Court clarified "which police interrogations produce testimony," 547 U.S. at 822, 126 S. Ct. at 2273, 165 L. Ed. 2d at 237, explaining that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency," *id.* at 822, 126 S. Ct. at 2273, 165 L. Ed. 2d at 237. On the other hand, statements "are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution," *id.* at 822, 126 S. Ct. at 2273-74, 165 L. Ed. 2d at 237. For that reason, "interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator" are testimonial. *Id.* at 826, 126 S. Ct. at 2276, 165 L. Ed. 2d at 240. In order to determine whether a particular statement is testimonial or nontestimonial in nature, the reviewing court must ascertain "the primary purpose of the interrogation." *Bryant*, 562 U.S. at 359, 131 S. Ct. at 1156, 179 L. Ed. 2d at 107 (2011) (quoting *Davis*, 547 U.S. at 822, 126 S. Ct. at 2273-74, 165 L. Ed. 2d at 237).

The United States Supreme Court noted that the extrajudicial statement at issue in *Davis* was made by a declarant who "was speaking about events *as they were actually happening*, rather than 'describ[ing] past events,' " *id.* at 827, 126 S. Ct. at 2276, 165 L. Ed. 2d at 240 (brackets in original) (quoting *Lilly v. Virginia*, 527 U.S. 116, 137, 119 S. Ct. 1887, 1990, 144 L. Ed. 2d 117, 135(1999) (plurality opinion)), while the declarant in *Crawford* was describing events that occurred hours before the challenged statements were made. In addition, the questions posed to the declarant in *Davis* were clearly intended to "elicit[ ] statements" necessary "*to resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past." *Id.* at 827, 126 S. Ct. at 2276, 165 L. Ed. 2d at 240. Finally, the declarant whose statements were at issue in *Crawford* "was responding calmly, at the station house, to a series of questions, with the officer-interrogator taping and making notes of [the declarant's] answers," while the declarant whose statements were at issue in *Davis* provided "frantic answers . . . over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe." *Id.* at 827, 126 S. Ct. at 2277, 165 L. Ed. 2d at 240. According to the United States Supreme

Court, the extrajudicial statements at issue in *Crawford* were testimonial, while the extrajudicial statements at issue in *Davis* were not.

As we have previously noted, Officer Kato testified that he responded to a domestic dispute at Ms. Wells's address on 10 December 2012 and made initial contact with Ms. Wells at an unspecified location outside of her apartment. At that time, Ms. Wells told Officer Kato that she "was met by her . . . estranged husband, at approximately 12:00, 12:30, in her apartment, that he entered through an unlocked door, and that she was kept there against her will for a period of two hours." According to Officer Kato, Ms. Wells stated that, during this two-hour period, she and her estranged husband "argued" to such an extent that "[t]he argument became heated at one point," that the argument "escalated to a physical struggle as well," and that, "after [the argument] had deescalated to no longer being physical, she was able to exit the apartment and leave the area in her vehicle." After receiving this information from Ms. Wells, Officer Kato, accompanied by Ms. Wells, "entered the apartment to be sure that [defendant] was not still there, and checked the area." After discovering that defendant no longer occupied Ms. Wells's apartment, Officer Kato obtained a warrant for defendant's arrest charging him with criminal domestic trespass.

A careful review of the challenged portion of Officer Kato's testimony satisfies us that the statements that he described Ms. Wells as having made at the time of the 10 December 2012 domestic disturbance were nontestimonial, rather than testimonial, in nature.[4] As we understand the record, Ms. Wells made the challenged statements during the course of an ongoing emergency caused by defendant's entry into her apartment and defendant's decision to both detain Ms. Wells at that location and to physically assault her. Although Ms. Wells did describe certain events that had occurred before Officer Kato's arrival outside her apartment, the information that Ms. Wells provided to Officer Kato led to Officer Kato's decision to enter the apartment to ensure that defendant, whose current location was unknown, had departed and no longer posed a threat to Ms. Wells's safety. In light of that fact, the extrajudicial statements that Ms. Wells made to Officer Kato served more than

4. Although defendant asserts that the trial court also erred by failing to make findings and conclusions explaining the basis for its decision to overrule defendant's confrontation-based objection to the admission of Officer Kato's testimony concerning the extrajudicial statements that Ms. Wells made to him on 10 December 2012, he has not cited any authority requiring a trial court to make such findings and conclusions relating to an issue similar to the one before us in this case, and we know of none.

an information-gathering purpose. In addition, the discussion between Officer Kato and Ms. Wells was clearly informal and took place in an environment that cannot be reasonably described as "tranquil," *see Davis*, 547 U.S. at 827, 126 S. Ct. at 2276-77, 165 L. Ed. 2d at 240. Thus, the trial court did not err by overruling defendant's confrontation-based objection and allowing the admission of Officer Kato's testimony concerning the statements that Ms. Wells made to him at the time of the 10 December 2012 domestic disturbance.[5] As a result, 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 judgments.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA
v.
AHMAD JAMIL NICHOLSON

No. 319A17

Filed 8 June 2018

Search and Seizure—objective, reasonable interpretation—robbery by back seat passenger

A police officer had reasonable suspicion of criminal activity to briefly detain defendant for questioning where: (1) it was 4:00 a.m.; (2) the vehicle was stopped in the road with no turn signal on; (3) there were only two people sitting in the car, one in the driver's seat and the other directly behind him in the back seat; (4) defendant (sitting behind the driver) appeared to be pulling some sort of toboggan or ski mask down over his face until he saw the officer and pushed it back up; (5) when the officer asked whether the occupants were okay, each said yes, but the driver made a hand motion at his neck area; (6) after the officer drove into the store parking lot

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5. In view of the nontestimonial nature of the challenged statements, we need not address the validity of the Court of Appeals' determinations with respect whether defendant had an adequate opportunity to cross-examine Ms. Wells at his domestic criminal trespass trial or whether the Court of Appeals erred by refusing to find the admission of the challenged evidence concerning Ms. Wells's extrajudicial statements to have been harmless beyond a reasonable doubt.

and waited for an additional thirty seconds, the vehicle still did not move or display a turn signal; (7) after defendant got out of the car, the driver was edging forward and about to leave defendant, who he had just said was his brother, on the side of the road on a cold, wet night; (8) when the officer again asked whether everything was okay, the driver shook his head "no" while defendant said everything was fine; and (9) after the officer confronted defendant with the fact that the driver had shaken his head "no," the driver quickly stated that everything was okay. The Court of Appeals erroneously placed undue weight on the officer's subjective interpretation of the facts rather than focusing on how an objective, reasonable officer would view them.

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. ___, 805 S.E.2d 348 (2017), finding prejudicial error after appeal from a judgment entered on 13 May 2016 by Judge John O. Craig III in Superior Court, Forsyth County, and granting defendant a new trial. Heard in the Supreme Court on 13 March 2018.

Joshua H. Stein, *Attorney General*, *by John R. Green*, *Jr.*, *Special Deputy Attorney General*, *for the State-appellant.*

Narendra K. Ghosh for defendant-appellee.

HUDSON, Justice.

Here we consider whether a police officer's decision to briefly detain Defendant Ahmad Jamil Nicholson for questioning was supported by a reasonable suspicion of criminal activity. Because we conclude that it was, we reverse the decision of the Court of Appeals holding otherwise and reinstate defendant's conviction.

I. FACTUAL AND PROCEDURAL BACKGROUND

While on patrol at around 4:00 a.m. on 23 December 2015, Lieutenant Damien Marotz of the Kernersville Police Department noticed a car parked on West Mountain Street in a turn lane next to a gas station. The car had its headlights on but no turn signal blinking. As Lt. Marotz pulled his marked patrol vehicle up next to the car, he saw two men inside, one in the driver's seat and the other—later identified as defendant—in the seat directly behind the driver. The windows were down despite misting rain and a temperature in the 40s. As Lt. Marotz pulled alongside, he saw

defendant pulling down a hood or "toboggan-style mask of some kind . . . with the holes in the eyes." Defendant pulled it down to the bridge of his nose but then pushed it back up when he saw Lt. Marotz.

Lt. Marotz asked the two men whether everything was okay, and they responded that it was. The driver, Quentin Chavis, explained that the man in the back seat was his brother and they had been in an argument. Chavis said that the argument was over and that everything was okay; defendant agreed, saying, "Yes, Officer, everything's fine." Sensing that something was not quite right, however, Lt. Marotz again asked the pair whether they were okay, and they nodded to indicate that they were. Then the driver moved his hand near his neck, "scratching or doing something with his hand," but Lt. Marotz was unsure what this gesture meant.

Still feeling that something was amiss, Lt. Marotz drove into the gas station parking lot to observe the situation. After watching as Chavis's car remained immobile in the turn lane for another half a minute, Lt. Marotz got out of his patrol vehicle and started on foot toward the stopped car. Defendant then stepped out, and Chavis began to edge the car forward about two feet. Lt. Marotz asked Chavis, "Where are you going? Are you going to leave your brother just out here?" Chavis responded, "No. I'm just late for work. I've got to get to work." Lt. Marotz again asked whether everything was okay, and the two men said "yes," everything was fine. Although Chavis said "yes," he shook his head "no." This gesture prompted Lt. Marotz to say to defendant, "Well, your brother here in the driver's seat is shaking his head. He's telling me everything's not fine. Is everything fine or not? Is everything good?" Chavis quickly interjected, "No, Officer, everything's fine. I've just got to get to work." After Chavis again stressed that he was going to be late for his job, Lt. Marotz told him, "Okay. Go to work."

After Chavis drove away, defendant stated to Lt. Marotz, "The store's right here. Can I just walk to the store? Please sir?" to which Lt. Marotz responded, "[H]ang tight for me just a second . . . you don't have any weapons on you do you?"[1] Defendant said that he had a knife with him that he carried for self-defense, but a frisk of his person by a backup officer who had just arrived did not reveal a weapon. After additional questioning, the officers learned defendant's identity from his ID card and told him he was "free to go."

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1. This is the point during the interaction at which the Court of Appeals assumed, without expressly deciding, that defendant was seized for Fourth Amendment purposes. *State v. Nicholson*, ___ N.C. App. ____, ___, 805 S.E.2d 348, 356.

Later that day, Chavis reported to police that defendant, who was not actually his brother, had been in the process of robbing him when Lt. Marotz pulled up. Chavis testified at trial that defendant had flagged him down while he (Chavis) was on his way to his early morning shift at FedEx and had requested a ride to the gas station. Once in the car, defendant held a knife to Chavis's throat and demanded money. Chavis handed over his debit card just before Lt. Marotz pulled up. Police later found a steak knife in the back seat of Chavis's vehicle. During a search of defendant's residence, police discovered a knife block containing steak knives that looked identical to the one found in Chavis's car, one of which was missing.

On 14 March 2016, the Forsyth County Grand Jury indicted defendant for robbery with a dangerous weapon. On 4 May 2016, defendant moved to suppress evidence obtained as a result of his seizure by Lt. Marotz, asserting that defendant had been unlawfully detained in violation of his rights under the constitutions of the United States and North Carolina.

Defendant was tried during the criminal session of Superior Court, Forsyth County, that began on 9 May 2016 before Judge John O. Craig III. At a hearing conducted that day on defendant's motion to suppress evidence related to his seizure, Lt. Marotz was the sole witness. His testimony included the facts set forth above explaining defendant's seizure on the morning of 23 December 2015. After hearing arguments from counsel, the trial court orally denied the motion to suppress without making specific findings of fact or conclusions of law. Although the trial court instructed the State to prepare an order containing findings of fact and conclusions of law, no such order can be found in the record.

The jury convicted defendant of common law robbery on 12 May 2016, and the trial court sentenced him to ten to twenty-one months of imprisonment, suspended for thirty-six months of supervised probation. Defendant appealed, and on 19 September 2017 the Court of Appeals issued a divided opinion in which it ordered a new trial after concluding that Lt. Marotz lacked reasonable suspicion to detain defendant for questioning and that the trial court committed prejudicial error by denying defendant's suppression motion. *State v. Nicholson*, ___ N.C. App. ____, ___, 805 S.E.2d 348, 358. The dissenting judge concluded that the trial court had properly denied the motion because Lt. Marotz did have reasonable suspicion that criminal activity was afoot when he seized defendant. *Id.* at ___, 805 S.E.2d at 358 (Murphy, J., dissenting). The State filed its appeal of right to this Court based on the dissent.

II. ANALYSIS

The State argues that the Court of Appeals erred in concluding that the facts established at the suppression hearing fell short of demonstrating that Lt. Marotz had a reasonable, articulable suspicion of criminal activity before he stopped defendant. Generally, 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)). In evaluating a trial court's denial of a motion to suppress when the facts are not disputed and the trial court did not make specific findings of fact either orally or in writing, we infer the findings from the trial court's decision and conduct a de novo assessment of whether those findings support the ultimate legal conclusion reached by the trial court.[2] Accordingly, we consider whether the inferred factual findings arising from the uncontested evidence presented by Lt. Marotz at the suppression hearing support the trial court's conclusion that reasonable suspicion existed to justify defendant's seizure.

As a general matter, "[b]oth the United States and North Carolina Constitutions protect against unreasonable searches and seizures." *Otto*, 366 N.C. at 136, 726 S.E.2d at 827 (citing U.S. Const. amend. IV and N.C. Const. art. I, § 20). The United States Supreme Court has long held that the Fourth Amendment permits a police officer to conduct a brief

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2. The statute governing motions to suppress evidence provides that the trial court "must set forth in the record [its] findings of facts and conclusions of law." N.C.G.S. § 15A-977(f) (2017). We have noted, however, that in some situations "[a] written determination setting forth the findings and conclusions is not necessary, but it is the better practice." *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015) (citing *State v. Oates*, 366 N.C. 264, 268, 732 S.E.2d 571, 574 (2012)). We explained in *Bartlett* that,

> [a]lthough the statute's directive is in the imperative form, only a material conflict in the evidence—one that potentially affects the outcome of the suppression motion—must be resolved by explicit factual findings that show the basis for the trial court's ruling. When there is no conflict in the evidence, the trial court's findings can be inferred from its decision. Thus, our cases require findings of fact only when there is a material conflict in the evidence and allow the trial court to make these findings either orally or in writing.

Id. at 312, 776 S.E.2d at 674 (first citing *State v. Salinas*, 366 N.C. 119, 123-24, 729 S.E.2d 63, 66 (2012); then citing *State v. Ladd*, 308 N.C. 272, 278, 302 S.E.2d 164, 168 (1983); and then citing *State v. Munsey*, 342 N.C. 882, 885, 467 S.E.2d 425, 427 (1996)).

investigatory stop of an individual based on reasonable suspicion that the individual is engaged in criminal activity. *See Terry v. Ohio*, 392 U.S. 1, 30-31, 88 S. Ct. 1868, 1884-85, 20 L. Ed. 2d 889, 911 (1968).

> The Fourth Amendment permits brief investigative stops . . . when a law enforcement officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." . . . The standard takes into account the totality of "the circumstances—the whole picture." Although a mere " 'hunch' " does not create reasonable suspicion, the level of suspicion the standard requires is "considerably less than proof of wrongdoing by a preponderance of the evidence," and "obviously less" than is necessary for probable cause.

Navarette v. California, ___ U.S. ____, ____, 134 S. Ct. 1683, 1687, 188 L. Ed. 2d 680, 686 (2014) (first quoting *United States v. Cortez*, 449 U.S. 411, 417-418, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621, 629 (1981); then quoting *id.* at 417, 101 S. Ct. at 695, 66 L. Ed. 2d at 629; then quoting *Terry*, 392 U.S. at 27, 88 S. Ct. at 1883, 20 L. Ed. 2d at 909; and then quoting *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1, 10 (1989)). As this Court has explained, "[t]he stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Watkins*, 337 N.C. 437, 441-42, 446 S.E.2d 67, 70 (1994) (citing, *inter alia*, *Terry*, 392 U.S. at 21-22, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906). "This same standard—reasonable suspicion—applies under the North Carolina Constitution." *Jackson*, 368 N.C. at 78, 772 S.E.2d at 849 (citing *Otto*, 366 N.C. at 136-37, 726 S.E.2d at 827). Therefore, when a criminal defendant files a motion to suppress challenging an investigatory stop, the trial court can deny that motion only if it concludes, after considering the totality of the circumstances known to the officer, that the officer possessed reasonable suspicion to justify the challenged seizure.

The parties here do not dispute that defendant was seized when, after Chavis drove off, defendant stated to Lt. Marotz, "The store's right here. Can I just walk to the store? Please sir?" and Lt. Marotz responded, "[H]ang tight for me just a second . . . you don't have any weapons on you do you?" As the Court of Appeals did, we assume without deciding that defendant was seized at this moment. *See Terry*, 392 U.S. at 16, 88 S. Ct. at 1877, 20 L. Ed. 2d at 903 (recognizing that a seizure can occur when an officer "restrains [a person's] freedom to walk away").

Here the State contends that the facts known to Lt. Marotz, when viewed objectively and in their totality, would lead a reasonable officer to suspect that a crime had just been committed or was in progress. The State points to the following facts, among others: (1) it was 4:00 a.m.; (2) the vehicle was stopped in the road with no turn signal on; (3) there were only two people sitting in the car, one in the driver's seat and the other directly behind him in the back seat; (4) defendant appeared to be pulling some sort of toboggan or ski mask down over his face until he saw Lt. Marotz and pushed it back up; (5) when Lt. Marotz asked whether the occupants were okay, each said yes, but Chavis made a hand motion at his neck area; (6) after Lt. Marotz drove into the store parking lot and waited for an additional thirty seconds, the vehicle still did not move or display a turn signal; (7) after defendant got out of the car, Chavis was edging forward and about to leave defendant, who he had just said was his brother, on the side of the road on a cold, wet night; (8) when Lt. Marotz again asked whether everything was okay, Chavis shook his head "no" while defendant said everything was fine; and (9) after Lt. Marotz confronted defendant with the fact that Chavis shook his head "no," Chavis quickly stated that everything was okay. All of this occurred before defendant stated that he wished to go into the store and Lt. Marotz stopped him to inquire about weapons.

We agree with the State that these circumstances established a reasonable, articulable suspicion that criminal activity was afoot. These facts strongly suggest that Chavis had been under threat from defendant, as well as the possibility that defendant was in the process of robbing Chavis. As we have recently explained,

> the reasonable suspicion standard does not require an officer actually to witness a violation of the law before making a stop. . . . *Terry* stops are conducted not only to investigate past crime but also to halt potentially ongoing crime, to thwart contemplated future crime, and . . . to protect the public from potentially dangerous activity.

State v. Heien, 366 N.C. 271, 279, 737 S.E.2d 351, 356-57 (2012) (citations omitted), *aff'd*, ___ U.S. ___, 35 S. Ct. 530, 190 L. Ed. 2d 475 (2014). Assessments of reasonable suspicion are often fact intensive, and courts must always view facts offered to support reasonable suspicion in their totality rather than in isolation. *See United States v. Arvizu*, 534 U.S. 266, 274, 122 S. Ct. 744, 751, 151 L. Ed. 2d 740, 750 (2002) ("Although each of the series of acts was 'perhaps innocent in itself,' . . . taken together, they 'warranted further investigation.' " (quoting *Terry*, 392 U.S. at 22, 88 S. Ct. at 1880-81, 20 L. Ed. 2d at 907)); *State v. Williams*, 366 N.C. 110,

117, 726 S.E.2d 161, 167 (2012) ("Viewed individually and in isolation, any of these facts might not support a reasonable suspicion of criminal activity. But viewed as a whole by a trained law enforcement officer . . . , the responses were sufficient to provoke a reasonable articulable suspicion that criminal activity was afoot . . . .").

Here, while each of the above-listed facts might not establish reasonable suspicion when viewed in isolation, when considered in their totality they could lead a reasonable officer to suspect that he had just happened upon a robbery in progress. When viewing all the facts together, innocent explanations for the events that Lt. Marotz observed seem much less likely than this scenario. If indeed these were two brothers, why would they be seated one in front of the other like a taxi or rideshare driver and customer might sit, and why would one brother leave the other on the side of the road in the middle of a cold, wet night after an argument had ended? And if everything had been resolved, why would Chavis silently shake his head "no" when asked whether everything was fine? Add to these questions defendant's suspicious behavior involving the toboggan or ski mask[3] and it is clear that reasonable suspicion existed to briefly detain defendant for questioning.[4]

We also agree with the State that the Court of Appeals majority placed undue weight on Lt. Marotz's subjective interpretation of the facts rather than focusing on how an objective, reasonable officer would have

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3. We are not persuaded by defendant's suggestion that Lt. Marotz's uncertainty during cross-examination about whether defendant's headgear actually had eyeholes is dispositive to the present analysis. The suspicious fact—just one among other suspicious indicia—was that defendant was pulling something down over his face and abruptly pushed it back up when he saw a police officer.

4. We find the drug cases from other jurisdictions cited by defendant unpersuasive because they are not factually analogous or otherwise helpful to his case. The broader point defendant appears to make is, as the United States Court of Appeals for the Fourth Circuit put it, a

> concern about the inclination of the Government toward using whatever facts are present, no matter how innocent, as indicia of suspicious activity. . . . [A]n officer and the Government must do more than simply label a behavior as "suspicious" to make it so. The Government must also be able to either articulate why a particular behavior is suspicious or logically demonstrate, given the surrounding circumstances, that the behavior is likely to be indicative of some more sinister activity than may appear at first glance.

United States v. Foster, 634 F.3d 243, 248 (4th Cir. 2011). We are satisfied that the State *is* able to articulate why the set of circumstances and behaviors here was suspicious and "likely to be indicative of some more sinister activity than may appear at first glance." *Id.*

viewed them. During cross-examination at the suppression hearing, the following exchange occurred in which defendant's counsel questioned Lt. Marotz about why he stopped defendant after permitting Chavis to leave the scene:

> Q. So you were continuing to question [defendant] about an incident that you had already released one of the parties to?
>
> A. That's correct.
>
> Q. *And you, at that point, had no evidence of any criminal activity that you were able to objectively point to. Correct?*
>
> A. *No. That's why I was continuing to investigate.*
>
> Q. So you were looking to see if you could find anything, but you hadn't yet seen anything?
>
> A. That's correct. I wanted to make sure that both your client and also the alleged victim were safe and that nothing had happened to either one of them.

(Emphases added.) The Court of Appeals majority concluded that this exchange "confirmed [Lt. Marotz] had no evidence of any criminal activity to which he could objectively point." *Nicholson*, ___ N.C. App. at ___, 805 S.E.2d at 356 (majority opinion).

It is well established, however, that "[a]n action is 'reasonable' under the Fourth Amendment, *regardless of the individual officer's state of mind*, 'as long as the circumstances, viewed *objectively*, justify [the] action.' " *Brigham City v. Stuart*, 547 U.S. 398, 404, 126 S. Ct. 1943, 1948, 164 L. Ed. 2d 650, 658 (2006) (brackets in original and first emphasis added) (quoting *Scott v. United States*, 436 U.S. 128, 138, 98 S. Ct. 1717, 1723, 56 L. Ed. 2d 168, 178 (1978) (second emphasis added)); *see also Ashcroft v. al–Kidd*, 563 U.S. 731, 736, 131 S. Ct. 2074, 2080, 179 L. Ed. 2d 1149, 1155-56 (2011) ("Fourth Amendment reasonableness 'is predominantly an objective inquiry.' We ask whether 'the circumstances, viewed objectively, [justify the challenged] action.' If so, that action was reasonable '*whatever* the subjective intent' motivating the relevant officials." (first quoting *City of Indianapolis v. Edmond*, 531 U.S. 32, 47, 121 S. Ct. 447, 457, 148 L. Ed. 2d 333, 347 (2000); then quoting *Scott*, 436 U.S. at 138, 98 S. Ct. at 1723, 56 L. Ed. 2d at 178 (bracketed language added); and then quoting *Whren v. United States*, 517 U.S. 806, 814, 116 S. Ct. 1769, 1775, 135 L. Ed. 2d 89, 98 (1996))); *Terry*, 392 U.S. at 21-22, 88 S.

Ct. at 1880, 20 L. Ed. 2d at 906 ("[It] is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?").

We have highlighted this principle in several of our decisions. For instance, in *State v. Bone*, 354 N.C. 1, 550 S.E.2d 482 (2001), *cert. denied*, 535 U.S. 940, 122 S. Ct. 1323, 152 L. Ed. 2d 231 (2002), we considered whether an officer had probable cause to arrest a defendant despite the fact that the officer stated during the suppression hearing that he did not think he had probable cause to make the arrest. *Id.* at 10, 550 S.E.2d at 488. We explained that the officer's "subjective opinion is not material. Nor are the courts bound by an officer's mistaken legal conclusion as to the existence or non-existence of probable cause or *reasonable* grounds for his actions. The search or seizure is valid when the objective facts known to the officer meet the standard required." *Id.* at 10, 550 S.E.2d at 488 (quoting *State v. Peck*, 305 N.C. 734, 741, 291 S.E.2d 637, 641-42 (1982)); *see also State v. Riggs*, 328 N.C. 213, 218-19, 400 S.E.2d 429, 432-33 (1991) (concluding that an officer's subjective belief that an informant whose tip he used to establish probable cause for a search warrant did not meet the legal definition of a "reliable" informant "does not control" given that "the defendants' rights 'are governed by the law, rather than by the officers' misunderstanding of it' " (quoting *State v. Coffey*, 65 N.C. App. 751, 758, 310 S.E.2d 123, 128 (1984))). Accordingly, we do not consider Lt. Marotz's subjective analysis of the facts as probative of whether those facts—viewed objectively—satisfy the reasonable suspicion standard necessary to support defendant's seizure.

In a related argument, defendant contends that the Court of Appeals correctly concluded that the facts did not establish reasonable suspicion "in light of the fact Lt. Marotz already questioned both Defendant and Chavis twice and subsequently released Chavis so he could go to work after he assessed the situation and concluded '[i]t was a heated argument between two brothers.' " *Nicholson*, ___ N.C. App. at ___, 805 S.E.2d at 356. That is, defendant argues that Lt. Marotz had determined, based upon Chavis's and defendant's responses to his questions, that there was no criminal activity afoot. But again, the Court of Appeals majority and defendant focus on Lt. Marotz's subjective state of mind rather than conducting an objective inquiry. Whatever personal perspective Lt. Marotz provided on cross-examination about the stop, the facts support a reasonable inference that, rather than a recent squabble between brothers, something more sinister had been unfolding when he arrived on the scene. Moreover, a reasonable officer is not required to

accept at face value statements made during an investigation, especially in light of the other suspicious circumstances present here.

As the United State States Supreme Court has observed,

> [t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response.

Adams v. Williams, 407 U.S. 143, 145-46, 92 S. Ct. 1921, 1923, 32 L. Ed. 2d 612, 616-17 (1972) (citing *Terry*, 392 U.S. at 23, 88 S. Ct. at 1881, 20 L. Ed. 2d at 907). Lt. Marotz adopted such an approach here. Rather than shrugging his shoulders when he came upon a concerning situation, he did good police work. He saw signs—some subtle, some more overt—that something was amiss, and he investigated appropriately. We will not fault the State for the officer's subjective characterizations of the facts at the suppression hearing when, as a legal matter, the undisputed facts establish reasonable suspicion necessary to justify defendant's seizure.

III. CONCLUSION

For the foregoing reasons, we reverse the decision of the Court of Appeals and instruct that court to reinstate the judgment entered by the trial court on 13 May 2016.

REVERSED.

STATE v. RODRIGUEZ

[371 N.C. 295 (2018)]

STATE OF NORTH CAROLINA
v.
JUAN CARLOS RODRIGUEZ

No. 302A14

Filed 8 June 2018

1. Jury—selection—death penalty—intellectually disabled person

In a capital prosecution for first-degree murder, the limitations that the trial court placed upon the ability of defendant's trial counsel to question prospective jurors concerning intellectual disability issues did not constitute an abuse of discretion or render the trial fundamentally unfair. Defendant was allowed explain that intellectual disability is a defense to the death penalty and ask prospective jurors about their experience with intellectual disabilities and their ability to follow the trial court's instruction.

2. Homicide—first-degree murder—identity—sufficiency

The trial court did not err by denying defendant's motion to dismiss a first-degree murder charge for insufficient evidence of defendant's identity. The evidence contained ample support for the State's contention that defendant caused the victim's death and permitted the inference that defendant acted with premeditation and deliberation.

3. Evidence—expert witness—prior testimony for defense in another case

In a prosecution for kidnapping, rape, and murder in which the defense of intellectual disability was raised, the trial court did not err by allowing the State to elicit evidence that its expert had previously testified for a criminal defense client in another case. The testimony was relevant to the witness's lack of bias, and it could not be said that the testimony constituted impermissible prosecutorial vouching for the witness's credibility.

4. Criminal Law—intellectual disability defense—motion to set aside verdict

The trial court did not abuse its discretion by failing to set aside the jury's verdict on intellectual disability in a prosecution for kidnapping, rape, and murder. Although defendant presented evidence to support a determination that he should be deemed exempt from the death penalty on the grounds of intellectual disability, the State

presented expert testimony that supported the verdict. The relative credibility of the testimony of the various expert witnesses was a matter for the jury.

5. Sentencing—capital—mitigating circumstance—mental or emotional disturbance—intellectual disability

The trial court erred in a capital sentencing proceeding by not submitting the mitigating circumstance of defendant's impaired capacity to appreciate the criminality of his conduct. The trial court has no discretion in determining whether to submit a mitigating circumstance when substantial evidence is submitted supporting the circumstance and the issue does not hinge on whether the defendant was under the influence of a mental or emotional disturbance at the time of the killing. In this case, the record contained ample evidence supporting the admission of the circumstance.

Chief Justice MARTIN dissenting.

Justice NEWBY joins in this dissenting opinion.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge R. Stuart Albright on 21 March 2014 in Superior Court, Forsyth County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court on 10 October 2016. Following the initial oral argument, this case was reargued on 9 October 2017.

Josh H. Stein, Attorney General, by Mary Carla Babb and Kimberly N. Callahan, Assistant Attorneys General, for the State.

Glenn Gerding, Appellate Defender, by Barbara S. Blackman, John F. Carella, and Kathryn L. VandenBerg, Assistant Appellate Defenders, for defendant-appellant.

ERVIN, Justice.

Defendant Juan Carlos Rodriguez was convicted of the first-degree murder of his estranged wife, Maria Magdelana Rodriguez, and sentenced to death. After careful consideration of defendant's challenges to his convictions and sentence in light of the record and the applicable law, we find no error in the proceedings leading to defendant's

conviction and the jury's rejection of his intellectual disability defense.[1] On the other hand, we conclude that the trial court erred by failing, acting *ex mero motu*, to submit the statutory mitigating circumstance enumerated in N.C.G.S. § 15A-2000(f)(6) ("[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired") to the jury at defendant's capital sentencing hearing. As a result, we vacate defendant's death sentence and remand this case to the Superior Court, Forsyth County, for a new capital sentencing hearing.

I. Factual Background

A. Substantive Facts

1. State's Evidence

Defendant and Ms. Rodriguez became emotionally involved with each other in late 1992. The couple married when Ms. Rodriguez was thirteen years old and defendant was sixteen or seventeen years old and had their first child when Ms. Rodriguez was fourteen years old. Unfortunately, defendant became physically and emotionally abusive towards Ms. Rodriguez following their marriage. This pattern of domestic violence continued after the couple came to the United States.

On 11 October 2010, Ms. Rodriguez entered a domestic violence shelter with her three children because she could "no longer live with [her] husband" and did not "have anywhere else to go." At the time that she entered the shelter, Ms. Rodriguez noted on an intake form that defendant had threatened to kill her, controlled most of her daily activities, and was violently jealous of her. Although Ms. Rodriguez left the shelter on 19 October 2010, she returned on 29 October to retrieve certain medications that she had left at that location. During the 29 October visit to the domestic violence shelter, Ms. Rodriguez seemed "happy" and "optimistic" and told shelter personnel that, while she was "doing well" and while Mr. Rodriguez "ha[d] not tried to move back in," "she [wa]s struggling to find employment" and "need[ed] assistance with food." On the other hand, Ms. Rodriguez told her friend, Merlyn Rodriguez, on 17 November 2010, that she was afraid of defendant; that he had "told her that if they didn't get back together, he would kill her"; and that "he could get rid of her and just throw her in the river."

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1. Although the statutory provisions in effect at the time of defendant's trial spoke in terms of "mental retardation," this opinion will use the currently applicable nomenclature of "intellectual disability" in lieu of the earlier statutory expression.

On 18 November 2010, defendant came to the couple's former apartment, which was located at 1828 Trellis Lane in Winston-Salem and in which Ms. Rodriguez and the children had resided following the couple's separation, and asked Ms. Rodriguez to speak with him privately in the master bedroom. After a few minutes, the Rodriguez children, who were listening to music in the living room, heard Ms. Rodriguez cry for help. Santos Estela Rodriguez, one of the couple's children, attempted to open the door to the master bedroom but found that it was locked.[2] After failing to gain access to the master bedroom by using a knife, Santos Estela Rodriguez told defendant that she was going to call the police. Shortly thereafter, defendant emerged from the master bedroom with blood on his knuckles, feet, and clothes. As soon as Santos Estela Rodriguez entered the master bedroom and "saw her mother on the floor" "breathing really hard," defendant stated that Ms. Rodriguez had hurt herself on the furniture and that he was taking Ms. Rodriguez to the hospital. After hoisting Ms. Rodriguez over his shoulder, defendant carried her to his vehicle.

Several hours later, defendant returned to 1828 Trellis Lane without Ms. Rodriguez. Upon arriving at the apartment, defendant asked the children and the son of a neighbor to help him clean the blood stained carpeting in the master bedroom. Although Santos Estela Rodriguez called all of the nearby hospitals, she was never able to locate her mother. On the following morning, 19 November 2010, defendant took the children to the home of his boss, Henry Ramirez, who lived in Eden. During the trip to Eden, Santos Estela Rodriguez observed the presence of blood in defendant's vehicle. A subsequent examination of defendant's vehicle by investigating officers revealed the presence of vomitus on the rear floorboard on the driver's side and blood on the interior of the rear driver's side door jamb, the back portion of the rear seat, a tan shirt located upon the upper portion of the rear seat, the rear floor mat on the driver's side, and the spare tire cover in the trunk.

At the time that investigating officers searched the apartment at 1828 Trellis Lane, they noticed that the premises were in disarray and that cleaning products could be found throughout the residence. "[A] large pool of blood or a large stain of what appeared to be blood [could be seen] on [the] carpet." According to another investigating officer, the carpet in the master bedroom "was discolored a pinkish color" and

2. Defendant's son, Juan Carlos Rodriquez, gave an account of the events that occurred at the 1828 Trellis Lane apartment that closely resembled that provided by Santos Estela Rodriquez.

"frayed as though it had been scrubbed." Additional blood spatter patterns could be observed in the master bedroom as well.

At about 11:30 p.m. on 18 November 2010, Merlyn Rodriguez 's sister, Zoila Rodriguez , began receiving messages from Ms. Rodriguez's phone. The messages received from Ms. Rodriguez 's phone stated that:

> Soyla, I went with my secret boyfriend to Spain. Carlos does not know. If he calls, tell him the truth and take care of the children. I met him three months ago. Cut the phone off because it doesn't work in the airport. Good-bye. I will call you from Spain. . . . I don't have a charge anymore. Good-bye. Cut the telephone off. Later, I will fix it. I will call you from there.

Although Ms. Rodriguez knew how to spell Zoila Rodriguez's name, defendant later spelled Zoila's name as "Soyla" while conversing with investigating officers.

On 19 November 2010, Merlyn Rodriguez attempted to telephone Ms. Rodriguez on several occasions. However, each of Merlyn Rodriguez's calls went unanswered. After ascertaining that Ms. Rodriguez was not in her apartment, Merlyn Rodriguez called defendant, who initially told Merlyn Rodriguez that he did not know where Ms. Rodriguez was before stating that Ms. Rodriguez had "[s]tepped out of the house that night" and "never came back" and finally telling Merlyn Rodriguez that Ms. Rodriguez had "had an accident that night" and "was at the hospital."

Following her conversation with defendant, Merlyn Rodriguez called the police. Officer L.N. Williams of the Winston-Salem Police Department responded to Merlyn Rodriguez's missing person report, entered Ms. Rodriguez's apartment, and determined that she was not there. At that point, Officer Williams obtained defendant's phone number from Merlyn Rodriguez and called defendant for the purpose of inquiring into Ms. Rodriguez's whereabouts. Defendant told Officer Williams that Ms. Rodriguez had gone for a walk and did not return. After ascertaining that Ms. Rodriguez was not at work or at a local shelter and that the Rodriguez children were not in school, investigating officers began treating this matter as a high-risk missing person's case.

Defendant spent the night of 19 November 2010 with his pastor, David Agueda, in Martinsville, Virginia. On the following morning, while leading Saturday services, Pastor Agueda learned that investigating officers were looking for defendant and Ms. Rodriguez. Upon obtaining this information, Pastor Agueda advised defendant to turn himself in.

At approximately 7:00 p.m. on 19 November 2010, Lieutenant Steven Tollie of the Winston-Salem Police Department reclassified the case as a homicide and assigned it to Detective Stanley Nieves. After investigating officers located defendant on 21 November 2010, he was taken to Eden to be interviewed by Detective Nieves. In response to Detective Nieves's request that he describe the events that had occurred on 18 November 2010 at the 1828 Trellis Lane apartment, defendant stated that Ms. Rodriguez had told him that she was a lesbian and no longer wanted to be with him, that Ms. Rodriguez had hit her head against the dresser while lunging at him, and that Ms. Rodriguez had called for help after falling to the floor. At that point, defendant assisted Ms. Rodriguez in her efforts to get up, carried her to his car, and began to drive her to the hospital. As he did so, Ms. Rodriguez told defendant to stop, left the vehicle, and walked out of defendant's sight. Although Detective Nieves repeatedly accused defendant of having killed Ms. Rodriguez and having knowledge of the location at which Ms. Rodriguez's body could be found, defendant repeatedly denied Detective Nieves's accusations.

On the afternoon of 12 December 2010, which was a "very cold, damp" day featuring light snow and misty rain, investigating officers received a report that a decapitated body had been discovered in an area near 5020 Williamsburg Road in Winston-Salem that was "overgrown with small bushy pines" about "40 to 50 feet to the west of the asphalt area." Fingerprint information obtained from the body established that it was that of Ms. Rodriguez. On 29 May 2013, a human skull, later determined to be that of Ms. Rodriguez through the use of DNA analysis, was found in a wooded area near Belews Lake in rural Forsyth County.

According to Patrick Lantz, M.D., who autopsied the body, Ms. Rodriguez was in the early stages of decomposition at the time that her body was discovered. Dr. Lantz observed "maggot activity around the incision on the skin," incision marks around her clavicle, and a number of bruises all over her body characteristic of defensive wounds." Dr. Lantz opined that "the cause of death was manual strangulation," that Ms. Rodriguez had been decapitated after her death, and that, while there was "not exactly" "a scientific way to determine a postmortem interval," he believed, based upon information that he had received from investigating officers concerning the date upon which Ms. Rodriguez had last been seen alive and the observations that he had made during the autopsy and at the location at which the body had been discovered, that Ms. Rodriguez had died on 18 November 2010 and that the postmortem interval "was consistent with her being out there for three and a half weeks, or 24 days."

2. Defendant's Evidence

Although she acknowledged that a forensic pathologist would be better qualified than she was to make such a determination, Dr. Ann Ross, a forensic anthropologist, concluded that Ms. Rodriguez 's abdominal area showed no signs of greening, which appears early in the putrefaction process. In addition, Dr. Ross believed that the crime scene and autopsy photographs suggested that Ms. Rodriguez "was still in the fresh state" of decomposition at the time that her body was found given the absence of significant marbling or maggot masses. According to Dr. Ross, "the remains of the decedent were in a fresh state" and had "not been out in the environmental conditions before December 1." Similarly, Thomas L. Bennett, M.D., a forensic pathologist, was of the opinion that "the most probable time frame" "is that [Ms.] Rodriguez was dead between three and seven days or so prior to her body being found on December 12th."

B. Intellectual Disability

1. Defendant's Life History

Defendant was born on 11 November 1974 in the Usulutan Department of El Salvador. Defendant and his family left the Usulutan Department "somewhere between 1979 and 1982" "because of the guerillas, who were the leftist fighters in the civil war in El Salvador." Defendant's family ultimately settled in Anchila, a location that was believed to be safe, when defendant was a child. However, the guerillas "began to occupy the area across the river from Anchila" after the Rodriguez family arrived at that location.

The Rodriguez home in Anchila was a "one-room hut[ ] with dirt floors. The walls were made out of sticks and mud." Although the roof was made out of "grass or tin," "there[was] no solid wall" or "security to speak of." "[D]uring the rainy season, the floods would flood through the house," exposing the family "to all kinds of bacteria, viruses, decaying animals, [and] human waste" from a nearby outhouse.

While in Anchila, defendant "didn't have access to medical care," did not "attend school of any kind," and experienced "[c]hronic hunger [as] a way of life." Upon reaching the age of nine, defendant was sent to live with an aunt in San Salvador, which was considered to be safer and to have less fighting than Anchila. While in San Salvador, defendant began to receive medical care and entered the first grade. After successfully completing the first grade while failing the second grade, defendant returned to Anchila to help his family and repeat the second grade when he was eleven or twelve years old.

At the time that defendant returned to Anchila, "the civil war was very much raging around the family." Defendant heard "shooting at night and [remembered] the family being on the floor in terror." "It was not uncommon for [the family] to see dead bodies along the way when they were walking to school" and to "hear bomb[s] blasting[ ] and shooting." When defendant was sixteen years old, his older brother, Jose Fermin, was killed by guerillas after joining the army. Defendant was responsible for retrieving his brother's body and bringing it to the family home. While he was still sixteen and in the seventh grade, defendant dropped out of school.

After Jose Fermin's death and defendant's marriage to Ms. Rodriguez, defendant relocated to the United States. Upon arriving in this country, defendant was granted asylum on the grounds that he had been "threatened by the guerillas" and was "[l]iving in constant fear" and received authorization to work. Although defendant's son, Fermin, remained in El Salvador with defendant's father, Ms. Rodriguez joined defendant in the United States, where the couple had three more children, Santos Estela, Juan Carlos, Jr., and Jonathan.

2. Expert Testimony

a. Defendant's Evidence

Dr. Selena Sermeno, an expert in the field of clinical psychology who specializes in issues involving El Salvadoran young people, testified that the "protective and risk factors" present in a child's life, coupled with "the presence of chronic violence and trauma and adversity" and "[f]actors such as poverty, malnutrition, poor health, falls, exposure to trauma, any form of traumatic event, [and] the presence of fear," affect the child's intellectual capabilities. According to Dr. Sermeno, the civil war that occurred in El Salvador during defendant's adolescence had a significant negative effect upon his cognitive development. Among other things, Dr. Sermeno observed that defendant's memory and communication skills were impaired, which is "a very classic symptom in children who are traumatized to that degree." Defendant struggled "to recall information in any kind of chronological sequential or linear format," was confused by numerical concepts, and answered questions in a very literal manner. In addition, defendant's exposure to dangerous pesticides and contaminated water caused him to suffer from frequent illnesses, for which he never received proper medical care. Dr. Sermeno believed that the existence of these adverse environmental conditions had a significant effect upon defendant's intellectual development as well.

According to Dr. Sermeno, defendant suffered from post-traumatic stress disorder and a mild intellectual disability. In support of the second of these two diagnoses, Dr. Sermeno pointed to the fact that defendant scored 61 on the third edition of the Wechsler Adult Intelligence Scale (WAIS-III). In Dr. Sermeno's view, defendant had particular difficulties with functional academic learning and communication skills, with these deficiencies having manifested themselves before defendant reached the age of eighteen. In addition, Dr. Sermeno's intellectual disability diagnosis also rested upon defendant's exposure to extreme poverty, severe malnutrition, constant violence, pesticides, educational obstacles, and inadequate health care. Finally, Dr. Sermeno believed that defendant's post-traumatic stress disorder made it difficult for him to express strong emotions through verbal communication and body language.

Moira Artigues, M.D., a general and forensic psychiatrist, testified that she had evaluated defendant's "developmental history and the impact that that may have had on him, as well as . . . his affect and demeanor, his face and his manner, and to form opinions about that as well." Dr. Artigues analyzes whether a person has an intellectual disability by examining that person's "background information, in terms of poverty, malnutrition, deprivation, education resources, and medical resources," "[b]ecause lack in any of those can affect intellectual development in children." According to Dr. Artigues, severe trauma, like that associated with "growing up in a civil war, very poor, and malnourished, causes the brain to wire in a way that's not optimal, and it can certainly affect your IQ as a result of the faulty wiring." As a child in El Salvador, defendant lacked access to medical care, experienced nutritional deprivation, and had no educational stimulation until he reached the age of ten, all of which can affect an individual's brain development and contribute to the development of a low intelligence quotient. Moreover, the experience of growing up during a civil war can result in accumulated trauma over time which can, in turn, lead to the development of post-traumatic stress disorder. In Dr. Artigues's view, a child's attempts to cope "with this chronic trauma and extreme stress" can affect the child's brain development and intelligence quotient.

In Dr. Artigues's opinion, defendant was mildly intellectually disabled. In support of this assertion, Dr. Artigues considered the fact that defendant had to make six different attempts to pass his driver's license test after reaching the United States. In addition, Dr. Artiques noted that, while interviewing defendant, he failed to grasp abstract concepts and had difficulty relaying information in chronological order, both of which conditions, in Dr. Artigues's opinion, reflect the existence

of an intellectual disability. Dr. Artigues testified that defendant learned how to be a brick mason by being shown measurements marked permanently on a yardstick rather than by utilizing mathematics, with this type of learning limitation being typical of persons suffering from a mild intellectual disability. According to Dr. Artigues, intellectually disabled individuals have the ability to drive motor vehicles, work, marry, and have children. Dr. Artigues believed that defendant's intellectual disability manifested itself before he turned eighteen years of age in light of defendant's school records, intelligence quotient test scores, the results achieved during defendant's psychological evaluations, and defendant's exposure to malnutrition, severe trauma, and poverty. In Dr. Artigues's view, defendant was significantly deficient in functional academics and communication skills. Finally, Dr. Artigues determined that defendant suffered from post-traumatic stress disorder given that he had been exposed to significant trauma during his life, reported having had intrusive thoughts about the traumatic events that he had experienced, and experienced certain specific triggering events.

Dr. Antonio Puente, a clinical neuropsychologist and professor of psychology at the University of North Carolina at Wilmington, conducted a neuropsychological evaluation of defendant. Dr. Puente testified that the fact that defendant had a full scale score of 61 on the Central American, Spanish language version of the WAIS-III placed defendant in the bottom one percentile of the population. In addition, Dr. Puente administered the Beta Test, Third Edition; the Comprehensive Test of Nonverbal Intelligence, Second Edition; and the Bateria Test, Third Edition, to defendant. According to Dr. Puente, the Beta test was developed to measure the intellectual abilities of individuals who lack a formal education. Defendant had a score of 65 on the Beta Test, a result that placed him in the bottom one percent of the population. Similarly, Dr. Puente testified that defendant's full-scale score of 53 on the Comprehensive Test of Nonverbal Intelligence placed him in the bottom percentile. Although the Bateria test does not produce an intelligence quotient score, it does generate an intellectual abilities number. Defendant's intellectual abilities score placed him in the second percentile from the bottom. According to Dr. Puente, mild intellectual disability involves an intelligence quotient of between 50 and 70.

Another sign of mild intellectual disability, in Dr. Puente's view, is the presence of only some of the skills that allow an individual to function in society. Dr. Puente undertook this portion of his analysis by examining defendant's school records, driving tests, and the opinions of knowledgeable persons concerning defendant's functional capabilities.

In addition, Dr. Puente administered sixteen additional neuropsychological tests to defendant, three of which were used to assess the reliability of defendant's responses and the adequacy of defendant's efforts during the testing process. According to Dr. Puente, defendant's test results did not reflect malingering and accurately demonstrated the extent of defendant's abilities. As a result, Dr. Puente testified that defendant has significant sub-average intellectual functioning; has deficient cognitive, social, and practical skills; and is significantly impaired in the areas of functional academics and communication skills, with all of these diagnostic criteria having manifested themselves before defendant attained the age of eighteen.

b. State's Evidence

Stephen Kramer, M.D., a forensic neuropsychiatrist and professor of psychiatry at Wake Forest Baptist Medical Center, testified on behalf of the State that the El Salvadoran school system, which is much less rigorous than the United States school system, grades students on a scale from one to ten, with five being the lowest passing score. According to Dr. Kramer, most of defendant's grades were in the six to seven range, a set of results that is inconsistent with the presence of mild intellectual disability. In addition, Dr. Kramer noted that defendant could perform the chores expected of similarly aged children, another fact that suggests that defendant did not suffer from mild intellectual disability. In a similar vein, Dr. Kramer noted that defendant had been able to find employment in the United States that paid more than the minimum wage and that he had been known to "motivate" his co-workers, with these facts also being inconsistent with a contention that defendant suffers from a mild intellectual disability. According to Dr. Kramer, other activities in which defendant engaged, including the payment of taxes, the maintenance of his immigration status, and his ability to obtain a driver's license, "show[ed that defendant had] a level of adaptive functioning beyond that [expected] for the deficits requisite for a diagnosis of" intellectual disability.

Dr. Kramer testified that Detective Nieves had described defendant's Spanish as grammatically correct and that defendant had used an appropriate volume when speaking with the detective. Dr. Kramer noted that defendant had received a number of visitors since the date of his incarceration, a fact that tends to suggest that defendant has a social network and demonstrates his adaptive abilities. Dr. Kramer considered defendant's request for a Spanish-to-English dictionary, a Bible, and a Spanish textbook while in pretrial detention to indicate that defendant has the apparent ability to read and desired to engage in

that activity, with those attributes further tending to show that defendant has adaptive capabilities. On the other hand, Dr. Kramer, like Dr. Artigues, believed that defendant has difficulty understanding abstract concepts like confidentiality or privacy.

According to Dr. Kramer, Dr. Puente mischaracterized the results of defendant's Dot Counting Test, an instrument used to detect malingering, because defendant "did worse the second time he did the test and was way over the threshold for suspecting not giving full effort." Dr. Kramer noted that defendant was "overtly cooperative," had a normal mood range, spoke Spanish in a clear and distinct manner while exhibiting a regular rate and rhythm, and had no difficulty with the comprehension portion of the exam. In addition, while defendant could not identify the year, month, day of the week, or season, he was able to perform complex commands without difficulty. The fact that defendant could not name the months of the year was "astonishing" to Dr. Kramer given his belief that even a person with mild intellectual disability should be able to perform that task.

Dr. Kramer administered a variety of tests for the purpose of assessing defendant's mathematical abilities, visual and verbal memory, neurological functioning, and motor skills. According to Dr. Kramer, defendant's math skills were "horrible" and included "very bizarre" responses. While completing a "literal cancellation test," which required defendant to find all of the As on a page while subject to certain time constraints, defendant missed some As and worked very slowly, with the physical restraints to which defendant was subject and visual deficits which defendant experienced accounting for this aspect of his performance. Dr. Kramer determined that defendant has a score of less than one on the National Stressful Events Survey PTSD Short Scale Test, which indicated, according to Dr. Kramer, that the severity of defendant's reaction to stress was, at most, mild. Even so, Dr. Kramer diagnosed defendant as suffering from dysthymic disorder, which is a form of chronic depression, and post-traumatic stress disorder.

Dr. Kramer questioned whether defendant exhibited symptoms of significant sub-average intellectual functioning. Although the fact that defendant had lived in severe poverty and suffered from malnutrition might adversely affect his intelligence quotient scores, those factors do not appear to have actually impaired his intellectual capacity. In addition, Dr. Kramer testified that defendant's "school grades were not consistent with [those of] someone with mild intellectual disability." According to Dr. Kramer, defendant's only adaptive functioning deficiency involved functional academics. As a result, for all of these reasons, Dr. Kramer

disagreed with Dr. Puente's diagnosis that defendant suffered from an intellectual disability.

c. Defendant's Rebuttal Evidence

Dr. John Olley, a professor at the University of North Carolina at Chapel Hill and a psychologist at the Carolina Institute for Developmental Disabilities, testified that, since a person with an intelligence quotient of between 55 and 70 can appropriately be diagnosed as mildly intellectually disabled and since defendant had a score of 61 on the WAIS-III, his intelligence quotient falls within the mildly intellectually disabled range. In Dr. Olley's view, approximately one-third of mildly intellectually disabled persons are able to obtain a driver's license or learner's permit. Dr. Olley asserted that "a person's accomplishments" cannot "rule out" the existence of an intellectual disability given that such a "diagnosis is based on identifying deficits, not identifying strengths," and revolves around "a pattern of lifelong limitations." In addition, Dr. Olley stated that the American Association of Intellectual and Development Disabilities (AAIDD), which was formerly known as the American Association of Mental Retardation, believes that socioeconomic factors, such as malnutrition, poverty, and lack of access to early childhood education, are "causative or at least high-risk factors in the diagnosis of" intellectual disabilities. According to Dr. Olley, the AAIDD attributes intellectual disabilities to biological, behavioral, social, and educational factors, with the biological factor being present in only the more severe cases of intellectual disabilities and with the other factors contributing to less severe cases. In Dr. Olley's view, poverty can contribute to a diagnosis of intellectual disability.

3. Capital Sentencing

a. State's Evidence

According to Lieutenant Tollie, the Rodriguez children had initially been placed in foster care before going to live with Ms. Rodriguez 's father, who resides in Boston. Friends Anna and Merlyn Rodriguez described Ms. Rodriguez as a very loving and caring mother who took good care of her children and had been excited to begin a new job at McDonald's.

b. Defendant's Evidence

Defendant had not been cited for any disciplinary infractions during the period of time in which he was held in pretrial confinement. Defendant's father, Manuel Romero, who was handicapped, loves his son very much and needs his financial support. Similarly, defendant's

sister, Ana Julia Romero, testified that she loves her brother very much, that defendant denied having done anything to Ms. Rodriguez, and that Ms. Rodriguez was a very nice person who loved defendant and had been a good wife. Juan Carlos Rodriguez and Estela Santos Rodriguez expressed the desire to continue to have a relationship with their father, stated that they loved and missed him, and described Ms. Rodriguez as a loving mother.

B. Procedural History

On 2 July 2012, the Forsyth County grand jury returned a bill of indictment charging defendant with assault with a deadly weapon inflicting serious injury and first-degree kidnapping. On 16 July 2012, the Forsyth County grand jury returned superseding indictments charging defendant with first-degree murder, assault with a deadly weapon inflicting serious injury, and first-degree kidnapping. The charges against defendant came on for trial before the trial court and a jury at the 3 February 2014 criminal session of the Superior Court, Forsyth County.

On 10 March 2014, the jury returned verdicts finding defendant guilty of first-degree murder on the basis of malice, premeditation, and deliberation and the felony murder rule using first-degree kidnapping as the predicate felony, assault with a deadly weapon inflicting serious injury, and first-degree kidnapping. After accepting the jury's verdict, the trial court convened a separate proceeding for the purpose of determining whether defendant is intellectually disabled as that term is currently used in N.C.G.S. § 15A-2005. On 14 March 2014, the jury returned a verdict finding that defendant was not exempt from the imposition of the death penalty based upon intellectual disability-related grounds. On 17 March 2014, defendant unsuccessfully moved to set aside the jury verdict with respect to the intellectual disability issue. On the same day, the sentencing phase of defendant's trial commenced.

On 21 March 2014, the jury returned a verdict determining that defendant had killed Ms. Rodriguez while engaged in the commission of a first-degree kidnapping. The jury did not find as mitigating circumstances that defendant lacked a significant history of prior criminal conduct, N.C.G.S. § 15A-2000(f)(1), or that defendant had murdered Ms. Rodriguez while under the influence of a mental or emotional disturbance, *id.* § 15A-2000(f)(2). In addition, the jury rejected all proposed nonstatutory mitigating circumstances and found that no other mitigating circumstances existed, *id.* 15A-2000(f)(9). Finally, the jury found that the aggravating circumstance was sufficiently substantial to call for the imposition of the death penalty. Based upon the jury's

verdicts, the trial court arrested judgment with respect to defendant's first-degree kidnapping conviction and entered judgments sentencing defendant to death based upon his first-degree murder conviction and to a concurrent term of twenty-five to thirty-nine months imprisonment based upon his conviction for assault with a deadly weapon inflicting serious injury. Defendant noted an appeal to this Court from the trial court's judgments.[3]

II. Legal Analysis

A. Jury Selection

[1] In his initial challenge to the trial court's judgments, defendant contends that the trial court deprived him of his state and federal constitutional right to a trial by a fair and impartial jury by prohibiting his trial counsel from questioning prospective jurors concerning their ability to follow the applicable law prohibiting the imposition of the death penalty upon an intellectually disabled person. More specifically, defendant contends that "[i]t was critically important that each juror be free of any bias regarding the exemption of [intellectually disabled] offenders from capital punishment that would prevent that juror from deciding the question of [intellectual disability] based on the clinical evidence in accordance with § 15A-2005," which provides that "no defendant who is [intellectually disabled] shall be sentenced to death." N.C.G.S. § 15A-2005 (2014). According to defendant, the jurors empaneled to hear and decide this case "were not made aware until the sentencing phase that they would need to make a determination of [intellectual disability] that could take the death penalty off the table" or questioned concerning their ability to follow the law governing the extent to which an intellectually disabled person is eligible for the imposition of the death penalty in violation of defendant's Sixth Amendment right "to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried," quoting *Conners v. United States*, 158 U.S. 408, 413, 15 S. Ct. 951, 953, 39 L. Ed. 1033, 1035 (1895), and citing *Morgan v. Illinois*, 504 U.S. 719, 727, 112 S. Ct. 2222, 2228-29, 119 L. Ed. 2d 494, 502 (1992).

The State contends, on the other hand, that the trial court did not abuse its discretion during the jury selection process by sustaining the State's objection to defendant's attempts to question prospective

3. The record does not reflect that defendant filed a motion to bypass the Court of Appeals with respect to the trial court's judgment in the case in which defendant was convicted of and sentenced for assault with a deadly weapon inflicting serious injury. We grant a motion to bypass the Court of Appeals in that case on our own motion.

jurors concerning intellectual disability issues. Contrary to defendant's assertions, the trial court simply prohibited defendant from prefacing the questions that he sought to pose to prospective jurors concerning intellectual disability issues with general legal statements. In addition, the State contends that defendant was able to elicit the information that he sought to obtain by posing these questions based upon prospective jurors' answers to other questions that the trial court allowed defendant to pursue and statements that the trial court allowed defendant's trial counsel to make. Finally, the State notes that the trial court properly instructed the jury concerning the effect of a finding of intellectual disability upon the jury's ability to make a binding recommendation that defendant be sentenced to death at an appropriate point in the proceedings.

During the jury selection process, defendant's trial counsel told the trial court that defendant's "intent was to ask these jurors can they follow the law with regard to mental retardation" and that, in order to make an adequate inquiry into this subject, he would be required "to tell them a little bit about what the law is." In response, the trial judge stated that defendant would be allowed to inquire into jurors' ability to follow the applicable law and stated:

> THE COURT: Just don't give editorial comments. I certainly understand you're going to be entitled—you can preface it as, "There may be a defense or evidence of alleged mental retardation in this case. Will you be able to fairly consider it in this case?"
>
> Is that—does that not get you what you want? . . .
>
> [DEFENSE COUNSEL]: It does. What I would like to say is that North Carolina does not allow . . . . for a defendant to get the death penalty if they're mentally retarded; does anybody on the panel have any issues with that law.
>
> . . . .
>
> THE COURT: Does the State object to that line of questioning?
>
> [PROSECUTOR]: Yes, Your Honor. We object to him prefacing it with what the state of the law is until the jury is instructed. . . . Because we would contend it's going to be in dispute.

. . . .

THE COURT: When we get to the jury instructions, I'll give them the law that applies to this particular case. You're going to be entitled to ask questions about any –

[DEFENSE COUNSEL]: And mental retardation is not a mitigating circumstance that decides, yes or no, death penalty. That's the weighing part of it. I don't want the jury confused that this is just another mitigating circumstance. It's the law that they have to first decide before they even get to that [procedure.]

THE COURT: I'm not inclined –

. . . .

THE COURT: — to allow the defendant just to state general propositions of the law. You're absolutely going to be entitled to ask jurors questions, as we've already discussed, with regard to any alleged mental retardation evidence. . . .

. . . .

THE COURT: . . . You can ask them if they can follow the law that the Court will give you with regard to mental retardation and the effect it may have as to any decisions in the case. "Can you follow the law fairly and impartially that the Judge will give you with regard to the law on mental retardation?"

. . . But I've told everybody that neither attorney should question the jurors about the law except to ask whether they will follow the law as given to you by the Court.

After the prospective jurors returned to the courtroom at the conclusion of this colloquy between the trial court and counsel for the parties, defendant's trial counsel stated, without objection, that "[m]ental retardation is a defense to the death penalty" and that "[m]ental retardation is defined, among other things, as having a low IQ" and, along with the prosecutor, asked prospective jurors numerous questions related to intellectual disability issues.

"The primary goal of the jury selection process is to ensure selection of a jury comprised only of persons who will render a fair and

impartial verdict." *State v. Locklear*, 331 N.C. 239, 247, 415 S.E.2d 726, 731 (1992) (citation omitted). "Pursuant to N.C.G.S. § 15A-1214(c), counsel may question prospective jurors concerning their fitness or competency to serve as jurors to determine whether there is a basis to challenge for cause or whether to exercise a peremptory challenge." *State v. Fullwood*, 343 N.C. 725, 732, 472 S.E.2d 883, 886-87 (1996) (citing N.C.G.S. § 15A-1214(c) (1988), *cert. denied*, 520 U.S. 1122, 117 S. Ct. 1260, 137 L. Ed. 2d 339 (1997)). As part of the jury selection process, the trial court must allow counsel an opportunity "to inquire into the ability of the prospective jurors to follow the law," with "questions designed to measure prospective jurors' ability to follow the law [being] within the [proper] context of *voir dire*." *State v. Wiley*, 355 N.C. 592, 617, 565 S.E.2d 22, 40 (2002), *cert. denied*, 537 U.S. 1117, 123 S. Ct. 882, 154 L. Ed. 2d 795 (2003). On the other hand, "[t]he trial judge has broad discretion to regulate jury *voir dire*." *Fullwood*, 343 N.C. at 732, 472 S.E.2d at 887 (citing *State v. Lee*, 335 N.C. 244, 268, 439 S.E.2d 547, 559, *cert. denied*, 513 U.S. 891, 115 S. Ct. 239, 130 L. Ed. 2d 162 (1994)); *see also State v. Locklear*, 349 N.C. 118, 142, 505 S.E.2d 277, 291 (1998) (explaining that "the extent and manner of the inquiry [allowed to counsel] rests within the trial court's discretion"), *cert. denied*, 526 U.S. 1075, 119 S. Ct. 1475, 143 L. Ed. 2d 559 (1999). "In order for a defendant to show reversible error in the trial court's regulation of jury selection, a defendant must show that the court abused its discretion and that he was prejudiced thereby." *Lee*, 335 N.C. at 268, 439 S.E.2d at 559 (citations omitted). As a result, "the trial court's exercise of discretion in preventing a defendant from pursuing a relevant line of questioning" must "render[ ] the trial fundamentally unfair" in order for the defendant to be entitled to obtain relief on appeal to this Court. *Fullwood*, 343 N.C. at 732-33, 472 S.E.2d at 887 (citing, *inter alia*, *Morgan*, 504 U.S. at 730 n.5, 112 S. Ct. at 2230 n.5, 119 L. Ed. 2d at 503 n.5).

Although the trial court did inform defendant's trial counsel that they should limit their questioning of prospective jurors with respect to intellectual disability issues to inquiring whether the members of the jury "can follow the law as given to you by the Court," defendant was allowed, without any objection from the State, to explain to two different jury panels at a time when all of the prospective jurors were present that "[m]ental retardation is a defense to the death penalty." In addition, defendant's trial counsel asked prospective jurors about their prior experiences with intellectually disabled individuals, the extent of their familiarity with intelligence testing and adaptive skills functioning issues, their willingness to consider expert mental health testimony, and their willingness to follow the applicable law as embodied in the trial

court's instructions. When considered in conjunction with the fact that defendant's trial counsel was allowed to tell the prospective jurors that "[m]ental retardation is a defense to the death penalty" and the common sense understanding of a "defense" as something that precludes a finding of guilt or the imposition of a particular punishment, the questions that defendant's trial counsel were allowed to pose to prospective jurors concerning their ability to follow the law with respect to the intellectual disability issue sufficed to permit defendant's trial counsel to determine whether specific jurors could fairly consider and follow the trial court's instructions concerning the issue of whether defendant should be exempted from the imposition of the death penalty on the basis of any intellectual disabilities from which he suffered. On the other hand, the specific question that defendant sought permission to pose to prospective jurors would have done little more than elicit the prospective jurors' opinions concerning the validity of the undisputed legal principle barring the imposition of the death penalty upon intellectually disabled individuals. As a result, we do not believe that the limitations that the trial court placed upon the ability of defendant's trial counsel to question prospective jurors concerning intellectual disability issues constituted an abuse of discretion or "render[ed] the trial fundamentally unfair." *Fullwood*, 343 N.C. at 732-33, 472 S.E.2d at 887.

B. Guilt-Innocence Proceeding Issues

1. Sufficiency of the Evidence

[2] Secondly, defendant contends that the trial court erred by denying his motion to dismiss the first-degree murder charge that had been lodged against him because the State failed to present sufficient evidence to establish his identity as the perpetrator of Ms. Rodriguez's murder. In support of this contention, defendant asserts that, when a State's case is wholly dependent upon circumstantial evidence, reviewing courts examine the record evidence for "proof of motive, opportunity, capability, and identity" in order "to show that a particular person committed a particular crime," quoting *State v. Bell*, 65 N.C App. 234, 238, 309 S.E.2d 464, 467 (1983), *aff'd*, 311 N.C. 299, 316 S.E.2d 72 (1984). Although defendant acknowledges that the record contains sufficient evidence to permit a rational juror to find that he had the capability and motive to commit first-degree murder, he contends that the State failed to elicit sufficient evidence to establish the necessary opportunity and identity. More specifically, defendant points to the expert testimony contained in the record suggesting that Ms. Rodriguez died much later than 18 November 2010 and argues that "the State lacked any eyewitness testimony or physical evidence establishing where and when the

homicide occurred," with such evidence being "critical to establishing opportunity," citing *State v. Scott*, 296 N.C. 519, 522, 251 S.E.2d 414, 416-17 (1979). In response, the State contends that the evidence more than sufficed to establish that defendant murdered Ms. Rodriguez, with defendant's argument resting upon an interpretation of the evidence that is favorable to himself rather than to the State.

"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. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998) (citation omitted). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (citation omitted), *cert. denied*, 537 U.S. 1005, 123 S. Ct. 495, 154 L. Ed. 2d 403 (2002). "As to whether substantial evidence exists, the question for the trial court is not one of weight, but of the sufficiency of the evidence." *Id.* at 301, 560 S.E.2d at 781.

> The evidence is to be considered 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; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

State v. Powell, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980) (citations omitted). On the other hand, in the event that the evidence merely raises "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." *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983) (citations omitted). "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. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988).

First-degree murder "is the unlawful killing of another human being with malice and with premeditation and deliberation." *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). "Premeditation and deliberation 'are not ordinarily subject to proof by direct evidence, but must generally be proved . . . by circumstantial evidence.' " *State v. Taylor*, 337 N.C. 597, 607, 447 S.E.2d 360, 367 (1994) (alteration in original) (quoting *State v. Williams*, 308 N.C. 47, 68-69, 301 S.E.2d 335, 349, *cert. denied*,

464 U.S. 865, 104 S. Ct. 202, 78 L. Ed. 2d 177 (1983)).[4] "Circumstances tending to prove that the killing was premeditated and deliberate include, but are not limited to:

> (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill-will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner.

Id. at 607, 447 S.E.2d at 367 (quoting *Williams*, 308 N.C. at 69, 301 S.E.2d at 349); *see also State v. Trull*, 349 N.C. 428, 448, 509 S.E.2d 178, 192 (1998) (concluding that the defendant's actions in destroying evidence and attempting to cover up his involvement in the murder "permit the inference that defendant acted with premeditation and deliberation"), *cert. denied*, 528 U.S. 835, 120 S. Ct. 95, 145 L. Ed. 2d 80 (1999); *State v. Scott*, 343 N.C. 313, 341, 471 S.E.2d 605, 622 (1996) (concluding that evidence tending to show, among other things, that the "[d]efendant lied to everyone about [the decedent's] whereabouts and did not call the police or emergency medical personnel" "was sufficient to show premeditation and deliberation"); *State v. Richardson*, 328 N.C. 505, 513, 402 S.E.2d 401, 406 (1991) (concluding that evidence that the defendant strangled the victim sufficed to show premeditation and deliberation).

The evidence elicited by the State at trial tended to show that defendant had a history of abusing Ms. Rodriguez, that defendant had threatened to kill Ms. Rodriguez and to dispose of her body, that defendant violently attacked Ms. Rodriguez on 18 November 2010, that defendant was the last person to see Ms. Rodriguez alive, that defendant had been seen in the general area in which Ms. Rodriguez's body had been discovered, that defendant had attempted to clean up the location at which he assaulted Ms. Rodriguez, that defendant sent text messages from Ms. Rodriguez's phone to Merlyn Rodriguez in an attempt to establish that Ms. Rodriguez had voluntarily left the area, that Ms. Rodriguez's clothing and blood were found in defendant's vehicle, that defendant made conflicting statements concerning the circumstances surrounding

4. In February 2010, a three-judge panel of the North Carolina Innocence Commission unanimously ruled that Taylor had been wrongly convicted in 1993.

Ms. Rodriguez's disappearance to various people, and that the autopsy performed upon Ms. Rodriguez's body indicated, consistently with other evidence tending to show that blood was emanating from Ms. Rodriguez's nose as Mr. Rodriguez carried her away, that Ms. Rodriguez had aspirated blood prior to her death. Aside from the fact that the evidence contains ample support for the State's contention that defendant caused Ms. Rodriguez's death, "[t]hese facts permit the inference that defendant acted with premeditation and deliberation." *Trull*, 349 N.C. at 448, 509 S.E.2d at 192. As a result, the trial court did not err by denying defendant's motion to dismiss the first-degree murder charge for insufficiency of the evidence.

2. Admission of Evidence Concerning Dr. Kramer's Former Employment

[3] Thirdly, defendant contends that the trial court erred by allowing the State to elicit, over objection, evidence that one of defendant's trial counsel had previously hired Dr. Kramer to testify on behalf of another client. In defendant's view, "[t]he State improperly vouched for Dr. Kramer's credibility by eliciting testimony that Dr. Kramer had been hired by Robert Campbell, one of Mr. Rodriguez's attorneys, to testify on behalf of a criminal defense client in another case and in highlighting the prior employment in its closing argument," with this error having been particularly prejudicial given that the State's opposition to defendant's claim to be exempt from the imposition of the death penalty on intellectual disability grounds rested solely upon the credibility of Dr. Kramer's opinion that defendant was not intellectually disabled. In response to defendant's assertion, the State contends that the challenged testimony was relevant to the issue of Dr. Kramer's lack of bias and that the trial court did not err by allowing its admission.

When conducting a cross-examination, a prosecutor may not "inject into questions 'his own knowledge, beliefs, and personal opinions not supported by the evidence.' " *State v. Sanderson*, 336 N.C. 1, 14, 442 S.E.2d 33, 41 (1994) (quoting *State v. Britt*, 288 N.C. 699, 711, 220 S.E.2d 283, 291 (1975)); *see also State v. Phillips*, 240 N.C. 516, 527, 82 S.E.2d 762, 770 (1954) (opining that prosecuting attorneys cannot "place before the jury by argument, insinuating questions, or other means, incompetent and prejudicial matters not legally admissible in evidence"). A prosecutor does not improperly vouch for the credibility of a State's witness, or otherwise "inject" "his own knowledge, beliefs, and personal opinions" into questioning, *Sanderson*, 336 N.C. at 14, 442 S.E.2d at 41, by merely explaining why the jury should find a State's witness to be

credible. *State v. Bunning*, 338 N.C. 483, 488-89, 450 S.E.2d 462, 464 (1994). "A witness may be [questioned concerning] any matter relevant to any issue in the case, including credibility." *State v. Lewis*, 365 N.C. 488, 494, 724 S.E.2d 492, 497 (2012) (quoting N.C.G.S. § 8C-1, Rule 611(b) (2011)). "We have long held that evidence of bias is logically relevant to a witness' credibility . . . ." *Id.* at 494, 724 S.E.2d 497; *see also State v. Atkins*, 349 N.C. 62, 83, 505 S.E.2d 97, 110 (1998) (concluding that "the State appropriately attempted to illustrate a potential source of witness bias, as revealed by the expert witness's own *curriculum vitae*"), *cert. denied*, 526 U.S. 1147, 119 S. Ct. 2025, 143 L. Ed. 2d 1036 (1999). If the record at trial "reveals significant discrepancies between the diagnosis made by defendant's . . . expert and the diagnosis reached by the State's expert," "it [is] entirely proper to elicit testimony indicative of potential witness bias." *Atkins*, 349 N.C. at 83, 505 S.E.2d at 111. A prosecutor's decision to elicit evidence tending to show a lack of bias on the part of a State's witness does not constitute impermissible prosecutorial vouching. *See Bunning*, 338 N.C. at 489, 450 S.E.2d at 464 (concluding that "statements by the prosecuting attorney were more in the nature of giving reason why the jury should believe the State's evidence than that the prosecuting attorney was vouching for the credibility of the State's witnesses or for his own credibility").

As we have already noted, Dr. Kramer testified that he disagreed with Dr. Puente's determination that defendant suffers from a mild intellectual disability. In view of the "significant discrepancies between the diagnosis made by defendant's . . . expert and the diagnosis reached by the State's expert," "it [is] entirely proper to elicit testimony indicative of potential witness bias," or the lack thereof. *Atkins*, 349 N.C. at 83, 505 S.E.2d at 111. The prosecutor's decision to elicit evidence to the effect that Dr. Kramer had previously performed work for one of defendant's trial counsel did not "inject" the prosecutor's personal opinions into defendant's intellectual capabilities. On the contrary, the evidence elicited in response to the relevant prosecutorial questions tended to show a lack of bias on the part of Dr. Kramer by demonstrating that he had previously worked on behalf of both the State and criminal defendants. Although the trial court might have been better advised to have exercised its discretionary authority pursuant to N.C.G.S. § 8C-1, Rule 403, to limit the scope of the prosecutor's inquiry to whether Dr. Kramer had previously worked for counsel representing criminal defendants in general rather than specifically identifying one of defendant's trial counsel as an attorney to whom Dr. Kramer had provided expert assistance, we are unable to say, given the record before us in this case, that the challenged testimony constituted impermissible prosecutorial vouching

for Dr. Kramer's credibility or that the trial court erred by refusing to preclude the admission of the challenged testimony.

C. Intellectual Disability Proceeding

[4] Next, defendant contends that he demonstrated that he suffers from an intellectual disability by a preponderance of the evidence and that the trial court erred by denying his motion to set aside the jury's verdict in the State's favor with respect to this issue. As defendant notes, he was required to prove that he had "significantly subaverage general intellectual functioning" and "significant limitations in adaptive functioning" that "was manifested before the age of 18," quoting N.C.G.S. § 15A-2005(a)(2), by a preponderance of the evidence in order to be found to be exempt from the imposition of the death penalty upon intellectual disability grounds, citing *id.* § 15A-2005(f). Defendant claims to have satisfied his burden of proof with respect to this issue given that three of his intelligence quotient scores were below 70, that three separate expert witnesses testified that he had significant limitations in at least two of the statutorily enumerated areas of adaptive functioning, and that each of defendant's experts testified that defendant's mild intellectual disability manifested itself before he reached the age of eighteen. According to defendant, the State's expert did little more than challenge the evidence tending to show that defendant exhibited subaverage intellectual functioning as "questionable" and agreed that defendant had an adaptive deficit in the area of functional academics. In response, the State contends that a reviewing court should not disturb a jury determination with respect to the issue of intellectual disability in the event that there is any competent evidence reasonably tending to support it and that the record provided ample support for the jury's determination that defendant had failed to establish that he should be exempt from the imposition of the death penalty on intellectual disability grounds.

A trial court's ruling with respect to a motion to set aside a jury verdict "will not be disturbed on appeal absent an abuse of discretion." *State v. Batts*, 303 N.C. 155, 162, 277 S.E.2d 385, 389 (1981) (citations omitted) (upholding the denial of a motion to set aside a verdict after finding that "[t]here was sufficient evidence to warrant submission of the case to the jury and to support its verdict"). According to well-established North Carolina law, "[t]he credibility of the witnesses, the weight of the testimony, and conflicts in the evidence are matters for the jury to consider and pass upon," *State v. Alford*, 329 N.C. 755, 761, 407 S.E.2d 519, 524 (1991) (citations omitted), with the reviewing court lacking any responsibility for "pass[ing] on the credibility of witnesses or to weigh[ing] the testimony," *State v. Hanes*, 268 N.C 335, 339, 150

S.E.2d 489, 492 (1966). Defendant's assertion that we should conduct a de novo review of the trial court's decision to refrain from setting aside the jury's verdict with respect to the intellectual disability issue amounts to a request that we reweigh the evidence and make our own factual findings on appeal, a task for which an appellate court like this one is not well suited. Although defendant did present sufficient evidence to support a determination that he should be deemed exempt from the imposition of the death penalty on intellectual disability grounds, the State presented expert testimony from Dr. Kramer tending to support a contrary determination. The relative credibility of the testimony offered by the various expert witnesses concerning the nature and extent of defendant's intellectual limitations was a matter for the jury rather than for this Court, particularly given that the burden of proof with respect to the intellectual disability issue rested upon defendant. In light of the fact that the record reveals the existence of a conflict in the evidence concerning the extent to which defendant was intellectually disabled for purposes of N.C.G.S. § 15A-2005, we are unable to conclude that the trial court abused its discretion by failing to set aside the jury's verdict in the State's favor with respect to that issue.[5]

D. Capital Sentencing Proceeding

[5] Finally, defendant asserts that the trial court erred at defendant's capital sentencing proceeding by failing to instruct the jury with respect to the statutory mitigating factor enumerated in N.C.G.S. § 15A-2000(f)(6), which addresses the extent to which defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was impaired. According to defendant, the trial court must instruct the jury concerning whether a particular mitigating circumstance exists in the event that the record contains sufficient evidence to establish the

5. In his supplemental brief, defendant contends that he is entitled to relief from the trial court's intellectual disability determination on the basis of the United States Supreme Court's decision in *Moore v. Texas*, ___ U.S. ___, 137 S. Ct. 1039, 197 L. Ed. 2d 416 (2017). In support of this contention, defendant reiterates his argument, which we have already rejected, that this Court is required to undertake a de novo review of the merits of the intellectual disability issue and contends that a portion of the evidence that the State elicited and the arguments that the State advanced during the intellectual disability proceeding conflict with the logic that the United States Supreme Court utilized in *Moore*. However, given defendant's failure to bring a challenge to the admission of the challenged evidence or the making of the challenged arguments forward for our consideration and defendant's failure to contend that the trial court's intellectual disability instructions conflicted with *Moore* in any way, we are not persuaded that defendant's *Moore*-based arguments are properly before us or that *Moore* has any bearing on the intellectual disability issue that defendant has actually raised, which is whether the trial court abused its discretion by refusing to set the jury's verdict with respect to the intellectual disability issue aside.

existence of that mitigating circumstance, citing *State v. Hurst*, 360 N.C. 181, 197, 624 S.E.2d 309, 322, *cert. denied*, 549 U.S. 875, 127 S. Ct. 186, 166 L. Ed. 2d 131 (2006). According to defendant, the record contained ample evidence tending to show that that defendant's "capacity . . . to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired," quoting N.C.G.S. § 15A-2000(f)(6), with the jury being entitled to find the existence of the statutory mitigating circumstance enumerated in N.C.G.S. § 15A-2000(f)(6) "even if a defendant has capacity to know right from wrong, to know that the act he committed was wrong, and to the know the nature and quality of the act," quoting *State v. Johnson*, 298 N.C. 47, 68, 257 S.E.2d 597, 613 (1979). More specifically, defendant contends that the record contains substantial evidence tending to show that defendant is intellectually disabled and suffers from post-traumatic stress disorder or another mental condition and that defendant killed Ms. Rodriguez in the course of a marital crisis characterized by emotional turmoil. Defendant asserts that "[t]he combination of subnormal intelligence, psychological disorders, and/or a breakdown in a relationship has often been held to support submission of both the (f)(2) and the (f)(6) statutory mitigating circumstances," citing, *inter alia*, *State v. Fullwood*, 329 N.C. 233, 404 S.E.2d 842 (1991) (concluding that the record contained substantial evidence tending to show the existence of the (f)(6) statutory mitigating circumstance given that an expert psychologist had testified that defendant had limited verbal abilities and suffered from low self-esteem); *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989), *vacated*, 497 U.S. 1021, 110 S. Ct. 3266, 111 L. Ed. 2d 777 (1990), *on remand*, 328 N.C. 532, 402 S.E.2d 577 (1991) (concluding that the record contained sufficient evidence to support the submission of the (f)(6) statutory mitigating circumstance given that the defendant exhibited symptoms of paranoid schizophrenia and delusional thinking); *State v. Stokes*, 308 N.C. 634, 304 S.E.2d 184 (1983) (holding that the record contained sufficient evidence to support the submission of the (f)(6) statutory mitigating circumstance given the presence of evidence tending to show that the defendant had an intelligence quotient of 63, poor reading skills, an antisocial disorder, and a history of mental health problems).

In seeking to persuade us to reach a different result, the State argues that this Court has noted that the (f)(6) statutory mitigating circumstance

> has only been found to be supported in cases where there was evidence, expert or lay, of some mental disorder, disease, or defect, or voluntary intoxication by alcohol or

> narcotic drugs, to the degree that it affected the defendant's ability to understand and control his actions.

State v. Kemmerlin, 356 N.C. 446, 479, 481, 573 S.E.2d 870, 893, 894 (2002) (concluding the trial court did not err by failing to submit the (f)(6) statutory mitigating circumstance even though a defense mental health expert diagnosed defendant with borderline personality disorder and major depressive disorder on the grounds that the expert also testified that these conditions "did not prevent defendant from appreciating the criminality of her conduct and controlling her conduct as required by law"). Moreover, the State asserts that this Court has concluded that a defendant's conduct in the time leading up to and following the murder "may demonstrate that he was aware that his acts were criminal." *State v. Polke*, 361 N.C. 65, 72, 638 S.E.2d 189, 194 (2006), *cert. denied*, 552 U.S. 836, 128 S. Ct. 70, 169 L. Ed. 2d 55 (2007). Although the record did contain evidence tending to show that defendant has subaverage intellectual functioning, suffers from post-traumatic stress disorder and chronic depression, and was in the midst of a marital crisis, the State argues that the record was devoid of any evidence that these conditions impaired his capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law," quoting N.C.G.S. § 15A-2000(f)(6), at the time that he murdered Ms. Rodriguez. On the contrary, according to the State, the evidence concerning defendant's conduct before and after the murder of Ms. Rodriguez demonstrated defendant's awareness that "his acts were criminal," quoting *Polke*, 361 N.C. at 72, 638 S.E.2d at 194. Finally, the State contends that any error that the trial court might have committed by failing to instruct the jury concerning the (f)(6) statutory mitigating circumstance was harmless given that "any such error did not prevent any juror from considering and giving weight to the mitigating evidence," quoting *State v. Ward*, 338 N.C. 64, 113, 449 S.E.2d 709, 736-37 (1994), *cert. denied*, 514 U.S. 1134, 115 S. Ct. 2014, 131 L. Ed. 2d 1013 (1995).

According to N.C.G.S. § 15A-2000(b), a trial judge is required to instruct the jury to consider any aggravating or mitigating circumstances which have adequate evidentiary support. N.C.G.S. § 15A-2000(b) (2017). For that reason, "a trial court has no discretion in determining whether to submit a mitigating circumstance when 'substantial evidence' in support of the circumstance has been presented." *State v. Watts*, 357 N.C. 366, 377, 584 S.E.2d 740, 748 (2003) (quoting *State v. Fletcher*, 354 N.C. 455, 477, 555 S.E.2d 534, 547 (2001), *cert. denied*, 537 U.S. 846, 123 S. Ct. 184, 154 L. Ed. 2d 73 (2002)), *cert. denied*, 541 U.S. 944, 124 S. Ct. 1673, 158 L. Ed. 2d 370 (2004); *see also State v. Williams*, 350 N.C. 1, 10-11, 510

S.E.2d 626, 633 (explaining that "the trial court has no discretion" and that "the statutory mitigating circumstance must be submitted to the jury, without regard to the wishes of the State or the defendant," if the "evidence will support a rational jury finding" concerning the existence of the mitigating circumstance) (quoting *State v. Smith*, 347 N.C. 453, 469,496 S.E.2d 357, 366, *cert. denied*, 525 U.S. 845, 119 S. Ct. 113, 142 L. Ed. 2d 91 (1998)), *cert. denied*, 528 U.S. 880, 120 S. Ct. 193, 145 L. Ed. 2d 162 (1999). "The test for determining if the evidence is 'substantial evidence' " to support an instruction for a statutory mitigating circumstance, "is 'whether a juror could reasonably find that the circumstance exists based on the evidence.' " *Watts*, 357 N.C. at 377, 584 S.E.2d at 748 (quoting *Kemmerlin*, 356 N.C. at 478, 573 S.E.2d at 892 (internal quotation marks omitted)). As a result, "[e]ven if the defendant does not request the submission of the [statutory] mitigator or objects to its submission, the trial court must submit the circumstance when it is supported by sufficient evidence," *State v. Cummings*, 361 N.C. 438, 471, 648 S.E.2d 788, 808 (2007) (citations omitted), *cert. denied*, 552 U.S. 1319, 128 S. Ct. 1888, 170 L. Ed. 2d. 760 (2008), with "any reasonable doubt regarding the submission of a statutory or requested mitigating factor [to] be resolved in favor of the defendant," *State v. Phillips*, 365 N.C. 103, 146, 711 S.E.2d 122, 152 (2011) (quoting *State v. Brown*, 315 N.C. 40, 62, 337 S.E.2d 808, 825 (1985), *cert. denied*, 476 U.S. 1164, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988)), *cert. denied*, 565 U.S. 1204, 132 S. Ct. 1541, 182 L. Ed. 2d 176 (2012). In other words, the actual fact-finding decision must, under the procedures outlined in North Carolina's capital sentencing statues, be made by the jury rather than the trial or a reviewing court. "[F]ailure to submit a statutory mitigating circumstance that is supported by sufficient evidence is prejudicial error unless the State can demonstrate that the error was harmless beyond a reasonable doubt." *Hurst*, 360 N.C. at 194, 624 S.E.2d at 320 (citation omitted).

N.C.G.S. § 15A-2000(f)(6) creates a statutory mitigating circumstance applicable to situations in which "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." N.C.G.S. § 15A-2000(f)(6) (2017). The (f)(6) statutory mitigating circumstance

> may exist even if a defendant has capacity to know right from wrong, to know that the act he committed was wrong, and to know the nature and quality of that act. It would exist even under these circumstances if the defendant's capacity to appreciate (to fully comprehend or be fully

> sensible of) the criminality (wrongfulness) of his conduct was impaired (lessened or diminished), or if defendant's capacity to follow the law and refrain from engaging in the illegal conduct was likewise impaired (lessened or diminished).

Johnson, 298 N.C at 375, 259 S.E.2d at 764. Evidence, "expert or lay, of some mental disorder, disease, or defect . . . to the degree that it affected the defendant's ability to understand and control his actions" supports submission of the (f)(6) statutory mitigating circumstance. *Kemmerlin*, 356 N.C. at 479, 573 S.E.2d at 893 (quoting *State v. Syriani*, 333 N.C. 350, 395, 428 S.E.2d 118, 142-43, *cert. denied*, 510 U.S. 948, 114 S. Ct. 392, 126 L. Ed. 2d 341 (1993)). Even "[i]f the jury determines that the defendant does not have an intellectual disability as defined by [N.C.G.S. § 15A-2005], the jury may consider any evidence of intellectual disability presented during the sentencing hearing when determining aggravating or mitigating factors and the defendant's sentence." N.C.G.S. § 15A-2005(g) (2017), *see also Bobby v. Bies*, 556 U.S. 825, 829, 129 S. Ct. 2145, 2149, 173 L. Ed. 2d 1173, 1178-79 (2009) (explaining that "mental retardation for purposes of *Atkins*[*v. Virginia*], and mental retardation as one mitigator to be weighed against aggravators, are discrete issues").

In *Fullwood*, this Court found that the record contained "substantial evidence to support [the (f)(6)] statutory mitigating circumstance," including expert testimony tending to show that the defendant's intelligence was between "low normal" and "retarded," that the defendant "suffered from very low feelings of self-esteem and 'inadequate personality,' " that the defendant's "ability to understand and be understood through words was severely limited," and that the defendant was suffering from emotional anguish at the time that he committed the murder at issue in that case. 329 N.C. at 237, 404 S.E.2d at 844. Among other things, the expert witness upon whose testimony we relied in concluding that the record supported the submission of the (f)(6) statutory mitigating circumstance in *Fullwood* stated that "the stress from [the defendant's] poor relationship with his lover and child affected the defendant's limited intellectual resources to the extent that the defendant's judgment was very poor at the moment of the crime." *Id.* at 237, 404 S.E.2d at 844. Similarly, we have also stated that the record contained sufficient evidence to support the submission of the (f)(6) statutory mitigating circumstance to the jury in light of the existence of evidence concerning the defendant's "impoverished skills," "chronic substance abuse," "poor impulse control," and "diminished capacity" resulting in the defendant's "failure to understand the consequences of his actions." *State v. Hooks*,

353 N.C. 629, 641-42, 548 S.E.2d 501, 510 (2001), *cert. denied*, 534 U.S. 1155, 122S. Ct. 1126, 151 L. Ed. 2d 1018 (2002).

The issue of whether the trial court should submit the (f)(6) statutory mitigating circumstance to the jury does not hinge upon the presence or absence of evidence tending to show that the defendant "was under the influence of a mental or emotional disorder or disturbance" "at the time of the killing." *State v. Geddie*, 345 N.C. 73, 102-03, 478 S.E.2d 146, 161 (1996) (ellipses in original) (finding that "[t]he use of the word 'disturbance' in the (f)(2) circumstance shows the General Assembly intended something more . . . than mental impairment which is found in [the (f)(6)] mitigating circumstance' "), *cert. denied*, 522 U.S. 825, 118 S. Ct. 86, 139 L. Ed. 2d 43 (1997) (quoting *State v. Spruill*, 320 N.C. 688, 696, 360 S.E.2d 667, 671 (1987), *cert. denied*, 486 U.S. 1061, 108 S. Ct. 2833, 100 L. Ed. 2d 934 (1988)). For example, in *State v. Stokes*, this Court held that evidence tending to show that the defendant had a lengthy history of "mental problems," was "mildly retarded," and suffered from an "antisocial disorder," 308 N.C. at 655, 304 S.E.2d at 197, sufficed to support a jury determination "that defendant's capacity to fully comprehend the wrongfulness of his conduct was impaired or diminished" so as to require the trial court to "submit[ ] the mitigating circumstance set forth in G.S. 15A-2000(f)(6) to the sentencing jury," *id.* at 656, 304 S.E.2d at 197, even though the record also contained evidence tending to show that the defendant "was capable of distinguishing right from wrong at the time of the offenses were committed," *id.* at 654, 304 S.E.2d at 197.

The record before us in this case contains ample support for the submission of the (f)(6) statutory mitigating circumstance. As an initial matter, we note that the record contains considerable evidence tending to show that defendant suffered from an intellectual disability, with the relevant evidence including expert testimony that defendant had an average intelligence quotient score of 61, that this intelligence quotient score placed defendant in the lowest two percent of the population, that defendant's intellectual disability initially manifested itself before defendant reached the age of eighteen, and that defendant's intelligence level will remain constant throughout his life. In addition, the record contains ample evidence that defendant suffers from multiple deficiencies in adaptive functioning and that defendant's exposure to extreme poverty, severe malnutrition, constant violence, and harmful pesticides, coupled with his lack of formal education and access to meaningful health care, make it more likely that defendant suffers from an intellectual disability. As Dr. Puente noted, a defendant's diminished intellectual capabilities impair his or her reasoning capabilities. Secondly, the expert testimony

contained in the present record contains near-unanimous support for the proposition that defendant suffers from an emotional disorder, such as dysthymic disorder (chronic depression) or post-traumatic stress disorder, and that defendant killed Ms. Rodriguez during a time of marital turmoil. As this Court indicated in *State v. Greene*, 329 N.C. 771, 777, 408 S.E.2d 185, 188 (1991), "an abnormally susceptible defendant" can be motivated "to commit murder" by emotional turmoil despite the fact that "a person of normal mental and emotional stability would likely have resolved [the situation] without such disastrous results." The evidence of defendant's mental limitations and disturbed and overwrought thinking supports a rational inference that defendant's ability to fully comprehend the wrongfulness of his conduct and to conform his conduct to the requirements of the law was adversely affected at the time that he murdered Ms. Rodriguez. Thus, the evidence contained in the record developed in this case, like the evidence that this Court considered in cases such as *Stokes* and *Fullwood*, more than suffices to permit a rational juror to conclude that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law at the time that he murdered Ms. Rodgriquez was impaired, so that the trial court erred by failing to submit the (f)(6) statutory mitigating circumstance to the jury.

The State's contention that the actions in which defendant engaged following the murder of Ms. Rodriguez establish defendant's awareness that his actions were wrongful rests upon a misapprehension of the nature and effect of the relevant statutory mitigating circumstance and the standard that the trial court should utilize in determining whether a particular mitigating circumstance should be submitted to the jury. In essence, the State's argument assumes that any recognition of the wrongfulness of his conduct on defendant's part suffices to preclude the necessity for the submission of the (f)(6) statutory mitigating circumstance. Aside from the fact that this aspect of the State's argument might be understood to require us to make a factual, rather than a sufficiency of the evidence, determination, a rational juror is entitled, as this Court recognized in *Johnson*, to find the existence of the (f)(6) statutory mitigating circumstance even if the defendant knew "right from wrong," understood "the nature and quality of [the] act," and "appreciate[d] . . . the criminality" of the act at the time of the commission of the murder for which he or she is being sentenced. 298 N.C. at 375, 259 S.E.2d at 764. Although intellectually disabled and emotionally disturbed and overwrought individuals "frequently know the difference between right and wrong," "they have diminished capacities to understand and process information, to communicate, to abstract from mistakes, and learn

from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others" "[b]ecause of their impairments." *Atkins v. Virginia*, 536 U.S. 304, 318, 122 S. Ct. 2242, 2250, 153 L. Ed. 2d 335, 348 (2002). As a result, even though the record in this case certainly contains evidence tending to suggest that, at some level, defendant understood the criminality of his conduct and attempted to undertake actions that were intended to avoid the consequences of his wrongful conduct, that fact does not obviate the necessity for the submission of the (f)(6) statutory mitigating circumstance given that the relevant legal test does not treat any recognition of wrongful conduct on the part of a defendant as sufficient to support the non-submission of the statutory mitigating circumstance in question.

The State's suggestion that defendant's failure to present explicit evidence that the mental and emotional conditions from which he suffered existed and affected his conduct at the time that he murdered Ms. Rodriguez is equally misplaced. As an initial matter, we note that, while such evidence is necessary to support a finding that the statutory mitigating circumstance enumerated in N.C.G.S. § 15A-2000(f)(2) exists, the same is not true with respect to the statutory mitigating circumstance enumerated in N.C.G.S. § 15A-2000(f)(6). *See Geddie*, 345 N.C. at 102, 478 S.E.2d at 161. Aside from the fact that Dr. Puente testified that defendant's intellectual limitations adversely affected his judgment at the time that he murdered Ms. Rodriguez, the evidence tending to show that defendant's intellectual disability had manifested itself before the time that defendant turned eighteen and the evidence tending to show that defendant's post-traumatic stress disorder had its origins in the impoverished and violent circumstances surrounding his childhood provide ample support for an inference that the conditions that tend to suggest the appropriateness of submitting the (f)(6) statutory mitigating circumstance existed and affected defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law at the time that he killed his estranged wife. As a result, given that "any reasonable doubt regarding the submission of a statutory or requested mitigating factor [must] be resolved in favor of the defendant," *Phillips*, 365 N.C. at 146, 711 S.E.2d at 152 (alteration in original) (quoting *State v. Brown*, 315 N.C. at 62, 337 S.E.2d at 825), and given that this Court has never required that the record contain explicit expert or lay testimony couched in the language set out in N.C.G.S. § 15A-2000(f)(6) as a precondition for the submission of the (f)(6) statutory mitigating circumstance to the jury, we conclude that the trial court erred by failing to submit the (f)(6) statutory mitigating circumstance to the jury at defendant's capital sentencing hearing.

Finally, we are unable to hold that the trial court's failure to instruct the jury concerning the statutory mitigating circumstance enumerated in N.C.G.S. § 15A-2000(f)(6) was harmless beyond a reasonable doubt. The State's argument to the contrary notwithstanding, this Court has held that an erroneous failure to submit a statutory mitigating circumstance to the jury at a capital sentencing hearing is not cured by the submission of other statutory and non-statutory mitigating circumstances given that "[e]ach mitigating circumstance is a discrete circumstance" with "its own meaning and effect." *Greene*, 329 N.C. at 776, 408 S.E.2d at 187. For that reason, the submission of other statutory and non-statutory mitigating circumstances and the catch-all mitigating circumstance enumerated in N.C.G.S. § 15A-2000(f)(9) did not provide the jury with an adequate opportunity to consider the extensive evidence tending to show that defendant's "capacity . . . to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." In addition, given the nature and extent of the evidence contained in the present record concerning defendant's intellectual limitations, mental health diagnoses, and emotional turmoil, we are unable to conclude beyond a reasonable doubt that no juror would have found the existence of the (f)(6) statutory mitigating circumstance and given it substantial weight in the jury's ultimate decision had the (f))(6) statutory mitigating circumstance been submitted to the jury at defendant's capital sentencing hearing. As a result, defendant is entitled to a new capital sentencing hearing.[6]

III. Conclusion

Thus, for the reasons set out above, we hold that the guilt-innocence and intellectual disability proceedings conducted before the trial court were free from error and that the outcomes reached in those proceedings should remain undisturbed. We further conclude, however, that the trial court committed prejudicial error by failing to submit the statutory mitigating circumstance enumerated in N.C.G.S. § 15A-2000(f)(6) to the jury at defendant's capital sentencing hearing. As a result, defendant's death sentence is vacated and this case is remanded to the Superior Court, Forsyth County for a new capital sentencing hearing.

NO ERROR IN GUILT-INNOCENCE PROCEEDING; DEATH SENTENCE VACATED; REMANDED FOR NEW CAPITAL SENTENCING PROCEEDING.

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6. In view of our decision that defendant is entitled to a new capital sentencing hearing, we need not address defendant's remaining challenges to his death sentence.

Chief Justice MARTIN dissenting.

Defendant beat and abducted his wife, Maria Rodriguez, before strangling her to death. After defendant strangled Maria, he decapitated her and hid her head and the rest of her body in two separate places. Maria's skull was not found for two and a half years.

A Forsyth County jury unanimously sentenced defendant to death for this premeditated and deliberate murder. Rather than respecting the jury's carefully considered sentencing verdict, the majority tries mightily to apply the facts of this case to the statutory mitigating circumstance found in N.C.G.S. § 15A-2000(f)(6). In doing so, the majority overlooks the complete lack of evidence linking defendant's purported intellectual impairment, mental disorders, and marital strife to his homicidal conduct. The majority also ignores the evidence showing that defendant's actions were carefully premeditated and that he took many steps to conceal his identity as the perpetrator, evidence that would clearly prevent any reasonable juror from finding the existence of the (f)(6) mitigating circumstance. For those reasons, the majority's holding is unsupported by the relevant sentencing statute and is inconsistent with the vast majority of our decisions interpreting it. I therefore respectfully dissent.

During the sentencing phase of a capital case, the trial court must submit a statutory mitigating circumstance to the jury if the defendant has presented "substantial evidence" of that circumstance. *State v. Watts*, 357 N.C. 366, 377, 584 S.E.2d 740, 748 (2003) (quoting *State v. Fletcher*, 354 N.C. 455, 477, 555 S.E.2d 534, 547 (2001), *cert. denied*, 537 U.S. 846, 123 S. Ct. 184 (2002)), *cert. denied*, 541 U.S. 944, 124 S. Ct. 1673 (2004). Evidence of a statutory mitigating circumstance is "substantial" only if "a juror could reasonably find that the circumstance exists based on the evidence." *Id.* (quoting *State v. Kemmerlin*, 356 N.C. 446, 478, 573 S.E.2d 870, 892 (2002)). The burden of producing substantial evidence to support the submission of a mitigating circumstance rests with the defendant. *Id.*

The (f)(6) mitigating circumstance states: "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." N.C.G.S. § 15A-2000(f)(6) (2017). It therefore "embraces two types of disability, one diminishing a person's ability to appreciate the criminal nature of his conduct, and the other diminishing a person's ability to control himself." *State v. Price*, 331 N.C. 620, 630-31, 418 S.E.2d 169, 175 (1992), *judgment vacated on other grounds*, 506 U.S. 1043, 113 S. Ct. 955 (1993). But in both of these instances, a defendant must produce evidence that

his capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law *was impaired*." N.C.G.S. § 15A-2000(f)(6) (emphasis added). In other words, the (f)(6) mitigating circumstance does not encompass every instance in which a defendant presents evidence of an intellectual impairment or mental disorder. *See State v. Syriani*, 333 N.C. 350, 395, 428 S.E.2d 118, 142-43 ("[The (f)(6) mitigating] circumstance has only been found to be supported in cases where there was evidence, expert or lay, of some mental disorder, disease, or defect, . . . to *the degree that it affected the defendant's ability to understand and control his actions*." (emphasis added)), *cert. denied*, 510 U.S. 948, 114 S. Ct. 392 (1993). Instead, a defendant's intellectual impairment or mental disorder must have *actually impaired* his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law—and the burden is on the defendant to produce evidence establishing this link.

Even assuming for the sake of argument that defendant did, in fact, have an intellectual impairment, as well as two mental disorders (namely, posttraumatic stress disorder and chronic depression), and that he was experiencing marital problems with Maria at the time of the murder, the mere presence of those conditions, without more, does not require submission of the (f)(6) mitigating circumstance. *See id.* Despite the clear requirement to do so, defendant did not present any evidence demonstrating a link between those conditions, on the one hand, and his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, on the other. To support its conclusion that the trial court should have submitted the (f)(6) mitigating circumstance, the majority conspicuously forgoes any substantive analysis of *how* or *to what extent* defendant's purported intellectual impairment, mental disorders, or marital strife affected his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. And this is for good reason: the record contains no evidence that would support an analysis linking defendant's purported conditions to his homicidal conduct.

At trial, Judge Albright recognized the evidentiary inadequacy of defendant's request for submission of the (f)(6) mitigating circumstance, noting that defendant had failed to present "any testimony to support" that instruction. Despite Judge Albright's astute handling of this issue, the majority tries to justify its holding by pointing to the testimony of Dr. Antonio Puente, one of defendant's expert witnesses, who testified that defendant had a very poor ability to "reason and think." But this testimony, without more, does not show that defendant's ability

to appreciate the criminality of his conduct was impaired. Nor does this testimony, without more, suggest that defendant had an impaired ability to conform his conduct to the requirements of the law. Poor reasoning skills do not necessarily impair one's ability to control his actions or to know what the law requires. Requiring the submission of the (f)(6) mitigating circumstance in every instance in which a defendant has poor reasoning skills, moreover, would likely mean that the mitigating circumstance would need to be submitted in every case in which the defendant has an intellectual impairment—an approach that this Court has clearly rejected and that would be inconsistent with the limits that the statutory text of subsection (f)(6) itself imposes.

Notably, the only testimony *directly* relating to defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law weighs in favor of the trial court's decision *not* to submit the (f)(6) mitigating circumstance to the jury. Dr. Selena Sermeño, another one of defendant's experts, testified that defendant generally seemed to be able to discern right from wrong. This was evident, Dr. Sermeño testified, by defendant's refusal to accept a gun that a soldier offered to him during the El Salvadorian civil war, when defendant was eleven years old. This testimony likely would not, by itself, be enough to foreclose submission of the (f)(6) mitigating circumstance to the jury, *see State v. Johnson*, 298 N.C. 47, 68, 257 S.E.2d 597, 613 (1979), at least when a defendant shows a causal nexus between his intellectual impairment and his ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law. But here, as the trial court recognized, defendant did not present evidence linking his purported intellectual impairment to his homicidal conduct.

Defendant similarly failed to present any evidence that linked his alleged posttraumatic stress disorder to his homicidal conduct. Two of defendant's own experts—Dr. Sermeño and Dr. Moira Artigues—testified that defendant's posttraumatic stress disorder did not manifest itself through irritability or violent outbursts. Rather, it manifested itself through defendant's impaired ability to express strong emotions verbally or through body language, as well as poor sleep, flashbacks, difficulty with smells and sudden noises, and difficulty with memories. None of these symptoms have anything to do with defendant's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law. And the record is similarly devoid of any explanation as to how defendant's ongoing marital problems or purported chronic depression impaired his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

Because evidence of any of these links was lacking, a jury would have had to go beyond the evidence presented and speculate in order to conclude that the (f)(6) mitigating circumstance may have applied here. And when the evidence is such that a jury would have to base its finding of a mitigating circumstance "solely upon speculation and conjecture, not upon substantial evidence," submission of the instruction to the jury is "unreasonable as a matter of law." *State v. Anderson*, 350 N.C. 152, 183, 513 S.E.2d 296, 315 (quoting *State v. Daniels*, 337 N.C. 243, 273, 446 S.E.2d 298, 316-17 (1994), *cert. denied*, 513 U.S. 1135, 115 S. Ct. 953 (1995)), *cert. denied*, 528 U.S. 973, 120 S. Ct. 417 (1999).

Even assuming for the sake of argument that defendant had produced evidence linking his purported intellectual impairment, mental disorders, and marital problems to his homicidal conduct, the record contains ample evidence that would rebut any reasonable inference that defendant had an impaired ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law. As noted earlier, a statutory mitigating circumstance must be submitted only if a juror could reasonably find its existence based on the evidence. *Watts*, 357 N.C. at 377, 584 S.E.2d at 748 (quoting *Kemmerlin*, 356 N.C. at 478, 573 S.E.2d at 892). The majority correctly recites this standard but then misapplies it. Although the majority's analysis seems to suggest otherwise, nowhere in our precedents have we required our trial courts to view all evidence pertaining to the submission of the (f)(6) mitigating circumstance in the light most favorable to the defendant, resolving ambiguities and inconsistencies in his favor. And we have never, until today, directed our trial courts to ignore the presence of overwhelming evidence that refutes any suggestion that a defendant had an impaired capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law.

In fact, our precedents clearly show the opposite. We have repeatedly recognized that a trial court may, in its determination of whether to submit the (f)(6) mitigating circumstance, consider evidence rebutting a defendant's argument that the instruction should be submitted to the jury. For instance, we have held that a trial court properly did not submit the (f)(6) mitigating circumstance when a defendant's academic performance and operation of a gambling business while in prison were inconsistent with his argument that he had an impaired ability to "understand and control his actions." *State v. Braxton*, 352 N.C. 158, 215, 531 S.E.2d 428, 461 (2000), *cert. denied*, 531 U.S. 1130, 121 S. Ct. 890 (2001); *see also State v. Strickland*, 346 N.C. 443, 464, 488 S.E.2d 194, 206 (1997) ("There was no evidence that consumption of this alcohol so impaired

defendant as to . . . affect[ ] his ability to control his actions. In fact, there was direct evidence to the contrary."), *cert. denied*, 522 U.S. 1078, 118 S. Ct. 858 (1998).

In a line of recent cases, this Court has placed particular emphasis on whether a defendant's acts "demonstrate that [he] was aware that his acts were criminal," therefore negating any suggestion that the defendant's capacity to appreciate the criminality of his conduct was impaired. *See State v. Polke*, 361 N.C. 65, 72, 638 S.E.2d 189, 194 (2006), *cert. denied*, 552 U.S. 836, 128 S. Ct. 70 (2007). For instance, we have held that the trial court properly declined to submit the (f)(6) mitigating circumstance to the jury when the evidence showed that the defendant lured the victim to the scene of the murder, disposed of the murder weapon, and had false identification when he was apprehended. *State v. Gainey*, 355 N.C. 73, 104, 558 S.E.2d 463, 483, *cert. denied*, 537 U.S. 896, 123 S. Ct. 182 (2002). Based on this evidence, the Court reasoned that the defendant "fully underst[ood] that his acts were criminal." *Id.* at 104, 558 S.E.2d at 483. In another case, this Court held that the trial court properly did not submit the (f)(6) mitigating circumstance when a "defendant's initial lies to police about his involvement in the murder and his washing and disposal of the murder weapon . . . tend[ed] to show that [the] defendant fully appreciated the criminality of his conduct." *State v. Badgett*, 361 N.C. 234, 258, 644 S.E.2d 206, 220 (citing *State v. Golphin*, 352 N.C. 364, 476, 533 S.E.2d 168, 240 (2000), *cert. denied*, 532 U.S. 931, 121 S. Ct. 1380 (2001)), *cert. denied*, 552 U.S. 997, 128 S. Ct. 502 (2007).

Here, defendant's conduct surrounding the murder of Maria demonstrates that he had a full grasp of the gravity and criminality of his actions. And this same evidence showing a careful, deliberate course of action indicates that defendant's mental faculties were not impaired during the course of the murder. While the majority recognizes the brutal nature of this murder, it utterly fails to recognize the legal significance of all of the preemptive steps that defendant took to conceal his identity as the perpetrator.

Defendant's actions when he came to Maria's apartment shortly before the murder provide ample evidence of defendant's meticulous attempts to conceal his crime. When defendant started arguing with Maria inside her bedroom and Maria called for help, the children found that the bedroom door was closed and locked. He also told the children not to call the police and took Maria's cell phone away so that they could not call for help after he assaulted their mother. After ending the argument with Maria by incapacitating her, defendant transported Maria

from the apartment to his car by carrying her over his shoulder, all the while covering her face with her work uniform so that the children could not see the condition of their mother's face. At that time, defendant told the children that Maria had hurt herself on some furniture and that he was going to take her to the hospital. He told a concerned neighbor a similar story and added that the children were not allowed to visit Maria.

Defendant, moreover, took a number of additional steps to avoid being identified as the perpetrator. For instance, defendant returned to Maria's apartment and attempted to clean up a pool of Maria's blood that had soaked into the carpet. He lied to their children, to his friend, and to investigating officers about what had happened during his encounter with Maria in the bedroom. Soon after the murder, when defendant was with the children, one of them attempted to check the trunk of defendant's car to see if Maria was there. When that child saw Maria's work uniform in defendant's trunk, defendant quickly ran over and closed the trunk to try to prevent his children from investigating further. Defendant told his children that Maria's uniform was there because the doctor had given it to him. The evidence also suggests that defendant sent three text messages from Maria's cell phone trying to convince one of Maria's friends that she had run away with a new boyfriend to Spain.

Most notably, however, defendant severed Maria's head from her body after the murder and hid Maria's remains in two separate, heavily wooded areas. Maria's skull was not found for another two and a half years after the rest of her body was discovered. The authorities never recovered Maria's phone, the clothing that she wore on the night of the murder, or the object used to remove her head, suggesting that defendant carefully hid them in his effort to thwart a future prosecution.

Defendant's actions before, during, and after the murder indicate careful deliberation and an attempt to evade punishment, rebutting any reasonable inference that defendant had an impaired capacity to appreciate the criminality of his conduct. And these same actions—especially those leading up to the murder—bear no resemblance to the frenzied, hectic behavior expected of a person with an impaired capacity to conform his conduct to the requirements of the law. Nor are they consistent with a "child-like thought process[ ]" or a "limited ability to think and reason beyond the immediate moment," as defendant argues. And despite what the majority suggests, defendant's actions demonstrate far, far more than a mere "recognition of the wrongfulness of his conduct."

Rather than acknowledging the legal significance of defendant's acts surrounding the murder and the lack of evidence linking defendant's

purported mental conditions to his homicidal conduct, the majority instead focuses its analysis on two cases that are inconsistent with the language of the (f)(6) mitigating circumstance, and which, as a result, have become outliers in our jurisprudence. Specifically, the majority rests the crux of its argument on *State v. Stokes*, 308 N.C. 634, 304 S.E.2d 184 (1983), and *State v. Fullwood*, 329 N.C. 233, 404 S.E.2d 842 (1991), which, according to the majority, dispel any requirement that a defendant present evidence of a nexus between a defendant's mental condition and the defendant's homicidal conduct.

To begin with, it is worth noting that *Stokes* and *Fullwood* are inconsistent with cases that were decided before they were. In *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979), this Court held that if a defendant was intoxicated at the time of the murder, but not to a degree that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was impaired, the (f)(6) mitigating circumstance should not be submitted to the jury. *Id.* at 32-33, 257 S.E.2d at 589. This Court reaffirmed that principle in a similar case decided three years later, *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243, *cert. denied*, 459 U.S. 1056, 103 S. Ct. 474 (1982). In *Williams*, this Court held that evidence showing that the defendant drank alcohol on the night of a murder, without evidence showing "that [the defendant's] capacity to appreciate the criminality of his conduct was impaired by [that] alcohol," was insufficient to support submission of the (f)(6) mitigating circumstance. *Id.* at 687, 292 S.E.2d at 262. These cases show that a defendant must present evidence of a link to require submission of the (f)(6) factor to a jury and therefore show that *Stokes* and *Fullwood* have been outliers in our jurisprudence ever since they were decided.

More recent cases, moreover, have implicitly overruled Stokes and Fullwood (or, alternatively, have confirmed that they were wrongly decided under preexisting caselaw when they were handed down). In *State v. Hill*, 347 N.C. 275, 493 S.E.2d 264 (1997), *cert. denied*, 523 U.S. 1142, 118 S. Ct. 1850 (1998), we considered a case in which the defendant exhibited personality traits of "emotional and social alienation," "mild depression," "poor impulse control," and "subaverage intelligence." *Id.* at 301-02, 493 S.E.2d at 279. But we held that the trial court was correct not to submit the (f)(6) mitigating circumstance to the jury because "the testimony *did not establish* that [the] defendant's personality characteristics *affected his ability to understand and control his actions*." *Id.* at 302, 493 S.E.2d at 280 (emphases added). Similarly, in *State v. Gainey*, expert testimony established that the defendant suffered from "moderately severe to severe mixed personality disorder . . . , with paranoid and

schizoid features which tended to make him restless and impulsive." 355 N.C. at 103 04, 558 S.E.2d at 483. But, consistent with our holding in *Hill*, we held that this testimony, standing alone, did not amount to evidence that the defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was impaired. *See id.*

The list goes on. In *State v. Kemmerlin*, the defendant presented evidence that she had "borderline personality disorder" and "major depressive disorder." 356 N.C. at 480, 573 S.E.2d at 893. The defendant was additionally concerned that her stepson was going to sexually abuse her daughter, and, because of the defendant's own experiences suffering sexual abuse, she was "exquisitely and overly attuned to sexual issues." *Id.* at 479, 573 S.E.2d at 893. But this evidence was insufficient to support submission of the (f)(6) mitigating circumstance to the jury because the defendant's suffering, according to her own expert witness, "was not to the level of impairing her ability to appreciate the wrongfulness" of her conduct. *Id.* at 481, 573 S.E.2d at 893.

To highlight the distinction between this case and cases in which the trial court *properly* instructed the jury on the (f)(6) mitigating circumstance, we need to look no further than the majority's own citations. In *State v. Hooks*, 353 N.C. 629, 548 S.E.2d 501 (2001), *cert. denied*, 534 U.S. 1155, 122 S. Ct. 1126 (2002), the defendant suffered from chronic substance abuse and underdeveloped skills for "emotional expression, social connection, and adult functioning." *Id.* at 640, 548 S.E.2d at 509. Although it was not squarely reviewing the propriety of the trial court's submission of the (f)(6) mitigating circumstance,[1] this Court emphasized the testimony of the defendant's expert witness: "[The defendant's] substance dependence and the impoverished skills for adult functioning combined such that his *ability to think through his behavior*, to *consider the consequences of his actions*, to reasonably plan or to understand and *appreciate the connection between his actions and consequent events* would have been impaired at the time of the offense." *Id.* (emphases added). In other words, as this Court recognized, the evidence indicated

1. The discussion of the (f)(6) mitigating circumstance in *Hooks* was dictum; the Court discussed the (f)(6) mitigating circumstance, which the trial court *did* submit to the jury, only to contrast the trial court's decision *not* to submit a different mitigating circumstance. *Id.* at 639-41, 548 S.E.2d at 508-09. Even though the Court's discussion of the (f)(6) mitigating circumstance was brief and not directly relevant to its holding, however, it is still helpful to show how the defendant in that case presented evidence linking his mental conditions to his homicidal conduct—which therefore justified the trial court's submission of the (f)(6) mitigating circumstance to the jury.

much more than the mere presence of a mental impairment; rather, expert testimony directly established a nexus between the defendant's impairments and how they manifested themselves, and therefore, a jury could find that the defendant was not able to fully appreciate the criminality of his conduct. *See id.*

As this Court has repeatedly recognized, then, evidence that a defendant merely *has* an intellectual impairment or mental disorder is not enough to require the trial court to submit the (f)(6) mitigating circumstance to the jury. Instead, the defendant has the burden of linking his intellectual impairment or mental disorder to his homicidal conduct. If a defendant does not produce evidence of this link, the jury will not be able to infer the presence of the (f)(6) mitigating circumstance. When it cannot, the trial court should not submit that instruction to it.

In sum, the language of the (f)(6) mitigating circumstance and the weight of this Court's caselaw interpreting that statutory provision require a causal nexus between a defendant's mental condition and his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law. Here, defendant presented no evidence of any such link. And by selectively relying on *Stokes* and *Fullwood*—which are clear outliers in our jurisprudence—the majority is dictating a change in law that has been relatively well settled for decades. *See Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 2609 (1991) (noting that the "consistent development of legal principles . . . contributes to the actual and perceived integrity of the judicial process"). In any event, defendant's conduct surrounding the murder dispels any doubt that defendant freely chose not to conform his conduct to the law and fully appreciated the criminality of his conduct. I therefore respectfully dissent.

Justice NEWBY joins in this dissenting opinion.

WALKER v. DRIVEN HOLDINGS, LLC

[371 N.C. 337 (2018)]

KEN WALKER, TED P. PEARCE, MARK STREET, AND WARREN C. BICKERS
v.
DRIVEN HOLDINGS, LLC

No. 395A17

Filed 8 June 2018

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an opinion and order dated 7 August 2017 entered by Judge James L. Gale, Chief Special Superior Court Judge for Complex Business Cases, in Superior Court, Mecklenburg 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 15 May 2018 in session in the Henderson County Historic Courthouse in the City of Hendersonville, pursuant to section 18B.8 of Chapter 57 of the 2017 North Carolina Session Laws.

Milazzo Webb Law, PLLC, by David C. Boggs and Colin R. Stockton, for plaintiff-appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Michael W. Mitchell and Jackson Wyatt Moore, Jr.; and White & Case LLP, by Glenn M. Kurtz, pro hac vice, and Kimberly A. Haviv, pro hac vice, for defendant-appellee.

PER CURIAM.

AFFIRMED.

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

7 JUNE 2018

002PA17	State v. Juan Antonia Miller	1. Def's Motion to Strike Transcript of State's Exhibit 2 and All References from the State's Brief 2. State's Motion to Amend the Record	1. Dismissed as moot 2. Dismissed as moot
025P18	State v. Michael Bernard Perry	Def's PDR Under N.C.G.S. § 7A-31 (COA17-223)	Denied
035A02-3	State v. Frank Junior Chambers (DEATH)	Def's *Pro Se* Motion to Appoint Counsel	Dismissed **Ervin, J., recused**
042P18	State v. Jamarick Yamon Horton	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-460) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
047P09-3	State v. Keith D. Wilson	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP18-55) 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
047P18	Joe Wallace Powell, Jr. v. Robert Kent and Cynthia Young	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-708)	Denied
048P18	State v. Armond Devega	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-1302) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
049P18	Crazie Overstock Promotions, LLC v. James McVicker, in his personal and official capacity as Sheriff for Bladen County North Carolina; Jeffery Tyler, in his personal and official capacity as a Captain in the Bladen County Sheriff's Department	Defs' PDR Under N.C.G.S. § 7A-31 (COA16-932-2)	Denied

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7 JUNE 2018

058P18	State v. Trevor Wilks Forte	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-513) 2. Def's Motion to Deem PDR Timely Filed and Served 3. Def's Conditional Petition for *Writ of Certiorari* to Review Decision of COA	1. Dismissed 2. Denied 3. Denied
069P18-2	State v. Nell Monette Baldwin	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP18-225)	Denied **Beasley, J., recused** **Morgan, J., recused**
070P18	State v. Stephanie Bridges	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-579) 2. State's Motion to Deem Its Response as Timely Filed	1. Denied 2. Allowed
074P18	State v. Stephen Kwame Gates	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-772) 2. Def's PDR 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
075P18	Anthony Butler v. Scotland County Board of Education	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA17-501)	Denied
076P18	Perrin Q. Henderson v. Mary Ward Henderson	Def's PDR Under N.C.G.S. § 7A-31 (COA16-72-2)	Denied
078P18	State v. Jermaine Jackson Goins	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-458) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
080P18-2	Darron J. Jones v. Mr. Cranford	1. Plt's *Pro Se* Motion for Objection 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Plt's *Pro Se* Motion for Order to Show Cause for Preliminary Injunction and Temporary Restraining Order	1. Dismissed 2. Allowed 3. Dismissed
090P18	State v. Willoughby Henerey Mumma	Def's Petition for *Writ of Certiorari* to Review Decision of COA (COA17-481)	Allowed

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

7 JUNE 2018

092P18	Souad Dass v. Fabien Anthony Dass	Def's PDR Under N.C.G.S. § 7A-31 (COA17-702)	Denied
095P18	State v. Michael Teon Brown	Def's PDR Under N.C.G.S. § 7A-31 (COA17-209)	Denied
096P18	State v. Steven J. Clark	1. Def's *Pro Se* Motion for Notice of Appeal 2. Def's *Pro Se* Petition for Writ of Certiorari	1. Dismissed 2. Dismissed
099P18	Durham County, on behalf of Terrance Adams v. Alma Adams	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA17-929) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal 4. Plt's Amended PDR Under N.C.G.S. § 7A-31	1. --- 2. Denied 3. Allowed 4. Dismissed as moot
100P18	David A. Perez v. Laurie S. Perez	1. Plt's *Pro Se* Motion for Temporary Stay (COA17-572) 2. Plt's *Pro Se* Petition for *Writ of Supersedeas* 3. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Allowed **04/05/2018** Dissolve **06/07/2018** 2. Denied 3. Denied
102P18	State v. George E. Harrison	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-805) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
107P18	State v. Jamal M. Watson	1. Def's Motion for Temporary Stay (COA17-253) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31 4. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **04/10/2018** Dissolved **06/07/2018** 2. Dismissed as moot 3. Dismissed 4. Dismissed as moot

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

7 JUNE 2018

120P18	IO Moonwalkers, Inc., and American Coins & Gold, Inc., Plaintiffs v. Banc of America Merchant Services, LLC, Bank of America Corporation, Bank of America, N.A. and First Data Merchant Services, LLC, Defendants v. Rilwan Hassan, Third-Party Defendant	Plts' and Third-Party Def's PDR Under N.C.G.S. § 7A-31 (COA17-703)	Denied
122P18	Zloop, Inc. v. Parker Poe Adams & Bernstein, LLP, Alba-Justina Secrist a/k/a A-J Secrist and R. Douglas Harmon	1. Verified Motion for Leave to File Amended Notice of Appeal 2. Plt's Petition for *Writ of Certiorari* to Review Decision of N.C. Business Court 3. Defs' Motion for Extension of Time to Respond to Petition for *Writ of Certiorari*	1. 2. 3. Allowed **05/21/2018**
123P18	State v. Joseph Matthew Zinna	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1028)	Denied
125P18	In the Matter of E.D.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA17-693) 2. Respondent's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Denied
129P18	Brandy Renee Flowers v. Pitt County District Court Judge Wendy Hazelton	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
130P18	State v. James Maurice Wilson	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	Denied
132P18	Beth Desmond v. The News and Observer Publishing Company, and Mandy Locke	1. Defs' PDR Prior to a Determination of the COA 2. Professor William Van Alystyne's Motion for Leave to File Amicus Brief in Support of PDR	1. Denied 2. Denied
140P18	State v. Robert Dwayne Lewis	1. State's Motion for Temporary Stay (COA17-888) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **05/17/2018** 2.

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

7 JUNE 2018

141P18	State v. Robert Dwayne Lewis	1. State's Motion for Temporary Stay (COA17-1051) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **05/17/2018** 2.
142P18	DTH Media Corporation; Capitol Broadcasting Company, Inc.; The Charlotte Observer Publishing Company; The Durham Herald Company v. Carol L. Folt, in her official capacity as Chancellor of the University of North Carolina at Chapel Hill, and Gavin Young, in his official capacity as Senior Director of Public Records for the University of North Carolina at Chapel Hill	1. Defs' Motion for Temporary Stay (COA17-871) 2. Defs' Petition for *Writ of Supersedeas*	1. Allowed **05/17/2018** 2.
143P18	State v. Ramelle Milek Lofton	1. State's Motion for Temporary Stay (COA17-716) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/21/2018** 2. 3.
155P18	David Wayne Ewart v. Mike Slagel (Superintendent)	Petitioner's *Pro Se* Motion for Notice of Appeal (COAP18-295)	Denied **05/23/2018**
160P18	State v. James Harold Courtney, III	1. State's Motion for Temporary Stay (COA17-1095) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **06/01/2018** 2.
161A18	State v. Mollie Elizabeth B. McDaniel	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **06/01/2018** 2.

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

7 JUNE 2018

165P18	Latwang Janell Reid El Bey ex rel. Latwang Janell Reid v. State of North Carolina, et al.; Erik A. Hooks, Secretary of the North Carolina Department of Public Safety, et al.	Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP18-253)	Denied **06/05/2018**
166P18	Diandra N. Webb v. Donnie Harrison, Wake County Jail	Plt's *Pro Se* Petition for *Writ of Habeas Corpus*	Dismissed **06/05/2018**
197P17-2	Brian Keith Blackwell v. Erik A. Hooks, Secretary of Prisons, Cynthia O. Thornton, Administrator I	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Dismissed **05/22/2018** **Ervin, J., recused**
241P17	Christine N. Brewington v. N.C. Department of Public Safety, State Bureau of Investigation	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA16-913) Denied	
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* 3. State's Notice of Appeal Based Upon a Dissent 4. State's PDR as to Additional Issues	1. Allowed **02/16/2018** 2. Allowed 3. --- 4. Allowed
298P17	State v. Rashand Nicholas Fitts	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1106)	Denied
302A14	State v. Juan Carlos Rodriguez (DEATH)	1. State's Motion to Strike Defendant's Supplemental Brief 2. State's Motion in the Alternative for Leave to File State's Supplemental Brief	1. Denied 2. Allowed **09/26/2017**
302A14	State v. Juan Carlos Rodriguez (DEATH)	Def's Motion Requesting Court to Take Judicial Notice	Dismissed as moot
302A14	State v. Juan Carlos Rodriguez (DEATH)	Def's Motion Requesting Court to Take Judicial Notice	Dismissed as moot

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

7 JUNE 2018

316P17	State v. Kathryn Rolland	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-168) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. Def's Motion for Addition to Record on Appeal	1. --- 2. Denied 3. Allowed 4. Dismissed as moot
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 5. Plt's Motion to Dismiss Appeal	1. Dismissed w/o prejudice **10/06/2017** 2. Denied 3. --- 4. Denied 5. Allowed
365A16-2	State v. David Michael Reed	1. State's Motion for Temporary Stay (COA16-33-2) 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 **02/02/2018** --- 2. Allowed 3. --- 4. Denied
406P17-2	State v. Daniel Luna	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **05/25/2018**
411P16-2	Union County v. Town of Marshville	Def's PDR Under N.C.G.S. § 7A-31 (COA17-37)	Denied **Ervin, J., recused**
449P11-19	In re Charles Everette Hinton	Petitioner's *Pro Se* Motion for Pardon and Discharge from Imprisonment	Dismissed **Ervin, J., recused**
505P96-3	State v. Melvin Lee White, Jr. (DEATH)	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Craven County	Denied
526A13-2	State v. Timothy Glen Mills	1. State's Motion for Temporary Stay (COA17-747) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **05/30/2018** 2. Allowed **05/30/2018** 3. ---

BOONE FORD, INC. v. IME SCHEDULER, INC.

[371 N.C. 345 (2018)]

BOONE FORD, INC. D/B/A BOONE FORD LINCOLN MERCURY, INC.
A DELAWARE CORPORATION
v.
IME SCHEDULER, INC., A NEW YORK CORPORATION
AND
CASH FOR CRASH, LLC, A NEW JERSEY LIMITED LIABILITY COMPANY
v.
BOONE FORD, INC. D/B/A BOONE FORD LINCOLN MERCURY, INC.
A DELAWARE CORPORATION

No. 162A17

Filed 17 August 2018

Trials—consolidation of cases—by judge who did not preside over trial—error corrected by presiding judge

Where two cases were consolidated before trial by one superior court judge and then tried by another superior court judge, the Supreme Court held that the first judge erred in consolidating the cases because he was not scheduled to preside over the consolidated trial, but the judge who presided at trial effectively corrected that error, leaving the trial and judgment untainted. The Supreme Court reaffirmed the rule from *Oxendine v. Catawba County Department of Social Services*, 303 N.C. 699 (1981)—that "the discretionary ruling of one superior court judge to consolidate claims for trial may not be forced upon another superior court judge who is to preside at that trial"—but clarified that the judge who presides at a consolidated trial can effectively correct the procedural error that an earlier judge makes under *Oxendine*.

Justice NEWBY concurring in the result only.

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 94 (2017), vacating an order granting a motion to consolidate entered on 21 April 2015 by Judge Jeff Hunt in Superior Court, Watauga County. Heard in the Supreme Court on 13 March 2018.

Reeves DiVenere Wright, by Anné C. Wright, for appellant Boone Ford, Inc.

Miller & Johnson, PLLC, by Nathan A. Miller, for defendant-appellee IME Scheduler, Inc. and plaintiff-appellee Cash for Crash, LLC.

MARTIN, Chief Justice.

This appeal concerns two cases that were consolidated before trial by one superior court judge and then tried by another superior court judge. We hold that the first judge erred in consolidating these cases because he was not scheduled to preside over the consolidated trial, but that the judge who presided at trial effectively corrected that error, leaving the trial and judgment untainted. We therefore reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for additional proceedings.

In February 2014, appellant Boone Ford, Inc. filed a complaint against appellee IME Scheduler, Inc. In its complaint, Boone Ford set forth five claims for relief relating to IME Scheduler's contemplated purchase of a Ford Raptor truck from Boone Ford. That purchase never occurred. In its answer, IME Scheduler asserted five counterclaims against Boone Ford arising out of the same failed transaction. That September, co-appellee Cash for Crash, LLC filed its own complaint against Boone Ford, alleging conversion and other torts based on an accidental wire transfer of $206,569 that, according to Cash for Crash's complaint, Boone Ford refused to return for three months. It is undisputed that IME Scheduler and Cash for Crash were both owned by the same man, Mikhail Heifitz, when the events at issue in both lawsuits took place. In its answer to Cash for Crash's complaint, Boone Ford moved to consolidate the two cases.

The superior court held a hearing on Boone Ford's motion to consolidate in April 2015, with Judge Jeff Hunt presiding. During the hearing, Judge Hunt said that he did not know who would preside at trial. There is no evidence in the record that Judge Hunt expected to be, or was scheduled to be, the presiding judge at trial. Judge Hunt granted the motion the day after the hearing.

Judge William H. Coward was ultimately assigned to preside at trial. In January 2016, he approved a pretrial order setting out various stipulations of the parties. He presided over the consolidated trial in February 2016. The record contains no indication that any party moved to sever the consolidated cases or asked Judge Coward to reconsider whether the cases should have been consolidated. The jury returned a verdict in Boone Ford's favor, and Judge Coward issued a judgment that awarded Boone Ford $70,000 in damages plus interest and costs.

IME Scheduler and Cash for Crash appealed that judgment to the Court of Appeals, arguing, among other things, that the cases had

been improperly consolidated. In a split decision, the Court of Appeals agreed with that argument, vacated Judge Hunt's consolidation order, and remanded the newly unconsolidated cases to superior court. *Boone Ford, Inc. v. IME Scheduler, Inc.*, ___ N.C. App. ___, ___, 800 S.E.2d 94, 98 (2017). Relying on our decision in *Oxendine v. Catawba County Department of Social Services*, the Court of Appeals reasoned that, because there was no indication that Judge Hunt would preside over these cases at trial, he lacked the authority to consolidate them. *Id.* at ___, 800 S.E.2d at 96-97 (citing and quoting *Oxendine*, 303 N.C. 699, 703-04, 281 S.E.2d 370, 373 (1981)). Based on this rationale, the Court of Appeals vacated the consolidation order. *Id.* at ___, 800 S.E.2d at 97-98. Judge Dillon dissented. *See generally id.* at ___, 800 S.E.2d at 98-99 (Dillon, J., dissenting). He agreed with the majority that Judge Hunt's order consolidating the cases was not binding on Judge Coward. *Id.* at ___, 800 S.E.2d at 98. But he noted that IME Scheduler and Cash for Crash "*never* made any motion asking Judge Coward to sever the matter." *Id.* at ___, 800 S.E.2d at 99. In Judge Dillon's view, this omission should have precluded IME Scheduler and Cash for Crash from objecting to the consolidation later simply because the jury returned a verdict unfavorable to them. *Id.* at ___, 800 S.E.2d at 98-99. Boone Ford appealed to this Court based on Judge Dillon's dissenting opinion.

In *Oxendine*, Judge Forrest A. Ferrell—the judge who was presiding over pretrial matters in the superior court action in that case—granted a motion to consolidate two actions even though "[t]here was no indication that he was scheduled to preside" at the trial of the consolidated cases. 303 N.C. at 704, 281 S.E.2d at 373. Adopting a rule first articulated by the Court of Appeals in *Pickard v. Burlington Belt Corp.*, this Court stated that "a consolidation cannot be imposed upon the judge presiding at the trial by the preliminary Order of another trial judge." *Id.* at 703, 281 S.E.2d at 373 (quoting *Pickard v. Burlington Belt Corp.*, 2 N.C. App. 97, 103, 162 S.E.2d 601, 604-05 (1968)). Applying this procedural rule from *Pickard*, this Court held that Judge Ferrell's entry of a consolidation order was "procedurally in error" and vacated that order. *Id.* at 703-04, 281 S.E.2d at 373. Thus, under *Oxendine*, a judge who is not scheduled to preside at the consolidated trial cannot consolidate two or more cases for trial. *Id.* "Whether cases should be consolidated for trial is to be determined in the exercise of his sound discretion *by the judge who will preside during the trial* . . . ." *Id.* at 703, 281 S.E.2d at 373 (emphasis added) (quoting *Pickard*, 2 N.C. App. at 103, 162 S.E.2d at 604-05).

Here, Judge Hunt stood in the same position that Judge Ferrell did in *Oxendine*. There was no indication in this case, either at the

consolidation hearing or at any other time, that Judge Hunt was scheduled to preside over the consolidated trial. As we have already said, Judge Hunt noted at the consolidation hearing that he did not know who would preside at trial. Like Judge Ferrell in *Oxendine*, then, Judge Hunt made a procedural error in issuing the consolidation order in question.

This does not end our analysis, however, because Judge Coward had the authority to make his own determination on consolidation. Under *Oxendine*, Judge Hunt's consolidation order could not bind Judge Coward. *Id.* at 704, 281 S.E.2d at 373. And although the record does not indicate that any party raised the question of consolidation before Judge Coward at any time, that does not change our analysis. Requiring Judge Coward to wait for a party to raise the issue of consolidation before acting on it, after all, would prevent him from severing the cases unless a party moved to sever. This requirement *would* allow Judge Hunt's order to bind Judge Coward in this instance, because no party moved before Judge Coward to sever the cases. That, in turn, would impose a restriction on the *Oxendine* rule that does not exist. Judge Coward therefore must have been free to sever the cases sua sponte for any reason he deemed appropriate.

Because we presume that judges know the law, *see Sanders v. Ellington*, 77 N.C. 255, 256 (1877); *accord Lambrix v. Singletary*, 520 U.S. 518, 532 n.4, 117 S. Ct. 1517, 1527 n.4 (1997), we presume that Judge Coward knew that he had the authority under *Oxendine* to sever the cases sua sponte. But he still signed a pretrial order that left the cases consolidated and ultimately presided over a consolidated trial. So Judge Coward implicitly made his own determination—a determination that the cases should be consolidated for trial. When he did so, his determination on consolidation replaced Judge Hunt's determination as the operative one in these proceedings. By substituting a procedurally sound determination in place of a procedurally unsound one, Judge Coward corrected the procedural error that Judge Hunt's consolidation order had injected into this case.

It is worth emphasizing the dramatically different postures in which this case and *Oxendine* came before our Court. The plaintiffs in *Oxendine* filed an interlocutory appeal less than a week after the entry of the consolidation order. *See* 303 N.C. at 701-02, 281 S.E.2d at 372. In other words, when *Oxendine* reached our appellate courts, no trial had occurred, and no judge had been assigned to preside at trial. As a result, no judge presiding at trial had the chance to correct the error that Judge Ferrell had made. Only the appellate courts could correct it, and this Court did so. *See id.* at 704, 281 S.E.2d at 373. In this case,

by contrast, Judge Coward was assigned to preside at, and did in fact preside at, the consolidated trial. He had already corrected the procedural error in question by the time the trial here took place, which left no error for the appellate courts to address. Because the appeal in this case was filed much later in this case's proceedings than the appeal in *Oxendine* was filed in that case's proceedings, and because in this case the second judge corrected the error that arose on the first judge's watch, this case is both factually and legally distinguishable from *Oxendine*.

The *Oxendine* rule—that is, the rule that "the discretionary ruling of one superior court judge to consolidate claims for trial may not be forced upon another superior court judge who is to preside at that trial," *id.* at 704, 281 S.E.2d at 373—was undoubtedly designed with the constitutionally mandated rotation of superior court judges in mind. *See* N.C. Const. art. IV, § 11 ("The principle of rotating Superior Court Judges among the various districts of a division is a salutary one and shall be observed."). *Oxendine*'s rule helps keep judges who will be rotating away from a district from unduly interfering with trials that will almost certainly be held in front of other judges. Because of what we hold today, a litigant who thinks that consolidation was improper under *Oxendine* may not wait until a consolidated trial is over and then object to consolidation just because the litigant does not like the outcome of the consolidated trial. Under today's decision, though, the authority to consolidate cases for trial remains in the hands of the judge who will preside at trial. That is *Oxendine*'s rule; it is sound; and we reaffirm it.

The *holding* of *Oxendine*, however, is on somewhat shakier ground. *Oxendine* could have held that Judge Ferrell's consolidation order could not bind any later-in-time judge but that the order was still valid until a later-in-time judge made a different determination. Instead, *Oxendine* held that it was improper for Judge Ferrell even to issue the consolidation order in the first place. *See* 303 N.C. at 703-04, 281 S.E.2d at 373. This holding does not necessarily follow from *Oxendine*'s rule, and its application may be impractical in some cases.[1]

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1. Notably, the *Superior Court Judges' Benchbook* cites *Oxendine* for the proposition that "[i]t is within the discretion of the judge presiding at trial whether to consolidate for trial actions that involve common questions of law and fact," but does not explicitly state that a judge not scheduled to preside at trial may not issue a consolidation order. Michael Crowell, *North Carolina Superior Court Judges' Benchbook*, *General: One Trial Judge Overruling Another* 5 (School of Gov't, Univ. of N.C. at Chapel Hill, Jan. 2015), https://benchbook.sog.unc.edu/judicial-administration-and-general-matters/one-trial-judge-overruling-another. The *Benchbook* thus summarizes *Oxendine*'s rule but not its holding.

In fact, *Oxendine*'s holding—that the judge who is assigned to hear preliminary matters but not scheduled to preside at trial cannot even *issue* an order consolidating related cases—cannot be easily harmonized with modern-day best practices for litigation. Because of the rotation process used to assign superior court judges, the judge hearing preliminary motions is often not the judge scheduled to preside at trial. Under *Oxendine*, it is therefore difficult to consolidate cases early in the litigation process absent a stipulation by the parties, even if consolidation is clearly justified on the merits. And waiting to consolidate until the eve of trial results in additional last-minute work for both judges and lawyers. Lawyers usually prefer to prepare cases as they will be tried, and Boone Ford correctly suggests in its brief that even work as prosaic as the preparation of trial notebooks and exhibits might be disrupted if cases are consolidated right before trial. In the meantime, lawyers and litigants may also waste time and effort on duplicative discovery matters. With all of that in mind, Judge Hunt's early consolidation order, although procedurally improper, made good practical sense.

The concurring opinion tries to resolve this tension by arguing that Judge Hunt did not commit error in this case at all. But *Oxendine*'s holding simply cannot be squared with a conclusion that no error occurred here. Both here and in *Oxendine*, a judge not scheduled to preside at trial consolidated two cases for trial, and *Oxendine* declared that the consolidation in that case was "procedurally in error," 303 N.C. at 703, 281 S.E.2d at 373, precisely because "[t]here was no indication that [the judge in question] was scheduled to preside at . . . trial," *id.* at 704, 281 S.E.2d at 373. The concurrence says nothing to distinguish the consolidation order in this case from the one in *Oxendine*, presumably because the two orders are not distinguishable. The meaningful difference between the two cases arose only when Judge Coward was assigned to preside at trial. At that point in time, Judge Coward could and did correct an error that had been made. But it is logically impossible that he retroactively caused no error to have been made at all. We have only two options: either declare Judge Hunt's order "procedurally in error" or overrule *Oxendine* outright. We cannot leave *Oxendine* in place while also declaring that no error occurred here.

And *Oxendine* has been good law for nearly four decades. We should not casually disturb our longstanding precedent, and we do not need to disturb it today to decide this case. It is enough to say that the judge who presides at a consolidated trial can effectively correct the procedural error that an earlier judge makes under *Oxendine*. We hold that Judge Coward's implicit determination that the cases in

question should be consolidated for trial replaced Judge Hunt's determination on consolidation and corrected the procedural error that Judge Hunt had made. We therefore reverse the decision of the Court of Appeals and remand this case to the Court of Appeals to consider other issues that its decision did not reach.

REVERSED AND REMANDED.

Justice NEWBY concurring in the result only.

Parties need to know the structure of the trial as early as possible to plan for the presentation of witnesses and evidence, to organize exhibits, and to conduct trial preparation generally. Rule 42 of the North Carolina Rules of Civil Procedure contemplates a pretrial procedure to consolidate matters for trial. This case illuminates the tension arising under our Rules of Civil Procedure as we adapt them to a system of rotating superior court judges. It appears this early notification of consolidation happened here. I agree with the majority that Judge Hunt's consolidation order had no binding effect on Judge Coward because Judge Hunt was not scheduled to preside over the trial. Any party objecting to the consolidation could have presented the matter afresh to the judge presiding at trial. Judge Coward, having the authority to make the final decision on consolidation, could have divided the cases for trial, but he did not. By ultimately trying the cases together, the presiding judge implicitly ratified the consolidation decision, leaving the trial and judgment untainted. Thus, Judge Hunt's initial decision to consolidate was a proper pretrial order, acquiesced to by the parties and ultimately ratified by the presiding judge at trial. Accordingly, I do not believe Judge Hunt committed "error." My concern is that, by labeling a preliminary pretrial consolidation order "error," the majority opinion will squelch the entry of these useful orders contemplated by Rule 42. Therefore, I concur in the result only.

Rule 42(a) of the North Carolina Rules of Civil Procedure governs the consolidation of claims in state court and authorizes the trial court to consolidate pending actions involving a common question of law or fact:

> [T]he judge may order a joint hearing or trial of any or all the matters in issue in the actions; he may order all the actions consolidated; and he may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

N.C.G.S. § 1A-1, Rule 42(a) (2017). In allocating this authority, the plain text of Rule 42 makes no distinction as to the judge who presides over the pretrial matters or trial. *Id.* (stating that "[w]hen actions involving a common question of law or fact are pending in both the superior and the district court of the same county, *a* judge of the superior court in which the action is pending may order all the actions consolidated" (emphasis added)). Rule 42 does not expressly prohibit the judge presiding over pretrial matters from entering a preliminary order of consolidation.[1]

We have often said that "one superior court judge ordinarily may not overrule a prior judgment of another superior court judge in the same case on the same issue." *State v. Duvall*, 304 N.C. 557, 561, 284 S.E.2d 495, 498 (1981) (quoting *State v. Duvall*, 50 N.C. App. 684, 691, 275 S.E.2d 842, 850 (1981), *rev'd on other grounds*, *Duvall*, 304 N.C. 557, 284 S.E.2d 495). "This rule does not apply, however, to *interlocutory* orders given during the progress of an action which affect the procedure and conduct of the trial." *State v. Stokes*, 308 N.C. 634, 642, 304 S.E.2d 184, 189 (1983) (citations omitted). "An interlocutory order or judgment does not determine the issues in the cause but directs further proceedings preliminary to the final decree." *Id.* at 642, 304 S.E.2d at 190 (citations omitted). "Such order or judgment is subject to change during the pendency of the action to meet the exigencies of the case." *Id.* at 642, 304 S.E.2d at 190 (citations omitted).

This case illustrates the challenge arising under our Rules of Civil Procedure as we apply them to a system of rotating superior court judges. *See* N.C. Const. art. IV, § 11 ("The principle of rotating Superior Court Judges among the various districts of a division is a salutary one and shall be observed."). Relevant here, we have held that a pretrial ruling made by a superior court judge who is not scheduled to preside over the trial that consolidates claims for trial does not bind the superior court judge who actually tries the case. "[T]he discretionary ruling of one superior court judge to consolidate claims for trial may not be forced upon another superior court judge who is to preside at that trial." *Oxendine v. Catawba Cty. Dep't of Soc. Servs.*, 303 N.C. 699, 704, 281 S.E.2d 370, 373 (1981); *see also Stokes*, 308 N.C. at 642, 304 S.E.2d at 189-90. In my view, the rule in *Oxendine*, read in this manner, squares with our current Rules of Civil Procedure and does not preclude the

1. Clearly, the judge presiding over pretrial matters can consolidate those matters for discovery and other pretrial purposes as needed.

judge who considers pretrial matters from making a non-binding, preliminary order.[2]

Here, since Judge Hunt was not scheduled to preside over the consolidated trial, his procedural consolidation order had no binding effect on Judge Coward. As the majority notes, trial court judges are presumed to know the law. *Sanders v. Ellington*, 77 N.C. 255, 256 (1877); *accord Lambrix v. Singletary*, 520 U.S. 518, 532 n.4, 117 S. Ct. 1517, 1527 n.4, 137 L. E. 2d 771, 789 n.4 (1997). We presume that Judge Coward knew he had the authority to sever the cases *ex mero motu*. *See Stokes*, 308 N.C. at 642, 304 S.E.2d at 189-90; *see also* N.C.G.S. § 1A-1, Rule 42(b)(1) (2017) ("The court may in furtherance of convenience or to avoid prejudice . . . order a separate trial of any claim . . . ."). No party contested the consolidation in the pretrial order. Judge Coward signed a pretrial order that left the cases consolidated and presided over a consolidated trial, thus implicitly ratifying Judge Hunt's preliminary order with his own determination on consolidation.

The rule in *Oxendine*, that the authority to consolidate cases for trial ultimately remains in the hands of the judge who will preside at the trial, does not preclude a trial judge from making a non-binding, preliminary determination that consolidation is warranted in the pretrial stages. This interpretation harmonizes the rule in *Oxendine* with our North Carolina Rules of Civil Procedure, which expressly contemplate these pretrial matters and allocate the authority to the presiding judge to consolidate without reservation. Nonetheless, parties need as much notice as possible if matters are to be consolidated for trial. Thus, a preliminary ruling on consolidation in the pretrial stages benefits the trial process and thereby serves the ends of justice. Accordingly, I believe no error was committed by the process used here.

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2. While this Court decided *Oxendine* after our adoption of the Rules of Civil Procedure, it relied on a pre-Rules case. *See Oxendine*, 303 N.C. at 703, 281 S.E.2d at 373 (citing *Pickard v. Burlington Belt Corp.*, 2 N.C. App. 97, 103, 162 S.E.2d 601, 604-05 (1965)). Furthermore, the trial judge in *Oxendine* issued his order "out of term and out of session." *Oxendine*, 303 N.C. at 704, 281 S.E.2d at 373. Orders that are issued out of term and out of session are improper unless both parties consent. *See State v. Saults*, 299 N.C. 319, 325, 261 S.E.2d 839, 842 (1980) (citing *Baker v. Varser*, 239 N.C. 180, 79 S.E.2d 757 (1954)). The opinion in *Oxendine* does not specify the impact of this error. Nonetheless, as indicated herein, I believe its essential holding, that the judge presiding at trial makes the ultimate determination regarding consolidation, can be harmonized with what occurred here without finding error.

MARJORIE C. LOCKLEAR
v.
MATTHEW S. CUMMINGS, M.D., SOUTHEASTERN REGIONAL MEDICAL CENTER, DUKE UNIVERSITY HEALTH SYSTEM, AND DUKE UNIVERSITY AFFILIATED PHYSICIANS, INC.

No. 202A17

Filed 17 August 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 346 (2017), reversing an order entered on 2 February 2016 and affirming an order entered on 4 February 2016, both by Judge James Gregory Bell in Superior Court, Robeson County. Heard in the Supreme Court on 14 March 2018.

Law Offices of Walter L. Hart, IV, by Walter L. Hart, IV; and Fulmer Law Firm, L.L.C., by H. Asby Fulmer, III, pro hac vice, for plaintiff-appellee.

Cranfill Sumner & Hartzog LLP, by Katherine Hilkey-Boyatt, David D. Ward, and Matthew R. Gambale, for defendant-appellants Matthew S. Cummings, M.D., Duke University Health System, and Duke University Affiliated Physicians, Inc.

PER CURIAM.

This matter is before the Court based upon a dissent at the Court of Appeals. *Locklear v. Cummings*, ___ N.C. App. ___, 801 S.E.2d 346 (2017). The dissent concluded that plaintiff pled "a claim of medical malpractice by a healthcare provider in her complaint, not a claim of ordinary negligence as asserted by the majority." *Id.* at ___, 801 S.E.2d at 352 (Berger, J., concurring in part and dissenting in part). We agree that the majority at the Court of Appeals erred when it converted plaintiff's claim of medical malpractice into a claim of ordinary negligence. *See Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam) ("It is not the role of the appellate courts . . . to create an appeal for an appellant."). We therefore reverse the decision of the Court of Appeals on that ground and remand this case to that court to address whether the trial court erred in dismissing plaintiff's complaint. *See Vaughan v. Mashburn*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (Aug. 17, 2018) (42PA17) (concluding "that a plaintiff in a medical malpractice action may file an amended complaint under Rule 15(a)" by leave of

court "to cure a defect in a Rule 9(j) certification when the expert review and certification occurred before the filing of the original complaint"); *Thigpen v. Ngo*, 355 N.C. 198, 204, 558 S.E.2d 162, 166 (2002) ("[P]ermitting amendment of a complaint to add the expert certification where the expert review occurred after the suit was filed would conflict directly with the clear intent of the legislature.").

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA
v.
MARIAN OLIVIA CURTIS

No. 441PA16

Filed 17 August 2018

Statutes of Limitation and Repose—misdemeanor—citation for DWI—tolling

A citation issued to defendant for driving while impaired tolled the statute of limitations for misdemeanors. The citation was a constitutionally and statutorily proper criminal pleading that conveyed jurisdiction to the district court to try defendant. The General Assembly did not intend the illogical result that an otherwise valid criminal pleading that vests jurisdiction in the trial court would not also toll the statute of limitations.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 794 S.E.2d 561 (2016), affirming an order signed on 9 February 2016 by Judge Michael Duncan in Superior Court, Caldwell County. Heard in the Supreme Court on 6 November 2017.

Joshua H. Stein, *Attorney General*, *by Christopher W. Brooks*, *Special Deputy Attorney General*, *for the State-appellant.*

Wilson, *Lackey & Rohr*, *P.C.*, *by Timothy J. Rohr*, *for defendant-appellee.*

JACKSON, Justice.

In this case we consider whether the two-year statute of limitations in N.C.G.S. § 15-1 bars the State from prosecuting defendant Marian Olivia Curtis for the misdemeanor offense of driving while impaired (DWI) when the State did not charge defendant by indictment or presentment and did not commence prosecution within that period. Because we conclude that other valid criminal pleadings listed in N.C.G.S. § 15A-921, including the citation issued to defendant in this case, toll the section 15-1 statute of limitations, we reverse the decision of the Court of Appeals affirming the superior court's order affirming the district court's order of dismissal and we remand this case for further proceedings.

On 1 August 2012, defendant was cited for DWI. Defendant was also charged with driving left of center and possession of a Schedule II controlled substance. A magistrate's order was issued on 9 August 2012. On 21 April 2015, defendant filed with the District Court, Caldwell County her Objection to Trial on Citation and Motion for Statement of Charges and Motion to Dismiss. In her motion defendant argued that, because she was filing a pretrial objection pursuant to N.C.G.S. § 15A-922(c) to trial on a citation, the State typically would be required by the statute to file a statement of charges; however, because section 15-1 establishes a two-year statute of limitations for misdemeanors, defendant contended that her charges must be dismissed instead. That same day, the district court issued a Preliminary Indication that "defendant was never charged via indictment, presentment, or warrant," that "[t]he statute of limitations ha[d] not been tolled," and that "[i]t has been more than two years since the alleged date of [the] offense." Consequently, the district court determined that the statute of limitations in section 15-1 barred further prosecution of defendant and thus dismissed the charges.

On 29 April 2015, the State appealed the district court's Preliminary Indication to Superior Court, Caldwell County and moved for an order denying defendant's motion to dismiss on the basis that the magistrate's order served to toll the section 15-1 statute of limitations. The superior court issued an order on 1 October 2015 affirming the district court's Preliminary Indication, granting defendant's motion to dismiss, and remanding the case to the district court for entry of a final order dismissing the DWI charge. The district court entered the final order of dismissal on 15 October 2015, and on appeal to superior court, that final order was affirmed in an order signed on 9 February 2016. The State appealed the superior court's decision to the Court of Appeals.

Having determined that the procedural and legal issues in this case were identical to those before it in *State v. Turner*, ___ N.C. App. ___, 793 S.E.2d 287 (2016), the Court of Appeals adopted its reasoning in

Turner and held that the district court had not erred in granting defendant's motion to dismiss. *State v. Curtis*, ___ N.C. App. ___, 794 S.E.2d 561, 2016 WL 7100635, at *1 (2016) (unpublished). Therefore, we look to *Turner*, which is also before this Court on appeal, for the reasoning of the Court of Appeals.[1]

The facts in *Turner* are substantially similar to those in this case. On 7 August 2012, the defendant, Christopher Glenn Turner, received a citation for driving while impaired, was arrested and brought before a magistrate who issued a magistrate's order, and was never charged by indictment, presentment, or warrant. *Turner*, ___ N.C. App. at ___, 793 S.E.2d at 288. On 26 November 2014, the defendant moved to dismiss the charges on grounds that the statute of limitations in section 15-1 had expired. *Id.* at ___, 793 S.E.2d at 288. As in this case, the charge ultimately was dismissed and the State appealed that decision to the Court of Appeals. *Id.* at ___, 793 S.E.2d at 288. The Court of Appeals reasoned that section 15-1 creates a two-year statute of limitations for the misdemeanors listed therein because it provides that "[t]he crimes of deceit and malicious mischief, and the crime of petit larceny where the value of the property does not exceed five dollars ($5.00), and all misdemeanors except malicious misdemeanors, shall be presented or found by the grand jury within two years after the commission of the same." *Id.* at ___, 793 S.E.2d at 289 (emphasis omitted) (quoting N.C.G.S. § 15-1 (2015)). Because the Court of Appeals determined that this statutory language was both explicit and clear, the court concluded that it "must give [the statute] its plain and definite meaning," and was "without power to interpolate, or superimpose, provisions and limitations not contained therein." *Id.* at ___, 793 S.E.2d at 290 (quoting *State v. Williams*, 218 N.C. App. 450, 451, 725 S.E.2d 7, 8-9 (2012)). The Court of Appeals also relied on this Court's determination regarding section 15-1 in *State v. Hedden* that "[t]here is no saving clause in this statute as to the effect of preliminary warrants before a justice of the peace or other committing magistrate, and in our opinion on the facts of this record the law must be construed and applied as written." *Id.* at ___, 793 S.E.2d at 289 (quoting *Hedden*, 187 N.C. 803, 805, 123 S.E. 65, 65 (1924) (footnote omitted)). Consequently, the Court of Appeals held that "the State had two years to either commence the prosecution of its case, or to issue a warrant, indictment, or presentment which would toll the

1. We allowed discretionary review of the decision of the Court of Appeals in *Turner* on 16 March 2017. For the reasons stated in our opinion here, we have filed a per curiam opinion reversing and remanding the decision of the Court of Appeals in *Turner*. *See State v. Turner*, ___ N.C. ___, ___ S.E.2d ___ (Aug. 17, 2018) (No. 440PA16).

statute of limitations," and affirmed dismissal of the DWI charge against the defendant because the State failed to pursue either course within that period. *Id.* at ___, 793 S.E.2d at 290.

On 16 March 2017, we allowed the State's petition for discretionary review of the decision of the Court of Appeals in this case. Before this Court, the State argues that any criminal pleading that establishes jurisdiction in the district court should toll the two-year statute of limitations in section 15-1 and therefore, that the Court of Appeals erred in holding that the State was barred from prosecuting this action due to expiration of the statute of limitations. We agree.

The issue before us is one of statutory interpretation. "The primary goal of statutory construction is to effectuate the purpose of the legislature in enacting the statute." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 574, 573 S.E.2d 118, 121 (2002) (citations omitted). "The legislative purpose of a statute is first ascertained by examining the statute's plain language." *Id.* at 574, 573 S.E.2d at 121 (quoting *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992)). We "give the statute its plain meaning" when the statutory language is clear, but when the meaning of the statute is ambiguous or unclear, we "must interpret the statute to give effect to the legislative intent." *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (citing *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990)). Moreover, when "a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *Id.* at 45, 510 S.E.2d at 163 (quoting *Mazda Motors of Am., Inc. v. Sw. Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979)).

Before its 1971 revision, our state constitution established that "[n]o person shall be put to answer any criminal charge, except as hereinafter allowed, but by indictment, presentment, or impeachment." N.C. Const. of 1868, art. I, § 12. From 1943 until 2017, section 15-1 stated that "all misdemeanors except malicious misdemeanors, shall be presented or found by the grand jury within two years after the commission of the same, and not afterwards." N.C.G.S. § 15-1 (2015).[2] In *State v. Hundley*

2. While our decision in this case was pending, the General Assembly amended section 15-1 to provide that "all misdemeanors except malicious misdemeanors, shall be charged within two years after the commission of the same, and not afterwards." Act of Oct. 5, 2017, ch. 212, sec. 5.3, 2017 N.C. Sess. Laws 1565, 1579 (codified at N.C.G.S. § 15-1 (2017)).

we recognized that this statute specifically "refers to criminal prosecutions based on grand jury action." 272 N.C. 491, 493, 158 S.E.2d 582, 583 (1968). That view was based, at least in part, on our earlier decision in *State v. Underwood*. *See id.* at 493, 158 S.E.2d at 583 (citing *Underwood*, 244 N.C. 68, 70, 92 S.E.2d 461, 463 (1956)).

In *Underwood* a defendant moved to quash a warrant for driving while under the influence when, after appealing to the superior court from his conviction in the Recorder's Court of Harnett County based upon that warrant, the superior court did not hear his case and the State did not obtain a bill of indictment or presentment within two years of the commission of the crime charged. 244 N.C. at 69, 92 S.E.2d at 461-62. In considering whether the statute of limitations in section 15-1 entitled the defendant to such relief, we necessarily addressed our previous decision on this topic in *State v. Hedden*, which defendant points to in support of her motion to dismiss here. *See id.* at 70, 92 S.E.2d at 463. In *Hedden* we had considered whether the statute of limitations that was the predecessor to section 15-1 could be tolled by a magistrate's warrant.[3] 187 N.C. at 804-05, 123 S.E. at 65-66. We determined:

> There is no saving clause in this statute as to the effect of preliminary warrants before a justice of the peace or other committing magistrate, and in our opinion on the facts of this record the law must be construed and applied as written. There must be a presentment or indictment within two years from the time of the offense committed and not afterwards.

Id. at 805, 123 S.E. at 65. In *Underwood*, though, we distinguished *Hedden* on the basis that the committing magistrate who issued the warrant "did not have final jurisdiction of the offense charged but bound the defendant over to the Superior Court. Consequently, the defendant could not have been tried in the Superior Court on the original warrant,

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3. Similar to the version of section 15-1 in effect during the events giving rise to this case, section 4512 of the Consolidated Statutes provided:

> All misdemeanors, and petit larceny where the value of the property does not exceed five dollars, except the offenses of perjury, forgery, malicious mischief, and other malicious misdemeanors, deceit, and the offense of being accessory after the fact, now made a misdemeanor, shall be presented or found by the grand jury within two years after the commission of the same, and not afterwards.

1 N.C. Cons. Stat. § 4512 (1919).

but only upon a bill of indictment." *Underwood*, 244 N.C. at 70, 92 S.E.2d at 463.[4] We determined that section 15-1 directed only that "[i]n criminal cases *where an indictment or presentment is required*, the date on which the indictment or presentment has been brought or found by the grand jury marks the beginning of the criminal proceeding and arrests the statute of limitations." *Id.* at 70, 92 S.E.2d at 463 (emphasis added) (citing N.C.G.S. § 15-1). We then held that:

> [I]n all misdemeanor cases, where there has been a conviction in an inferior court that had final jurisdiction of the offense charged, upon appeal to the Superior Court the accused may be tried upon the original warrant and that the statute of limitations is tolled from the date of the issuance of the warrant.

Id. at 70, 92 S.E.2d at 462.

Defendant argues here that our holding in *Underwood* should be read to carve out a single exception to the plain language of section 15-1 to allow warrants to toll the statute of limitations. Defendant's attempt to distinguish *Underwood* from the present case elevates form over substance and is unpersuasive. Although our holding in *Underwood* addressed the specific factual circumstances of that case, the critical distinction we drew was more generally between crimes that require grand jury action to convey jurisdiction to the trial court and crimes that do not. *See Underwood*, 244 N.C. at 70, 92 S.E.2d at 463. For the latter, it would be absurd to require the State to charge a defendant by indictment or presentment in order to toll the statute of limitations when the State has already obtained an otherwise valid criminal pleading that conveys jurisdiction by satisfying the requirements of N.C.G.S. § 15A-924(a). *See State v. Brice*, 370 N.C. 244, 249, 806 S.E.2d 32, 36 (2017) (explaining that a criminal pleading is constitutionally sufficient and conveys jurisdiction to the trial court when the pleading "clearly [ ] apprise[s] the defendant . . . of the conduct which is the subject of the accusation" (quoting N.C.G.S. § 15A-924(a)(5) (2015))).

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4. In other words, because of the locality-specific structure and jurisdiction of the inferior courts at the times that *Underwood* and *Hedden* were decided, the defendant in *Underwood* could be tried to final judgment, convicted, and sentenced based upon the warrant in that case, but the defendant in *Hedden* could only be held based upon the warrant at issue pending further action by a grand jury. Therefore, the *Underwood* warrant had the effect of tolling the statute of limitations and the *Hedden* preliminary warrant did not.

Since our decision in *Underwood*, the structure of the General Court of Justice as well as the allocation of subject-matter jurisdiction and the types of pleadings that may convey jurisdiction over criminal actions all have undergone substantive changes. The extensive amendments to Article IV of the 1868 constitution that were ratified in 1962 created the District Courts as a division of the new General Court of Justice, *see* N.C. Const. of 1868, art. IV, §§ 1-2, 8 (1962), and granted to the General Assembly the power to "by general law uniformly applicable in every local court district of the State, prescribe the jurisdiction and powers of the District Courts," *id.* art. IV, § 10(3). In a provision that has remained unaltered since its enactment, the General Assembly subsequently directed that "the district court has exclusive, original jurisdiction for the trial of criminal actions, including municipal ordinance violations, below the grade of felony, and the same are hereby declared to be petty misdemeanors." *Compare* N.C.G.S. § 7A-272(a) (Supp. 1965), *with id.* § 7A-272(a) (2017). Following these changes in the structure and allocation of jurisdiction in the General Court of Justice, the text of the provision formerly denominated as Article I, Section 12 of the 1868 constitution was changed in the 1971 constitution to state that "[e]xcept in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment." N.C. Const. art. I, § 22. As such, the General Statutes have directed since 1975 that "[t]he citation, criminal summons, warrant for arrest, or magistrate's order serves as the pleading of the State for a misdemeanor prosecuted in the district court, unless the prosecutor files a statement of charges, or there is objection to trial on a citation." *Compare* N.C.G.S. § 15A-922(a) (1975), *with id.* § 15A-922(a) (2017).

Defendant argues that the expansion of the scope of criminal pleadings for misdemeanor offenses contemplated in Article I, Section 22 does not mean that the scope of pleadings capable of tolling the two-year statute of limitations has also expanded. If the General Assembly desired that effect, defendant contends that section 15-1 would provide for it explicitly. Here defendant again draws an overly technical distinction—one that fails to contemplate the purpose of the two-year statute of limitations in light of development of our State's laws governing criminal procedure.

We have recognized that the purpose of a statute of limitations such as section 15-1 is to "provide predictable, legislatively enacted limits on prosecutorial delay," thereby serving as "the primary guarantee against bringing overly stale criminal charges." *State v. Goldman*, 311 N.C. 338, 343, 317 S.E.2d 361, 364 (1984) (quoting *United States v. Lovasco*, 431

U.S. 783, 789, 97 S. Ct. 2044, 2048 (1977)). Because a criminal citation may now serve as the State's charging document for misdemeanors, *see* N.C.G.S. § 15A-922(a); *see also id.* § 20-138.1(c)-(d) (2017) (stating that "[i]mpaired driving as defined in this section is a misdemeanor," and "[i]n any prosecution for impaired driving, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges that the defendant drove a vehicle on a highway or public vehicular area while subject to an impairing substance"), the purpose of the statute of limitations was satisfied by issuance of the citation to defendant.

Here defendant received a citation for driving while subject to an impairing substance. That citation was a constitutionally and statutorily proper criminal pleading that conveyed jurisdiction to the district court to try defendant for the misdemeanor crime charged. In light of our decision in *Underwood*, the changes to criminal procedure and to our court system since the enactment of section 15-1, as well as our understanding of the general purpose of a criminal statute of limitations, we hold that the citation issued to defendant tolled the statute of limitations here. We cannot conclude that the General Assembly intended the illogical result that an otherwise valid criminal pleading that vests jurisdiction in the trial court would not also toll the statute of limitations. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for remand to the Superior Court, Caldwell County, with instructions to vacate the 9 February 2016 Order Affirming District Court Order and for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA
v.
TERRENCE LOWELL HYMAN

No. 245A08-2

Filed 17 August 2018

1. Criminal Law—appropriate relief—inability to raise in prior proceedings

The defendant in a first-degree murder prosecution was not in a position to adequately raise his ineffective assistance of counsel claim in prior direct appeals, and his motion for appropriate relief was not subject to the procedural bar created by N.C.G.S. § 15A-1419(a)(3).

2. Criminal Law—appropriate relief—adequate representation—motion denied

The trial court's decision to deny defendant's motion for appropriate relief was supported by the evidence where the claim for ineffective assistance of counsel rested on an alleged conversation between a witness and defendant's trial counsel concerning a probation violation proceeding prior to this trial, which raised the possibility of a conflict of interest. The trial court found that the alleged conversation never happened.

Appeal pursuant to N.C.G.S. § 7A-30(2) and on writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 797 S.E.2d 308 (2017), reversing an order denying defendant's motion for appropriate relief signed on 12 May 2015 by Judge Cy A. Grant, Sr., and entered in Superior Court, Bertie County. Heard in the Supreme Court on 5 February 2018.

Joshua H. Stein, *Attorney General*, *by Mary Carla Babb and Nicholaos G. Vlahos*, *Assistant Attorneys General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by Nicholas C. Woomer-Deters*, *Assistant Appellate Defender*, *for defendant-appellee.*

ERVIN, Justice.

The question before us in this case is whether the record supports the trial court's decision to deny defendant's motion for appropriate relief. After carefully considering the record in light of the applicable law, we hold that, while the claim asserted in defendant's motion for appropriate relief is not subject to the procedural bar established by N.C.G.S. § 15A-1419(a)(3), the trial court did not err by denying defendant's motion for appropriate relief for the reasons stated by the Court of Appeals. As a result, we affirm the decision of the Court of Appeals, in part; reverse that decision, in part; and remand this case to the Court of Appeals for consideration of defendant's remaining challenges to the trial court's order denying his motion for appropriate relief.

At approximately 10:00 p.m. on 5 May 2001, Earnest Bennett arrived at the L and Q nightclub with his friends Shelton Lamont Gilliam, Tyrone Knight, and Alton Bennett. As the night progressed and early morning arrived, a man confronted Mr. Bennett, leading to an argument between the two men that escalated into an altercation after a "crew of people" approached Mr. Bennett and began to hit him with "bottles, chairs and basically everything that they could find."

Derrick Speller testified for the State at defendant's trial that, after the altercation had been in progress for approximately fifteen minutes, he observed defendant Terrence Lowell Hyman enter the nightclub with a firearm and shoot it at Mr. Bennett. At that point, Mr. Speller observed Mr. Bennett "clench his side and run for the door." As Mr. Bennett reached the nightclub door, defendant shot him again in the small of his back. According to Mr. Speller, Mr. Bennett and defendant exited the nightclub once defendant had shot Mr. Bennett a second time. Outside the nightclub, Mr. Speller saw defendant "kneeling down over" Mr. Bennett, who was on the ground, and shoot Mr. Bennett a third time.[1] Mr. Bennett died as a result of the gunshot wounds that he sustained on this occasion.

On the other hand, Demetrius Pugh testified on defendant's behalf that he observed Demetrius Jordan shoot Mr. Bennett multiple times inside and outside of the nightclub. According to Demetrius Pugh, Mr. Jordan had a .38 caliber handgun inside the nightclub and procured a nine millimeter handgun from his van after leaving the nightclub's interior.[2] In addition, Lloyd Pugh testified on defendant's behalf that he heard two gunshots inside the nightclub. Although Lloyd Pugh could not

1. Robert Wilson, another witness for the State, also identified defendant as the individual who shot Mr. Bennett.

2. Mr. Speller admitted that Mr. Jordan fired a nine millimeter handgun into the air outside the nightclub.

see who had fired these shots, he knew that defendant had not fired them because he could see defendant, who was leaving the nightclub at that time, and observed that he did not have a firearm on his person when the shots were fired. As Lloyd Pugh attempted to bring the fight inside the nightclub under control, he heard additional gunshots outside. Simultaneously, Lloyd Pugh observed defendant reentering the nightclub without a firearm in his possession.

On 30 July 2001, the Bertie County grand jury returned a bill of indictment charging defendant with first-degree murder. The charges against defendant came on for trial before the trial court and a jury at the 25 August 2003 criminal session of Superior Court, Bertie County.

During the trial, Mr. Speller testified on direct examination that defendant's trial counsel, Teresa Smallwood, had spoken with him before the trial and asked for his help with the case.[3] In the course of a cross-examination conducted by Ms. Smallwood, Mr. Speller testified that he had sought assistance from Ms. Smallwood's law firm with respect to a probation violation proceeding at some point prior to the time that this case came on for trial. In addition, Mr. Speller testified that:

> Q.: At some point in time during that conversation it came up that you had been at the L and Q, do you remember that?
>
> A.: No
>
> . . . .
>
> Q.: Do you remember when you told the members of the jury this earlier that I wanted you to help me, it was because you told me a story on that particular occasion as to what you say happened; isn't that correct?
>
> A.: No, it's not.
>
> . . . .
>
> Q.: You sat in my office and you told me across the desk from me that you had seen Demetrius Jordan . . . . shoot a weapon; isn't that correct?

3. Defendant's other trial counsel, W. Hackney High, stated during a bench conference that he had not known that Mr. Speller and Ms. Smallwood had conversed prior to trial until that fact emerged during Mr. Speller's testimony.

A.: No, it's not.

Q.: And you told me that the reason you didn't want to come forward is because you had been hustling for Turnell Lee and Demetrius Jorden and them dudes was lethal. Do you recall saying that?

A.: No, I did not.

Q.: They would off you in a minute. You don't remember that?

A.: No.

Q.: I didn't either. Until I went back and got the notes. Then in the course of the conversation when you and I were talking, you said that you would help in any way you could; isn't that correct?

A.: No, it's not.

. . . .

Q.: Well earlier you told the members of the jury that I said I needed you to help?

. . . .

A.: Not in the conversation that you're referring to.

. . . .

Q.: Do you recall that at the point in time when we were talking about what it was you knew about the L and Q, do you recall telling me that Turnell Lee and Demetrius Jordan were after you to go and tell the police something that you knew wasn't true?

A.: No, we never had that conversation.

. . . .

When I spoke to you about that case, that was when you sent Tyrone Watson to say that you wanted to talk to me, Turnell and a few other people. I went to your office and seen—and talked to you and Tanza [Ruffin][4] in the parking lot at your office. You all was leaving. I told you

4. At the time of defendant's trial, Ms. Ruffin was Ms. Smallwood's law partner.

at that time I couldn't help you on this case, that I would harm him more than I could help him if I was brought on the stand to testify. That's the only conversation that you and I ever had about this case.

Q.: Derrick, that's the second time we talked about this; isn't that correct?

. . . .

Didn't I represent you in '01?

A.: No, Tanza [Ruffin] represented me.

. . . .

Q.: And I ultimately represented you in that case; isn't that correct?

. . . .

Before the judge, you and I stood before the judge on that case?

A.: Yes, we stood before the judge.

Q.: And it was in the occurrence of that that you talked about all these things as to why you never came forward; isn't that correct?

A.: No, it is not.

At one point in her cross-examination of Mr. Speller, Ms. Smallwood attempted to question Mr. Speller using a one-page document that had Mr. Speller's name at the top and writing on the right-hand side, but was precluded from doing so by the trial court.

On 12 September 2003, the jury returned a verdict convicting defendant of first-degree murder. On 16 September 2003, the jury returned a verdict determining that no aggravating circumstances existed and that defendant should be sentenced to a term of life imprisonment without the possibility of parole. Based upon the jury's verdicts, the trial court entered a judgment sentencing defendant to a term of life imprisonment without parole.

In seeking relief from the trial court's judgment before the Court of Appeals, defendant argued that the trial court had erred by failing "to conduct a hearing when the trial court became aware of a potential conflict of interest on the part of" Ms. Smallwood arising from the fact

"that [Ms.] Smallwood had previously represented [Mr.] Speller in an unrelated case." *State v. Hyman*, 172 N.C. App. 173, 616 S.E.2d 28, 2005 WL 1804345, at *4 (2005) (unpublished) (*Hyman I*). After determining that it could not "find from the face of the record that defendant's attorney's prior representation of [Mr.] Speller affected her representation of defendant," *id.* at *6, the Court of Appeals remanded this case to the Superior Court, Bertie County, "for an evidentiary hearing 'to determine if the actual conflict adversely affected [the attorney's] performance,' " *id.* (alteration in original) (quoting *State v. James*, 111 N.C. App. 785, 791, 433 S.E.2d 755, 759 (1993)).

An evidentiary hearing was conducted before the trial court on remand on 3 October 2005 and 2 November 2005. At the remand hearing, Ms. Smallwood testified that the information that she used during her cross-examination of Mr. Speller stemmed from a meeting that she had had with Mr. Speller, during which she had taken notes. According to available court records, Ms. Smallwood appeared on Mr. Speller's behalf at a probation revocation hearing on 26 September 2002, although Ms. Ruffin was listed as Mr. Speller's attorney of record in that case.[5] On 28 November 2005, the trial court entered an order concluding that Ms. Smallwood's "representation of [defendant] was not adversely affected by her previous representation of [Mr.] Speller." On appeal to the Court of Appeals from the trial court's remand order, defendant argued that "[Ms.] Smallwood's actual conflict of interest adversely affected her representation of him." *State v. Hyman*, 182 N.C. App. 529, 642 S.E.2d 548, 2007 WL 968753, at *2 (2007) (unpublished) (*Hyman II*). The Court of Appeals rejected defendant's challenge to the trial court's remand order on the grounds that defendant had not challenged any of the trial court's findings of fact, rendering them conclusive for purposes of appellate review, *id.* at *4, and that "[d]efendant [had] failed to show [that] the trial court [had] erred when it concluded that [Ms.] Smallwood's representation of him was not adversely affected by her previous representation of [Mr.] Speller," *id.* at *5. As a result, the Court of Appeals affirmed the trial court's remand order. *Id.* at *6.

On 8 May 2008, defendant filed a petition seeking the issuance of a writ of habeas corpus with the United States District Court for the Eastern District of North Carolina. On 31 May 2008, defendant filed a petition seeking the issuance of a writ of certiorari by this Court authorizing

5. Ms. Smallwood had been appointed to represent defendant in this case on 14 May 2001.

review of the Court of Appeals' decisions in *Hyman I* and *Hyman II* and the trial court's remand order. This Court denied defendant's certiorari petition on 22 December 2008. On 31 March 2010, United States District Judge Terrence W. Boyle entered an order opining that "[Ms.] Smallwood's actual conflict of interest adversely affected her performance" and issuing the requested writ of habeas corpus. The State noted an appeal to the United States Court of Appeals for the Fourth Circuit from the District Court's order. On 21 July 2011, the Fourth Circuit released an opinion staying further federal appellate proceedings in order "to provide the North Carolina courts with an opportunity to weigh in on the procedural and substantive issues." *Hyman v. Keller*, No. 10-6652, 2011 WL 3489092, at *11 (4th Cir. Aug. 10, 2011) (per curiam).

On 15 July 2013, defendant filed a motion for appropriate relief in Superior Court, Bertie County, in which he asserted, among other things, that his "constitutional right to effective, conflict-free trial counsel [had been] violated." Defendant argued that "[Ms.] Smallwood was a critical defense witness because she could have testified concerning a prior statement by [Mr.] Speller, a key State's witness, that both impeached his testimony and tended to exculpate [defendant]" and requested that an evidentiary hearing be held at which he could "present evidence, which has never been considered by any court, that establishes a prima facie claim that his right to effective, conflict-free counsel was violated." On 16 July 2013, the trial court entered an order granting defendant's request that an evidentiary hearing be held.

On 3 June 2014, the trial court held an evidentiary hearing for the purpose of considering the issues raised by defendant's motion for appropriate relief. On 12 May 2015, the trial court signed an order denying defendant's motion for appropriate relief. In its order, the trial court found as a fact that:

> 11. At the MAR evidentiary hearing held June 3, 2014, Defendant introduced as evidence a page out of a legal notepad which contained handwritten notes, the contents of which were as follows:
>
> 11/20/01
> Derrick Speller
> saw the whole thing
> Demet had a .380 and a 9 mm.
> He shot the guy and then ran out the back door
> Somebody else shot at the guy with a chrome looking small gun but "I don't know who it was."

> "I heard Demetrius shot him again outside but I don't know for sure."
> "I think it was a 9 mm he (Demet) had outside.
> --Never gave a statement to police because he hustled for Demet and Turnell and them [n*******] are lethal.
> can you shoot me a couple of dollars

The handwritten notes had an exhibit stamp on them reading "Defendant's Exhibit 1." This is an indication that at trial Ms. Smallwood placed the exhibit stamp on the notes, marking them as Defendant's Exhibit 1, when she attempted to show the notes to Speller, but the undersigned would not allow her to do so. . . .

. . . .

13. Former NCPLS attorney Ravi Manne testified at the MAR evidentiary hearing that he . . . . located Defendant's MAR Exhibit 1 among Ms. Smallwood's files on Defendant's case.

. . . .

17. At the MAR evidentiary hearing, Defendant introduced an October 9, 2003 letter Ms. Smallwood sent the Office of Indigent Defense Services ("IDS"), which appeared with other documents admitted into evidence collectively as Defendant's MAR Exhibit 30. . . . Attached to the letter was an "Attorney Time Sheet," detailing in eight pages Ms. Smallwood's daily hours in Defendant's case. The first entry on the time sheet is for May 14, 2001, at which time Ms. Smallwood noted that she reviewed her appointment notice and talked to Defendant's family. There is no entry on the time sheet for November 20, 2001, the date listed on the handwritten notes purportedly from the conversation Ms. Smallwood had with Speller admitted at the MAR evidentiary hearing as Defendant's MAR Exhibit 1.

. . . .

19. At the MAR evidentiary hearing, W. Hackney High testified that he was appointed, along with Ms. Smallwood, to represent Defendant at trial. According to Mr. High, Ms. Smallwood was first-chair counsel, and

he was second-chair counsel. In preparing for trial, Mr. High and Ms. Smallwood reviewed the State's witness list and together determined which attorney would cross-examine which witness, depending on several factors including whether either attorney knew the witness. Mr. High and Ms. Smallwood had decided prior to trial that Mr. High would cross-examine Speller. A witness list Ms. Smallwood and Mr. High prepared from information conveyed to them by the State was admitted into evidence at the MAR evidentiary hearing as Defendant's MAR Exhibit 21. The list contained a notation indicating that "Hack," meaning Mr. High, was to cross-examine Speller.

20. According to Mr. High's MAR evidentiary hearing testimony, prior to trial he and Ms. Smallwood did not have a substantive conversation about Speller. Mr. High testified that he had some indication what Speller would testify to, but did not recall knowing specifically what he was going to say. Mr. High further testified that he was not aware of any conversation between Speller and Ms. Smallwood or any notes regarding a conversation between the two before trial. Mr. High testified that if he had the notes Ms. Smallwood would subsequently claim she had at trial, he would have provided them to his co[-] counsel. Moreover, Mr. High noted that if he had known about the notes when preparing for trial, he would have told Ms. Smallwood that she needed to cross-examine Speller, or they would have approached his cross-examination differently.

21. According to Mr. High's MAR evidentiary hearing testimony, when Speller's name was called at trial, Ms. Smallwood leaned over to Mr. High and said, "[D]on't worry about this one, I've got it." When Mr. High inquired as to why, Ms. Smallwood told him that he had spoken with Speller about the case and to let her handle it.

22. At the MAR evidentiary hearing, Mr. High testified that after District Attorney Asbell concluded her direct examination of Speller at trial, Ms. Smallwood left the courtroom during the recess and returned with some papers. Ms. Smallwood told Mr. High that she had talked to Speller prior to trial and that she had some notes she was going to use to cross-examine him. This was the first

time Mr. High heard of the notes. Mr. High testified that with Speller's cross-examination, Ms. Smallwood tried to establish that the events on the night in question were different than how Speller testified to them on direct examination. According to Mr. High, Ms. Smallwood had a piece of paper in her hand when she was cross-examining Speller. Mr. High testified that the decision to have Ms. Smallwood, rather than himself, cross-examine Speller was a strategic decision based on her having prior knowledge concerning the witness that Mr. High did not have.

23. . . . . Mr. High recalled that the [trial court] would not admit the notes because Speller had denied that the conversation which Ms. Smallwood was referring to during the cross-examination ever took place.

24. At the MAR evidentiary hearing, Mr. High could not positively identify Defendant's MAR Exhibit 1 as the piece of paper Ms. Smallwood had with her when she came back into the courtroom after the recess.

. . . .

27. At the MAR evidentiary hearing, Ms. Ruffin stated that she was aware that Speller had testified at defendant's trial and that his trial testimony was not helpful to Defendant's case. However, she was under the impression that Speller had information which would be helpful. Ms. Ruffin remembered being in the parking lot when Speller was speaking with Ms. Smallwood and that he indicated he could be helpful to the case, but she could not remember exactly what he said. Ms. Ruffin also remembered Ms. Smallwood telling her that Speller claimed that he was there the night of the murder, that he saw everything, and that he sought her out and indicated to her that he could help. Ms. Ruffin testified that Ms. Smallwood may have had a conversation with Speller other than the one in the parking lot.

28. At the MAR evidentiary hearing, Ms. Ruffin identified the handwriting on Defendant's MAR Exhibit 1 as that of Ms. Smallwood.

29. . . . . Ms. Ruffin testified that just because Defendant's MAR Exhibit 2 was found in a box of

Defendant's case files did not mean they were related to Defendant; rather, they could have simply been notes taken on a notepad used in Defendant's case that were never torn out.

. . . .

31. Defendant called neither Ms. Smallwood nor Speller as a witness at the MAR evidentiary hearing.

32. Defendant presented no credible evidence that the conversation which Ms. Smallwood claimed she had with Speller ever took place.

33. Defendant presented no credible evidence that Defendant's MAR Exhibit 1 contained, as he purported, notes taken contemporaneously with any conversation between Ms. Smallwood and Speller.

34. Defendant presented no credible evidence that the purposed conversation between Ms. Smallwood and Speller took place on the date appearing on Defendant's MAR Exhibit 1, i.e., November 20, 2001.

35. Given the evidence presented at the MAR evidentiary hearing, the Court cannot definitely find based only upon Defendant's MAR Exhibit 1 and Ms. Smallwood's cross-examination of Speller at Defendant's trial that Ms. Smallwood wrote the notes admitted as Defendant's MAR Exhibit 1 contemporaneously with any conversation she had with Speller; that the purported conversation took place on the date appearing on the exhibit, i.e., November 20, 2001; or that the conversation ever took place. The undersigned acknowledged that Ms. Ruffin did testify as to how she remembered, based upon Speller's attitude in the parking lot and from talking to Ms. Smallwood, that Speller would be helpful to the case. However, other evidence indicated that the conversation purportedly memorialized in Defendant's MAR Exhibit 1 never took place. First, Ms. Smallwood did not inform her co-counsel Mr. High of her conversation with Speller, despite the fact that she and Mr. High had decided that he would be the attorney cross-examining Speller. In fact, Mr. High did not learn about the purported conversation until Speller testified at trial several days after the trial began. Secondly,

> despite keeping detailed notes of the time she spent working on Defendant's case, the time sheet Ms. Smallwood submitted to IDS for fee payment approval did not contain an entry for November 20, 2001, the date on Defendant's MAR Exhibit 1.
>
> 36. At trial, Ms. Smallwood attempted to show Speller what she identified as her notes from their conversation. The undersigned finds upon a review of the trial transcript that he would not allow Ms. Smallwood to do so because Speller had denied that the conversation which Ms. Smallwood was referring to during the cross-examination ever took place.

Based upon these findings of fact, the trial court concluded, in pertinent part, that defendant's ineffective assistance of counsel claim stemming from "Ms. Smallwood's failure to withdraw and testify" concerning her alleged prior conversation with Mr. Speller was "procedurally barred because [d]efendant was in a position to adequately raise it in *Hyman I*, but failed to do so." In the alternative, the trial court concluded that defendant's ineffective assistance of counsel claim lacked merit given that he "can demonstrate neither deficient performance nor prejudice in regard to trial counsel's failure to withdraw from representing [d]efendant and to testify as a witness regarding a prior conversation she had with Speller in which he made remarks inconsistent with his direct trial testimony," citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 692 (1984). More specifically, the trial court concluded that it could not find that Ms. Smallwood's performance had been deficient because the trial court could not find, based upon the evidence contained in the transcript of defendant's trial and the evidence presented at the evidentiary hearing, that Ms. Smallwood's notes were written contemporaneously with any alleged conversation that Ms. Smallwood had with Mr. Speller, that the alleged conversation between Ms. Smallwood and Mr. Speller took place on 20 November 2001, or that the alleged conversation between Ms. Smallwood and Mr. Speller ever actually occurred. Finally, the trial court concluded that "[d]efendant can demonstrate neither deficient performance nor prejudice even assuming that the conversation which Ms. Smallwood claimed [that] she had with [Mr.] Speller took place" "because Ms. Smallwood would not have been allowed to testify to the substance of the conversation [that] she allegedly had with [Mr.] Speller had she withdrawn and testified at trial" or "introduced her notes of the conversation" "because [Mr.] Speller categorically denied having had the alleged conversation with

Ms. Smallwood." In light of that fact, "any testimony by Ms. Smallwood would have been limited to impeaching only [Mr.] Speller's denial that any conversation took place, and would not have included the substance of the alleged conversation." For that reason, the trial court determined that "the absence of Ms. Smallwood's limited testimony did not prejudice [d]efendant, particularly in light of her effective cross-examination of [Mr.] Speller" and the fact that "other evidence established defendant, not Demetrius Jordan, was the shooter."

In seeking relief from the trial court's order before the Court of Appeals, defendant argued that the trial court had erroneously relied upon the ineffective assistance of counsel test enunciated in *Strickland* and should, instead, have relied upon the test enunciated in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). According to defendant, "the test for determining ineffective assistance of counsel based on an attorney's conflict of interest is whether 'an actual conflict of interest adversely affected his lawyer's performance,' " quoting *Sullivan*, 446 U.S. at 350, 100 S. Ct. at 1719, 64 L. Ed. 2d at 348. Defendant contended that the record developed at the evidentiary hearing demonstrated that Ms. Smallwood had been subject to an actual conflict of interest at the time that she represented defendant. In the alternative, defendant argued that, even if the trial court had properly relied upon the *Strickland*, rather than the *Cuyler*, test, the trial court's order should still be overturned because Ms. Smallwood's failure to withdraw from her representation of defendant in order to testify concerning her conversation with Mr. Speller constituted ineffective assistance of counsel, citing *Strickland*, 466 U.S. at 687, 694, 104 S. Ct. at 2064, 2068, 80 L. Ed. 2d at 693, 698. In support of this contention, defendant argued that Finding of Fact Nos. 32, 33, 34, and 35 lacked sufficient evidentiary support in light of the overwhelming and unrebutted evidence tending to show that the alleged conversation between Ms. Smallwood and Mr. Speller actually took place. In addition, defendant contends that Ms. Smallwood's testimony concerning Mr. Speller's statements would have been admissible given that "[e]xtrinsic evidence is admissible to prove a witness's prior inconsistent statement, where the inconsistency goes to a material issue," citing *State v. Green*, 296 N.C. 183, 192-93, 250 S.E.2d 197, 203 (1978). Finally, defendant argued that, to the extent that defendant was procedurally barred from raising the ineffective assistance of counsel claim asserted in his motion for appropriate relief because he could have asserted it in *Hyman I*, his failure to do so should be excused because he had received ineffective assistance from his appellate counsel.

The State, on the other hand, argued that the trial court had correctly concluded that defendant's ineffective assistance of trial counsel claim was procedurally barred given that, even though defendant was in a position to adequately raise the claim in question on direct appeal, he had failed to do so and had opted, instead, to argue "that the trial court [had] erred in failing to conduct a hearing when it became aware of a conflict of interest." In addition, the trial court correctly rejected defendant's ineffective assistance of counsel claim on the merits given the existence of sufficient record evidence to support the trial court's determination that the alleged conversation between Ms. Smallwood and Mr. Speller never took place and given that the trial court had correctly determined that, even if the conversation in question had occurred, Ms. Smallwood would not have been allowed to testify to the substance of the alleged conversation before the jury.

After summarizing the procedural history of the case, the Court of Appeals rejected the State's contention that defendant's ineffective assistance of counsel claim was procedurally barred on the grounds that, "[w]hile perhaps unartfully, defendant adequately raised the exculpatory witness claim when he was first in a position to do so" by arguing in *Hyman I* that "[d]efense counsel Smallwood had a conflict of interest in that she was in possession of information which could be used to impeach Derrick Speller, one of the State's most crucial witnesses," and that, "[a]lthough she chose to remain as counsel and used the information she acquired in her representation of Speller to impeach his testimony, rather than withdrawing as counsel and testifying as a witness, it is not at all clear that this was the correct decision." *State v. Hyman*, ___ N.C. App. ___, ___, 797 S.E.2d 308, 317 (2017) (*Hyman III*). Secondly, the Court of Appeals held that, the trial court's findings to the contrary notwithstanding, defendant had proved by a preponderance of the evidence that "[Ms.] Smallwood was privy to a conversation in which [Mr.] Speller identified the shooter as someone other than defendant" and that the presentation of evidence concerning this conversation "would have been both relevant and material had it been offered at trial." *Id.* at ___, 797 S.E.2d at 318 (citing N.C.G.S. § 15A-1420(c)(5) (2015)). For that reason, the Court of Appeals held that the trial court's findings of fact to the effect that the alleged conversation between Ms. Smallwood and Mr. Speller never took place "were not germane to the adjudication of defendant's exculpatory witness claim" and did not, for that reason, "support its conclusion that defendant's claim is meritless for lack of evidentiary support." *Id.* at ___, 797 S.E.2d at 318.

After making these preliminary determinations, the Court of Appeals proceeded to consider the merits of defendant's ineffective assistance of counsel claim. As an initial matter, the Court of Appeals determined, in reliance upon this Court's decision in *State v. Phillips*, 365 N.C. 103, 711 S.E.2d 122 (2011), *cert. denied*, 565 U.S. 1204, 132 S. Ct. 1541, 182 L. Ed. 2d 176 (2012), that "*Strickland* provides an adequate framework to review defendant's exculpatory witness claim." *Id.* at ___, 797 S.E.2d at 320 (citing *Phillips*, 365 N.C. at 121-22, 711 S.E.2d at 137); *see also id.* at ___, 797 S.E.2d at 319-20 (quoting *Phillips*, 365 N.C. at 121-22, 711 S.E.2d at 137 (explaining that "[t]he purpose of our *Holloway* and *Sullivan* exceptions from the ordinary requirements of *Strickland* . . . is . . . to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel" (first ellipsis in original) (quoting *Mickens v. Taylor*, 535 U.S. 162, 176, 122 S. Ct. 1237, 1246, 152 L. Ed. 2d 291, 307 (2002)), and that, "[b]ecause the facts do not make it impractical to determine whether defendant suffered prejudice, we conclude that *Strickland*'s framework is adequate to analyze defendant's issue")). According to the Court of Appeals, since "the facts of this case do not 'make it impractical to determine whether defendant suffered prejudice,' " *id.* at ___, 797 S.E.2d at 320 (quoting *Phillips*, 365 N.C. at 122, 711 S.E.2d at 137), the *Strickland* framework is adequate "to evaluate defendant's exculpatory witness claim," *id.* at ___, 797 S.E.2d at 320.

In addition, the Court of Appeals held that, contrary to the result reached by the trial court, Ms. "Smallwood's testimony, had it been offered, would have been admissible to impeach [Mr.] Speller by showing that he had previously identified [Mr.] Jordan as the shooter," which "was a material issue in defendant's murder trial." *Id.* at ___, 797 S.E.2d at 320; *see State v. Stokes*, 357 N.C. 220, 226, 581 S.E.2d 51, 55 (2003) (stating that, "when a witness is confronted with prior statements that are inconsistent with the witness' testimony, the witness' answers are final as to collateral matters, but where the inconsistencies are material to the issue at hand in the trial, the witness' testimony may be contradicted by other testimony"). In addition, even if testimony concerning the statements that Mr. Speller allegedly made to Ms. Smallwood concerned a collateral matter, her "testimony would have also been admissible to show [Mr.] Speller's bias or interest in the trial." *Id.* at ___, 797 S.E.2d at 320; *see Green*, 296 N.C. at 193, 250 S.E.2d at 203 (stating that, if the cross-examination relates to a collateral matter, "but tends to show bias, motive, or interest of the witness, the [examiner] must first confront the witness with the 'prior statement so that he may have an opportunity to admit, deny or explain it.' ").

The Court of Appeals further concluded that, "[w]hile the admissibility of [Ms.] Smallwood's testimony does not in and of itself establish deficient performance, the circumstances surrounding her decision to remain as counsel leads us to that conclusion." *Id.* at ___, 797 S.E.2d at 321. More specifically, the Court of Appeals noted that "[Ms.] Smallwood was the only witness to [Mr.] Speller's prior inconsistent statement" and determined that, "after her ineffective cross-examination, she became a necessary witness at trial with a duty to withdraw." *Id.* at ___, 797 S.E.2d at 321 (citation omitted). In addition, the Court of Appeals concluded that defendant was prejudiced by Ms. Smallwood's failure to withdraw as one of defendant's trial counsel and testify as a witness on defendant's behalf because "she could have testified that [Mr.] Speller, one of only two key witnesses for the State, had previously told her that it was [Mr.] Jordan—not defendant—who shot [Mr.] Bennett," *id.* at ___, 797 S.E.2d at 321; because "[s]he could have attacked [Mr.] Speller's credibility through his prior inconsistent statement and evidence of his interest in the trial," *id.* at ___, 797 S.E.2d at 321; and because "[Ms.] Smallwood's testimony could have rehabilitated her own credibility as an advocate at trial." *Id.* at ___, 797 S.E.2d at 322.

In a dissenting opinion, Judge Dillon concluded that the trial court had properly denied defendant's motion for appropriate relief on the grounds that the ineffective assistance of counsel claim that defendant had asserted in his motion for appropriate relief was procedurally barred. *Id.* at ___, 797 S.E.2d at 323 (Dillon, J., dissenting). More specifically, Judge Dillon asserted that defendant's brief before the Court of Appeals in *Hyman I* "*failed* to make an exculpatory witness claim" and, even if the brief "*did* raise an exculpatory witness claim, [d]efendant is still procedurally barred because he failed to raise it through a petition for rehearing to [the Court of Appeals] following the issuance of our prior opinion, which ostensibly ignored his claim." *Id.* at ___, 797 S.E.2d at 323 (citing N.C. R. App. P. 31 (providing that a party may file a petition for rehearing arguing "the points of fact or law that, in the opinion of the petitioner, the [Court of Appeals] overlooked or misapprehended" "contain[ing] such argument in support of the petition as petitioner desires to present" (first alteration in *Hyman III*))). According to Judge Dillon, "[d]efendant has failed to establish that, 'more likely than not, but for the error, no reasonable fact finder would have found the defendant guilty of the underlying offense,' " *id.* at ___, 797 S.E.2d at 323 (quoting N.C.G.S. § 15A-1419(e)(1) (2015)), given his failure to "present evidence to show exactly what Ms. Smallwood would have said had she taken the stand," *id.* at ___, 797 S.E.2d at 323. In Judge Dillon's opinion, defendant did not establish that there was a reasonable probability that a different

result would have occurred had Ms. Smallwood withdrawn as counsel and attempted to testify as a witness or had defendant's appellate counsel sought rehearing with respect to his exculpatory witness claim. *Id.* at ___, 797 S.E.2d at 323. Judge Dillon believed that, in order to establish the necessary prejudice, defendant would have had "to show exactly what the substance of Ms. Smallwood's testimony would have been," *id.* at ___, 797 S.E.2d at 323, and failed to do so at the hearing held for the purpose of considering the issues raised by defendant's motion for appropriate relief, *id.* at ___, 797 S.E.2d at 323-24. Finally, Judge Dillon concluded that the copy of Ms. Smallwood's notes of her alleged conversation with Mr. Speller was not admissible to show the contents of Ms. Smallwood's testimony had she withdrawn from her representation of defendant in order to testify. *Id.* at ___, 797 S.E.2d at 324. This Court undertook review of the Court of Appeals' decision in light of Judge Dillon's dissenting opinion and our decision to allow the State's petition seeking the issuance of a writ of certiorari authorizing review of issues in addition to those addressed in Judge Dillon's dissent.

In seeking to persuade us to reverse the Court of Appeals' decision, the State argues that, in order to establish that his ineffective assistance of counsel claim had merit, defendant had to establish that the conversation that allegedly occurred between Ms. Smallwood and Mr. Speller actually took place and the content of the testimony that Ms. Smallwood would have given had she withdrawn from her representation of defendant and testified. According to the State, the trial court's finding that defendant "presented no credible evidence that the conversation which Ms. Smallwood claimed she had with [Mr.] Speller ever took place" had adequate evidentiary support. In view of the fact that the record contains no evidence concerning the substance of Ms. Smallwood's potential testimony, the State claims that a reviewing court lacks the ability to determine whether Ms. Smallwood's testimony would have been admissible or affected the jury's deliberations at trial.

The State contends that defendant failed to show either deficient performance or prejudice as required by *Strickland*. According to the State, defendant did not establish any deficient performance on Ms. Smallwood's part given his failure to "present any evidence as to what Ms. Smallwood would have testified to had she withdrawn and taken the stand" or to present any "credible evidence establishing [that] Ms. Smallwood's conversation with [Mr.] Speller ever took place." In the State's view, even if Ms. Smallwood had withdrawn as one of defendant's trial counsel and testified, she "could not have testified to the content of her notes," citing *State v. Moore*, 275 N.C. 198, 213-14, 166

S.E.2d 652, 662-63 (1969) (determining that extrinsic evidence of a witness's prior inconsistent statement, which constituted double hearsay, was not admissible to impeach that witness after the witness denied making the statement). Similarly, the State argued that defendant was not prejudiced by Ms. Smallwood's failure to withdraw as one of his trial counsel and to testify on his behalf even if she was entitled to testify to the entirety of her conversation with Mr. Speller as reflected in the notes admitted into evidence at the hearing held with respect to defendant's motion for appropriate relief given that, even though the questions that Ms. Smallwood posed to Mr. Speller on cross-examination were not evidence, the posing of those questions necessarily created the impression that Mr. Speller had made statements to Ms. Smallwood that were inconsistent with Mr. Speller's trial testimony. In addition, the State contends that, even if Ms. Smallwood had withdrawn and testified, there is no way to know what impact her testimony would have had upon the jury. The State contends that the record contained ample support for the jury's decision to convict defendant, including testimony from additional witnesses aside from Mr. Speller and evidence casting doubt upon the credibility of the witnesses upon whose testimony defendant relied.

Finally, the State contends that the trial court correctly determined that the ineffective assistance of counsel claim asserted in defendant's motion for appropriate relief was procedurally barred. After acknowledging that defendant had listed a claim like the one upon which he now relies in the record on appeal submitted for consideration by the Court of Appeals in *Hyman I*, the State points out that defendant did not argue the merits of this claim in his brief and had argued, instead, that the trial court had erred by failing to conduct a hearing upon learning that Ms. Smallwood had previously represented Mr. Speller. Moreover, the State contends that defendant failed to establish any justification for a decision to excuse the procedural bar to which defendant's claim was subject.

In seeking to persuade us to uphold the Court of Appeals' decision, defendant contends that the extent to which the alleged conversation between Mr. Speller and Ms. Smallwood actually occurred is irrelevant to the validity of defendant's ineffective assistance of counsel claim given that the jury, rather than the trial court, bore ultimate responsibility for determining the credibility of Ms. Smallwood's testimony, citing *State v. Scott*, 323 N.C. 350, 353, 372 S.E.2d 572, 575 (1988) (explaining that "[t]he credibility of the witnesses and the weight to be given their testimony is exclusively a matter for the jury"). In addition, defendant contends that, even if the extent to which the conversation between Mr.

Speller and Ms. Smallwood actually occurred is relevant to the issues that are before the Court in this case, the substance of that conversation was established in the record developed at trial and at the hearing held for the purpose of considering defendant's motion for appropriate relief. According to defendant, Ms. Smallwood's testimony at the remand hearing established that she could have testified about the prior inconsistent statements that Ms. Speller made to her had she withdrawn from her representation of defendant for the purpose of testifying on defendant's behalf. More specifically, defendant notes that Ms. Smallwood testified at the remand hearing that she took contemporaneous notes of her conversation with Mr. Speller and described the substance of the information contained in those notes, which were found in Ms. Smallwood's file concerning defendant's case and admitted into evidence at the hearing held for the purpose of considering the issues raised by defendant's motion for appropriate relief. In addition, defendant notes that the questions that Ms. Smallwood posed to Mr. Speller on cross-examination at trial consisted of a "nearly verbatim" recitation of the information contained in the notes admitted into evidence at the hearing held in connection with defendant's motion for appropriate relief and that Ms. Ruffin testified to her understanding that Mr. Speller had stated during a conversation between Ms. Smallwood and Mr. Speller that he could be helpful to defendant's defense. Although Ms. Smallwood's time sheet did not indicate that she had spent any time working on defendant's case on 20 November 2001, her time sheet did indicate that Ms. Smallwood spent time working on defendant's case on 30 November 2001, a fact that suggests that a recordkeeping error might have occurred.

Defendant maintains that, in view of the fact that Ms. Smallwood was the only witness to Mr. Speller's prior inconsistent statements concerning the identity of the individual that murdered Mr. Bennett and the fact that Mr. Speller's prior inconsistent statements concerned facts that were material to the issue of defendant's guilt, Ms. Smallwood's failure to withdraw from her representation of defendant and to testify on his behalf constituted deficient performance. Ms. Smallwood's testimony concerning her conversation with Mr. Speller would not have amounted to an attempt "to prove the truth of the matter asserted," quoting N.C.G.S. § 8C-1, Rule 701. Instead, Ms. Smallwood's testimony concerning her conversation with Mr. Speller, which included an account of the shooting for which defendant was on trial, would have been admissible to impeach Mr. Speller's testimony concerning a material issue of fact. In defendant's view, the fact that this case was a close one that hinged upon the credibility of the State's witnesses demonstrates that Ms.

Smallwood's failure to withdraw from her representation of defendant and to testify concerning her conversation with Mr. Speller prejudiced defendant's chances for a more favorable outcome at trial.

Finally, defendant argues that the claim that he had asserted in his motion for appropriate relief was not procedurally barred. According to defendant, a fair reading of the argument that he advanced before the Court of Appeals in *Hyman I* demonstrates that the claim asserted in his motion for appropriate relief was adequately presented for the Court of Appeals' consideration. The brief that defendant submitted to the Court of Appeals in *Hyman I* summarized several conflict of interest cases, described Ms. Smallwood's conflict of interest as involving her "possession of information which could be used to impeach" Mr. Speller, and stated that, "[w]here an actual conflict exists which adversely affects counsel's performance, a new trial is necessary."

According to well-established North Carolina law, appellate courts review trial court orders deciding motions for appropriate relief "to determine 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.' " *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). "[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)). "If no exceptions are taken to findings of fact [made in a ruling on a motion for appropriate relief], such findings are presumed to be supported by competent evidence and are binding on appeal." *State v. Mbacke*, 365 N.C. 403, 406, 721 S.E.2d 218, 220 (alteration in original) (quoting *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984)), *cert. denied*, 568 U.S. 864, 133 S. Ct. 224, 184 L. Ed. 2d 116 (2012). Conclusions of law, on the other hand, are fully reviewable. *State v. Bush*, 307 N.C. 152, 168, 297 S.E.2d 563, 573 (1982) (citation omitted).

[1] As an initial matter, we must address the validity of the State's contention that the claim asserted in defendant's motion for appropriate relief is procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(3), which provides that a claim asserted in a motion for appropriate relief must be denied if, "[u]pon a previous appeal, the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so." N.C.G.S. § 15A-1419(a)(3) (2017). As we

have previously indicated, N.C.G.S. § 15A-1419(a)(3) "is not a general rule that any claim not brought on direct appeal is forfeited on state collateral review" and requires the reviewing court, instead, "to determine whether the particular claim at issue could have been brought on direct review." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 525 (2001) (quoting *McCarver v. Lee*, 221 F.3d 583, 589 (4th Cir. 2000), *cert. denied*, 531 U.S. 1089, 121 S. Ct. 809, 148 L. Ed. 2d 694 (2001)), *cert. denied*, 535 U.S. 1114, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002). "[Ineffective assistance of counsel] claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as . . . an evidentiary hearing." *Id.* at 166, 557 S.E.2d at 524 (citations omitted). Although, "to avoid procedural default under N.C.G.S. § 15A-1419(a)(3), defendants should necessarily raise those [ineffective assistance of counsel] claims on direct appeal that are apparent from the record," "defendants likely will not be in a position to adequately develop many [ineffective assistance of counsel] claims on direct appeal." *Id.* at 167, 557 S.E.2d at 525 (citing *McCarver*, 221 F.3d at 589-90). As a result, in order to be subject to the procedural default specified in N.C.G.S. § 15A-1419(a)(3), the direct appeal record must have contained sufficient information to permit the reviewing court to make all the factual and legal determinations necessary to allow a proper resolution of the claim in question.

A careful review of the record demonstrates that defendant was not in a position to adequately raise the ineffective assistance of counsel claim asserted in his motion for appropriate relief on direct appeal.[6] "A

6. Although the Court of Appeals held that defendant did, in fact, adequately assert his ineffective assistance of counsel claim on direct appeal in *Hyman I*, we do not find that argument persuasive. The mere fact that defendant stated that Ms. Smallwood labored under a conflict of interest at defendant's trial by virtue of the fact that she allegedly possessed information that could be used to impeach Mr. Speller and pointed out that "it [was] not at all clear" that Ms. Smallwood's decision "to remain as counsel and use[ ] the information [that] she acquired in her representation of [Mr.] Speller to impeach his testimony, rather than withdrawing as counsel and testifying as a witness," "was the correct decision" cannot be understood as the assertion of an explicit claim that Ms. Smallwood's failure to withdraw from her representation of defendant and to take the stand as a witness in his behalf constituted ineffective assistance of counsel given the well-established legal principle that "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066-67, 80 L. Ed. 2d at 696 (citation omitted). As a result, while we agree with the Court of Appeals that the ineffective assistance of counsel claim that defendant raised in his motion for appropriate relief is not procedurally barred by N.C.G.S. § 15A-1419(a)(3), we reach that result for a different reason than that found persuasive by the Court of Appeals.

convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial[.]

Id. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. As a result, in order to successfully challenge the trial court's judgment on the basis of the ineffective assistance of counsel claim asserted in his motion for appropriate relief, defendant would have had to establish that Ms. Smallwood was in a position to provide favorable testimony on defendant's behalf, that her failure to withdraw from her representation of defendant in order to testify on his behalf constituted deficient performance, and that, had Ms. Smallwood acted as defendant contends that she should have acted, there is a reasonable probability that defendant would have been found not guilty of the first-degree murder of Mr. Bennett.

The record developed at trial did not contain any information affirmatively tending to show that the alleged conversation between Ms. Smallwood and Mr. Speller actually occurred or whether Ms. Smallwood had a strategic or tactical reason for failing to withdraw from her representation of defendant and testify before the jury concerning the statements that Mr. Speller allegedly made to her. Although the trial court ultimately found that Ms. Smallwood and Mr. Speller never had the conversation upon which defendant's ineffective assistance of counsel claim relies, the fact that the trial court ultimately rejected this aspect of defendant's claim should not cause us to overlook the fact that defendant had no hope of making a viable showing to the contrary based upon the evidentiary record developed at trial, which consisted of nothing more than Mr. Speller's denial that the alleged conversation had ever occurred. Similarly, while defendant made no effort to elicit testimony from Ms. Smallwood concerning the extent, if any, to which she had a strategic or tactical reason for refraining from withdrawing from her representation of defendant and testifying on his behalf, the extent to which her acts or omissions had such a strategic or tactical motivation was a relevant issue about which the trial record is completely silent. Finally, the record presented for consideration by the Court of Appeals

in *Hyman I* is devoid of any affirmative evidence concerning the nature of the statements that Mr. Speller allegedly made to Ms. Smallwood or the content of the testimony that Ms. Smallwood would have given had she withdrawn from her representation of defendant and testified on defendant's behalf. Although the trial transcript does contain the questions that Ms. Smallwood posed to Mr. Speller on cross-examination at defendant's trial and although these questions do track the contents of the notes that defendant introduced into evidence at the hearing held for the purpose of considering defendant's motion for appropriate relief, the fact that Ms. Smallwood posed certain questions to Mr. Speller on cross-examination does not constitute the existence of evidence sufficient to support a finding of fact concerning the contents of the testimony that Ms. Smallwood would have been able to deliver had she withdrawn from her representation of defendant and testified on his behalf. As a result, we hold that defendant was not, in fact, in a position to adequately raise his ineffective assistance of counsel claim on direct appeal in *Hyman I* and is not, for that reason, subject to the procedural bar created by N.C.G.S. § 15A-1419(a)(3) with respect to the ineffective assistance of counsel claim that is before us in this case.[7]

[2] In view of our determination that defendant's ineffective assistance of counsel claim is not procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(3), we must next address the merits of defendant's ineffective assistance of counsel claim. At the beginning of our analysis of this issue, we must acknowledge that the trial court determined that defendant failed to establish that the conversation between Ms. Smallwood and Mr. Speller, upon which defendant's ineffective assistance of counsel

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7. The dissenting judge in the Court of Appeals determined that defendant was procedurally barred from raising the ineffective assistance of counsel claim set out in his motion for appropriate relief claim because, even if defendant had raised that claim before the Court of Appeals, as the majority held that he had, defendant "is still procedurally barred because he failed to raise it through a petition for rehearing to this Court following the issuance of our prior opinion, which ostensibly ignored his claim," citing N.C. R. App. P. 31 (authorizing a party to "file a petition for rehearing after an opinion to argue 'the points of fact or law that, in the opinion of the petitioner, the [Court of Appeals] overlooked or misapprehended' "). *Hyman III*, ___ N.C. App. at ___, 797 S.E.2d at 323. As a result of the fact that rehearing petitions pursuant to N.C. Rule of Appellate Procedure 31 are only available in civil cases, defendant had no right to seek rehearing of the Court of Appeals' decision in *Hyman I* or *Hyman II* and cannot be held to have been subject to a procedural bar for failing to file an unauthorized rehearing petition. Moreover, nothing in N.C.G.S. § 15A-1419(a)(3) provides any support for a determination that a failure to seek rehearing following an appellate decision works any sort of procedural bar. As a result, the fact that defendant did not file any sort of rehearing petition with the Court of Appeals following its decisions in *Hyman I* and *Hyman II* has no bearing on the proper resolution of the procedural default issue that is before us in this case.

claim rests, actually occurred. More specifically, the trial court found as a fact that defendant presented no credible evidence during the hearing held for the purpose of considering defendant's motion for appropriate relief that "Ms. Smallwood wrote the notes admitted as Defendant's MAR Exhibit 1 contemporaneously with any conversation she had with Speller; that the purported conversation took place on the date appearing on the exhibit, i.e., November 20, 2001; or that the conversation ever took place."

"A defendant who seeks relief by motion for appropriate relief must show the existence of the asserted grounds for relief," N.C.G.S. § 15A-1420(c)(6) (2017), with "the moving party ha[ving] the burden of proving by a preponderance of the evidence every fact essential to support the motion," *id.* § 15A-1420(c)(5) (2017). As a result, in order to sustain the ineffective assistance of counsel claim asserted in his motion for appropriate relief, defendant was required to persuade the trial court, by a preponderance of the evidence, of the nature and extent of the testimony that Ms. Smallwood would have provided had she withdrawn from her representation as defendant's trial counsel and testified on defendant's behalf.

As the record clearly reflects, the trial court found that the alleged conversation between Ms. Smallwood and Mr. Speller upon which defendant's ineffective assistance of counsel claim rests never occurred. Although defendant contends that the trial court's findings to this effect lack adequate evidentiary support, we believe that the record contains adequate evidentiary support[8] for the trial court's findings. We note, as an initial matter, that, while defendant introduced a document consisting of notes written in Ms. Smallwood's handwriting dated 20 November 2001, neither Ms. Smallwood nor anyone else ever testified that a

8. The record does, of course, contain ample evidence from which a contrary finding could have been made, including, but not limited to, the content of the questions that Ms. Smallwood posed to Mr. Speller on cross-examination, the content of the notes found in Ms. Smallwood's file concerning defendant's case, the resemblance of the notes that Ms. Smallwood utilized during her cross-examination of Mr. Speller at trial to the document found in Ms. Smallwood's file, and Ms. Smallwood's testimony at the remand hearing held as a result of the Court of Appeals' decision in *Hyman I*. However, the fact that such evidence exists has little to no bearing on the issue that is actually before us, which is whether the findings of fact that the trial court actually did make had sufficient evidentiary support. Although the members of this Court might have found the facts differently than the trial court did, the trial judge, rather than an appellate court, is responsible for resolving factual disputes in the record given the trial judge's superior opportunity to make such determinations.

conversation of the nature allegedly memorialized in these notes actually occurred. Although Ms. Ruffin was able to verify that Mr. Speller and Ms. Smallwood had a conversation[9] and that Ms. Smallwood believed that Mr. Speller would be helpful to defendant's defense, Ms. Ruffin acknowledged that she did not hear Mr. Speller make the statements recounted in the notes that defendant introduced during the proceedings before the trial court. As a related matter, the fact that the notes in question were found in Ms. Smallwood's trial files, while suggestive of a conversation, does not, without more, tend to establish that a conversation of the type upon which defendant's ineffective assistance of counsel claim hinges ever actually occurred. On the other hand, the fact that Ms. Smallwood and Mr. High had decided before trial that Mr. High would assume responsibility for cross-examining Mr. Speller, the fact that one of the criteria that Ms. Smallwood and Mr. High utilized in determining which of them would cross-examine each of the State's witnesses was the extent to which either Ms. Smallwood or Mr. High knew the witness, and the fact that Ms. Smallwood had not told Mr. High that she had had a conversation with Mr. Speller at any point prior to the time that Mr. Speller took the witness stand at defendant's trial raises questions about the validity of defendant's claim that the alleged conversation between Ms. Smallwood and Mr. Speller ever actually occurred. The trial court's finding that the alleged conversation did not, in fact, take place is also supported by the fact that the time records that Ms. Smallwood submitted to Indigent Defense Services at the time that she sought payment for the services that she provided during the course of her representation of defendant contained no indication that she did any work on defendant's behalf on the date shown on the notes that Ms. Smallwood allegedly made during her conversation with Mr. Speller. Finally, Mr. Speller adamantly insisted during his trial testimony that he never made any statement to Ms. Smallwood consistent with the information contained in the handwritten notes found in Ms. Smallwood's file relating to defendant's case. As a result, for all of these reasons, we conclude that the record contains sufficient evidence to support the trial court's findings of fact to the effect that the alleged conversation between Ms. Smallwood and Mr. Speller never occurred.

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9. The conversation that Ms. Ruffin described in her testimony before the trial court, which allegedly took place in the parking lot outside the law office that she and Ms. Smallwood utilized, appears to be a different conversation than the one which allegedly took place in Ms. Smallwood's office, during which Mr. Speller allegedly told Ms. Smallwood that Mr. Bennett was killed by Mr. Jordan, rather than defendant.

Although the Court of Appeals was correct in pointing out that defendant "was not required to 'definitely' prove that [Ms.] Smallwood transcribed the handwritten notes contemporaneously with any conversation she had with [Mr.] Speller, that the purported conversation took place on 20 November 2001, or that the conversation ever took place," ___ N.C. App. at ___, 797 S.E.2d at 318 (majority), we do believe that the viability of defendant's ineffective assistance of counsel claim hinges upon the extent to which Ms. Smallwood was in a position to properly testify that Mr. Speller made the statements attributed to him in the notes that were admitted into evidence at the hearing held in connection with defendant's motion for appropriate relief. In the event that the conversation between Ms. Smallwood and Mr. Speller never happened, Ms. Smallwood could not have properly contradicted Mr. Speller's trial testimony from the witness stand because any testimony that she might have given to that effect would have been perjured. Similarly, in the event that the notes upon which defendant relies for the purpose of showing the contents of the testimony that Ms. Smallwood would have been able to deliver had she withdrawn from her representation of defendant and testified on his behalf did not reflect an actual conversation between Ms. Smallwood and Mr. Speller, they cannot serve as a basis for showing the contents of the testimony that she would have been able to provide had she acted in accordance with the theory that underlies the ineffective assistance of counsel claim asserted in defendant's motion for appropriate relief. Although we agree with defendant's contention that the mere fact that Ms. Smallwood and Mr. Speller disagree about the extent to which Mr. Speller made certain statements to Ms. Smallwood concerning the events that happened at the time of Mr. Bennett's death does not, without more, suffice to preclude the allowance of defendant's motion for appropriate relief, the complete absence of any testimony from Ms. Smallwood or some other witness to the effect that the conversation in question did occur and describing the contents of the conversation that occurred at that time, coupled with the existence of ample evidentiary support for the trial court's determination, based upon its observations during the original trial and subsequent hearings, that the alleged conversation never took place, suffices to support the trial court's decision to deny defendant's motion for appropriate relief. As a result, for all of these reasons, we affirm the Court of Appeals' decision that defendant's ineffective assistance of counsel claim is not procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(3), reverse the Court of Appeals' decision to overturn the trial court's order denying defendant's motion for appropriate relief, and remand this case to the Court of Appeals for

consideration of remaining challenges to the trial court's order denying defendant's motion for appropriate relief.

AFFIRMED, IN PART; REVERSED, IN PART; AND REMANDED.

STATE OF NORTH CAROLINA
v.
WILLIE JAMES LANGLEY

No. 221PA17

Filed 17 August 2018

Indictment and Information—habitual felon—conviction of lesser-included offense

Where the habitual felon indictment returned against defendant alleged that defendant had committed the offenses of robbery with a dangerous weapon and had been convicted of common law robbery, the Supreme Court held that the habitual felon indictment was not fatally defective. The indictment contained all of the information required by N.C.G.S. § 14-7.3 and gave defendant adequate notice of the charge against him. Further, common law robbery is a lesser-included offense of robbery with a dangerous weapon, and an indictment for an offense includes all the lesser degrees of the same crime.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 166 (2017), finding no error in part and vacating in part judgments entered on 28 January 2015 by Judge W. Russell Duke, Jr., in Superior Court, Pitt County, and remanding for resentencing. Heard in the Supreme Court on 16 April 2018.

Joshua H. Stein, Attorney General, by Kimberly N. Callahan, Assistant Attorney General, for the State-appellant.

John Keating Wiles for defendant-appellee.

ERVIN, Justice.

The issue before us in this case is whether an habitual felon indictment returned against defendant was fatally defective. After carefully considering the record in light of the applicable law, we hold that the habitual felon indictment at issue in this case was not fatally defective. For that reason, we reverse the Court of Appeals' decision to the contrary and remand this case to the Court of Appeals for consideration of defendant's remaining challenge to the trial court's judgments.

At approximately 10:30 p.m. on 24 September 2014, Jesse Atkinson, Jr., drove his father, Jesse Atkinson, Sr., and a friend named Kion in Kion's Honda Civic to Vance Street in Greenville for the purpose of buying marijuana. Upon reaching Vance Street, Mr. Atkinson, Jr., pulled up against the curb, at which point Kion exited the car, leaving Mr. Atkinson, Jr., in the front seat and Mr. Atkinson, Sr., in the back seat. After sitting in the car for about five to ten minutes, Mr. Atkinson, Jr., and Mr. Atkinson, Sr., observed a dark blue Nissan Sentra drive past the Honda, stop at a nearby corner, make a U-turn, and pull up beside the Honda facing in the opposite direction. Davron Lovick drove the dark blue Nissan Sentra, with defendant Willie James Langley occupying the front passenger seat.

As the Nissan Sentra neared the Honda, defendant jumped across Mr. Lovick and started shooting at Mr. Atkinson, Jr., and Mr. Atkinson, Sr., with either an AK47 or SKS rifle. After the shooting began, Mr. Atkinson, Jr., drove away while the Nissan continued to chase the Honda and defendant continued to fire at the fleeing vehicle. Defendant fired at least eight shots at the Honda, with Mr. Atkinson, Sr., sustaining gunshot wounds to his right calf and left thigh.

On 29 September 2014, the Pitt County grand jury returned bills of indictment charging defendant with assaulting Mr. Atkinson, Jr., with a deadly weapon with the intent to kill; assaulting Mr. Atkinson, Sr., with a deadly weapon with the intent to kill inflicting serious injury; two counts of attempted first-degree murder; possession of a firearm by a felon; discharging a weapon into an occupied vehicle; and having attained habitual felon status. The indictment charging that defendant had attained habitual felon status alleged, in pertinent part, that

> on or about the date of offense shown and in the County named above the defendant named is an habitual felon in that on or about September 11, 2006, the defendant did commit the felony of Felony Larceny, in violation of North Carolina General Statute 14-72(a), and that on or about February 15, 2007, the defendant was convicted of the felony of Felony Larceny in the Superior Court of Pitt County,

> North Carolina; and that on or about October 08, 2009, the defendant did commit the felony of Robbery with a Dangerous Weapon, in violation of North Carolina General Statute 14-87, and that on or about September 21, 2010, the defendant was convicted of the felony of Common Law Robbery in the Superior Court of Pitt County, North Carolina; and that on or about August 24, 2011, the defendant did commit the felony of Robbery with a Dangerous Weapon, in violation of North Carolina General Statute 14-87.1, and that on or about May 5, 2014, the defendant was convicted of the felony of Common Law Robbery in the Superior Court of Pitt County, North Carolina, against the form of the statute . . . and against the peace and dignity of the State.

The charges against defendant came on for trial before the trial court and a jury at the 26 January 2015 criminal session of the Superior Court, Pitt County. On 28 January 2015, the jury returned verdicts finding defendant guilty as charged. Based upon the jury's verdicts, the trial court consolidated defendant's convictions for two counts of attempted first-degree murder, assault with a deadly weapon with the intent to kill, and assault with a deadly weapon with the intent to kill inflicting serious injury for judgment and sentenced defendant to a term of 238 to 298 months imprisonment; sentenced defendant to a consecutive term of 110 to 144 months imprisonment based upon his conviction for possession of a firearm by a felon; and sentenced defendant to a consecutive term of 110 to 144 months imprisonment based upon his conviction for discharging a weapon into an occupied vehicle. 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, among other things,[1] that the habitual felon indictment that had been returned against him was facially defective. According to defendant, "with respect to the second and third previous felony convictions alleged in the habitual felon indictment returned against [defendant], the previous offenses that he allegedly *committed* differed from the offenses of conviction." In defendant's view, the fact

1. In addition to the issue discussed in the text of this opinion, defendant contended that the trial court had erred by denying his motion for a mistrial and instructing the jury in such a manner as to constructively amend the habitual felon indictment. The Court of Appeals held that the trial court had not abused its discretion in denying defendant's mistrial motion and did not reach the issue of whether the trial court had constructively amended the habitual felon indictment in its instructions to the jury.

that the offense that defendant allegedly committed differed from the offense that defendant was allegedly convicted of having committed demonstrated that the habitual felon indictment failed to comply with the pleading requirements set out in N.C.G.S. 14-7.3 as construed in *State v. Cheek*, 339 N.C. 725, 729-30, 453 S.E.2d 862, 865 (1995). The State, on the other hand, argued that the habitual felon indictment returned against defendant did, in fact, comply with the requirements set out in N.C.G.S. § 14-7.3 and sufficed to support the trial court's decision to sentence defendant as an habitual felon.

In its opinion, the Court of Appeals "order[ed] that the judgment regarding the habitual felon conviction be vacated and the case be remanded for resentencing on the underlying felonies without the habitual felon enhancement" on the grounds that "the trial court proceeded on a facially deficient habitual felon indictment." *State v. Langley*, ___ N.C. App. ___, ___, 803 S.E.2d 166, 167 (2017). In support of this determination, the Court of Appeals explained that, "for a habitual felon indictment to fully comport with statutory requirements there must be two dates listed for each prior felony conviction put forth in the habitual felon indictment—both the date the defendant committed the felony and the date the defendant was convicted of *that same felony* in the habitual felon indictment." *Id.* at ___, 803 S.E.2d at 171 (first citing N.C.G.S. § 14-7.3; then citing *Cheek*, 339 N.C. at 729-30, 453 S.E.2d at 865). More specifically, the Court of Appeals noted that, "[o]n its face, the indictment did not provide the offense date for Conviction 2 or Conviction 3. Instead, for both of these convictions, the indictment alleged offense dates for robberies with a dangerous weapon, and then gave conviction dates for two counts of common law robbery." *Id.* at ___, 803 S.E.2d at 171. According to the Court of Appeals, "[i]t would be an impermissible inference to read into the indictment that common law robbery took place on 8 October 2009 or 24 August 2011 because that is not what the grand jury found when it returned its bill of indictment." *Id.* at ___, 803 S.E.2d at 167. This Court granted the State's request for discretionary review of the Court of Appeals' decision with respect to the validity of defendant's habitual felon indictment on 1 November 2017.

In seeking to persuade us to reverse the Court of Appeals' decision, the State argues that the Court of Appeals erroneously engrafted an additional requirement onto the statutory provisions governing the contents of an habitual felon indictment given that the applicable statutory language requires that the offense that the defendant allegedly committed be identical to the offense that the defendant was allegedly convicted of committing. The State contends that the insertion of this requirement

into N.C.G.S. § 14-7.3 conflicts with this Court's consistent refusal to "engraft additional unnecessary burdens upon the due administration of justice," quoting *State v. Freeman*, 314 N.C. 432, 436, 333 S.E.2d 743, 746 (1985). According to the State, N.C.G.S. § 14-7.3 simply does not require that an habitual felon indictment identify the nature of the prior offense aside from alleging that it was a felony. In the State's view, the habitual felon indictment returned against defendant in this case adequately alleged that defendant had attained habitual felon status by alleging that defendant had committed and had been convicted of three prior felony offenses, specifying the date upon which each felony offense had been committed, asserting that the offenses in question were committed against the State of North Carolina, listing the date upon which each conviction occurred, and identifying the court in which defendant was convicted on each occasion, with the name of the prior felony being mere surplusage unnecessary to the existence of a facially valid indictment.

Defendant, on the other hand, asserts that the mere fact that an individual has been convicted of three prior felony offenses does not suffice to establish that the individual in question is an habitual felon given that the felonies necessary to establish the existence of that status cannot overlap. For example, defendant notes that the second felony must have been "committed after the conviction of or plea of guilty to the first felony" and that the third felony must have been "committed after the conviction of or plea of guilty to the second felony," quoting N.C.G.S. § 14-7.1. In light of that fact, a valid habitual felon indictment must allege "both the date the defendant committed the felony and the date the defendant was convicted of *that same felony* in the habitual felon indictment," quoting *Langley*, ___ N.C. App. at ___, 803 S.E.2d at 171. In other words, in order for an habitual felon indictment to show that the prior felony convictions upon which the State relies do not impermissibly overlap, the dates upon which those felonies were committed and the dates upon which defendant was convicted of committing those felonies must be set out in that indictment. In defendant's view, the habitual felon indictment returned against him in this case is fatally defective because it did not provide conviction dates for the second and third of the three felony offenses that defendant allegedly committed, making it impossible to know whether defendant's second and third common law robbery convictions impermissibly overlapped given that the indictment did not indicate when those two common law robbery offenses were committed, and because the indictment did not provide offense dates for the second and third offenses for which defendant was allegedly convicted, making it impossible to know whether defendant's second

and third robbery with a dangerous weapon offenses did not impermissibly overlap given that the indictment did not indicate when defendant was convicted of committing those offenses.

"A valid . . . indictment is an essential of jurisdiction." *State v. McBane*, 276 N.C. 60, 65, 170 S.E.2d 913, 916 (1969) (quoting *State v. Morgan*, 226 N.C. 414, 415, 36 S.E.2d 166, 167 (1946)). "The . . . indictment must charge all the essential elements of the alleged criminal offense," *id.* at 65, 170 S.E.2d at 916 (citing *Morgan*, 226 N.C. 414, 38 S.E.2d 166), "in a plain, intelligible, and explicit manner," *id.* at 65, 170 S.E.2d at 916 (quoting N.C.G.S. § 15-153 (1969)).[2] "The purpose of an indictment 'is (1) to give the defendant notice of the charge against him to the end that he may prepare his defense . . . [and] (2) to enable the court to know what judgment to pronounce in case of conviction.' " *State v. Russell*, 282 N.C. 240, 243-44, 192 S.E.2d 294, 296 (1972) (quoting *State v. Burton*, 243 N.C. 277, 278, 90 S.E.2d 390, 391 (1955)). "[I]t is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged. . . ." *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981). For that reason, indictment drafting is "no longer bound by the 'ancient strict pleading requirements of the common law.' " *State v. Williams*, 368 N.C. 620, 623, 781 S.E.2d 268, 271 (2016) (quoting *Freeman*, 314 N.C. at 436, 333 S.E.2d at 746).

The content of a valid indictment alleging that a defendant has attained habitual felon status is specified in N.C.G.S. 14-7.3, which provides that the indictment "shall be separate from the indictment charging [that person] with the principal felony" and "must set forth the date that the prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place." N.C.G.S. § 14-7.3 (2017). In view of the fact that the ultimate question before us in this case is whether N.C.G.S. § 14-7.3 requires that an indictment charging that the defendant has attained habitual felon status must allege that the defendant committed the same felony offense for which he was ultimately convicted, we are required to interpret the relevant statutory provision to see if it embodies a requirement of the type for which defendant contends.

2. The relevant statutory language has not changed since *McBane* was decided.

"Legislative intent controls the meaning of a statute." *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016) (quoting *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 895 (1998)). "The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, 'the spirit of the act and what the act seeks to accomplish.' " *Id.* at 258, 794 S.E.2d at 792 (quoting *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001)). "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *State v. Hooper*, 358 N.C. 122, 125, 591 S.E.2d 514, 516 (2004) (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)). "[I]t 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) (citations omitted).

The language of the relevant statutory provision is clear, unambiguous, and requires no construction. N.C.G.S. § 14-7.3 states that an habitual felon indictment must set forth (1) "the date that prior felony offenses were committed," (2) "the name of the state or other sovereign against whom said felony offenses were committed," (3) "the dates that pleas of guilty were entered to or convictions returned in said felony offenses," and (4) "the identity of the court wherein said pleas or convictions took place." N.C.G.S. § 14-7.3; *accord Cheek*, 339 N.C. at 729-30, 453 S.E.2d at 865 (explaining that an "habitual felon indictment fully comports with the requirements of N.C.G.S. § 14-7.3 by setting forth the three prior felony convictions relied on by the State, the dates these offenses were committed, the name of the state against whom they were committed, the dates defendant's guilty pleas for these offenses were entered, and the identity of the court wherein these convictions took place"). The indictment at issue in this case alleged that the three prior felony offenses upon which the State relied in attempting to establish that defendant had attained habitual felon status were committed on 11 September 2006, 8 October 2009, and 24 August 2011; that the offenses that led to defendant's felony convictions were committed against the State of North Carolina; that defendant was convicted of committing these offenses, the identity of which was specified in the body of the habitual felon indictment, on 15 February 2007, 21 September 2010, and 5 May 2014; and that each of these convictions occurred in the Superior Court, Pitt County. As a result, the habitual felon indictment returned against defendant in this case contains all of the information required by N.C.G.S. § 14-7.3 and provides defendant with adequate notice of the

bases for the State's contention that defendant had attained habitual felon status.

In addition, we note that the habitual felon indictment returned against defendant in this case alleged that defendant had committed the offenses of robbery with a dangerous weapon and had been convicted of the lesser included offenses of common law robbery. "[I]t is well settled that an indictment for an offense includes all the lesser degrees of the same crime," *State v. Baker*, 369 N.C. 586, 595, 799 S.E.2d 816, 822 (2017) (quoting *State v. Roy*, 233 N.C. 558, 559, 64 S.E.2d 840, 841 (1951)), so that, "[w]hen a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense when the greater offense charged in the bill of indictment contains all of the essential elements of the lesser," *State v. Thomas*, 325 N.C. 583, 591, 386 S.E.2d 555, 559 (1989) (quoting *State v. Weaver*, 306 N.C. 629, 633, 295 S.E.2d 375, 377 (1982), *abrogated on other grounds by State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993)). As a result, when defendant allegedly committed the offense of robbery with a dangerous weapon on 8 October 2009 and 24 August 2011, he also committed the lesser included offense of common law robbery. Thus, the Court of Appeals' statement that "[i]t would be an impermissible inference to read into the indictment that common law robbery took place on 8 October 2009 or 24 August 2011 because that is not what the grand jury found when it returned its bill of indictment," *Langley*, ___ N.C. App. at ___, 803 S.E.2d at 171, to the contrary notwithstanding, the habitual felon indictment returned against defendant in this case did effectively allege that defendant had both committed and been convicted of common law robbery.

As a result, for all of these reasons, we hold that the habitual felon indictment returned against defendant in this case was not fatally defective, reverse the Court of Appeals' decision, and remand this case to the Court of Appeals consideration of defendant's remaining challenge to the trial court's judgments.

REVERSED AND REMANDED.

STATE v. ROGERS

[371 N.C. 397 (2018)]

STATE OF NORTH CAROLINA
v.
ANTWARN LEE ROGERS

No. 63A17

Filed 17 August 2018

1. Drugs—keeping or maintaining a car used for the keeping or selling of a controlled substance—keeping a car—possession for a short period, or intent to retain possession, for a certain use

Where defendant was convicted of keeping or maintaining a car which is used for the keeping or selling of a controlled substance in violation of N.C.G.S. § 90-108(a)(7) and where he argued on appeal that the trial court erred by denying his motion to dismiss, the Supreme Court held that, when viewed in the light most favorable to the State, it could reasonably be inferred from the evidence at trial that defendant had "kept" the Cadillac he was driving. The word "keep" in the relevant portion of subsection 90-108(a)(7) refers to possessing something for at least a short period of time—or intending to retain possession of something in the future—for a certain use. During the hour and a half of surveillance, officers saw defendant arrive at a hotel in a Cadillac, stay in a hotel room for a while, and then leave in the Cadillac. He was the only person they saw using the Cadillac, and there was a service receipt in the Cadillac bearing defendant's name and dated two and a half months before defendant's arrest. A reasonable jury thus could conclude that defendant had possessed the Cadillac for about two and a half months, at the very least.

2. Drugs—keeping or maintaining a car used for the keeping or selling of a controlled substance—keeping a controlled substance—storing rather than merely transporting

Where defendant was convicted of keeping or maintaining a car which is used for the keeping or selling of a controlled substance in violation of N.C.G.S. § 90-108(a)(7) and where he argued on appeal that the trial court erred by denying his motion to dismiss, the Supreme Court held that, when viewed in the light most favorable to the State, it could reasonably be inferred from the evidence at trial that defendant was using the Cadillac he was driving to "keep" crack cocaine. The word "keeping" in the relevant portion of subsection 90-108(a)(7) refers to the storing of illegal drugs. The cocaine was

hidden in the gas compartment of the car, and the circumstances were such that a reasonable jury could conclude that defendant was storing rather than merely transporting the drugs in the car.

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 91 (2017), finding no error in part and reversing and remanding in part judgments entered on 13 August 2015 by Judge W. Allen Cobb Jr. in Superior Court, New Hanover County. Heard in the Supreme Court on 12 March 2018.

Joshua H. Stein, *Attorney General*, *by Kathleen N. Bolton*, *Assistant Attorney General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by Wyatt Orsbon*, *Assistant Appellate Defender*, *for defendant-appellee.*

MARTIN, Chief Justice.

During a drug investigation, law enforcement officers pulled defendant over and discovered two bags of crack cocaine hidden behind the gas-cap door of the car that he was driving. After the trial court denied defendant's motion to dismiss, defendant was convicted of, among other things, keeping or maintaining a vehicle which is used for the keeping or selling of controlled substances. We hold that it can reasonably be inferred from the evidence at trial, when viewed in the light most favorable to the State, that defendant had kept the car that he was driving, and that he was using that car to store crack cocaine when he was arrested. We therefore conclude that the trial court correctly denied defendant's motion to dismiss as to the charge of keeping or maintaining a vehicle which is used for the keeping or selling of controlled substances.

Detective Evan Luther of the New Hanover County Sheriff's Office Vice and Narcotics Unit became familiar with defendant over the course of a months-long drug investigation. On 8 August 2013, while that investigation was ongoing, Detective Luther obtained information implicating defendant in drug activity that, according to Detective Luther's trial testimony, "needed to be acted upon that day." Detective Luther also learned that defendant would be driving a particular white Cadillac and staying in Room 129 of a specific Econo Lodge hotel. After obtaining this information, Detective Luther began the process of getting a search warrant for the hotel room and the Cadillac. While he was doing so, he told assisting officers that defendant was "wanted on outstanding warrants"

and that, as a result, officers could initiate contact with defendant at any time.

As part of Detective Luther's investigation, Lieutenant Leslie Wyatt of the New Hanover County Sheriff's Office went to set up surveillance at the hotel where defendant was expected to be. When Lieutenant Wyatt got there, he spotted a Cadillac matching the description that Detective Luther had given him. Lieutenant Wyatt briefly went to a nearby gas station, and when he got back, the Cadillac was gone. About ten minutes after Lieutenant Wyatt had set up stationary surveillance on the hotel, the Cadillac returned and parked in front of Room 129. Defendant, who was the only person in the car, got out and went into that room. He stayed there for about forty-five minutes but then left the room and drove away in the Cadillac. At least one officer stayed behind to conduct surveillance on the hotel room.

Other officers followed defendant as he drove to an apartment complex, turned around, left the complex, and continued driving. This behavior was "[i]ndicative of someone seeing if they're being followed," according to Lieutenant Wyatt's trial testimony, so the officers pulled defendant over. Defendant was alone in the car, and the officers arrested him based on his outstanding warrants. While defendant was in custody, his cell phone continuously received calls and text messages. A contact named "Surf City Lick" called a number of times and sent several text messages, and a contact named "Mexican Friend Lick" also called a number of times. The word "lick," Detective Luther testified, is a slang term for someone who purchases drugs. Detective Luther also testified that the contents of some of the text messages, which the arresting officers could see on the screen of the phone, could be consistent with a customer's asking if a drug delivery was forthcoming.

The officers who arrested defendant took defendant and the Cadillac back to the hotel. Detective Luther arrived at the hotel shortly thereafter with a signed warrant to search the Cadillac and Room 129 of the hotel. Collectively, the officers at the hotel had conducted surveillance for about an hour and a half before they executed the search warrant. When officers searched the Cadillac, they found two purple plastic bags hidden in the small space behind the door covering the gas cap. Both bags contained crack cocaine. As in many cars, the gas-cap compartment of the Cadillac was accessible only by operating a switch inside the car. When the officers searched inside the car, they found a marijuana cigarette, $243 in cash hidden inside a boot, and a service receipt dated 29 May 2013 with defendant's name printed on it.

Meanwhile, the officers who searched the hotel room found two purple plastic bags containing a much larger amount of crack cocaine hidden behind the toilet paper holder in the bathroom. The purple bags in the hotel room were the same type of bags as those found in the gas-cap compartment of the Cadillac. Officers also found a number of small Ziploc bags in the hotel room—bags that, according to Detective Luther, drug dealers commonly use to package drugs into smaller amounts for sale. Finally, officers found a digital scale disguised to look like an MP3 player in the hotel room. Investigating officers determined that the car was registered to someone other than defendant, that the hotel room was checked out under someone else's name, and that defendant did not leave personal luggage inside the hotel room. These practices, Detective Luther testified, are consistent with drug sale activity.

Defendant was indicted for possession with intent to manufacture, sell, and/or deliver cocaine; manufacture of cocaine; possession of cocaine; keeping or maintaining a vehicle which is used for the keeping or selling of a controlled substance; possession of drug paraphernalia; possession of up to one-half ounce of marijuana; and having attained the status of a habitual felon. The State declined to proceed on the manufacture-of-cocaine charge. At the close of the State's evidence, defendant moved to dismiss all of the remaining charges against him. The trial court granted the motion as to the possession-of-cocaine charge, but denied the motion as to all other remaining charges. The jury found defendant guilty of all of these charges.

Defendant appealed to the Court of Appeals, arguing, among other things, that the trial court erred in denying his motion to dismiss the charge of keeping or maintaining a vehicle which is used for the keeping or selling of a controlled substance. In an opinion that split on this issue, the Court of Appeals reversed that conviction. The majority held that there was insufficient evidence that defendant kept or maintained the Cadillac, and also held that "there was insufficient evidence that defendant used [the Cadillac] on any prior occasion for the purpose of keeping or selling a controlled substance." *State v. Rogers*, ___ N.C. App. ___, ___, ___, 796 S.E.2d 91, 96, 97 (2017) (emphasis omitted). The judge who dissented on this issue determined that the evidence, taken together, was sufficient to show that defendant kept or maintained the Cadillac over a period of time for the purpose of keeping cocaine. *Id.* at ___, 796 S.E.2d at 101-02 (Stroud, J., concurring in part and dissenting in part). The State gave notice of appeal based on the partially dissenting opinion.

[1] Defendant was convicted of keeping or maintaining a car which is used for the keeping or selling of a controlled substance in violation

of N.C.G.S. § 90-108(a)(7). That provision says, in pertinent part, that "[i]t shall be unlawful for any person . . . [t]o knowingly keep or maintain any . . . vehicle . . . which is used for the keeping or selling of [controlled substances] in violation of this Article." N.C.G.S. § 90-108(a)(7) (2017). To prove a defendant guilty under this portion of subsection 90-108(a)(7), the State must prove that the defendant "(1) knowingly (2) ke[pt] or maintain[ed] (3) a vehicle (4) which [wa]s used for the keeping or selling (5) of controlled substances." *State v. Mitchell*, 336 N.C. 22, 31, 442 S.E.2d 24, 29 (1994). For a criminal prosecution to survive a motion to dismiss, the State must present "substantial evidence of all the material elements of the offense charged and [substantial evidence] that the defendant was the perpetrator of the offense." *State v. Campbell*, 368 N.C. 83, 87, 772 S.E.2d 440, 444 (2015) (quoting *State v. Myrick*, 306 N.C. 110, 113-14, 291 S.E.2d 577, 579 (1982)). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (quoting *State v. Turnage*, 362 N.C. 491, 493, 666 S.E.2d 753, 755 (2008)). "[W]e must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citing *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992)). "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, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.' " *Id.* at 75-76, 430 S.E.2d at 919 (alteration in original) (emphasis omitted) (quoting *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978)).

In this case, officers conducted surveillance for approximately an hour and a half on the day that defendant was arrested. During that time, they did not see any person other than defendant driving or occupying the Cadillac. A subsequent search of the Cadillac revealed two bags of crack cocaine stored in the gas-cap compartment. Thus, the only issues before us are whether there was substantial evidence to show that defendant "ke[pt] or maintain[ed]" the Cadillac and, if so, whether there was substantial evidence that the Cadillac was "used for the keeping . . . of" controlled substances.[1]

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1. A defendant may be convicted of violating subsection 90-108(a)(7) if he keeps or maintains a vehicle which is used for "the keeping *or* selling of" drugs. (Emphasis added.) The Court of Appeals majority failed to analyze whether substantial evidence supported the theory that the Cadillac that defendant was driving was used for the *selling* of drugs—even though the State made that argument on appeal. Because the Court of Appeals

"In the construction of any statute, . . . words must be given their common and ordinary meaning, nothing else appearing." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202-03 (1974). To quote the beginning of subsection 90-108(a)(7) at greater length than we did above, that subsection makes it "unlawful for any person" to "keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever" for certain purposes or uses. The meaning of the term "keep," as it is used in referring to a person who "keep[s]" a vehicle, building, or other place, is clear from the context in which it appears. When you "keep" a "shop," for instance—that is, when you are a shopkeeper—you have possession of the shop for a designated purpose or use (usually to sell goods). You generally will have possessed that shop for at least a short period of time, but in some instances, you may be said to be "keep[ing]" a shop even when you have just opened it, if the circumstances indicate that you intend to retain the shop for continued use in the future. *Cf. The New Oxford American Dictionary* 952 (3d ed. 2010) (defining "keep" as "have or retain possession of" or "retain or reserve for use in the future"). This possession must have occurred for at least a short period of time, or the circumstances must indicate an intent to retain that property in the future (and in many cases, both may be evident). Thus, the word "keep," in the "keep or maintain" language of subsection 90-108(a)(7), refers to possessing something for at least a short period of time—or intending to retain possession of something in the future—for a certain use.

In this case, officers conducted surveillance for about an hour and a half before searching the Cadillac and defendant's hotel room. During their surveillance, the officers saw defendant arrive at the hotel in the Cadillac, stay in his room awhile, and then leave in the Cadillac. Defendant, moreover, was the only person that the officers saw using the car. And let's not forget an additional, very important piece of evidence: the service receipt found inside the Cadillac bearing defendant's name—a receipt that bore a date from about two and a half months before defendant's arrest. Viewing this evidence in the light most favorable to the State, and drawing all reasonable inferences from it, we hold that a reasonable jury could conclude that defendant had possessed the

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majority did not conduct this analysis, *see Rogers*, ___ N.C. App. at ___, 796 S.E.2d at 94-98, the opinion that dissented on this issue did not do so either, *see id.* at ___, 796 S.E.2d at 100-02 (Stroud, J., concurring in part and dissenting in part). The State, moreover, did not petition this Court to consider any issues beyond the scope of that partially dissenting opinion. We therefore limit our analysis to whether there was substantial evidence that defendant used the Cadillac to *keep* drugs. *See* N.C. R. App. P. 16(b).

car for about two and a half months, at the very least.[2] The State therefore presented sufficient evidence that defendant "ke[pt]" the Cadillac.

[2] We thus turn to the other issue before us: whether the State presented sufficient evidence that defendant used the Cadillac "for the keeping . . . of" illegal drugs. N.C.G.S. § 90-108(a)(7). Ordinarily, "words used in one place in [a] statute have the same meaning in every other place in the statute." *Campbell v. First Baptist Church of Durham*, 298 N.C. 476, 483, 259 S.E.2d 558, 563 (1979) (first citing *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 55 S. Ct. 50 (1934); and then citing *Wells v. Hous. Auth.*, 213 N.C. 744, 197 S.E. 693 (1938)). But there are exceptions to that rule, and this is one. By making it a crime to "keep" a car "which is used for the keeping" of controlled substances, subsection 90-108(a)(7) uses the word "keep" and its variant "keeping" to mean different things. We have already noted that in the first instance, the word "keep" refers to possessing something for at least a short period of time, or to possessing something currently and intending to retain possession of it in the future, for some designated purpose or use. In the second instance, however, the word "keeping" is used to refer to *keeping drugs in* (in this case) *a car*. When someone "keep[s]" an object in his car, that word does not refer to possessing something for a designated use; it refers to *storing* that object in his car. That is the "common and ordinary meaning" of the word "keeping" in this context. *See In re Clayton-Marcus*, 286 N.C. at 219, 210 S.E.2d at 202. There is no reason to interpret the use of the word "keeping" in subsection 90-108(a)(7) differently, and, in fact, no other interpretation would make sense. So when subsection 90-108(a)(7) speaks of "the keeping . . . of" drugs, it is referring to the storing of drugs.

In this case, the State presented substantial evidence that defendant was using the Cadillac to store crack cocaine. Officers found the cocaine hidden in, of all places, the gas-cap compartment. At no point did the officers see anyone other than defendant use the Cadillac or access its gas-cap compartment, nor did the officers see defendant himself access the gas-cap compartment at any point during their observation period. So a jury could reasonably infer that the bags of cocaine had been placed

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2. Possessing a car for two and a half months is sufficient to show that an individual "ke[pt]" a car under subsection 90-108(a)(7). But we do not mean to imply that possession for that long is necessary to satisfy that element. "[K]eep[ing]" a car for a much shorter period of time may suffice—we need not, and do not, take any position on that to decide this case. And, of course, as we have already suggested, the State may also be able to prove that a defendant has "ke[pt]" a car by proving that the defendant possessed a car, and that he intended to continue possessing it in the future, when he was arrested.

there before the Cadillac was under stationary surveillance—indeed, that seems to be the only plausible inference. And defendant's actions—arriving at the hotel, staying there for about forty-five minutes while the drugs evidently stayed hidden in the gas-cap compartment, and leaving in the Cadillac again—seem to indicate that defendant was not using the car only to transport drugs from one place to another.[3] Plus, a defendant who wants to store contraband will, all other things equal, want to store it in a hidden place, which is exactly what putting the cocaine in the gas-cap compartment would accomplish. Finally, putting the drugs in a place that is somewhat hard to access—and that is not inside the passenger compartment of the car at all—likewise suggests storage rather than mere transportation. So, when viewing this evidence in the light most favorable to the State and drawing all reasonable inferences from it, the evidence indicates that defendant was using the Cadillac to store cocaine within it.

In addition, the evidence suggesting that defendant was involved in selling drugs also permits us to draw a reasonable inference that defendant was using the Cadillac to store cocaine. Officers found $243 in cash hidden inside a boot kept in the car, and the continuous stream of calls and messages to defendant's phone when defendant was in custody suggested that he was about to conduct a drug sale. The cocaine found inside the gas-cap compartment of the Cadillac, moreover, was stored in purple plastic bags of the same color, type, and size as the bags of cocaine that officers found in defendant's hotel room. And when officers searched the hotel room, they also found a number of smaller Ziploc bags and a digital scale that was disguised to look like something else. These circumstances, when viewed in the light most favorable to the State, indicate that defendant used the hotel room to split up large amounts of crack cocaine into smaller portions that he would then store inside the Cadillac until they were sold.

This Court has discussed subsection 90-108(a)(7) on only one prior occasion, in *State v. Mitchell*, 336 N.C. 22, 442 S.E.2d 24 (1994). In that case, the defendant entered a convenience store with two bags of marijuana in his shirt pocket. *Id.* at 26, 442 S.E.2d at 26. The store clerk, an off-duty police officer, asked about the bags, which the defendant admitted contained marijuana, and the defendant gave them to her. *Id.*

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3. Of course, if a defendant used a car to transport illegal drugs to, for instance, a drug sale, that fact might well be evidence that he was "us[ing]" the car "for the . . . *selling of*" controlled substances. *See* N.C.G.S. § 90-108(a)(7) (emphasis added). But, as we have already said, we are not addressing the "selling" element of subsection 90-108(a)(7) due to the limited scope of this appeal.

The store clerk then called the police, at which time the defendant left the store. *Id.* The next day, the defendant was arrested for possession of marijuana. *Id.* Police found a marijuana cigarette inside the defendant's car, and when the police searched the defendant's house, they found additional evidence: a scale with some cocaine residue, as well as small plastic bags, two marijuana cigarettes, and rolling papers. *Id.*

The main dispute in *Mitchell* was whether the State presented substantial evidence that the defendant's car "was used for keeping or selling marijuana." *Id.* at 32, 442 S.E.2d at 29. *Mitchell* held, and we reaffirm today, that subsection 90-108(a)(7) does not "create a separate crime simply because the controlled substance was temporarily in a vehicle." *Id.* at 33, 442 S.E.2d at 30. In other words, merely possessing or transporting drugs inside a car—because, for instance, they are in an occupant's pocket or they are being taken from one place to another—is not enough to justify a conviction under the "keeping" element of subsection 90-108(a)(7).[4] *See id.* at 32-33 & n.1, 442 S.E.2d at 30 & n.1. Rather, courts must determine whether the defendant was using a car for the *keeping* of drugs—which, again, means the *storing* of drugs—and courts must focus their inquiry "on the *use*, not the contents, of the vehicle." *See id.* at 34, 442 S.E.2d at 30.

In *Mitchell*, the State's evidence from the night that the defendant went to the convenience store was sufficient to raise an inference that the defendant temporarily possessed marijuana in his car, but nothing more. *Id.* at 33, 442 S.E.2d at 30. And although the State's evidence also indicated that police found a single marijuana cigarette in the defendant's car the next day, *see id.*, that alone does not indicate that the car was being used to *store* the cigarette; people often leave cigarettes or other small moveable things in their cars but then take them out soon thereafter. This Court correctly reasoned that the sum of this evidence was insufficient to raise a reasonable inference that the defendant was using the car to "keep[ ]" marijuana, which is what subsection 90-108(a)(7) prohibits. *See id.* Our analysis today is therefore consistent with the holding of *Mitchell*.

Even though *Mitchell* reached the correct result, however, part of its reasoning was inconsistent with the text of subsection 90-108(a)(7). Specifically, *Mitchell* interpreted "the keeping . . . of [drugs]" to mean

4. As we have already suggested in footnote 3, though, evidence that a defendant has transported or possessed drugs inside a car may, in conjunction with additional evidence, be enough to satisfy the "*selling*" element of subsection 90-108(a)(7). (Emphasis added.)

"not just possession, but possession that occurs over a duration of time." *Id.* at 32, 442 S.E.2d at 30. But the statutory text does not require that drugs be kept for "a duration of time." As we have seen, the linchpin of the inquiry into whether a defendant was using a vehicle, building, or other place "for the keeping . . . of" drugs is whether the defendant was using that vehicle, building, or other place for the storing of drugs. So, for instance, when the evidence indicates that a defendant has possessed a car for at least a short period of time, but that he had just begun storing drugs inside his car at the time of his arrest, that defendant has still violated subsection 90-108(a)(7)—even if, arguably, he has not stored the drugs for any appreciable "duration of time." The critical question is *whether* a defendant's car is used to store drugs, not *how long* the defendant's car has been used to store drugs for. As a result, we reject any notion that subsection 90-108(a)(7) requires that a car kept or maintained by a defendant be used to store drugs for a certain minimum period of time—or that evidence of drugs must be found in the vehicle, building, or other place on more than one occasion—for a defendant to have violated subsection 90-108(a)(7). But again, merely having drugs in a car (or other place) is not enough to justify a conviction under subsection 90-108(a)(7). The evidence and all reasonable inferences drawn from the evidence must indicate, based "on the totality of the circumstances," *id.* at 34, 442 S.E.2d at 30, that the drugs are also being stored there. To the extent that *Mitchell*'s "duration of time" requirement conflicts with the text of subsection 90-108(a)(7), therefore, this aspect of *Mitchell* is disavowed.

In sum, viewing the evidence in this case in the light most favorable to the State and drawing all reasonable inferences from that evidence, a reasonable jury could find that defendant kept the Cadillac in question and that defendant used that Cadillac to store crack cocaine. The trial court correctly denied defendant's motion to dismiss the charge of keeping or maintaining a vehicle which is used for the keeping or selling of controlled substances. We therefore reverse the decision of the Court of Appeals as to the issue before us. The remaining issues that the Court of Appeals addressed are not before us, and we leave its decision as to those issues undisturbed.

REVERSED.

STATE OF NORTH CAROLINA
v.
FELIX RICARDO SALDIERNA

No. 271PA15-2

Filed 17 August 2018

Juveniles—custodial interrogation—waiver of juvenile rights

The trial court did not err by concluding that juvenile defendant knowingly, willingly, and understandingly waived his juvenile rights pursuant to N.C.G.S. § 7B-2101 before making certain incriminating statements. Evidence in the record tended to show that the detective advised defendant of his juvenile rights in spoken English, written Spanish, and written English; defendant initialed each of the rights on the juvenile rights waiver form and signed it; defendant answered affirmatively that he understood his rights; and defendant understood what the detective was saying. While the record did contain evidence that would have supported a different conclusion, the evidence supported the trial court's conclusion that defendant waived his juvenile rights.

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. ___, 803 S.E.2d 33 (2017), reversing an order denying defendant's motion to suppress entered on 20 February 2014 by Judge Forrest Donald Bridges, vacating a judgment entered on 4 June 2014 by Judge Jesse B. Caldwell, both in Superior Court, Mecklenburg County, and remanding the case for further proceedings after the Supreme Court of North Carolina remanded the Court of Appeals' prior decision in this case, *State v. Saldierna*, 242 N.C. App. 347, 775 S.E.2d 326 (2015). Heard in the Supreme Court on 14 May 2018 in session in the Old Burke County Courthouse in the City of Morganton pursuant to N.C.G.S. § 7A-10(a).

Joshua H. Stein, *Attorney General*, *by Kimberly N. Callahan*, *Assistant Attorney General*, *for the State-appellant.*

Goodman Carr, *PLLC*, *by W. Rob Heroy*, *for defendant-appellee.*

ERVIN, Justice.

The issue before the Court in this case is whether the trial court's order denying defendant's suppression motion contained sufficient findings of fact to support its conclusion that defendant knowingly and voluntarily waived his juvenile rights pursuant to N.C.G.S. § 7B-2101 before making certain incriminating statements. After careful consideration of defendant's challenge to the denial of his suppression motion in light of the record and the applicable law, we hold that the trial court's order contained sufficient findings to support this conclusion and reverse the decision of the Court of Appeals to the contrary.

From 26 November 2012 to 3 January 2013, defendant Felix Ricardo Saldierna and seven other individuals were involved in a series of breakings and enterings that occurred in the Charlotte area. After coming home from work on 17 December 2012, Cheryl Brewer[1] discovered that someone had entered her residence through a broken window, scrawled "Merry Chritmas" [sic] across a wall, and stolen a 32-inch television and a lock box. On 18 December, a 42-inch television, an Xbox game system, and jewelry were stolen from the residence of William Nunez. Another individual suspected in the commission of these crimes told investigating officers that defendant had been involved in the underlying break-ins. In January 2013, warrants for arrest charging defendant with felonious breaking or entering and conspiracy to commit breaking or entering were issued. Based upon the issuance of these warrants for arrest, defendant was taken into custody at his home in Fort Mill, South Carolina.

After having been placed under arrest, defendant was transported to the York County Justice Center, where he was interviewed by Detective Aimee Kelly of the Charlotte-Mecklenburg Police Department. At the beginning of this interview, Detective Kelly informed defendant that she was required to inform him of his rights. Defendant responded to Detective Kelly's statement by telling her that "my English is good, but like when you say something like that much it's kind of confusing." After stating that he was sixteen years old, defendant informed Detective Kelly that he was taking courses intended for both freshman and sophomore high school students. When Detective Kelly asked defendant if he could read, defendant responded in the affirmative before adding that he could read English "kind of, a little bit," and that he could read Spanish. At that point, Detective Kelly told defendant that she would provide him with

1. The name of the victim set out in the text of this opinion is derived from the factual basis statement provided by the prosecutor at the time that defendant entered his negotiated guilty plea. The indictment returned against defendant in the relevant cases named the alleged victim as Cheryl Drew.

a copy of a juvenile rights waiver form in both English and Spanish so that he would be able to read along with her while she informed him of his rights. At the conclusion of this portion of their discussion, Detective Kelly and defendant had the following exchange:

> [Kelly]: You understand I'm a police officer, right?
>
> [Defendant]: Yes ma[']am[.]
>
> [Kelly]: Ok, and that I would like to talk to you about this. And this officer has also explained to me and I understand that I have the right to remain silent, that means that I don't have to say anything or answer any questions. Should be right there number 1 right on there. Do you understand that?
>
> [Defendant]: [unintelligible] questions?
>
> [Kelly]: Yes, that is your right? So do you understand that? If you understand that, put your initials right there showing that you understand that. On this sheet. On this one. You can put it on both. Anything I say can be used against me. Do you understand that?
>
> [Defendant]: Yes ma[']am.
>
> [Kelly]: I have the right to have a parent[,] guardian or custodian here with me now during questioning. Parent means my mother, father, stepmother, or stepfather. Guardian means the person responsible for taking care of me. Custodian means the person in charge of me where I am living. Do you understand that? Do you want to read that?
>
> [Defendant]: Yeah.
>
> [Kelly]: Do you understand that?
>
> [Defendant]: [no response]
>
> [Kelly]: I have the right to talk to a lawyer and to have a lawyer here with me now to advise and help during questioning. Do you understand that?
>
> [Defendant]: [unintelligible]
>
> [Kelly]: If I want to have a lawyer with me during questioning one will be provided to me at no cost before any questioning. Do you understand that?
>
> [Defendant]: Yes ma[']am.

[Kelly]: Ok. Now I want to talk to you about some stuff that's happened in Charlotte. And um, I will tell you this. There's been some friends of yours that have already been questioned about these items and these issues. And they've been locked up. And that's what I want to talk to you about. Do you want to help me out and to help me understand what's been going on with some of these cases and talk to me about this now here?

[Defendant]: Uh

[Kelly]: Are you willing to talk to me is what I'm asking.

[Defendant]: Yes ma[']am.

[Kelly]: Ok. So I am 14 years or more. Let me see that pen. And I understand my rights as they've been explained by [D]etective Kelly. I do wish to answer questions now without a lawyer, parent, guardian or custodian here with me? My decision to answer questions now is made freely and is my own choice. No one has threatened me in any way or has promised me any special treatment because I have decided to answer questions now. I am signing my name below. Do you understand this? Initial, sign, date and time.

[Kelly]: It is 1/9/13. It is 12:10PM.

[Defendant]: Um, Can I call my mom?

[Kelly]: Call your mom now?

[Defendant]: She's on her um. I think she is on her lunch now.

[Kelly]: You want to call her now before we talk?

[Kelly] [to other officers]: He wants to call his mom.

. . . .

[Other Officer]: [S]tep back outside and we'll let you call your mom outside. . . .

. . . .

9:50: [Defendant] [can be heard on phone. Call is not intelligible.]

. . . .

> [Kelly]: 12:20: Alright Felix, so, let's talk about this thing going on. Like I said a lot of your friends have been locked up and everybody's talking. They're telling me about what's going on and what you've been up to. I'm not saying you're the ringleader of this here thing and some kind of mastermind right but I think you've gone along with these guys and gotten yourself into a little bit of trouble here. This is not something that's going to end your life. You know what I'm saying. This is not a huge deal. I know you guys were going into houses when nobody was home. You weren't looking to hurt anybody or anything like that. I just want to hear your side of the story. We can start off. I'm going to ask you questions I know the answer to. A lot of these questions are to tell if you're being truthful to me.

At that point, Detective Kelly interviewed defendant for approximately fifty-four minutes concerning the extent of his involvement in the commission of the crimes that Detective Kelly was investigating. During the course of the ensuing interrogation, defendant confessed to having been involved in the break-ins that had occurred at the residences of Ms. Brewer and Mr. Nunez.

On 22 January 2013, the Mecklenburg County grand jury returned bills of indictment charging defendant with two counts of conspiracy to commit felonious breaking, entering, and larceny and two counts of felonious breaking or entering. On 9 October 2013, defendant filed a motion seeking to have his confession and all of the evidence that the State had obtained as a result of the statements that defendant made to Detective Kelly suppressed on the grounds that his confession had been obtained as the result of violations of N.C.G.S. § 7B-2101 and his federal constitutional right not to be deprived of liberty without due process of law. According to defendant, "[b]y asking to speak to his mother prior to questioning, [d]efendant invoked his rights under N.C.G.S. § 7B-2101." In addition, defendant alleged that, in light of his "indicat[ion] that he was not ready to be questioned without her," "[t]he interview should have ceased at that moment and not continued until [d]efendant's mother was present, or should have simply ceased."

On 31 January 2014, defendant's suppression motion came on for hearing before Judge Forrest Donald Bridges in the Superior Court, Mecklenburg County. At the suppression hearing, Detective Kelly testified that, while defendant "spoke English clearly and understood what [she] was saying," "[he] said he wasn't very good at reading English." Although Detective Kelly acknowledged that defendant might have

claimed to have had "some issues understanding English," she stated that defendant "seemed to very clearly understand what [she] was asking him" and that she had had no trouble understanding defendant at any point during the interview. Detective Kelly "found [defendant's English] to be fine" and believed "that he understood [his juvenile] rights." According to Detective Kelly, defendant followed along and initialed the relevant portions of the juvenile rights waiver form while she read his juvenile rights to him.

In addition, Detective Kelly asserted at the suppression hearing that defendant "never said he wanted his mother [at the interview]." On the other hand, Detective Kelly did not ask defendant "whether or not he was ready to proceed" after he requested to be allowed to speak with his mother. In fact, defendant had signed the juvenile rights waiver form before asking the investigating officers to give him an opportunity to call his mother. Detective Kelly had an "understanding" that defendant had called his mother "to let her know where he was and that he was arrested."

On 20 February 2014, the trial court entered an order denying defendant's suppression motion in which the court found as a fact:

> 1. That Defendant was in custody.
>
> 2. That Defendant was advised of his juvenile rights pursuant to North Carolina General Statute § 7B-2101.
>
> 3. That Detective Kelly of the Charlotte-Mecklenburg Police Department advised Defendant of his juvenile rights.
>
> 4. That Defendant was advised of his juvenile rights in three manners. Defendant was advised of his juvenile rights in spoken English, in written English, and in written Spanish.
>
> 5. That Defendant indicated that he understood his juvenile rights as given to him by Detective Kelly.
>
> 6. That Defendant indicated he understood his rights after being given and reviewing a form enumerating those rights in Spanish.
>
> 7. That Defendant indicated that he understood that he had the right to remain silent. Defendant understood that to mean that he did not have to say anything or answer any questions. Defendant initialed next to this right at number 1

on the English rights form provided to him by Detective Kelly to signify his understanding.

8. That Defendant indicated he understood that anything he said could be used against him. Defendant initialed next to this right at number 2 on the English rights form provided to him by Detective Kelly to signify his understanding.

9. That Defendant indicated he understood that he had the right to have a parent, guardian, or custodian there with him during questioning. Defendant understood the word parent meant his mother, father, stepmother, or stepfather. Defendant understood the word guardian meant the person responsible for taking care of him. Defendant understood the word custodian meant the person in charge of him where he was living. Defendant initialed next to this right at number 3 on the English rights form provided to him by Detective Kelly to signify his understanding.

10. That Defendant indicated he understood that he had the right to have a lawyer and that he had the right to have a lawyer there with him at the time to advise and help him during questioning. Defendant initialed next to this right at number 4 on the English rights form provided to him by Detective Kelly to signify his understanding.

11. That Defendant indicated he understood that if he wanted a lawyer there with him during questioning, a lawyer would be provided to him at no cost prior to questioning. Defendant initialed next to this right at number 5 on the English rights form provided to him by Detective Kelly to signify his understanding.

12. That Defendant initialed a space below the enumerated rights on the English rights form that stated the following: "I am 14 years old or more and I understand my rights as explained by Detective Kelly. I DO wi[s]h to answer questions now, WITHOUT a lawyer, parent, guardian, or custodian here with me. My decision to answer questions now is made freely and is my own choice. No one has threatened me in any way or promised me special treatment. Because I have decided to answer questions now, I am signing my name below."

13. That Defendant's signature appears on the English rights form below the initialed portions of the form. Defendant's signature appears next to the date, 1-9-13, and the time, 12:10. Detective Kelly signed her name as a witness below Defendant's signature.

14. That after being informed of his rights, informing Detective Kelly he wished to waive those rights, and signing the rights form, Defendant communicated to Detective Kelly that he wished to contact his mother by phone. Defendant was given permission to do so.

15. That Defendant attempted to call his mother, but was unable to speak to her.

16. That Defendant indicated that his mother was on her lunch break at the time he tried to contact her.

17. That Defendant did not at that time or any other time indicate that he changed his mind regarding his desire to speak to Detective Kelly. That Defendant did not at that time or any other time indicate that he revoked his waiver.

18. That Defendant only asked to speak to his mother.

19. That Defendant did not make his interview conditional on having his mother present or conditional on speaking to his mother.

20. That Defendant did not ask to have his mother present at the interview site.

21. That, upon review of the totality of the circumstances, the Court finds that Defendant's request to speak to his mother was at best an ambiguous request to speak to his mother.

22. That at no time did Defendant make an unambiguous request to have his mother present during questioning.

23. That Defendant never indicated that his mother was on the way or could be present during questioning.

24. That Defendant made no request for a delay of questioning.

Based upon these findings of fact, the trial court concluded as a matter of law:

1. That the State carried its burden by a preponderance of the evidence that Defendant knowingly, willingly, and understandingly waived his juvenile rights.

2. That the interview process in this case was consistent with the interrogation procedures as set forth in North Carolina General Statute § 7B-2101.

3. That none of Defendant's State or Federal rights were violated during the interview conducted of Defendant.

4. That statements made by Defendant were not gathered as a result of any State or Federal rights violation.

In light of these findings and conclusions, the trial court denied defendant's suppression motion.

On 4 June 2014, defendant entered a negotiated plea of guilty to two counts of felonious breaking or entering and two counts of conspiracy to commit breaking or entering while reserving the right to seek appellate review of the denial of his suppression motion.[2] Based upon defendant's plea, Judge Caldwell consolidated defendant's convictions for judgment and entered a judgment sentencing defendant to a term of six to seventeen months imprisonment, with this sentence being suspended and defendant placed on supervised probation for a period of thirty-six months on the condition that defendant serve a forty-five day active sentence, for which he received forty-five days' credit for time spent in pretrial confinement; pay the costs; comply with the usual terms and conditions of probation; and have no contact with the victim.[3] Defendant noted an appeal from Judge Caldwell's judgment to the Court of Appeals.

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2. The plea agreement between defendant and the State provided that, in return for defendant's guilty pleas, the State would voluntarily dismiss one additional count of felonious breaking or entering, one count of conspiracy to break or enter, and three counts of felonious larceny and that defendant would receive a sentence of six to seventeen months imprisonment, with this sentence to be suspended and with defendant to be on supervised probation for a period of thirty-six months, with the terms and conditions of defendant's probation including a requirement that he serve a forty-five day split sentence, subject to credit for time served in pretrial confinement, and that he be subject to intensive probation for a period of one year.

3. The final page of Judge Caldwell's judgment was omitted from the record on appeal. Having obtained a copy of that page from the office of the Clerk of Superior Court, Mecklenburg County, we have added it to the record on appeal upon our own motion pursuant to N.C.R. App. P. 9(b)(5)b.

In seeking relief from the Court of Appeals, defendant argued that his request to call his mother during his conversation with Detective Kelly had constituted "an unambiguous invocation of his right to have a parent present during a custodial interrogation" and that, in the alternative, even if his request for the presence of his mother had been ambiguous, "[Detective] Kelly was required to make further inquiries to clarify whether he actually meant that he was invoking his right to end the interrogation until his mother was present." *State v. Saldierna*, 242 N.C. App. 347, 353, 775 S.E.2d 326, 330 (2015) (*Saldierna I*). In addition, defendant contended that the trial court had failed to "appropriately consider his juvenile status in determining that his waiver of rights was knowing and voluntary." *Id.* at 354, 775 S.E.2d at 331.

In holding that the trial court had erred by denying defendant's suppression motion, the Court of Appeals determined "that[, while] the findings of fact regarding the ambiguous nature of [defendant's] statement, 'Can I call my mom[,]' are supported by competent evidence," the "ambiguous [nature of that] statement required [Detective] Kelly to clarify whether [defendant] was invoking his right to have a parent present during the interview." *Id.* at 360, 775 S.E.2d at 334. As a result, the Court of Appeals held "that the trial court erred in concluding that [Detective] Kelly complied with the provisions of section 7B-2101" and "reverse[d] the trial court's order, vacate[d] the judgments entered upon [defendant's] guilty pleas, and remand[ed] to the trial court with instructions to grant the motion to suppress." *Id.* at 360, 775 S.E.2d at 334. This Court granted the State's petition seeking discretionary review of the Court of Appeals' decision, reversed that decision, and remanded this case to the Court of Appeals for consideration of defendant's remaining challenge to the trial court's suppression order. *State v. Saldierna*, 369 N.C. 401, 409, 794 S.E.2d 474, 479 (2016).[4]

In overturning the Court of Appeals' decision in *Saldierna I*, this Court concluded that defendant's statement, "Um, [c]an I call my mom?", did not constitute "a clear and unambiguous invocation of his right to have his parent or guardian present during questioning." *Id.* at 408, 794 S.E.2d at 479 (citing *Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct.

4. Justice Beasley dissented from the Court's decision to reverse the Court of Appeals based upon her belief that the record established that defendant had unambiguously invoked his right to the presence of a parent and that investigating officers had an obligation to obtain clarification of any ambiguous statement that defendant may have made regarding the extent to which he desired the presence of a parent prior to being interrogated by Detective Kelly. *Saldierna*, 369 N.C. at 409, 794 S.E.2d at 479-80 (Beasley, J., dissenting).

2350, 2355, 129 L. Ed. 2d 362, 371 (1994) (holding that invocation of the right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney")). "Although defendant asked to call his mother, he never gave any indication that he wanted to have her present for his interrogation, nor did he condition his interview on first speaking with her." *Id.* at 408, 794 S.E.2d at 479. As a result, we determined that the Court of Appeals had erred by holding that the ambiguous nature of defendant's request to be allowed to call his mother required Detective Kelly to make further inquiry into the extent to which defendant intended to invoke his right to have his mother present before any custodial interrogation could commence. *Id.* at 409, 794 S.E.2d at 479.

On remand before the Court of Appeals, defendant argued that the trial court had erred by denying his suppression motion on the grounds that his confession had been obtained as the result of a violation of both his statutory and constitutional rights as a juvenile. According to defendant, the United States Supreme Court held in *J.D.B. v. North Carolina* "that reviewing courts must take into account the juvenile's age and maturity when determining the admissibility of a confession, and not to evaluate the confession as if the juvenile were an adult," citing *J.D.B.*, 564 U.S. 261, 272, 131 S. Ct. 2394, 2403, 180 L. Ed. 2d 310, 323-24 (2011). Defendant argued "that the *Davis* test should not be applied to the context of a juvenile interrogation" because "*Davis* involved an adult," because "the [United States] Supreme Court did not announce that the rule applied equally to juvenile confessions," and because "the [United States] Supreme Court has made clear . . . that juvenile confessions should be evaluated differently than adult confessions," citing, *inter alia*, *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 257 (1967), and *J.D.B.*, 564 U.S. 261, 131 S. Ct. 2394, 180 L. Ed. 2d 310.

In addition, defendant argued that, in light of the totality-of-the-circumstances approach outlined in *J.D.B.*, the trial court had erred by failing to consider that defendant "was in custody and outnumbered by three law enforcement officers"; had "stated to the detective plainly, '[c]an I call my mom now?' "; was sixteen years old and had only completed the eighth grade as of the date of the interrogation; "indicated to [Detective Kelly] that his native language was Spanish, that he could not write in English, and he may have stated he had difficulty understanding" Detective Kelly; provided "unclear" responses to questions that Detective Kelly posed during the interrogation; and expressed a desire to call his mother. According to defendant, an analysis of the totality of the circumstances surrounding defendant's interrogation established

that the trial court had erred by finding that defendant had knowingly and voluntarily waived his statutory and constitutional rights.

The State, on the other hand, argued before the Court of Appeals that defendant had knowingly, willingly, and understandingly waived his juvenile rights when he was advised of those rights in spoken English, written English, and written Spanish; had acknowledged that he understood those rights; and had expressed, both verbally and in writing, his willingness to waive those rights. "[A]s [ ] evidence of his understanding and intention to proceed with the interview," the State pointed to the fact that defendant had "signed each paragraph of the Rights Waiver Form" and had gone "on to answer Detective Kelly's questions for nearly an hour without ever once indicating . . . . he did not understand the rights read to him or that he was at all unclear about the choice he made to answer questions." Although "age is to be considered by the trial judge," the State asserted that defendant's juvenile status and grade level did not preclude him from understanding and waiving his juvenile rights. Moreover, the State claimed that "[t]here is no evidence of mistreatment or coercion" during the interrogation. In spite of the fact that it involved the interrogation of an adult rather than a juvenile, the State contended that the United States Supreme Court's decision in *Davis* remains applicable in determining whether defendant had validly waived his juvenile rights. Finally, the State argued that defendant's reliance upon *J.D.B.* was misplaced given that *J.D.B.* involved the issue of a juvenile's age as "relevant to the determination of whether the child was considered to have been 'in custody' for *Miranda* purposes" and given that the United States Supreme Court had stated in *J.D.B.* that "a child's age will [not] be determinative, or even a significant factor in every case," quoting *J.D.B.*, 564 U.S. at 277, 131 S. Ct. at 2406, 180 L. Ed. 2d at 326.

In holding that the trial court had erred by denying defendant's suppression motion, the Court of Appeals concluded on remand that defendant did not "knowingly, willingly, and understandingly waive[ ] his rights under section 7B-2101 of the North Carolina General Statutes and under the constitutions of North Carolina and the United States." *State v. Saldierna*, ___ N.C. App. ___, ___, 803 S.E.2d 33, 35 (2017) (*Saldierna II*). In reaching this conclusion, the Court of Appeals explained that, "[w]hether a waiver is knowingly and intelligently made depends on the specific facts and circumstances of each case, including the background, experience, and conduct of the accused." *Id.* at ___, 803 S.E.2d at 36 (quoting *State v. Simpson*, 314 N.C. 359, 367, 334 S.E.2d 53, 59 (1985)). According to the Court of Appeals, "[t]he totality of the circumstances *must be carefully scrutinized* when determining if a youthful

defendant has legitimately waived his *Miranda* rights," *id.* at ___, 803 S.E.2d at 40 (quoting *State v. Reid*, 335 N.C. 647, 663, 440 S.E.2d 776, 785 (1994) (emphasis added)), given that juveniles possess "unique vulnerabilities," in that "(1) they are less likely than adults to understand their rights; and (2) they are distinctly susceptible to police interrogation techniques," *id.* at ___, 803 S.E.2d at 42 (emphasis omitted) (quoting Cara A. Gardner, *Failing to Serve and Protect: A Proposal for an Amendment to a Juvenile's Right to a Parent, Guardian, or Custodian During a Police Interrogation After* State v. Oglesby, 86 N.C. L. Rev. 1685, 1698 (2008)).

The Court of Appeals stated that, "despite the trial court's many findings of fact that defendant 'indicated he understood' Detective Kelly's questions and statements regarding his rights, the evidence as recorded contemporaneously during the questioning and as noted in testimony from the hearing, does not support those findings." *Id.* at ___, 803 S.E.2d at 41. In addition, the Court of Appeals stated that "the findings do not reflect the scrutiny that a trial court is required to give in juvenile cases." *Id.* at ___, 803 S.E.2d at 41. Among other things, the Court of Appeals noted that "no response [was] recorded that [defendant] 'understood' " that Detective Kelly had asked defendant to initial, sign, and date the English version of the juvenile rights waiver form. *Id.* at ___, 803 S.E.2d at 41. For that reason, the Court of Appeals held that the finding of fact " '[t]hat [d]efendant was advised of his juvenile rights . . . in written Spanish,' is not supported by competent *documentary* evidence in the record" and that "the evidence does not support the trial court's ultimate conclusion that defendant executed a valid waiver." *Id.* at ___, 803 S.E.2d at 41 (alterations in original). As a result, the Court of Appeals determined that "the totality of the circumstances set forth in this record ultimately do not fully support the trial court's conclusions of law, namely, '[t]hat the State carried its burden by a preponderance of the evidence that [d]efendant knowingly, willingly, and understandingly waived his juvenile rights.' " *Id.* at ___, 803 S.E.2d at 43 (alterations in original). This Court granted the State's petition for discretionary review of the Court of Appeals' remand decision in *Saldierna II* on 1 November 2017.

In seeking to persuade us to reverse the Court of Appeals' decision, the State claims that the Court of Appeals failed to properly apply the applicable standard of appellate review. According to the State, the Court of Appeals should have focused upon determining "whether the unchallenged findings of fact supported the trial court's conclusion of law that defendant knowingly and voluntarily waived his juvenile rights." The State further contends that, even if the trial court's findings

had been challenged by defendant as lacking in sufficient evidentiary support, they would nevertheless be "conclusive on appeal" because they were "supported by competent evidence, even if the evidence is conflicting," quoting *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994), *cert. denied*, 513 U.S. 1096, 115 S. Ct. 764, 130 L. Ed. 2d 661 (1995). In the State's view, the audio recording of defendant's interview with Detective Kelly "demonstrates that defendant had the ability to understand Detective Kelly as she read him his juvenile rights." In addition, the State notes that, in instances in which defendant failed to provide an audible response to Detective Kelly's inquiries concerning the extent to which defendant understood specific juvenile rights, defendant placed his initials by the relevant paragraph on the juvenile rights waiver form. Finally, the State asserts that Detective Kelly's suppression hearing testimony sufficed to support the trial court's findings to the effect that defendant understood Detective Kelly as she read his juvenile rights to him.

Defendant, on the other hand, contends that the State failed to meet its burden of demonstrating that he knowingly, willingly, and understandingly waived his statutory and constitutional rights. According to defendant, this Court should consider defendant's youth, his request to call his mother, the number of officers present during the interrogation, and the misleading statements made to defendant by investigating officers in determining that the trial court had erred by denying defendant's suppression motion. In spite of the fact that defendant had initialed the juvenile rights waiver form, defendant argues that the fact that his responses to Detective Kelly's questions regarding the extent to which he understood his rights were unclear indicates that he had not understood the questions that Detective Kelly had posed to him. In addition, defendant notes that the trial court failed to make any findings of fact concerning defendant's "experience, education, background, . . . intelligence," and "capacity to understand the warnings given [to] him" as required by the totality-of-the-circumstances analysis enunciated in *Fare v. Michael C.*, quoting *Fare*, 442 U.S. 707, 725, 99 S. Ct. 2560, 2571, 61 L. Ed. 2d 197, 212 (1979). In light of these deficiencies in the trial court's findings of fact and the fact that, in the Court of Appeals' view, the relevant findings were actually mixed findings of fact and conclusions of law, defendant contends that the Court of Appeals appropriately examined the evidence anew, citing, *inter alia*, *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 548, 356 S.E.2d 578, 586-87 (1987), and had not committed any error of law in the course of overturning the trial court's suppression order.

"The standard of review in evaluating 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. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citation omitted). The trial court's findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *Eason*, 336 N.C. at 745, 445 S.E.2d at 926. "The conclusions of law made by the trial court from such findings, however, are fully reviewable on appeal." *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993) (citation omitted), *cert. denied*, 512 U.S. 1254, 114 S. Ct. 2784, 129 L. Ed. 2d 895 (1994), *post-conviction relief granted*, *State v. McCollum*, No. 83 CRS 15506-07, 2014 WL 4345428 (N.C. Super. Ct. Robeson County Sept. 2, 2014) (order vacating defendant's convictions and the trial court's judgment, and mandating defendant's immediate release from custody). "[A]n appellate court accords great deference to the trial court . . . because it is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619-20 (1982).

N.C.G.S. § 7B-2101(a) states that

> (a) [a]ny juvenile in custody must be advised prior to questioning:
>
> (1) That the juvenile has a right to remain silent;
>
> (2) That any statement the juvenile does make can be and may be used against the juvenile;
>
> (3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and
>
> (4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.

N.C.G.S. § 7B-2101(a) (2015).[5] The relevant statutory language is clearly intended to codify the rights afforded to a juvenile subjected to custodial

5. At the time that the interrogation at issue in this case occurred, N.C.G.S. § 7B-2101(b) provided that, "[w]hen the juvenile is less than 14 years of age, no in-custody

interrogation pursuant to *Miranda* in addition to affording a juvenile the State statutory right to have a parent, guardian, or custodian present during the interrogation process. *See Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706-07 (1966) (holding that, "[p]rior to any questioning, [a] person [subjected to custodial interrogation] must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed," although "[t]he defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently"). "If the juvenile indicates in any manner and at any stage of questioning pursuant to this section that the juvenile does not wish to be questioned further, the officer shall cease questioning." N.C.G.S. § 7B-2101(c). "Before admitting into evidence any statement resulting from custodial interrogation, the court shall find that the juvenile knowingly, willingly, and understandingly waived the juvenile's rights." *Id.* § 7B-2101(d) (2017). The State "bears the burden of demonstrating that the waiver was knowingly and intelligently made, and an express written waiver, while strong proof of the validity of the waiver, is not inevitably sufficient to establish a valid waiver." *Simpson*, 314 N.C. at 367, 334 S.E.2d at 59 (citations omitted); *see also State v. Thibodeaux*, 341 N.C. 53, 58, 459 S.E.2d 501, 505 (1995) (explaining that "[t]he State has the burden of showing by a preponderance of the evidence that the defendant made a knowing and intelligent waiver of his rights and that his statement was voluntary"). "Whether a waiver is knowingly and intelligently made depends on the specific facts and circumstances of each case, including the background, experience, and conduct of the accused." *Simpson*, 314 N.C. at 367, 334 S.E.2d at 59 (citations omitted). As a result, "the court [is required to look] at the totality of the circumstances surrounding the statement" in order to determine whether the State has adequately established that a waiver was knowingly and intelligently made. *Thibodeaux*, 341 N.C. at 58, 459 S.E.2d at 505.

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admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney." For offenses committed on or after 1 December 2015, the General Assembly amended N.C.G.S. § 7B-2101(b) by raising the age at which the presence of the juvenile's parent, guardian, custodian, or attorney is required from less than fourteen to less than sixteen. Act of May 26, 2015, ch. 58, secs. 1.1, 4. 2015 N.C. Sess. Laws 126, 126, 130. However, given that defendant was sixteen years old at the time of the interrogation at issue in this case, neither version of N.C.G.S. § 7B-2101(b) would have barred the admission of defendant's incriminating statements concerning his involvement in the unlawful break-ins at the residence of Ms. Brewer and Mr. Nunez.

"This totality-of-the-circumstances approach is adequate to determine whether there was been a waiver even where interrogation of juveniles is involved." *Fare*, 442 U.S. at 725, 99 S. Ct. at 2572, 61 L. Ed. 2d at 212. "The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation," including "evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his . . . rights, and the consequences of waiving those rights." *Id.* at 725, 99 S. Ct. at 2572, 61 L. Ed. 2d at 212 (citing *North Carolina v. Butler*, 441 U.S. 369, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979)). In applying the totality-of-the-circumstances test in cases involving the custodial interrogation of juveniles, we have noted that "the record must be carefully scrutinized, with particular attention to both the characteristics of the accused and the details of the interrogation." *State v. Fincher*, 309 N.C. 1, 19, 305 S.E.2d 685, 697 (1983) (quoting *State v. Spence*, 36 N.C. App. 627, 629, 244 S.E.2d 442, 443, *disc. rev. denied*, 295 N.C. 556, 248 S.E.2d 734 (1978)). However, a defendant's juvenile status "does not compel a determination that he did not knowingly and intelligently waive his *Miranda* rights." *Id.* at 19, 305 S.E.2d at 696-97 (citation omitted). Instead, the juvenile's age is a factor to consider along with "the characteristics of the accused and the details of the interrogation." *Id.* at 19, 305 S.E.2d at 697 (quoting *Spence*, 309 N.C. at 629, 244 S.E.2d at 443).

A careful review of the record satisfies us that the trial court's findings of fact have adequate evidentiary support and that those findings support the trial court's conclusion that defendant knowingly and voluntarily waived his juvenile rights. In reaching a contrary conclusion, the Court of Appeals failed to focus upon the sufficiency of the evidence to support the findings of fact that the trial court actually made and to give proper deference to those findings. *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619-20. Although the Court of Appeals concluded that "the evidence does not support the trial court's findings of fact . . . that defendant 'understood' Detective Kelly's questions and statements regarding his rights," *Saldierna II*, ___ N.C. App. at ___, 803 S.E.2d at 41, the record contains ample support for the trial court's determination that defendant understood his juvenile rights, with this determination resting upon the existence of evidence tending to show that Detective Kelly advised defendant of his juvenile rights in spoken English, written Spanish, and written English;[6] that defendant initialed each of the rights enumerated

6. In spite of the fact that the record does not contain the Spanish language version of the juvenile rights waiver form, the trial court's determination that defendant was

on the juvenile rights waiver form that Detective Kelly reviewed with him and signed the juvenile rights waiver form in such a manner as to indicate that he had decided to waive his juvenile rights and to speak with Detective Kelly without the presence of a parent, guardian, custodian, or attorney; that defendant answered affirmatively when questioned about the extent to which he understood his rights; and that defendant "understood what [Detective Kelly] was saying." As a result, we hold that the Court of Appeals erred in determining that the record did not support the trial court's findings to the effect that defendant understood his juvenile rights.

Admittedly, the record does contain evidence that would have supported a different determination concerning the issue of whether defendant understood the juvenile rights that were available to him. For example, the record does reflect that some of defendant's responses to Detective Kelly's inquiries concerning the extent to which he understood certain of his rights were "unintelligible" and that English was not defendant's primary language. However, given the evidence recited above, including Detective Kelly's suppression hearing testimony that defendant "seemed to very clearly understand what [she] was asking him" and that his English was "fine," the record concerning the extent to which defendant was able to understand the English language in general and Detective Kelly's questions in particular was, at most, in conflict. According to well-established North Carolina law, resolution of such evidentiary conflicts is a matter for the trial court, which has the opportunity to see and hear the witnesses, rather than an appellate court, which is necessarily limited to consideration of a cold record even in cases involving audio recordings and videographic evidence.

In addition, the trial court's findings support its conclusion of law that "[d]efendant knowingly, willingly, and understandingly waived his juvenile rights." Among other things, the record contains defendant's express written waiver of his juvenile rights which, while not determinative, is "strong proof of the validity of the waiver." *Simpson*, 314 N.C. at 367, 334 S.E.2d at 59. In addition to the express written waiver, the record contains evidence tending to show, and the trial court found, that defendant was advised of his rights in both written English and Spanish and in spoken English. Moreover, the transcript of defendant's interview with Detective Kelly indicates that, in all but two instances, defendant verbally affirmed that he understood his rights and that he was willing to

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informed of his juvenile rights in written form using the Spanish language is amply supported by Detective Kelly's suppression hearing testimony.

answer Detective Kelly's questions. Aside from the fact that defendant's suggestion that the inaudibility of certain of defendant's responses demonstrated that he did not understand his rights conflicts with Detective Kelly's suppression hearing testimony to the contrary and the fact that the record contains no evidence tending to show that defendant ever expressed a lack of willingness to speak with Detective Kelly, sought to invoke his rights, or was unable to adequately communicate with the investigating officers, this aspect of defendant's argument represents, in essence, an attempt to persuade us to reweigh the evidence and reach a different result with respect to a factual issue other than that deemed appropriate by the trial court. Similarly, the Court of Appeals' determinations that defendant's request to call his mother "shows enough uncertainty, enough anxiety on [defendant's] behalf, so as to call into question whether, under all the circumstances present in this case, the waiver was (unequivocally) valid" and that defendant's "last ditch effort to call his mother (for help), after his prior attempt to call her had been unsuccessful,[7] was a strong indication that he did not want to waive his rights at all," *Saldierna II*, ___ N.C. App. at ___, 803 S.E.2d at 42, are inconsistent with the trial court's findings of fact concerning the circumstances surrounding defendant's attempt to call his mother, which we have already found to have adequate record support. Finally, the record contains no allegations of coercive police conduct or the use of improper interrogation techniques.[8] As a result, we hold that the trial court did not err by concluding that defendant had knowingly, willingly, and understandingly waived his juvenile rights and that the Court of Appeals' decision to the contrary should be reversed.[9]

REVERSED.

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7. A number of statements that were made by investigating officers during Detective Kelly's interview with defendant suggest that defendant had made an earlier, unsuccessful attempt to reach his mother before the phone call reflected in the interview transcript.

8. Both defendant and the Court of Appeals appear to assert that Detective Kelly's statement to defendant that "[t]his is not something that's going to end your life" and "is not a huge deal" constituted a deceptive statement that should be weighed in favor of a finding that defendant had not voluntarily waived his juvenile rights. We are acutely aware that the incurrence of a felony conviction can have significant, and lasting, effects upon a juvenile's prospects. However, we are not persuaded that the statement in question constitutes official misconduct sufficient to compel a conclusion that defendant's will was overborne at the time that he decided to waive his juvenile rights and speak with Detective Kelly and believe that it simply reflects Detective Kelly's opinion that defendant was not suspected of having committed other, more serious criminal offenses.

9. A considerable amount of defendant's argument to this Court focuses upon policy, rather than legal or evidentiary, considerations. Although defendant points to a substantial

Justice BEASLEY dissenting.

In *Saldierna I*, I dissented because defendant's statement, "Um, [c]an I call my mom?", was an unambiguous invocation of his right to have a parent present during questioning. *See State v. Saldierna* (*Saldierna I*), 369 N.C. 401, 409, 794 S.E.2d 474, 479 (2016) (Beasley, J., dissenting). Upon this unambiguous invocation, law enforcement should have immediately ceased questioning and not resumed until defendant's mother was present or he reinitiated the conversation. *See id.* at 412, 794 S.E.2d at 481 (citing *Edwards v. Arizona*, 451 U.S. 477, 484-85, 68 L. Ed. 2d 378, 386 (1981)). Defendant did not knowingly, intelligently, and voluntarily waive his right to have his mother present—rather, he unambiguously invoked that right. Thus, for the reasons stated in my dissent to *Saldierna I*, I respectfully dissent.

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body of research that suggests that juveniles are unable to understand the language typically used in informing them of their rights, the approach that defendant advocates in reliance upon this information lacks support in the precedent of the United States Supreme Court or of this Court. On the contrary, as we have already noted, the United States Supreme Court has explicitly held that the totality-of-the-circumstances test for determining the validity of waivers of a defendant's *Miranda* rights is equally applicable to adults and juveniles, see *Fare*, 442 U.S. at 725, 99 S. Ct. at 2572, 61 L. Ed. 2d at 212, with a juvenile's age being a relevant, but not determinative, factor in the required analysis. Nothing in the record that has been presented for our consideration tends to show that the trial court failed to properly incorporate evidence concerning defendant's age or his linguistic and educational status into the required totality-of-the-circumstances evaluation.

STATE v. TURNER

[371 N.C. 427 (2018)]

STATE OF NORTH CAROLINA
v.
CHRISTOPHER GLENN TURNER

No. 440PA16

Filed 17 August 2018

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 793 S.E.2d 287 (2016), affirming an order entered on 15 January 2016 by Judge Michael Duncan in Superior Court, Caldwell County. Heard in the Supreme Court on 6 November 2017.

Joshua H. Stein, *Attorney General*, *by Christopher W. Brooks*, *Special Deputy Attorney General*, *for the State-appellant.*

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

PER CURIAM.

For the reasons stated in *State v. Curtis*, ___ N.C. ___, ___ S.E.2d ___ (Aug. 17, 2018) (No. 441PA16), we reverse the decision of the Court of Appeals and remand this case to that court for remand to the Superior Court, Caldwell County, with instructions to vacate the 15 January 2016 Order Affirming District Court Order and for further proceedings not inconsistent with our opinion in *Curtis*.

REVERSED AND REMANDED.

MARIA VAUGHAN
v.
LINDSAY MASHBURN, M.D. AND LAKESHORE WOMEN'S SPECIALISTS, PC

No. 42PA17

Filed 17 August 2018

Medical Malpractice—pleadings—Rule 9(j)—amendment—relation back

A plaintiff in a medical malpractice action may file an amended complaint under Rule 15(a) of the N.C. Rules of Civil Procedure to cure a defect in a Rule 9(j) certification when the expert review and certification occurred before the filing of the original complaint. Further, such an amended complaint may relate back under Rule 15(c). In this case, plaintiff's amended complaint corrected a technical pleading error and made clear that the expert review required by Rule 9(j) occurred before the filing of the original complaint. The trial court's denial of plaintiff's motion to amend as being futile was based on a misapprehension of the law.

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 781 (2016), affirming an order entered on 27 August 2015 by Judge Stanley L. Allen in Superior Court, Iredell County. Heard in the Supreme Court on 13 December 2017.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Patricia P. Shields and Joshua D. Neighbors; Shapiro, Appleton & Duffan, P.C., by Kevin M. Duffan and Richard N. Shapiro; and Collum & Perry, PLLC, by Travis E. Collum, for plaintiff-appellant.

Parker Poe Adams & Bernstein LLP, by Chip Holmes and Bradley K. Overcash, for defendant-appellees.

Law Office of D. Hardison Wood, by D. Hardison Wood; and Knott & Boyle PLLC, by W. Ellis Boyle, for North Carolina Advocates for Justice, amicus curiae.

Roberts & Stevens, P.A., by Phillip T. Jackson and Eric P. Edgerton, for North Carolina Association of Defense Attorneys, amicus curiae.

HUDSON, Justice.

Here we are asked to decide whether a medical malpractice plaintiff may amend a timely filed complaint to cure a defective Rule 9(j) certification after the statute of limitations has run, when the expert review required by Rule 9(j) occurred before the filing of the original complaint. The Court of Appeals concluded that Rule 9(j) does not permit a plaintiff to amend in these circumstances and affirmed the trial court's dismissal of plaintiff's medical malpractice complaint. *Vaughan v. Mashburn*, ___ N.C. App. ___, 795 S.E.2d 781 (2016). Because we conclude that the procedures plaintiff followed here are consistent with the letter and spirit of Rule 9(j), we reverse the decision of the Court of Appeals and remand to the trial court for further proceedings.

Background

On 3 May 2012, plaintiff underwent a laparoscopic hysterectomy at Lake Norman Regional Medical Center in Mooresville, North Carolina. The operation was performed by defendant Lindsay Mashburn, M.D., a physician who practices in the area of obstetrics and gynecology and who is an employee of defendant Lakeshore Women's Specialists, PC. Plaintiff alleges that during this surgery defendant Mashburn "inappropriately inflicted an injury and surgical wound to the Plaintiff's right ureter" resulting in "severe bodily injuries and other damages."

In October 2014, plaintiff's original counsel contacted Nathan Hirsch, M.D., a specialist in obstetrics and gynecology who had performed approximately one hundred laparoscopic hysterectomies, and provided Dr. Hirsch all of plaintiff's medical records pertaining to defendants' alleged negligence. After reviewing these records, Dr. Hirsch informed plaintiff's counsel on 31 October 2014 that in his opinion, the care and treatment rendered to plaintiff by defendants during and following the 3 May 2012 operation violated the applicable standard of care and that he was willing to testify to this effect.

Plaintiff filed a medical malpractice complaint against defendants on 20 April 2015 within the time afforded by the applicable statute of limitations, which expired on 3 May 2015.[1] In accordance with the special pleading requirements of section (j) ("Medical malpractice") of Rule 9 ("Pleading special matters") of the North Carolina Rules of Civil Procedure, plaintiff alleged in the complaint:

1. Pursuant to N.C.G.S. §§ 1-15(c) and 1-52, medical malpractice actions must be brought within three years of the last allegedly negligent act of the physician.

> Plaintiff avers that the medical care received by [plaintiff] complained of herein has been reviewed by persons who are reasonably expected to qualify as expert witnesses under Rule 702 of the North Carolina Rules of Evidence and who are willing to testify that the medical care provided did not comply with the applicable standard of care.

In making this assertion, however, plaintiff inadvertently used the certification language of a prior version of Rule 9(j), which stated:

> (j) Medical malpractice. — Any complaint alleging medical malpractice by a health care provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:
>
> (1) The pleading specifically asserts that *the medical care has been reviewed* by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

N.C.G.S. § 1A-1, Rule 9 (2009) (emphasis added). In 2011 the legislature amended Rule 9(j), and the rule now provides, in pertinent part:

> (j) Medical malpractice. — Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:
>
> (1) The pleading specifically asserts that the medical care *and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry* have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

Id., Rule 9 (2017) (emphasis added); *see also* Act of June 13, 2011, ch. 400, sec. 3, 2011 N.C. Sess. Laws 1712, 1713. Thus, plaintiff's Rule 9(j) certification omitted an assertion that "all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry" had been reviewed as required by the applicable rule.

On 10 June 2015, defendant Mashburn filed a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, asserting that the complaint failed "to state a claim upon which relief can be granted." Two days later, defendants filed an answer, which incorporated by reference defendant Mashburn's motion to dismiss. On 30 June 2015, plaintiff filed a motion for leave to file an amended complaint under Rule 15(a) of the North Carolina Rules of Civil Procedure to "add[ ] a single sentence to paragraph 21 of Plaintiff's original Complaint that accurately reflects the events that occurred prior to the filing of Plaintiff's original Complaint," specifically that "all medical records pertaining to the alleged negligence that are available to Plaintiff after reasonable inquiry have been reviewed before the filing of this Complaint," as required by Rule 9(j). In support of her motion for leave to file an amended complaint, plaintiff submitted to the trial court an affidavit of her original trial counsel, an affidavit of Dr. Hirsch, and her responses to defendants' Rule 9(j) interrogatories—all indicating that Dr. Hirsch reviewed plaintiff's medical care and related medical records before the filing of plaintiff's original complaint.

Following a hearing on 10 August 2015, the trial court entered an order on 27 August granting defendants' motion to dismiss, denying plaintiff's motion for leave to file an amended complaint, and dismissing plaintiff's complaint with prejudice. In its order the trial court stated:

> 1. Plaintiff's Original Complaint, filed on April 20, 2015, did not comply with Rule 9(j) of the North Carolina Rules of Civil Procedure, as amended effective October 1, 2011, in that the pleading did not specifically assert that the Plaintiff's medical expert reviewed **all** medical records pertaining to the alleged negligence that are available to the Plaintiff after reasonable inquiry.
>
> 2. Plaintiff's Motion for Leave to File an Amended Complaint, filed on June 30, 2015, is denied as being futile because the proposed amendment to Plaintiff's Original Complaint does not relate back to the filing date of Plaintiff's Original Complaint, and the statute of limitations ran on May 3, 2015.

Plaintiff appealed from the trial court's order to the Court of Appeals.

At the Court of Appeals plaintiff argued that the trial court's ruling was erroneous and that under this Court's decision in *Thigpen v. Ngo*, 355 N.C. 198, 558 S.E.2d 162 (2002), a plaintiff may amend a defective

Rule 9(j) certification and receive the benefit of relation back under Rule 15(c) so long as there is evidence "the review occurred before the filing of the original complaint." The Court of Appeals disagreed, noting that *Thigpen* was inapposite because the Court in that case did not address the issue of relation back under Rule 15(c). *Vaughan*, ___ N.C. App. at ___, 795 S.E.2d at 784-85. Relying instead on its own precedent in *Alston v. Hueske*, 244 N.C. App. 546, 781 S.E.2d 305 (2016), and *Fintchre v. Duke University*, 241 N.C. App. 232, 773 S.E.2d 318 (2015), the Court of Appeals determined that it was "again compelled by precedent to reach 'a harsh and pointless outcome' as a result of 'a highly technical failure' by [plaintiff's] trial counsel—the dismissal of a non-frivolous medical malpractice claim and the 'den[ial of] any opportunity to prove her claims before a finder of fact.' " *Id.* at ___, 795 S.E.2d at 788 (quoting *Fintchre*, 241 N.C. App. at 246, 773 S.E.2d at 327 (Stephens, J., concurring)). The court held that "where a medical malpractice 'plaintiff did not file the complaint with the *proper* Rule 9(j) certification *before the running of the statute of limitation*, the complaint cannot have been deemed to have commenced within the statute.' " *Id.* at ___, 795 S.E.2d at 788 (quoting *Alston*, 244 N.C. App. at 554, 781 S.E.2d at 311 (emphases added)). Accordingly, the Court of Appeals affirmed the ruling of the trial court. *Id.* at ___, 795 S.E.2d at 788-89.

Plaintiff filed a petition for discretionary review, which this Court allowed on 16 March 2017.

Analysis

Plaintiff argues that she should be permitted to amend her medical malpractice complaint under Rule 15(a) to correct a purely technical pleading error when doing so would enable the plaintiff to truthfully allege compliance with Rule 9(j) before both the filing of the initial complaint and the expiration of the statute of limitations. Further, plaintiff contends that such an amendment can relate back under Rule 15(c) so as to survive a motion to dismiss pursuant to Rule 9(j) and the applicable statute of limitations. We agree.

The outcome of this case hinges on the interaction between N.C.G.S. § 1A-1, Rule 9(j), as set forth above, and N.C.G.S. § 1A-1, Rule 15, which governs amendments to pleadings. "Statutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each." *Bd. of Adjust. v. Town of Swansboro*, 334 N.C. 421, 427, 432 S.E.2d 310, 313 (1993) (citing *Jackson v. Guilford Cty. Bd. of Adjust.*, 275 N.C. 155, 167, 166 S.E.2d 78, 86 (1969)).

Rule 15 provides, in pertinent part:

> (a) Amendments. — A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within 30 days after service of the amended pleading, unless the court otherwise orders.
>
> . . . .
>
> (c) Relation back of amendments. — A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

N.C.G.S. § 1A-1, Rule 15 (2017). "A motion to amend is addressed to the discretion of the trial court." *Henry v. Deen*, 310 N.C. 75, 82, 310 S.E.2d 326, 331 (1984). When the trial court's ruling is based on a misapprehension of law, the order will be vacated and the case remanded to the trial court for further proceedings. *See Concerned Citizens of Brunswick Cty. Taxpayers Ass'n v. State ex rel. Rhodes*, 329 N.C. 37, 54-55, 404 S.E.2d 677, 688 (1991) ("When the order or judgment appealed from was entered under a misapprehension of the applicable law, the judgment, including the findings of fact and conclusions of law on which the judgment was based, will be vacated and the case remanded for further proceedings." (citing *Davis v. Davis*, 269 N.C. 120, 127, 152 S.E.2d 306, 312 (1967))). While "[a] judge's decision in this matter will not be reversed on appeal absent a showing of abuse of discretion[,] . . . amendments should be freely allowed unless some material prejudice to the other party is demonstrated." *Mauney v. Morris*, 316 N.C. 67, 72, 340 S.E.2d 397, 400 (1986) (first citing *Henry*, 310 N.C. at 82, 310 S.E.2d at 331; then citing *Mangum v. Surles*, 281 N.C. 91, 98-99, 187 S.E.2d 697, 702 (1972)); *see also id.* at 72, 340 S.E.2d at 400 ("The burden is upon the opposing party to establish that that party would be prejudiced by

the amendment." (first citing *Roberts v. Reynolds Mem'l Park*, 281 N.C. 48, 58-59, 187 S.E.2d 721, 727 (1972); then citing *Vernon v. Crist*, 291 N.C. 646, 654, 231 S.E.2d 591, 596 (1977))).

This "liberal amendment process" under Rule 15 "complements the concept of notice pleading embodied in Rule 8," 1 G. Gray Wilson, *North Carolina Civil Procedure* § 15-1, at 15-2 to 15-3 (3d ed. 2007) [hereinafter Wilson, Civil Procedure], and reflects the legislature's intent "that decisions be had on the merits and not avoided on the basis of mere technicalities," *Mangum*, 281 N.C. at 99, 187 S.E.2d at 702 (citation omitted); *see also Roberts*, 281 N.C. at 56, 187 S.E.2d at 725 ("The new Rules achieve their purpose of insuring a speedy trial on the merits of a case by providing for and encouraging liberal amendments to conform pleadings and evidence under Rule 15(a), by pretrial order under Rule 16, during and after reception of evidence under Rule 15(b), and after entry of judgment under Rules 15(b), 59 and 60."). "There is no more liberal canon in the rules than that leave to amend 'shall be freely given when justice so requires.' " Wilson, *Civil Procedure* § 15-3, at 15-5.

In addressing the applicability of Rule 15 in the context of a medical malpractice complaint, we must also consider the legislative intent behind Rule 9(j). *See Brown v. Kindred Nursing Ctrs. E., L.L.C.*, 364 N.C. 76, 80, 692 S.E.2d 87, 89 (2010) (concluding that in addressing "the extent to which Rule 9(j) allows a party to amend a deficient medical malpractice complaint[,] . . . the specific policy objectives embodied in Rule 9(j) must be considered").

"Rule 9(j) serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review *before* filing of the action." *Moore v. Proper*, 366 N.C. 25, 31, 726 S.E.2d 812, 817 (2012) (citing *Thigpen*, 355 N.C. at 203-04, 558 S.E.2d at 166); *see also* Minutes of N.C. House Select Comm. on Tort Reform, *Hearing on H. 636 & H. 730*, 1995 Reg. Sess. (Apr. 19, 1995) [hereinafter *Hearing*] (comments by Rep. Charles B. Neely, Jr.) (explaining that "[t]he bill attempts to weed out law suits which are not meritorious *before they are filed*" (emphasis added)). As the caption of the 1995 legislation states, *see* Act of June 20, 1995, ch. 309, 1995 N.C. Sess. Laws 611, 611 ("An Act to Prevent Frivolous Medical Malpractice Actions by Requiring that Expert Witnesses in Medical Malpractice Cases Have Appropriate Qualifications to Testify on the Standard of Care at Issue and to Require Expert Witness Review as a Condition of Filing a Medical Malpractice Action"), the rule seeks to accomplish its purpose in two ways:

> First, the legislature mandated that an expert witness must review the conduct at issue and be willing to testify

> at trial that it amounts to malpractice before a lawsuit may be filed. Second, the legislature limited the pool of appropriate experts to those who spend most of their time in the profession teaching or practicing.

Moore, 366 N.C. at 37, 726 S.E.2d at 820 (Newby, J., concurring in part and concurring in the result) (citing ch. 309, secs. 1, 2, 1995 N.C. Sess. Laws at 611-13). Thus, the rule averts frivolous actions by precluding any filing in the first place by a plaintiff who is unable to procure an expert who both meets the appropriate qualifications and, after reviewing the medical care and available records, is willing to testify that the medical care at issue fell below the standard of care.

The Court of Appeals correctly noted that this Court has not addressed, in *Thigpen* or in any other case, the precise issue raised here involving the interplay between Rule 15 and Rule 9(j). We find our previous decisions, particularly *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 528 S.E.2d 568 (2000), instructive in resolving the question presented here.

In *Brisson* the plaintiffs' claims stemmed from injuries allegedly sustained during an abdominal hysterectomy performed on the female plaintiff on 27 July 1994. 351 N.C. at 591-92, 528 S.E.2d at 569. The plaintiffs filed a timely medical malpractice action on 3 June 1997 but failed to include a Rule 9(j) expert certification in their complaint. *Id.* at 591-92, 528 S.E.2d at 569. On the basis of this defect, the defendants moved to dismiss the plaintiffs' complaint. *Id.* at 591-92, 528 S.E.2d at 569. The plaintiffs then filed a motion to amend their complaint, along with an attached affidavit of their counsel, asserting that "a physician has reviewed the subject medical care, but it was inadvertently omitted from the pleading." *Id.* at 592, 528 S.E.2d at 569-70. The plaintiffs also filed a motion in the alternative to voluntarily dismiss their complaint without prejudice under Rule 41(a)(1) of the North Carolina Rules of Civil Procedure. *Id.* at 592, 528 S.E.2d at 570. After the trial court denied the plaintiffs' motion to amend but reserved ruling on the defendants' motion to dismiss, the plaintiffs voluntarily dismissed their claims against defendants under Rule 41(a)(1) on 6 October 1997. *Id.* at 592, 528 S.E.2d at 570.

Similar to Rule 15(c)'s "relation back" provision, Rule 41(a)(1) includes a one-year "saving provision" for voluntary dismissals, providing that "[i]f an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within

one year after such dismissal." N.C.G.S. § 1A-1, Rule 41(a)(1) (2017). Thus, "a plaintiff may 'dismiss an action that originally was filed within the statute of limitations and then refile the action after the statute of limitations ordinarily would have expired.' " *Brisson*, 351 N.C. at 594, 528 S.E.2d at 571 (quoting *Clark v. Visiting Health Prof'ls, Inc.*, 136 N.C. App. 505, 508, 524 S.E.2d 605, 607, *disc. rev. denied*, 351 N.C. 640, 543 S.E.2d 867 (2000)).

Accordingly, within one year of their voluntary dismissal, the plaintiffs filed a new complaint on 9 October 1997 that included the Rule 9(j) certification. *Id.* at 592, 528 S.E.2d at 570. The defendants filed an answer and moved for judgment on the pleadings, asserting that the plaintiffs' claims were barred by the statutes of limitations and repose. *Id.* at 592, 528 S.E.2d at 570. The trial court entered an order granting the defendants' motion for judgment on the pleadings, ruling that the plaintiffs' original 3 June 1997 complaint "d[id] not extend the statute of limitations in this case because it d[id] not comply with Rule 9(j)" and that the subsequent 9 October 1997 complaint was barred by the statute of limitations. *Id.* at 592, 528 S.E.2d at 570. After the Court of Appeals reversed the trial court's ruling, this Court granted the defendants' petition for discretionary review. *Id.* at 593, 528 S.E.2d at 570.

We first noted that the plaintiffs' voluntary dismissal under Rule 41(a)(1) rendered the plaintiffs' motion to amend "neither dispositive nor relevant to the outcome of this case" and that the sole issue was whether the voluntary dismissal under Rule 41(a)(1) "effectively extended the statute of limitations by allowing plaintiffs to refile their complaint against defendants within one year, even though the original complaint lacked a Rule 9(j) certification." *Id.* at 593, 528 S.E.2d at 570. In resolving this issue, we rejected the defendants' contention that the plaintiffs' failure to comply with Rule 9(j) in their first complaint rendered the one-year "saving provision" of Rule 41(a)(1) inapplicable. *Id.* at 594, 528 S.E.2d at 571. Regarding the interplay between Rule 41(a)(1) and Rule 9(j), we concluded:

> This Court has repeatedly stated that "[s]tatutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each." *Board of Adjust. v. Town of Swansboro*, 334 N.C. 421, 427, 432 S.E.2d 310, 313 (1993). On these facts, we must look to our Rules of Civil Procedure and construe Rule 9(j) along with Rule 41. Although Rule 9(j) clearly requires a complainant of a medical malpractice action to attach to the complaint specific verifications regarding

> an expert witness, the rule does not expressly preclude such complainant's right to utilize a Rule 41(a)(1) voluntary dismissal. Had the legislature intended to prohibit plaintiffs in medical malpractice actions from taking voluntary dismissals where their complaint did not include a Rule 9(j) certification, then it could have made such intention explicit. In this case, the plain language of Rule 9(j) does not give rise to an interpretation depriving plaintiffs of the one-year extension pursuant to their Rule 41(a)(1) voluntary dismissal merely because they failed to attach a Rule 9(j) certification to the original complaint. "[T]he absence of any express intent and the strained interpretation necessary to reach the result urged upon us by [defendants] indicate that such was not [the legislature's] intent." *Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 425, 276 S.E.2d 422, 436 (1981).

Id. at 595, 528 S.E.2d at 571. Accordingly, we determined that the plaintiffs' voluntary dismissal of their original 3 June 1997 complaint—though it lacked a proper Rule 9(j) expert certification—extended for one year the statute of limitations pursuant to Rule 41(a)(1) and rendered the plaintiffs' subsequent 9 October 1997 complaint timely filed. *Id.* at 597, 528 S.E.2d at 573. In closing, we noted that our decision

> merely harmonizes the provisions of Rules 9(j) and 41(a). A frivolous malpractice claim with no expert witness pursuant to Rule 9(j) still meets the ultimate fate of dismissal. Likewise, a meritorious complaint will not be summarily dismissed without benefit of Rule 41(a)(1), simply because of an error by plaintiffs' attorney in failing to attach the required certificate to the complaint pursuant to Rule 9(j).

Id. at 598, 528 S.E.2d at 573. Regarding the additional issue of whether "an amended complaint which fails to allege that review of the medical care in a medical malpractice action took place before the filing of the original complaint satisf[ies] the requirements of Rule 9(j)," we concluded that discretionary review was improvidently allowed. *Id.* at 597, 528 S.E.2d at 573. That issue subsequently arose in *Thigpen*.

In *Thigpen* the alleged medical malpractice occurred in June 1996. 355 N.C. at 199, 558 S.E.2d at 163. Rule 9(j) allows a plaintiff, before expiration of the statute of limitations, to file "a motion to extend the statute of limitations for a period not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule."

N.C.G.S. § 1A-1, Rule 9(j). In accordance with this provision, on 8 June 1999, before the expiration of the three-year statute of limitations, the plaintiff filed a motion to extend the statute of limitations for 120 days in order to file a complaint. *Thigpen*, 355 N.C. at 199, 558 S.E.2d at 163. The trial court granted the plaintiff's motion and entered an order extending the statute of limitations through 6 October 1999. *Id.* at 199, 558 S.E.2d at 164.

On the final day of the extended deadline, the plaintiff filed her medical malpractice complaint but failed to include the Rule 9(j) expert certification. *Id.* at 200, 558 S.E.2d at 164. On 12 October 1999, six days after the extended statute of limitations had expired, the plaintiff filed an amended complaint "including a certification that the 'medical care has been reviewed' by someone who would qualify as an expert." *Id.* at 200, 558 S.E.2d at 164. The defendants then filed motions to dismiss on the basis that the plaintiff's amended complaint was not filed before expiration of the extended statute of limitations. *Id.* at 200, 558 S.E.2d at 164. The trial court granted the defendants' motions and dismissed with prejudice the plaintiff's complaint, finding that "Plaintiff's original Complaint did not contain a certification that the care rendered by Defendants had been reviewed by an expert witness reasonably expected to testify that the care rendered to Plaintiff did not comply with the applicable standard of care as required by Rule 9(j)." *Id.* at 200, 558 S.E.2d at 164. After a split decision of the Court of Appeals, in which the majority reversed the trial court, the defendants appealed to this Court. *Id.* at 198-99, 200, 558 S.E.2d at 163-64.

As an initial matter, we determined that "the interplay between Rule 9(j) and Rule 15" was "neither dispositive nor relevant to th[e] case" and further, that *Brisson* was factually distinguishable and therefore inapposite. *Id.* at 200-01, 558 S.E.2d at 164. We then noted that

> [t]he General Assembly added subsection (j) of Rule 9 in 1995 pursuant to chapter 309 of House Bill 730, entitled, "An Act to Prevent Frivolous Medical Malpractice Actions by Requiring that Expert Witnesses in Medical Malpractice Cases Have Appropriate Qualifications to Testify on the Standard of Care at Issue and to Require Expert Witness Review as a Condition of Filing a Medical Malpractice Action." Act of June 20, 1995, ch. 309, 1995 N.C. Sess. Laws 611. The legislature specifically drafted Rule 9(j) to govern the initiation of medical malpractice actions and to require physician review as a condition for filing the action. The legislature's intent was to provide

> a more specialized and stringent procedure for plaintiffs in medical malpractice claims through Rule 9(j)'s requirement of expert certification prior to the filing of a complaint. Accordingly, permitting amendment of a complaint to add the expert certification where the expert review occurred after the suit was filed would conflict directly with the clear intent of the legislature.

Id. at 203-04, 558 S.E.2d at 166. Because the plaintiff's original complaint failed to comply with Rule 9(j), we concluded that the trial court correctly dismissed the complaint.

Next, we addressed an issue for which we granted discretionary review (and for which we concluded discretionary review had been improvidently allowed in *Brisson*)—whether "an amended complaint which fails to allege that review of the medical care in a medical malpractice action took place before the filing of the original complaint satisfies the requirements of Rule 9(j)." *Id.* at 204, 558 S.E.2d at 166. Consistent with our prior discussion of legislative intent, we held that it does not. *Id.* at 204, 558 S.E.2d at 166. Specifically, we determined that

> [t]o survive dismissal, the pleading must "specifically assert[ ] that the medical care *has been reviewed*." N.C.G.S. § 1A-1, Rule 9(j), para. 1(1), (2) (emphasis added). Significantly, the rule refers to this mandate twice (in subsections (1) and (2)), and in both instances uses the past tense. *Id.* In light of the plain language of the rule, the title of the act, and the legislative intent previously discussed, it appears review must occur *before* filing to withstand dismissal. Here, in her amended complaint, plaintiff simply alleged that "[p]laintiff's medical care *has been reviewed* by a person who is reasonably expected to qualify as an expert witness." (Emphasis added.) There is no evidence in the record that plaintiff alleged the review occurred before the filing of the original complaint. Specifically, there was no affirmative affidavit or date showing that the review took place before the statute of limitations expired. Allowing a plaintiff to file a medical malpractice complaint and to then wait until after the filing to have the allegations reviewed by an expert would pervert the purpose of Rule 9(j).

Id. at 204, 558 S.E.2d at 166-67. Thus, *Thigpen* emphasizes that because expert review is a condition of initiating a medical malpractice action in the first place, the review must occur before the filing of an original

complaint.[2] Because the plaintiff's proposed amended complaint still failed to comply with Rule 9(j), it was unnecessary to address whether the amended complaint—had it been in compliance—could have received the benefit of relating back to the filing date of the original complaint under Rule 15(c). Accordingly, we concluded that discretionary review was improvidently allowed regarding the issue of "whether a plaintiff who files a complaint without expert certification pursuant to Rule 9(j) can cure that defect after the applicable statute of limitations expires by amending the complaint as a matter of right and having that amendment relate back to the date of the original complaint." *Id.* at 204-05, 558 S.E.2d at 167.

That latter issue is similar in significant respect to the one raised here, though the proposed amended complaint in *Thigpen* was attempted as "a matter of course," whereas plaintiff here sought to amend "by leave of court," which, as previously noted, "shall be freely given when justice so requires." N.C.G.S. § 1A-1, Rule 15(a). With that "liberal canon" in mind, we now conclude that much of the rationale behind our decision in *Brisson* is similarly applicable here and, in conjunction with the legislative intent behind Rules 15 and 9(j), leads to a result that is consistent with *Thigpen* and was forecast in part by our discussion in that case. *See, e.g.*, *Thigpen*, 355 N.C. at 204, 558 S.E.2d at 166 ("[P]ermitting amendment of a complaint to add the expert certification where the expert review occurred after the suit was filed would conflict directly with the clear intent of the legislature. . . . There is no evidence in the record that plaintiff alleged the review occurred before the filing of the original complaint. Specifically, there was no affirmative affidavit or date showing that the review took place before the statute of limitations expired.").

Our conclusion in *Brisson* that "the plain language of Rule 9(j) does not give rise to an interpretation depriving plaintiffs of the one-year extension pursuant to their Rule 41(a)(1) voluntary dismissal merely because they failed to attach a Rule 9(j) certification to the original complaint," 351 N.C. at 595, 528 S.E.2d at 571, has similar application here.

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2. We again emphasized the necessity of the expert review occurring before filing in *Brown*, in which the plaintiff filed his complaint first and then attempted to utilize Rule 9(j)'s 120-day extension in order to conduct the expert review. *See Brown*, 364 N.C. at 80, 692 S.E.2d at 90 ("[P]laintiff's sole reason for requesting an extension of the statute of limitations is inconsistent with the General Assembly's purpose behind enacting Rule 9(j). Here, plaintiff did not move for a 120-day extension to locate a certifying expert before filing his complaint. Rather, plaintiff alleged malpractice first and then sought to secure a certifying expert. This is the exact course of conduct the legislature sought to avoid in enacting Rule 9(j).").

Just as Rule 9(j) "does not expressly preclude such complainant's right to utilize a Rule 41(a)(1) voluntary dismissal," *id.* at 595, 528 S.E.2d at 571, Rule 9(j) does not preclude plaintiff's right to utilize a Rule 15(a) amended complaint or her right to have the amended complaint relate back to the date of the original filing under Rule 15(c). As we noted in *Brisson*, "[h]ad the legislature intended to prohibit plaintiffs in medical malpractice actions from" filing an amended complaint and receiving the benefit of relation back under Rule 15(c), "then it could have made such intention explicit." *Id.* at 595, 528 S.E.2d at 571. Further, "[t]he absence of any express intent and the strained interpretation necessary to reach the result urged upon us by [defendants] indicate that such was not [the legislature's] intent." *Id.* at 595, 528 S.E.2d at 571 (quoting *Sheffield*, 302 N.C. at 425, 276 S.E.2d at 436). Moreover, we find persuasive that when the legislature amended Rule 9(j) in 2001, Act of May 17, 2001, ch. 121, sec. 1, 2001 N.C. Sess. Laws 232, 232-33, and again in 2011, more than a decade after *Brisson*, ch. 400, sec. 3, 2011 N.C. Sess. Laws at 1713, it did not include any amendments rejecting that decision. *See Brown*, 364 N.C. at 83, 692 S.E.2d at 91-92 (" 'The legislature's inactivity in the face of the Court's repeated pronouncements' on an issue 'can only be interpreted as acquiescence by, and implicit approval from, that body.' " (quoting *Rowan Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 9, 418 S.E.2d 648, 654 (1992))). Similar to *Brisson*, we reject defendants' contention here that the defect in plaintiff's Rule 9(j) certification in her original, timely filed complaint failed to "toll" the statute of limitations, thereby depriving plaintiff of relation back under Rule 15(c). Accordingly, we conclude that a plaintiff in a medical malpractice action may file an amended complaint under Rule 15(a) to cure a defect in a Rule 9(j) certification when the expert review and certification occurred before the filing of the original complaint. Further, such an amended complaint may relate back under Rule 15(c).

We again emphasize that in a medical malpractice action the expert review required by Rule 9(j) must occur before the filing of the original complaint. This pre-filing expert review achieves the goal of "weed[ing] out law suits which are not meritorious before they are filed." *Hearing* (comments by Rep. Neely). But when a plaintiff prior to filing *has* procured an expert who meets the appropriate qualifications and, after reviewing the medical care and available records, is willing to testify that the medical care at issue fell below the standard of care, dismissing an amended complaint would not prevent frivolous lawsuits. Further, dismissal under these circumstances would contravene the principle "that decisions be had on the merits and not avoided on the basis of mere technicalities." *Mangum*, 281 N.C. at 99, 187 S.E.2d at 702. As in

Brisson, our decision "merely harmonizes" the provisions of Rule 9(j) and Rule 15. 351 N.C. at 598, 528 S.E.2d at 573. "A frivolous malpractice claim with no expert witness pursuant to Rule 9(j) still meets the ultimate fate of dismissal. Likewise, a meritorious complaint will not be summarily dismissed without benefit of Rule [15], simply because of an error by [plaintiff's] attorney in failing to attach the required certificate to the complaint pursuant to Rule 9(j)." *Id.* at 598, 528 S.E.2d at 573.

Here plaintiff alleged in her 20 April 2015 complaint that the expert review of the "medical care" had occurred as required by Rule 9(j) but failed to assert that "all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry" had been included in that review. After the statute of limitations expired on 3 May 2015, plaintiff filed a motion to amend by leave of court in order to correct her defective Rule 9(j) certification and assert that "all medical records pertaining to the alleged negligence that are available to Plaintiff after reasonable inquiry" had been reviewed before the filing of the original complaint. In support of her motion for leave to file an amended complaint, plaintiff submitted to the trial court an affidavit of her original trial counsel, an affidavit of her medical expert, Dr. Hirsch, and her responses to defendants' Rule 9(j) interrogatories—all indicating that Dr. Hirsch reviewed plaintiff's medical care and related medical records before the filing of plaintiff's original complaint. Defendants do not contend that anything in the record indicates that the expert review did not take place before the filing of the original complaint. Because plaintiff's amended complaint corrected a technical pleading error and made clear that the expert review required by Rule 9(j) occurred before the filing of the original complaint, the amended complaint complied with Rule 9(j) and may properly relate back to the date of the original complaint under Rule 15(c). Accordingly, the trial court's denial of plaintiff's motion to amend as being futile was based on a misapprehension of law. The decision of the Court of Appeals to the contrary is reversed, and this case is remanded for further proceedings.

As a final matter, this Court allowed discretionary review of the issue of whether "the trial court abuse[d] its discretion in denying [plaintiff's] motion to amend when [plaintiff] filed a motion to amend within 120 days of the expiration of the statute of limitations, and verified by affidavits that her proposed Rule 9(j) certification factors all had occurred inside the statute of limitations." As to this issue, we hold that discretionary review was improvidently allowed.

REVERSED AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

STATE v. CLEGG

[371 N.C. 443 (2018)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Wake County
	)	
CHRISTOPHER A. CLEGG	)	

No. 101P15-3

ORDER

This case is before the Court upon defendant's request for further review of the Court of Appeals' unanimous, unpublished decision holding that "defendant's *Batson* challenge was properly denied" by the trial court. *State v. Clegg*, No. COA-17-76, 2017 WL 3863494, at *6 (N.C. Ct. App. Sept. 5 2017). On its own motion, the Court orders that this case be remanded to the trial court for reconsideration of defendant's *Batson* challenge based upon the existing record and the entry of a new order addressing the merits of defendant's *Batson* challenge in light of the United States Supreme Court decision in *Foster v. Chatman*, __ U.S. __, 136 S. Ct. 1737, 195 L. Ed. 1 (2016), which was decided after the trial court's decision in this case. After the entry of the order on remand, the trial court should certify that order to this Court, which retains jurisdiction and will undertake any necessary additional proceedings at that time.

By order of the Court in conference, this the 14th day of August, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of August, 2018.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
Assistant Clerk, Supreme Court of
North Carolina

STATE v. J.C.

[371 N.C. 444 (2018)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Onslow County
	)	
J.C.	)	

No. 405P17

ORDER

The State's petition for discretionary review is decided as follows:

The State's request for discretionary review with respect to the following issue is allowed:

> Whether the Court of Appeals erred in dismissing the State's appeal as of right from the trial court's expunction order granting petitioner his requested relief.

Except as otherwise allowed, the State's petition for discretionary review is denied.

By order of the Court in conference, this the 14th day of August, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of August, 2018.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
Assistant Clerk, Supreme Court of
North Carolina

STATE v. RYAN

[371 N.C. 445 (2018)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Gaston County
	)	
MICHAEL PATRICK RYAN	)	

No. 366A10

ORDER

This case is before the Court upon the State's request for further review of the trial court's order dated 3 February 2017. On its own motion, this Court allows review of this matter and directs the parties to brief whether the trial court erred in granting defendant's Motion for Appropriate Relief and ordering a new trial.

By order of the Court, this the 14th day of August, 2018.

s/Morgan, J.
For the Court

Ervin, J., recused

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of August, 2018.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
Assistant Clerk, Supreme Court of
North Carolina

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

14 AUGUST 2018

001P18	Christian G. Plasman, in his individual capacity and derivatively for the benefit of, on behalf of and right of nominal party Bolier & Company, LLC v. Decca Furniture (USA), Inc., Decca Contract Furniture, LLC, Richard Herbst, Wai Theng Tin, Tsang G. Hung, Decca Furniture, Ltd., Decca Hospitality Furnishings, LLC, Dongguan Decca Furniture Co. Ltd., Darren Hudgins, Decca Home, LLC, and Elan By Decca, LLC, and Bolier & Company, LLC, nominal defendant v. Christian J. Plasman a/k/a Barrett Plasman, third-party defendant	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA17-358) 2. Plt's Petition for *Writ of Certiorari* to Review Decision of COA (COA17-358) 3. Plt's Motion to Certify for Discretionary Review and Consolidate for Consideration COA16-777, COA16-1156, COA17-358 4. Plt's PDR Under N.C.G.S. § 7A-31 (COA17-151)	1. Denied 2. Denied 3. Dismissed as moot 4. Denied
002P18	Jennifer L. Wilson v. SunTrust Bank; SunTrust Mortgage Inc.; Deutsche Bank Trust Company Americas; The Law Firm of Hutchens, Senter & Britton, P.A. n/k/a Hutchens, Senter, Kellam & Pettit, P.A.; Substitute Trustee Services, Inc.; and Does/Janes 1-10 Inclusive	1. Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA17-482) 2. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
017P18-2	State v. Joseph Burton Mial	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Guilford County 2. Def's *Pro Se* Motion for PDR	1. Dismissed 2. Dismissed

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031A18	Andrea Kirby Crowell v. William Worrell Crowell	1. Plt's Notice of Appeal Based Upon a Dissent (COA17-164) 2. Plt's PDR as to Additional Issues 3. Plt's Motion for Temporary Stay 4. Plt's Petition for *Writ of Supersedeas*	1. --- 2. 3. Allowed **06/28/2018** 4. Allowed **06/28/2018**
033P18	State v. Nicholas Anthony Borsello	Def's PDR Under N.C.G.S. § 7A-31 (COA17-40)	Denied
036P18	Walton North Carolina, LLC and Walton NC Concord, L.P. v. The City of Concord, North Carolina	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA17-822) 2. Plts' Motion to Amend PDR	1. Denied 2. Allowed
038P18	Krista Ragsdale, Guardian Ad Litem for Alec Seeburger v. Dr. John M. Whitley and Cumberland County Hospital System, Inc., d/b/a Cape Fear Valley Health System	Defs' PDR Under N.C.G.S. § 7A-31 (COA17-860)	Denied
039P18	Russell F. Walker v. Knats Creek Nursery, Inc.	1. Plt's *Pro Se* Motion for PDR (COAP18-21) 2. Def's Motion to Deny PDR	1. Denied **05/09/2018** 2. Dismissed as moot
039P18-2	Russell F. Walker v. Knats Creek Nursery, Inc.	1. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP18-21, 17-1192) 2. Plt's *Pro Se* Motion to Proceed as an Indigent 3. Def's Motion for Sanctions 4. Def's Motion for "Gatekeeper" Order	1. Denied 2. Allowed 3. Denied 4. Denied
041P17-2	Arthur O. Armstrong v. North Carolina, et al.	Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	Denied
044P18	Brenda Lemus Rodriguez v. Liliana Silverio Lemus	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-1285) 2. Def's Petition in the Alternative for *Writ of Certiorar*i to Review Decision of COA	1. Denied 2. Dismissed as moot

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050P18	Karen Cecchettini v. Thomas Cecchettini	Def's PDR Under N.C.G.S. § 7A-31 (COA17-556)	Denied
051P18	North Carolina Farm Bureau Insurance Company, Inc. and North Carolina Insurance Underwriting Association v. Ronnie D. Lilley, Sr.	Def's PDR Under N.C.G.S. § 7A-31 (COA16-998)	Denied
065A17-2	State v. Jeffrey Robert Parisi	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **06/25/2018** 2.
067P18	State v. Jonathan Eugene Dixon	1. State's Motion for Temporary Stay (COA17-962) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **03/07/2018** Dissolved **08/14/2018** 2. Denied 3. Denied **Ervin, J., recused**
073P18	Erin Keena v. Cedar Street Investments, LLC, d/b/a Draught, a Domestic for Profit, LLC, and John Doe Employee and/or Agent, jointly and severally, directly and vicariously	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-852)	Denied
075P17-4	Ocwen Loan Servicing v. Margaret Ann Reaves	1. Def's *Pro Se* Motion for Notice of Appeal 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Wake County	1. Dismissed *ex mero motu* 2. Denied
080P18-3	Darron J. Jones v. Mr. Cranford	Plt's *Pro Se* Motion to File Amended Complaint	Dismissed as moot
094P18	USA Trouser, S.A. de C.V. v. James A. Williams; Navigators Insurance Company; and Navigators Management Company, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-918)	Denied

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

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097P18	Phyllis V. Parsons v. Donald Joe Parsons, Jr., Individually, and as Administrator of the Estate of Donald Joe Parsons	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-278)	Denied
101P15-3	State v. Christopher Anthony Clegg	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-76) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Special Order 3. Allowed
106A18	State v. Scott Alton Hill	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-758) 2. State's Motion to Dismiss Appeal	1. --- 2. Allowed
107P17-2	State v. Teon Jamell Williams	Def's *Pro Se* Motion to Dismiss and/ or Squash, Set Aside, Vacate the Indictments for Habitual Felon and Resentence, or Consolidate, or Run Concurrent	Dismissed
109P17-5	In re Olander R. Bynum	Petitioner's *Pro Se* Motion for *En Banc* Consideration of Application for *Writ of Mandamus*	Dismissed
109P18	Theodore Creed v. William E. Creed, Nationwide Property & Casualty Insurance Company, Inc., Essentia Insurance Company, and Owners Insurance Company	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-456)	Denied
110P18	State v. Devon Shamark Crooms	Def's PDR Under N.C.G.S. § 7A-31 (COA17-317)	Denied
112P18	James H. McCall, IV and Shannon McCall v. Ronald Lee Million, Jr. and Marissa Hayler Million	1. Defs' Notice of Appeal Based Upon a Constitutional Question (COA17-403) 2. Defs' PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
113P18	State v. Billy Ray Allen	Def's PDR Under N.C.G.S. § 7A-31 (COA17-661)	Denied

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116P18	State v. Nicholas Nacoleon Harding	1. Def's Motion for Temporary Stay (COA17-448) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/11/2018** Dissolved **08/14/2018** 2. Denied 3. Denied
117P18	Regency Lake Owners' Association, Inc., and Charles Huffman v. Regency Lake, LLC, Courtland Properties, Inc., and Joseph MacMinn	Plts' PDR Under N.C.G.S. § 7A-31 (COA17-1117)	Denied
121P18	In the Matter of A.R., D.G., T.G.	Respondent Mother's PDR Under N.C.G.S. § 7A-31 (COA17-1212)	Denied
127P18	William M. Byron and Dana T. Byron v. Synco Properties, Inc., a North Carolina Corporation, and City of Charlotte, a North Carolina Body Politic and Corporate	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA17-318) 2. Defs' Motion to Dismiss PDR	1. Denied 2. Dismissed as moot
128A18	Azure Dolphin, LLC, et al. v. Barton, et al.	Counsel for Plaintiff-Appellant's Motion to Withdraw as Appellate Counsel	Allowed **08/15/2018**
130A03-2	State v. Quintel Martinez Augustine (DEATH)	1. NAACP Legal Defense and Educational Fund, Inc.'s Motion to Admit Jin Lee Hee *Pro Hac Vice* 2. NAACP Legal Defense and Educational Fund, Inc.'s Motion to Admit W. Kerrel Murray *Pro Hac Vice* 3. NAACP Legal Defense and Educational Fund, Inc.'s Motion to Not Require the Payment of Additional *Pro Hac Vice* Fees	1. Allowed **07/18/2018** 2. Allowed **07/18/2018** 3. Denied **07/18/2018** **Ervin, J., recused**

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

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130A03-2	State v. Quintel Martinez Augustine (DEATH)	1. Former State and Federal Prosecutors' Motion to Admit Paul F. Khoury *Pro Hac Vice* 2. Former State and Federal Prosecutors' Motion to Admit Robert L. Walker *Pro Hac Vice* 3. Former State and Federal Prosecutors' Motion to Admit Madeline J. Cohen *Pro Hac Vice* 4. Former State and Federal Prosecutors' Motion to Not Require the Payment of Additional *Pro Hac Vice* Fees	1. Allowed **07/20/2018** 2. Allowed **07/20/2018** 3. Allowed **07/20/2018** 4. Denied **07/20/2018** **Ervin, J., recused**
131P16-9	State v. Somchoi Noonsob	Def's *Pro Se* Motion for Verified Complaint	Denied **06/27/2018**
132P14-2	State v. Melvin Bibian Warner	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Cabarrus County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
134A18	Regency Centers Acquisition, LLC v. Crescent Acquisitions, LLC	Plt's Motion to Hold Case in Advance of Settlement	Allowed **08/10/2018**
135P18	State v. Albert Uriah Mathis	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA17-128) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
136A18	Donald Sullivan v. Robert Wayne Pugh and Karen Lloyd Pugh, His Legal Wife ——— TOG Properties, LLC v. Karen Pugh	1. Plt's (Donald Sullivan) *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA17-450) 2. Plt's (TOG Properties, LLC) Motion to Dismiss Appeal	1. --- 2. Allowed
137A18	Cassandra Swaringen Christian v. Department of Health and Human Services	1. Petitioner's Notice of Appeal Based Upon a Constitutional Question (COA17-605) 2. Respondent's Motion to Dismiss Appeal	1. --- 2. Allowed

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

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138P18	Betty Jo O'Neal v. Jeffrey Hunter Fox and Lisa Polley Fox	1. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-754) 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
148P18	State v. Robert O'Neal Dick	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-1251) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
149P18	Angela Meshell Bluitt v. Wake Forest University Baptist Medical Center, Wake Forest University, North Carolina Baptist Hospital, and Evan Rubery, MD	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-1170)	Denied
150P03-2	State v. Larry Chavis	1. Def's *Pro Se* Motion for Notice of Appeal (COAP18-195) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* Petition in the Alternative for *Writ of Certiorari* to Review Order of COA	1. Dismissed 2. Dismissed 3. Dismissed
152P18	State v. Maurice Alexander Robinson	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-839) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
154P18	State v. Kenneth Wayne Ryckeley	Def's PDR Under N.C.G.S. § 7A-31 (COA17-200)	Denied
157P18	State v. Kim Sydnor	Def's *Pro Se* Motion to Have COA Enforce Its Order (COA17-48)	Dismissed
158P18	In re Robert Lee Styles, Jr.	Petitioner's *Pro Se* Motion for PDR (COAP18-93)	Dismissed
159P18	State v. Timothy Brown	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-944)	Denied
161A18	State v. Mollie Elizabeth B. McDaniel	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **06/01/2018** 2. Allowed **06/25/2018** 3. ---

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

14 AUGUST 2018

162P18	State v. Ronnie Lee Ford	1. Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COA17-817) 2. Def's *Pro Se* Motion for *En Banc* Review 3. Def's *Pro Se* Motion for Discretionary Review Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed 3. Dismissed
163P18	State v. Brundon Moore	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
167P18	State v. Tristan Philip Hines	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-1141)	Denied
168P18	State v. Rachel McAlister	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-282)	Denied
171P18	State v. Ray Muhammad	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-166) 2. Defendant's Motion for Temporary Stay	1. Denied 2. Dismissed **07/20/2018** **Morgan, J., recused**
172P18	State v. Dominic Rashaun Stroud	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-762) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed **Ervin, J., recused**
173P18	State v. Donte Parker	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1067)	Denied
174P18	State v. Robert Harold Johnson	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Watauga 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
175P18	Neil Allen Simcox v. General Court of Justice District Court Division State of North Carolina County of Cabarrus	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **06/13/2018**

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

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178P18	Elizabeth E. LeTendre v. Currituck County, North Carolina	1. Plt's Motion for Temporary Stay (COA17-1108) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's Notice of Appeal Based Upon a Constitutional Question 4. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/19/2018** 2. 3. 4.
179P18	State v. Frank Gladney, III	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-831)	Denied
181P18	State v. Toni Turnage	1. Def's Motion for Temporary Stay (COA17-803) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/20/2018** 2. 3.
182A15-4	Adam Jarmal Hodge v. State of North Carolina	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied
183P18	State v. Samantha Rae Xiong	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-1185) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed **Ervin, J., recused**
187P18	State v. Edward Smith, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA17-925)	Denied
188P18	Banyan GW, LLC v. Wayne Preparatory Academy Charter School, Inc. and its Board of Directors; Sharon Thompson, Chair of the Board of Directors; and John Ankeney, and Lucius J. Stanley, as members of the Board of Directors, and Vertex III, LLC	1. Def's (Wayne Preparatory Academy Charter School, Inc.) Motion for Temporary Stay (COA18-378) 2. Def's (Wayne Preparatory Academy Charter School, Inc.) Petition for *Writ of Supersedeas*	1. Denied **06/25/2018** 2. Denied **06/25/2018**
189P18	State v. Kurt Allen Corey	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **06/22/2018** 2.

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191P18	State v. Jesse Dean Hoppes	Def's *Pro Se* Motion for Petition for *En Banc* Rehearing (COA17-861)	Dismissed **Ervin, J., recused**
193P18	State v. Joshua Bolen	Def's *Pro Se* Motion for Appropriate Relief (COAP18-238)	Denied **06/25/2018**
193P18-2	State v. Joshua Bolen	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **07/10/2018**
194A16-2	State v. Michael Antonio Bullock	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA15-731-2) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. State's Conditional PDR Under N.C.G.S. § 7A-31	1. --- 2. Denied 3. Allowed 4. Dismissed as moot
194P18	State v. Jesse James Lenoir	1. State's Motion for Temporary Stay (COA17-943) 2. State's Petition for *Writ of Supersedeas* 3. State's Motion to Dissolve Stay and Withdraw Petition for *Writ of Supersedeas*	1. Allowed **06/25/2018** 2. --- 3. Allowed **07/06/2018**
195P18	Jabar Hope v. Marion Correctional Institution	Plt's *Pro Se* Motion for Appeal	Dismissed
196P18	State v. Ricky Staten	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Halifax 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
198P18	State v. Curtis L. Tyson	1. Def's *Pro Se* Motion for Appropriate Relief 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot

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

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200P18	George Reynold Evans v. State of North Carolina and Alan Adam, ADA 13A Judicial District and Prosecutorial District	1. Petitioner's *Pro Se* Motion of Appeal for Discretionary Review (COAP18-359) 2. Petitioner's *Pro Se* Petition for *Writ of Mandamus* 3. Petitioner's *Pro Se* Motion of Appeal for Discretionary Review 4. Petitioner's *Pro Se* Motion of *Writ of Mandamus* as Alternative of the *Writ of Habeas Corpus*	1. Denied **07/12/2018** 2. Denied **07/12/2018** 3. Denied **07/12/2018** 4. Denied **07/12/2018**
207P18	Trustee Services of Carolina, Benjamin Barco, Brock and Scott v. Chilove-Chery Saimplice	1. Def's *Pro Se* Petition for *Writ of Supersedeas* 2. Def's *Pro Se* Motion for Notice of Appeal	1. Denied 2. Dismissed
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 4. Def's Motion to Dismiss State's Notice of Appeal for Mootness	1. Allowed **06/23/2017** 2. Allowed **06/23/2017** 3. --- 4.
210P18	James E. Price v. Magistrate Donald Paschall and Magistrate Willis James E. Price v. Magistrate D.C. Robinson	1. Plt's *Pro Se* PDR (COA17-1146) 2. Plt's *Pro Se* Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA 3. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Denied 3. Allowed
213P18	State v. Montey Andrea Murray	Def's PDR Under N.C.G.S. § 7A-31 (COA17-769)	Denied
216P18	Jermaine M. Jones v. District Attorney Britt, Secretary of State, Director of Prison, Treasurer, and Governor Roy Cooper	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied **07/12/2018**
223P18	State v. Jimmy Lee Forte, Jr.	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **07/18/2018** 2.

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

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227P14-2	State v. Max Tracy Earls	Def's *Pro Se* Motion for Review of a Constitutional Question (COAP18-455)	Dismissed
227P18	State v. Carl Ray Poore, Jr.	1. State's Motion for Temporary Stay (COA17-1387) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/23/2018** 2. 3.
237P18	State v. Aaron Ross Taylor	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **08/02/2018** 2.
238A18	In the Matter of T.T.E.	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/02/2018** 2.
239A18	State v. Neil Wayne Hoyle	1. State's Motion for Temporary Stay (COA17-1324) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/03/2018** 2.
241P18	Bradley Lynn Mauney v. State of North Carolina	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **08/06/2018**
242P18	Johnnie Rowe v. State of North Carolina	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **08/07/2018**
249P11-7	State v. Bobby Ray Grady	1. Def's *Pro Se* Motion for *Writ of Supersedeas* (COAP17-914) 2. Def's *Pro Se* Motion for the Production of Documents	1. Dismissed 2. Dismissed
266A94-2	State v. Eric Johnson	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Vance 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

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266P17	State v. Jawanz Bacon	1. State's Motion for Temporary Stay (COA16-1268) 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 **08/04/2017** Dissolved **08/14/2018** 2. Denied 3. Denied 4. Dismissed as moot
274P15-3	State v. Robert K. Stewart	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Moore County 2. Def's *Pro Se* Motion to Dismiss All Charges 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 4. Def's *Pro Se* Motion to Appoint Counsel	1. Denied **06/12/2018** 2. Dismissed **06/12/2018** 3. Allowed **06/12/2018** 4. Dismissed **06/12/2018**
274P15-4	State v. Robert K. Stewart	1. Def's *Pro Se* Motion for Reconsideration 2. Def's *Pro Se* Motion for Hearing *En Banc*	1. Dismissed 2. Dismissed
309P15-5	State v. Reginald Underwood Fullard	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Forsyth 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
316P98-3	State v. Billy Ray Artis	Def's *Pro Se* Motion for Relief	Dismissed **Ervin, J., recused**
327P02-10	State v. Guy Tobias LeGrande	Def's *Pro Se* Motion for Discretionary Review	Dismissed **Ervin, J., recused**

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331P17	State v. Amia Smith Ervin	1. State's Motion for Temporary Stay (COA17-324)	1. Allowed **10/05/2017** Dissolved **08/14/2018**
		2. State's Petition for *Writ of Supersedeas*	2. Denied
		3. State's PDR Under N.C.G.S. § 7A-31	3. Denied
		4. Def's Conditional PDR Under N.C.G.S. § 7A-31	4. Dismissed as moot
335A17	Pine v. Wal-Mart Associates, Inc. #1552, et al.	1. Plt's Motion to Substitute New Brief with Corrected Brief	1. Allowed **08/03/2018**
		2. Plt's Motion to Deem Brief Timely Filed	2. Allowed **08/03/2018**
341P12-6	State v. Donald Durrant Farrow	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **07/02/2018**
366A10	State v. Michael Patrick Ryan	1. Def's Motion to Dismiss Appeal	1. Special Order
		2. Def's Motion to Deny Petition for *Certiorari*	2. Special Order
		3. Def's Motion to Expedite	3. Special Order
		4. State's Motion to Strike Reply to Response to Motion to Dismiss Appeal	4. Special Order
			Ervin, J., recused
394P17	State v. Dontail Brinkley	1. State's Motion for Temporary Stay (COA16-572)	1. Allowed **11/21/2017** Dissolved **08/14/2018**
		2. State's Petition for *Writ of Supersedeas*	2. Denied
		3. State's PDR Under N.C.G.S. § 7A-31	3. Denied

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14 AUGUST 2018

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. Allowed 3. Special Order 4. Denied 5. 6.
406P17-3	State v. Daniel Luna	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, New Hanover 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
411A94-6	State v. Marcus Reymond Robinson (DEATH)	1. NAACP Legal Defense and Educational Fund, Inc.'s Motion to Admit Jin Hee Lee *Pro Hac Vice* 2. NAACP Legal Defense and Educational Fund, Inc.'s Motion to Admit W. Kerrel Murray *Pro Hac Vice*	1. Allowed **07/18/2018** 2. Allowed **07/18/2018**
411A94-6	State v. Marcus Reymond Robinson (DEATH)	1. Former State and Federal Prosecutors' Motion to Admit Paul F. Khoury *Pro Hac Vice* 2. Former State and Federal Prosecutors' Motion to Admit Robert L. Walker *Pro Hac Vice* 3. Former State and Federal Prosecutors' Motion to Admit Madeline J. Cohen *Pro Hac Vice*	1. Allowed **07/20/2018** 2. Allowed **07/20/2018** 3. Allowed **07/20/2018**
421PA17	State v. Juan Foronte McPhaul	Motion to Admit Sharon Katz and Matthew R. Brock *Pro Hac Vice*	Allowed **08/02/2018**
422P07-2	State v. Keith Douglas Robinson	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Durham County	Denied **07/12/2018**

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14 AUGUST 2018

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* 3. Defs' Motion to Dismiss Appeal	1. Denied 2. Allowed **02/12/2018** 3. Allowed **Jackson, J., recused**
438P13-2	State v. Derrick Thomas Bailey	1. Def's *Pro Se* Motion for Notice of Appeal (COAP17-317) 2. Def's *Pro Se* Motion for PDR	1. Dismissed 2. Dismissed **Ervin, J., recused**
441A98-4	State v. Tilmon Charles Golphin (DEATH)	1. NAACP Legal Defense and Educational Fund, Inc.'s Motion to Admit Jin Hee Lee *Pro Hac Vice* 2. NAACP Legal Defense and Educational Fund, Inc.'s Motion to Admit W. Kerrel Murray *Pro Hac Vice* 3. NAACP Legal Defense and Educational Fund, Inc.'s Motion to Not Require the Payment of Additional *Pro Hac Vice* Fees	1. Allowed **07/18/2018** 2. Allowed **07/18/2018** 3. Denied **07/18/2018** **Beasley, J., recused**
441A98-4	State v. Tilmon Charles Golphin (DEATH)	1. Former State and Federal Prosecutors' Motion to Admit Paul F. Khoury *Pro Hac Vice* 2. Former State and Federal Prosecutors' Motion to Admit Robert L. Walker *Pro Hac Vice* 3. Former State and Federal Prosecutors' Motion to Admit Madeline J. Cohen *Pro Hac Vice* 4. Former State and Federal Prosecutors' Motion to Not Require the Payment of Additional *Pro Hac Vice* Fees	1. Allowed **07/20/2018** 2. Allowed **07/20/2018** 3. Allowed **07/20/2018** 4. Denied **07/20/2018** **Beasley, J., recused**

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499P04-2	André M. Spates v. State of North Carolina, Judge Charles H. Henry	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied **07/27/2018**
519P99-2	State v. Larry Leggett	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP18-367)	Dismissed
526A13-2	State v. Timothy Glenn Mills	1. State's Motion for Temporary Stay (COA17-747) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent 4. Def's Motion to Dismiss State's Appeal 5. State's Amended Notice of Appeal Based Upon a Dissent	1. Allowed **05/30/2018** 2. Allowed **05/30/2018** 3. --- 4. Denied 5. ---
532P08-3	State v. Frank Durand Tomlin	1. Def's Motion for Temporary Stay (COA17-351) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31 4. Def's Petition for *Writ of Certiorari* to Review Decision of COA	1. Allowed **07/11/2018** 2. 3. 4.
536P00-8	Terrance L. James v. State of North Carolina	1. Petitioner's *Pro Se* Motion for Averment of Jurisdiction 2. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* 3. Petitioner's *Pro Se* Petition for *Writ of Mandamus* 4. Petitioner's *Pro Se* Petition for *Writ of Prohibition*	1. Dismissed **06/15/2018** 2. Denied **06/15/2018** 3. Denied **06/15/2018** 4. Denied **06/15/2018**
548A00-2	State v. Christina Shea Walters (DEATH)	1. NAACP Legal Defense and Educational Fund, Inc.'s Motion to Admit Jin Hee Lee *Pro Hac Vice* 2. NAACP Legal Defense and Educational Fund, Inc.'s Motion to Admit W. Kerrel Murray *Pro Hac Vice* 3. NAACP Legal Defense and Educational Fund, Inc.'s Motion to Not Require the Payment of Additional *Pro Hac Vice* Fees	1. Allowed **07/18/2018** 2. Allowed **07/18/2018** 3. Denied **07/18/2018**

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548A00-2	State v. Christina Shea Walters (DEATH)	1. Former State and Federal Prosecutors' Motion to Admit Paul F. Khoury *Pro Hac Vice*	1. Allowed **07/20/2018**
		2. Former State and Federal Prosecutors' Motion to Admit Robert L. Walker *Pro Hac Vice*	2. Allowed **07/20/2018**
		3. Former State and Federal Prosecutors' Motion to Admit Madeline J. Cohen *Pro Hac Vice*	3. Allowed **07/20/2018**
		4. Former State and Federal Prosecutors' Motion to Not Require the Payment of Additional *Pro Hac Vice* Fees	4. Denied **07/20/2018**
579P01-5	State v. Antorio Maurice Smarr	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Gaston County	1. Dismissed
		2. Def's *Pro Se* Motion to Appoint Counsel	2. Dismissed as moot

ADAMS CREEK ASSOCIATES
v.
MELVIN DAVIS AND LICURTIS REELS

No. 3A08-4

Filed 21 September 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. ___, 810 S.E.2d 6 (2018), affirming an order denying motions in the cause entered on 13 June 2016 by Judge Benjamin G. Alford in Superior Court, Carteret County. Heard in the Supreme Court on 29 August 2018.

Armstrong Law Firm, P.A., by L. Lamar Armstrong, Jr. and L. Lamar Armstrong, III, for plaintiff-appellee.

Hairston Lane, P.A., by James E. Hairston, Jr., for defendant-appellants.

Tin Fulton Walker & Owen, PLLC, by William G. Simpson, Jr.; and Goldsmith Resolutions, by Frank Goldsmith, for North Carolina Advocates for Justice, amicus curiae.

PER CURIAM.

The decision of the Court of Appeals is vacated, and this case is remanded to the Court of Appeals for further remand to the trial court for findings of fact concerning defendants' ability to comply with the removal of the structures as a condition of the 2011 Contempt Order. In the trial court, defendants also are without prejudice to advance claims not briefed or previously raised but discussed at oral arguments before this Court.

VACATED AND REMANDED.

STATE v. AUSTIN

[371 N.C. 465 (2018)]

STATE OF NORTH CAROLINA
v.
NANCY BENGE AUSTIN

No. 294PA17

Filed 21 September 2018

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an unpublished order of the Court of Appeals dated 4 August 2017 denying defendant's petitions for writ of mandamus or writ of certiorari to review an order entered on 14 November 2016 by Judge Bryan Collins in Superior Court, Caldwell County. Heard in the Supreme Court on 27 August 2018.

Joshua H. Stein, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State.

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

PER CURIAM.

CERTIORARI IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA
v.
JERMEL TORON KRIDER

No. 68A18

Filed 21 September 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. ___, 810 S.E.2d 828 (2018), vacating a judgment entered on 3 October 2016 by Judge Mark E. Klass in Superior Court, Iredell County. Heard in the Supreme Court on 30 August 2018.

Joshua H. Stein, *Attorney General*, *by Kimberly N. Callahan*, *Assistant Attorney General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by Emily Holmes Davis*, *Assistant Appellate Defender*, *for defendant-appellee.*

PER CURIAM.

As to the issue of whether the evidence in this case could support a determination that defendant violated N.C.G.S. § 15A-1343(b)(3a), we hold that the State failed to carry its burden of presenting sufficient evidence to support the trial court's decision to revoke defendant's probation based upon a finding that defendant willfully absconded probation. Accordingly, we affirm the decision of the Court of Appeals; however, we disavow the portion of the opinion analyzing the pertinence of the fact that defendant's probationary term expired prior to the date of the probation violation hearing and holding "that the trial court lacked jurisdiction to revoke defendant's probation after his case expired." *State v. Krider*, ___ N.C. App. ___, ___, 810 S.E.2d 828, 833 (2018).

MODIFIED and AFFIRMED.

STATE v. MCPHAUL

[371 N.C. 467 (2018)]

STATE OF NORTH CAROLINA
v.
JUAN FORONTE McPHAUL

No. 421PA17

Filed 21 September 2018

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 808 S.E.2d 294 (2017), finding no prejudicial error in part and vacating in part judgments entered on 2 October 2015 by Judge James M. Webb in Superior Court, Hoke County. On 9 May 2018, the Supreme Court allowed the State's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 28 August 2018.

Joshua H. Stein, Attorney General, by William P. Hart, Jr., Assistant Attorney General, for the State-appellant/appellee.

Glenn Gerding, Appellate Defender, by Amanda S. Zimmer, Assistant Appellate Defender, for defendant-appellant/appellee.

Rayburn Cooper & Durham, P.A., by James B. Gatehouse; and Davis Polk & Wardwell LLP, by Sharon Katz, pro hac vice, and Matthew R. Brock, pro hac vice, for Professor Brandon L. Garrett and twenty-five other named scholars representing the fields of law, forensic science, medicine, and statistics, amici curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA
v.
JOHN H. SAYRE

No. 330A17

Filed 21 September 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 699 (2017), affirming an order entered on 2 May 2016 by Judge Eric C. Morgan in Superior Court, Forsyth County. Heard in the Supreme Court on 27 August 2018.

Joshua H. Stein, *Attorney General*, *by Kimberly N. Callahan*, *Assistant Attorney General*, *for the State.*

Glenn Gerding, *Appellate Defender*, *by Nicholas C. Woomer-Deters*, *Assistant Appellate Defender*, *for defendant-appellant.*

PER CURIAM.

AFFIRMED.

STATE v. SMITH

[371 N.C. 469 (2018)]

STATE OF NORTH CAROLINA
v.
MARCUS MARCEL SMITH

No. 290A17

Filed 21 September 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 235 (2017), reversing an order denying defendant's motion to suppress entered on 9 May 2016 by Judge John O. Craig III in Superior Court, Forsyth County. On 7 December 2017, the Supreme Court allowed petitions for discretionary review of additional issues filed by both the State and defendant. Heard in the Supreme Court on 29 August 2018.

Joshua H. Stein, Attorney General, by Teresa M. Postell, Assistant Attorney General, for the State-appellant/appellee.

Jason Christopher Yoder for defendant-appellant/appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals. With respect to the additional issues raised by the parties' petitions for discretionary review, we conclude that discretionary review was improvidently allowed. Therefore, the decision of the Court of Appeals as to these matters remains undisturbed.

REVERSED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE v. STIMPSON

[371 N.C. 470 (2018)]

STATE OF NORTH CAROLINA
v.
ANTONIO LAMAR STIMPSON

No. 408A17

Filed 21 September 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 603 (2017), finding no error after appeal from judgments entered on 28 April 2016 by Judge Susan E. Bray in Superior Court, Guilford County. Heard in the Supreme Court on 28 August 2018.

Joshua H. Stein, Attorney General, by Wes Saunders, Assistant Attorney General, for the State.

Drew Nelson for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE v. BUCHANAN

[371 N.C. 471 (2018)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Yancey County
	)	
WILLIAM JESSE BUCHANAN	)	

No. 305P17

SPECIAL ORDER

Upon consideration of the petition filed by Defendant on 14 August 2017 in this matter for a writ of certiorari to review the decision of the North Carolina Court of Appeals, the following order is entered and is hereby certified to the North Carolina Court of Appeals:

Allowed for the limited purpose of vacating that portion of the opinion of the Court of Appeals entered 6 June 2017 discussing jury instructions, the single taking rule, and double jeopardy; and remanding to the Court of Appeals with instructions to address the issue presented by defendant on appeal, to wit:

> Did the trial court commit plain error by failing to instruct the jury that it could not convict Mr. Buchanan of obtaining property by false pretense and attempting to obtain property by false pretense because such a verdict would violate the "single taking rule?"

That portion of the opinion discussing sufficiency of the evidence remains undisturbed.

Defendant's remaining motions are dismissed.

By order of the Court in Conference, this the 20th day of September, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 25th day of September, 2018.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
Assistant Clerk, Supreme Court of
North Carolina

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

20 SEPTEMBER 2018

031A18	Andrea Kirby Crowell v. William Worrell Crowell	1. Plt's Notice of Appeal Based Upon a Dissent (COA17-164) 2. Plt's PDR as to Additional Issues 3. Plt's Motion for Temporary Stay 4. Plt's Petition for *Writ of Supersedeas* 5. Def's Motion to Dismiss Appeal	1. — 2. Allowed as to Issues I and II only 3. Allowed **06/28/2018** 4. Allowed **06/28/2018** 5. Denied
032P18	Little River, LLC, Petitioner v. Lee County, North Carolina, Respondent, and Carolina Trace Association, Inc., South Landing Property Owners Association, Inc., Village at the Trace Property Owners Association, Sedgemoor Property Owners Association, Escalante Carolina Trace, LLC., Sandra Ward, Terry Ward, Laura Riddle, Bobby Riddle, Jr., Daniel Stanley, Kay Coles, Fred Berman, C. David Turner, John Beck, Lyona Beck, Gerald Merritt, Kermit Keeter, Louane Keeter, Alfred Rushatz, Sharwynne Blatterman, Barry Markowitz, Miriam Markowitz, Terri Dussault, and Homer Todd Spoffard, Neighbor-Respondents	1. Respondent's (Lee County) PDR Under N.C.G.S. § 7A-31 (COA17-461) 2. Petitioner's 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

20 SEPTEMBER 2018

038P10-4	John Fletcher Church v. Jean Marie Decker (formerly Church)	1. Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA17-1119, 17-1120) 2. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Plt's *Pro Se* Motion to Amend Petition	1. Dismissed *ex mero motu* 2. Denied 3. Allowed **Ervin, J., recused**
055P02-14	State v. Henry Ford Adkins	Def's *Pro Se* Motion for PDR(COAP18-582)	Denied
055A18	State v. James Howard Terrell, Jr.	1. State's Motion for Temporary Stay (COA17-268) 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 Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **02/23/2018** 2. Allowed 3. --- 4. Allowed as to Issues I and III only 5. Dismissed as moot
060A18	David Hampton and Wife, Mary D. Hampton v. Cumberland County	1. Petitioners' Notice of Appeal Based Upon a Dissent (COA16-704) 2. Petitioners' Notice of Appeal Based Upon a Constitutional Question 3. Petitioners' Petition for *Writ of Certiorari* to Review Decision of COA	1. Dismissed *ex mero motu* 2. Dismissed *ex mero motu* 3. Allowed
065A17-2	State v. Jeffrey Robert Parisi	1. Def's Motion for Temporary Stay (COA17-1221) 2. Def's Petition for *Writ of Supersedeas* 3. Def's Notice of Appeal Based Upon a Dissent	1. Allowed **06/25/2018** 2. Allowed 3. ---
065P18	State v. Noui Phachoumphone	Def's PDR Under N.C.G.S. § 7A-31 (COA17-247)	Allowed

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

20 SEPTEMBER 2018

091P14-5	State v. Salim Abdu Gould	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COA18-425) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion for Writ of Immediate Appeal 4. Def's *Pro Se* Motion *In Limine* 5. Def's *Pro Se* Motion for Temporary Stay 6. Def's *Pro Se* Petition for *Writ of Supersedeas*	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed **09/17/2018** 6. Dismissed **09/17/2018**
101P18	Glen Lewis Ring, Wanda Joyce Ring, William Thomas Ring, and Pamela Ann Ring v. Moore County, Camp Easter Management, LLC, and Bob Koontz	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA16-1034) 2. Plts' Petition for *Writ of Certiorari* to Review Decision of COA	1. Dismissed 2. Denied
102P13-4	State v. Charles Anthony Ball	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COAP18-358)	Dismissed
108P18	Willard Briggs, Employee v. Debbie's Staffing, Inc., Employer, N.C. Ins. Guar. Ass'n, Carrier; Employment Plus, Employer, N.C. Ins. Guar. Ass'n; and Permatech, Inc., Employer, Cincinnati Ins. Co., Carrier	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA17-778) 2. Defs' (Permatech, Inc. and Cincinnati Ins. Co.) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
111P18	State v. Isaac Tyrone Jackson, Jr.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-1141) 2. Def's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA 3. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Dismissed 2. Denied 3. Dismissed as moot

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122P18	Zloop, Inc. v. Parker Poe Adams & Bernstein, LLP, Alba-Justina Secrist a/k/a AJ Secrist and R. Douglas Harmon	1. Plt's Verified Motion for Leave to File Amended Notice of Appeal 2. Plt's Petition for *Writ of Certiorari* to Review Decision of N.C. Business Court 3. Def's Motion for Extension of Time to Respond to Petition for *Writ of Certiorari*	1. Dismissed as moot 2. Allowed 3. Allowed **05/21/2018**
126A18	State v. Mardi Jean Ditenhafer	1. State's Notice of Appeal Based Upon a Dissent (COA16-965) 2. State's PDR as to Additional Issues	1. — 2. Allowed
127P13-2	State v. Jarrod W. Willis	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Mecklenburg County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot **Ervin, J., recused**
131P16-10	State v. Somchai Noonsab	Def's *Pro Se* Motion for Constitutional Questions	Dismissed
145PA17-2	In the Matter of A.P.	1. Guardian ad Litem's Motion for Temporary Stay (COA16-1010-2) 2. Guardian ad Litem's Petition for *Writ of Supersedeas* 3. Guardian ad Litem's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/12/2018** 2. 3.
153P18	State v. Corey Alexander Thomas	Def's PDR Under N.C.G.S. § 7A-31 (COA17-520)	Denied
155P17-3	State v. Joe Robert Reynolds	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Surry County	Dismissed
156P18	Danny Hopper, Employee v. Lakeside Mills, Inc., Employer Penn Millers Insurance Company, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-706)	Denied

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160P18	State v. James Harold Courtney, III	1. State's Motion for Temporary Stay (COA17-1095) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Constitutional Question 4. State's PDR Under N.C.G.S. § 7A-31 5. Def's Motion to Dismiss Appeal	1. Allowed 06/01/2018 2. Allowed 3. --- 4. Allowed 5. Allowed
170P18	Claudia Holcombe; Tom Pelton; Dos Aves, LLC, a North Carolina Limited Liability Company; and Robert Martin and wife, Naomi Martin v. Oak Island Aircraft Housing, LLC, a North Carolina Limited Liability Company; 717, NC, LLC, a North Carolina Limited Liability Company; Brian Keesee; John M. Martin; Kevin W. Stephenson; Oak Island Aircraft Management, Inc., a Former North Carolina Corporation and/or Past and/or Present Business Trade Name; Dick J. Thompson; and Robert Weinbach	1. Defs' (717, NC, LLC; Brian Keesee; and Dick J. Thompson) Notice of Appeal Based Upon a Constitutional Question (COA17-1081) 2. Defs' (717, NC, LLC; Brian Keesee; and Dick J. Thompson) PDR Under N.C.G.S. § 7A-31 3. Def's (Kevin W. Stephenson) Motion to Dismiss Appeal 4. Plts' (Claudia Holcombe; Tom Pelton; and Dos Aves, LLC) Motion to Dismiss Appeal 5. Plts' (Claudia Holcombe; Tom Pelton; and Dos Aves, LLC) Motion for Sanctions	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as moot 4. Dismissed as moot 5. Denied
177P18	Anthony Douglas Pryor, Sr., Employee v. Express Services, Employer, Sedgwick CMS, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-1060)	Denied
180P18	Michelle Kish v. Frye Regional Medical Center, Employer, Self-insured (Sedgwick Claims Management Services, Inc., Third-Party Administrator)	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-1314)	Denied

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182P18	State v. Kindrick Jarod Payne	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-650) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
186P18	Evelyn Talley v. Pride Mobility Products Corporation, Quality Home Healthcare, Inc., William S. Cameron and Barbara B. Cameron	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-896)	Denied
189P18	State v. Kurt Allen Corey	1. State's Motion for Temporary Stay (COA17-1031) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/22/2018** 2. Allowed 3. Allowed
190P18	State v. Lee-Jamil Ke'Ruan Miller	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1049)	*Ex mero motu*, treated as PWC and denied
192P18	Russell Walker v. Hoke County, Fifth Third Bank, Inc., and Tyton NC Biofuels, LLC	1. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-341) 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
201PA12-5	Dickson, et al. v. Rucho, et al.	Plts' Motion to Dismiss Appeal	Denied
201P18	State v. James Leon Rucker, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA17-809)	Denied
203P18	State v. Dexter Leon Surratt	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-1285) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. State's Motion to Deem Response to PDR Timely Filed	1. — 2. Denied 3. Allowed 4. Allowed
205P18	State v. Alquan De'Shawn Hill	Def's PDR Under N.C.G.S. § 7A-31 (COA17-993)	Denied

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206A18	State v. Galen Lee Smith	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-1116) 2. State's Motion to Dismiss Appeal 3. Def's Motion to Amend Notice of Appeal	1. — 2. Allowed 3. Allowed
208P18	State v. Kevin Jonathan Mitchell	Def's PDR Under N.C.G.S. § 7A-31 (COA17-212)	Denied
209P18	State v. Laris Sutton	Def's PDR Under N.C.G.S. § 7A-31 (COA17-35)	Denied
212P18	City of Hickory v. Willie James Grimes, National Casualty Company, Travelers Indemnity Company, North Carolina Insurance Guaranty Association, Argonaut Great Central Insurance Company, Twin City Fire Insurance Company, and TIG Insurance Company	Def's (Argonaut Great Central Insurance Company) PDR Under N.C.G.S. § 7A-31 (COA17-441)	Denied
215P18	State v. James Charles	Def's PDR Under N.C.G.S. § 7A-31 (COA17-937)	Denied
217P18	State v. Edwin Christopher Lawing	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-231) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
221P18	State v. Michael Eugene Bowden	1. Def's *Pro Se* Motion for Notice of Appeal (COAP18-394) 2. Def's *Pro Se* Motion for PDR	1. Dismissed 2. Dismissed **Hudson, J., recused** **Jackson, J., recused**
224P18	State v. Damien Markese Pruitt	Def's PDR Under N.C.G.S. § 7A-31 (COA17-883)	Denied

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225P18	State v. Brandon Marquis Cozart	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA17-535) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
233P18	State v. Kion Tyearl Dail	PDR Under N.C.G.S. § 7A-31 (COA17-294)	Denied
234P18	State v. Gambit C. Shreve	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA 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
237P18	State v. Aaron Ross Taylor	1. Def's Motion for Temporary Stay (COA17-730) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/02/2018** Dissolved **09/20/2018** 2. Denied 3. Denied
238A18	In the Matter of T.T.E.	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **08/02/2018** 2. Allowed **09/04/2018** 3. ---
243P18	State v. Ronald Lin Murray	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Carteret 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
248A18	Sykes, et al. v. Blue Cross and Blue Shield of N.C., et al.	Joint Motion to Stay All Briefing	Dismissed as moot

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251P18	Susan Sykes d/b/a Advanced Chiropractic and Health Center; Dawn Patrick; Troy Lynn; Lifeworks on Lake Norman, PLLC; Brent Bost; and Bost Chiropractic Clinic, PA v. Health Network Solutions, Inc. f/k/a Chiropractic Network of the Carolinas, Inc.; Michael Binder; Steven Binder, Robert Stroud, Jr.; Larry Grosman; Matthew Schmid; Ralph Ransone; Jeffrey K. Baldwin; Ira Rubin; Richard Armstrong; Brad Batchelor; John Smith; Rick Jackson; and Mark Hooper	Defs' PDR Prior to a Determination of COA	Allowed
253P18	State v. Webster Waller	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP18-201)	Dismissed
256P18	Nathaniel R. Webb v. Donnie Harrison; Wake County Jail; Attorney General for North Carolina	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Dismissed **08/20/2018**
257P18	State v. Sydney Shakur Mercer	1. State's Motion for Temporary Stay (COA17-1279) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/21/2018** 2.
261P18	NC NAACP v. Moore, et al.	Plt's Petition for *Writ of Supersedeas*	Denied **09/04/2018**
264P18	In the Matter of B.O.A.	1. Petitioner's Motion for Temporary Stay (COA18-7) 2. Petitioner's Petition for *Writ of Supersedeas* 3. Petitioner's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/23/2018** 2. 3.

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265P18	State v. Shenondoah Perry and Earl Lamont Powell	1. State's Motion for Temporary Stay (COA17-714) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/22/2018** 2.
266P18	State v. Charles Antonio Means	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Dismissed **08/23/2018**
268P18	State v. Marvin Louis Miller, Jr.	1. State's Motion for Temporary Stay (COA17-1215) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/23/2018** 2.
269P18	Rebecca Anne Edwards, Plaintiff v. The Bipartisan State Board of Elections and Ethics Enforcement; Kim Westbrook Strach, in her Official Capacity as Executive Director of the Bipartisan State Board of Elections and Ethics Enforcement, and the State of North Carolina, Defendants and Philip E. Berger, in his Official Capacity as President Pro Tempore of the Senate; and Timothy K. Moore, in his Official Capacity as Speaker of the House, Intervenors	1. Plt's PDR Prior to a Determination of COA (COAP18-587) 2. Intervenors' (Berger and Moore) Conditional PDR	1. Dismissed as moot 2. Dismissed as moot **Jackson, J., recused** **Ervin, J., recused**
270A18	State v. Thomas Earl Griffin	1. State's Motion for Temporary Stay (COA17-386) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/24/2018** 2.
271A18	State *ex rel.* Utilities Commission v. Attorney General	Joint Motion to Hold Case in Abeyance	Allowed **09/12/2018**

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272P18	Christopher J. Anglin v. Philip E. Berger, in his Official Capacity as President Pro Tempore of the North Carolina State Senate; Timothy K. Moore, in his Official Capacity as Speaker of the North Carolina House of Representatives, the State of North Carolina; the North Carolina Bipartisan State Board of Elections and Ethics Enforcement; and Kimberly W. Strach, in her Official Capacity as Executive Director of the North Carolina Bipartisan State Board of Elections and Ethics Enforcement	1. Plt's PDR Prior to Determination of COA (COAP18-586) 2. Defs' (Berger and Moore) Conditional PDR	1. Dismissed as moot 2. Dismissed as moot **Jackson, J., recused**
273P18	State v. Gregory Charles Baskins	1. State's Motion for Temporary Stay (COA17-1327) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/27/2018** 2.
274A18	State v. Duval Lamont Bowman	1. State's Motion for Temporary Stay (COA17-657) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/27/2018** 2.
275P18	State v. Theola Antonio Saunders	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Bertie County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
277P18	State v. Gabriel Adrian Ferrari	1. Def's *Pro Se* Motion for Notice of Appeal (COA98-724) 2. Def's *Pro Se* Motion for Certiorari	1. Dismissed 2. Dismissed
280P18	State v. Nashone L. Wiggins	Def's *Pro Se* Motion for Appropriate Relief	Denied **08/30/2018**

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282P18	State v. Christopher Jamme Whitfield and State v. Corey Levi Banner	1. State's Motion for Temporary Stay (COA17-184) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/31/2018** 2.
288P18	State v. Edward M. Alonzo	1. Def's Application for Temporary Stay (COA17-1186) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **09/07/2018** 2.
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 **12/07/2017** 3. — 4. Allowed **12/07/2017** 5. Dismissed as moot 6. Allowed **12/07/2017**
295P18	State v. Charles Ward Ayers	1. State's Motion for Temporary Stay (COA17-725) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **09/12/2018** 2.
301A18	State v. Aaron Kenard Westbrook	1. State's Motion for Temporary Stay (COA18-32) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **09/13/2018** 2. Allowed **09/13/2018** 3. —
302A18	State v. Michelle Smith White	1. State's Motion for Temporary Stay (COA18-39) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **09/13/2018** 2. Allowed **09/13/2018** 3. —

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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* 4. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Yancey County 5. Def's *Pro Se* Supplemental Petition for *Writ of Certiorari* to Review Order of Superior Court, Yancey County 6. Def's *Pro Se* Supplemental Petition for *Writ of Certiorari* to Review Order of Superior Court, Yancey County 7. Def's Supplemental Petition for *Writ of Certiorari*	1. Special Order 2. Special Order 3. Denied **12/27/2017** 4. Special Order 5. Special Order 6. Special Order 7. Special Order
305P18	State v. Fred Dravis	1. State's Motion for Temporary Stay (COA18-76) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **09/13/2018** 2.
309P18	State v. Douglas W. Standard	1. Def's *Pro Se* Motion for Trial by Jury 2. Def's *Pro Se* Motion for Change of Venue 3. Def's *Pro Se* Motion to Stay the Judgment	1. Denied **09/20/2018** 2. Denied **09/20/2018** 3. Denied **09/20/2018**
330A17	State v. John H. Sayre	State's Motion to Take Judicial Notice of Court Records	Dismissed as moot
341P12-7	State v. Donald Durrant Farrow	Def's *Pro Se* Motion to Amend Petition for *Writ of Mandamus*	Dismissed as moot **Ervin, J., recused**
368P12-5	Sherif A. Philips, M.D. v. Pitt County Memorial Hospital, Inc., Paul Bolin, M.D. and Ralph Whatley, M.D., Sanjay Patel, M.D. and Cynthia Brown, M.D.	1. Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question 2. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed 2. Dismissed

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376P17	Jennifer Cleland Green v. Stanley Boyd Green	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA16-1102) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
379P12-2	James and Lara Barnhill v. Richard W. Farrell and The Farrell Law Group, PC	Defs' *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-402)	Denied
390P12-2	State v. Todd Joseph Martin	1. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Carteret County 2. Def's Motion for Appendices to Petition for *Writ of Certiorari* to be Filed Under Seal	1. Dismissed 2. Dismissed as moot
405PA17	State v. J.C.	State's Motion to Deem Brief Timely Filed	Allowed **09/20/2018**
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' Motion for Monetary Damages Caused by Frivolous Appeal	Denied **Jackson, J., recused**
449P11-20	Charles Everette Hinton v. State of North Carolina, et al.	1. Plt's *Pro Se* Motion for Class Action Third-Party Claim 2. Plt's *Pro Se* Motion for Demand for Trial by Jury 3. Plt's *Pro Se* Motion for Inquiry into Restraints on Liberty and Privileges of the *Writ of Habeas Corpus* 4. Plt's *Pro Se* Motion to Intervene in Class Action Third-Party Claim	1. Denied **09/11/2018** 2. Denied **09/11/2018** 3. Denied **09/11/2018** 4. Denied **09/11/2018**

IN RE CHAPMAN

[371 N.C. 486 (2018)]

IN RE INQUIRY CONCERNING A JUDGE, NO. 17-262
RONALD L. CHAPMAN, RESPONDENT

No. 197A18

Filed 26 October 2018

Judges—discipline—unreasonably delayed ruling

A district court judge was suspended without pay for thirty days where he delayed issuing a ruling in a domestic matter for years, never made a ruling, and the file on the case went missing.

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 14 June 2018 that Respondent Ronald L. Chapman, a Judge of the General Court of Justice, District Court Division Twenty-six, be suspended for thirty days without pay for conduct in violation of Canons 1, 2A, 3A(5), and 3B(1) 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. This matter was calendared for argument in the Supreme Court on 30 August 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 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 District Court Judge Ronald L. Chapman should be suspended without compensation for violations of Canons 1, 2A, 3A(5), and 3B(1) of the North Carolina Code of Judicial Conduct amounting to conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b). Respondent has not challenged the findings of fact made by the Judicial Standards Commission (the Commission) or opposed the Commission's recommendation that he be suspended without compensation by this Court.

On 8 January 2018, the Commission Counsel filed a Statement of Charges against Respondent alleging he had engaged in conduct inappropriate to his office by failing to issue a ruling for more than five years on a motion for permanent child support. Respondent fully cooperated

with the Commission's inquiry into this matter. In the Statement of Charges, Commission Counsel asserted that Respondent's actions constituted conduct inappropriate to his judicial office and prejudicial to the administration of justice constituting grounds for disciplinary proceedings under Chapter 7A, Article 30 of the North Carolina General Statutes.

Respondent filed his answer on 21 February 2018. On 5 April, Commission Counsel and Respondent entered into a Stipulation and Agreement for Stated Disposition (the Stipulation) containing joint evidentiary, factual, and disciplinary stipulations as permitted by Commission Rule 22 that tended to support a decision to suspend Respondent without compensation. The Stipulation was filed with the Commission on 9 April. The Commission heard this matter on 11 May and entered its recommendation on 14 June 2018, which contains the following stipulated findings of fact:

> 1. On or about November 30, 2012, Respondent concluded presiding over a multi-day hearing in *Ives v. Ives*, Mecklenburg County File No. 10CVD15357, to determine plaintiff Laura Ives' claims for permanent child support and attorney's fees. Ms. Ives was represented by attorney Jonathan Feit and the defendant Mr. Ives was represented by attorney Dorian Gunter. At that time, the parties were subject to an October 25, 2010 order for temporary child support wherein Mr. Ives paid Mrs. Ives support in the amount of $1,725.00 per month for the four (4) Ives children. Based on Mr. Ives' income, Mrs. Ives argued at the November 30, 2012 hearing that she was entitled to $5,087.50 per month in child support and $17,490.50 in attorney's fees. Respondent reserved his ruling and took the matter under advisement.
>
> 2. On December 5, 2012, Respondent indicated to Mr. Feit that he would make his ruling a priority over the upcoming holidays. Respondent did not issue a ruling over the December 2012 holidays.
>
> 3. On January 22, 2013, Mr. Feit emailed Respondent inquiring as to the status of his ruling. The following day, Respondent replied that he was "shooting for [tomorrow] afternoon. Friday [January 25, 2013] noon at the latest." No ruling was made by Respondent that week. On January 28, 2013, Respondent emailed the attorneys that

he had been in court the previous Friday, but would "continue to work on [this] order."

4. On February 27, 2013, Mr. Feit emailed Respondent, again seeking an update on the status of the ruling/order. Respondent did not respond to Mr. Feit's email.

5. On June 14, 2013, Mr. Feit emailed Respondent again to inquire as to the status of the ruling/order. Later that day, the attorneys received a response from Respondent's judicial assistant, stating that Respondent was working to resolve all of his pending domestic cases, including the *Ives* matter.

6. On October 16, 2013, Mr. Feit emailed Respondent and his judicial assistant requesting an update and expressing the need to have the matter addressed quickly because his client was receiving insufficient child support. On October 25, 2013, Respondent replied that he would be working on the *Ives* case that coming weekend, but acknowledged there were issues they needed to discuss "due to the delay getting this to you." Several days later, Respondent followed up with another email wherein he again committed to quickly complete the ruling.

7. After another two (2) months, Mr. Feit emailed Respondent again on January 3, 2014 and stressed that the order was required to resolve ongoing financial issues. Respondent, over a month later, informed Mr. Feit on or about February 12, 2014 that he would be "taking it home with him" because the courts were closing due to inclement weather.

8. On March 10, 2014, Mr. Feit emailed Respondent again asking for a ruling. Respondent did not reply.

9. After several more months went by without a ruling from Respondent, Mr. Feit emailed Respondent on June 9, 2014 imploring him to "please let us hear from you." Respondent again did not reply.

10. On July 7, 2014, Mr. Feit emailed Respondent once again to inquire into the status of Respondent's ruling. Respondent replied two (2) days later that, barring late assignments, he was not assigned in court the following week and he would "commit to scheduling time to wrap [this] up."

11. On July 21, 2014, after the unassigned court week, Respondent informed the attorneys that he "had more court than expected" but would "give [them] a decision or update by later [this] week." No decision or update came from Respondent that week. Several weeks later, on August 19, 2014, Mr. Feit asked for an update and, again, Respondent did not reply.

12. With more than two years since the hearing on permanent child support, and in an effort to secure some action from Respondent, on December 5, 2014, Mr. Feit provided Respondent with a proposed order even though Respondent had not requested one. Upon objection from opposing counsel as to the content of the proposed order, Mr. Feit offered to make any changes Respondent suggested. Respondent took no action on the proposed order.

13. Two (2) months later, on February 12, 2015, Mr. Feit followed up with Respondent with another email asking him to "please either sign the order as presented or let us hear from you one way or the other so we can move this matter forward." Respondent replied the following day that "you will hear from me no later than 10 days from now." Eleven (11) days later, on February 24, 2015, Respondent emailed the attorneys that because of other court assignments, he had not worked on the *Ives* matter. However, Respondent told the attorneys "[he would] work on *Ives* over the[ ] next two weekends" and during his vacation week in March. No ruling followed Respondent's vacation.

14. In an email to Respondent on April 17, 2015, Mr. Feit continued to stress the need to "move this matter along." Later that day, Respondent acknowledged in an email that he had not "held up my end of things" and "sincerely hope to get up with you soon."

15. On May 19, 2015, Mr. Feit again asked for Respondent to "please let us have your order." Respondent did not reply.

16. On July 14, 2015, Mr. Feit emailed Respondent asking to be informed whether Respondent planned to sign the proposed order. On July 23, 2015, Respondent replied that he had been out of the office, but would

"communicate a substantive response about when I will have something for you by Monday." On July 27, 2015, Respondent followed up with the attorneys, notifying them that he expected to have an order to them "by a week from tomorrow."

17. A month later, Mr. Feit emailed Respondent on August 26, 2015 asking for the status of the order. Respondent did not reply.

18. On December 3, 2015, more than three years after the hearing on permanent child support, Mr. Feit emailed Respondent asking for Respondent to communicate with the attorneys as to the status of the ruling. Respondent did not reply.

19. On April 18, 2016, Mr. Feit emailed Respondent a final time requesting the order. Respondent immediately replied that "there is not a day, and seldom a night, that goes by that this case has not been on my mind. I understand your clients [sic] needs." Despite this assertion, Respondent again failed to make any ruling.

20. After the last effort to secure a ruling in April 2016 (three and a half years after the hearing), and out of concern that further contact was futile and could harm his client's interests, Mr. Feit ceased contacting Respondent regarding the ruling.

21. Over a year after this last effort by Mr. Feit, and almost five years after the November 2012 hearing, on October 16, 2017, the Domestic Unit Supervisor in the Mecklenburg County Clerk's Office emailed the attorneys in the *Ives* matter asking if Respondent had ever made a decision on permanent child support and notifying them that the court file was missing. Mr. Feit confirmed that no order had been entered because Respondent never made a ruling.

22. To date, the official *Ives* court file remains missing after being checked out by a deputy clerk on November 30, 2012 for the final day of the permanent child support hearing. Respondent acknowledges that he had in his possession an exhibit folder from the November 2012 hearing, but had been unable to locate the remainder of the file.

> 23. On his own motion, Respondent entered an order of recusal from the *Ives* matter filed on November 21, 2017.
>
> 24. No ruling on permanent child support has issued since the matter was concluded in late November 2012.

(brackets in original) (citations to pages of the Stipulation 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. Canon 3 of the Code of Judicial Conduct governs a judge's discharge of his or her official duties. Canon 3A(5) requires a judge to "dispose promptly of the business of the court." Furthermore, Canon 3B(1) requires a judge to "diligently discharge the judge's administrative responsibilities" and "maintain professional competence in judicial administration."
>
> 4. The Commission's findings of fact, as supported by the Stipulation, show that since the *Ives* matter was concluded on November 30, 2012, no ruling has yet to be issued and Respondent has offered no justification for the delay. These facts, coupled with the fact that the file remains missing, continues [sic] to harm the interests of the litigants in the *Ives* matter.
>
> 5. Upon the Commission's independent review of the stipulated facts concerning Respondent's unreasonable

and unjustified delay in issuing the ruling, the Commission concludes that Respondent:

a. failed to personally observe appropriate standards of conduct necessary to ensure that the integrity of the judiciary is preserved, in violation of Canon 1 of the North Carolina Code of Judicial Conduct;

b. failed to conduct himself in a manner that promotes public confidence in the integrity of the judiciary, in violation of Canon 2A of the North Carolina Code of Judicial Conduct;

c. failed to dispose promptly of the business of the court, in violation of Canon 3A(5) of the North Carolina Code of Judicial Conduct;

d. and failed to diligently discharge his administrative responsibilities and maintain professional competence in judicial admin-istration in violation of Canon 3B(1) of the North Carolina Code of Judicial Conduct.

6. The Commission also notes that Respondent agreed in the Stipulation that he violated the foregoing provisions of the North Carolina Code of Judicial Conduct by (1) failing to issue a ruling for more than five (5) years on the motion for permanent child support without justification, (2) failing to respond to legitimate requests from counsel as to the status of the order, (3) representing to counsel that he was diligently working on the ruling when he was not; and (4) recusing himself from the case instead of entering an order thereby causing further delay.

7. The Commission further concludes that Respondent's violations 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). *See also* Code of Judicial Conduct, Preamble ("[a] violation of this Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute.").

(brackets in original) (citations to pages of the Stipulation omitted)

Based on these Findings of Fact and Conclusions of Law, the Commission recommended that this Court suspend Respondent without pay for a period of thirty days. The Commission based this recommendation on its earlier findings and conclusions and the following additional dispositional determinations:

> 1. As a mitigating factor, Respondent has in the past enjoyed the high regard of the legal community. As set forth in the Stipulation, Respondent ranked first in overall performance among twelve district judges in District Court Division 26 in the 2012 North Carolina Bar Association survey, and fourth among eleven district judges in the 2015 survey. An additional mitigating factor is his volunteer work on behalf of the justice system. He currently is in his ninth year of volunteering to attend Truancy Court one morning a week at low performing schools. He also was a participant in the first Domestic Violence Fatality Review team in North Carolina, serving on panels in Mecklenburg County for several years that reviewed instances of death related to apparent domestic violence. Respondent also offered at the hearing of this matter a letter of support from Attorney George V. Laughrun, II of the firm Goodman, Carr, Laughrun, Levine & Greene, PLLC in Charlotte, North Carolina.
>
> 2. As an additional mitigating factor, Respondent agreed to enter into the Stipulation to bring closure to this matter and because of his concern for protecting the integrity of the court system. Respondent also understands the negative impact his actions have had on the integrity and impartiality of the judiciary. Respondent was cooperative with the Commission's investigation, voluntarily providing information about the incident and fully and openly admitting error and remorse.
>
> 3. Nevertheless, the misconduct set out in this Recommendation is aggravated by the fact that Respondent received a private letter of caution from the Commission on March 11, 2013 after Respondent unreasonably delayed entering an adjudicative order in a different domestic action for thirteen (13) months. Respondent was warned that recurrence of such conduct may result in further proceedings before the Commission. Respondent received this letter of caution while the *Ives*

matter (the subject of this proceeding) was under advisement. Notwithstanding the Commission's warning about unreasonable delay, Respondent engaged in the egregious delay in the present case.

4. The Commission also finds that Respondent fails to appreciate the magnitude of the harm caused by his misconduct. At the hearing of this matter, and notwithstanding his agreement to accept a stated disposition of suspension without pay for 30 days, Respondent through Counsel asserted to the Commission that a lesser sanction would be more appropriate. The Commission rejects that assertion, and but for the Stipulation and Agreement for Stated Disposition, which obviated the need for a lengthy and expensive contested hearing, would have recommended a higher sanction to the Supreme Court.

5. The Commission and Respondent acknowledge the ultimate jurisdiction for the discipline of judges is vested in the North Carolina Supreme Court pursuant to Chapter 7A, Article 30 of the North Carolina General Statutes, which may either accept, reject, or modify any disciplinary recommendation from the Commission.

6. Pursuant to N.C. Gen. Stat. § 7A-377(a5), which requires that at least five members of the Commission concur in a recommendation of public discipline to the Supreme Court, all seven Commission members present at the hearing of this matter concur in this recommendation to **suspend Respondent without pay for a period of 30 days.**

(emphasis in original) (citations to pages of the Stipulation omitted)

In resolving this matter, we observe that "[t]he Supreme Court 'acts as a court of original jurisdiction, rather than in its typical capacity as an appellate court' when reviewing a recommendation from the Commission." *In re Hartsfield*, 365 N.C. 418, 428, 722 S.E.2d 496, 503 (2012) (order) (quoting *In re Badgett*, 362 N.C. 202, 207, 657 S.E.2d 346, 349 (2008) (order)). Neither the Commission's findings of fact nor its conclusions of law are binding on this Court, but may be adopted by the Court if they are supported by clear and convincing evidence. *Id.* If the Commission's findings are adequately supported by clear and convincing evidence, the Court must determine whether those findings support the Commission's conclusions of law. *Id.* at 429, 722 S.E.2d at 503.

The Commission found the stipulated facts to be supported by "clear, cogent and convincing evidence." Respondent executed the Stipulation and agreed that those facts and information would serve as the evidentiary and factual basis for the Commission's recommendation. Respondent does not contest any of the findings or conclusions made by the Commission. After careful review, we agree that the Commission's findings are supported by clear, cogent, and convincing evidence, and we now adopt them as our own. Furthermore, we agree with the Commission's conclusions that Respondent's conduct violates Canons 1, 2A, 3A(5) and 3B(1) of the North Carolina Code of Judicial Conduct, and is prejudicial to the administration of justice, thus bringing the judicial office into disrepute in violation of N.C.G.S. § 7A-376.

This Court is free to exercise its own judgment in arriving at a disciplinary decision in light of Respondent's violations of several canons of the North Carolina Code of Judicial Conduct and is not bound by the recommendations of the Commission. *Id.* Accordingly, "[w]e may adopt the Commission's recommendation, or we may impose a lesser or more severe sanction." *Id.* The Commission recommended that Respondent be suspended without compensation from the performance of his judicial duties for a period of thirty days. Respondent does not contest the Commission's findings of fact or conclusions of law and voluntarily entered into the Stipulation with the understanding that the Commission's recommendation would be suspension from his judicial duties for a period of thirty days without compensation.

We are mindful of Respondent's high regard in the legal community and of his volunteer activities within the judicial system. We also appreciate Respondent's cooperation with the Commission's investigation, including his voluntary provision of information when requested, his admission of error and expression of remorse, and his willingness to enter into the Stipulation to bring this matter to a close. Respondent has demonstrated an understanding of the negative effect of his actions on the integrity and impartiality of the judiciary. Nevertheless, the misconduct set out in the facts of this case is aggravated by the finding that Respondent received a private letter of caution from the Commission on 11 March 2013, while he had the *Ives* matter under advisement, after he had unreasonably delayed entering an order in a different domestic action for thirteen months. He was warned at that time that recurrence of such conduct could result in further proceedings before the Commission. Notwithstanding his receipt of the Commission's warning about unreasonable delay, he engaged in the egregious delay in the present case. Weighing the severity of his conduct against his candor and

cooperation, we conclude that the Commission's recommended thirty-day suspension without compensation is appropriate. At the conclusion of his suspension, Respondent may resume the duties of his office.

Therefore, the Supreme Court of North Carolina orders that Respondent Ronald L. Chapman be, and is hereby, SUSPENDED WITHOUT COMPENSATION from office as a Judge of the General Court of Justice, District Court Division Twenty-six, for THIRTY days from the entry of this order for conduct in violation of Canons 1, 2A, 3A(5), and 3B(1) of the North Carolina Code of Judicial Conduct, and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376.

By order of the Court in Conference, this the 26th day of October, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 26th day of October, 2018.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

MEINCK v. CITY OF GASTONIA

[371 N.C. 497 (2018)]

JOAN A. MEINCK
v.
CITY OF GASTONIA, A NORTH CAROLINA MUNICIPAL CORPORATION

No. 130PA17

Filed 26 October 2018

1. Immunity—governmental—downtown redevelopment—art center—negligence claim

The trial court correctly granted summary judgment for defendant city on the basis of governmental immunity in a negligence case arising from a slip and fall at an art center used as a part of a downtown redevelopment. An urban redevelopment project undertaken in accordance with statutes and for the purpose of promoting the health, safety, and welfare of the inhabitants of the State of North Carolina is a governmental function.

2. Immunity—governmental—downtown redevelopment—art center—governmental function

The trial court correctly determined that defendant city was engaged in a governmental function and granted summary judgment for defendant on the basis of governmental immunity in a negligence case arising from a slip and fall at an art center used as a part of a downtown redevelopment. While the legislature has not deemed that all urban redevelopment and downtown revitalization projects are governmental functions that are immune from suit, defendant's activity here in leasing the property to an arts guild to promote the arts for the purpose of redeveloping and revitalizing the downtown area was a governmental function.

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 417 (2017), reversing and remanding an order granting summary judgment entered on 1 June 2016 by Judge Lisa Bell in Superior Court, Gaston County. On 8 June 2017, the Supreme Court allowed plaintiff's petition for discretionary review of additional issues. Heard in the Supreme Court on 6 February 2018.

Law Office of Thomas D. Bumgardner, PLLC, by Thomas D. Bumgardner, for plaintiff-appellee/appellant.

Stott, Hollowell, Palmer & Windham, L.L.P., by Martha Raymond Thompson and Aaron C. Low, for defendant-appellant/appellee.

Martin & Jones, PLLC, by Huntington M. Willis; and Terpening Wilder Law, by William R. Terpening, for North Carolina Advocates for Justice, amicus curiae.

Clawson and Staubes, PLLC, by Andrew J. Santaniello; and Kimberly S. Hibbard, NCLM General Counsel, and Gregory F. Schwitzgebel III, NCLM Associate General Counsel, for North Carolina Association of Defense Attorneys and North Carolina League of Municipalities, amici curiae.

HUDSON, Justice.

Here we consider whether the trial court erred in granting a motion for summary judgment in favor of defendant, the City of Gastonia, based upon the doctrine of governmental immunity. The Court of Appeals concluded that governmental immunity did not apply and reversed the trial court's order granting summary judgment in favor of defendant. *Meinck v. City of Gastonia*, ___ N.C. App. ___, 798 S.E.2d 417 (2017). Because we conclude that defendant is entitled to governmental immunity, we reverse the decision of the Court of Appeals and remand this case to that court for further proceedings.

Background

In 2011 defendant purchased from Gaston County a historic building located at 212 West Main Avenue in downtown Gastonia. According to an affidavit and deposition testimony from defendant's city manager, Edward C. Munn, defendant had determined that this vacant building was in a "strategic location" for defendant's effort to redevelop and revitalize the downtown area, which was rife with vacant and deteriorating properties. According to Munn, "your downtown is your face. It is how you project your image to the rest of anyone who wants to do commerce or if you want to live there." Defendant's intent in purchasing the building was to preserve it "but also to put it into use" and "not [ ] allow it to be vacant and deteriorate." Defendant had further determined that, based on other successful examples throughout the country, one of the "key pieces" necessary for revitalization was "bringing artists into the downtown" and into the older buildings with the idea that the downtown area would thus become more attractive for businesses and people.

To that end, defendant began leasing the property to "nonprofit arts groups," first to the Gaston County Arts Council, Inc. from 2011 to 2013, and then, beginning in mid-2013, to the Gaston County Art Guild (the

Art Guild). As with the nearly identical first lease agreement, the lease agreement between defendant and the Art Guild (the lease) provided that the Art Guild was to sublease portions of the building to individual artists (the subtenants) to use as studios—a cooperative enterprise[1] referred to as "Arts on Main." Under the lease defendant was responsible for maintaining the exterior of the premises and also had the right to inspect the property at any time.[2] The lease required the Art Guild to use the property "only for purposes of an art gallery and artists' studios and a gift shop" and required the subtenants to use the property only for creating and selling works of art. The lease fixed the rents to be paid by subtenants for the studio spaces at a range of $90.00 to $375.00 per month and provided that all art sales made at the property were subject to a 30% commission.

Under the lease defendant received 90% of all rents paid by the subtenants and 15% of "the gross receipts from all sales or commissions occurring on" the property.[3] In addition, the lease required the subtenants to provide as consideration a minimum of fifteen hours per month of volunteer time tending the gallery and gift shop, and subtenants were expected to provide additional volunteer time necessary for the operation of Arts on Main as a "viable operation." In the 2013 fiscal year, defendant's revenues received from the rents and sales or commissions amounted to $21,572.98. Defendant's expenditures for that year totaled $33,062.01, which netted a loss of $11,489.03 for 2013. In the 2014 fiscal year, defendant's revenues from the rents and sales or commissions totaled $21,935.57 and its expenditures totaled $40,008.13, netting defendant a loss of $18,072.56. Additionally, Munn testified that defendant spent money on labor and overhead but did not include those items in its financial spreadsheet. According to Munn, the city did not seek to make a profit from the lease with the Art Guild and "there's no profit in this operation."

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1. While one attachment to the lease described Arts on Main as "a cooperative business," Munn testified that it was more accurately characterized as "a non-profit cooperative effort to promote the arts."

2. The subtenants' studio spaces were subject to inspection during normal business hours.

3. The Court of Appeals erroneously stated that the lease "guaranteed Defendant 30% of the gross sales receipts received for art the Art Guild sold on the premises." *Meinck*, ___ N.C. App. at ___, 798 S.E.2d at 420. The lease subjected art sold by subtenants on the property to a minimum 30% commission, but under the lease defendant only received "an amount equal to 15% of the gross receipts from all sales or commissions occurring on the Premises." Presumably, the Art Guild was entitled to the other portion of commissions.

On 11 December 2013, plaintiff, who was one of the subtenants of the Art Guild, was leaving the building through a rear exit carrying a stack of large pictures when she lost her balance on a set of steps and fell. Evidence tended to show that part of the concrete steps had eroded. Plaintiff suffered a broken hip and other injuries as a result of her fall, and she "required emergency medical treatment, surgery, hospitalization, and substantial rehabilitation." On 4 February 2015, plaintiff filed a complaint against defendant alleging that defendant was negligent in failing to maintain the building's exit in a reasonably safe condition and failing to warn of the dangerous and hazardous condition of the exit. Plaintiff's complaint alleged that defendant had waived any claim of governmental immunity by purchasing liability insurance and also that defendant's tortious conduct occurred while defendant was engaged in a proprietary function, thereby depriving defendant of governmental immunity.

On 12 January 2016, defendant filed a motion for summary judgment asserting that the city was entitled to governmental immunity, that defendant was not negligent as a matter of law, and that plaintiff was contributorily negligent as a matter of law. The trial court determined that defendant's liability insurance policy "contained an express nonwaiver provision" and therefore, defendant had not waived any claim of governmental immunity. The trial court further concluded that "the City leased the property to the Art Guild as part of its governmental function to revitalize the downtown area, preserve a historical structure, and prevent deterioration of the downtown area" and accordingly, was "entitled to governmental immunity regarding Plaintiff's claims." On that basis, the trial court granted summary judgment for defendant. Additionally, the trial court determined that, although the issue was moot in light of the court's ruling on immunity, the court would deny defendant's motion for summary judgment based on plaintiff's contributory negligence. Plaintiff appealed this order to the Court of Appeals.

At the Court of Appeals plaintiff argued that defendant's ownership and maintenance of the building leased to the Art Guild as part of defendant's downtown revitalization efforts was a proprietary function and not a governmental function; therefore, defendant was not entitled to governmental immunity. The Court of Appeals agreed, noting first that governmental immunity applies only if a municipality is engaging in a governmental function, as opposed to a proprietary function. *Meinck*, ___ N.C. App. at ___, 798 S.E.2d at 421. The court stated that the "threshold inquiry" in making the distinction between governmental and proprietary functions is "whether, and to what degree, the legislature has

addressed the issue." *Id.* at ___, 798 S.E.2d at 421 (quoting *Estate of Williams v. Pasquotank Cty. Parks & Recreation Dep't*, 366 N.C. 195, 200, 732 S.E.2d 137, 141-42 (2012)). The court determined that the legislature did not specify in N.C.G.S. § 160A-272, which authorizes cities to lease property to private parties, whether such activity is governmental or proprietary. *Id.* at ___, 798 S.E.2d at 421. Here the Court of Appeals also recognized that N.C.G.S. § 160A-535 authorizes cities to establish municipal service districts for the purpose of downtown revitalization projects like the one engaged in by defendant here but determined that "[n]owhere has the legislature deemed all downtown revitalization projects undertaken by a city within a service district to be activities[ ] which are exempt from suit through governmental immunity." *Id.* at ___, 798 S.E.2d at 421. Addressing the next inquiry, which is whether an activity "can only be provided by a governmental agency or instrumentality," *id.* at ___, 798 S.E.2d at 421 (quoting *Williams*, 366 N.C. at 202, 732 S.E.2d at 142), the court determined that "[t]he ownership and maintenance of property leased to a private entity is not an activity[ ] which is provided only by a governmental agency or instrumentality," *id.* at ___, 798 S.E.2d at 421-22.

The Court of Appeals then addressed additional factors, including "whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider." *Id.* at ___, 798 S.E.2d at 422 (quoting *Williams*, 366 N.C. at 202-03, 732 S.E.2d at 143 (footnotes omitted)). The court determined that defendant's activity here is not one "solely and traditionally provided by a governmental entity." *Id.* at ___, 798 S.E.2d at 422. Further, in reliance on *Glenn v. City of Raleigh*, 246 N.C. 469, 98 S.E.2d 913 (1957), the court determined that, although defendant's revenues from the rents and sales or commissions did not cover its operating costs and were far exceeded by its expenditures, the revenues were "substantial" and provided "such a pecuniary advantage to exclude the application of government immunity as a matter of law," *id.* at ___, 798 S.E.2d at 422 (citing *Glenn*, 246 N.C. at 476-77, 98 S.E.2d at 918-19). The court held that "[i]n light of all these factors," defendant was not entitled to governmental immunity, *id.* at ___, 798 S.E.2d at 422, and it thus reversed the trial court's entry of summary judgment in favor of defendant on that basis, *id.* at ___, 798 S.E.2d at 424. Having reached this conclusion, the court did not address plaintiff's argument that defendant's non-waiver provision in its liability insurance contract did not effectively preserve defendant's governmental immunity.

Additionally, the court addressed the parties' arguments on negligence and contributory negligence. *Id.* at ___, 798 S.E.2d at 422-24. The court determined that "Plaintiff's forecast of evidence is sufficient to raise the genuine issues of material fact of whether Defendant negligently failed to maintain the steps on which Plaintiff tripped or acted negligently in failing to warn about the condition of the steps." *Id.* at ___, 798 S.E.2d at 423. Moreover, the court determined that "a jury could find Plaintiff . . . acted reasonably in using the exit with the hazardous steps" because "[n]o evidence of other means of exiting the building was presented" and "[t]he carrying of large pictures out of the art gallery is a reasonable, non-negligent use of the exit." *Id.* at ___, 798 S.E.2d at 424. Accordingly, the court concluded that defendant was not entitled to summary judgment on the issue of plaintiff's contributory negligence. *Id.* at ___, 798 S.E.2d at 424.

On 20 April 2017, defendant filed a petition for discretionary review seeking review of the decision of the Court of Appeals that concluded that governmental immunity did not apply and that plaintiff was not contributorily negligent as a matter of law. Plaintiff filed a conditional petition for discretionary review on 28 April 2017 also seeking review of the issue of plaintiff's contributory negligence. This Court allowed both petitions on 8 June 2017.

Analysis

[1] Defendant argues that the Court of Appeals erred in reversing the trial court's order granting summary judgment for defendant on the basis of governmental immunity. We agree.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2017). We review a trial court's order denying a motion for summary judgment de novo. *E.g.*, *Bynum v. Wilson County*, 367 N.C. 355, 358, 758 S.E.2d 643, 645 (2014) (citing *Williams*, 366 N.C. at 198, 732 S.E.2d at 140). We review decisions of the Court of Appeals for errors of law. *E.g.*, *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)).

"Under the doctrine of governmental immunity, a county or municipal corporation 'is immune from suit for the negligence of its employees in the exercise of *governmental functions* absent waiver of immunity.' " *Williams*, 366 N.C. at 198, 732 S.E.2d at 140 (emphasis added) (quoting

Evans ex rel. Horton v. Hous. Auth. Of Raleigh, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004)). When, however, a county or municipality is engaged in a "*proprietary function*," governmental immunity does not apply. *Id.* at 199, 732 S.E.2d at 141 (emphasis added) (citing *Town of Grimesland v. City of Washington*, 234 N.C. 117, 123, 66 S.E.2d 794, 798 (1951)). As a result, the determination of "whether an entity is entitled to governmental immunity . . . turns on whether the alleged tortious conduct of the county or municipality arose from an activity that was governmental or proprietary in nature." *Id.* at 199, 732 S.E.2d at 141.

In *Williams* we addressed this distinction between governmental and proprietary functions, noting that:

> We have long held that a "governmental" function is an activity that is "discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself." *Britt v. City of Wilmington*, 236 N.C. 446, 450, 73 S.E.2d 289, 293 (1952). A "proprietary" function, on the other hand, is one that is "commercial or chiefly for the private advantage of the compact community." *Id.*[at 450, 73 S.E.2d at 293]; *see also Evans*, 359 N.C. at 54, 602 S.E.2d at 671 (describing the test set forth in *Britt* as our "one guiding principle").
>
> Our reasoning when distinguishing between governmental and proprietary functions has been relatively simple, though we have acknowledged the difficulties of making the distinction. *Evans*, 359 N.C. at 54, 602 S.E.2d at 671 ("The difficulties of applying this principle have been noted." (citations omitted)). "When a municipality is acting 'in behalf of the State' in promoting or protecting the health, safety, security, or general welfare of its citizens, it is an agency of the sovereign. When it engages in a public enterprise essentially for the benefit of the compact community, it is acting within its proprietary powers." *Britt*, 236 N.C. at 450-51, 73 S.E.2d at 293.

Id. at 199-200, 732 S.E.2d at 141 (citation omitted). Furthermore, to aid in making this distinction, we recognized that "[o]ur case law demonstrates that a number of factors are relevant when ascertaining whether action undertaken by a county or municipality is governmental or proprietary in nature." *Id.* at 200, 732 S.E.2d at 141.

First, we concluded that "the threshold inquiry . . . is whether, and to what degree, the legislature has addressed the issue." *Id.* at 200, 732

S.E.2d at 141-42; *see id.* at 200-01, 732 S.E.2d at 142 ("This is especially so given . . . that any change in the common law doctrine of governmental immunity is a matter for the legislature." (citation omitted)). Recognizing that even the legislature's designation of a general activity as a governmental function may not be dispositive on the specific facts of a case, we stated that "[w]hen the legislature has not directly resolved whether a specific activity is governmental or proprietary in nature, other factors are relevant." *Id.* at 202, 732 S.E.2d at 142. The first of these additional factors is whether "the undertaking is one in which ***only*** a governmental agency could engage," in which case "it is perforce governmental in nature." *Id.* at 202, 732 S.E.2d at 142 (citations omitted). Acknowledging that in more recent years this determination had become "increasingly difficult" because "many services once thought to be the sole purview of the public sector have been privatized in full or in part," we continued, stating that

> when the particular service can be performed both privately and publicly, the inquiry involves consideration of a number of additional factors, of which no single factor is dispositive. Relevant to this inquiry is whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider. We conclude that consideration of these factors provides the guidance needed to identify the distinction between a governmental and proprietary activity. Nevertheless, we note that the distinctions between proprietary and governmental functions are fluid and courts must be advertent to changes in practice. We therefore caution against overreliance on these four factors.

Id. at 202-03, 732 S.E.2d at 143 (footnotes omitted). Finally, we emphasized that "the proper designation of a particular action of a county or municipality is a fact intensive inquiry" and "may differ from case to case." *Id.* at 203, 732 S.E.2d at 143.

Here it is undisputed that the activity out of which defendant's alleged tortious conduct arose was defendant's leasing of the property at 212 West Main Avenue to the Art Guild. It is further undisputed that defendant purchased this historic and vacant property and entered into the lease as part of its efforts at urban redevelopment and downtown revitalization. With regard to the "threshold inquiry" under *Williams*, *id.*

at 200, 732 S.E.2d at 141-42, several statutes are relevant to the activity in which defendant was engaged.

First, N.C.G.S. § 160A-272 authorizes a city to lease or rent any property it owns "but not for longer than 10 years . . . and only if the council determines that the property will not be needed by the city for the term of the lease." N.C.G.S. § 160A-272(a) (2017). This statute requires the lease or rental agreement to be authorized by a resolution "adopted at a regular council meeting upon 30 days' public notice." *Id.* § 160A-272(a1) (2017).[4] Nothing in this statute indicates any intent by the legislature to designate the leasing of property authorized therein as a governmental or proprietary function. As a result, we conclude that the legislature has not addressed whether the leasing by a city of its unused property is generally a governmental or proprietary function. Additional statutes, however, are more specific to the activity engaged in by defendant here.

In Article 22 of Chapter 160A (the Urban Redevelopment Law), the legislature addressed the problem of "blighted areas" and authorized municipalities to engage in "redevelopment projects" in the interest of public health, safety, convenience, and welfare. N.C.G.S. §§ 160A-500 to -526 (2017). In N.C.G.S. § 160A-501 the legislature made the following findings:

> (1) That there exist in urban communities in this State blighted areas as defined herein.
>
> (2) That such areas are economic or social liabilities, inimical and injurious to the public health, safety, morals and welfare of the residents of the State, harmful to the social and economic well-being of the entire communities in which they exist, depreciating values therein, reducing tax revenues, and thereby depreciating further the general community-wide values.
>
> (3) That the existence of such areas contributes substantially and increasingly to the spread of disease and crime, necessitating excessive and disproportionate expenditures of public funds for the preservation of the public health and safety, for crime prevention, correction, prosecution, punishment and the treatment of

4. "No public notice . . . need be given for resolutions authorizing leases or rentals for terms of one year or less, and the council may delegate to the city manager or some other city administrative officer authority to lease or rent city property for terms of one year or less." N.C.G.S. § 160A-272(b) (2017).

> juvenile delinquency and for the maintenance of adequate police, fire and accident protection and other public services and facilities, constitutes an economic and social liability, substantially impairs or arrests the sound growth of communities.
>
> (4) That the foregoing conditions are beyond remedy or control entirely by regulatory processes in the exercise of the police power and cannot be effectively dealt with by private enterprise under existing law without the additional aids herein granted.
>
> (5) That the acquisition, preparation, sale, sound replanning, and redevelopment of such areas in accordance with sound and approved plans for their redevelopment will promote the public health, safety, convenience and welfare.

Id. Accordingly, the legislature

> hereby declared [it] to be the policy of the State of North Carolina to promote the health, safety, and welfare of the inhabitants thereof by the creation of bodies corporate and politic to be known as redevelopment commissions, which shall exist and operate for the public purposes of acquiring and replanning such areas and of holding or disposing of them in such manner that they shall become available for economically and socially sound redevelopment. Such purposes are hereby declared to be public uses for which public money may be spent, and private property may be acquired by the exercise of the power of eminent domain.

Id. The legislature made additional findings in N.C.G.S. § 160A-502, providing:

> (1) That the cities of North Carolina constitute important assets for the State and its citizens; that the preservation of the cities and of urban life against physical, social, and other hazards is vital to the safety, health, and welfare of the citizens of the State, and sound urban development in the future is essential to the continued economic development of North Carolina, and that the creation, existence, and growth of substandard areas present substantial hazards to the

cities of the State, to urban life, and to sound future urban development.

(2) That blight exists in commercial and industrial areas as well as in residential areas, in the form of dilapidated, deteriorated, poorly ventilated, obsolete, overcrowded, unsanitary, or unsafe buildings, inadequate and unsafe streets, inadequate lots, and other conditions detrimental to the sound growth of the community; that the presence of such conditions tends to depress the value of neighboring properties, to impair the tax base of the community, and to inhibit private efforts to rehabilitate or improve other structures in the area; and that the acquisition, preparation, sale, sound replanning and redevelopment of such areas in accordance with sound and approved plans will promote the public health, safety, convenience and welfare.

(3) That not only is it in the interest of the public health, safety, convenience and welfare to eliminate existing substandard areas of all types, but it is also in the public interest and less costly to the community to prevent the creation of new blighted areas or the expansion of existing blighted areas; that vigorous enforcement of municipal and State building standards, sound planning of new community facilities, public acquisition of dilapidated, obsolescent buildings, and other municipal action can aid in preventing the creation of new blighted areas or the expansion of existing blighted areas; and that rehabilitation, conservation, and reconditioning of areas in accordance with sound and approved plans, where, in the absence of such action, there is a clear and present danger that the area will become blighted, will protect and promote the public health, safety, convenience and welfare.

Id.[5] In accordance with these findings and policies, the legislature authorized the governing bodies of municipalities to create a separate body to

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5. Again, the legislature made a declaration of policy, providing that

> it is hereby declared to be the policy of the State of North Carolina to protect and promote the health, safety, and welfare of the inhabitants of its urban areas by authorizing redevelopment commissions to undertake

act as a "redevelopment commission," N.C.G.S. § 160A-504(a), or to simply "undertake to exercise such powers, duties, and responsibilities [of a redevelopment commission] itself," *id.* § 160A-505(a).[6] These "public and essential governmental powers . . . include all powers necessary or appropriate to carry out and effectuate the purposes and provisions of this Article." *Id.* § 160A-512. The legislature also enumerated a nonexhaustive list of grants of authority under this Article:

> (3) To act as agent of the State or federal government or any of its instrumentalities or agencies for the public purposes set out in this Article;
>
> (4) To prepare or cause to be prepared and recommend redevelopment plans to the governing body of the municipality and to undertake and carry out "redevelopment projects" within its area of operation;
>
> . . . .
>
> (6) Within its area of operation, to purchase, obtain options upon, acquire by gift, grant, devise, eminent domain or otherwise, any real or personal property or any interest therein, together with any improvements thereon, necessary or incidental to a redevelopment project, except that eminent domain may only be used to take a blighted parcel; to hold, improve, clear or prepare for redevelopment any such property, and subject to the provisions of G.S. 160A-514, and with the approval of the local governing body sell, exchange, transfer, assign, subdivide, retain for its own use, mortgage, pledge, hypothecate or otherwise encumber or dispose of any real or personal property or any interest therein, either as an entirety to a single "redeveloper" or in parts to several redevelopers; provided

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> nonresidential redevelopment in accord with sound and approved plans and to undertake the rehabilitation, conservation, and reconditioning of areas where, in the absence of such action, there is a clear and present danger that the area will become blighted.

N.C.G.S. § 160A-502.

6. A municipality may also "designate a housing authority created under the provisions of Chapter 157 [Housing Authorities and Projects] to exercise the powers, duties, and responsibilities of a redevelopment commission." N.C.G.S. § 160A-505(a).

> that the commission finds that the sale or other transfer of any such part will not be prejudicial to the sale of other parts of the redevelopment area, nor in any other way prejudicial to the realization of the redevelopment plan approved by the governing body; to enter into contracts, either before or after the real property that is the subject of the contract is acquired by the Commission (although disposition of the property is still subject to G.S. 160A-514), with "redevelopers" of property containing covenants, restrictions, and conditions regarding the use of such property for residential, commercial, industrial, recreational purposes or for public purposes in accordance with the redevelopment plan and such other covenants, restrictions and conditions as the commission may deem necessary to prevent a recurrence of blighted areas or to effectuate the purposes of this Article; to make any of the covenants, restrictions or conditions of the foregoing contracts covenants running with the land, and to provide appropriate remedies for any breach of any such covenants or conditions, including the right to terminate such contracts and any interest in the property created pursuant thereto; to borrow money and issue bonds therefor and provide security for bonds; to insure or provide for the insurance of any real or personal property or operations of the commission against any risks or hazards, including the power to pay premiums on any such insurance; and to enter into any contracts necessary to effectuate the purposes of this Article;
>
> . . . .
>
> (11) To make such expenditures as may be necessary to carry out the purposes of this Article; and to make expenditures from funds obtained from the federal government[.]

Id. Plaintiff does not dispute that defendant's purchase of the vacant property at 212 West Main Avenue and its lease of the property to the Art Guild in order to promote the arts for the purpose of revitalizing the downtown area is a valid redevelopment activity under the Urban Redevelopment Law.

Also relevant to the activity at issue here is Article 23, the "Municipal Service District Act of 1973" (the Municipal Service District Act), N.C.G.S. §§ 160A-535 to -544 (2017), which allows cities to establish "service districts in order to finance, provide, or maintain for the districts one or more of the following services, facilities, or functions in addition to or to a greater extent than those financed, provided or maintained for the entire city," *id.* § 160A-536(a). These services include "[d]owntown revitalization projects," *id.* § 160A-536(a)(2), which overlap with the activities authorized by the Urban Redevelopment Law, and are defined as

> improvements, services, functions, promotions, and developmental activities intended to further the public health, safety, welfare, convenience, and economic well-being of the central city or downtown area. Exercise of the authority granted by this Article to undertake downtown revitalization projects financed by a service district do not prejudice a city's authority to undertake urban renewal projects in the same area. Examples of downtown revitalization projects include by way of illustration but not limitation all of the following:
>
> . . . .
>
> (7) Sponsoring festivals and markets in the downtown area, promoting business investment in the downtown area, helping to coordinate public and private actions in the downtown area, and developing and issuing publications on the downtown area.

Id. § 160A-536(b). Plaintiff argues in her brief that defendant's activity here is not a valid downtown revitalization project because it does not meet any of the "categories of conduct" defined by the legislature in subsection 160A-536(b). We disagree, and we conclude there is no genuine issue of material fact with respect to this issue. Plaintiff neglects to mention that the "categories" enumerated in the statute are mere examples and are explicitly nonexhaustive. *See id.* § 160A-536(b) (providing that "[e]xamples of downtown revitalization projects include by way of illustration but not limitation all of the following"). We conclude that the uncontroverted evidence presented in the trial court establishes that defendant's activity is a valid "service[ ], function[ ], promotion[ ], [or] developmental activit[y] intended to further the public health, safety, welfare, convenience, and economic well-being of the central city or downtown area." *Id.* We further conclude that defendant's activity falls

under the example in subdivision (7) in that defendant's "Arts on Main" project is a cooperative public and private initiative wherein a market is established to sell and promote the arts in the downtown area.

In its analysis of the threshold inquiry, the Court of Appeals below briefly mentioned the Municipal Service District Act before concluding that "[n]owhere has the legislature deemed all downtown revitalization projects undertaken by a city within a service district to be activities[ ] which are exempt from suit through governmental immunity." *Meinck*, ___ N.C. App. at ___, 798 S.E.2d at 421. This portion of the court's analysis, which notably omitted any mention of the Urban Redevelopment Law, tends to suggest that a legislative provision that addresses a particular activity but does not explicitly provide that such activity is a governmental function immune from suit has no bearing on a determination of whether the activity is governmental or proprietary. The inquiry, however, is not merely whether the legislature has explicitly provided that a specific activity is governmental but rather, "*whether, and to what degree*, the legislature has addressed the issue." *Williams*, 366 N.C. at 200, 732 S.E.2d at 142 (emphasis added).

For example, in *Williams*, while we reserved comment on whether a statute at issue there was "ultimately determinative in light of the facts at hand" and left that determination to the trial court upon remand, we did note that the statute at issue was, at a minimum, "clearly relevant" to whether the defendants' activity was governmental or proprietary. *Id.* at 201, 732 S.E.2d at 142 (emphases omitted). Furthermore, in arriving at our conclusion in *Williams* that the "threshold inquiry" was the extent to which the legislature had addressed the issue, we discussed as an example *Evans*, in which the Court "considered the Housing Authorities Law in holding that a housing authority was protected by governmental immunity against allegations of lead paint-based injuries." *Id.* at 200, 732 S.E.2d at 141 (internal citation omitted) (citing *Evans*, 359 N.C. at 55-56, 602 S.E.2d at 671-72). Notably, the plaintiff in *Evans* argued that the defendant was not immune "because the Housing Authorities Law does not *specifically provide* for immunity." *Evans*, 359 N.C. at 54, 602 S.E.2d at 671 (emphasis added). We rejected that argument, noting that

> in enacting the Housing Authorities Law at issue, the General Assembly provided
>
> > "that unsanitary or unsafe dwelling accommodations exist in urban and rural areas throughout the State . . .; that these conditions cannot be remedied by the ordinary operation of private enterprise;

> that the . . . providing of safe and sanitary dwelling accommodations for persons of low income are *public uses and purposes for which public money may be spent* and private property acquired; . . . and that the necessity for the provisions hereinafter enacted is hereby declared as a matter of legislative determination to be in the public interest."

Id. at 55, 602 S.E.2d at 672 (alterations in original) (citing N.C.G.S. § 157-2(a) (2003)). We considered the emphasized language a significant "statutory indication that the provision of low and moderate income housing is a governmental function." *Id.*

Williams, 366 N.C. at 200, 732 S.E.2d at 141. Based on this "statutory indication," in conjunction with our prior case law interpreting the original Housing Authorities Law, as well as the principle "that an 'activity of the municipality which is . . . public in nature and performed for the public good in behalf of the State . . . comes within the class of governmental functions,' " *Evans*, 359 N.C. at 55-56, 602 S.E.2d at 671-72 (alterations in original) (quoting *Millar v. Town of Wilson*, 222 N.C. 340, 341, 23 S.E.2d 42, 44 (1942)), we determined that the defendant in *Evans* was entitled to governmental immunity on the facts of that case, *id.* at 56, 602 S.E.2d at 672. Thus, even when the legislature "has not directly resolved whether a specific activity is governmental or proprietary in nature," *Williams*, 366 N.C. at 202, 732 S.E.2d at 142, a legislative provision addressing the activity may still be relevant—in conjunction with the other *Williams* factors—to a determination of whether an activity is governmental, particularly if the statutory language suggests "a significant 'statutory indication' that the [activity] is a governmental function," *id.* at 200, 732 S.E.2d at 141 (quoting *Evans*, 359 N.C. at 55, 602 S.E.2d at 672).

In that regard, we note that certain language from the Urban Redevelopment Law is similar in significant respects to the emphasized language from the Housing Authorities Law in *Evans*. *Compare* N.C.G.S. § 160A-501 (providing that "the public purposes of acquiring and replanning [blighted] areas and of holding or disposing of them in such manner that they shall become available for economically and socially sound redevelopment . . . . are hereby declared to be *public uses for which public money may be spent*" (emphasis added)), *with Evans*, 359 N.C. at 55, 602 S.E.2d at 672 ("[T]he . . . providing of safe and sanitary dwelling accommodations for persons of low income are *public uses and purposes for which public money may be spent* and private

property acquired . . . ." (first ellipsis in original) (quoting N.C.G.S. § 157-2(a) (2003) (emphasis added))). Moreover, in both enactments the legislature recognized a serious problem that could not be adequately remedied by private enterprise alone. *Compare* N.C.G.S. § 160A-501(4) (providing that "the foregoing conditions are beyond remedy or control entirely by regulatory processes in the exercise of the police power and cannot be effectively dealt with by private enterprise under existing law without the additional aids herein granted"), *with Evans*, 359 N.C. at 55, 602 S.E.2d at 672 ("[T]hese conditions cannot be remedied by the ordinary operation of private enterprise . . . ." (quoting N.C.G.S. § 157-2(a))). Additionally, both the Urban Redevelopment Law and the Municipal Service District Act establish that downtown revitalization is—like the provision of low and moderate income housing under the Housing Authorities Law—in the public interest. *Compare* N.C.G.S. § 160A-502(3) (providing that "not only is it in the interest of the public health, safety, convenience and welfare to eliminate existing substandard areas of all types, but it is also in the public interest and less costly to the community to prevent the creation of new blighted areas or the expansion of existing blighted areas"), *and id.* § 160A-536(b) (providing that " 'downtown revitalization projects' are improvements, services, functions, promotions, and developmental activities intended to further the public health, safety, welfare, convenience, and economic well-being of the central city or downtown area"), *with Evans*, 359 N.C. at 55, 602 S.E.2d at 672 ("[T]he necessity for the provisions hereinafter enacted is hereby declared as a matter of legislative determination to be in the public interest." (quoting N.C.G.S. § 157-2(a))). We conclude that these provisions of the Urban Redevelopment Law and the Municipal Service District Act are statutory indications that an urban redevelopment project undertaken in accordance with these statutes and for the purpose of "promot[ing] the health, safety, and welfare of the inhabitants" of the State of North Carolina is a governmental function. N.C.G.S. § 160A-501; *see Williams*, 366 N.C. at 200, 732 S.E.2d at 141 (explaining that a municipality is "an agency of the sovereign" and engaged in a governmental function when it "is acting 'in behalf of the State' in promoting or protecting the health, safety, security, or general welfare of its citizens" (quoting *Britt*, 236 N.C. at 450, 73 S.E.2d at 293)).

[2] Nonetheless, as the Court of Appeals correctly recognized, the legislature has not deemed all urban redevelopment and downtown revitalization projects governmental functions that are immune from suit. Moreover, in *Williams* we recognized that even when the legislature has designated a general activity to be "a governmental function by statute, the question remains whether the specific [activity at issue], in this case

and under these circumstances, is a governmental function." 366 N.C. at 201, 732 S.E.2d at 142 (citation omitted). Thus, while the applicable statutory provisions are "clearly relevant," we conclude that the legislature has not "directly resolved" whether defendant's lease of 212 West Main Avenue to the Art Guild as part of its downtown revitalization efforts "is governmental or proprietary in nature," thus requiring us to examine "other factors [that] are relevant." *Id.* at 201-02, 732 S.E.2d at 142 (emphasis omitted).

The first of these additional factors inquires "if the undertaking is one in which only a governmental agency could engage," in which event "it is perforce governmental in nature." *Id.* at 202, 732 S.E.2d at 142 (emphasis omitted). Relevant to this consideration, although not dispositive, are the legislature's statements regarding the "economic or social liabilities" caused by "blighted areas," specifically "[t]hat the foregoing conditions are beyond remedy or control entirely by regulatory processes in the exercise of the police power and *cannot be effectively dealt with by private enterprise under existing law without the additional aids herein granted.*" N.C.G.S. § 160A-501(1), (2), (4) (emphasis added). Assuredly, this legislative finding does not preclude private entities from *engaging* in redevelopment projects and downtown revitalization activities, and a private entity could conceivably engage in the same activity as defendant did here. Thus, we cannot conclude that this legislative pronouncement is dispositive; that is, it does not render defendant's leasing of the property to the Art Guild in order to promote the arts for the purpose of urban redevelopment and downtown revitalization an "undertaking . . . in which ***only*** a governmental agency could *engage*." *Williams*, 366 N.C. at 202, 732 S.E.2d at 142 (second emphasis added). Nonetheless, we find the legislative determination that the *purposes* of urban redevelopment can be accomplished *only* when governmental agencies engage in such activities to be a relevant consideration under this factor, as well as another statutory indication that an activity undertaken for urban redevelopment and to promote the public interest is governmental in nature.

Because the particular activity here can be performed both publicly and privately, we consider "a number of additional factors," including "whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider." *Id.* at 202-03, 732 S.E.2d at 143 (footnotes omitted). Defendant argues that maintaining a historic and vacant building and leasing it to a nonprofit art guild is an undertaking that is not

traditionally provided by an entity other than a governmental agency or instrumentality. Yet, defendant has not pointed to any evidence or authority, nor are we aware of any, that supports this assertion.

We have evidence, however, of the fees charged and the costs incurred by defendant. Here the lease sets rental rates for the Art Guild's subtenants in a range of not more than $90.00 to $375.00 per month, of which 90% is paid to defendant. Furthermore, defendant receives 15% of all sales or commissions under the lease, and subtenants are required to provide additional consideration in the form of volunteer time, with a minimum of fifteen hours per month. For the 2013 fiscal year, defendant's revenues from the rent and sales or commissions amounted to $21.572.98. Defendant's expenditures for that year totaled $33,062.01, with the city's electric charges alone totaling $26,547.34. Thus, defendant netted a loss of $11,489.03 that year. Defendant's loss for the 2014 fiscal year was even greater, with defendant's revenues amounting to $21,935.57 and its expenditures totaling $40,008.13, netting defendant a loss of $18,072.56. In addition, Munn testified that defendant spent money on labor and overhead but did not include those items in its financial spreadsheet. Despite these losses, plaintiff asserts that defendant received "financial gain" and that defendant's financial spreadsheet reflects a "budget surplus," referring to the fact that defendant spent less than was budgeted for Arts on Main. But this "surplus" reflected in the spreadsheet would, if anything, seemingly support defendant's position because it demonstrates that defendant had budgeted for, and prepared to suffer, losses even greater than the considerable loss it actually incurred. As Munn testified, the city did not seek to make a profit from the lease with the Art Guild and "there's no profit in this operation." We conclude that the revenues received by defendant under the lease are not "substantial," particularly because such revenues were not designed even to "simply cover the operating costs of the service provider," nor did they do so in reality.[7] *Id.* at 202-03, 732 S.E.2d at 143.

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7. In reaching a different conclusion with respect to the revenues received by defendant, the Court of Appeals relied on *Glenn v. City of Raleigh*. In *Glenn*, which considerably predates our decision in *Williams*, the plaintiff was injured by a rock launched from a lawn mower being operated at Pullen Park, which was maintained by the defendant. *Id.* at 470-71, 98 S.E.2d at 914. It appears that the majority in *Glenn*, in reviewing the trial court's denial of a motion for nonsuit on the basis of governmental immunity, did not consider the defendant's evidence of the costs incurred in maintaining the park. *Id.* at 477, 98 S.E.2d at 919 ("Considering plaintiff's evidence in the light most favorable to him, and disregarding defendant's evidence which tends to establish another and a different state of facts, or which tends to impeach or contradict his evidence, which we are required to do on the motion for judgment of nonsuit, it is our opinion that the net revenue of $18,531.14 for the fiscal year 1 July 1952 to 30 June 1953 received by the city of Raleigh from the operation

Recognizing that the additional factors listed in *Williams* are not exhaustive, *id.* at 203, 732 S.E.2d at 143 ("[T]he distinctions between proprietary and governmental are fluid . . . . We therefore caution against overreliance on these four factors."), we also consider as relevant the particular and decidedly noncommercial nature of defendant's undertaking here. Art occupies a unique role in our society and our state, as evidenced by the legislature's tasking the Department of Natural and Cultural Resources in Chapter 143, Article 47 (Promotion of Arts), with various duties connected with promoting the arts in this state, including "[a]ssist[ing] local organizations and the community at large with needs, resources and opportunities in the arts" and "[a]ssist[ing] in bringing the highest obtainable quality in the arts to the State; promot[ing] the maximum opportunity for the people to experience, enjoy, and profit from those arts." N.C.G.S. § 143-406(2), (5) (2017).[8] Defendant's undertaking to promote the arts by bringing individual, local artists into the downtown area furthers these aims, which in turn dovetail with the overall goal of revitalizing the downtown area.

Plaintiff does not actually dispute that defendant's lease with the Art Guild for the purpose of promoting the arts was an earnest effort at redeveloping and revitalizing its downtown area or that defendant did not seek or obtain any profit from this activity. Rather, the thrust of plaintiff's argument is that case law dictates that the "lease of government property to third parties" is a proprietary function. This broad proposition is not supported by plaintiff's proffered authorities, none of which are binding on this Court. To the extent plaintiff relies upon this Court's decision in *Aaser v. City of Charlotte*, in which the Court held

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of Pullen Park for that period, which was used by the city for the capital maintenance of the park area, building items, paying salaries, buying fuel, etc., (the evidence that the $18,531.14 was spent in the amusement area only is the defendant's evidence), was such as to remove it, for the purposes of the consideration of a motion for judgment of nonsuit, from the category of incidental income, and to import such a corporate benefit or pecuniary profit or pecuniary advantage to the city of Raleigh as to exclude the application of governmental immunity." (citations omitted)). Whether or not the majority's decision to limit its review in this manner was procedurally correct, that is not the situation here, in which the trial court properly considered both parties' evidence on the motion for summary judgment—including defendant's evidence both of its revenue received and its costs incurred—in order to determine if there was a genuine issue of material fact.

8. The legislature also created the North Carolina Arts Council to assist the Department in this function, providing that the Council is to, *inter alia*, "advise the Secretary [of Natural and Cultural Resources] concerning assistance to local organizations and the community at large in the area of the arts" and "advise the Secretary in regard to bringing the highest obtainable quality in the arts to the State and promoting the maximum opportunity for the people to experience and enjoy those arts." N.C.G.S. § 143B-87(2), (5) (2017).

the activities at issue were proprietary, that case is easily distinguished. 265 N.C. 494, 144 S.E.2d 610 (1965). There we determined that "the holding of exhibitions and athletic events" at the defendant's hockey arena was "to produce revenue and [was] for the private advantage of the compact community," and therefore, the defendant was "engaging in a proprietary function when it operates such an arena, or leases it to the promoter of an athletic event, and when it operates refreshment stands in the corridors of the building for the sale of drinks and other items to the patrons of such an event." *Id.* at 497, 144 S.E.2d at 613 (citations omitted). Unlike here, the operation and leasing of the hockey arena was not an effort at revitalizing the defendant's downtown area, nor were there any relevant statutes indicating that the defendant's activity was governmental in nature, nor was there any discussion of the fees charged and whether they covered the defendant's operating costs. Furthermore, plaintiff's proposition would be contrary to our mandate that "the proper designation of a particular action of a county or municipality is a fact intensive inquiry . . . and may differ from case to case." *Williams*, 366 N.C. at 203, 732 S.E.2d at 143.

After careful consideration of all the factors set forth in *Williams*, we conclude that—in light of the statutory indications that urban redevelopment activities undertaken to promote the health, safety, and welfare of North Carolina citizens are governmental functions, and the legislative determination that urban blight "cannot be effectively dealt with by private enterprise" alone, as well as the uncontroverted evidence: that defendant's lease of the historic property to the nonprofit Art Guild in order to promote the arts in the downtown area was a valid urban redevelopment and downtown revitalization activity; that defendant did not seek to make a profit; and that the fees charged by defendant were not substantial and did not cover its operating costs—defendant's activity here in leasing the property to the Art Guild so as to promote the arts for the purpose of redeveloping and revitalizing the downtown area was a governmental function. Our decision should not be construed as holding that every urban redevelopment activity is a governmental function or even that every lease of historic property to a nonprofit arts group for the purpose of promoting the arts is a governmental function. Urban redevelopment and downtown revitalization activities defy straightforward definition, and such projects could seemingly cast a wide net encompassing a number of local government endeavors, many of which may be more commercial in nature or less geared towards remedying blighted areas and promoting the public interest than defendant's cooperative enterprise here with the Art Guild. We again emphasize that "the proper designation of a particular action of a county or municipality is

a fact intensive inquiry . . . and may differ from case to case." *Id.* at 203, 732 S.E.2d at 143; *see also id.* at 203, 732 S.E.2d at 143 ("[I]t does not follow that a particular activity will be denoted a governmental function even though previous cases have held the identical activity to be of such a public necessity that the expenditure of funds in connection with it was for a public purpose." (quoting *Sides v. Cabarrus Mem'l Hosp., Inc.*, 287 N.C. 14, 22, 213 S.E.2d 297, 302 (1975) (emphasis omitted))). Because we conclude that the trial court correctly determined that defendant was engaged in a governmental function, we reverse the decision of the Court of Appeals. Because the Court of Appeals determined that defendant was not entitled to governmental immunity, it did not address whether the trial court correctly ruled that defendant did not waive governmental immunity by purchasing liability insurance. We remand this case to the Court of Appeals to address that issue.

As a final matter, this Court allowed discretionary review of an issue raised by both parties—whether the Court of Appeals correctly determined that defendant is not entitled to summary judgment as a matter of law on the issue of plaintiff's contributory negligence. As to this issue, we hold that discretionary review was improvidently allowed.

REVERSED AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

STATE OF NORTH CAROLINA
v.
JAMES EDWARD ARRINGTON

No. 280A17

Filed 26 October 2018

Criminal Law—plea agreement—sentencing worksheet—stipulation to classification of prior second-degree murder

Where defendant, as part of a plea agreement, stipulated to a sentencing worksheet showing his prior offenses, including a second-degree murder conviction designated as a B1 offense, the Court of Appeals erred by holding that the stipulation to this type of second-degree murder was an improper legal stipulation. Defendant could properly stipulate to the facts surrounding his offense either by recounting the facts at the hearing or by stipulating to a general second-degree murder conviction that has a B1 classification.

Defendant's stipulation was an acknowledgement that that the factual basis of his conviction involved general second-degree murder—a B1 offense—not covered by the B2 exceptions.

Justice ERVIN dissenting.

Justices HUDSON and BEASLEY 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. ___, 803 S.E.2d 845 (2017), vacating a judgment entered on 14 September 2015 by Judge Alan Z. Thornburg in Superior Court, Buncombe County, setting aside defendant's plea agreement, and remanding the case for further proceedings. Heard in the Supreme Court on 14 March 2018.

Joshua H. Stein, *Attorney General*, *by Tracy Nayer*, *Assistant Attorney General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by James R. Grant*, *Assistant Appellate Defender*, *for defendant-appellee.*

NEWBY, Justice.

This case addresses whether, as part of a plea agreement, a defendant can stipulate on his sentencing worksheet that a second-degree murder conviction justified a B1 classification. A defendant may properly stipulate to prior convictions. Defendant here stipulated to the sentencing worksheet showing his prior offenses, one of which was a second-degree murder conviction designated as a B1 offense. In so stipulating, defendant acknowledged that the factual basis of his conviction involved general second-degree murder (a B1 classification) and did not implicate the exception for less culpable conduct involving an inherently dangerous act or omission or a drug overdose (a B2 classification). Nevertheless, a majority at the Court of Appeals held that the stipulation to this type of second-degree murder was an improper legal stipulation. Because defendant properly stipulated to the facts underlying his conviction and the conviction itself, comparable to his stipulating to his other offenses on the worksheet, the decision of the Court of Appeals is reversed.

On 14 September 2015, defendant entered into a plea agreement, which required him to plead guilty to assault with a deadly weapon

inflicting serious injury, felony failure to appear, and having attained habitual felon status. Under the plea agreement, which defendant read and signed, the State consolidated the felony failure to appear charge into the assault with a deadly weapon charge, dismissed a second count of attaining habitual felon status, and allowed defendant to be sentenced in the mitigated range. On the sentencing worksheet, defendant stipulated to multiple previous offenses, including breaking and entering and larceny, possession of drug paraphernalia, assault on a female, driving while impaired, and breaking and entering a motor vehicle, in addition to second-degree murder. As a part of the plea agreement, defendant also stipulated that his 1994 second-degree murder conviction was accurately designated as a B1 offense.

At defendant's sentencing hearing, the court read defendant's plea agreement, which, as noted above, defendant had read and signed:

> The Court: The prosecutor, your attorney and you have informed the Court that the following includes all the terms and conditions of your plea, and I will read the plea arrangement to you now.
>
> The defendant stipulates that he has 16 points and is a Level V for habitual felon sentencing purposes. The state agrees that 14 CRS 267 will be consolidated for sentencing purposes into 13 CRS 63727. The defendant will be sentenced as an habitual felon in the mitigated range and the state will dismiss the charge of obtaining the status of habitual felon in 15 CRS 624.
>
> So does that include all the terms and conditions of your plea?
>
> The Defendant: Yes, sir.

Soon thereafter, the following exchange occurred:

> [Prosecutor]: . . . would the defendant stipulate to a factual basis and allow the state to summarize?
>
> [Defense Counsel]: We will so stipulate.
>
> [Prosecutor]: And would he also stipulate to the contents of the sentencing worksheet that was prepared for habitual sentencing purposes showing him to be a Level V for –

> [Defense Counsel]: We will stipulate to the sentencing sheet.

Defense counsel then conceded, "There's nothing I can deny about Mr. [Arrington's] record, absolutely nothing." The State later referenced defendant's prior second-degree murder conviction, noting that "[defendant] killed a nine-year-old child, shot a nine-year-old child to death. . . . He ended up pleading guilty to second-degree murder . . . ." Defendant did not attempt to explain further the facts of the second-degree murder conviction. After hearing from both parties, the judge determined that defendant had attained habitual felon status and sentenced him in the mitigated range, as agreed.

A divided panel of the Court of Appeals vacated the trial court's judgment and set aside defendant's guilty plea, holding that defendant improperly stipulated to a matter of "pure legal interpretation." *State v. Arrington*, ___ N.C. App. ___, ___, 803 S.E.2d 845, 849 (2017). The Court of Appeals reasoned that, because the legislature divided second-degree murder into two classifications after the date of defendant's second-degree murder offense, determining the appropriate classification of the offense would be a legal question that is thus inappropriate as the subject of a stipulation between the parties. *Id.* at ___, 803 S.E.2d at 848. The Court of Appeals opined that the analysis required here paralleled comparing elements of an out-of-state offense to the corresponding elements of a North Carolina offense, which this Court has determined to be an improper subject of a stipulation. *Id.* at ___, 803 S.E.2d at 849 (citing *State v. Sanders*, 367 N.C. 716, 766 S.E.2d 331 (2014)).

The dissent argued that defendant's stipulation to the second-degree murder conviction listed on his sentencing worksheet did not constitute an improper stipulation of law. *Id.* at ___, 803 S.E.2d at 852 (Berger, J., dissenting). The dissent asserted that, while the trial court must make the legal determination of defendant's prior record level, a defendant may stipulate to the existence of prior convictions and their classifications, which is what defendant did here. *Id.* at ___, 803 S.E.2d at 852. Thus, the dissent would have affirmed the trial court's judgment. *Id.* at ___, 803 S.E.2d at 852-53. The State filed notice of appeal based on the dissenting opinion.

Every criminal conviction involves facts (i.e., what actually occurred) and the application of the law to the facts, thus making the conviction a mixed question of fact and law. In a jury trial the judge instructs jurors on the law, and the jury finds the facts and applies the law. Similarly, in a guilty plea trial counsel summarizes the facts,

and the judge determines whether the facts support a conviction of the pending charge. Consequently, when a defendant stipulates to a prior conviction on a worksheet, the defendant is admitting that certain past conduct constituted a stated criminal offense. It is well settled that a defendant can stipulate to a prior conviction, even though the prior conviction itself involved a mixed question of fact and law. While the statutory classification of this prior conviction is a legal determination, its classification is fact driven. Relying on a defendant's past criminal history, the trial court determines the range of sentence.

Here the crime of second-degree murder has two potential classifications, B1 and B2, depending on the facts of the murder. By stipulating that the former conviction of second-degree murder was a B1 offense, defendant properly stipulated that the facts giving rise to the conviction fell within the statutory definition of a B1 classification. Like defendant's stipulation to every other offense listed in the worksheet, defendant's stipulation to second-degree murder showed that he stipulated to the facts underlying the conviction and that the conviction existed. While defendant does not challenge the other stipulations as improper, he contends he could not legally stipulate that his prior second-degree murder conviction constituted a B1 felony.

"The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court . . . finds to have been proved in accordance with this section." N.C.G.S. § 15A-1340.14(a) (2017). "The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction." *Id.* § 15A-1340.14(f) (2017). The State may prove a prior conviction exists by (1) "[s]tipulation of the parties"; (2) "[a]n original or copy of the court record of the prior conviction"; (3) "[a] copy of records maintained by the Department of Public Safety, the Division of Motor Vehicles, or of the Administrative Office of the Courts"; or (4) "[a]ny other method found by the court to be reliable." *Id.* After the trial court determines the total number of prior record points a defendant has accumulated, the court utilizes N.C.G.S. § 15A-1340.14(c) to establish the prior record level based on the total record points the defendant has accrued.

Before 2012 all second-degree murders were classified at the same level for sentencing purposes. *See* Act of June 28, 2012, ch. 165, sec. 1, 2011 N.C. Sess. Laws (Reg. Sess. 2012) 781, 782. In the 2012 amendments, however, the legislature assigned culpability to convicted offenders depending upon the nature of their conduct at the time of the homicide

resulting in their second-degree murder convictions and the intent with which they acted at that time. *See also* ch. 165, pmbl., 2011 N.C. Sess. Laws (Reg. Sess. 2012) at 781. The version of the statute applicable here states:

> (b) . . . Any person who commits second degree murder shall be punished as a Class B1 felon, *except* that a person who commits second degree murder shall be punished as a Class B2 felon in either of the following circumstances:
>
> (1) The malice necessary to prove second degree murder is based on an inherently dangerous act or omission, done in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief.
>
> (2) The murder is one that was proximately caused by the unlawful distribution of [controlled substances], and the ingestion of such substance caused the death of the user.

N.C.G.S. § 14-17(b)(1)-(2) (2015) (emphasis and brackets added).

While the second-degree murder classifications changed, second-degree murder remained a single offense with the same elements and definition. Second-degree murder is defined as "(1) the unlawful killing, (2) of another human being, (3) with malice, but (4) without premeditation and deliberation." *State v. Coble*, 351 N.C. 448, 449, 527 S.E.2d 45, 47 (2000) (citations omitted). Malice may be shown in at least three different ways: (1) actual malice, meaning "hatred, ill-will or spite"; (2) an inherently dangerous act "done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief"; or (3) " 'that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification.' " *State v. Reynolds*, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982) (quoting *State v. Foust*, 258 N.C. 453, 458, 128 S.E.2d 889, 893 (1963)).

Given the consistent definition of second-degree murder and the 2012 amendments to N.C.G.S. § 14-17, the text of the statute indicates the legislature's intent to elevate second-degree murder to a B1 offense, except in the two limited factual scenarios when the second-degree murder stems from either an inherently dangerous act or omission or a drug

overdose. *See id.* § 14-17(b) ("Any person who commits second degree murder shall be punished as a Class B1 felon, *except* that a person who commits second degree murder shall be punished as a Class B2 felon . . . ." (emphasis added)); *see also State v. Lail*, ___ N.C. App. ___, ___, 795 S.E.2d 401, 408 (2016) ("The plain language of [N.C.G.S. § 14-17] . . . indicates clearly that the legislature intended to increase the sentence for second-degree murder to Class B1 and to retain Class B2 punishment only where either statutorily defined situation exists."), *disc. rev. denied*, 369 N.C. 524, 796 S.E.2d 927 (2017). Thus, the legislature distinguishes between second-degree murders that involve an intent to harm (actual malice or the intent to take a life without justification) versus the less culpable ones that involve recklessness (an inherently dangerous act or omission) or a drug overdose. Generally, a second-degree murder conviction is a B1 offense, *see* N.C.G.S. § 14-17(b), which receives nine sentencing points, *see id.* § 15A-1340.14(b)(1a) (2017). The exception arises when it is shown that the facts of the murder meet one of the statutory exceptions, thereby making the murder a B2 offense, which receives six points for sentencing purposes. *See id.* § 15A-1340.14(b)(2) (2017).

It is undisputed that the State may prove a prior offense through stipulation of the parties. *See id.* § 15A-1340.14(f). This proof by stipulation necessarily includes the factual basis and legal application to the facts underlying the conviction. Once a defendant makes this stipulation, the trial court then makes a legal determination by reviewing the proper classification of an offense so as to calculate the points assigned to that prior offense. Thus, like a stipulation to any other conviction, when a defendant stipulates to the existence of a prior second-degree murder offense in tandem with its classification as either a B1 or B2 offense, he is stipulating that the facts underlying his conviction justify that classification.

Here defendant could properly stipulate to the facts surrounding his offense by either recounting the facts at the hearing or by stipulating to a general second-degree murder conviction that has a B1 classification. Either method of stipulating would allow the trial judge to determine the proper classification of the offense, calculate the total number of points assigned to defendant's prior convictions, and designate defendant's appropriate offender level. By stipulating to the worksheet, defendant simply agreed that the facts underlying his second-degree murder conviction, of which he was well aware, fell within the general B1 category because the offense did not involve either of the two factual exceptions recognized for the B2 classification. *See id.* § 14-17; *see also*

N.C.P.I. – Crim. 206.30A (June 2014) (instructing the jury to determine, as a question of fact, whether malice exists, including the types of malice that dictate whether conduct is a B1 offense). Defendant's factual stipulation then allowed the trial judge to properly classify the offense as B1.

The pertinent facts underlying defendant's second-degree murder conviction are helpful in understanding why he would stipulate that his conviction fell within the standard second-degree murder category. This Court in *State v. Pickens*, 335 N.C. 717, 440 S.E.2d 552 (1994), thoroughly recounted the facts leading to defendant's plea to second-degree murder.[1] In 1991 a jury originally convicted defendant of first-degree murder based on the felony murder rule. The murder arose from a lengthy, heated, and volatile situation. Defendant assaulted his then-girlfriend, Robinson, who called the police and subsequently obtained an arrest warrant. *Id.* at 718-19, 440 S.E.2d at 553. Thereafter, defendant returned to Robinson's apartment and again assaulted her. *Id.* at 719, 440 S.E.2d at 553. At that point, a fight broke out between defendant and Cannady, a man helping move defendant's items out of the apartment, and both men were injured. *Id.* at 719, 440 S.E.2d at 553. Robinson, Cannady, and several others fled to a relative's apartment in the same complex. *Id.* at 719, 440 S.E.2d at 553. The State presented evidence that defendant and his half-brother, Pickens, were both armed and pursued the others. Once the others were inside the second apartment, Robinson looked out a window and saw defendant. Thereafter, two shots came through the window, one of which struck and killed Robinson's young daughter. *Id.* at 719, 440 S.E.2d at 553.

Defendant and Pickens were jointly tried for the murder. *Id.* at 718, 440 S.E.2d at 552-53. Neither defendant nor Pickens contended that the incident resulted from a random shooting, but they instead accused each other of firing the fatal shot. *Id.* at 724, 440 S.E.2d at 556. After defendant was convicted of first-degree murder, this Court granted him a new trial upon concluding that the charges against him were erroneously joined with charges against the other defendant. *See id.* at 728-29, 440 S.E.2d at 559. On remand, defendant pled guilty to second-degree murder based on the same facts. These relevant facts, of which defendant was intimately aware, indicate that his conduct fell within the usual

1. The complete name of this case is *State of North Carolina v. Charles L. Pickens, Jr., and James Edward Arrington*. Pickens and defendant were jointly tried for the murder, and they are half-brothers.

B1 second-degree murder classification and do not support either of the limited factual exceptions recognized in the B2 classification.[2]

Moreover, taking into account the customarily fast pace of a plea sentencing hearing, a common sense reading of the exchange between the parties at trial shows that defendant's stipulation was to the nature of his conduct, which met the requirements of the B1 classification for second-degree murder not covered by the B2 exceptions. Stipulations of prior convictions, including the facts underlying a prior offense and the identity of the prior offense itself, are routine; for instance, defendant here stipulated to numerous other prior convictions and does not contend that those stipulations are improper. Nothing suggests the trial court did not accept defendant's stipulation here to likewise be a standard one that was, as a matter of course, linked to the facts surrounding his second-degree murder conviction.

Because defendant, the person most familiar with the facts surrounding his offense, stipulated to the factual basis for his 1994 second-degree murder conviction, this Court need not require a trial court to pursue further inquiry or make defendant recount the facts during the hearing. *See Sanders v. Ellington*, 77 N.C. 255, 256 (1877) ("When the parties to an action agree upon a matter of fact, they are bound by it, and it is not the duty of the judge to interfere, for he is presumed to be ignorant of the facts. When the parties agree upon a matter of law, they are not bound by it, and it is the duty of the judge to interfere and correct the mistake, if there be one, as to the law, for he is presumed to know the law . . . ."). It is presumed that defense counsel knew the law and advised defendant about the listed offenses when reviewing the plea agreement before defendant accepted the agreement. *See Turner v. Powell*, 93 N.C. 341, 343 (1885) ("It is presumed that [counsel] knew the law and advised his client correctly . . . ."). Further, it is evident that the trial court was satisfied to exercise its authority to accept the parties' stipulation regarding prior offenses as a part of the court's acceptance of the plea arrangement. If the trial court had concern about the nature of the second-degree murder stipulation in light of the date of conviction, the court would have inquired further.

Our analysis here is consistent with that of the Court of Appeals in *State v. Wingate*, 213 N.C. App. 419, 713 S.E.2d 188 (2011), in which that

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2. Whether Robinson's daughter was the intended target is irrelevant because the malice with which defendant acted "follows the bullet." *See State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971) (quoting 40 Am. Jur. 2d *Homicide* § 11, at 303 (1968)).

court upheld a stipulation to a particular classification of a crime arising under a statute having two possible classifications. The defendant in *Wingate* stipulated to a sentencing worksheet stating he had previously been convicted of one count of conspiracy to sell or deliver cocaine and two counts of selling or delivering cocaine, all of which were designated on the worksheet as Class G felonies. *Id.* at 420, 713 S.E.2d at 189. Though prohibited under the same criminal statute, selling cocaine constitutes a Class G felony and delivering cocaine constitutes a Class H felony. On appeal the defendant argued that his stipulation to the Class G classification constituted an improper stipulation of law. *Id.* at 420, 713 S.E.2d at 189-90. The Court of Appeals rejected the defendant's argument, holding that "the class of felony for which defendant was previously convicted was a question of fact, to which defendant could stipulate." *Id.* at 420, 713 S.E.2d at 190. In doing so, the Court of Appeals recognized that the defendant stipulated to a question of fact: that he was convicted of the offense under a theory of *selling* cocaine. *Id.* at 421, 713 S.E.2d at 190. Just as the classifications in *Wingate* involved a question of fact to which the defendant could properly stipulate, defendant here could properly stipulate that the facts underlying his second-degree murder conviction justified its classification as a B1 offense.

In sum, defendant's stipulation here is properly understood to be a stipulation to the facts of his prior offense and that those facts supported its B1 classification. The trial court duly accepted the stipulation. Therefore, the decision of the Court of Appeals vacating the trial court's judgment and setting aside defendant's plea agreement is reversed, and the Court of Appeals is instructed to reinstate the judgment of the trial court.

REVERSED.

Justice ERVIN dissenting.

As a result of its determination that "[d]efendant properly stipulated to the facts of his prior offense and that those facts supported its B1 classification," the Court has decided that the trial court properly classified defendant's prior second-degree murder conviction as a Class B1, rather than a Class B2, felony for purposes of calculating defendant's prior record level based upon the parties' stipulation. In view of my belief that the classification of defendant's prior second-degree murder conviction as a Class B1 felony required the making of a legal determination and that the record presented for our review in this case lacks any support for the trial court's determination to classify defendant's prior

second-degree murder conviction as a Class B1 felony other than the parties' stipulation, I believe that the Court of Appeals correctly held that the trial court erred in the course of calculating defendant's prior record level. As a result, I respectfully dissent from the Court's decision in this case.

As the record clearly reflects, defendant entered a plea of guilty to second-degree murder on 1 July 1994. At the time that defendant was convicted of second-degree murder, all second-degree murders were classified in the same manner for sentencing purposes. In 2012, the General Assembly modified the manner in which the offense of second-degree murder was classified for sentencing purposes, with a judge sentencing a defendant who has been convicted of second-degree murder being required to decide whether the defendant should be sentenced as a Class B1 felon or a Class B2 felon, with that determination hinging upon the type of malice with which the defendant acted at the time that he committed the murder and whether the murder proximately resulted from the distribution of certain controlled substances.

On 14 September 2015, defendant entered a guilty plea to a number of new offenses committed in 2013, resulting in the entry of the judgment that is at issue in this case. At the time that defendant was sentenced for these new convictions, the trial court had to determine defendant's prior record level which, in turn, required the trial court to determine how many prior record points should be assigned to defendant's 1994 second-degree murder conviction. In order to make that determination, the trial court was required to decide whether defendant's second-degree murder conviction should be classified as a Class B1 or a Class B2 felony, with that decision necessarily resting upon a determination of the type of malice with which defendant acted at the time that he committed the second-degree murder for which he was convicted in 1994 given the absence of any indication in the record that defendant's second-degree murder conviction in any way resulted from the distribution of opium, cocaine, or methamphetamine.[1] As I read the record,

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1. According to well-established North Carolina law, "there are at least three kinds of malice," including "a positive concept of express hatred, ill-will or spite, sometimes called actual, express, or particular malice"; "when an act which is inherently dangerous to human life is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief"; and "that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification." *State v. Reynolds*, 307 N.C. 184, 191, 297 S.E.2d 532, 536 (1982) (first citing *State v. Benson*, 183 N.C. 795, 799, 111 S.E. 869, 871 (1922), *disapproved in part on other grounds by State v. Phillips*, 264 N.C. 508, 516, 142 S.E.2d 337, 342 (1965); then

the only basis upon which the trial court could have made this determination was the parties' stipulation that defendant's prior second-degree murder conviction should be assigned nine, rather than six, prior record points for purposes of calculating defendant's prior record level.

As a general proposition, "stipulations as to matters of law are not binding upon courts." *State v. McLaughlin*, 341 N.C. 426, 441, 462 S.E.2d 1, 8 (1995) (citations omitted), *cert. denied*, 516 U.S. 1133, 116 S. Ct. 956, 133 L. Ed. 2d 879 (1996); *see also State v. Fearing*, 315 N.C. 167, 174, 337 S.E.2d 551, 555 (1985) (stating that the trial court erred by accepting the parties' stipulation that a child was not competent to testify as a witness given the trial court's failure to make an independent competency evaluation based upon a personal evaluation of the child); *State v. Phifer*, 297 N.C. 216, 226, 254 S.E.2d 586, 591 (1979) (stating that this Court was not bound by the State's stipulation that investigating officers lacked probable cause to suspect that contraband would be found in the glove compartment in a defendant's motor vehicle given "[t]he general rule" that "stipulations as to the law are of no validity" (first citing *Quick v. United Benefit Life Ins. Co.*, 287 N.C. 47, 56-57, 213 S.E.2d 563, 569 (1975); then citing *In re Edmundson*, 273 N.C. 92, 97, 159 S.E.2d 509, 513 (1968); then citing *U Drive It Auto Co. v. Atl. Fire Ins. Co.*, 239 N.C. 416, 419, 80 S.E.2d 35, 38 (1954); then citing *Moore v. State*, 200 N.C. 300, 301, 156 S.E. 806, 807 (1931); and then citing *Sanders v. Ellington*, 77 N.C. 255, 256 (1877) (stating that, "[w]hen the parties agree upon a matter of law, they are not bound by it, and it is the duty of the judge to interfere and correct the mistake, if there be one, as to the law, for he is presumed to know the law, and it is his province to declare it"))).

For better or worse, the difference between a matter of fact and a matter of law is not always clear. *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (stating that "[t]he classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult"). On the one hand, "[f]acts are things in space and time that can be objectively ascertained by one or more of the five senses or by mathematical calculation" and, "in turn, provide the bases for conclusions." *State ex rel. Utils. Comm'n v. Pub. Staff*, 322 N.C. 689, 693, 370 S.E.2d 567, 570 (1988) (citing *State ex rel. Utils. Comm'n v. Eddleman*, 320 N.C. 344, 351, 358 S.E.2d 339, 346 (1987)). On the other hand, "any determination requiring the exercise of judgment or the application of

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citing *State v. Wilkerson*, 295 N.C. 559, 578, 247 S.E.2d 905, 916 (1978); and then quoting *State v. Foust*, 258 N.C. 453, 458, 128 S.E.2d 889, 893 (1963) (quoting *Benson*, 183 N.C. at 799, 111 S.E. at 871)).

legal principles is more properly classified a conclusion of law." *State v. Sparks*, 362 N.C. 181, 185, 657 S.E.2d 655, 658 (2008) (quoting *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675 (first citing *Plott v. Plott*, 313 N.C. 63, 74, 326 S.E.2d 863, 870 (1985); then citing *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 657-58 (1982))). As a result, a valid stipulation must concern "things in space and time that can be objectively ascertained by one or more of the five senses," *Utils. Comm'n v. Pub. Staff*, 322 N.C. at 693, 370 S.E.2d at 570, rather than a "determination requiring the exercise of judgment or the application of legal principles," *Sparks*, 362 N.C. at 185, 657 S.E.2d at 658 (quoting *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675).

A determination of the type of malice with which defendant acted at the time that he committed the killing that led to his 1994 conviction for second-degree murder required the sentencing judge to ascertain both what the defendant did and the legal effect of the defendant's actions. Although the first of these two determinations, which requires an examination of what happened in space and time, is a factual one, the second will, in at least some circumstances, require the sentencing judge to make a legal determination as to what the available factual evidence suggests that the theory of guilt that led to the defendant's conviction would have been. In view of the fact that there has been no prior determination of the theory of malice upon which defendant's second-degree murder conviction rested in this case, the trial court's decision concerning the manner in which defendant's second-degree murder conviction should be classified for the purpose of calculating his prior record level in this case necessarily requires both a factual and a legal determination, with the former being something to which the parties could properly stipulate and the latter being something to which they could not properly stipulate.

As the Court notes, the parties to a criminal action may stipulate to the fact that the defendant had previously been convicted of a criminal offense. N.C.G.S. § 15A-1340.14(f)(1)(2017). Although "conviction" is not statutorily defined in or for purposes of N.C.G.S. 15A-1340.14, that term is ordinarily understood as "the ascertainment of the defendant's guilt by some known legal mode, whether by confession in open court or by the verdict of a jury." *Smith v. Thomas*, 149 N.C. 100, 101, 62 S.E. 772, 773 (1908) (citations omitted); *see also Conviction*, *Black's Law Dictionary* (10th ed. 2014) (defining "conviction" as "[t]he act or process of judicially finding someone guilty of a crime; the state of having been proved guilty" or "[t]he judgment (as by a jury verdict) that a person is guilty of a crime"). Thus, the "conviction" to which a defendant is

entitled to stipulate in accordance with N.C.G.S. § 15A-1340.14(f)(1) is the fact that he or she had been judicially determined to have committed a specific offense rather than the body of factual information underlying that conviction. Although a determination that a defendant has been judicially determined to have committed a specific offense is, in almost all instances, sufficient to permit a subsequent sentencing judge to determine precisely how many prior record points should be assigned to that defendant based upon that prior conviction, the 2012 amendments to N.C.G.S. § 14-17(b) providing for the classification of certain second-degree murders as Class B1 felonies and other second-degree murders as Class B2 felonies preclude a trial judge from determining how many prior record points should be assigned to a defendant based solely upon the fact that he or she had a prior second-degree murder conviction given that such convictions result in the assignment of different numbers of prior record points depending upon whether the conduct that resulted in the defendant's conviction was encompassed within N.C.G.S. § 14-17(b)(1) or N.C.G.S. § 14-17(b)(2). Although defendant could have properly stipulated to the facts necessary to make the required determination concerning the extent to which his prior second-degree murder conviction was for a Class B1 or a Class B2 felony, the record does not reflect that he ever did so. Instead, the parties simply stipulated to the legal conclusion that defendant's conduct should be treated as coming within the confines of N.C.G.S. § 14-17(b)(1) rather than N.C.G.S. § 14-17(b)(2). For that reason, I am unable to avoid the conclusion that the trial court's decision to classify defendant's prior second-degree murder conviction as a Class B1, rather than a Class B2, felony rested solely upon an acceptance of the parties' legal determination that various facts never presented for the trial court's consideration by stipulation or otherwise sufficed to establish that defendant's conduct was described in N.C.G.S. § 14-17(b)(1), rather than N.C.G.S. § 14-17(b)(2), instead of resting upon an independent analysis of the applicable facts in light of the relevant legal principles. As a result, I am also unable to avoid the conclusion that the trial court's decision to assign nine, rather than six, prior record points to defendant's conviction rested upon an unlawful stipulation to a matter of law.[2]

2. Although the Court treats a second-degree murder conviction as presumptively being a Class B1 felony, the fact that the State has the burden of proving that a particular prior conviction exists, N.C.G.S. § 15A-1340.14(f)(2017) (providing that "[t]he State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists"), compels the conclusion that any failure on the part of the State to establish that a defendant's second-degree murder conviction should be treated as a Class B1 felony requires that the relevant second-degree murder conviction be treated as a Class B2 felony for the purpose of calculating the defendant's prior record level.

In reaching a contrary conclusion, the Court asserts that defendant's stipulation that his second-degree murder conviction should be classified as a Class B1, rather than a Class B2, felony is "like a stipulation to any other conviction" and notes that defendant "does not challenge the other five stipulations [to prior convictions] as improper." Although the parties to a criminal action are clearly authorized to stipulate to the fact that the defendant has previously been convicted of a particular criminal offense, N.C.G.S. § 15A-1340.14(f)(1), and while the parties to this case did properly stipulate to the existence of all the other convictions reflected upon the prior record worksheet submitted for the trial court's consideration, the classification of defendant's other convictions did not necessitate a legal determination like the one required to determine whether defendant's second-degree murder conviction should be classified as a Class B1 or a Class B2 felony. As a result, the fact that the parties to this case were entitled to stipulate to defendant's other convictions sheds little light on their ability to stipulate to the manner in which defendant's second-degree murder should be treated for prior record level calculation purposes given that, in the aftermath of the 2012 amendments to N.C.G.S. § 14-17(b), the mere fact that the defendant has been convicted of second-degree murder, standing alone, does not answer the question of how many prior record points should be attributed to that conviction. Simply put, the parties' stipulation that defendant's second-degree murder conviction should be treated as a Class B1, rather than a Class B2, felony is simply not like other stipulations to the effect that a defendant has been convicted of a particular offense and should not be treated as such.

In reversing the Court of Appeals' decision, the Court essentially concludes that the trial court was entitled to accept the parties' stipulation to the number of prior record points that should be assigned to defendant's second-degree murder conviction on the theory that a defendant who stipulates to having been convicted of a particular offense also stipulates to the facts underlying that conviction. In other words, the Court evidently believes that a defendant who stipulates to the manner in which his or her prior second-degree murder conviction should be classified for prior record level calculation purposes effectively stipulates to the existence of facts sufficient to support a determination that his or her conviction should be classified as either a Class B1 or a Class B2 felony, making it a "factual stipulation" that "allowed the trial judge to properly classify the offense as B1." Aside from the fact that the Court has not cited any authority in support of this expansive definition of a "conviction" as that term in used in N.C.G.S. § 15A-1340.14 or explained why this approach is consistent with the manner in which that term

has been utilized in this Court's precedent, it is difficult for me to see what sort of stipulation would not qualify as a stipulation of fact under the Court's logic or how the Court's decision can be squared with this Court's holdings in cases like *Fearing*, 315 N.C. at 174, 337 S.E.2d at 55 (prohibiting a trial judge from accepting the parties' stipulation that a particular child was competent to testify as a witness); *Phifer*, 297 N.C. at 226, 254 S.E.2d at 591 (stating that the trial court was not bound by the State's stipulation that investigating officers lacked probable cause to believe that contraband was located in a particular automobile); *Quick*, 287 N.C. at 56-57, 213 S.E.2d at 569 (stating that the trial court was not bound by any stipulation that defendant was a "slayer" for purposes of N.C.G.S. § 31A-3(3)); and *In re Edmundson*, 273 N.C. at 97, 159 S.E.2d at 513 (rejecting the parties' stipulation to the effect "[t]hat the agreed statement of facts stipulated herein are all of the facts necessary for the court to make its decision"). As a result, the logic upon which the Court's decision to reverse the Court of Appeals' decision in this case rests does not strike me as persuasive.

I am equally unpersuaded by the Court's reliance upon the decision of the Court of Appeals in *State v. Wingate*, 213 N.C. App. 419, 713 S.E.2d 188 (2011), which upheld the parties' stipulation that defendant had been convicted for selling, as compared to delivering, cocaine. *See* N.C.G.S. § 90-95(b)(1) (2009) (providing that "any person who violates G.S. 90-95(a)(1) with respect to . . . [a] controlled substance . . . shall be punished as a Class H felon, except . . . the sale of a controlled substance classified in Schedule I or II shall be punished as a Class G felony"); *see also State v. Creason*, 313 N.C. 122, 129, 326 S.E.2d 24, 28 (1985) (observing that "the *sale* of narcotics and the *delivery* of narcotics are separate offenses" (citing *State v. Dietz*, 289 N.C. 488, 223 S.E.2d 357 (1976)).[3] Aside from the fact that it is not binding upon this Court, *Wingate* did nothing more than reiterate the longstanding principle that a defendant

3. Admittedly, this Court did state in *State v. Moore*, 327 N.C. 378, 382, 395 S.E.2d 124, 127 (1990), that, "by the statutory language at issue here the legislature has made it *one criminal offense* to 'sell or deliver' a controlled substance under N.C.G.S. § 90-95(a)(1)." On the other hand, after acknowledging the language from *State v. Creason* quoted in the text of this opinion, we stated that *Creason*, 313 N.C. at 129, 326 S.E.2d at 28, and *State v. Dietz*, 289 N.C. 488, 498, 223 S.E.2d 357, 364 (1976) (stating that "the two acts could have been *charged* as separate offenses" (emphasis added)), did "not mandate the conclusion that a defendant may also be *convicted* for two offenses in such situations." *Moore*, 327 N.C. at 382, 395 S.E.2d at 127 (emphasis omitted). As a result, our cases addressing this issue, when harmonized with each other, indicate that, while the sale and delivery of a controlled substance are separate offenses, a defendant cannot be separately convicted of and sentenced for the sale and delivery of the same controlled substance consistent with the relevant legislative intent.

can stipulate that he or she had been convicted of a particular offense at some point in the past. Thus, *Wingate* has no bearing upon the proper resolution of this case, which revolves around a determination of the identity of the theory under which defendant was convicted of second-degree murder rather than the identity of the crime that defendant was previously convicted of having committed.

In addition to concluding that the stipulation upon which the trial court based its prior record level determination was factual rather than legal in nature, the Court conducts an independent factual analysis based upon the information contained in this Court's decision overturning defendant's original first-degree murder conviction in order to determine that defendant's second-degree murder conviction should be classified as a Class B1, rather than a Class B2, felony for purposes of calculating defendant's prior record level and that defendant had ample justification for believing that his second-degree murder conviction reflected his guilt of a Class B1, rather than a Class B2, felony. According to the Court, "defendant pled guilty to second-degree murder based on the same facts" and "[t]hese relevant facts, of which defendant was intimately aware, indicate that defendant's conduct fell within the [B1] second-degree murder classification." Aside from my concern that this portion of the Court's analysis could be construed as appellate fact-finding, the record contains no indication that the information upon which the Court relies in making this determination was ever presented to the trial court, which acts as the fact-finder in structured sentencing proceedings.[4] As a result, I do not believe that the Court's independent evaluation of material that does not appear in the record that has been presented for our review in this case provides any basis for upholding the trial court's decision to treat defendant's prior second-degree murder conviction as a Class B1, rather than a Class B2, felony for the purpose of calculating defendant's prior record level.

Thus, the trial court's decision to classify defendant's prior second-degree murder conviction as a Class B1, rather than a Class B2, felony necessarily rested upon an acceptance of the parties' legal determination that various facts never presented for the trial court's consideration

4. Admittedly, the prosecutor did state in the course of her sentencing argument that defendant had "killed a nine-year-old child, shot a nine-year-old child to death" and that defendant had entered a plea of "guilty to second-degree murder" after this Court reversed his first-degree murder conviction. However, the statement in question does not constitute evidence and defendant never took any action that can be construed as a stipulation to the accuracy of that statement.

by stipulation or otherwise sufficed to establish that defendant's conduct was encompassed in N.C.G.S. § 14-17(b)(1), rather than N.C.G.S. § 14-17(b)(2), instead of upon an independent analysis of the factual information presented for the court's consideration at defendant's sentencing hearing in light of the applicable legal principles. For that reason, the trial court's determination that defendant's second-degree murder conviction should be assigned nine, rather than six, points for the purpose of calculating defendant's prior record level rests solely upon an acceptance of the parties' stipulation to a matter of law, an action which this Court has repeatedly held that trial judges lack the authority to take. As a result, I respectfully dissent from my colleagues' decision to reverse the Court of Appeals' decision and would, instead, affirm the Court of Appeals' decision to vacate defendant's guilty plea and remand this case for further proceedings in the trial court.

Justices HUDSON and BEASLEY join in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
JUSTIN DEANDRE BASS

No. 208A17

Filed 26 October 2018

1. Criminal Law—instructions—self-defense—stand your ground

The trial court erred by omitting the relevant stand-your-ground language from the jury instructions delivered at a trial in which defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury. The trial court concluded that the "no duty to retreat" instruction did not apply because defendant was not in his home or place of residence, workplace, or car. An individual who is lawfully located may stand his ground and defend himself from attack when he reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself or another. A defendant entitled to any self-defense instruction is entitled to a complete self-defense instruction, which includes the stand-your-ground provision.

2. Evidence—victim's character—violent conduct—specific instances

The trial court did not err in an assault prosecution by excluding specific instances of the victim's violent conduct offered to prove that he was the first aggressor on the night he was shot. Character is not an essential element of self-defense; to show that he acted in self-defense, a defendant must show that his victim was the aggressor but need not prove that the victim was a violent or aggressive person. N.C. Rule of Evidence 405 limits the use of specific instances of past misconduct to cases in which character is an essential element of the charge, claim, or defense.

3. Criminal Law—continuance—development of inadmissible evidence

The trial court properly denied a motion for a continuance where the motion was for the purpose of further developing evidence that would have been inadmissible at trial.

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 477 (2017), awarding defendant a new trial after appeal from a judgment entered on 19 December 2014 by Judge Paul C. Ridgeway in Superior Court, Wake County. Heard in the Supreme Court on 28 August 2018.

Joshua H. Stein, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State-appellant.

Lisa Miles for defendant-appellee.

BEASLEY, Justice.

In this case we consider whether the Court of Appeals erred in holding that the trial court committed prejudicial error by (1) omitting the relevant stand-your-ground language from jury instructions on self-defense, (2) excluding evidence at trial of specific incidents of the victim's violent past conduct, and (3) denying defendant's motion to continue. For the reasons stated below, we hold that the Court of Appeals erred with regard to the second and third issues. Accordingly, we affirm in part and reverse in part the decision of the Court of Appeals and remand this case for further proceedings.

On 4 July 2014, defendant Justin Deandre Bass and Jerome Fogg, the victim, engaged in a verbal altercation, which escalated to the point

that defendant shot Fogg, severely injuring him. The night of the shooting was not defendant's first run in with Fogg. Defendant and Fogg first met just two weeks before, on 23 June 2014, when Fogg instigated a fight with defendant. Defendant's and Fogg's accounts of the night they first met and the night defendant shot Fogg differ substantially.

23 June 2014 – Fogg Beats Defendant

On 23 June 2014, defendant encountered Fogg on the grounds of the Bay Tree Apartments in Raleigh, where defendant lived. According to Fogg, defendant began making disrespectful comments about Fogg. After ignoring the comments for some time, Fogg confronted defendant, who then said that he was, like Fogg, a member of the Piru Blood gang. When Fogg attempted to initiate the Piru handshake with defendant, defendant was unable to perform the correct gestures. Fogg asked defendant additional questions to determine if he was truly a Piru member, and when he was satisfied that defendant's claim was true, taught defendant the handshake. The men went their separate ways for a short time, but according to Fogg, defendant continued to speak about him in a disrespectful manner. When Fogg again confronted defendant, defendant pulled his pants up and raised his hands—gestures that implied to Fogg that defendant wanted to fight. Fogg obliged by throwing the first punch.

Defendant also testified at trial about the night he first met Fogg. According to defendant, he was celebrating his birthday by drinking vodka in the parking lot of the Bay Tree Apartments when Fogg approached him and demanded that he perform the Piru handshake, which he was unable to do. Fogg left and returned a short time later, again demanding that defendant perform the handshake. When defendant could not, Fogg immediately punched him in the nose. Defendant testified that he never made disrespectful comments or gestures toward Fogg and that he never hit Fogg back. Fogg beat defendant severely, breaking his jaw in three places and landing one blow powerful enough to cause defendant to "fly through the air and roll." Defendant required surgery for his injuries, and his jaw was wired shut for approximately seven weeks, during which he could not speak and was restricted to a liquid diet. After the beating, defendant began carrying a handgun to protect himself from Fogg.

4 July 2014 – Defendant Shoots Fogg

On 4 July 2014, two weeks after he was beaten by Fogg, and while his mouth was still wired shut from the incident, defendant was watching fireworks with friends at the Bay Tree Apartments. Defendant testified

that at some point after the fireworks ended, he saw Fogg arrive at the apartment complex. Defendant walked to a different part of the complex, hoping to avoid Fogg. Nonetheless, Fogg approached defendant aggressively, accused him of "talking junk," and taunted him, saying, "I hope you enjoy drinking the Ensure for six weeks." As Fogg approached defendant, defendant saw a large knife on his hip. According to defendant, Fogg told defendant that he "had five minutes to get away from him. And if [defendant] didn't get away from him within five minutes[,] he was going to beat [defendant] up." Defendant attempted to move away, walking from the breezeway where he was standing to a grassy area nearby, but Fogg told him instead to "get on the concrete." Defendant pulled his gun from his pocket and pointed it at Fogg, hoping that he would leave. Fogg asked if defendant intended to shoot him and started reaching for his knife and moving toward defendant. Defendant cocked the gun and began shooting as Fogg advanced. Defendant stopped shooting and ran when he saw Fogg grab his chest and start stumbling. Defendant fled to Virginia for approximately two weeks before returning to North Carolina, where he was arrested.

According to Fogg's testimony, he was at the Bay Tree Apartments visiting friends on 4 July 2014 when defendant approached him and threatened to "pop [Fogg's] mother****ing ass." Fogg testified that he never removed his knife from its holster on his hip. Defendant pulled out the gun and immediately shot Fogg three times. As a result of the shooting, Fogg underwent multiple surgeries and spent a month in the hospital, two weeks of which he was in a coma.

On 9 September 2014, defendant was indicted in Wake County for attempted first-degree murder of Jerome Fogg. A superseding indictment dated 18 November 2014 added a second count of assault with a deadly weapon with intent to kill inflicting serious injury. Defendant pleaded not guilty and gave notice that he intended to pursue a defense of self-defense.

The case was heard during the 10 December 2014 criminal session of Superior Court, Wake County, before Judge Paul C. Ridgeway.[1] At the conclusion of the trial, the jury found defendant not guilty of attempted first-degree murder but convicted him of assault with a deadly weapon

1. Defendant had a co-defendant, Bruce Douglas, who was charged with being an accessory after the fact to attempted first-degree murder because he allegedly assisted defendant in attempting to escape from the scene after the shooting. Douglas was acquitted.

inflicting serious injury. That same day, the trial court sentenced defendant, a Level III offender, to a presumptive-range term of thirty to forty-eight months.

Defendant appealed his conviction, and a divided panel of the Court of Appeals found reversible error and granted defendant a new trial based on its decision with respect to three issues: the trial court's denial of defendant's request for certain jury instructions related to the doctrine of self defense; its exclusion of evidence of specific acts of violence committed by Fogg against individuals other than defendant; and its denial of defendant's motion to continue based on defense counsel's request to investigate new evidence disclosed by the State on the eve of trial. *See State v. Bass*, ___ N.C. App. ___, 802 S.E.2d 477 (2017). The State now appeals the Court of Appeals' decision with respect to each issue on the basis of Judge Bryant's dissent below.

I.

On 24 October 2014, defendant gave notice of his intent to pursue the defense of self-defense, and throughout the trial, presented evidence tending to support his self defense claim. At the charge conference following the close of evidence, defense counsel requested that the jury charge include language from Pattern Jury Instruction 308.45 providing, in relevant part, that "the [d]efendant has no duty to retreat in a place where the [d]efendant has a lawful right to be. [And] [t]he Defendant would have a lawful right to be in his place of residence." N.C.P.I.–Crim. 308.45 (June 2012) (footnotes, brackets, and parentheses omitted). Believing that the "no duty to retreat" provisions apply only to an individual located in his own home, workplace, or motor vehicle, the trial court concluded the proposed instruction was inapplicable to defendant and declined to deliver it.

After deliberations began, the jury asked for clarification on a defendant's duty to retreat. Outside the presence of the jury, defense counsel again requested that the trial court deliver a "no duty to retreat" instruction, this time pointing to Pattern Jury Instruction 308.10, providing that

> If the defendant was not the aggressor and the defendant was [in the defendant's own home] [on the defendant's own premises] [in the defendant's place of residence] [at the defendant's workplace] [in the defendant's motor vehicle] [at a place the defendant had a lawful right to be], the defendant could stand the defendant's ground and repel force with force regardless of the character of the assault being made upon the defendant.

> However, the defendant would not be excused if the defendant used excessive force.

N.C.P.I.–Crim. 308.10 (June 2012) (brackets in original) (footnote omitted). Specifically, defense counsel asked the trial court to deliver the instruction utilizing the bracketed phrase "at a place the defendant had a lawful right to be." Again, the trial court concluded that, because defendant was not in his home or place of residence, workplace, or car, the "no duty to retreat" instruction did not apply. After hearing from counsel, the trial court instructed the jury that "by North Carolina statute, a person has no duty to retreat in one's home, one's own premises, one's place of residence, one's workplace, or one's motor vehicle. This law does not apply in this case."

With regard to this issue, the Court of Appeals held that, based on the plain language of the relevant statutes, the trial court committed reversible error in omitting the "no duty to retreat" language from its instructions. *Bass*, ___ N.C. App. at ___, 802 S.E.2d at 484. The dissent agreed with the majority's statutory construction but felt constrained by a prior Court of Appeals decision to the contrary. *Id.* at ___, 802 S.E.2d at 487 (Bryant, J., dissenting) (citing *State v. Lee*, ___ N.C. App. ___, ___, 789 S.E.2d 679, 686 (2016), *rev'd*, 370 N.C. 671, 811 S.E.2d 563 (2018)). The State argues that the Court of Appeals erred in granting defendant a new trial based on the trial court's omission of no duty to retreat jury instructions.

[1] Two sections of the General Statutes set out circumstances in which an individual will be excused from criminal liability for using deadly force in self defense. First, under N.C.G.S. § 14-51.3,

> [a] person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if either of the following applies:
>
> (1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another.
>
> (2) Under the circumstances permitted pursuant to [N.C.]G.S. 14 51.2.

N.C.G.S. § 14-51.3(a) (2017). Second, under N.C.G.S. § 14-51.2,

> (b) The lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or

herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:

(1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace, or if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace.

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

. . . .

(f) A lawful occupant within his or her home, motor vehicle, or workplace does not have a duty to retreat from an intruder in the circumstances described in this section.

Id. § 14-51.2(b), (f). Both sections provide that individuals using force as described are immune from civil or criminal liability[2] and that such individuals have no duty to retreat before using defensive force. *Id.* §§ 14-51.2(f), -51.3(a). Thus, wherever an individual is lawfully located—whether it is his home, motor vehicle, workplace, or any other place where he has the lawful right to be—the individual may stand his ground and defend himself from attack when he reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself or another.

After the Court of Appeals issued its opinion in the instant case, this Court reversed that court's decision in *Lee*. *See State v. Lee*, 370 N.C. 671, 811 S.E.2d 563 (2018), *rev'g* ___ N.C. App. at ___, 789 S.E.2d at 686. Thus, neither the trial court below nor the dissenting judge had

2. N.C.G.S. §§ 14-51.2(e), -51.3(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, unless the person against whom force was used is a law enforcement officer or bail bondsman who was lawfully acting in the performance of his or her official duties and the officer or bail bondsman identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties.").

the benefit of this Court's decision in *Lee* when considering the instant case. In *Lee*, the trial court agreed to deliver the pattern jury instruction on first-degree murder and self-defense, N.C.P.I.–Crim. 206.10, which provides, in relevant part, that "the defendant has no duty to retreat in a place where the defendant has a lawful right to be" and incorporates by reference the pattern instruction on "Self-Defense, Retreat," which 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." *Lee*, 370 N.C. at 673, 811 S.E.2d at 565 (first quoting N.C.P.I.–Crim. 206.10 (June 2014), then quoting N.C.P.I.–Crim. 308.10 (June 2012) (second set of brackets in original)). When the trial court charged the jury, however, it omitted the "no duty to retreat" language from its instructions. *Id.* at 673, 811 S.E.2d at 565. This Court concluded that the omission amounted to an "inaccurate and misleading statement of the law," warranting a new trial. *Id.* at 671, 811 S.E.2d at 564.

Based on our opinion in *Lee*, it is clear that a defendant entitled to *any* self-defense instruction is entitled to a *complete* self-defense instruction, which includes the relevant stand-your-ground provision.

The State here does not appear to argue otherwise. Instead, contrary to its implicit concession before the trial court, the State argues that defendant was not entitled to a self defense instruction at all. *See St.'s Br.* at 27 ("Section 14-51.4 states unequivocally that the justification described in Section 14-51.3 is not available to one who was committing a felony."). Whether defendant was precluded from the protection of the self-defense statutes was not an issue raised by the dissent in the Court of Appeals, nor was it the subject of a petition seeking discretionary review of additional issues. With regard to the jury instructions at issue here, the only question properly before this Court is whether, assuming defendant was entitled to a self-defense instruction, the trial court erred in omitting the relevant stand-your-ground language. It did. Defendant is entitled to a trial with complete and accurate jury instructions.

II.

[2] In its next argument, the State argues that the Court of Appeals erred in holding that the trial court should have admitted evidence of specific instances of Fogg's violent conduct for the purpose of proving he was the first aggressor on the night he was shot. We agree.

In his case-in-chief, defendant sought to introduce testimony describing specific instances of violent conduct by Fogg. Specifically,

defendant sought to introduce testimony from Candia Williford, Michael Bauman, and Terry Harris about times when they had experienced or witnessed Fogg's violent behavior. The trial court excluded all evidence of specific instances of Fogg's violent conduct, finding them inadmissible at trial under Rule 405(b) of the North Carolina Rules of Evidence. Rather, each witness was allowed to testify only to his or her opinion of Fogg's character for violence and Fogg's reputation in the community.

Evidence of an individual's character is generally inadmissible to prove he "acted in conformity therewith on a particular occasion." N.C.G.S. § 8C-1, Rule 404(a). A criminal defendant may, however, introduce evidence of a victim's pertinent character traits. *Id.*, Rule 404(a)(2).

Whether character evidence is admissible under Rule 404(a)(2) is merely a threshold inquiry, separate from the determination of the *method* by which character may be proved, which is governed by Rule 405. Under Rule 405, character may be demonstrated by evidence of specific instances of conduct only in cases "in which character or a trait of character of a person is an essential element of a charge, claim, or defense." *Id.*, Rule 405(b). Otherwise, character may be proved only "by testimony as to reputation or by testimony in the form of an opinion." *Id.*, Rule 405(a).

To determine whether evidence of specific instances of conduct is admissible, a court must ask whether the character trait is an "essential element." Because this Court has not defined the term "essential element" for purposes of Rule 405(b), we look to secondary sources and decisions of federal courts as instructive.[3] To determine whether character is "an essential element of a charge, claim, or defense," *id.*, Rule 405(b), "courts must ascertain whether a character trait is an 'operative fact'—one that under the substantive law determines rights and liabilities of the parties." 1 Kenneth S. Broun, *McCormick on Evidence* § 187, at 1019-20 (7th ed. 2013). This determination requires the court to ask whether "proof, or failure of proof, of the character trait by itself [would] actually satisfy an element of the charge, claim, or defense." *Id.* at 1020. If it would not, "then character is not essential and evidence should be limited to opinion or reputation." *Id.*

In a case in which the defendant relies on the defense of entrapment, for example, his predisposition to commit the crime of which he is

3. *See* N.C.G.S. § 8C-1, Rule 405 commentary ("This [r]ule is identical to Fed. R. Evid. 405 except for the addition of the last sentence to subdivision (a).").

accused has been held to be an essential element. *See, e.g.*, *United States v. Mendoza-Prado*, 314 F.3d 1099, 1103 (9th Cir. 2002) (per curiam) ("The character of the defendant is one of the elements—indeed, it is an essential element—to be considered in determining predisposition."); *accord United States v. Brannan*, 562 F.3d 1300, 1308 (11th Cir. 2009); *United States v. Franco*, 484 F.3d 347, 352 (6th Cir. 2007); *see also* N.C.G.S. § 8C-1, Rule 404 commentary (noting that "[c]haracter may itself be an element of a crime, claim, or defense. A situation of this kind is commonly referred to as 'character in issue,' " such as in an action for negligent entrustment of a motor vehicle, in which the driver's competency is at issue. (quoting Fed. R. Evid. 404(a) advisory comm. n.)).

Although under Rule 404(a)(2), evidence of a violent character is admissible to prove circumstantially that the victim was the aggressor, Rule 405(b) limits the method by which that fact may be proved. To prove he acted in self-defense, a defendant must show that his victim was the aggressor; he need not prove that the victim was a violent or aggressive person. *See State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572 (1981) (listing the elements of self-defense, which include that the "defendant was not the aggressor in bringing on the affray, *i.e.*, he did not aggressively and willingly enter into the fight without legal excuse or provocation" (citations omitted)); *see also* N.C.G.S. §§ 14-51.2, 51.3. To say that a person is the aggressor on a specific occasion is not to say that he has a violent character: a generally peaceful person may experience a moment of violence, and a normally aggressive or violent person might refrain from violence on a specific occasion. Because a defendant may prove self-defense without demonstrating his victim's character, character is not an essential element of self-defense. Accordingly, with regard to a claim of self-defense, the victim's character may not be proved by evidence of specific acts.

This Court's opinion in *State v. Watson* does not hold otherwise. 338 N.C. 168, 187, 449 S.E.2d 694, 706 (1994), *disavowed in part on other grounds by State v. Richardson*, 341 N.C. 585, 461 S.E.2d 724, *cert. denied*, 514 U.S. 1071 (1995). In *Watson*, the defendant sought to elicit testimony regarding a witness's opinion of the victim's character for violence. *Id.* at 186-87, 449 S.E.2d at 705-06. We held that, "[b]ecause the jury was instructed on self-defense and was required to determine who was the aggressor in the affray, it was error for the trial court not to permit the jury to hear evidence regarding the victim's violent character." *Id.* at 188, 449 S.E.2d at 706. Because *Watson* dealt only with opinion evidence—not evidence of specific acts—it sheds little light on the issue presented here.

Here, the excluded evidence consisted of specific incidents of violence committed by Fogg. Williford, Fogg's ex-girlfriend, would have testified that Fogg had, without provocation and in front of Williford's three-year-old daughter, pulled a gun on Williford and choked her until she passed out. She also would have testified that Fogg beat her so badly that her eyes were swollen shut and she was left with a bruise reflecting an imprint of Fogg's shoe on her back. Michael Bauman would have testified that, on one occasion, he witnessed Fogg punch his own dog in the face because it approached another individual for attention. On another occasion, Bauman encountered Fogg at a restaurant, where Fogg initiated a fight with Bauman and also "grabbed" and "threw" Bauman's mother-in-law when she attempted to defuse the situation. Terry Harris would have testified that Fogg, a complete stranger to him, initiated a verbal altercation with him in a convenience store. Two or three weeks later, Fogg pulled over when he saw Harris walking on the side of the road and hit him until Harris was knocked unconscious. According to Harris, Fogg "[s]plit the side of [his] face" such that he required stitches.

Because Rule 405 limits the use of specific instances of past conduct to cases in which character is an essential element of the charge, claim, or defense, the trial court correctly excluded testimony regarding these specific prior acts of violence by Fogg.[4]

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4. Our holding today is not only dictated by the plain language of Rule 405, but is also consistent with federal circuit court decisions, which are instructive on the issue. *See*, *e.g.*, *United States v. Bordeaux*, 570 F.3d 1041, 1050-51 (8th Cir. 2009) (holding that, because a victim's violent character is not an essential element of self-defense, the victim's character could not be demonstrated by evidence of specific violent acts so that such evidence was not admissible under Rule 405(b)); *United States v. Jackson*, 549 F.3d 963, 975-76 (5th Cir. 2008) (holding that a victim's prison records showing specific instances of violence were inadmissible under Rule 405(b) to prove he was the first aggressor), *cert. denied*, 558 U.S. 828 (2009); *United States v. Bautista*, 145 F.3d 1140, 1152 (10th Cir.) (holding that evidence of a victim's aggressive character to prove he was the aggressor must consist of reputation or opinion evidence only), *cert. denied*, 525 U.S. 911 (1998); *Palmquist v. Selvik*, 111 F.3d 1332, 1341 (7th Cir. 1997) (holding that, because evidence showing an individual had a "death wish" and desired to commit "suicide by police" was character evidence that did not speak to an essential element of a law enforcement officer's self-defense claim, the evidence could be presented only in the form of reputation or opinion); *United States v. Keiser*, 57 F.3d 847, 857 (9th Cir.) (holding that evidence of specific instances of violence by the victim that tended to demonstrate his violent character were inadmissible to prove that he was the aggressor in an affray), *cert. denied*, 516 U.S. 1029 (1995); *Virgin Islands v. Carino*, 631 F.2d 226, 229 (3d Cir. 1980) (holding that the trial court properly excluded evidence of a victim's prior conviction of manslaughter to demonstrate that the victim was likely the aggressor in a physical altercation with the defendant).

III.

[3] Finally, the State argues that the trial court did not err in denying defendant's motion to continue. We agree.

On the eve of trial, the State received information related to five incidents of assaultive behavior by Fogg, each of which was previously unknown to either the prosecutor or defense counsel. The State immediately relayed the information to defense counsel, who moved for a continuance to further investigate the information. The trial court denied the motion and proceeded to trial.

Because defendant's motion to continue was for the purpose of further developing evidence that would have been inadmissible at trial, the trial court properly denied that motion.

Conclusion

We hold that the trial court committed reversible error in omitting the relevant stand your ground language from the jury instructions delivered at trial; accordingly, we affirm that part of the Court of Appeals' decision holding that defendant is entitled to a new trial on that basis. and remand this case for further proceedings not inconsistent with this opinion. Because we conclude that the trial court did not err in excluding specific instances of Fogg's violent conduct or in denying defendant's motion to continue, we reverse the decision below with regard to those issues. This case is remanded to the Court of Appeals for further remand to the trial court for proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED; NEW TRIAL.

STATE v. FREDERICK

[371 N.C. 547 (2018)]

STATE OF NORTH CAROLINA
v.
KURT DEION FREDERICK

No. 146A18

Filed 26 October 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. ___, 814 S.E.2d 855 (2018), affirming an order entered on 7 June 2016 by Judge W. Osmond Smith, III in Superior Court, Wake County. Heard in the Supreme Court on 1 October 2018.

Joshua H. Stein, Attorney General, by J. Aldean Webster III, Assistant Attorney General, for the State.

Glenn Gerding, Appellate Defender, and Amanda S. Hitchcock, Assistant Appellate Defender, for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
DARYL LAMONT JONES

No. 336A17

Filed 26 October 2018

Indictment and Information—citation for misdemeanor—sufficient to invoke trial court's subject matter jurisdiction

Defendant's citation for operating a motor vehicle when having an open container of alcohol in the passenger compartment while alcohol remained in his system was sufficient to charge him with the misdemeanor offense and to invoke the trial court's subject matter jurisdiction. The citation included sufficient criminal pleading contents (which are designed to be more relaxed than those of other criminal charging instruments), and defendant chose not to invoke his right through an appropriate motion to have the State charge him in a new pleading while the matter was still pending in its court of original jurisdiction.

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. ___, 805 S.E.2d 701 (2017), finding no error in a judgment entered on 15 June 2016 by Judge George B. Collins, Jr. in Superior Court, Wake County. Heard in the Supreme Court on 16 April 2018.

Joshua H. Stein, Attorney General, by Robert C. Montgomery, Senior Deputy Attorney General, and Daniel P. O'Brien, Special Deputy Attorney General, for the State.

Glenn Gerding, Appellate Defender, by James R. Grant, Assistant Appellate Defender, for defendant-appellant.

MORGAN, Justice.

Defendant Daryl Lamont Jones was convicted of operating a motor vehicle when having an open container of alcohol in the passenger compartment while alcohol remained in his system. Defendant appealed his conviction to the Court of Appeals which, in a divided opinion, found that the citation that charged the offense was legally sufficient to properly invoke the trial court's subject-matter jurisdiction. *State v. Jones*, ___ N.C. App. ___, ___, 805 S.E.2d 701, 706 (2017). The dissenting judge

did not believe that the citation met the statutory requirements for a valid criminal pleading in this State. *Id.* at ___, 805 S.E.2d at 712. Upon review, we conclude that the citation sufficiently and properly vested the trial court with subject-matter jurisdiction in this criminal proceeding and we thus affirm the decision of the Court of Appeals.

I. Factual and Procedural Background

On 4 January 2015, while driving his vehicle in Wake County, defendant was cited for speeding and charged with operating a motor vehicle when having an open container of alcohol while alcohol remained in his system. Defendant was not charged with driving while impaired. The fill-in-the-blanks citation form utilized by the charging officer stated that the officer

> has probable cause to believe that on . . . Sunday, the 04 day of January, 2015 at 10:16PM in the county named above [defendant] did unlawfully and willfully
>
> OPERATE A MOTOR VEHICLE ON A STREET OR HIGHWAY AT A SPEED OF 62 MPH IN A 45 MPH ZONE (G.S. 20-141(J1))
>
> and on . . . Sunday, the 04 day of January, 2015 at 10:16PM in the county named above [defendant] did unlawfully and willfully WITH AN OPEN CONTAINER OF ALCOHOLIC BEVERAGE AFTER DRINKING (G.S. 20-138.7(A))[.]

(Underlined language added by the officer to supply the pertinent information regarding the charged offenses in the blanks provided on the citation).

Defendant filed a motion to dismiss the open container charge on grounds that the citation was fatally defective such that the trial court lacked jurisdiction. The district court denied the motion and found defendant guilty as charged of both offenses. Defendant appealed his convictions to the Superior Court, Wake County. On 15 June 2016, a jury found defendant guilty of operating a vehicle while having an open container but found him not guilty of speeding. Defendant was sentenced on the same day to a twenty-day term of incarceration, which was suspended subject to six months of unsupervised probation. Defendant appealed his conviction to the Court of Appeals.

In the Court of Appeals, defendant argued that the trial court lacked jurisdiction to try him for operating a motor vehicle while having an open container because the citation purporting to charge him with that

offense failed to allege all of its essential elements. *Id.* at ___, 805 S.E.2d at 705. In a divided opinion filed on 5 September 2017, the Court of Appeals found no error. The majority of the court explained that N.C.G.S. § 15A-302(c) establishes requirements for citations like the one issued here. The majority further noted that the official commentary to Article 49, "Pleadings and Joinder," which is part of the Criminal Procedure Act embodied in Chapter 15A, states that a citation, which "constitutes the 'pleading' for misdemeanor criminal cases, ... 'requires only that the crime be "identified." ' " *Id.* at ___, 805 S.E.2d at 703. The commentary further states that a defendant has the right under N.C.G.S. § 15A-922(c) to object to the description of the crime in a citation and "require a more formal pleading." *Id.* at ___, 805 S.E.2d at 704 (emphasis omitted) (quoting N.C.G.S. ch. 15A, art. 49 official cmt. (2015)). Therefore, the majority concluded that "[t]o the extent there was a deficiency in the citation, [d]efendant had the right to object to trial on the citation by filing a motion" requiring that he "be charged in a new pleading," with any such objection being filed in the district court division. *Id.* at ___, 805 S.E.2d at 704 (quoting N.C.G.S. § 15A-922(c) (2015)).

The Court of Appeals majority determined that the citation complied with N.C.G.S. § 15A-302(c) because the charging instrument "properly identified the crime of having an open container of alcohol in the car while alcohol remained in his system, charged by citing N.C.[G.S.] § 20-138.7(a) and stating [d]efendant had an open container of alcohol after drinking." *Id.* at ___, 805 S.E.2d at 705. The majority reiterated that

> [b]ecause [d]efendant failed to file a motion pursuant to [N.C.G.S. §] 15A-922(c) [to object to the citation at the district court level], he was no longer in a position to assert his statutory right to object to trial on citation, or to the sufficiency of the allegations set forth in [N.C.G.S. §] 20-138.7(g).

Id. at ___, 805 S.E.2d at 705.

The court's majority went on to add that even assuming, *arguendo*, that defendant was not required to object to the contents of the citation, "the failure to comply with N.C.[G.S.] § 15A-924(a)(5) by neglecting to allege facts supporting every element of an offense in a citation is not a *jurisdictional* defect." *Id.* at ___, 805 S.E.2d at 705. Unlike the requirements for an indictment, the State constitution does not require "a citation charging a misdemeanor to allege each element as a prerequisite of the district court's jurisdiction." *Id.* at ___, 805 S.E.2d at 705. As a result, "any failure of a law enforcement officer to include each element of the

crime in a citation is not fatal to the district court's jurisdiction." *Id.* at ___, 805 S.E.2d at 706. Furthermore, the majority found that "the record establishes that [d]efendant was apprised of the charge against him and would not be subject to double jeopardy." *Id.* at ___, 805 S.E.2d at 706.

The dissenting judge reasoned that the citation was defective due to its failure to allege facts that "would support the elements of the offense" with which defendant was charged. *Id.* at ___, 805 S.E.2d at 712 (Zachary, J., dissenting). She disagreed with the majority's determination that defendant's failure to object to the citation in the court of original jurisdiction—here, the district court—precluded his challenge to jurisdiction. *Id.* at ___, 805 S.E.2d at 707. The dissent noted that N.C.G.S. § 15A-1446(d) allows a defendant to assert errors on appellate review based upon the failure of a pleading "to state essential elements of an alleged violation as required by [N.C.]G.S. § 15A-924(a)(5)," even if no objection was made in the trial division because a challenge to subject-matter jurisdiction can be raised at any time. *Id.* at ___, 805 S.E.2d at 707. The dissent noted that the majority opinion relied primarily on the language of N.C.G.S. § 15A-302, which describes the information that a valid citation must contain; however, the dissent distinguished between a citation used as a process, which serves as a directive that a person appear in court and answer a misdemeanor or infraction charge or charges, and a citation used as a criminal pleading, which must assert facts supporting every element of a criminal offense and the defendant's commission thereof. *Id.* at ___, ___, 805 S.E.2d at 706, 708. The dissent concluded that the majority "fails to acknowledge this issue or to articulate a basis for applying the requirements for use of a citation as a form of process, rather than the specific statutory criteria for use of a citation as a criminal pleading." *Id.* at ___, 805 S.E.2d at 710.

For those reasons, the dissenting judge stated that she would hold that, "upon application of the plain language of the statutes governing criminal pleadings in North Carolina, the citation is invalid." *Id.* at ___, 805 S.E.2d at 707. The dissenting opinion included the following passage:

> In sum, N.C.[G.S.] § 15A-921 expressly states that a citation may serve as the State's pleading in a criminal case, and N.C.[G.S.] § 15A-924(a)(5) requires that <u>every</u> criminal pleading must contain facts supporting each of the elements of the criminal offense with which the defendant is charged. There do not appear to be *any* appellate cases holding that N.C.[G.S.] § 15A-924 does not apply to a citation used as the pleading in a criminal case. Under the plain language of these statutes, when a citation is used

> by the State as the pleading in a criminal case, it must—like any other criminal pleading—allege facts that support the elements of the offense with which the defendant is charged.

Id. at ___, 805 S.E.2d at 709. The dissent opined that the citation "fail[ed] to allege that defendant operated a motor vehicle on a public road or highway, or even that he drove," or "that the open container of alcohol was in the passenger area of defendant's car." *Id.* at ___, 805 S.E.2d at 709. Accordingly, the dissent concluded that "[t]he citation fails to allege facts that would support two of the three elements of the offense: that defendant drove on a public highway, or that he had an open container of alcohol in the passenger area of the car." *Id.* at ___, 805 S.E.2d at 709. The dissent concluded that, "[a]s a result, the citation did not comply with the requirements of N.C.[G.S.] § 15A-924 [governing contents of pleadings] and did not confer subject matter jurisdiction upon the trial court." *Id.* at ___, 805 S.E.2d at 709.

II. Analysis

North Carolina General Statutes section 15A-921 states: "[T]he following may serve as pleadings of the State in criminal cases:

> (1) Citation.
> (2) Criminal summons.
> (3) Warrant for arrest.
> (4) Magistrate's order . . . after arrest without warrant.
> (5) Statement of charges.
> (6) Information.
> (7) Indictment."

N.C.G.S. § 15A-921 (2017). Defendant was issued a citation for a misdemeanor offense and ordered to appear in the District Court, Wake County. "Exclusive original jurisdiction of all misdemeanors is in the district courts of North Carolina." *State v. Felmet*, 302 N.C. 173, 174, 273 S.E.2d 708, 710 (1981) (citing N.C.G.S. § 7A-272)).

The criminal pleading that initiated proceedings against defendant in the present case is a citation. "A citation is a directive, issued by a law enforcement officer or other person authorized by statute, that a person appear in court and answer a misdemeanor or infraction charge or charges." N.C.G.S. § 15A-302(a) (2017). A law enforcement officer is authorized to "issue a citation to any person who he has probable cause

to believe has committed a misdemeanor or infraction." *Id.* § 15A-302(b) (2017). Statutory mandates require that a citation:

> (1) Identify the crime charged, including the date, and where material, identify the property and other persons involved,
>
> (2) Contain the name and address of the person cited, or other identification if that cannot be ascertained,
>
> (3) Identify the officer issuing the citation, and
>
> (4) Cite the person to whom issued to appear in a designated court, at a designated time and date.

Id. § 15A-302(c) (2017).

While N.C.G.S. § 15A-302 clearly establishes that a citation is sufficient to be utilized as a criminal pleading as authorized by N.C.G.S. § 15A-921(1), nevertheless, it is appropriate and instructive to reconcile the efficacy and properness of its usage in light of N.C.G.S. § 15A-924(a)(5). N.C.G.S. § 15A-924(a)(5) states 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. When the pleading is a criminal summons, warrant for arrest, or magistrate's order, or statement of charges based thereon, both the statement of the crime and any information showing probable cause which was considered by the judicial official and which has been furnished to the defendant must be used in determining whether the pleading is sufficient to meet the foregoing requirement.

Id. § 15A-924(a)(5) (2017).

At first blush, it appears that the statutory provisions of N.C.G.S. § 15A-302 and N.C.G.S. § 15A-921(1), when read together, are in conflict with the terms contained in N.C.G.S. § 15A-924(a)(5). N.C.G.S. §§ 15A-302 and 15A-921(1) jointly establish that a citation sufficiently operates as a criminal pleading when it merely complies with the requirement, *inter alia*, to "[i]dentify the crime charged"; N.C.G.S. § 15A-924(a)(5), on the other hand, mandates a fuller recitation in a criminal pleading of

"[a] plain and concise factual statement in each count which . . . asserts facts supporting every element of a criminal offense." This seeming inconsistency between and among the statutory enactments at issue in the present case is readily resolved by the Official Commentary to Article 49 of the North Carolina General Statutes.

While N.C.G.S. § 15A-924 sets forth specific requirements for criminal pleadings, the opening Official Commentary to Article 49, "Pleadings and Joinder"— within which N.C.G.S. § 15A-924 is found—expressly discusses citations used as pleadings. *See id.* ch. 15A, art. 49 official cmt. (2017). "[T]he commentary to a statutory provision can be helpful in some cases in discerning legislative intent." *Parsons v. Jefferson-Pilot Corp.*, 333 N.C. 420, 425, 426 S.E.2d 685, 689 (1993) (citations omitted). The commentary to Article 49 delineates the evolution and application of different types of pleadings which are employable for the prosecution of criminal cases in North Carolina, while particularly noting the requirements that make each one legally sufficient. N.C.G.S. ch. 15A, art. 49 official cmt. In comparing and contrasting the required components of these various criminal pleadings, the Official Commentary details the salient considerations which are endemic to the first four criminal pleading forms which were recognized in this State before the introduction of the citation form: "warrants and criminal summonses in misdemeanor cases and informations and indictments in felony cases." *Id.* Concepts such as sufficiency of the pleading, the statement of the crime, a showing of probable cause, an order for arrest, an order to appear, an order of commitment or bail, and provisions for supplemental information are all identified and compared for each of the original four types of criminal pleadings in North Carolina. *Id.* On the other hand, in contrast to these other types of criminal pleadings, the Official Commentary instructs that a citation simply needs to identify the crime that is being charged:

> It should be noted that the citation (G.S. 15A-302) requires only that the crime be "identified," less than is required in the other processes. This is a reasonable difference, since it will be prepared by an officer on the scene. *It still may be used as the pleading, but rather than get into sufficiency of the pleading in such a case the [Criminal Code] Commission simply gives the defendant the right to object and require a more formal pleading.* G.S. 15A-922(c).

Id. (emphasis added).

Here, the fill-in-the-blanks citation form showed that the charging officer

> has probable cause to believe that on or about Sunday, the 04 day of January, 2015 at 10:16PM in the county named above [defendant] did unlawfully and willfully
>
> OPERATE A MOTOR VEHICLE ON A STREET OR HIGHWAY AT A SPEED OF 62 MPH IN A 45 MPH ZONE (G.S. 20-141(J1))
>
> and on . . . Sunday, the 04 day of January, 2015 at 10:16PM in the county named above [defendant] did unlawfully and willfully WITH AN OPEN CONTAINER OF ALCOHOLIC BEVERAGE AFTER DRINKING (G.S. 20-138.7(A))[.]

A studious focus on the applicable statutes, official commentaries to those statutes, and relevant case law demonstrates that the citation in the case at bar is a criminal pleading that is sufficient to authorize the trial court to exercise jurisdiction over the charged criminal misdemeanor offense, while giving appropriate notice to defendant of the offense for which he is being compelled to appear in court. The citation at issue fulfills the salient requirements of N.C.G.S. § 15A-302, and therefore this charging instrument is in compliance with the statute in that it was a directive issued by a law enforcement officer for defendant to appear in court to answer the misdemeanor charge of driving a motor vehicle on a highway while there is an alcoholic beverage in the passenger area in other than the unopened manufacturer's original container and while the driver is consuming alcohol or while alcohol remains in the driver's body, thereby satisfying N.C.G.S. § 15A-302(a); the citation was issued to defendant by the charging officer based upon the officer's determination that probable cause existed to believe that the misdemeanor offense had been committed by defendant, thereby satisfying N.C.G.S. § 15A-302(b); and the citation identified the crime charged, contained the name and address of defendant, identified the charging officer, and directed defendant to appear in the District Court, Wake County in Courtroom 101 on Thursday, February 19, 2015 between the hours of 7:45 a.m. and 3:30 p.m., thereby satisfying N.C.G.S. § 15A-302(c).[1]

It is at this juncture in the analysis that the learned dissent in the appellate court below begins to veer from the proper course, because

1. Because the speeding charge which was also alleged in the citation is not relevant to this analysis, any discussion of it is purposely omitted.

the dissent focuses upon the *manner* in which the statement of the charged crime is conveyed in the entirety of the citation instead of the *substance* of the statement of the charged crime in the whole citation. Although the dissent is discomforted by the fragmented language that was utilized by the charging officer in composing the details of the misdemeanor charge, nonetheless, the contents of the citation at issue as drafted by the officer comport with the substantive requirements delineated in N.C.G.S. § 15A-302(c) and suit the practical considerations afforded by the Official Commentary to Article 49, "Pleadings and Joinder," of the North Carolina General Statutes.

If defendant had concerns about the level of detail contained in the citation, N.C.G.S. § 15A-922(c) expressly provides that "[a] defendant charged in a citation with a criminal offense may by appropriate motion require that the offense be charged in a new pleading." *Id.* § 15A-922(c) (2017). This opportunity is afforded to a defendant in recognition of the fact that N.C.G.S. § 15A-302 "provides for a separate criminal process, applicable to any misdemeanor." N.C.G.S. § 15A-302 (2017). Additionally, in light of this classification of a citation as a "separate criminal process" that is required only to identify the crime at issue instead of providing a more exhaustive "statement of the crime" as required in the other criminal pleadings, a defendant such as the current one is given the right to object and require a more formal pleading under N.C.G.S. § 15A-922(c). *See id.* ch. 15A, art. 49 official cmt. The dissent in the appellate court below misidentifies this statutory right of a defendant to require a criminal pleading more formal than a citation while the charge is still pending in the court of original jurisdiction by conflating it with a defendant's challenge to a trial court's jurisdiction over a criminal matter that can be raised even on appeal. While a defendant is entitled to require the State to file a statement of charges if he objects to being tried by citation alone, after defendant here did not object to trial by citation in the court of original jurisdiction, he was no longer entitled to assert that right. *See State v. Monroe*, 57 N.C. App. 597, 599, 292 S.E.2d 21, 22 (1982) (citing *Felmet*, 302 N.C. 173, 273 S.E.2d 708); *see also State v. Phillips*, 149 N.C. App. 310, 318, 560 S.E.2d 852, 857, *appeal dismissed*, 355 N.C. 499, 564 S.E.2d 230 (2002). In the case at bar, because defendant did not invoke his right through an appropriate motion filed in District Court, Wake County to have the State charge him in a new pleading while the matter was still pending in its court of original jurisdiction, defendant was precluded from challenging the citation in another tribunal on those grounds because he was no longer in a position to assert his statutory right to object to trial on citation after jurisdiction had been established and his case had been determined in district court.

Lastly, it is significant that a citation's pleading contents are deemed to be "reasonabl[y] differen[t]" from the more stringent requirements for other criminal processes because the citation "will be prepared by an officer on the scene." N.C.G.S. ch. 15A, art. 49 official cmt. This approved relaxation of the established criminal pleading contents for a citation is rooted in the realization that the execution of a law enforcement officer's investigative duties and responsibilities must embrace certain practicalities and realities. Among them is the unsettling, unpredictable, and unsecure environment in which officers routinely issue citations as they patrol and monitor the areas that they serve. An officer on his or her beat cannot reasonably be expected to utilize the same measured standards of thoroughness and exactness in syntax and grammar that a grand jury applies in its quietude in composing an indictment or a prosecutor employs in drafting an information. Based upon these and related considerations, the criminal pleading contents of a citation are designed and allowed to be more relaxed than those of other criminal charging instruments.

A citation that identifies the charged offense in compliance with N.C.G.S. § 15A-302(c) sufficiently satisfies the legal requirements applicable to the contents of this category of criminal pleadings and establishes the exercise of the trial court's jurisdiction. Under the facts and circumstances of the present case, the citation at issue included sufficient criminal pleading contents in order to properly charge defendant with the misdemeanor offense for which he was found guilty, and the trial court had subject-matter jurisdiction to enter judgment in this criminal proceeding. Accordingly, we affirm the decision of the Court of Appeals finding no error in the trial court's judgment.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
JOHN ANDREW MADDUX

No. 278PA17

Filed 26 October 2018

1. Appeal and Error—plain error—standard

The holding in *State v. Lawrence*, 365 N.C. 506 (2012), reaffirmed the legal principle that plain error does not exist where a defendant cannot show that the jury probably would have returned a different verdict absent the error. *Lawrence* did not hold that plain error is shown *unless* the evidence against defendant is overwhelming and uncontroverted.

2. Criminal Law—instructions—aiding and abetting—individual guilt

To the extent that the Court of Appeals applied the correct standard for plain error review to a prosecution arising from the discovery of materials used for manufacturing methamphetamine in and around defendant's house, it incorrectly concluded that an erroneous aiding and abetting instruction did not amount to plain error. Given the evidence of defendant's individual guilt (including viewing the items found in context and not in isolation), the erroneous aiding and abetting instruction did not have a probable impact on the jury's finding.

3. Appeal and Error—plain error—alternate theories of conviction

The rule that reversible error occurs when it is not clear which alternate theory the jury used to convict defendant does not apply to plain error cases.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 463 (2017), finding plain error in judgments entered on 20 April 2016 by Judge C. Winston Gilchrist in Superior Court, Johnston County, and granting defendant a new trial. Heard in the Supreme Court on 29 August 2018.

Joshua H. Stein, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State-appellant.

Anne Bleyman for defendant-appellee.

HUDSON, Justice.

This case comes to us by way of the State's petition for discretionary review of the opinion of the Court of Appeals. Specifically, the State has asked us to determine whether the Court of Appeals erred in awarding defendant a new trial because of plain error in a jury instruction on aiding and abetting. We agree that the trial court erred in giving the aiding and abetting instruction; however, because the Court of Appeals incorrectly concluded that the trial court's error amounted to plain error, we reverse the decision of the Court of Appeals.

I. Factual and Procedural Background

This case began with two searches of defendant's residence by the Johnston County Sheriff's Office Narcotics Division on 19 August 2015. On that date, two detectives responded to a complaint that drug activity was occurring at defendant's home. When they arrived at the house, defendant answered the door, identified himself as the owner of the property, and consented to a search of his residence.

During the first search, the two detectives walked through the interior of the home. Defendant first took the detectives to his master bedroom and adjoining master bathroom, where they found no evidence of drug activity. Then defendant took the detectives to the bedroom of one of his sons, where they found on the floor a clear baggie containing four white pills and a homemade bong. Upon finding these things, detectives asked defendant whether any methamphetamine manufacturing items or paraphernalia were in the home. Defendant responded in the negative but added that his stepson Lyn Sawyer (Sawyer), who occasionally spent the night on defendant's couch, was on probation for manufacturing methamphetamine in South Carolina.[1]

Next, the detectives' search took them to the outside of defendant's residence, where they found a one-pot meth lab[2] inside a burn barrel.[3]

1. Detectives would later find mail addressed to Sawyer in defendant's residence.

2. The one-pot meth lab is one of a number of methods that methamphetamine producers use to cook meth. The process involves placing the ingredients, including ammonium nitrate, into a plastic bottle and shaking the bottle to produce an ammonia gas reaction. As the ammonia gas is produced, the person cooking the meth alternatively shakes the bottle and partially opens the cap to release the pressure building inside the bottle. The result of this process is that the pseudoephedrine inside the bottle will convert into methamphetamine. After the pseudoephedrine converts into methamphetamine, a separate process is used to change the methamphetamine into a powdery substance. That powdery substance is then filtered through strainers and coffee filters.

3. A burn barrel houses a burn pile, which is a commonly used method by methamphetamine producers to destroy the evidence of methamphetamine production.

The one-pot meth lab and burn barrel were located approximately thirty yards behind defendant's home, and they were accessible to neighboring properties. Upon finding the burn barrel, the two detectives turned the investigation over to another detective, who carried out his own search of defendant's residence and conducted a more general investigation.

The other detective's search of defendant's residence revealed the following items that are commonly used in methamphetamine production: (1) in defendant's master bedroom, an empty package of lithium batteries, a metal strainer, a glass measuring cup, the top portion of a plastic bottle containing a white residue,[4] a Walgreens receipt for pseudoephedrine,[5] and a plastic tube located inside a plastic tote bag sitting by defendant's bed; (2) in defendant's master bathroom, an open box of instant cold packs,[6] a clear plastic baggie containing a white powdered substance that appeared to be methamphetamine,[7] and a trash bag containing balled-up, burnt strips of aluminum foil that were consistent with meth boats used to smoke methamphetamine; and (3) in defendant's kitchen, a can of acetone[8] that was either nearly or completely empty, a water bladder from an instant cold pack,[9] and more meth boats inside a diaper box.

When the other detective searched the burn barrel in defendant's back yard, he found two two-liter plastic bottles that the North Carolina State Crime Laboratory would later determine contained methamphetamine and pseudoephedrine, along with coffee filters, a latex glove, trash bags, paper towels, and battery casings that apparently had been pried open.[10]

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4. This residue was not chemically analyzed.

5. Pseudoephedrine is an immediate precursor chemical to the manufacture of methamphetamine under N.C.G.S. § 90-95(d2)(37)(2017).

6. The specific brand of instant cold packs found in defendant's bathroom contains ammonium nitrate, which is an essential element in manufacturing methamphetamine.

7. This powdered substance was not chemically analyzed.

8. Acetone is an immediate precursor chemical to the manufacture of methamphetamine under N.C.G.S. § 90-95(d2)(2)(2017).

9. In the process of cooking methamphetamine, producers separate the water bladder from the ammonium nitrate contained in the cold pack and discard the water bladder.

10. Methamphetamine producers pry open casings for AA lithium batteries to access the lithium strips that are used in methamphetamine production. It is unclear whether the battery casing recovered from the burn barrel belonged to a AA lithium battery.

After searching the burn barrel, the detective continued to walk around the exterior premises of defendant's residence, during which he was approached by defendant's neighbor. After briefly speaking with the neighbor, the detective decided to search the neighbor's residence also. Before searching the house, the detective learned that the neighbor shared her house with her daughter, Alex Tucker (Tucker), and Sawyer, defendant's stepson. After receiving consent from Tucker to search her room, the detective found a pink bag containing materials that he identified as methamphetamine components.

Also, while the detective was at the neighbor's residence, a child informed him that Sawyer had run out of the back door when the detective approached the residence. Although Sawyer would not return to the neighbor's residence, the detective spoke with him over the telephone. Sawyer said he was scared to return because he was on probation, and he was afraid the detective would arrest him for manufacturing meth.

Next, the detective spoke with defendant, who stated that: (1) "Sawyer was a liar"; (2) Sawyer possibly cooked meth with Tucker next door; (3) Sawyer talked about cooking meth all the time; and (4) defendant had once tried meth but did not like it.

On 5 October 2015, defendant was indicted for manufacturing methamphetamine, possession of a methamphetamine precursor, and felony conspiracy to manufacture methamphetamine. On 2 November 2015, defendant was further indicted for two counts of trafficking in methamphetamine by manufacture and one count of conspiring to traffic in methamphetamine. Later, on 7 March 2016, the second indictment was replaced by a superseding indictment charging trafficking in methamphetamine by manufacture, trafficking in methamphetamine by possession, and conspiracy to traffic in methamphetamine.

Defendant's trial began on 18 April 2016, and the State presented the above evidence through the testimonies of (1) the detectives who conducted the 19 August 2015 searches and interviews, (2) an agent with the State Bureau of Investigation who entered defendant's home and processed the items related to the one-pot meth lab and those found in the burn barrel located on defendant's property, and (3) a drug chemist at the North Carolina State Crime Laboratory who analyzed the contents of plastic bottles contained in the one-pot meth lab and burn-barrel.

At the close of the State's evidence, defendant moved to dismiss all charges. The State voluntarily dismissed the two conspiracy charges, and the trial court granted defendant's motion to dismiss as to the charge of possession of an immediate precursor; however, the court denied the

motion as to the rest of the charges. Defendant offered no evidence at trial.

At the close of all evidence, the trial court instructed the jury that defendant could be found guilty of manufacturing methamphetamine, trafficking in methamphetamine by manufacture, and trafficking in methamphetamine by possession either through a theory of individual guilt or of aiding and abetting. Defendant did not object to these instructions.

The jury convicted defendant of the following charges by means of a general verdict sheet: (1) manufacturing methamphetamine, (2) trafficking in methamphetamine by manufacture, and (3) trafficking in methamphetamine by possession. Because there was no special verdict sheet, the record does not reflect whether the jury convicted defendant based on individual guilt or a theory of aiding and abetting. Defendant appealed his convictions to the Court of Appeals.

The Court of Appeals announced two holdings pertinent to this appeal. First, the Court of Appeals determined that the trial court erred in giving an aiding and abetting instruction because "[t]he evidence does not reveal Defendant expressly communicated his intent to aid or encourage either Tucker or Sawyer." *State v. Maddux*, ___ N.C. App.___, 803 S.E.2d 463, 2017 WL 3259784, at *6 (2017) (unpublished). The Court of Appeals added:

> Further, there is no evidence to warrant the inference of aid from the relationship or friendship they shared. Defendant is Sawyer's stepfather. However, Sawyer did not live with Defendant. The only evidence linking Sawyer to Defendant's home is Defendant's admission he allowed Sawyer to "occasionally crash[ ] on his couch in the living room ... every once in a while," and one piece of mail addressed to Sawyer at Defendant's address. The evidence does not disclose a friendship or close relationship between the men. On the contrary, the evidence tends to show a contentious relationship. Defendant told Detectives Sawyer "was a liar and that you cannot trust anything that he said." Furthermore, the only evidence linking Defendant to Tucker is their mutual connection to Sawyer, living next door to one another, and Tucker's statement to Detective Creech about the bag found in her room.
>
> This evidence is not enough to show Defendant aided and abetted another. Accordingly, we hold the court erred by instructing the jury on the State's theory of aiding and abetting.

Maddux, 2017 WL 3259784, at *6 (alterations in original) (footnote and citations omitted).

Second, the Court of Appeals held that the instruction constituted plain error entitling defendant to a new trial. *Id.* at *7. The Court of Appeals correctly noted that because defendant did not object to the instruction at trial, the court must review the instruction for plain error. *Id.* at *5. Then the Court of Appeals set out the test for plain error as follows:

> Plain error occurs when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done [.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quotation marks omitted) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. [ ])[, *cert. denied*, 459 U.S. 1018 (1982)]). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted)."

Id. (alteration in original).

After reciting the test for plain error as stated above, the Court of Appeals opined that "absent the erroneous jury instruction, the jury probably would have reached a different result" for four reasons: (1) "The evidence linking Defendant to the offenses is entirely circumstantial"; (2) "There is no direct evidence linking Defendant to the manufacturing evidence found in the house"; (3) "The items found in his home, such as the cold packs and pseudoephedrine medication, are common household products"; and (4) "Detectives found the actual manufacturing device and only evidence chemically analyzed and determined to be methamphetamine in the back yard, between Defendant and Tucker's homes." *Id.* at *7. Later in its opinion, however, the Court of Appeals concluded that "[h]ere, unlike in *Lawrence*, the evidence is not 'overwhelming and uncontroverted' showing Defendant's guilt." *Id.* (quoting *State v. Lawrence*, 365 N.C. 506, 519, 723 S.E.2d 326, 335 (2012)). As a result of its conclusion that the trial court committed plain error, the Court of Appeals granted a new trial to Defendant. *Id.*

Following the decision by the Court of Appeals, the State filed a petition for discretionary review, which we allowed on 1 March 2018. In its petition, the State requested that we examine whether the Court of Appeals erred by holding that the trial court committed plain error in giving the aiding and abetting instruction.

This Court reviews the decision of the Court of Appeals to determine whether it contains any errors of law. N.C. R. App. P. 16(a); *State v. Mumford*, 364 N.C. 394, 398, 699 S.E.2d 911, 914 (2010) (citation omitted). We agree with the Court of Appeals that the trial court erred in giving the aiding and abetting instruction. The Court of Appeals, however, incorrectly concluded that the error amounted to plain error. For the reasons stated below we conclude that the Court of Appeals erred in determining that plain error occurred.

II. Analysis

[1] The Court of Appeals improperly applied the plain error standard of review to the facts here. Specifically, the Court of Appeals erred in two ways by (1) incorrectly applying the plain error standard we articulated in *State v. Lawrence*, and (2) concluding on this evidence that there was plain error when applying the correct standard.

An appellate court will apply the plain error standard of review to unpreserved instructional and evidentiary errors in criminal cases. *Lawrence*, 365 N.C. at 512, 723 S.E.2d at 330. In *Lawrence*, we reaffirmed our holding in *State v. Odom* that initially incorporated the plain error rule into North Carolina law. *Id.* at 516-18, 723 S.E.2d at 333-34; *see also Odom*, 307 N.C. at 659-62, 300 S.E.2d at 378-79 (adopting the plain error rule used by the federal courts).

In reaffirming *Odom*, we held that to demonstrate that a trial court committed plain error, the defendant must show "that a fundamental error occurred at trial." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citing *Odom*, 307 N.C. at 660, 300 S.E.2d at 378). To show fundamental error, a defendant "must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* at 518, 723 S.E.2d at 334 (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378). Further, we held that, "because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." ' " *Id.* at 518, 723 S.E.2d at 334 (alteration in original) (internal citations omitted) (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378).

In *Lawrence*, while we reaffirmed the legal principles applicable to plain error review, we concluded that the defendant failed to meet his burden of demonstrating such error. *Id.* at 519, 723 S.E.2d at 334. Specifically, we held that the trial court's instruction on conspiracy to commit robbery with a dangerous weapon was erroneous; however, we determined that the error was not plain error, because "[i]n light of the

overwhelming and uncontroverted evidence, defendant cannot show that, absent the error, the jury probably would have returned a different verdict." *Id.* at 519, 723 S.E.2d at 335.

Here the Court of Appeals stated the standard for plain error review correctly and in accord with *Lawrence*: "Defendant must demonstrate that 'absent the error, the jury probably would have reached a different result.' " *Maddux*, 2017 WL 3259784, at *7 (quoting *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993)). But, the court later reasoned that "[h]ere, unlike in *Lawrence*, the evidence is not 'overwhelming and uncontroverted' showing Defendant's guilt." *Id.* (quoting *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335).

The Court of Appeals concluded that the lack of "overwhelming and uncontroverted" evidence against defendant, *see id.* (quoting *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335), meant that "the jury probably would have reached a different result" absent the improper aiding and abetting instruction. *Id.* (quoting *Jordan*, 333 N.C. at 440, 426 S.E. 2d at 697). In other words, the court appears to have indicated that the lack of overwhelming and uncontroverted evidence against defendant required the conclusion that a jury probably would have reached a different result. The Court of Appeals erred in this line of reasoning. We did not hold in *Lawrence* that plain error is shown, and a new trial is required, *unless* the evidence against defendant is overwhelming and uncontroverted. Accordingly, the Court of Appeals erred to the extent it so held. *See id.*

[2] The Court of Appeals also erred in applying the correct standard for plain error. It erred because, "after examination of the entire record," we conclude that the ample evidence of defendant's individual guilt made it unlikely that the improper aiding and abetting instruction "had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (citing and quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378).

Here the evidence supporting defendant's individual guilt included the following: (1) all of the items found throughout defendant's residence that the State's witnesses identified as being commonly used in the production of methamphetamine, including immediate precursor chemicals to the manufacture of methamphetamine, and (2) all of the evidence found inside the one-pot meth lab and burn barrel on defendant's property, including the plastic bottles that tested positive for methamphetamine and pseudoephedrine. After examining the entire record, we conclude that the erroneous aiding and abetting instruction did not have a probable impact on the jury's finding that defendant was

guilty because of the evidence indicating that defendant, individually, used the components found throughout his house to manufacture methamphetamine in the one-pot meth lab on his own property.

The Court of Appeals offered several explanations for its conclusions. First, the Court of Appeals determined that "[t]he evidence linking Defendant to the offenses is entirely circumstantial." *Maddux*, 2017 WL 3259784, at *7. Relatedly, the Court of Appeals stated that "[t]here is no direct evidence linking Defendant to the manufacturing evidence found in the house." *Id.* Even if accurate, these assertions are not dispositive. We have routinely stated, in the sufficiency of the evidence context, that the characterization of evidence as either direct or circumstantial does not resolve whether the evidence is sufficient. *See, e.g.*, *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 550 (2018) ("[T]he test of the sufficiency of the evidence to withstand the motion is the same whether the evidence is direct, circumstantial or both." (quoting *State v. Malloy*, 309 N.C. 176, 178-79, 305 S.E.2d 718, 720 (1983))); *State v. Haselden*, 357 N.C. 1, 18, 577 S.E.2d 594, 605 ("Circumstantial evidence may be sufficient to support a conviction even when 'the evidence does not rule out every hypothesis of innocence.' " (quoting *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988))), *cert. denied*, 540 U.S. 98 (2003).

Second, the Court of Appeals reasoned that the items found in defendant's house were simply common household materials. *Maddux*, 2017 WL 3259784, at *7 ("The items found in his home, such as the cold packs and pseudoephedrine medication, are common household products."). But, this explanation is also unavailing because it treats the items in isolation and without regard for where they were located in the residence.

For example, the second search of defendant's master bedroom area revealed a metal strainer, a glass measuring cup, and a trash bag containing balled-up, burnt pieces of aluminum foil that were consistent with meth boats. In isolation, these items could be innocent household items. Had they been found in defendant's kitchen, one could conclude that they had no purpose outside of routine food preparation and waste disposal.

In contrast, here the metal strainer, the glass measuring cup, and the trash bag containing the balled-up, burnt aluminum foil were found in defendant's master bedroom or bathroom, where they would have no obvious or common household purpose. Additionally, the State's witnesses testified that other items used in methamphetamine production were present throughout defendant's residence and that defendant had a one-pot meth lab and a burn barrel on his property. Furthermore,

chemical analysis of a plastic bottle found inside the one-pot meth lab and burn barrel tested positive for methamphetamine and pseudoephedrine. Lastly, a Walgreens receipt for pseudoephedrine was also found in defendant's bedroom. When viewed with the rest of the evidence, the metal strainer, the glass measuring cup, and the trash bag containing the burnt, aluminum foil strips appear to be something other than mere common household items. In context, these items point more toward usage in the manufacture, possession, or trafficking of methamphetamine.

Finally, the Court of Appeals found that "the actual manufacturing device and only evidence chemically analyzed and determined to be methamphetamine [were found] in the back yard, between Defendant['s] and Tucker's homes." *Id.* at *7. As a result, the Court of Appeals suggested that, because others had access to the burn barrel, there is insufficient evidence to establish defendant as the "sole perpetrator." *Id.* This explanation fails, as did the Court of Appeals' common household items characterization, because it views in isolation the fact that the burn barrel was accessible to others.

We acknowledge that the evidence shows the burn barrel could have been accessed by Sawyer or Tucker from Tucker's home. Nonetheless, this finding does not undermine the theory that defendant was the sole perpetrator. Specifically, the Court of Appeals recognized the existence of methamphetamine "manufacturing evidence" in defendant's residence. *Id.* Furthermore, although the one-pot meth lab and burn barrel were accessible from both residences, they were on *defendant's* property. The evidence viewed in context amply supports the conclusion that defendant used the items found in his house to manufacture methamphetamine in a one-pot meth lab on his property.

We conclude, given this evidence of defendant's individual guilt, that the erroneous aiding and abetting instruction given by the trial court here did not have "a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378).[11]

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11. **[3]** In addition to the conclusions reached by the Court of Appeals, defendant argues that we cannot uphold his conviction even though there is ample evidence of his individual guilt because we have held that reversible error occurs when a jury is presented with alternative theories of guilt when (1) one of the theories is not supported by the evidence, and (2) it is unclear upon which theory the jury convicted defendant. *See State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987). This rule, however, is not applicable to plain error cases, such as this one, in which the error complained of is not preserved. As such, we need not address the substance of this argument.

For the reasons stated above, we hold that the trial court's error in giving the aiding and abetting instruction did not amount to plain error. Accordingly, the decision of the Court of Appeals is reversed.

REVERSED.

TD BANK, N.A.
v.
EAGLES CREST AT SHARP TOP, LLC, JOHN W. HOLDSWORTH, AND JOHN H. SEATS

No. 350PA16

Filed 26 October 2018

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 651 (2016), dismissing defendants' appeal from an order of summary judgment entered on 11 July 2014 and affirming an order denying reconsideration entered on 5 December 2014 by Judge Gary M. Gavenus in Superior Court, Yancey County. Heard in the Supreme Court on 7 November 2017.

Ward and Smith, P.A., by Norman J. Leonard and Lance P. Martin, for plaintiff-appellee.

David R. Payne, P.A., by David R. Payne and Brian W. Sharpe, for defendant-appellants.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

24 OCTOBER 2018

041P17-3	Arthur O. Armstrong v. Wilson County, et al.	1. Plt's *Pro Se* Petition for *Writ of Mandamus* 2. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Wilson County	1. Denied 2. Denied
050P17-2	State v. Robert Wayne Smith	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
072P17-4	State v. LeQuan Fox	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Wake County	Denied
089P18	Francisco J. Adame v. Aerotek, Employer, Self-Insured (ESIS, Third Party Administrator)	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA16-1118) 2. Defs' Motion to Withdraw PDR	1. --- 2. Allowed
093A93-5	Jamie Duarte Sierra v. Eric A. Hooks, Secretary, North Carolina Department of Public Safety Division of Prisons, et al., Timothy McKoy, Superintendent, Franklin Correctional Center	Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Franklin County	Denied **09/21/2018**
093P18	Latonya A. Taylor, Individually, and as the Administratrix of the Estates of Sylvester Taylor and Angela Taylor; and as Guardian ad Litem of J.T., N.H., and A.H., Minor Children v. Wake County, d/b/a The Division of Social Services	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA12-99) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Strike	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as moot
103P18	Donnie L. Goins and Jackie Knapp v. Time Warner Cable Southeast, LLC and Wake Electric Membership Corporation d/b/a Wake Electric	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA17-531) 2. Def's (Time Warner Cable Southeast, LLC) 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

24 OCTOBER 2018

115A18	Intersal, Inc. v. Hamilton, et al.	Plt's Motion for Extension of Time to Respond to Motion to Dismiss	Allowed extension of time up to and including 19 Oct 2018 **10/02/2018**
118P18-2	State v. Maurice L. Stroud	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Mecklenburg County 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 4. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed 3. Allowed 4. Dismissed as moot
133P15-3	State v. William Earl Askew	1. Def's *Pro Se* Motion for Notice of Appeal (COA18-267) 2. Def's *Pro Se* Motion for PDR	1. Dismissed 2. Dismissed
139A18	SciGrip, Inc. f/k/a IPS Structural Adhesives Holdings, Inc. and IPS Intermediate Holdings Corp. v. Samuel B. Osae and Scott Bader, Inc.	1. Joint Motion for Leave to File Under Seal 2. Plts' Conditional Petition for *Writ of Certiorari* to Review Decision of Business Court	1. Allowed 2. Allowed
142P18	DTH Media Corporation; Capitol Broadcasting Company, Inc.; The Charlotte Observer Publishing Company; The Durham Herald Company v. Carol L. Folt, in her official capacity as Chancellor of the University of North Carolina at Chapel Hill, and Gavin Young, in his official capacity as Senior Director of Public Records for the University of North Carolina at Chapel Hill	1. Defs' Motion for Temporary Stay (COA17-871) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **05/17/2018** 2. Allowed 3. Allowed
144P14-2	State v. Scott Jay Stough	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Jackson County	Dismissed

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

24 OCTOBER 2018

145P18	State v. Aaron Jackson	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-939) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
151P15-3	State v. Timothy Neal Prince	Def's *Pro Se* Motion for PDR (COAP18-559)	Dismissed
158P18-2	In re Robert Lee Styles, Jr.	Petitioner's *Pro Se* Motion to Reconsider	Dismissed
185P18	Nationwide Affinity Insurance Company of America v. Le Bei, Administrator of the Estate of Tei Paw, Thla Aye, Administrator of the Estate of Khai Hne, Khai Tlo, Nu Cing, and Tin Aung	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA17-1086) 2. N.C. Farm Bureau Mutual Insurance Company and N.C. Association of Defense Attorneys' Conditional Motion for Leave to File Amicus Brief	1. Denied 2. Dismissed as moot
193P18-3	State v. Joshua Bolen	Def's *Pro Se* Motion for Appropriate Relief	Dismissed
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 4. Def's Motion to Dismiss State's Notice of Appeal for Mootness	1. Allowed **06/23/2017** 2. Allowed **06/23/2017** 3. — 4. Denied
210P16-2	Dale Patrick Martin v. Mike Slagel, (Supt.)	Def's *Pro Se* Motion for Notice of Appeal (COAP18-632)	Denied **10/04/2018**
211P18	State v. Joseph Edwards Teague, III	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1134)	Denied **Morgan, J., recused**
220P18	State v. Reginald Leon Allen	Def's PDR Under N.C.G.S. § 7A-31 (COA17-973)	Denied
222P18	State v. Byron Domaine Griffin	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP18-409) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed 3. Dismissed as moot

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

24 OCTOBER 2018

226P13-2	State v. Joseph Ragland	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **10/05/2018**
226P18	State v. Joey Lee Raborn, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1105)	Denied **Ervin, J., recused**
228P18	Homestead at Mills River Property Owners Association, Inc. v. Boyd L. Hyder, et al.	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-606)	Denied
232P18	Rhonda K. Daniels v. Jerry Daniels	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-73)	Denied
233P12-2	State v. Montrez Benjamin Williams	1. State's Motion for Temporary Stay (COA16-178) 2. State's Petition for *Writ of Supersedeas* 3. Def's Motion for Temporary Stay 4. Def's Petition for *Writ of Supersedeas*	1. Allowed **10/05/2018** 2. 3. Allowed **10/05/2018** 4.
235P18	State v. Ty Rayshun Davis	Def's *Pro Se* Motion for Judicial Review	Dismissed
236P06-2	Robert Andrew Bartlett, Sr., v. Eric A. Hooks, Secretary, North Carolina Department of Public Safety	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **09/27/2018**
237P04-2	State v. James Edward Bell, Jr.	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP17-126)	Dismissed
247P18	State v. Christopher Georges Degand	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1026)	Denied
248A18	Sykes, et al. v. Blue Cross and Blue Shield of North Carolina, et al.	Plts' Motion to Amend Record on Appeal	Allowed **10/02/2018**

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

24 OCTOBER 2018

250P18	State v. Harvey Lee Grady	1. Def's Notice of Appeal Based Upon a Constitutional Question COA17-731) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Deem PDR Timely Filed 4. Def's Motion in the Alternative to Deem PDR a Petition for *Writ of Certiorari* 5. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Denied 4. Allowed 5. Allowed
252P18	State v. Franchot Lane Christmas	Def's *Pro Se* Motion for Notice of Appeal (COAP18-519)	Dismissed
257P18	State v. Sydney Shakur Mercer	1. State's Motion for Temporary Stay (COA17-1279) 2. State's Petition for *Writ of Supersedeas* 3. State's Motion to File Petition for *Writ of Supersedeas* and Application for Temporary Stay with Corrected Certificate of Service 4. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/21/2018** 2. 3. Allowed **09/28/2018** 4.
258P18	State v. Darren Wayne Blevins	Def's Petition for *Writ of Certiorari* to Review Decision of COA (COA16-589)	Denied
262P18	Alessandra L. McKenzie v. Steven M. McKenzie	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-854)	Denied
266P18-2	State v. Charles Antonio Means	Def's *Pro Se* Motion to Dismiss	Dismissed
271A18	State *ex rel.* Utilities Commission v. Attorney General	1. Joint Motion for Leave to File Documents Under Seal 2. Intervenor's Motion to Admit Bridget M. Lee *Pro Hac Vice*	1. Allowed 2. Allowed
274P15-5	State v. Robert K. Stewart	Def's *Pro Se* Motion of Objections	Dismissed
274A18	State v. Duval Lamont Bowman	1. State's Motion for Temporary Stay (COA17-657) 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 **08/27/2018** 2. Allowed 3. --- 4. Allowed

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

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278P18	State v. Vondell Tyshang Gregory	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP18-571)	Denied
279P18	Huran Ali Born Aaron Godett v. State of North Carolina and Craven County	Plt's *Pro Se* Motion for Suit for Punitive Damages and Compensatory Damages	Dismissed
281P18	State v. Jason Robert Vickers	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-1216) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied
285P18	State v. Otis Redding Howie, Jr.	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Union County	Dismissed **Ervin, J., recused**
287P18	State v. Donald Wayne Black	Def's PDR Under N.C.G.S. § 7A-31 (COA17-963)	Denied
307P18	Common Cause, Dawn Baldwin Gibson, Robert E. Morrison, Cliff Moone, T. Anthony Spearman, Alida Woods, Lamar Gibson, Michael Schacter, Stella Anderson, Mark Ezzell, and Sabra Faires v. Daniel J. Forest, in his Official Capacity as President of the North Carolina Senate; Timothy K. Moore, in his Official Capacity as Speaker of the North Carolina House of Representatives; and Philip E. Berger in his Official Capacity as President Pro Tempore of the North Carolina Senate	Plts' PDR Under N.C.G.S. § 7A-31 (COA18-870)	Denied

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308P18	State v. Michael Odell Fair	Def's *Pro Se* Motion for Notice of Motion to Intervene an Estoppel and Rebuttal to Quittance Claim	Dismissed
311P18	State v. Shakita Necole Walton	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **09/21/2018** 2.
312P18	State v. Aaron Lee Gordon	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **09/21/2018** 2.
313P18	Dunhill Holdings, LLC, Plaintiff/ Counter-Defendant v. Tisha L. Lindberg, Defendant/Counter-Plaintiff and Wes Massey, Craig Herndon, Hardee Merritt, and Derek Boone, Defendants ——— Tisha L. Lindberg, Third-Party Plaintiff v. Greg Lindberg, Third-Party Defendant	1. Plaintiff-Counter Defendant and Third-Party Def's Motion for Temporary Stay (COAP18-613) 2. Plaintiff/Counter-Defendant and Third-Party Def's Petition for *Writ of Supersedeas* 3. Defendant/Counter-Plaintiff and Third-Party Plaintiff's Motion for Expedited Consideration	1. Allowed **09/24/2018** 2. 3. **Jackson, J., recused**
314P18	State v. Denzil Dequon Fennell	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Wake 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

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

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315P18	Roy A. Cooper, III, Individually and in his Official Capacity as Governor of the State of North Carolina v. Philip E. Berger, in his Official Capacity as President Pro Tempore of the North Carolina Senate; Timothy K. Moore, in his Official Capacity as Speaker of the North Carolina House of Representatives; Charlton L. Allen, in his Official Capacity as Chair of the North Carolina Industrial Commission; and Yolanda K. Stith, in her Official Capacity as Vice-Chair of the North Carolina Industrial Commission	Plt's PDR Prior to a Determination by COA	Allowed
316P98-4	State v. Billy Ray Artis	Def's *Pro Se* Motion for Petition for Rehearing	Dismissed **Ervin, J., recused**
323P18	State v. Ricky Charles Howell	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **09/27/2018**
331P01-5	State v. Nicholas Nathaniel Cauley	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP18-432)	Dismissed
332P17-2	Joris Haarhuis, Administrator of the Estate of Julie Haarhuis (deceased) v. Emily Cheek	1. Def's Motion for Temporary Stay (COA17-1179) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31 4. Plt's Motion to Reconsider and Vacate Order Allowing Temporary Stay	1. Allowed **10/19/2018** 2. 3. 4. Denied **10/22/2018**
332P18	State v. Michael Stanley Mazur and Anne-Marie Mazur	1. Def's (Anne-Marie Mazur) Motion for Temporary Stay (COA17-736) 2. Def's (Anne-Marie Mazur) Petition for *Writ of Supersedeas*	1. Allowed **10/05/2018** 2.

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332P18	State v. Michael Stanley Mazur and Anne-Marie Mazur	1. Def's (Michael Stanley Mazur) Motion for Temporary Stay (COA17-736) 2. Def's (Michael Stanley Mazur) Petition for *Writ of Supersedeas*	1. Allowed **10/08/2018** 2.
335P18	In the Matter of J.B.	1. State's Motion for Temporary Stay (COA17-1373) 2. State's Petition for *Writ of Supersedeas* 3. Counsel's Motion to Withdraw as Counsel of Record 4. Juvenile's Motion to Appoint the Appellate Defender 5. Juvenile's Motion for Extension of Time to Respond to PDR	1. Allowed **10/08/2018** 2. 3. Allowed **10/11/2018** 4. Allowed **10/11/2018** 5. Allowed **10/11/2018**
340A95-6	State v. William E. Morganherring, IV	1. Def's *Pro Se* Petition for *Writ of Habeas Corpus* 2. Def's *Pro Se* Motion for DNA Testing of Biological Specimens	1. Denied **10/02/2018** 2. Dismissed **10/02/2018**
352P18	Elizabeth E. LeTendre v. Currituck County, North Carolina and Michael Long and Marie Long	1. Plt's Motion for Temporary Stay (COA18-163) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/18/2018** 2. 3.
355P18	State v. Shelly Anne Osborne	1. State's Petition for *Writ of Supersedeas* 2. Application for Temporary Stay	1. 2. Allowed **10/22/2018**
402PA15-3	State v. Donna Helms Ledbetter	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-414-3) 2. Def's Motion for Temporary Stay 3. Def's Petition for *Writ of Supersedeas*	1. 2. Allowed **10/15/2018** 3.
449P11-21	In re Charles Everette Hinton	1. Plt's *Pro Se* Motion to Amend 2. Plt's *Pro Se* Motion for Trial by Jury and Separate Trials 3. Plt's *Pro Se* Motion for Relief from Court Orders	1. Denied **10/08/2018** 2. Denied **10/08/2018** 3. Denied **10/08/2018** **Ervin, J., recused**

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

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532P08-3	State v. Frank Durand Tomlin	1. Def's Motion for Temporary Stay (COA17-351)	1. Allowed **07/11/2018** Dissolved **10/24/2018**
		2. Def's Petition for *Writ of Supersedeas*	2. Denied
		3. Def's PDR Under N.C.G.S. § 7A-31	3. Denied
		4. Def's Petition for *Writ of Certiorari* to Review Decision of COA	4. Denied
		5. State's Conditional PDR Under N.C.G.S. § 7A-31	5. Dismissed as moot

AZURE DOLPHIN, LLC v. BARTON

[371 N.C. 579 (2018)]

AZURE DOLPHIN, LLC, a Nevada Limited Liability Company,
and JEAN-PIERRE BOESPFLUG
v.
JUSTIN BARTON; BARTON BOESPFLUG II, a California Limited Liability Partnership;
HESS CREEK, LLC, an Oregon Limited Liability Company; ROYAL ASCOT, LLC, an Oregon
Limited Liability Company; and VINTAGE OAK II, a California Limited Partnership

No. 128A18

Filed 7 December 2018

1. Pleadings—removal of LLC manager—foreign organization—pre-suit demand requirement—futility exception

The trial court did not err by dismissing plaintiffs' claims for removal of Mr. Barton as manager or general partner of certain investment entities where the claims were derivative; the laws of California and Oregon, where the entities were organized, applied to the question of pre-suit demand; and the demand and the explanation needed in the pleadings for the futility exception to the demand requirement were not present.

2. Fiduciary Relationship—breach of fiduciary duty—constructive fraud—fiduciary relationship—insufficiently alleged

The trial court did not err in an action between real estate investors by dismissing plaintiffs' hybrid constructive fraud and breach of fiduciary duty claim for failure to state a claim upon which relief could be granted. Plaintiffs insufficiently alleged a fiduciary relationship between the investors as a matter of law or fact.

3. Unfair Trade Practices—failure to state a claim—underlying constructive fraud claim dismissed

The trial did not err by dismissing plaintiffs' unfair and deceptive practices claim for failure to state a claim upon which relief could be granted where the claim was based on a claim for constructive fraud, the dismissal of which was upheld elsewhere in the opinion.

4. Pleadings—second amendment to complaint—undue delay

The trial court did not abuse its discretion by denying plaintiffs' second motion to amend the complaint. There was ample support for the trial court's conclusion that plaintiff's second amendment involved undue delay, suggested a dilatory motive, and was neither accompanied by a brief nor a statement of the position of opposing counsel, as required by the applicable Business Court Rules.

Appeal pursuant to N.C.G.S. §§ 7A-27(a)(2) and 7A-27(a)(3) from a final opinion and order dated 2 October 2017 and an interlocutory order entered on 2 June 2017, both by Judge Adam M. Conrad, 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 1 October 2018.

Blanco, Tackabery & Matamoros, P.A., by Peter J. Juran, M. Rachael Dimont, and Chad A. Archer, for plaintiff-appellants.

Bell, Davis & Pitt, P.A., by Andrew A. Freeman and Alan M. Ruley, for defendant-appellees.

ERVIN, Justice.

The principal issues before the Court in this case are whether the trial court properly dismissed the claims that plaintiffs Azure Dolphin, LLC, and Jean-Pierre Boespflug asserted in their first amended complaint and whether the trial court properly denied plaintiffs' second motion to amend their complaint. After careful consideration of plaintiffs' challenges to the trial court's orders in light of the applicable law, we conclude that the challenged orders should be affirmed.

I. Factual Background

A. Substantive Facts

Mr. Boespflug and defendant Justin Barton[1] began working together in the real estate investment business approximately thirty years ago. As part of their business strategy, Mr. Boespflug and Mr. Barton created "various entities to acquire and hold investment properties throughout the United States," including "large apartment complexes and commercial buildings." Among the investment entities that resulted from this process were defendants Hess Creek, LLC, an Oregon limited liability company formed in 1996; Royal Ascot, LLC, an Oregon limited liability company formed in 2001; and Barton Boespflug II and Vintage Oak II,[2] both of which were California limited partnerships formed in 1986.

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1. Mr. Barton and his wife, Janet Barton, control and operate a property management business located in Winston-Salem known as Viking Properties.

2. While plaintiffs' amended complaint refers to this entity as both "Vintage Oak" and "Vintage Oaks," we note that plaintiffs' briefs refer to the entity as "Vintage Oak." We, therefore, will refer to this entity as "Vintage Oak" throughout the remainder of this opinion.

According to the allegations contained in the amended complaint, Mr. Barton served as manager or general partner for Hess Creek, Royal Ascot, Barton Boespflug, Vintage Oak, and the other investment entities, while Mr. Boespflug "contributed the majority of the capital" and served as either a member or limited partner of each of the investment entities. Mr. Boespflug gave Mr. Barton "some discretion to manage the Properties," with Mr. Barton having the responsibility for "reporting to [Mr.] Boespflug intermittently on the state of the portfolio." At some unspecified point in time, Mr. "Boespflug formed Azure Dolphin," a Nevada limited liability company, to which he transferred a portion of his economic interests in the investment entities that he and Mr. Barton had created and operated.

On 21 April 2011, Mr. Boespflug, a dual citizen of France and the United States, moved back to Paris. On 26 April 2011, Mr. Barton e-mailed Mr. Boespflug for the purpose of requesting his assistance in securing a new loan and refinancing two existing loans. In his reply, Mr. Boespflug "explained to [Mr.] Barton that his financial position was no longer conducive to personally guaranteeing loans" relating to the investment entities. After a lender "demanded that both Azure [Dolphin] and [Mr.] Boespflug guaranty the new loans," Mr. Boespflug reiterated "that this was not an option."

Subsequently, Mr. Barton converted Mr. Boespflug's membership interests in the investment entities to notes payable with a face value that "was a fraction of the true value of [Mr.] Boespflug's membership interests." More specifically, on 1 January 2012, Mr. Barton issued promissory notes to Mr. Boespflug in order to transfer "all of the Investment Entities['] interests [that Mr.] Boespflug [had] previously assigned to Azure Dolphin" to the following entities: Barton Boespflug; Viking Property Investors, LLC; Ash Creek, LLC; Vintage Oak; and Willamette River I, LLC. On 1 January 2013, Mr. Barton issued a second series of promissory notes to Mr. Boespflug by means of which he acquired "the remainder of [Mr.] Boespflug's interest in the Investment Entities." The promissory notes in question reflected the value of the interests that Mr. Boespflug and Azure Dolphin owned in the investment entities, which, according to appraisals that Mr. Barton had obtained, amounted to a total of $2,008,006. In plaintiffs' view, Mr. Barton "manipulated" the appraisals so as to undervalue Mr. Boespflug's interests in the investments entities.

After engaging in these transactions, Mr. Barton "unilaterally amended the operating agreements of the Investment Entities with terms considerably more favorable to him," "sold at least six of the [p]roperties" owned by the investment entities, and transferred properties

held by the investment entities "into his own name and to different entities controlled by [Mr.] Barton and/or his immediate family members."

On 15 January 2013, Mr. Barton sent an e-mail to Mr. Boespflug to which was attached a letter signed by Mr. Barton that had as its subject line "Buyout of Jean-Pierre Boespflug, effective 1/1/2013." The letter stated that:

> Effective January 1, 2013 (pursuant to amended restated operating agreements, dated November 1, 2011), your economic interest in partnerships, per MAI appraisals, will be replaced with promissory notes. These partnerships are as follows: Ash Creek, LLC, Hess Creek, LLC, Jay's Canby, LLC, Jay's Commonwealth Park I, LLC, Jay's Commonwealth Park II, LLC, Newby House LLC, Richmond Park, LLC, and River Valley Investors, LLC. The respective promissory notes and corresponding loan amortization schedules are enclosed.

According to the amended complaint, these promissory notes accompanied "an otherwise unrelated email with no indication of the importance of the communication and thus this email remained unread until 2016." Mr. Boespflug claimed that he did not actually learn of the actions reflected in this letter until the summer of 2016.

B. Procedural History

1. Trial Court Proceedings

a. Preliminary Proceedings

On 16 December 2016, Mr. Boespflug, Azure Dolphin, and JPB Holdings, Inc.,[3] commenced this action by filing a complaint asserting fifteen claims, including individual and derivative claims for constructive fraud, breach of the duty of loyalty, breach of the duty of care, breach of the duty of good faith and fair dealing, civil conspiracy, fraudulent conveyance, and unfair and deceptive practices, and seeking various remedies against twenty-one defendants,[4] including Mr. Barton, certain

3. Although JPB Holdings, Inc., participated in the proceedings before the trial court, it is not a party to the proceedings on appeal.

4. The defendants named in the original complaint were Mr. Barton; Janet Barton; Viking Properties; Sanur Brokerage; Viking Property Investors; Montpelier Investors, LLC; Jay's Canby Florence, LLC; Willamette River One, LLC; Victoria Place General Partnership; Jay's Commonwealth Phase 1, LLC; Jay's Commonwealth Phase 2, LLC; Ash Creek; Barton Boespflug; Hess Creek; Jay Canby, LLC; Newby House, LLC; Richmond Park, LLC; River Valley Investors, LLC; Royal Ascot; Vintage Oak; and Willamette River One.

of the investment entities, and other defendants. On 19 December 2016,[5] the Chief Justice designated this case as a mandatory complex business case. On 10 February 2017, defendants[6] filed a motion to compel arbitration or, alternatively, to dismiss plaintiffs' complaint for lack of personal jurisdiction, lack of subject matter jurisdiction, failure to join a necessary party, insufficiency of process, failure to state a claim upon which relief could be granted, and "the existence of arbitration agreements." On the same day, Sanur Brokerage filed an answer to plaintiffs' complaint.

On 14 March 2017, plaintiffs filed a motion seeking leave to file an amended complaint, a copy of which was attached to their amendment motion. The proposed amended complaint attempted to add eleven additional defendants and included a number of new factual and legal assertions, including allegations that the trial court had jurisdiction over all of the named defendants pursuant to N.C.G.S. § 1-75.4(1) and that, even though certain of the investment entities had been organized under the laws of other states, they were "instrumentalities of [Mr.] Barton as he engages in substantial activity within North Carolina" and had "received property and proceeds of property that belong to North Carolina domestic entities and benefit from bad acts committed by [Mr.] Barton inside of North Carolina or directed at North Carolina corporations." In seeking leave to amend their complaint, plaintiffs asserted that the amended complaint would "cure deficiencies alleged by the [d]efendants in their joint Motion to Dismiss filed on February 10, 2017[,] including naming necessary parties previously unknown to the [p]laintiffs."

On 6 April 2017, the trial court granted plaintiffs' amendment motion, ordered plaintiffs to file their amended complaint on or before 11 April 2017, and denied defendants' dismissal motion without prejudice to their right to move to dismiss the amended complaint. In the 6 April 2017 order, the trial court noted that plaintiffs had "failed to state the position of opposing counsel" as required by Business Court Rule 7.3 and indicated its expectation that plaintiffs would "comply with the General Rules of Practice and Procedure for the North Carolina Business Court in future filings."

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5. The e-filing date and file-stamp date associated with many of the documents referenced in this case differ slightly. In the event that there is such a discrepancy, we have utilized the e-filing date in this opinion in lieu of the date upon which the document was file-stamped.

6. All of the defendants named in the original complaint except for Viking Properties joined the motion to dismiss the original complaint.

On 18 April 2017, plaintiffs filed an amended complaint. On 19 April 2017, defendants filed a clarification motion in which they asserted that plaintiffs had failed to file their amended complaint by 11 April 2017 and had, instead, sought an extension of time within which to file their amended complaint. In addition, defendants noted that, on 17 April 2017, the trial court had denied plaintiffs' extension motion and had, instead, ordered plaintiffs to "file the version of their Amended Complaint attached to their March 14, 2017 Motion to Amend no later than 5:00 [p.m.] on April 18, 2017." Finally, defendants asserted that plaintiffs' amended complaint had been filed without authorization and differed from the proposed amended complaint that had been attached to plaintiffs' amendment motion.

On 20 April 2017, plaintiffs filed an errata notice and the version of the amended complaint that had been attached to their amendment motion. On 21 April 2017, the Business Court entered an order striking the amended complaint that plaintiffs had filed on 18 April 2017 and declaring that the amended complaint that plaintiffs had filed on 20 April 2017 was the relevant pleading for purposes of future proceedings in this case.

On 12 May 2017, plaintiffs filed a motion for leave to file a second amended complaint, to which they attached a proposed amended complaint. On 19 May 2017, defendants filed a motion to dismiss plaintiffs' amended complaint. On 22 May 2017, plaintiffs filed an errata notice and a new version of the proposed second amended complaint.

On 30 May 2017, the trial court entered an order denying plaintiffs' second amendment motion. In its order, the trial court stated that, while "[p]laintiffs filed the correct version of the amended complaint on April 20, 2017," they did not do so until "31 days after [p]laintiffs first notified the Court that they intended to file a second motion for leave to amend." In addition, the trial court pointed out that the "proposed second amended complaint undoes many of the changes made in the first amended complaint," such as the elimination of "Sanur Brokerage LLC, Viking Properties, LLC, and all individuals except for Justin and Janet Barton as defendants." According to the trial court, plaintiffs' second amendment motion involved undue delay, suggested the existence of a "dilatory motive," and was accompanied by neither a brief nor a statement of the position of opposing counsel as required by the applicable Business Court Rules.

On 8 June 2017, plaintiffs voluntarily dismissed their claims against Sanur Brokerage, Viking Properties, and the "necessary defendants" that

plaintiffs had named in the amended complaint. In addition, plaintiffs voluntarily dismissed their unjust enrichment, conversion, and derivative claims for breach of fiduciary duty, imposition of a constructive trust, and punitive damages.

b. Trial Court's Order

On 2 October 2017, the trial court entered an order granting defendants' dismissal motion. *Azure Dolphin, LLC v. Barton*, No. 16 CVS 7622, 2017 WL 4400223, at *11 (N.C. Super. Ct. Forsyth County Bus. Ct. Oct. 2, 2017), *appeal dismissed in part*, 2018 WL 3241726, at *3 (N.C. Super. Ct. Mar. 28, 2018). After noting that "[e]ach of the ten [d]efendants [challenging the trial court's jurisdiction over their persons had] filed an affidavit stating it is not domiciled in and does not have its principal place of business in this State," the trial court concluded that "[p]laintiffs have not carried their burden to support the exercise of personal jurisdiction" given their failure to produce "evidence of any 'continuous and systematic' contacts between these ten [d]efendants and North Carolina giving rise to general jurisdiction," citing *Goodyear v. Brown*, 564 U.S. 915, 919, 131 S. Ct. 2846, 2851, 180 L. Ed. 2d 796, 803 (2011), or any "evidence that the ten [d]efendants 'purposely avail[ed]' themselves 'of the privilege of conducting activities within' North Carolina, such that the exercise of specific jurisdiction would be appropriate," citing *Cambridge Homes of N.C. L.P. v. Hyundai Constr., Inc.*, 194 N.C. App. 407, 413, 670 S.E.2d 290, 296 (2008) (quoting *Lulla v. Effective Minds, LLC*, 184 N.C. App. 274, 279, 646 S.E.2d 129, 133 (2007)). As a result, the trial court dismissed the claims that plaintiffs had asserted against these ten defendants for lack of personal jurisdiction.

After dismissing the claims that had been asserted on behalf of JPB Holdings on the grounds that it lacked a valid corporate existence, the trial court determined that it lacked the authority to dissolve Barton Boesplug and Vintage Oak, both of which were California limited partnerships, and Hess Creek and Royal Ascot, both of which were Oregon limited liability companies. In addition, although Jay's Commonwealth Park and Jay's Commonwealth Park Phase II were both North Carolina limited liability companies, the trial court found that, since neither Azure Dolphin nor Mr. Boespflug were members of the entities in question, both plaintiffs lacked standing to assert a dissolution claim involving those entities, citing N.C.G.S. § 57D-6-02(2) (providing that "only a member of [a limited liability company] has standing to assert a claim for judicial dissolution"). Lastly, the trial court dismissed plaintiffs' claim seeking the removal of Mr. Barton from his position as manager of the

investment entities[7] on the grounds that such relief must be sought in a derivative, rather than an individual action, and that plaintiffs had failed to make the demand upon the entities in question required by N.C.G.S. § 57D-8-01(a)(2) before filing their complaint in this case.

Thirdly, the trial court addressed plaintiffs' claim seeking to have Mr. Boespflug's removal as a member of the investment entities and Mr. Barton's efforts to "unilaterally amend[ ] the operating agreements of some or all of the Investment Entities" invalidated. In concluding that these claims should be dismissed, the trial court determined that plaintiffs had failed to join all of the parties necessary for a proper adjudication of the claims in question, citing N.C.G.S. § 1-260 (providing that "all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings"), on the grounds that, since "[a]ny declaration invalidating an operating agreement or altering the LLC's membership under the operating agreement would, 'as a practical matter,' adversely affect the rights of these members," it would be improper for the trial court to adjudicate the validity of the operating agreements without joining each member of the relevant investment entities, quoting *N.C. Monroe Constr. Co. v. Guilford County Bd. of Educ.*, 278 N.C. 633, 640, 180 S.E.2d 818, 822 (1971). In addition, the trial court determined that "any attempt to cure would be futile" given that "all of the additional parties reside outside North Carolina, and there are no allegations that would support the exercise of personal jurisdiction over them." As a result, the trial court dismissed plaintiffs' claims seeking the invalidation of Mr. Barton's amendments to the operating agreements of the investment entities and the restoration of Mr. Boespflug's interests in the investment entities for lack of subject matter jurisdiction.

The trial court next considered whether plaintiffs' amended complaint contained sufficient allegations to state a hybrid claim for breach of fiduciary duty and constructive fraud.[8] Although these two claims had been pleaded jointly in the amended complaint, the trial court noted

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7. Any reference to a "removal claim" throughout the remainder of this opinion should be understood as referring to plaintiffs' request for a judicial declaration that Mr. Barton be removed as manager or general partner of the investment entities.

8. As the court pointed out, plaintiffs had already voluntarily dismissed their claims against Viking Properties, so the only remaining hybrid constructive fraud and breach of fiduciary duty claim was the one that plaintiffs had asserted against Mr. Barton and Viking Property Investors.

that they required proof of different elements. However, the existence of a fiduciary relationship is necessary to the successful assertion of both claims, citing *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001), and *Crumley & Assocs., P.C. v. Charles Peed & Assocs., P.A.*, 219 N.C. App. 615, 620, 730 S.E.2d 763, 767 (2012)). In spite of the fact that plaintiffs alleged that Mr. "Barton [had] abused his position of trust and confidence by altering the records of the Investment Entities, diverting the income streams and opportunities to himself, other entities under his control and other insiders of Viking Properties . . . for the purpose of benefitting himself to the detriment of the Investment Entities and the members," the trial court determined that plaintiffs "ha[d] not adequately alleged the existence of a fiduciary relationship" as either a matter of law or fact. In view of the fact that, "as a matter of law, a manager of [a limited liability company] does not owe a fiduciary duty to its members," the trial court concluded that plaintiffs' allegation that Mr. Barton managed the investment entities and that Mr. Boespflug was a member did not establish the existence of a fiduciary relationship between the two men as a matter of law. In addition, the trial court determined that the amended complaint did not "meet the 'demanding' standard for alleging that a fiduciary relationship exists as a fact," citing *Lockerman v. S. River Elec. Membership Corp.*, ___ N.C. App. ___, ___ 794 S.E.2d 346, 352 (2016), because the amended complaint, which depicted a relationship in which "[Mr.] Boespflug contributed most of the capital while [Mr.] Barton contributed most of the real estate expertise," did not reflect a dynamic in which either party "held 'all the financial power or technical information' or exercised dominion and influence over the other," citing *Lockerman*, ___ N.C. App. at ___, 794 S.E.2d at 352 (quoting *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 613, 659 S.E.2d 442, 451 (2008)). As a result, the trial court dismissed plaintiffs' hybrid constructive fraud and breach of fiduciary duty claim.

In addressing plaintiffs' remaining claims, the trial court began by dismissing the fraudulent conveyance claim that plaintiffs had asserted against four defendants on the grounds that plaintiffs' "vague" assertions that they were entitled to recover "real property, proceeds from that property and/or revenue streams associated with the property" were insufficiently particular to satisfy the requirements of N.C.G.S. § 1A-1, Rule 9. In addition, given that plaintiffs had relied upon "instances of fraud, constructive fraud, and fraud by omission" to establish that defendants had committed an unfair or deceptive act, plaintiffs' failure to "adequately allege facts to support their claims for constructive fraud and fraudulent conveyance" necessarily demonstrated that plaintiffs had

failed to "allege[ ] facts to show that [d]efendants committed an unfair or deceptive act under [N.C.G.S. §] 75-1.1." The trial court dismissed plaintiffs' civil conspiracy claim on the grounds that civil conspiracy does not constitute an independent cause of action and that the trial court had already dismissed the fraud-based claims upon which plaintiffs' civil conspiracy claim rested. Finally, the trial court dismissed plaintiffs' "purported 'claims for relief' for injunction, appointment of a receiver, constructive trust, and punitive damages" on the grounds that these "claims" were actually "*remedies*, not *causes of action*." As a result, the trial court dismissed all of the claims that plaintiffs had asserted against each defendant. Plaintiffs noted an appeal to this Court from the trial court's orders.

2. Appellate Proceedings

In seeking to persuade us to overturn the challenged trial court orders, plaintiffs contend that the trial court erred by dismissing their claims for Mr. Barton's removal as manager or general partner of the investment entities based upon plaintiffs' purported failure to comply with what is "commonly known as the 'North Carolina Limited Liability Company Act,' " citing N.C.G.S. §§ 57D-1-01, 57D-1-02(a). More specifically, plaintiffs note that N.C.G.S. § 57D-8-06 provides, in pertinent part, that, "[i]n any derivative proceeding in the right of a foreign [limited liability company], the matters covered by this Article will be governed by the law of the jurisdiction of the foreign [limited liability company's] organization," so that the statutory pre-suit "demand requirement" set out in N.C.G.S. § 57D-8-01(a)(2) is inapplicable to Barton Boespflug, Hess Creek, Royal Ascot, and Vintage Oak, each of which was organized under either California or Oregon law. As a result, plaintiffs contend that Oregon law governs whether and to what extent plaintiffs must satisfy a statutory pre-suit demand requirement before commencing a derivative action on behalf of Hess Creek and Royal Ascot and note that Oregon law recognizes a futility exception to its statutory pre-suit demand requirement, citing Or. Rev. Stat. Ann. § 63.801(2) (West 2018) (providing that "a complaint in a proceeding brought in the right of a limited liability company must allege with particularity the demand made, if any, to obtain action by the managers or the members who would otherwise have the authority to cause the limited liability company to sue in its own right, and either that the demand was refused or ignored or the reason why a demand was not made"); *Bernards v. Summit Real Estate Mgmt., Inc.*, 229 Or. App. 357, 363, 213 P.3d 1, 4 (2009). According to plaintiffs, "it would be entirely illogical to treat a plaintiff's statutorily excused 'failure' to make a futile demand on an entity prior to pursuit of a derivative

claim on the entity's behalf as a jurisdictional bar to the adjudication of that claim."

Similarly, plaintiffs assert that their "claims to remove [Mr.] Barton as general partner of Barton Boespflug II and Vintage Oak II are governed by California law" rather than North Carolina law. As a result of the fact that the relevant North Carolina statutory provisions apply to "a partnership formed by two or more persons *under the laws of this State*," N.C.G.S. § 59-102(8) (emphasis in plaintiffs' brief), plaintiffs assert that North Carolina's statutory limited partnership pre-suit demand requirement, N.C.G.S. § 59-1001 (providing that "[a] limited partner may bring an action in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed"), does not extend to entities, such as Barton Boespflug and Vintage Oak, which were not organized under North Carolina law. On the contrary, plaintiffs contend that California law governs their claims to remove Mr. Barton as the general partner of Barton Boespflug and Vintage Oak, citing N.C.G.S. § 59-901 for the proposition that "the laws of the jurisdiction under which a foreign limited partnership is organized govern its organization and internal affairs," and argue that, "to the extent the claims [relating to the limited partnerships] are derivative in nature, failure to make a pre-suit demand would not be fatal" under either North Carolina law, N.C.G.S. § 59-1001, or California law, Cal. Corp. Code § 15910.02 (West 2018) (providing that "[a] partner may bring a derivative action to enforce a right of a limited partnership if" "the partner first makes a demand on the general partners, requesting that they cause the limited partnership to bring an action to enforce the right, and the general partners do not bring the action within a reasonable time" "or [making such] a demand would be futile"). As a result, plaintiffs argue that the trial court erred by dismissing their claims for Mr. Barton's removal as the general partner of Barton Boespflug and Vintage Oak based upon plaintiffs' failure to make a pre-suit demand.

In addition, plaintiffs claim that a "litigant's purported failure to satisfy a pleading requirement does not deprive a court of subject matter jurisdiction" and would, instead, "entitle the litigant's opponent to challenge the claim by way of a [ ] motion to dismiss for failure to state a claim," which "is an affirmative defense." Citing *Simon v. Manufacturers Hanover Tr. Co.*, 849 F. Supp. 880, 882 (S.D.N.Y. 1994). In view of the fact that a court may not "*sua sponte* raise an affirmative defense on a defendant's behalf," it "must refrain from [ ] independently examining whether dismissal could be appropriate based on an unraised affirmative defense

that a complaint fails to state a claim upon which relief can be granted," citing *Unifund CCR, LLC v. Francois*, ___ N.C. App. ___, ___, 817 S.E.2d 915, 916 (2018). As a result, plaintiffs argue that, since defendants' motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) did not rest upon an argument that "dismissal was appropriate because [plaintiffs] failed to satisfy the pleading requirements of either Or. Rev. Stat. Ann. § 63.801(2) or Cal. Corp. Code § 15910.04," any decision to affirm the trial court's dismissal order would amount to "sanctioning a sua sponte invocation of an unraised affirmative defense."

Furthermore, plaintiffs contend that the common law-based "internal affairs doctrine would nevertheless vitiate the Business Court's holding" that plaintiffs' claims for the removal of Mr. Barton as manager or general partner of the investment entities were subject to the pre-suit demand requirements enunciated in N.C.G.S. § 57D-8-01(a)(2). According to plaintiffs, the internal affairs doctrine is

> a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands.

Quoting *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 680, 657 S.E.2d 55, 63, *disc. review denied*, 362 N.C. 679, 669 S.E.2d 741 (2008). Although this doctrine arose in the corporate context, plaintiffs assert that the internal affairs doctrine "has also been applied with respect to the internal affairs of limited liability companies and limited partnerships," citing *TC Invs., Corp. v. Becker*, 733 F. Supp. 2d 266, 282 (D.P.R. 2010). As a result, plaintiffs argue that the internal affairs doctrine provides another basis for concluding that plaintiffs' removal claims are subject to Oregon and California, rather than North Carolina, law.

Lastly, plaintiffs contend that "it is not clear that the claims for removal of [Mr.] Barton as manager or general partner of the Entity Appellees are purely derivative." After recognizing that decisions from other jurisdictions have determined that similar removal claims in the limited liability company and limited partnership context are derivative in nature, plaintiffs argue that, "in accordance with the internal affairs doctrine, courts look to the state of an entity's organization to determine whether a particular claim is derivative or direct," citing *Becker*, 733 F. Supp. 2d at 282, and *Munson v. Valley Energy Inv. Fund, U.S., LP*, 264 Or. App. 679, 703, 333 P.3d 1102, 1119 (2014). According to plaintiffs,

the Oregon and California courts "have eschewed strict classification of particular types of claims as either direct or derivative and have opted instead to take an ad hoc approach, evaluating whether a particular claim, as asserted in a particular lawsuit, is being asserted in a direct capacity, a derivative capacity, or both," citing *Loewen v. Galligan*, 130 Or. App. 222, 228, 882 P.2d 104, 111, *review denied*, 320 Or. 493, 887 P.2d 793 (1994), as "looking to whether a shareholder has suffered a 'special injury' to determine whether [a] claim, as asserted, was direct or derivative," and pointing to *Sole Energy Co. v. Petrominerals Corp.*, 128 Cal. App. 4th 212, 228, 26 Cal. Rptr. 3d 798, 809, *review denied*, 2005 Cal. LEXIS 8003 (2005), as holding that "[w]hether a cause of action is derivative or can be asserted by an individual shareholder is determined by considering the wrong alleged."

Plaintiffs assert that their claims to remove Mr. Barton from the management of Hess Creek and Royal Ascot "likely are at least partially direct" because Mr. "Boespflug and Azure Dolphin have undoubtedly suffered 'special injury' as a result of Barton's abuse of his position as manager," citing *Loewen*, 130 Or. App. at 228, 882 P.2d at 111. Similarly, plaintiffs argue that, because their removal claims pertaining to Hess Creek and Royal Ascot "are 'based . . . on a fraud affecting [them] directly,' " they are, for that reason, at least partially direct, quoting *Sutter v. Gen. Petroleum Corp.*, 28 Cal. 2d 525, 530, 170 P.2d 898, 901 (1946). As a result, for all of these reasons, plaintiffs contend that the trial court erred by dismissing plaintiffs' removal claims on the basis of N.C.G.S. § 57D-8-01(a)(2).

Secondly, plaintiffs assert that the trial court erred by dismissing plaintiffs' hybrid constructive fraud and breach of fiduciary duty claim by ignoring the "allegations that a fiduciary relationship existed as a matter of law" and by improperly subjecting plaintiffs to a heightened pleading standard. According to plaintiffs, Mr. "Boespflug specifically pleaded allegations which, if taken as true, are sufficient to establish a broker-principal fiduciary relationship between [Mr.] Barton and [Mr.] Boespflug." In support of their "broker-principal" argument, plaintiffs point to the allegations contained in the amended complaint that Mr. Barton acted as Mr. Boespflug's "deal broker" and that Mr. Barton held himself out as an expert in real estate investments. In addition, plaintiffs contend that the allegations contained in the amended complaint show that a fiduciary relationship in fact existed between Mr. Boespflug and Mr. Barton. After acknowledging that the trial court, acting in reliance upon "the 'demanding' standard articulated in *Lockerman*," found that plaintiffs had failed to adequately plead the existence of a de facto

fiduciary relationship, plaintiffs contend that *Lockerman*, which was decided in a summary judgment rather than a pleading context, is irrelevant to the proper resolution of this case and has been utilized by the trial court to require plaintiffs to satisfy an impermissibly high pleading standard. As a result, since the amended complaint "adequately pleaded . . . the existence of both a de jure and a de facto fiduciary relationship," plaintiffs contend that the trial court erred by reaching a contrary conclusion.

Thirdly, plaintiffs claim that the trial court's erroneous decision to dismiss their hybrid constructive fraud and breach of fiduciary duty claim resulted in the erroneous decision to dismiss plaintiffs' unfair and deceptive practices claim. According to plaintiffs, the fact that they adequately pleaded a claim for constructive fraud sufficed to establish that they adequately pleaded an unfair and deceptive practices claim as well.

Finally, plaintiffs contend that trial court erred by denying their motion for leave to file a second amended complaint. After acknowledging that the trial court had considered "various factors sanctioned by the appellate courts of this State in its order denying [p]laintiffs' motion," plaintiffs assert that the trial court "improperly [drew] every inference and view[ed] all the circumstances in a light most favorable to the [d]efendants, who actually bore the burden of demonstrating why the (presumptively permissible) motion should not have been granted."

In urging us to uphold the challenged orders, defendants begin by noting that, "[i]n discussing the 2 October 2017 Order granting the motion to dismiss, [plaintiffs] only address five of the defendants listed in the Amended Complaint"—Mr. Barton, Barton Boespflug, Hess Creek, Royal Ascot, and Vintage Oak—and "only three of the fifteen claims for relief alleged in the Amended Complaint." In addressing plaintiffs' challenge to the dismissal of their removal claims, defendants contend that plaintiffs had "requested application of North Carolina law" and had refrained from questioning the manner in which the trial court had applied North Carolina law in dismissing their removal claims. According to defendants, "[u]nder both Oregon and California law, the necessary prerequisites to pursuing a derivative claim to remove a manager (to the extent such a claim exists) were not alleged" in plaintiffs' amended complaint, necessitating the dismissal of plaintiffs' claims under Oregon or California law. More specifically, defendants note that the Oregon statute upon which plaintiffs rely provides that the complaint in a derivative action "must allege with particularity the demand made . . . or the reason why a demand was not made," citing Or. Rev. Stat. § 63.801(2), and that the relevant California statute contains a "pleading requirement, which

[ ] requires a party to plead with particularity why a demand would be futile," citing Cal. Corp. Code § 15910.02 (West 2018). Defendants argue that plaintiffs have "fail[ed] to point to any paragraph in the forty-three page Amended Complaint that purports to satisfy the particularized demand futility pleading requirements of Oregon and California" and assert that "no such allegations were made."

In addition, defendants argue that plaintiffs' contention that their request for Mr. Barton's removal as manager or limited partner of the investment entities was "partially" derivative lacks merit. According to defendants, the relevant operating agreements provide that the "removal of a manager for gross negligence requires either the 'majority vote' or a 'unanimous vote' of all members." As a result, "even if [plaintiffs] had properly pled a claim to remove [Mr.] Barton as the manager of the [investment entities]," the Court lacks the authority to act in accordance with plaintiffs' request.

In addition, defendants claim that plaintiffs' removal claims are time barred, given that the "allegedly negligent conduct that forms the basis for requested removal occurred prior to January 1, 2013, at the latest," which means that "[t]he statute of limitations for the [ ] removal claim expired three years later, on January 1, 2016." In view of the fact that this action was not filed until 16 December 2016, defendants contend that plaintiffs' "removal claim is barred by the statute of limitations."

Secondly, defendants assert that the trial court properly dismissed plaintiffs' constructive fraud and breach of fiduciary duty claim. According to defendants, plaintiffs had attempted to establish the existence of a de facto, but not a de jure, fiduciary relationship before the trial court. Under that set of circumstances, defendants contend that plaintiffs should not be permitted to argue before this Court that a de jure fiduciary relationship existed between Mr. Boespflug and Mr. Barton. In addition, defendants argue that plaintiffs failed to allege that Mr. Barton took any action in his capacity as Mr. Boespflug's real estate broker that would amount to a breach of that fiduciary duty.

Similarly, defendants argue that plaintiffs failed to allege sufficient facts to establish the existence of a de facto fiduciary relationship between Mr. Barton and Mr. Boespflug. More specifically, defendants contend that plaintiffs failed to allege sufficient facts to show that Mr. Barton completely dominated Mr. Boespflug. In addition, defendants assert that any conduct that might otherwise amount to the breach of a fiduciary duty, such as the issuance of the promissory notes about which plaintiffs complain, "is not a substitute for [plaintiffs'] failure to allege

sufficient facts to show that a de facto fiduciary relationship arose prior [to] the time this conduct occurred."

In the same vein, defendants argue that the trial court properly dismissed plaintiffs' unfair and deceptive practices claim in light of plaintiffs' failure to allege "instances of fraud, constructive fraud, and fraud by omission." Moreover, defendants assert that plaintiffs failed to allege the occurrence of an in-state injury, which they believe to be a prerequisite to the assertion of a valid unfair and deceptive practices claim. Lastly, defendants argue that the dismissal of plaintiffs' unfair and deceptive practices claim was appropriate because "intra-corporate conduct" is not cognizable under N.C.G.S. § 75-1.1.

Finally, defendants assert that the trial court properly denied plaintiffs' second amendment motion. Although plaintiffs did include "a section in their brief requesting that the denial of their second motion to amend be reversed," defendants contend that plaintiffs' failure to provide any "substantive analysis or argument" relating to the amendment issue constituted an abandonment of plaintiffs' challenge to the denial of their amendment motion. In addition, defendants note that the various justifications that the trial court provided "in the Order denying the second motion to amend" "make[ ] it undeniable that the trial court's decision was the product of a reasoned decision." As a result, defendants contend that the trial court did not err by denying plaintiffs' second amendment motion.

II. Substantive Legal Analysis

A. Claims for Mr. Barton's Removal

[1] In their initial challenge to the trial court's dismissal order, plaintiffs argue that the trial court erred by dismissing their claims for Mr. Barton's removal as the manager or general partner of certain of the investment entities for lack of standing because the claims in question were derivative, rather than personal, in nature and because plaintiffs failed to make a demand upon the entities to take action against Mr. Barton before filing suit. "We review the decision of a trial court to dismiss an action for lack of subject matter jurisdiction de novo." *Catawba County ex rel. Rackley v. Loggins*, 370 N.C. 83, 87, 804 S.E.2d 474, 477-78 (2017) (citing *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007)). Likewise, "[q]uestions 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)).

A limited liability company is defined as "[a]n entity formed under [Chapter 57D] (or former Chapter 57C of the General Statutes) that has not become another entity or form of entity by merger, conversion, or other means." N.C.G.S. § 57D-1-03(19) (2017). A "derivative action" is defined as "a proceeding brought in the superior court of this State in the right of [a limited liability company] or, to the extent provided in G.S. 57D-8-06, in the right of a foreign [limited liability company], to recover a judgment in favor of the [limited liability company] or, if applicable, the foreign [limited liability company]." *Id.* § 57D-8-01(b) (2017). A member of a limited liability company[9] may initiate a derivative action when the member "ma[kes] written demand on the [limited liability company] to take suitable action," and either the demand is rejected or "90 days [ ] expire[ ] from the date the demand was made," or, alternatively, when "irreparable injury to the [limited liability company] would result by waiting for the expiration of the 90-day period." *Id.* § 57D-8-01(a)(2) (2017).

Similarly, a limited partnership is defined as "a partnership formed by two or more persons under the laws of this State and having one or more general partners and one or more limited partners, [including], for all purposes of the laws of the State of North Carolina, a limited liability limited partnership." *Id.* § 59-102(8) (2017). "A limited partner may bring an action in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed." *Id.* § 59-1001 (2017). As a result, North Carolina law contains pre-suit demand requirements applicable to derivative claims asserted against both limited liability companies and limited partnerships.

In dismissing plaintiffs' claims for the removal of Mr. Barton, the trial court determined that plaintiffs' failure to allege that they had made demand upon the investment entities in accordance with N.C.G.S. § 57D-8-01(a)(2) deprived plaintiffs of standing to maintain their removal claims and necessitated dismissal of those claims for lack of subject

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9. A member of a limited liability company is "[a] person who has been admitted as a member of the [limited liability company] as provided in the operating agreement or G.S. 57D-3-01, who was a member of the [limited liability company] immediately before the repeal of Chapter 57C of the General Statutes until the person ceases to be a member as provided in the operating agreement or G.S. 57D-3-02, or, with respect to a foreign [limited liability company], a person who has been admitted as a member of the foreign [limited liability company] under the law of the jurisdiction in which the foreign [limited liability company] is organized until the person ceases to be a member under that law." N.C.G.S. § 57D-1-03(21) (2017).

matter jurisdiction. Plaintiffs, however, argue that the trial court's decision to this effect was erroneous for a number of reasons, including, but not limited to, the fact that the demand rule contained in N.C.G.S. § 7D-8-01(a)(2) does not apply to limited partnerships,[10] that plaintiffs' removal claims are governed by the laws of jurisdictions other than North Carolina, and that the laws of the relevant foreign jurisdictions do not contain mandatory pre-suit demand requirements of the type embodied in N.C.G.S. § 57D-8-01(a)(2). As a result, plaintiffs urge us to overturn that portion of the trial court's dismissal order relating to plaintiffs' removal claims.

As an initial matter, we are inclined to believe that plaintiffs' removal claims are, in fact, governed by foreign, rather than North Carolina, law.[11] As far as limited liability companies are concerned, N.C.G.S. § 57D-8-06 provides that, "[i]n any derivative proceeding in the right of a foreign [limited liability company], the matters covered by this Article will be governed by the law of the jurisdiction of the foreign [limited liability company's] organization." *Id.* § 57D-8-06 (2017). Similarly, with respect to limited partnerships, "the laws of the jurisdiction under which a foreign limited partnership is organized govern its organization and internal affairs . . . ." *Id.* § 59-901 (2017). As a result, the relevant North Carolina statutes indicate that plaintiffs' claims for Mr. Barton's removal as the manager of Hess Creek and Royal Ascot are governed by Oregon law and that plaintiffs' claims for Mr. Barton's removal as the general partner of Barton Boespflug and Vintage Oak are governed by California law.[12] However, the fact that the trial court's decision rested upon North Carolina, rather than Oregon and California, law does not require reversal of the trial court's decision to dismiss plaintiffs' removal claims in this case.

According to the statutory provisions governing derivative actions brought against Oregon limited liability companies:

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10. Although we tend to agree with plaintiffs that the demand rules for derivative claims relating to North Carolina limited liability companies and North Carolina limited partnerships are different, we need not address the nature or extent of those differences given our determination that the demand rules applicable to plaintiffs' claims are governed by foreign, rather than North Carolina, law.

11. We note, in passing, that the trial court appears to have introduced the pre-suit demand requirement issue into this case rather than the parties.

12. In light of our understanding of the relevant statutory provisions, we need not determine whether a similar result is required under the internal affairs doctrine.

> Except as otherwise provided in writing in the articles of organization or any operating agreement, a complaint in a proceeding brought in the right of a limited liability company must allege with particularity the demand made, if any, to obtain action by the managers or the members who would otherwise have the authority to cause the limited liability company to sue in its own right, and either that the demand was refused or ignored or the reason why a demand was not made.

Or. Rev. Stat. Ann. § 63.801(2) (West 2018). Similarly, the California statute governing the assertion of derivative claims in the limited partnership context provides that

> [a] partner may bring a derivative action to enforce a right of a limited partnership if:
>
> (1) the partner first makes a demand on the general partners, requesting that they cause the limited partnership to bring an action to enforce the right, and the general partners do not bring the action within a reasonable time; or
>
> (2) a demand would be futile.

Cal. Corp. Code § 15910.02 (West 2018). According to section 15910.04 of the California Corporations Code, the complaint filed in a derivative action involving a limited partnership must state "the date and content of plaintiff's demand and the general partners' response to the demand" or "why demand is excused as futile." *Id.* § 15910.04 (West 2018). As a result, while plaintiffs are correct in noting that both Oregon Revised Statutes section 63.801(2) and California Corporations Code section 15910.02 contain what amounts to a "futility" exception to the otherwise-applicable pre-suit demand requirement, they overlook the fact that both Oregon and California law require that the plaintiff allege the basis for any claim of futility in any derivative complaint that he or she elects to file on behalf of a limited liability company or a limited partnership.

A careful reading of plaintiffs' amended complaint provides no indication that plaintiffs have attempted to satisfy the statutory requirement that the complaint in any derivative action that they might seek to file under either Oregon limited liability company law or California limited partnership law contain an affirmative allegation explaining why it would have been futile for them to have made a demand upon the relevant investment entities. In fact, plaintiffs do not appear to contend in their brief that they made any effort to satisfy the requirement

that they affirmatively allege the basis for a contention that the making of a demand upon Hess Creek, Royal Ascot, Barton Boespflug, or Vintage Oak would have been futile. Instead, plaintiffs appear to argue that it would have been inappropriate for the trial court to raise what they describe as the "affirmative defense" of their failure to allege why it would have been futile for them to make demand upon the relevant investment entities and suggest that their removal claims were only "partially" derivative. Rather than being an affirmative defense, however, the pleading requirements set out in Oregon Revised Statutes section 63.801(2) and California Corporations Code section 15910.02 constitute affirmative obligations that plaintiffs clearly are required to satisfy in order to assert a valid derivative claim on behalf of either an Oregon limited liability company or a California limited partnership.[13] In addition, as defendants note, plaintiffs sought Mr. Barton's removal as the manager or general partner of the relevant investment entities rather than the recovery of damages or some relief that does not affect all other interested parties associated with the relevant investment entities for some specific injury that plaintiffs claim to have sustained. For that reason, plaintiffs' removal claims strike us as quintessentially derivative, rather than personal, in nature. *Loewen*, 130 Or. App. at 229-30, 882 P.2d at 112 (stating that a claim that does not seek recovery for a "special injury" is derivative). As a result, for all of these reasons, we conclude that the trial court did not err by dismissing plaintiffs' removal claims.[14]

B. Fiduciary Relationship

[2] Secondly, plaintiffs challenge the trial court's decision to dismiss their hybrid constructive fraud and breach of fiduciary duty claim for failure to state a claim upon which relief can be granted.

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

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13. As a result of the fact that the pleading requirements set out in Or. Rev. Stat. Ann. § 63.801(2) (West 2018) and Cal. Corp. Code § 15910.02 (West 2018) are clearly mandatory in nature, plaintiffs' removal claims are clearly subject to dismissal pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) even if the pleading requirement in question is not jurisdictional in nature.

14. In light of our determination that plaintiffs failed to satisfy the applicable Oregon and California pleading requirements, we need not consider the validity of defendants' other arguments in support of the trial court's decision to dismiss plaintiffs' removal claims.

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)). In ruling upon a dismissal motion filed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), "the well-pleaded material allegations of the complaint are taken as true; but conclusions of law or unwarranted deductions of fact are not admitted." *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 781 S.E.2d 1, 7-8, 368 N.C. 440, 448 (2015) (quoting *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970)). "Our review of the grant of a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is de novo." *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013).

A claim for constructive fraud only "arises where a confidential or fiduciary relationship exists." *Watts v. Cumberland Cty. Hosp. Sys., Inc.*, 317 N.C. 110, 115-16, 343 S.E.2d 879, 884 (1986) (first citing *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981); and then citing *Patuxent Dev. Co. v. Bearden*, 227 N.C. 124, 128, 41 S.E.2d 85, 88 (1947)). Similarly, "[f]or a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Dalton*, 353 N.C. at 651, 548 S.E.2d at 707 (first citing *Curl v. Key*, 311 N.C. 259, 264, 316 S.E.2d 272, 275 (1984); and then citing *Link v. Link*, 278 N.C. 181, 192, 179 S.E.2d 697, 704 (1971)). In the event that a party "fail[s] to allege any special circumstances that could establish a fiduciary relationship," *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 449, 781 S.E.2d 1, 8 (2015), dismissal of a claim which hinges upon the existence of such a relationship would be appropriate. *See id.* at 448-51, 781 S.E.2d at 8-9 (upholding a trial court's order dismissing claims for fraud and unfair and deceptive practices given the failure of the complaint to sufficiently allege the existence of a fiduciary relationship between the parties).

"Though difficult to define in precise terms, a fiduciary relationship is generally described as arising when 'there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.' " *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367, 760 S.E.2d 263, 266 (2014) (quoting *Green v. Freeman*, 367 N.C. 136, 141, 749 S.E.2d 262, 268 (2013)). A fiduciary relationship may exist in law or in fact. *See Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). For that reason, even when a fiduciary relationship does not arise as a matter of law, that is, due to the "legal relations" between two parties, it may yet exist as a matter of fact in such instances when there is "confidence reposed on one side, and the resulting superiority and influence on the other." *Id.* at 598, 160 S.E. at 906 (quoting Pomeroy's Equity

Jurisprudence, 3d Ed., Vol. 2, § 956). As a result, the ultimate issue raised by plaintiffs' challenge to the trial court's decision to dismiss the plaintiffs' hybrid constructive fraud and breach of fiduciary duty claim is whether the amended complaint alleges facts that, if believed, would suffice to establish the existence of a fiduciary relationship between Mr. Barton and Mr. Boespflug.

As an initial matter, we find no merit in plaintiffs' challenge to the standard upon which the trial court relied in determining that plaintiff had failed to state a claim for constructive fraud or breach of fiduciary duty. Although *Lockerman* was, as plaintiffs note, decided in the context of a summary judgment motion rather than a motion to dismiss for failure to state a claim upon which relief can be granted, that fact does not indicate that the trial court required plaintiffs to satisfy a "heightened pleading standard" with respect to their hybrid constructive fraud and breach of fiduciary duty claim. Aside from the fact that the language from *Lockerman* upon which the trial court relied states a general legal standard that would not vary depending upon whether a court was considering a summary judgment motion or a dismissal motion lodged pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), the trial court clearly cited *Lockerman* for the purpose of indicating that, as is required by well-established North Carolina law, detailed factual allegations, rather than mere conclusory assertions, are necessary to demonstrate the existence of a fiduciary relationship as a matter of fact. *Watts*, 317 N.C. at 116, 343 S.E.2d at 884 (stating that, in order to "stat[e] a cause of action for constructive fraud, the plaintiff must allege facts and circumstances," among other things, " 'which created the relation of trust and confidence' ") (quoting *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950)). As a result, the trial court's decision to dismiss plaintiffs' hybrid constructive fraud and breach of fiduciary duty claim does not rest upon a misapprehension of the pleading standard that must be satisfied in order to survive a motion to dismiss for failure to state a claim upon which relief can be granted.

As a substantive matter, plaintiffs argue that they "specifically pleaded allegations" of a "broker-principal" relationship between Mr. Barton and Mr. Boespflug and that the existence of such a relationship suffices to show that there was a fiduciary relationship between Mr. Barton and Mr. Boespflug as a matter of law. In support of this assertion, plaintiffs point to the allegations in the amended complaint stating that, "[s]ince 1986, [Mr.] Barton has acted as [Mr.] Boespflug's deal broker, recommending real estate investments and advising [Mr.] Boespflug," and that "[a] special relationship of trust was formed between

[Mr.] Barton and [Mr.] Boespflug because [Mr.] Barton held himself out as a real estate investment expert generally and as [Mr.] Boespflug's advisor specifically." According to plaintiffs, these allegations "show that [Mr.] Boespflug reposed special trust and confidence on [Mr.] Barton as his real estate investment broker, property manager, and personal advisor, thereby giving rise to a fiduciary relationship between [Mr.] Barton and [Mr.] Boespflug as a matter of law." We do not find plaintiffs' argument persuasive.

A careful examination of the record indicates that plaintiffs made no effort to persuade the trial court that a fiduciary relationship existed between Mr. Barton and Mr. Boespflug as a matter of law. Instead, the only argument that plaintiffs made with respect to the fiduciary duty issue before the trial court involved an assertion that such a relationship existed between the two men as a matter of fact. In addition, the allegations contained in the amended complaint refer to Mr. Barton as a "deal broker" rather than a real estate broker, with plaintiffs having failed to present any authority defining a "deal broker," much less establishing that such a relationship is fiduciary in nature. Finally, even if plaintiffs did, in fact, allege that a real estate brokerage relationship existed between Mr. Barton and Mr. Boespflug, plaintiffs' hybrid constructive fraud and breach of fiduciary duty claim does not appear to rest upon any conduct in which Mr. Barton engaged in the context of any such relationship. As a result, for all of these reasons, we conclude that plaintiffs failed to allege the existence of a fiduciary relationship as a matter of law between Mr. Barton and Mr. Boespflug in their amended complaint.

Similarly, we are not persuaded that the allegations contained in the amended complaint suffice to establish the existence of a fiduciary relationship between Mr. Barton and Mr. Boespflug as a matter of fact. On the contrary, the amended complaint lacks allegations suggesting the existence of the "confidence reposed on one side, and the resulting superiority and influence on the other," necessary to show the existence of a fiduciary relationship as a matter of fact, *Abbitt*, 201 N.C. at 598, 160 S.E. at 906, and seems to suggest, instead, that the opposite conclusion is more appropriate. For example, plaintiffs' allegation that "[Mr.] Boespflug placed [Mr.] Barton in a position of trust and gave him some discretion to manage the Properties, reporting to [Mr.] Boespflug intermittently on the state of the portfolio" tends to suggest that Mr. Barton lacked the superior authority over the operation of the investment entities necessary to establish the existence of a fiduciary relationship in fact and, on the contrary, buttresses the trial court's description of the relationship between Mr. Barton and Mr. Boespflug as "one in which

both men played a key role: [Mr.] Boespflug contributed most of the capital while [Mr.] Barton contributed most of the real estate expertise."[15] Thus, we hold that the trial court did not err by dismissing plaintiffs' hybrid constructive fraud and breach of fiduciary duty claim for failure to state a claim upon which relief can be granted.

C. Unfair and Deceptive Practices Claim

[3] The result that we reached with respect to plaintiffs' challenge to the dismissal of their hybrid constructive fraud and breach of fiduciary duty claim controls with respect to their challenge to the dismissal of their unfair and deceptive practices claim. "In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton*, 353 N.C. at 656, 548 S.E.2d at 711 (citing *Spartan Leasing Inc. v. Pollard*, 101 N.C. App. 450, 460-61, 400 S.E.2d 476, 482 (1991)). In support of their unfair and deceptive practices claim, plaintiffs alleged in the amended complaint that defendants' "conduct described herein and throughout this complaint, including its numerous instances of fraud, constructive fraud, and fraud by omission, has a tendency to deceive, is immoral, unethical, oppressive, and unscrupulous." In dismissing plaintiffs' unfair and deceptive practices claim, the trial court stated that, "[h]aving determined that [p]laintiffs did not adequately allege facts to support their claims for constructive fraud and fraudulent conveyance (the only 'fraud' claims asserted in their complaint)," "[p]laintiffs have not alleged facts to show that Defendants committed an unfair or deceptive act under" N.C.G.S. § 75-1.1." The only basis upon which plaintiffs contend that the trial court erred by dismissing their unfair and deceptive practices claim is that they "adequately alleged a claim for constructive fraud." Having already rejected the only arguments that plaintiffs have advanced in support of their challenge to the trial court's decision to dismiss their hybrid constructive fraud and breach of fiduciary duty claim, we are compelled to reject their challenge to the dismissal of their unfair and deceptive practices claim as

15. Although plaintiffs direct our attention to various allegations describing certain actions in which Mr. Barton allegedly engaged, including the issuance of promissory notes in exchange for Mr. Boespflug's share in the investment entities, selling various properties, and modifying certain investment entity operating agreements, these allegations, while relevant to show that Mr. Barton breached any fiduciary duty that might have existed between Mr. Barton and Mr. Boespflug, have no bearing upon the extent to which a fiduciary relationship actually existed between the two men. *See Watts*, 317 N.C. at 115-16, 343 S.E.2d at 884 (citations omitted).

well. As a result, we hold that the trial court did not err by dismissing plaintiffs' unfair and deceptive practices claim for failure to state a claim upon which relief can be granted.

D. Amendment Motion

[4] Finally, plaintiffs contend that the trial court erred by denying their second motion to amend their complaint. According to well-established North Carolina law, after the time for answering a pleading has expired, "a motion to amend is addressed to the discretion of the court, and its decision thereon is not subject to review except in case of manifest abuse." *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972) (citations omitted). A trial court abuses its discretion in the event that its decision " 'is manifestly unsupported by reason' or 'so arbitrary that it could not have been the result of a reasoned decision.' " *Frost v. Mazda Motors of Am., Inc.*, 353 N.C. 188, 199, 540 S.E.2d 324, 331 (2000) (quoting *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986) (first quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985); and then quoting *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985))). "Among proper reasons for denying a motion to amend are undue delay by the moving party and unfair prejudice to the nonmoving party." *News & Observer Publ'g. Co. v. Poole*, 330 N.C. 465, 485, 412 S.E.2d 7, 19 (1992) (citing *Patrick v. Ronald Williams, P.A.*, 102 N.C. App. 355, 360, 402 S.E.2d 452, 455 (1991)).

In challenging the denial of their second amendment motion, plaintiffs note that N.C.G.S. § 1A-1, Rule 15(a) provides that "leave [to amend] shall be freely given when justice so requires" and contend that the trial court erroneously placed the burden of proof upon them to establish that their amendment motion should be allowed rather than requiring defendants to establish why their amendment motion should not be allowed, citing *Mauney v. Morris*, 316 N.C. 67, 72, 340 S.E.2d 397, 400 (1986) (stating that "[t]he burden is upon the opposing party to establish that that party would be prejudiced by the amendment" (citing *Roberts v. William N. & Kate B. Reynolds Mem'l Park*, 281 N.C. 48, 58, 187 S.E.2d 721, 727 (1972))). We do not find plaintiffs' argument persuasive.

Aside from the fact that the record contains no reason to believe that the trial court's order denying plaintiffs' second amendment motion rested upon an impermissible placement of the burden upon plaintiffs rather than defendants, a careful review of the relevant provisions of the trial court's order demonstrates that it had ample justification for denying plaintiffs' second amendment motion. As an initial matter, the trial court noted that it had already allowed plaintiffs to

file an amended complaint while admonishing plaintiffs to comply with the applicable Business Court rules in the future. However, instead of filing the amended complaint which had been attached to their amendment motion within the time specified in the trial court's amendment order, plaintiffs sought an extension of time within which to make the required filing. After the trial court, despite denying plaintiffs' extension motion, gave plaintiffs a new deadline within which to file their amended complaint, plaintiffs filed an amended complaint that differed from the amended complaint that had been attached to their amendment motion. Even so, the trial court allowed plaintiffs to file the amended complaint that had been attached to their amendment motion and treated it as their complaint for purposes of future proceedings in this case. Within only a few weeks after the filing of their amended complaint, plaintiffs sought leave to file a second amended complaint that was not accompanied by a brief or a statement of opposing counsels' position, and that essentially "undid" a significant number of the changes that had been made to their original complaint in their amended complaint. In light of these determinations, which plaintiffs concede are relevant to a proper analysis of whether an amendment motion should be allowed or denied and which provide ample support for the trial court's conclusion that plaintiffs' second amendment motion involved "undue delay," suggested a "dilatory motive," and was neither accompanied by a brief nor a statement of the position of opposing counsel as required by the applicable Business Court Rules, we have no hesitation in concluding that the trial court did not abuse its discretion by denying plaintiffs' second amendment motion.

III. Conclusion

Thus, for all of these reasons, we conclude that the trial court did not err by dismissing plaintiffs' amended complaint and denying plaintiffs' second amendment motion. As a result, the challenged trial court orders are affirmed.

AFFIRMED.

CORWIN v. BRITISH AM. TOBACCO PLC

[371 N.C. 605 (2018)]

DR. ROBERT CORWIN AS TRUSTEE FOR THE BEATRICE CORWIN LIVING IRREVOCABLE TRUST, ON BEHALF OF A CLASS OF THOSE SIMILARLY SITUATED
v.
BRITISH AMERICAN TOBACCO PLC, REYNOLDS AMERICAN, INC., SUSAN M. CAMERON, JOHN P. DALY, NEIL R. WITHINGTON, LUC JOBIN, SIR NICHOLAS SCHEELE, MARTIN D. FEINSTEIN, RONALD S. ROLFE, RICHARD E. THORNBURGH, HOLLY K. KOEPPEL, NANA MENSAH, LIONEL L. NOWELL, III, JOHN J. ZILLMER, AND THOMAS C. WAJNERT

No. 56PA17

Filed 7 December 2018

1. Corporations—direct claim by shareholder—voter dilution—personal injury distinct from corporation—standing

Where the terms of an acquisition agreement between two tobacco companies diluted the voting power of a subset of the purchasing company's minority shareholders, plaintiff shareholder had standing to bring a direct claim against the 42% shareholder, British American Tobacco (BAT), for breach of fiduciary duty. The alleged dilution of plaintiff's voting power—based on BAT's 42% voting power being permitted to remain the same at the expense of other shareholders—harmed plaintiff and the non-BAT shareholders but not the corporation itself. Plaintiff's alleged personal injury in conjunction with his claim that BAT breached a fiduciary duty to himself and non-BAT shareholders was sufficient to confer subject matter jurisdiction on the Court.

2. Corporations—minority shareholder—fiduciary duties

Where plaintiff shareholder filed a class action suit asserting a claim for breach of fiduciary duty against a 42% shareholder, British American Tobacco (BAT), because the terms of an acquisition agreement resulted in the dilution of plaintiff's voting power, the allegations of the complaint, if true, failed to satisfy the actual control test under Delaware law for a minority shareholder to owe fiduciary duties to other shareholders. Considering the restrictions in the Governance Agreement on BAT's power along with the absence of allegations of coercive or otherwise controlling actions on the part of BAT, plaintiff failed to allege that BAT exercised such domination and control over the purchasing company's board that BAT was indistinguishable from a majority shareholder. The Court did not need to decide whether to follow Delaware's rule that a minority shareholder can owe fiduciary duties to other shareholders because the complaint would still fail under that rule.

Justice HUDSON dissenting.

Justices BEASLEY and MORGAN join in this 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. ___, 796 S.E.2d 324 (2016), affirming in part and reversing and remanding in part an order and opinion entered on 6 August 2015 by Judge James L. Gale, Chief Special Superior Court Judge for Complex Business Cases, in Superior Court, Guilford County. Heard in the Supreme Court on 9 January 2018.

Mullins Duncan Harrell & Russell PLLC, by Alan W. Duncan and Stephen M. Russell, Jr.; and Block & Leviton LLP, by Jason M. Leviton, pro hac vice, for plaintiff-appellee.

Robinson & Lawing, LLP, by H. Brent Helms; and Cravath, Swaine & Moore LLP, by Gary A. Bornstein, pro hac vice, for defendant-appellant British American Tobacco PLC.

Bell Davis & Pitt, P.A., by Alan M. Ruley and William K. Davis, for North Carolina Association of Defense Attorneys, amicus curiae.

MARTIN, Chief Justice.

This appeal arises from the agreement of Reynolds American, Inc. to purchase Lorillard, Inc. Defendant British American Tobacco PLC (BAT) owned 42% of the stock in Reynolds and agreed to fund part of the Lorillard transaction by purchasing enough of the newly acquired shares to maintain that 42% ownership interest. The terms of this agreement diluted the voting power of Reynolds' other minority shareholders, including plaintiff Dr. Robert Corwin. Plaintiff then filed a putative class action suit on behalf of similarly situated stockholders asserting a claim for breach of fiduciary duty against, among others, BAT.

In this appeal, we consider whether BAT owed fiduciary duties to those other shareholders in the context of the Lorillard acquisition. The Business Court concluded that BAT did not owe fiduciary duties to the other shareholders and granted BAT's motion to dismiss. We agree with the Business Court and therefore reverse the decision of the Court of Appeals.

I. Background

The matter before us is an appeal of a determination under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, so we accept all

of the facts pleaded in plaintiff's First Amended Class Action Complaint (the operative pleading here, which we will hereinafter refer to as the Complaint) as true. *See Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 7 (2015) (quoting *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970)). Our statement of the facts of this case is derived from the Complaint, as well as from other documents that the Complaint incorporates by reference.

Reynolds, an American tobacco company, was created after Reynolds' predecessor entity acquired Brown & Williamson (B&W), another tobacco company. B&W was a subsidiary of BAT, a tobacco holding company that is headquartered in London. As a result of the transaction, BAT became a 42% stockholder of Reynolds, and BAT and Reynolds entered into a governance agreement dated 30 July 2004 (the Governance Agreement).

The Governance Agreement contained specific limitations on BAT's power.[1] BAT could effectively nominate only five members to Reynolds' thirteen-member Board of Directors, and three of those nominees had to be "Independent Directors." The Governance Agreement defined the term "Independent Director" to mean a director who was considered independent of Reynolds under the New York Stock Exchange Rules[2] and who had not been a director, officer, or employee of BAT or its subsidiaries within the past three years. Reynolds' Corporate Governance and Nominating Committee (the Committee) had the right to nominate the remaining eight directors, seven of whom had to be Independent Directors. All members of the Committee itself had to be Independent Directors, and, provided that the Reynolds board was fully staffed, the majority of those directors had to be non-BAT-nominated Independent Directors. During a standstill period imposed by the Governance Agreement,[3] BAT could not seek removal of any of the directors that it did not nominate, unless the

1. Most of the provisions of the Governance Agreement that we discuss here refer not to BAT but to its subsidiary, B&W. However, the Governance Agreement specifically provides that "B&W may assign, in its sole discretion, any of or all its rights, interests and obligations under this Agreement to BAT or any of its Subsidiaries that agrees in writing to be bound by the provisions hereof." We can find no portion of the record indicating that B&W made such an assignment to BAT, but, because the courts below and both parties to this appeal treat BAT as having assumed B&W's rights and obligations under the Governance Agreement, we also do so for the purpose of our decision here.

2. This portion of the definition of the term "Independent Director" applies only if Reynolds is listed on the New York Stock Exchange. Because the Complaint alleges that Reynolds "trades on the New York Stock Exchange," though, that portion of the definition applies to the term for the purposes of this motion.

3. The standstill period was set to run from 30 July 2004—the effective date of the Governance Agreement—until either the tenth anniversary of the Governance Agreement

Reynolds board amended or waived that limitation. Further, a majority of the Independent Directors who were not nominated by BAT had to approve any material transaction between, or involving, Reynolds and BAT (with certain narrow exceptions that no party asserts as being relevant here). These restrictions, along with the rest of the Governance Agreement, would continue until BAT's ownership interest reached 100% or fell below 15% (or until a person or group other than BAT, with some other exceptions not relevant here, owned or controlled more than 50% of the voting power of all voting stock), at which point the Governance Agreement would terminate by its own terms.

Alongside these restrictions, the Governance Agreement conveyed certain contractual rights to BAT. The Governance Agreement required the approval of a majority of the BAT-nominated directors for certain actions such as stock issuances if that stock would have voting power greater than or equal to 5% of the voting power outstanding before that issuance. It also required the approval of BAT as a stockholder for certain actions such as the sale of specified intellectual property.

In September 2012, Reynolds, the second-largest tobacco company in the United States, began considering a merger with Lorillard, the third-largest tobacco company in the United States. Reynolds met with BAT before entering negotiations with Lorillard. BAT indicated that it would support the Lorillard merger only on terms that it approved of and expressed its desire to maintain its 42% ownership interest in Reynolds. BAT was willing to provide financing for the transaction through purchasing enough of the newly acquired shares to maintain its ownership interest, and the parties agreed to a term sheet regarding that financing. BAT insisted that this term sheet contain a provision that prevented BAT or Reynolds from seeking to change the Governance Agreement in connection with the proposed transaction. BAT also indicated that it was not willing to extend the standstill period specified in the Governance Agreement.

Initially, discussions proceeded toward what Lorillard hoped would be a merger of equals. The Other Directors—a term that the Governance Agreement defined (in its singular form) to mean an Independent Director of the Reynolds board who was not nominated by BAT—even discussed reducing BAT's ownership percentage after the merger to allow a greater

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or the date on which a significant transaction occurred, whichever was earlier. According to the Governance Agreement, a significant transaction would be "any sale, merger, acquisition . . . , consolidation, dissolution, recapitalization or other business combination involving Reynolds American or any of its Subsidiaries pursuant to which more than 30% of the Voting Power or the consolidated total assets of Reynolds American would be acquired or received" by an outside party.

ownership level for Lorillard's stockholders. But this change ultimately did not happen. Eventually, Lorillard terminated negotiations after concluding that the transaction was not truly a merger of equals given the power that BAT would wield over the combined company. Reynolds then decided to pursue an acquisition of Lorillard instead.

During subsequent negotiations, the Other Directors requested the removal of a provision in the proposed merger agreement that required BAT to vote its shares of Reynolds stock in favor of the transaction regardless of whether the Reynolds board changed its recommendation in favor of the transaction. Lorillard, however, insisted that this provision remain in the agreement. BAT said that it would consider Lorillard's demand but would not commit over the objections of the Other Directors. The Other Directors agreed to allow the provision to remain in the proposed merger agreement, so it did, in fact, remain there.

On 15 July 2014, the companies announced that they had reached a final agreement. Reynolds would purchase Lorillard and pay the Lorillard stockholders a combination of 0.2909 shares of Reynolds common stock plus $50.50 for each share of Lorillard stock that they owned. At the time, this price corresponded to a value of $68.88 per Lorillard share based on the closing price of Reynolds stock on 14 July 2014.

To help finance the acquisition, Reynolds would divest a package of assets, including several cigarette brands, to Imperial Tobacco Group PLC. Additionally, BAT would help finance the acquisition by purchasing enough additional shares of Reynolds for it to maintain its 42% ownership of Reynolds after the completion of the transaction. BAT would be permitted to purchase these additional Reynolds shares for $60.16 per share—the price of Reynolds stock on 2 July 2014, which was also used to determine the stock component of the Lorillard shareholders' consideration. This price was $3.02 less than the closing price of Reynolds stock on 14 July 2014, the day before the transaction was executed. Reynolds and BAT also agreed to pursue a technology-sharing initiative for next-generation tobacco products such as digital vapor cigarettes. The entire Reynolds board, including the Other Directors, unanimously approved these transactions.[4]

In response to the announcement of these transactions, plaintiff Dr. Robert Corwin filed a class action complaint against BAT, Reynolds, and

4. However, the Complaint indicates that plaintiff lacks specific information about whether a separate vote by the Reynolds board on the technology-sharing agreement occurred (or, by necessary implication, how the board voted if a vote did occur).

a group of Reynolds' directors (director defendants) in his capacity as trustee for the Beatrice Corwin Living Irrevocable Trust and on behalf of other stockholders similarly situated. The case was designated as a mandatory complex business case to be heard by the Business Court. The Complaint (which, again, is the operative pleading here) alleges, among other things, that BAT was a controlling stockholder of Reynolds, that BAT therefore owed fiduciary duties to plaintiff, and that BAT breached those fiduciary duties through its conduct in connection with the Lorillard transaction. Although BAT was not a majority stockholder of Reynolds, plaintiff bases his claim that BAT was nevertheless a *controlling* stockholder on various aspects of the Reynolds-BAT Governance Agreement and BAT's involvement in the Lorillard transaction. Plaintiff claims that BAT's control over Reynolds allowed BAT to negotiate benefits for itself that were not shared with other Reynolds stockholders.

BAT, Reynolds, and director defendants moved to dismiss plaintiff's Complaint. BAT argued that it was not a controlling stockholder of Reynolds and did not owe fiduciary duties to plaintiff under North Carolina law because it owned less than a majority of Reynolds stock. BAT also argued that plaintiff's claim was derivative and that plaintiff therefore lacked standing because he had not made a pre-suit demand on the Reynolds board, as North Carolina law requires before a plaintiff files a derivative suit. Plaintiff, on the other hand, urged the Business Court to adopt the standard that Delaware uses to determine whether a stockholder is a controlling stockholder, which would impose fiduciary duties on a minority stockholder who is found to be controlling.

The Business Court granted all of the defendants' motions to dismiss. Regarding BAT, the Business Court concluded that, even if the Delaware standard applied, the Complaint failed to allege that BAT exercised actual control over the Reynolds board regarding the transaction. In reaching this conclusion, the Business Court noted the "extraordinary" limitations that the Governance Agreement placed on BAT's ability to control the Reynolds board. Plaintiff appealed the dismissal of his claims to the Court of Appeals.

In a unanimous opinion, the Court of Appeals reversed the Business Court's dismissal of plaintiff's claims against BAT but affirmed the dismissal of plaintiff's claims against Reynolds and director defendants. *Corwin v. British Am. Tobacco PLC*, ___ N.C. App. ___, ___, 796 S.E.2d 324, 340 (2016). The Court of Appeals used the Delaware approach to determine whether BAT was a controlling stockholder and concluded that plaintiff alleged enough facts to support a reasonable inference that BAT was a controlling stockholder. *Id.* at ___, ___, 796 S.E.2d at 332,

337. The Court of Appeals also concluded that plaintiff had standing to bring a direct claim against BAT because plaintiff sufficiently pleaded that BAT owed plaintiff a special duty. *Id.* at ___, 796 S.E.2d at 338 (citing *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 658, 488 S.E.2d 215, 219 (1997)).

BAT petitioned this Court for discretionary review on various issues related to whether a minority stockholder could owe fiduciary duties to other stockholders under North Carolina law and whether the Court of Appeals correctly found that a controlling stockholder necessarily owes a special duty to other stockholders for standing purposes. This Court allowed BAT's petition.

II. Analysis

BAT moved to dismiss plaintiff's Complaint for lack of standing under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The Business Court assumed without deciding that plaintiff had standing, and then dismissed plaintiff's Complaint for failure to state any claim for breach of fiduciary duty. Nevertheless, we will consider the issue of standing before addressing the Rule 12(b)(6) issue because "standing is a 'necessary prerequisite to a court's proper exercise of subject matter jurisdiction.' " *Willowmere Cmty. Ass'n v. City of Charlotte*, 370 N.C. 553, 561, 809 S.E.2d 558, 563 (2018) (quoting *Crouse v. Mineo*, 189 N.C. App. 232, 236, 658 S.E.2d 33, 36 (2008)).

A. Standing

[1] The Court of Appeals concluded that plaintiff had standing to bring a direct claim against BAT because the Complaint contained enough allegations to support a determination that BAT owed a special duty to plaintiff. *Corwin*, ___ N.C. App. at ___, 796 S.E.2d at 338 (citing *Barger*, 346 N.C. at 658, 488 S.E.2d at 219). BAT argues, however, that plaintiff's claims are derivative and that plaintiff lacks standing because he failed to make a pre-suit demand on Reynolds. Because this appeal stems from a trial court's order granting a motion to dismiss under Rule 12(b)(1), we apply de novo review, accepting the allegations in the complaint as true and viewing them in the light most favorable to the non-moving party. *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008).

A derivative proceeding is defined as "a civil suit in the right of a domestic corporation." N.C.G.S. § 55-7-40.1 (2017). Before commencing a derivative proceeding, a stockholder must make a written demand

"upon the corporation to take suitable action." *Id.* § 55-7-42 (2017). In line with this requirement, this Court has stated that "[t]he general rule is that '[s]hareholders . . . generally may not bring individual actions to recover what they consider their share of the damages suffered by [a] corporation.' " *Green v. Freeman*, 367 N.C. 136, 142, 749 S.E.2d 262, 268 (2013) (second alteration in original) (quoting *Barger*, 346 N.C. at 660, 488 S.E.2d at 220-21). There are two exceptions to this general rule: shareholders "may bring an individual action . . . when (1) 'the wrongdoer owed [them] a special duty' or (2) they suffered a personal injury 'distinct from the injury sustained by . . . the corporation itself.' " *Id.* at 142, 749 S.E.2d at 268 (second and third alterations in original) (quoting *Barger*, 346 N.C. at 659, 661, 488 S.E.2d at 219, 221).

The first exception applies when the wrongdoer owes a duty that is "personal to plaintiffs as shareholders and [is] separate and distinct from the duty defendant[ ] owe[s] the corporation," such as a fiduciary duty owed to the stockholders. *Barger*, 346 N.C. at 659, 488 S.E.2d at 220. In this case, whether plaintiff had standing to bring a direct claim under the first exception depends on whether BAT was a controlling stockholder that owed plaintiff fiduciary duties. This issue is the same issue that we must decide in order to determine whether the Business Court properly dismissed plaintiff's Complaint under Rule 12(b)(6) for failure to state a claim. We will therefore determine whether plaintiff has standing under the second exception before addressing whether BAT owed plaintiff fiduciary duties, to ascertain whether it gives us an independent basis for asserting jurisdiction.

The second *Barger* exception applies when a plaintiff suffers an injury that is "distinct from the injury suffered by the corporation itself." *Green*, 367 N.C. at 144, 749 S.E.2d at 269 (quoting *Barger*, 346 N.C. at 661, 488 S.E.2d at 221). In this case, plaintiff asserts that he and the Reynolds stockholders other than BAT have been injured by the reduction of their percentage ownership of Reynolds. Before the transaction, BAT owned 42% of the outstanding shares, and plaintiff and other stockholders owned the remaining 58% of shares. Under the transaction agreement, however, former Lorillard stockholders would own approximately 15% of Reynolds shares, and BAT would be permitted to purchase additional shares to maintain its 42% ownership. That means that plaintiff and the other stockholders would only own 43% of Reynolds shares after the transaction. Plaintiff claims that this arrangement allowed BAT to "maintain[ ] its own ownership stake and control over [Reynolds] while diluting the stake of Plaintiff and the Class by means of the BAT Share Purchase." This dilution translates to a reduction in voting power

for plaintiff and the other non-BAT stockholders, and that alleged injury affects the voting power of plaintiff and the non-BAT stockholders rather than the corporation itself. We therefore conclude that plaintiff had standing to bring a direct claim against BAT under the second *Barger* exception due to the alleged dilution of plaintiff's voting power.

While this Court has never before addressed whether a stockholder can bring a direct claim for voting power dilution, caselaw from Delaware permits it, and we find that caselaw to be persuasive. In *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, the Supreme Court of Delaware held that whether an action is direct or derivative is determined by "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)[.]" 845 A.2d 1031, 1033 (Del. 2004) (en banc). Before *Tooley*, Delaware applied a "special injury" test, which *Tooley* rejected. *Id.* at 1038-39. At first glance, it might appear that Delaware precedent should therefore be irrelevant to our analysis, on the assumption that the special injury test that *Tooley* rejected is similar to our Court's current "distinct injury" exception under *Barger*. The special injury test in Delaware, however, was different than the distinct injury exception in North Carolina. The phrase "special injury" referred to a "wrong . . . inflicted upon the stockholder alone" and not shared by the other *stockholders*, *see id.* at 1037, whereas "distinct injury" in North Carolina means that the injury to the stockholder is distinct from the injury suffered by the *corporation*, *Green*, 367 N.C. at 144, 749 S.E.2d at 269. So the *Tooley* analysis, like the second *Barger* exception, focuses on whether the stockholder suffered a harm that is distinct from the harm suffered *by the corporation*. Focusing on the stockholder's harm compared to the corporation's harm rather than on the harm of one stockholder compared to the harm of other stockholders makes sense because, as *Tooley* explained, "a direct, individual claim of stockholders that does not depend on harm to the corporation can also fall on all stockholders equally, without the claim thereby becoming a derivative claim." 845 A.2d at 1037.

The Supreme Court of Delaware has recognized in *In re Tri-Star Pictures, Inc., Litigation*, furthermore, that voting power dilution is a harm to stockholders when the minority stockholders' voting power is decreased while the majority stockholder's power is increased. 634 A.2d 319, 330 (Del. 1993). In *Tri-Star*, the Supreme Court of Delaware noted that the plaintiffs, who were minority stockholders, "suffer[ed] harm by voting power dilution which, in essence, is no more than a relative diminution in the minority's proportionate influence over corporate

affairs." *Id.* The court further explained that "[v]oting power dilution is a harm distinct and separate from" other harms suffered by the minority stockholders, such as alleged nondisclosure in proxy materials, because "[t]he harm from voting power dilution goes to the impact of an individual stockholder's vote." *Id.* at 330 n.12. Although *Tri-Star* was decided before *Tooley*, Delaware courts, including the Supreme Court of Delaware, have continued to cite the pertinent analysis from *Tri-Star* while applying the *Tooley* test for distinguishing between direct and derivative claims. *See*, *e.g.*, *Gentile v. Rossette*, 906 A.2d 91, 101-03 (Del. 2006) (noting that *Tri-Star* provides the "analytical framework" for claims based on dilution of stockholder voting power and then applying *Tooley* to determine that the claim at issue was direct rather than derivative because the harm to minority stockholders was unique from any injury suffered by the corporation and because the only available relief would exclusively benefit those minority stockholders).

Using the *Tooley* test, the Delaware Court of Chancery has determined that a claim of voting power dilution can be a direct claim "where a significant stockholder's interest is increased at the sole expense of the minority." *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 818 (Del. Ch. 2005) (quoting *In re Paxson Commc'n Corp. S'holders Litig.*, No. Civ.A. 17568, 2001 WL 812028, at *5 (Del. Ch. July 12, 2001)).[5] The Court of Chancery has explained that "[v]oting power dilution may constitute a direct claim, because it can directly harm the shareholders without affecting the corporation, and any remedy for the harm suffered under those circumstances would benefit the shareholders." *Oliver v. Boston Univ.*, No. Civ.A. 16570-NC, 2006 WL 1064169, at *17 (Del. Ch. Apr. 14, 2006) (unreported).[6]

In this case, BAT's voting power did not increase, but it was allowed to remain constant at the sole expense of plaintiff and the other non-BAT

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5. The Supreme Court of Delaware has likewise clarified that, although *Tri-Star* itself speaks of, and the facts in *Tri-Star* involved, a majority stockholder's power being increased, the *Tri-Star* rule applies when a "*significant or controlling* stockholder['s]" interest is increased. *See In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 774-75 (Del. 2006) (en banc) (emphasis added) (quoting *In re Paxson*, 2001 WL 812028, at *5).

6. Delaware allows unpublished cases to be cited as precedent. Stephen R. Barnett, *No-Citation Rules Under Siege: A Battlefield Report and Analysis*, 5 J. App. Prac. & Process 473, 481 (2003). Specifically, the Rules of the Court of Chancery of the State of Delaware refer to both reported and unreported Delaware cases as "principal Delaware decisions" that can be included in a party's compendium of authorities for the court to review along with its brief. Del. Ch. Ct. R. 171(i). In ascertaining the nature of Delaware law, therefore, we cite both reported and unreported Delaware Court of Chancery cases throughout this opinion and consider them to have equal authority for the purposes of our analysis.

stockholders, whose voting power significantly decreased. This voting power dilution did not harm the corporation itself, but it did harm the non-BAT stockholders. Thus, although this case is the first time that this Court has considered whether voting power dilution is a direct claim, we agree with the relevant reasoning of the Delaware courts that we have discussed, and hold that plaintiff has pleaded "a personal injury." *See Green*, 367 N.C. at 142, 749 S.E.2d at 268. We further hold that the alleged personal injury, in conjunction with plaintiff's legal claim that BAT breached a purported fiduciary duty to himself and his fellow non-BAT minority stockholders, is enough to confer subject-matter jurisdiction on this Court. Because we have concluded that plaintiff had standing to bring a direct claim for voting power dilution, we will now address whether the Business Court properly granted BAT's motion to dismiss under Rule 12(b)(6).

B. Fiduciary Duties

[2] On appeal from the dismissal of a complaint pursuant to North Carolina Rule of Civil Procedure 12(b)(6), we conduct de novo review to determine "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51, 790 S.E.2d 657, 659 (2016) (quoting *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013)). It is well established that dismissal pursuant to Rule 12(b)(6) is proper 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)).[7]

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7. The dissent relies heavily on the Rule 12(b)(6) standard recited in cases such as *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 559, 681 S.E.2d 770, 774 (2009), and *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 444, 666 S.E.2d 107, 116 (2008), which, in turn, finds its genesis in *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957), *abrogated by Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007). We decline to address what admittedly may be a lack of doctrinal consistency in our standard of review for Rule 12(b)(6) motions when that question was not among "the issues stated in . . . the petition for discretionary review and the response thereto filed." N.C. R. App. P. 16(a). In any event, this Court routinely uses the Rule 12(b)(6) standard that we apply here in assessing the sufficiency of complaints in the context of complex commercial litigation. *See, e.g.*, *Krawiec v. Manly*, 370 N.C. 602, 606, 811 S.E.2d 542, 546 (2018); *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5, 802 S.E.2d 888, 891 (2017).

This Court held in *Gaines v. Long Manufacturing Company* that the majority stockholder of a corporation owes fiduciary duties to the minority stockholders. 234 N.C. 340, 344, 67 S.E.2d 350, 353 (1951). This Court reasoned that majority stockholders owe fiduciary duties to minority stockholders because majority stockholders "have a community of interest with the minority holders in the same property and because the latter can act and contract in relation to the corporate property only through the former." *Id.* at 344, 67 S.E.2d at 353 (quoting 13 Am. Jur. *Corporations* § 423 (1938)). "It is the fact of control of the common property held and exercised . . . that creates the fiduciary obligation on the part of the majority stockholders in a corporation for the minority holders." *Id.* at 344-45, 67 S.E.2d at 353 (quoting 13 Am. Jur. *Corporations* § 423). Under *Gaines*, BAT did not necessarily owe fiduciary duties to the other stockholders because BAT was not a majority stockholder.

This Court has never held that a *minority* stockholder owes fiduciary duties to other stockholders, but it has also never held that a minority stockholder *cannot* owe fiduciary duties to other stockholders. We do not need to decide that question today, however. Even if we agreed with Delaware courts that a minority stockholder may owe fiduciary duties to other stockholders based on its exercising actual control over the board of directors, the complaint in this case would still fail to state a claim upon which relief can be granted because the Complaint does not adequately allege that BAT exercised actual control over the Reynolds board here.

In Delaware, "[i]t is well settled law that only a 'controlling stockholder' owes fiduciary duties to other stockholders." *In re Primedia Inc. Derivative Litig.*, 910 A.2d 248, 257 (Del. Ch. 2006) (citing *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1113-14 (Del. 1994)). A stockholder is considered controlling if it owns more than 50% of the corporation's voting power or if it "exercises control over the business and affairs of the corporation." *Id.* (quoting *Kahn*, 638 A.2d at 1113 (emphasis omitted)). Put another way, a minority stockholder is considered a controlling stockholder if the minority stockholder exercises "domination . . . through actual control of corporate conduct." *In re Morton's Rest. Grp., Inc. S'holders Litig.*, 74 A.3d 656, 664 (Del. Ch. 2013) (quoting *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 70 (Del. 1989)). This inquiry focuses on actual control over *the board of directors*. *Id.* at 664 65; *In re KKR Fin. Holdings LLC S'holder Litig.*, 101 A.3d 980, 993-94 (Del. Ch. 2014), *aff'd sub nom. Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015). Actual control exists only when the allegedly controlling stockholder "exercises such

formidable voting and managerial power that [it], as a practical matter, [is] no differently situated than if [it] had majority voting control." *In re KKR*, 101 A.3d at 993 (alterations in original) (quoting *In re Morton's*, 74 A.3d at 665) (internal quotations omitted). As a necessary prerequisite for a minority stockholder to exercise actual control, then, the stockholder's "power must be so potent that independent directors . . . cannot freely exercise their judgment, fearing retribution." *Id.* (emphasis omitted) (quoting *In re Morton's*, 74 A.3d at 665 (alteration in original)) (internal quotations omitted).

To survive a motion to dismiss in Delaware, a claim for breach of fiduciary duty by a minority stockholder must contain more than "[t]he bare conclusory allegation that a minority stockholder possessed control . . . . Rather, the [c]omplaint must contain well-pled facts showing that the minority stockholder '*exercised* actual domination and control over . . . [the] directors.' " *In re Morton's*, 74 A.3d at 664-65 (emphasis added) (fourth and fifth alterations in original) (quoting *In re Sea-Land Corp. S'holders Litig.*, No. Civ.A. 8453, 1988 WL 49126, at *3 (Del. Ch. May 13, 1988) (unreported)). Even at the motion to dismiss stage, Delaware courts have noted that "[t]his actual control test is 'not an easy one to satisfy' as 'stockholders with very potent clout have been deemed, in thoughtful decisions, to fall short of the mark.' " *Sciabacucchi v. Liberty Broadband Corp.*, No. CV 11418-VCG, 2017 WL 2352152, at *16 (Del. Ch. May 31, 2017) (unreported) (quoting *In re PNB Holding Co. S'holders Litig.*, No. Civ.A. 28-N, 2006 WL 2403999, at *9 (Del. Ch. Aug. 18, 2006) (unreported)).

That the actual control standard emphasizes the exercise of actual control over the board—an affirmative act by the minority stockholder—and not just the mere possession of power means that an allegation that a minority stockholder has some leverage over the board of directors is not enough. *See In re Sea-Land*, 1988 WL 49126, at *3 (stating that allegations that amount to significant "leverage" will not allow a complaint to survive because " 'leverage' is not actual domination and control"). A party may, after all, use its leverage to negotiate favorable terms in a transaction with another party even when it has no control (and thus has exercised no control) over that other party. Applying this standard in the context of a Rule 12(b)(6) motion, plaintiff's Complaint necessarily fails if it "reveals the absence of facts" that BAT engaged in some affirmative act to direct or compel the Reynolds board to enter into the Lorillard transaction on the terms that plaintiff takes issue with here. *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). In other words, the complaint must allege, through well-pleaded facts, *actual control*, *see Sciabacucchi*, 2017 WL 2352152,

at *16, which refers to control that prevents a company's directors from "freely exercis[ing] their judgment in determining whether or not to approve and recommend" a transaction, *In re KKR*, 101 A.3d at 993.

In the same vein, the fact that a stockholder possesses contractual rights permitting it to restrict corporate action and thereby giving it leverage over board decisions does not necessarily mean that the stockholder is exercising actual control. *Thermopylae Capital Partners, L.P. v. Simbol, Inc.*, C.A. No. 10619-VCG, 2016 WL 368170, at *13 (Del. Ch. Jan. 29, 2016) (unreported). Unexercised contractual rights alone, such as board veto power, do not equate to actual control over a board. *Williamson v. Cox Commc'ns, Inc.*, No. Civ.A. 1663-N, 2006 WL 1586375, at *5 (Del. Ch. June 5, 2006) (unreported). Even a stockholder who *exercises* its contractual rights to further its own goals "is simply exercising [its] own property rights, not that of others, and is no fiduciary." *Thermopylae*, 2016 WL 368170, at *14. For example, in *Superior Vision Services, Inc. v. ReliaStar Life Insurance Co.*, No. Civ.A. 1668-N, 2006 WL 2521426 (Del. Ch. Aug. 25, 2006) (unreported), the allegedly controlling stockholder had a contractual right to withhold its consent and effectively veto any dividend payment that the board voted to approve, *id.* at *4. The stockholder exercised that right, but the Delaware Court of Chancery concluded that the stockholder was not controlling solely by virtue of "exercis[ing] a duly-obtained contractual right." *Id.* at *5. The court reasoned that to hold otherwise would mean that "any strong contractual right, duly obtained by a significant shareholder (a somewhat elusive term in itself), would be limited by and subject to fiduciary duty concerns." *Id.*

A minority stockholder who exercises contractual rights may, however, be considered a controlling stockholder if the stockholder "achieved control or influence over a majority of directors through non-contractual means." *Thermopylae*, 2016 WL 368170, at *14. Additionally, it could be possible to determine that a stockholder is a controlling one "where the holding of contractual rights [is] coupled with a significant equity position and other factors, . . . especially if those contractual rights are used to induce or to coerce the board of directors to approve (or refrain from approving) certain actions." *Superior Vision*, 2006 WL 2521426, at *5. In *Williamson v. Cox Communications, Inc.*, for example, the court found that unexercised veto power was significant in denying a motion to dismiss because the stockholder had veto power over *all* board decisions and could use that veto power "to shut down the effective operation of the . . . board of directors." 2006 WL 1586375, at *5. The veto power therefore gave that stockholder coercive leverage

because the board effectively had to get the stockholder's approval in order to take any action whatsoever. *Id.* But "a significant shareholder, who exercises a duly-obtained contractual right that somehow limits or restricts the actions that a corporation otherwise would take, does not become, without more, a 'controlling shareholder' for that particular purpose." *Superior Vision*, 2006 WL 2521426, at *5.

On the other hand, the existence of contractual *restrictions* on a stockholder's ability to exercise control may prevent a finding of control at the pleading stage. *See Sciabacucchi*, 2017 WL 2352152, at *17-18. In *Sciabacucchi v. Liberty Broadband Corp.*, for instance, contractual restrictions prevented the allegedly controlling stockholder from designating a majority of the board, soliciting proxies, or obtaining more than 35% of the voting stock. *Id.* at *18. The restrictions also required certain directors and unaffiliated stockholders to approve specific transactions like the one at issue. *Id.* The court concluded that these "contractual handcuffs," among other things, prevented a finding that the plaintiff had adequately pleaded actual control. *Id.* at *20.

Threats and demands, however, may support a claim that the stockholder exercised actual control. *See Kahn*, 638 A.2d at 1114. In *Kahn v. Lynch Communication Systems, Inc.*, the Supreme Court of Delaware affirmed the Court of Chancery's determination that a minority stockholder was controlling when the 43.3% stockholder threatened the board, saying, "[Y]ou must listen to us. We are 43 percent owner. You have to do what we tell you." *Id.* There was also evidence in *Kahn* that board members were intimidated by this stockholder and therefore complied with its demands instead of exercising their own independent business judgment. *Id.* at 1114-15. Thus, *Kahn* suggests that allegations of a threat by a significant minority stockholder, plus allegations that the board was intimidated by that threat, may be enough to establish actual control.

As we have already said, we do not need to decide whether to adopt the Delaware approach to determining controlling-stockholder status in order to decide this case. Even under the Delaware approach, we conclude that plaintiff has failed to allege facts that, if true, would establish that BAT exercised actual control over the Reynolds board of directors, and therefore that plaintiff has failed to plead a breach-of-fiduciary-duty claim.

Plaintiff claims that the Governance Agreement gave BAT the ability to control the Reynolds board. In fact, the exact opposite is true. In several ways, the Governance Agreement placed "contractual handcuffs" on BAT that prevented it from controlling the Reynolds board. *See Sciabacucchi*, 2017 WL 2352152, at *20. BAT could nominate only five of

the thirteen Reynolds directors, and three of those directors could not currently be (or have been in the past three years) an officer, director, or employee of BAT. Generally, BAT was required to vote all of its shares in favor of electing the directors that it did not nominate, and, if their removal was sought, BAT was required to vote all of its shares against their removal. And BAT could not seek to remove any of the directors that it did not nominate. BAT therefore had no means of retribution against the majority of the directors that could have impaired the ability of those directors to exercise independent judgment. *See In re KKR*, 101 A.3d at 993-94. BAT also could not increase its ownership percentage during the standstill period, which was in effect when this transaction occurred. And the Other Directors who were not nominated by BAT or recently affiliated with BAT had to approve this transaction in a separate vote—which they did unanimously.

Plaintiff argues that BAT's contractual approval rights over the issuance of shares and the sale of intellectual property in this transaction gave BAT actual control, but contractual approval rights do not equate to actual control. *Superior Vision*, 2006 WL 2521426, at *4-5. Although BAT could stop this transaction from happening, BAT could not *make* it happen. To be a controlling stockholder, the minority stockholder must have "such formidable voting and managerial power that [it], as a practical matter, [is] no differently situated than if [it] had majority voting control." *In re PNB*, 2006 WL 2403999, at *9. Merely being able to stop a transaction does not give a minority stockholder the same level of power that a majority stockholder would have, because a majority stockholder would have the power both to stop a transaction *and to make it happen*. *See Gaines*, 234 N.C. at 344, 67 S.E.2d at 353 (noting that a majority stockholder has "the power, by the election of directors and by the vote of [its] stock, to do everything that the corporation can do" (quoting 13 Am. Jur. *Corporations* § 422)). Although a minority stockholder with veto power might be able to exercise that same level of power through coercion, *see Williamson*, 2006 WL 1586375, at *5, merely having veto power over the Board's ability to enter into this particular transaction is not enough. To be clear, plaintiff does not allege that Reynolds *had to* enter into this transaction—much less to enter into this transaction as it was structured, which is what triggered BAT's contractual right to veto it. So the fact of BAT's contractual rights did not, on its own, give BAT the kind of coercive power over the Reynolds board that could allow BAT to exercise actual control. *Cf. Kahn*, 638 A.2d at 1112-13 (noting that the Lynch board had determined that Lynch needed to obtain certain technology to remain competitive and that Lynch's "alternatives to [the] cash-out merger" that its significant stockholder Alcatel had proposed "had been investigated but were impracticable").

As we have already said, of course, a stockholder who holds contractual rights could be considered a controlling stockholder "where the holding of contractual rights [is] coupled with a significant equity position and other factors." *Superior Vision*, 2006 WL 2521426, at *5. But as we discuss more fully below, plaintiff has failed to plead sufficient "other factors" to support such a finding in this case.

Plaintiff claims that BAT's involvement in the negotiations demonstrates actual control. Plaintiff does not allege that BAT ever threatened the Reynolds board in any way, however—unlike, for example, the stockholder who was considered controlling in *Kahn*, 638 A.2d at 1114-15—even though BAT was involved in many of the discussions regarding the Lorillard transaction from an early date. Admittedly, BAT did represent that it would support the transaction only on terms that were agreeable to BAT. BAT wanted to maintain its 42% ownership interest after the transaction and did not want the transaction to affect the terms of the Governance Agreement, but in expressing that, BAT was making a statement only about exercising its veto power. And a statement that does not express the intent to do anything other than exercise veto power does not make BAT a controlling stockholder, because, in making that statement, BAT was merely informing the board of how it would exercise its contractual rights—rights that were the property of BAT alone and that could not turn BAT into a fiduciary. *See Thermopylae*, 2016 WL 368170, at *14.

Plaintiff also alleges that BAT had additional leverage in the transaction due to the threat that BAT would buy the remaining 58% of Reynolds' shares at the expiration of the standstill. But the Complaint does not actually allege that BAT ever threatened to do that. It merely refers to news outlet reports that speculated that BAT would buy the remaining shares at that time: specifically, to a report from the *Telegraph* stating "that Citigroup analysts had 'talked up the likelihood' that BAT would buy the remaining 58% of Reynolds" and to a report from the *Daily Mail* that there was "growing speculation [that BAT] is ready to splash out billions of pounds buying the 58 per cent of US rival Reynolds American it does not already own." And the Complaint alleges that the CEO of BAT told stockholders at its 2014 annual stockholder meeting "that BAT looks at acquiring Reynolds on a yearly basis." Accepting these allegations in the complaint as true merely requires us to accept that the *Telegraph* and the *Daily Mail* reported on this "speculation" and that BAT's CEO told stockholders that BAT considered acquiring Reynolds every year. None of these allegations, if taken as true, indicate that BAT was actually planning to acquire Reynolds, or, more importantly, that

BAT had actually threatened Reynolds with the idea of purchasing the remaining shares at the expiration of the standstill if BAT's preferences were not accommodated. And, more generally, taking as true plaintiff's allegation that "[t]he threat of a complete takeover gave BAT additional leverage to impose its terms on the Reynolds Board during [ ] negotiations," we must note again that the mere existence of leverage does not equate to the exercise of actual control. *See In re Sea-Land*, 1988 WL 49126, at *3. Where, as here, the "threat" to which a complaint refers is the mere *ability* to take over a company, that ability does not amount to actual control because it does not involve a stockholder who *prevents* board members from exercising their own independent judgment.

Plaintiff suggests in the complaint that the board was not independent of BAT in this transaction for other reasons. Plaintiff claims that the Other Directors—who were not nominated by BAT or recently affiliated with BAT—did not engage independent legal counsel soon enough and should have also engaged independent financial advisors. Plaintiff alleges that there is no evidence that Reynolds explored other financing options until just weeks before the transaction was executed. Plaintiff also suggests that many of Reynolds' directors had conflicts of interest in the transaction because seven of the directors were either current or former officers, directors, or attorneys for BAT or its affiliates. And, at times, BAT-appointed Reynolds directors even spoke on behalf of BAT during meetings about the proposed transactions, according to plaintiff's allegations.

But, aside from the fact that any BAT nominees representing BAT's interests to the board were necessarily in the minority, the presence of board members who merely share interests with a significant stockholder does not give that stockholder actual control of the board; the proper focus is on whether the allegedly controlling stockholder exercised power over the board rather than on whether the directors had conflicts of interest. *See Sciabacucchi*, 2017 WL 2352152, at *17. To the extent that plaintiff relies on any of the above actions by the directors to state that BAT exercised actual control over the board, moreover, plaintiff's allegations are insufficient because plaintiff does not allege any act by BAT to direct, compel, or coerce the actions of the directors. As to the claim at issue here, after all, plaintiff is claiming a breach of fiduciary duty *by BAT*, not by any of the Reynolds directors (whether they be directors designed by or otherwise connected to BAT or not).

The dissent's reliance on plaintiff's allegations that the board failed to obtain outside and independent advice and counsel is marked by the same erroneous reasoning. Even if the Reynolds board should have

engaged, but failed to engage, independent counsel, or otherwise failed to comply with its own legal obligations (which we take no position on), that would in no way show that BAT "prevent[ed] the . . . board from freely exercising its independent judgment in considering the [transaction]." *In re KKR*, 101 A.3d at 995. Plaintiff cannot simply allege that the Reynolds board failed to comply with all of its legal duties (assuming, for the sake of argument, that he has at least done that); he must allege facts that would show that BAT prevented the board from *acting independently*. He has failed to do so.

Plaintiff points to recommendations of the Other Directors that were ultimately rejected as further evidence that BAT had actual control over the board. During negotiations, the Other Directors discussed reducing BAT's ownership percentage after the merger to allow a greater ownership level for Lorillard's stockholders, but this change ultimately never happened. Plaintiff does not allege any facts showing that the ultimate rejection of this change was due to BAT's intervention, though; the mere fact that this change was considered and rejected does not mean that BAT had actual control of the board. And even if BAT *had* influenced the decision on this particular aspect of the transaction, that does not mean that BAT exerted actual control over the board with respect to the transaction as a whole. Once again, its influence on the decision would be readily explained by BAT's leverage over the transaction, as a major financer of the transaction and as a holder of contractual rights implicated by the transaction. Because that leverage did not equate to actual control over the Reynolds board with respect to the transaction, anything that arose from that leverage does not equate to actual control, either.

Similarly, the Other Directors sought to remove a provision in the proposed merger agreement that required BAT to vote its shares of Reynolds stock in favor of the transaction regardless of whether the Reynolds board changed its recommendation on the transaction. Lorillard, however, insisted that the provision remain in the agreement. Far from controlling this decision, BAT said that it would not commit to the provision over the objections of the Other Directors. The Other Directors ultimately agreed to allow the provision to remain in the proposed merger agreement, though, and remain it did. This change, then, was not rejected because of BAT's control over the Reynolds board. Instead, it was rejected because of Lorillard's demands and the Other Directors' acquiescence to those demands. Anyway, it is unclear why plaintiff thinks that the retention of this provision is helpful to his cause. All that the provision did was to *restrict* BAT's ability to freely decide whether to vote in favor of the transaction.

To the extent that plaintiff argues that terms in the agreement that are favorable to BAT demonstrate control, those arguments also fail. It is reasonable to infer, based on the pleadings, that Reynolds wanted BAT's support for the transaction and that BAT had some leverage because of the number of shares that it owned and its willingness to help finance the transaction (and because BAT could veto a transaction that, like the one proposed, was structured in a way that stock representing over 5% of Reynolds' stockholders' voting power had to be issued). Leverage is not the same as actual control, though, and does not, on its own, transform a minority stockholder into a controlling stockholder. *See In re Sea-Land*, 1988 WL 49126, at *3.

At best, the allegations that some terms in the transaction agreement were favorable to BAT show only that BAT's contractual rights gave it the ability to secure some favorable terms from the board. Those allegations do not show that BAT exercised *control* over the board—that is, to make it take action. If they did, then every contractual right that allowed a stockholder to exert some leverage over a transaction would automatically convert the stockholder into a controlling stockholder. That, in turn, would contravene the principle that a "contractual right . . . , without more," does not turn "a significant shareholder" into "a 'controlling shareholder.' " *Superior Vision*, 2006 WL 2521426, at *5.

The terms of the agreement allowed BAT to maintain its 42% ownership interest in Reynolds by purchasing shares at a rate lower than the closing price for Reynolds shares the day before the transaction agreements were signed. That purchase price was based on the closing price of Reynolds stock on 2 July 2014, which was the date used to set the financial terms of the acquisition. Setting the purchase price ahead of time makes sense because Reynolds would have needed to know how much money it would receive from BAT in order to secure the rest of the financing required to complete the transaction. Further, using this date allowed the purchase price to be set before news of the proposed transaction was publicly released and affected stock prices. This term of the agreement therefore does not indicate actual control.

Reynolds and BAT also agreed to pursue a technology-sharing initiative for next generation tobacco products such as digital vapor cigarettes. Plaintiff alleged that "the Director Defendants . . . agreed to allow BAT to access Reynolds'[ ] game-changing technology without adequate compensation," thereby removing any "need for BAT to pay the Public Shareholders a control premium to buy the rest of the Company." But it is unclear how this agreement demonstrates that BAT had actual control of the Reynolds board with respect to the transaction to purchase

Lorillard. The dissent points to the perceived threat of a takeover by BAT and to the allegation that this technology-sharing agreement made Reynolds a "significantly less attractive takeover target for BAT" and contends that these allegations, taken as true, show that BAT exercised actual control over the board. Again, though, leverage to obtain favorable terms in an agreement does not necessarily indicate that the beneficiary of those favorable terms was a controlling stockholder.

Overall, plaintiff's allegations and the incorporated Governance Agreement demonstrate that BAT did not have majority voting power either on the board or as a stockholder, that BAT could not retaliate against the non-BAT appointed directors who made up a majority of the board, and that the Lorillard transaction could not be approved without the separate approval of the Other Directors, who were Independent Directors not nominated by BAT. Because of these facts, BAT could not and did not exercise actual control over the Reynolds board. Additionally, plaintiff has filled his Complaint with allegations of BAT's leverage and bargaining power—contractual or otherwise—and has also demonstrated that BAT was able to obtain favorable terms for itself during Reynolds' acquisition of Lorillard. But again, BAT's having bargaining power and negotiating a good deal because of it does not mean that BAT engaged in any coercive behavior or otherwise exercised actual control over the board.

Considering the restrictions in the Governance Agreement that we discuss above, and considering the absence of allegations of coercive or otherwise controlling actions on the part of BAT, plaintiff has failed to allege that BAT exercised such domination and control over the Reynolds board that BAT was indistinguishable from a majority stockholder. *See In re KKR*, 101 A.3d at 993-94. Under the Delaware controlling-stockholder standard, therefore, plaintiff's Complaint "on its face reveals the absence of facts sufficient to make a good claim" that BAT owed plaintiff fiduciary duties because it controlled the Reynold's board, and it also "discloses some fact[s] that necessarily defeat[ ] the plaintiff's claim" that BAT could even exercise such control. *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).

III. Conclusion

For the reasons stated above, the Court of Appeals erred in concluding that plaintiff's allegations, if true, would satisfy the actual control test as that test is elucidated in Delaware caselaw. Because BAT was not a majority or controlling stockholder, it did not owe fiduciary duties to

the other Reynolds stockholders, and the Business Court properly dismissed plaintiff's breach-of-fiduciary-duty claim against BAT. We accordingly reverse the decision of the Court of Appeals on this issue. Plaintiff has not appealed the dismissal of his claims against defendant directors or Reynolds to this Court. The dismissal of those claims is therefore not before us, and the decision of the Court of Appeals as to those claims remains undisturbed.

REVERSED.

Justice HUDSON dissenting.

Here the majority concludes that plaintiff's complaint fails to adequately allege actual control by BAT over the Reynolds board of directors in the context of the Lorillard acquisition and that, as a result, we need not decide whether, in accordance with Delaware courts that have addressed the issue, "a minority stockholder may owe fiduciary duties to other stockholders based on its exercising actual control over the board of directors." Accordingly, the majority holds that the Business Court properly dismissed plaintiff's breach of fiduciary duty claim against BAT. In my opinion the complaint sufficiently alleges actual control by BAT; therefore, I would proceed to address whether this Court follows the Delaware approach on the issue of whether a minority stockholder who exercises actual control over the board of directors owes fiduciary duties to other stockholders. As such, I respectfully dissent.

The relevant inquiry in reviewing a trial court's ruling on a motion to dismiss under Rule 12(b)(6) 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)). Under N.C.G.S. 1A-1, Rule 8(a)(1) (2017), a complaint must contain "[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." (Emphasis added.) "The system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss." *Wray v. City of Greensboro*, 370 N.C. 41, 46, 802 S.E.2d 894, 898 (2017) (quoting *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 334 S.E.2d 751, 755 (1985)); *see also id.* at 50, 802 S.E.2d at 900 ("In light of the low bar for notice pleading under Rule 12(b)(6), . . . the averments in plaintiff's first amended complaint are sufficient

. . . .”). “The complaint should be liberally construed and should not be 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.’ ” *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 559, 681 S.E.2d 770, 774 (2009) (quoting *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 444, 666 S.E.2d 107, 116 (2008) (brackets omitted)); *see also id.* at 559, 681 S.E.2d at 774 (stating that the complaint must be viewed “in the light most favorable to plaintiffs, giving them the benefit of every reasonable inference that can be drawn therefrom”). “We review appeals from dismissals under Rule 12(b)(6) de novo.” *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)).

I agree with much of the majority’s discussion of the Delaware approach, under which a minority stockholder is considered to be a controlling stockholder—therefore owing fiduciary duties to other stockholders—if the minority stockholder exercises “domination . . . through actual control of corporate conduct.” *In re Morton’s Rest. Grp. S’holders Litig.*, 74 A.3d 656, 664 (Del. Ch. 2013) (quoting *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 70 (Del. 1989)); *see also id.* at 664-65 (“[T]he Complaint must contain well-pled facts showing that the minority stockholder ‘exercised actual domination and control over . . . [the] directors.’ ” (second and third alterations in original) (quoting *In re Sea-Land Corp. S’holders Litig.*, Civ.A. No. 8453, 1988 WL 49126, at *384 (Del. Ch. May 13, 1988))). A complaint must allege facts from which it is reasonable to infer that the allegedly controlling stockholder could “prevent the [company’s] board from freely exercising its independent judgment in considering the [transaction] or . . . exact retribution by removing the [company’s] directors from their offices.” *In re KKR Fin. Holdings LLC S’holder Litig.*, 101 A.3d 980, 995 (Del. Ch. 2014), *aff’d sub nom. Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015). A plaintiff is not required to plead actual control by a minority stockholder of the “day-to-day operations” of the board of directors; rather, a “[p]laintiff can survive the motion to dismiss by alleging actual control with regard to the particular transaction that is being challenged.” *Williamson v. Cox Commc’ns, Inc.*, No. Civ.A. 1663-N, 2006 WL 1586375, at *4 (Del. Ch. June 5, 2006) (citing *In re W. Nat’l Corp. S’holders Litig.*, No. 15927, 2000 WL 710192, at *20 (Del. Ch. May 22, 2000)); *see also Super. Vision Servs. v. ReliaStar Life Ins. Co.*, No. Civ.A. 1668-N, 2006 WL 2521426, at *4 (Del. Ch. Aug. 25, 2006) (explaining that “pervasive control over the corporation’s actions is not required” and a plaintiff can allege “ ‘actual control with regard to the particular transaction that is being challenged’ ” (quoting *Williamson*, 2006 WL 1586375, at *4)).

Here the allegations of control are "with regard to a particular transaction that is being challenged"—the Lorillard acquisition. Among the allegations that in my view sufficiently allege actual control by BAT are the following[1]:

> 5. As a July 15, 2014 CNBC story put it, "the real victor" in the Proposed Transaction is neither Reynolds nor Lorillard, but BAT, which "***solidified its position in a larger company without paying a premium.***" The Proposed Transaction enriches BAT by extracting and transferring value from all other Reynolds shareholders (the "Public Shareholders") to BAT. As a result of the Proposed Transaction, the Public Shareholders will not only lose out on the economic value of the "game changing" e-cigarette and heat-not-burn technology being transferred to BAT, but their share of the combined company will be notably diluted and they will lose out on the control premium that BAT should have been required to pay to maintain its effective control over the Company.
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> . . . .
>
> 34. In addition to the power to designate five board members, the Governance Agreement gives BAT significant additional means by which it exerts control over Reynolds. For example, as Reynolds disclosed in its most recent Form 10-K, BAT has a veto over "the sale or transfer of certain RAI intellectual property associated with B&W brands having an international presence, other than in connection with a sale of [Reynolds]; and [Reynolds's] adoption of any takeover defense measures that would apply to the acquisition of equity securities of Reynolds by [BAT] or its affiliates, other than the re-adoption of the [Reynolds] rights plan in its present form." Moreover, "the approval of a majority of [BAT's] designees on [Reynolds's] Board is required in connection with the following matters: any issuance of [Reynolds] securities in excess of 5% of its outstanding voting stock, unless at such time [BAT's] ownership interest in [Reynolds] is less than 32%; and any repurchase of [Reynolds] common stock, subject

1. Allegations pertaining to the threat of takeover are summarized with that part of the discussion below.

to a number of exceptions, unless at such time [BAT's] ownership interest in [Reynolds] is less than 25%."

35. Finally, the mere size of BAT's stake gives it significant control over Reynolds. As the Preliminary Proxy notes, "[u]nless substantially all RAI shareholders other than BAT vote together on matters presented to RAI shareholders, BAT would have the power to determine the outcome of matters submitted to a shareholder vote, which could result in RAI taking actions that RAI's other shareholders do not support."

36. The Governance Agreement will terminate, however, if BAT owns either 100% or less than 15% of Reynolds. The Governance Agreement will also terminate, automatically, if a third party acquires a majority stake in Reynolds.

. . . .

41. Reynolds's release also disclosed that BAT would receive two significant benefits stemming from the Proposed Transaction that were not shared with Public Shareholders: (i) the Technology Sharing Agreement will give BAT access to Reynolds's "game-changing" e-cigarette technology; and (ii) the BAT Share Purchase will allow BAT to maintain its pre-acquisition share of the Company and avoid being diluted along with the Public Shareholders by purchasing new shares at a discount to the Company's trading price:

> **. . . . As part of the transaction, BAT will maintain its 42 percent ownership in RAI through an investment of approximately $4.7 billion (based on RAI's closing share price of $60.16 as of July 2, 2014, the same share price used to determine the stock component of Lorillard shareholders' consideration).**
>
> **In addition, RAI and BAT have agreed in principle to pursue an ongoing technology-sharing initiative for the development and commercialization of next-generation tobacco products, including heat-not-burn cigarettes and vapor products.**

. . . .

C. BAT's De Facto Control Over the Reynolds Board Enabled It To Dominate The Board's Decision Making Process

42. The "Background of the Merger" section in the Form S-4 that Reynolds filed with the Securities and Exchange Commission on October 17, 2014 (the "Preliminary Proxy") underscores that the Proposed Transaction was driven by the interests of BAT, at the expense of the Public Shareholders.

43. BAT was involved in the negotiation of the Proposed Transaction from the beginning. According to the Preliminary Proxy, Reynolds met with BAT before it presented any proposal to Lorillard or Imperial. In discussions between Reynolds and BAT in January 2013, BAT's representatives made clear that BAT would dictate the terms of any transaction:

> BAT's representatives reiterated BAT's support, as a RAI shareholder, for a business combination of RAI and Lorillard. They also indicated BAT would wish to maintain its approximately 42% beneficial ownership interest in RAI after the transaction and was willing to provide equity financing for such a transaction in order to maintain its ownership interest. BAT's representatives also stated that decisions as to whether and how to pursue a business combination between RAI and Lorillard were to be made by the RAI board of directors, but that BAT, in its capacity as a substantial financing source and holder of contractual approval rights, would cooperate with combining the companies only on transactional terms and with an execution strategy of which it approved. Such issues included, among others, the brands to be divested, the subscription price for any additional BAT investment, maintaining the terms of the governance agreement, avoiding a RAI commitment to pay any material 'reverse termination fee' due to the failure to obtain regulatory clearance and an executive succession plan for the combined company.

44. In June 2013, BAT and RAI agreed to a term sheet "with respect to the subscription by BAT for additional shares of RAI common stock in order to provide financing for the potential transaction involving RAI and Lorillard and to maintain BAT's approximately 42% beneficial ownership interest in RAI" (the "2013 Term Sheet"). At "the insistence of BAT," the 2013 Term Sheet included a provision "that neither BAT nor RAI would seek any changes in the governance agreement in connection with the possible acquisition of Lorillard." The Preliminary Proxy does not disclose any other material terms of the 2013 Term Sheet.

45. According to the Preliminary Proxy, the 2013 Term Sheet was approved by a vote of "the independent directors of RAI [*i.e.*, directors who are neither officers nor employees of Reynolds] not designated by B&W, referred to as the Other Directors." Yet there is no indication in the Preliminary Proxy that the Other Directors hired independent counsel or an independent financial advisor to assist them in evaluating or negotiating the 2013 Term Sheet.

46. Indeed, it does not appear that the Other Directors played any significant role in the negotiations with BAT over the 2013 Term Sheet. Rather, according to the Preliminary Proxy, the Board established a strategic matters review committee ("SMRC"), which existed and operated on behalf of Reynolds from September 2012 to May 2014. The Preliminary Proxy does not disclose the members of the SMRC. Between September 2012 and the signing of the 2013 Term Sheet in June 2013, Reynolds's primary negotiator was Daniel M. Delen, the then-CEO of Reynolds. Mr. Delen worked for BAT from 1989 through 2006.

47. Later in the summer of 2013, "representatives of BAT indicated to representatives of RAI that BAT was not prepared to provide financial support to a transaction that would include a divestiture of the 'e-vapor' brand blu, as requested by Imperial, although eventually it changed its position." Reynolds and BAT then worked hand-in-hand to negotiate the divestments. According to the Preliminary Proxy, "[i]n July 2013, with the support of the RAI board of directors, [Thomas R.] Adams [an RAI executive], along with Scott M. Hayes, then group head of mergers & acquisitions for BAT, contacted representatives of

another potential divestiture partner to inquire about the possibility of such party's participation in a brand divestiture transaction."

48. Mr. Hayes continued to function as a de facto member of the Reynolds team. According to the Preliminary Proxy, on November 21, 2013, Reynolds's SMRC met with "representatives of RAI's senior management, [Reynolds's legal advisors] Jones Day, [and] Richards Layton and [Reynolds's financial advisor] Lazard. Mr. Hayes also participated in part of the meeting." And, "[a]t the request of the SMRC, Mr. Hayes presented BAT's view of a possible transaction with Lorillard and expressed BAT's support for such a transaction."

49. BAT continued to give strong direction to the Reynolds Board. On December 4 and 5, 2013, "the RAI board of directors met . . . with representatives of Jones Day, Richards Layton and Lazard. . . . Representatives of BAT provided BAT's view of the potential transaction, including BAT's belief that the transaction was value enhancing for all RAI shareholders and important from a competitive perspective and that, given the status of discussions with Imperial, BAT supported renewing contact with Lorillard." After that presentation, "the RAI board of directors authorized Mr. Wajnert to contact Mr. Kessler [Lorillard's Chairman and CEO] to explore the possibility of a potential transaction between RAI and Lorillard on the terms reviewed at the meeting."

50. According to the Preliminary Proxy, on December 19, 2013, Mr. Wajnert conveyed the following proposal to Mr. Kessler:

- the proposed business combination would be a market based transaction structured in a manner similar to a 'merger-of-equals,' in which Lorillard shareholders would receive consideration consisting of a mix of cash and stock at market value without a premium and both Lorillard's and RAI's shareholders would realize future value creation through the realization of meaningful synergies and changed market dynamics;

- BAT would maintain a significant beneficial ownership interest in the combined company, including through an investment of approximately $4.5 billion in cash at the consummation of the proposed business combination transaction;
- the leadership and governance of the combined company would be structured as a balance between the two organizations, subject to BAT's expressed desire to preserve its right to designate five members to the board of directors of the combined company (three of whom would be required to be independent of both BAT and the combined company); and
- in connection with a proposed business combination, RAI's subsidiaries' WINSTON, SALEM and KOOL and Lorillard's Maverick cigarette brands and Lorillard's 'e-vapor' brand blu (including SKYCIG) would be divested to Imperial in an effort to enhance the receipt of antitrust clearance from the regulatory authorities.

51. After discussions amongst the Lorillard Board, Mr. Kessler contacted Mr. Wajnert on January 11, 2014 to inform him that "while the Lorillard board of directors was potentially interested in the strategic and long-term financial aspects of a potential business combination between the companies, they did not think the RAI proposal provided sufficient value to Lorillard shareholders. Mr. Kessler indicated, however, that the Lorillard board of directors was willing to explore a business combination that was structured like a 'merger-of-equals' if the key terms were improved[.]"

52. According to the Preliminary Proxy, the Reynolds Board met by phone on January 14, 2014. At that meeting, "[a] representative of Lazard reported that he had contacted representatives of UBS Limited and Deutsche Bank AG, financial advisors to BAT, referred to as UBS and Deutsche Bank, respectively, to discuss potential

pro forma ownership." There is no indication that any of the BAT Designees recused themselves from this call. It appears that the Other Directors had not retained independent counsel or an independent financial advisor prior to Lazard initiating negotiations with UBS and Deutsche Bank regarding BAT's stake in the combined company.

53. Indeed, the Preliminary Proxy does not reference any separate action by the Other Directors—other than a separate vote on the 2013 Term Sheet—until January 18, 2014, more than a year after serious discussions began. On January 18, 2014, the Other Directors held a telephone meeting with Lazard, Jones Day, and Richards Layton separately from the other Reynolds directors.

54. That same day, a "representative of Lazard . . . introduc[ed] a [possible] alternative approach in which cash available as consideration would be distributed on a pro rata basis to Lorillard shareholders and to RAI shareholders other than BAT." Lazard also reported on discussions regarding "potential solutions that would be in the best interests of RAI shareholders other than BAT and continue to meet the objectives of both Lorillard and BAT. These discussions included the possibility that BAT and/or RAI shareholders other than BAT could have decreased post-closing ownership interest in the combined company." This appears to be the first time that the Reynolds Board considered the obvious tension between the interests of BAT and the Public Shareholders.

55. According to the Preliminary Proxy, the Other Directors did not discuss obtaining independent counsel until February 2014. During meetings between February 4 and 7, 2014, "[r]epresentatives of Lazard presented a variety of modifications to the proposal made in December in connection with the exploration of an alternative proposal to present to Lorillard. The modifications considered included providing a premium on cash paid to Lorillard shareholders, a premium on shares of RAI common stock issued, changes to the BAT investment and incremental changes to RAI's leverage and cash allocation. It was the consensus of the Other Directors that RAI shareholders other than BAT should receive at least 30% of the equity ownership of the combined company and ***receive a pro***

rata portion of the cash distribution. The Other Directors discussed engaging independent legal counsel."

56. The Other Directors finally engaged separate legal counsel on February 12, 2014—retaining Moore & Van Allen. Based on the Preliminary Proxy, however, it appears that the Other Directors *never* retained any independent financial advisors. Moreover, as set forth below, Moore & Van Allen appears to have frequently been excluded from crucial negotiations.

57. At the February 12, 2014 meeting of the Other Directors, "[t]here was extensive discussion regarding the consideration to be received by RAI shareholders other than BAT and BAT's willingness to move from its initial position regarding post-transaction equity ownership." According to the Preliminary Proxy, later in February 2014, there were discussions regarding a proposal to provide extra equity to Lorillard shareholders by reducing BAT's stake: "the ownership level of Lorillard shareholders in the combined company would be approximately 36.5%, with RAI shareholders other than BAT and BAT holding approximately 30% and 33.5% of the outstanding common stock of the combined company, respectively" (subject to a provision allowing BAT to subscribe for additional shares in phases over two years).

58. Ultimately, however, BAT's ironclad control over the Board won out. The Public Shareholders will receive ***no*** separate consideration and BAT did not move from its initial position regarding post-transaction equity ownership.

59. Similarly, during the course of discussions in February 2014, "[r]epresentatives of Cravath[, BAT's attorneys,] indicated that BAT was not prepared to extend the standstill covenant in the governance agreement in connection with the proposed business combination transaction[.]" As with its other demands, BAT got its way. The Standstill would still expire on schedule on July 30, 2014.

60. On March 10, 2014, the Lorillard board met and discussed the fact that the proposed transaction was not appropriately viewed as a merger of equals given BAT's control over the combined company. According to the Preliminary Proxy, Lorillard's board believed that the proposed

transaction would not be a merger-of-equals because "BAT would continue to be the most significant shareholder of the combined company with the right to board representation in accordance with the governance agreement and . . . BAT would resist agreeing to an extension of the standstill agreement in the governance agreement[.]"

61. On March 13, 2014, the Lorillard board "determined not to proceed with the proposed business combination transaction and to terminate the related discussions with RAI, BAT and Imperial. Among other things . . . the Lorillard board of directors did not believe that the proposed transaction in fact reflected a 'merger-of-equals'-like transaction[.]" Lorillard informed Reynolds of its decisions and discussions between Lorillard and Reynolds ceased until May 10, 2014.

62. On May 1, 2014, Ms. Cameron was elected CEO of Reynolds, following Mr. Delen's retirement.

63. The Preliminary Proxy states that on May 7, 2014, "the Other Directors met with RAI senior management, representatives of RAI's outside legal and financial advisors and Moore & Van Allen to consider further the possibility of an acquisition of Lorillard." The Preliminary Proxy claims that "[t]here was extensive discussion, among other things, of the potential benefits to [the Public Shareholders] of BAT's commitment to purchase additional shares of RAI common stock as part of the financing for the proposed transaction, including that it was unlikely RAI would be able to obtain equity financing from a third party on terms as favorable as those offered by BAT."

64. There is no indication in the Preliminary Proxy, however, that Reynolds, its advisors or the Other Directors had, at this point, (i) compared the terms of BAT's proposed equity financing to potential *debt* financing options that might be available (including the potential tax benefits thereof); (ii) actually contacted other potential sources of equity financing or (iii) determined that BAT was unwilling to offer more favorable terms.

65. According to the Preliminary Proxy, the Reynolds Board dissolved the SMRC on May 7 or 8, 2014 "in light of the role required by the governance agreement of the

Other Directors in considering the transaction and the fact that the SMRC was not otherwise operative at this time." The Preliminary Proxy does not explain why it was appropriate for the SMRC—instead of the Other Directors—to act on behalf of Reynolds, for approximately a year and a half prior to May 2014, during which period all of the fundamental aspects of BAT's role in the Proposed Transaction were negotiated.

66. On May 10, 2014, Mr. Wajnert sent Mr. Kessler a proposal for Reynolds to acquire Lorillard for cash and stock worth approximately $65 per share. The proposal provided for BAT to maintain its 42% stake in exchange for an additional cash investment of approximately $5 billion.

67. Reynolds and Lorillard engaged in negotiations over this proposal between May 15 and May 20, 2014. "Representatives of Centerview [Lorillard's financial advisor] telephoned representatives of Lazard and indicated that Mr. Kessler would be prepared to discuss with the Lorillard board of directors the proposed acquisition if RAI increased its offer to $68 per share."

68. At a May 20, 2014 meeting of the Reynolds Board, Reynolds's Directors "determined it would not agree to a 'reverse' termination fee"—which was, of course, one of BAT's conditions—but authorized a proposal to Lorillard with a range of $67 to $68 per share. The Preliminary Proxy states that, during the discussions, "representatives of BAT on the RAI board of directors reported, on behalf of BAT, support for the proposed transaction at the higher price."

69. The fact that the BAT Designees were designated by BAT does not change the fact that they owed independent fiduciary duties to Reynolds and its public shareholders. It was inappropriate for the BAT Designees to act "on behalf of BAT," in any capacity, while acting as members of the Reynolds Board. That the BAT Designees were speaking for BAT while sitting as Reynolds directors in a Reynolds board meeting underscores BAT's dominance over Reynolds's decision making.

70. On May 27, 2014, Reynolds and Imperial executed a non-binding memorandum of understanding with respect to the proposed asset sale. According to the Preliminary Proxy, "Over the next several weeks, representatives of RAI, Imperial, Lorillard, and in some cases BAT, engaged in discussions regarding the divestiture transaction, including with respect to 'route to market,' reciprocal contract manufacturing and other commercial arrangements." Then, "[f]rom June 11, 2014 through July 15, 2014, legal counsel to RAI, BAT and Lorillard, with the assistance of RAI's and Lorillard's senior managements and financial advisors, engaged in extensive negotiations concerning, and exchanged numerous drafts of, the proposed merger agreement and its key terms, including the allocation of antitrust risk and required efforts in the proposed transaction."

71. The Preliminary Proxy identifies only one specific recommendation made by the Other Directors during this period. That recommendation was ultimately rejected. According to the Preliminary Proxy, "on July 2, 2014, Moore & Van Allen reviewed the proposed draft of the subscription and support agreement with the Other Directors, who requested that BAT's draft provision for an unconditional commitment to vote the shares of RAI common stock it beneficially owned in favor of the transaction (regardless of any change in recommendation of the RAI board of directors) be deleted." Yet, on July 5, 2014 "Simpson Thacher [counsel for Lorillard] advised Jones Day [counsel for Reynolds] that Lorillard was insistent, as a condition of proceeding, on having a commitment from BAT to vote the shares of RAI common stock it beneficially owned in favor of the transaction even if the RAI board of directors changed its recommendation of the transaction. Cravath [counsel for BAT] advised Jones Day that BAT would consider this demand but would not give such a commitment over the objections of the Other Directors. The Other Directors agreed to accept that commitment."

72. The Preliminary Proxy suggests that even after Moore & Van Allen—independent counsel to the Other Directors—was retained, the firm was frequently excluded from discussions amongst counsel for the parties. For example:

- Between February 20 and February 24, 2014, "representatives of Jones Day [for Reynolds], Cravath [for BAT] and Simpson Thacher [for Lorillard] began to discuss the outlines of other potential terms in the 'merger-of-equals'-like transaction.";
- "[C]ommencing on May 21, 2014, representatives of Jones Day, Cravath and Simpson Thacher began discussing various process matters, including those relating to structure, due diligence, documentation and various matters relating to the Imperial asset divestiture.";
- "On June 3, 2014, representatives of Jones Day, Cravath and Simpson Thacher held a telephonic meeting to discuss certain legal matters, ***including the potential key terms of the definitive transaction agreements*** expected to be entered into among the parties, including the allocation of antitrust risk and required efforts."; and
- "On July 5, 2014, . . . representatives of Jones Day, Cravath and Simpson Thacher met to discuss the proposed merger agreement, ***including the allocation of antitrust risk*** and required efforts in the proposed transaction, and the status of the other definitive transaction documents, including the subscription and support agreement"

73. The Other Directors should have insisted—yet apparently did not—that Moore & Van Allen be included in every discussion amongst counsel for the parties, including those listed above.

74. On July 13 and 14, 2014, the Other Directors reviewed and unanimously approved the Proposed Transaction. They did not retain any independent financial advisor to assist them in evaluating the fairness of the Proposed Transaction to the Public Shareholders. The Reynolds Board also unanimously approved the Proposed Transaction.

II. THE PROPOSED TRANSACTION UNFAIRLY BENEFITS BAT AT THE EXPENSE OF PUBLIC SHAREHOLDERS

A. The Proposed Transaction Will Give BAT Access To Reynolds's "Game-Changing" E-Cigarette Technology Without Adequately Compensating Public Shareholders

. . . .

B. The Proposed Transaction Will Dilute Public Shareholders But Permit BAT To Retain Its Blocking Position Without Paying A Control Premium

. . . .

87. Under the terms of the Subscription and Support Agreement dated as of July 15, 2014, BAT will purchase the additional shares at a reference price of $60.16 per share. This is $3.02 per share ***less*** than Reynolds's closing price on July 14, 2014 of $63.18 per share—representing a ***negative*** 4.8% premium. In a truly arm's-length negotiation, Reynolds should have required BAT to pay a significant, ***positive*** premium to purchase sufficient shares to maintain its controlling blocking position.

Construing the complaint liberally and drawing every reasonable inference therefrom, the complaint alleges that BAT used its significant forty-two percent minority stake (the Preliminary Proxy, incorporated by reference, reveals that the next largest ownership block was five percent) and its veto power over the board to dictate the terms of the Lorillard acquisition in order to enrich itself at the expense of other shareholders, namely, by gaining access to Reynolds's lucrative e-cigarette technology and by maintaining its acquisition share while other shareholders' shares were diluted. The complaint further alleges that BAT employed additional coercive leverage to control the board in the Lorillard acquisition, including by implicitly threatening a takeover of Reynolds made possible by the impending expiration of the Standstill, as well as by acting as a major source of financing for the transaction. The complaint also alleges that during discussions the representatives of BAT on the board spoke "on behalf of BAT," in contravention of their fiduciary duties as board members, further underscoring BAT's coercive influence over the board. Finally, the complaint alleges that, as a result of

BAT's control of the board in this transaction, the other board members (several of whom are alleged to have close ties with BAT) delayed in retaining separate legal counsel and then failed to adequately utilize that counsel, never retained an independent financial advisor, never received a separate fairness opinion regarding the BAT share purchase, and never considered other options to finance the transaction besides BAT equity financing. In my view, "[i]n light of the low bar for notice pleading under Rule 12(b)(6)," *Wray*, 370 N.C. at 50, 802 S.E.2d at 900, these allegations are more than sufficient to allege that BAT exercised actual control over the board and prevented the board from "freely exercising its independent judgment" in considering the Lorillard acquisition.

The majority recognizes that the complaint alleges that BAT possessed significant veto power and used this to its advantage in the transaction, but the majority concludes that in the absence of "other factors," the veto power, as the mere exercise of a contractual right, cannot alone support a finding of actual control. *See Super. Vision*, 2006 WL 2521426, at *5 ("There may be circumstances where the holding of contractual rights, coupled with a significant equity position and other factors, will support the finding that a particular shareholder is, indeed, a 'controlling shareholder,' especially if those contractual rights are used to induce or to coerce the board of directors to approve (or refrain from approving) certain actions."). In light of the complaint's allegations of the threat posed by an acquisition of Reynolds by BAT, BAT's role as the major source of equity financing, and the alleged "inappropriate" role played by representatives of BAT on the board, I conclude these allegations include such other factors.

The majority dismisses any alleged leverage over the board posed by the threat of a takeover of Reynolds by BAT, asserting that the complaint merely alleges that news outlets reported on "speculation" of a takeover and that the complaint fails to allege that BAT actually threatened Reynolds with purchasing the remaining shares at the end of the Standstill period. The majority further asserts that "BAT could not seek to remove any of the directors that it did not nominate" and "therefore had no means of retribution against the majority of the directors that could have impaired the ability of those directors to exercise independent judgment." In my view, the majority reads the complaint's allegations regarding the threat of a takeover too narrowly and also ignores the fact that the restriction on BAT's seeking to remove any of the Other Directors, similar to the prohibition on BAT increasing its ownership percentage, was one of the governance agreement restrictions set to expire with the impending cessation of the Standstill period, which,

according to the complaint, " 'BAT was not prepared to extend[.]' . . . As with its other demands, BAT got its way. The Standstill would still expire on schedule on July 30, 2014." Following the expiration of the Standstill period, BAT could seek the removal of Other Directors, or it could effect their removal by doing precisely what the Standstill had prevented for ten years—acquiring Reynolds. As the complaint alleges, "[t]he timing of the Proposed Transaction is no coincidence." Turning back to the complaint, which alleges regarding the control exercised over the board by the threat of a takeover:

> 3. The Proposed Transaction is Reynolds's first significant strategic transaction since 2004. The Proposed Transaction was announced just two weeks before the expiration of a ten-year *standstill provision (the "Standstill") that prevented BAT from purchasing the Company in its entirety*.
>
> 4. The timing of the Proposed Transaction is no coincidence. The Proposed Transaction forestalls a takeover by making Reynolds a significantly less attractive takeover target for BAT.
>
> . . . .
>
> **A. *The Impending Expiration Of The Standstill Put The Directors' Jobs At Risk***
>
> 32. Reynolds was created as a result of the 2004 acquisition of BAT's U.S. subsidiary, B&W, by Reynolds's predecessor entity, the R.J. Reynolds Tobacco Company. As part of the Brown & Williamson Acquisition, BAT acquired a 42% stake in Reynolds.
>
> 33. In connection with the Brown & Williamson Acquisition, BAT and Reynolds adopted a July 30, 2004 Governance Agreement (the "Governance Agreement"), which included *a provision that prohibited BAT from increasing its percentage ownership of Reynolds until July 30, 2014—i.e., the Standstill*.
>
> . . . .
>
> 37. . . . . BAT cannot replace the Reynolds Board in its entirety without purchasing 100% of the Company.
>
> 38. In the weeks leading up to the expiration of the Standstill, there were reports suggesting that BAT might

be interested in doing just that. On March 10, 2014, the Telegraph reported that Citigroup analysts had "talked up the likelihood" that BAT would buy the remaining 58% of Reynolds. At BAT's annual shareholder meeting in April 2014, BAT CEO Nicandro Durante made a point of noting that BAT looks at acquiring Reynolds on a yearly basis. Such commentary resurfaced in early July 2014 when the Daily Mail reported on "growing speculation [that BAT] is ready to splash out billions of pounds buying the 58 per cent of US rival Reynolds American it does not already own."

39. At the time of these reports, the Proposed Transaction was already being negotiated. *The threat of a complete takeover gave BAT additional leverage to impose its terms on the Reynolds Board during those negotiations.*

40. *The Director Defendants adopted a plan that had the purpose and effect of allowing them to keep their jobs.* On July 15, 2014, Reynolds issued a press release announcing the Proposed Transaction[.]

. . . .

93. . . . .

- All members of the Reynolds Board have an incentive to safeguard their comfortable and lucrative positions, which could be lost in the event of a BAT takeover of Reynolds.

. . . .

97. As detailed in the Company's most recent annual proxy, Reynolds's non-officer directors are paid hundreds of thousands of dollars each year to serve on the Board[.]

(Emphases added.) Construing these allegations liberally, there appears to be more than a reasonable inference that the threat of a takeover of Reynolds by BAT loomed large; indeed, the specter of a BAT takeover would seem to be a familiar shadow to Reynolds by then, given that it was apparently the entire purpose of the ten-year-old Standstill provision. In my view, the distinct message of plaintiff's allegations is that after the expiration of the Standstill period a takeover could well

follow along with the loss of a board position if the Other Directors did not agree to BAT's transaction terms in the Lorillard acquisition. These allegations set forth a scenario in which BAT in effect coerced the Other Directors into acceding to exceedingly favorable terms for BAT in order to maintain their positions in the company. The likelihood that plaintiff could ultimately prove these allegations is an entirely different issue, and one on which I express no opinion. The majority appears to focus on likely proof of the allegations, rather than sufficiency of the allegations themselves; our review in accord with Rule 12(b)(6) requires focus on the latter.

In that respect, I note that the majority also asserts that "[p]laintiff does not allege that BAT ever threatened the Reynolds board in any way, however—unlike, for example, the stockholder who was considered controlling in *Kahn*[ ]—even though BAT was involved in many of the discussions regarding the Lorillard transaction from an early date." *See Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1113-15 (Del. 1994) (concluding that a minority stockholder was controlling when the minority stockholder intimidated the board and at one point threatened them, saying, "[y]ou must listen to us. We are 43 percent owner. You have to do what we tell you."). But *Kahn* was not decided on a motion to dismiss for failure to state a claim; rather, the Court of Chancery determined that the minority stockholder was controlling after a three-day trial. *Id.* at 1111. As the majority states, "[t]here was also *evidence* in *Kahn* that board members were intimidated by this stockholder and therefore complied with its demands instead of exercising their own independent business judgment." An explicit statement like the one in *Kahn*, or testimonial evidence that board members were intimidated, would certainly be beneficial to a claimant in plaintiff's position, but these are examples of evidence that will only be made known or available through discovery or at trial.

On the other hand, portions of the complaint pertaining to information available to a stockholder situated like plaintiff are summarily dismissed by the majority. For instance, plaintiff alleges that the other board members delayed in retaining separate legal counsel and then failed to adequately utilize that counsel, never retained an independent financial advisor, never received a separate fairness opinion regarding the BAT share purchase, and never considered other options to finance the transaction besides BAT equity financing. The majority briefly touches on some of these allegations but concludes that because they focus on the actions of the Other Directors rather than on the actions of BAT, these allegations "would *in no way show* that BAT" exercised actual

control of the board in the Lorillard transaction. (Emphasis added.) Given that plaintiff—with his allegations that BAT dictated the terms of the Lorillard transaction by means of its significant forty-two percent minatory stake, its veto power over the board, its role as a major source of equity financing for the transaction, and the threat of a takeover and the termination of the Other Directors following the expiring Standstill, as well as the allegation that BAT's representatives on the Board acted in breach of their fiduciary duties—has alleged that BAT exercised actual control of the board in this transaction, i.e. "prevent[ing] the [company's] board from freely exercising its independent judgment in considering the [transaction]," *In re KKR*, 101 A.3d at 995, and given that these allegations reflect that the other board members were in fact not "freely exercising [their] independent judgment," *id.*, I find perplexing the majority's conclusion that such allegations are essentially irrelevant.

Similarly, with regard to the complaint's allegations of the "Technology Sharing Agreement" concerning "the development and commercialization of next-generation tobacco products, including heat-not-burn cigarettes and vapor products," the majority dismisses these allegations with an oft-repeated refrain, stating "[a]gain, though, leverage to obtain favorable terms in an agreement does not necessarily indicate that the beneficiary of those favorable terms was a controlling stockholder." Indeed, in the majority's view, nearly everything can be reduced to the "mere existence of leverage." *See In re Sea-Land*, 1988 WL 49126, at *3 ("Plaintiffs allege only that LLC and its affiliates had significant 'leverage,' (*i.e.*, a superior bargaining position) because they owned 39.5% of Sea-Land's stock. But 'leverage' is not actual domination and control."). But as the majority recognizes elsewhere in its opinion, a minority stockholder may employ means beyond its mere ownership percentage or contractual rights that amount to "coercive leverage" and actual control over the board. *See Williamson*, 2006 WL 1586375, at *5 ("Cox and Comcast's potential veto power is significant for analysis of the control issue, however, because it supports plaintiff's allegation that Cox and Comcast had *coercive leverage* over At Home. Cox and Comcast had the ability to shut down the effective operation of the At Home board of directors by vetoing board actions. Plaintiff may be able to prove facts showing that this leverage (together with the special business relationships and other circumstances mentioned above) was enough for Cox and Comcast to obtain a far better deal th[a]n they would have in an arm's-length transaction." (emphasis added)). In light of the allegations of coercive leverage discussed above, I also view as relevant the allegations regarding the "Technology Sharing Agreement," which is alleged to have been significant, if not vital, to the Lorillard transaction;

these allegations demonstrate that BAT was able "to obtain a far better deal th[a]n [it] would have in an arm's-length transaction." *Id.*

For instance, the complaint included numerous allegations about the importance to Reynolds of its "game-changing" VUSE brand of e-cigarettes, as well as its heat-not-burn technology, asserting that e-cigarettes are "the future of the tobacco industry" and that before the Lorillard acquisition, Reynolds was predicted to "have $4 billion in revenue from e-cigs in 2021, compared with $3.9 billion from conventional cigarettes." The complaint alleges further that news reports prior to the transaction had recognized that "gaining access to Reynolds's e-cigarette and heat-not-burn technology was one of the primary reasons that BAT might want to buy the Company." Due to BAT's control of the board, however, "the Director Defendants have agreed to allow BAT to access Reynolds's game-changing technology without adequate compensation, [and] there is no need for BAT to pay the Public Shareholders a control premium to buy the rest of the Company." The complaint alleges that this "forestalls a takeover by making Reynolds a significantly less attractive takeover target for BAT," or in other words, it allows BAT to "get the milk without buying the cow." Based on these allegations, I disagree with the majority's assertion that "it is unclear how this agreement demonstrates that BAT had actual control of the Reynolds board with respect to the transaction to purchase Lorillard."

In sum, looking solely at the allegations in the complaint and taking them as true, I conclude that plaintiff has sufficiently alleged actual control by BAT over the board in the Lorillard acquisition. As such, I respectfully dissent.

Justices BEASLEY and MORGAN join in this dissenting opinion.

HAIRSTON v. HARWARD

[371 N.C. 647 (2018)]

WILLIAM HAIRSTON, JR.
v.
ASHWELL BENNETT HARWARD, JR.

No. 416A17

Filed 7 December 2018

Motor Vehicles—underinsured motorist coverage—collateral for purposes of collateral source rule

In a case arising from an automobile accident, the trial court erred by crediting a $145,000 payment made to plaintiff under his own underinsured motorist (UIM) coverage against the $230,000 judgment that plaintiff obtained against defendant where plaintiff's UIM carrier elected to waive its statutory subrogation rights. Payments from UIM coverage are collateral for purposes of the collateral source rule. In this case, one party or the other would receive a "windfall" as a result of the Supreme Court's decision, and the better option, which was most consistent with the policy reasons for the collateral source rule, was to allow the plaintiff to retain the windfall that resulted from his foresight in voluntarily electing to purchase UIM coverage rather than allowing defendant, who failed to purchase enough liability coverage, to be the ultimate beneficiary of plaintiff's prudent decision.

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. ___, 808 S.E.2d 286 (2017), affirming a judgment entered on 1 December 2015 by Judge Joseph N. Crosswhite in Superior Court, Davidson County. Heard in the Supreme Court on 30 August 2018.

Maynard & Harris, Attorneys at Law, PLLC, by C. Douglas Maynard, Jr.; Higgins Benjamin, PLLC, by John F. Bloss; and Roane Law, by James M. Roane, III, for plaintiff-appellant.

Davis and Hamrick, LLP, by Kent L. Hamrick and Ann C. Rowe, for defendant-appellee Ashwell Bennett Harward, Jr.

Burton, Sue & Anderson, LLP, by Stephanie W. Anderson, for unnamed defendant-appellee Erie Insurance Exchange.

Pinto Coates Kyre & Bowers, PLLC, by Deborah J. Bowers and Andrew G. Pinto, for North Carolina Association of Defense Attorneys, amicus curiae.

ERVIN, Justice.

The question before us in this case is whether the trial court erred by crediting a payment made to plaintiff William Hairston, Jr., under his own underinsured motorist coverage against the amount of the judgment that plaintiff obtained against defendant Ashwell Bennett Harward, Jr., arising from a motor vehicle collision. After carefully considering the record in light of the applicable law, we hold that the trial court erred by crediting the amount of this payment against the amount that defendant owed to plaintiff under the judgment and remand this case to the Court of Appeals for further remand to the Superior Court, Davidson County, for further proceedings.

On 20 November 2009, defendant was driving an automobile that, as a result of defendant's negligence, collided with a motor vehicle operated by plaintiff at an intersection in Lexington. At the time of the collision, plaintiff was insured under an automobile liability insurance policy issued by Erie Insurance Exchange that included, among other things, underinsured motor vehicle coverage subject to a coverage limit of $250,000 per person,[1] while defendant was insured under an automobile liability insurance policy issued by State Farm Mutual Automobile Insurance Company that was subject to a per person liability limit of $100,000.

On 27 July 2011, plaintiff filed a complaint against defendant alleging that the collision in which plaintiff was injured resulted from defendant's negligence and seeking a judgment against defendant encompassing compensation for past and future medical expenses, lost wages, permanent injuries, and pain and suffering. On 15 January 2013, plaintiff

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1. Plaintiff's policy provided, among other things, that:

> We will also pay compensatory damages which an insured is legally entitled to recover from the owner or operator of an underinsured motor vehicle because of bodily injury sustained by an insured and caused by an accident. The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the underinsured motor vehicle. We will pay for these damages only after the limits of liability under any applicable liability bonds or policies have been exhausted by payments of judgments or settlements, unless we:
>
> 1. Have been given written notice in advance of settlement between an insured and the owner or operator of the underinsured motor vehicle; and
>
> 2. Consent to advance payment to the insured in the amount equal to the tentative settlement.

(Bold typeface deleted.)

moved to amend his complaint to assert a medical negligence claim against his treating physician arising from the treatment that was provided to plaintiff following the motor vehicle accident, with this motion having been allowed on the following day. On 17 April 2013, Erie made an appearance in this case as an unnamed defendant. On 14 March 2014, plaintiff took a voluntary dismissal with prejudice of his medical negligence claim against his treating physician.

Plaintiff's case against defendant came on for trial before the trial court and a jury at the 11 August 2014 civil session of the Superior Court, Davidson County. On 14 August 2014, the jury returned a verdict finding defendant to be negligent and awarding plaintiff $263,000 in compensation for his personal injuries.

On 11 September 2014, Erie issued a check to plaintiff in the amount of $145,000, which, according to Erie, represented "the amount of [underinsured motorist coverage to which plaintiff was entitled] under [plaintiff's] Erie policy."[2] On 15 September 2014, defendant filed a motion seeking to have the trial court determine the amount to be set off and credited against the amount that the jury had awarded plaintiff in which defendant alleged, among other things, that plaintiff had already received $3,000 from defendant's liability carrier and at least $30,000 from his treating physician arising from the settlement of plaintiff's medical negligence claim, with these amounts to be deducted from the jury's damage award prior to the entry of judgment. In addition, defendant, in light of the fact that Erie had waived its right to be subrogated to plaintiff's rights against defendant, sought to obtain a credit against the amount of damages determined to be appropriate by the jury in the amount of $145,000 arising from the payment that Erie made to plaintiff. On 3 October 2014, plaintiff executed a "settlement agreement and full and final release of all claims against Erie only." (All capital letters in original.) On 9 October 2014, State Farm sent plaintiff a check for $97,000.

On 16 October 2014, the trial court entered an order finding that "the parties agree that Defendant is entitled to setoffs or credits totaling $33,000.00," "that the judgment amount will be $230,000.00," and that prejudgment interest would cease accruing as of 1 October 2014. In addition, the trial court found that "[t]he parties continue to disagree over whether . . . to credit the judgment ultimately entered in this case by the amount of the $145,000.00 underinsured motorists coverage

2. The appropriateness of the making of this $145,000 payment and the manner in which it was calculated are not in dispute between the parties.

payment made by [Erie] to Plaintiff" and, pursuant to an agreement between the parties, delayed making a determination regarding whether the amount of the payment that plaintiff received from Erie should be deducted from the judgment amount "until the mandate from the North Carolina Supreme Court in the case of Wood v. Nunnery . . . inasmuch as the Wood case may be dispositive of this disagreement between the parties." On 10 April 2015, this Court filed an opinion in *Wood v. Nunnery*, 368 N.C. 30, 771 S.E.2d 762 (2015) (per curiam), stating that discretionary review had been improvidently allowed in that case.

On 17 September 2015, plaintiff filed a response to defendant's motion for setoffs and credits in which he requested the trial court to enter judgment against defendant prior to considering defendant's motion for setoffs and credits and moving to strike an affidavit submitted by defendant's counsel in support of defendant's claim that Erie had waived its subrogation rights on the grounds that "[w]hether or not [Erie], as Plaintiff's UIM carrier[,] has waived its subrogation right (and reimbursement right) is not relevant to the judgment entered against a tortfeasor." In addition, plaintiff requested the trial court, in the event that it considered the affidavit or "other evidence on the waiver of subrogation," to authorize plaintiff "to take post-verdict depositions of appropriate Erie and State Farm personnel and their agents to determine . . . whether the doctrines of estoppel, waiver, unclean hands, or some other legal or equitable remedy preclude [Defendant Harward] and State Farm from arguing such waiver would inure to the benefit of Defendant [Harward]." On 25 September 2015, Erie filed an affidavit stating that Erie had waived its subrogation rights against defendant. On 29 October 2015, plaintiff filed a motion seeking to have Erie's affidavit stricken or allowing post-verdict depositions to be taken, with this relief being sought on the same grounds that led to the filing of plaintiff's earlier motion to the same effect.

On 1 December 2015, the trial court entered an order allowing defendant's motion for credits and setoffs in which it concluded as a matter of law that "[Defendant] is entitled to credit for the $145,000.00 payment made by the UIM carrier." In reaching this result, the trial court, acting in reliance upon *Baity v. Brewer*, 122 N.C. App. 645, 470 S.E.2d 836 (1996), and *Seafare Corp. v. Trenor Corp.*, 88 N.C. App. 404, 363 S.E.2d 643, *disc. rev. denied*, 322 N.C. 113, 367 S.E.2d 917 (1988), focused upon "the common law principle that a plaintiff should not be permitted a double recovery for a single injury." The trial court distinguished the initial decision of the Court of Appeals in *Wood v. Nunnery*, 222 N.C. App. 303, 730 S.E.2d 222 (2012), in which the Court of Appeals held that

payments made by the plaintiff's underinsured motor vehicle insurance carrier should not be credited to the defendant,[3] with the trial court emphasizing that in *Wood*, unlike this case, the underinsured motorist carrier had not waived its subrogation rights. In view of the fact that "no subrogation rights remain[ed]" for Erie, the trial court determined that defendant was entitled to a credit for the amount that Erie had paid to plaintiff. Finally, the trial court made no ruling on plaintiff's argument that the payment that he had received from Erie should be treated as a collateral source on the grounds that "such issue would be more properly addressed by the Appellate Courts."[4] Based upon these findings and conclusions, the trial court entered a judgment providing that plaintiff have and recover $46,527.12 from defendant.[5] Plaintiff noted an appeal to the Court of Appeals from the trial court's judgment.

In seeking relief from the trial court's judgment before the Court of Appeals, plaintiff contended that the trial court's decision to reduce the judgment amount by the $145,000 payment that plaintiff had received from Erie violated the collateral source rule, which prohibits a "plaintiff's recovery [from] be[ing] reduced . . . by some source collateral to the defendant," *Young v. Baltimore & Ohio Railroad Co.*, 266 N.C. 458, 466, 146 S.E.2d 441, 446 (1966), on the theory that the payment that plaintiff had received from Erie "is completely independent from" and,

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3. In *Wood*, 222 N.C. App. at 308, 730 S.E.2d at 226, the Court of Appeals vacated a portion of the trial court's order and remanded the case to the trial court for further proceedings. The order that the trial court entered on remand in *Wood* was also appealed to and affirmed by the Court of Appeals, 232 N.C. App. 523, 757 S.E.2d 526, 2014 WL 640884 (2014) (unpublished), with this Court ultimately determining that it had improvidently allowed discretionary review of the Court of Appeals' decision concerning the validity of the trial court's remand order in *Wood*. *Wood*, 368 N.C. at 30, 771 S.E.2d at 762.

4. In addition, the trial court denied plaintiff's motions to strike the affidavits that had been filed for the purpose of informing the parties and the trial court that Erie had waived its subrogation rights and refused to authorize the taking of post-verdict depositions. The Court of Appeals affirmed the trial court's decisions with respect to these issues and plaintiff did not seek to bring them forward for consideration by this Court.

5. The trial court calculated the amount that plaintiff was entitled to recover from defendant set out in the judgment by reducing the jury's $263,000 award to $230,000 based upon the parties' agreement that the judgment amount should be reduced by the $3,000 amount that had been advanced to plaintiff by State Farm and the $30,000 amount that plaintiff had received as a result of the medical negligence claim that plaintiff had asserted against his treating physician. After increasing the damage award by $58,777.52 in prejudgment interest, the trial court credited $97,000 against the judgment amount relating to the additional payment that plaintiff received from State Farm and the $145,000 payment that plaintiff received from Erie before ordering that plaintiff recover $46,527.12 in damages from defendant.

for that reason, collateral to, defendant. In addition, plaintiff argued that the trial court's failure to determine whether the monies that plaintiff had received from Erie represented payment from a collateral source constituted an independent legal error, citing *Pierson v. Ray*, 386 U.S. 547, 554, 87 S. Ct. 1213, 1218, 18 L. Ed. 2d 288, 294 (1967) (stating that "[i]t is a judge's duty to decide all cases within his jurisdiction that are brought before him"). According to plaintiff, the trial court's order conflicted with the decision of the Court of Appeals in *Wood*, 222 N.C. App. at 303, 730 S.E.2d at 222, which, in plaintiff's view, required the trial court to reach a result diametrically opposed to the one embodied in the order that it entered in this case given that the Court of Appeals decided to refrain from crediting the defendant in *Wood* with the amount of the payment that the plaintiff had received from his own underinsured motorist carrier on the grounds that, "[b]y the plain language of N.C.[G.S.] § 1-239, [a] defendant is responsible for satisfying the judgment entered against him"; that "the amounts owed by defendant as the tortfeasor in this matter and the amount owed by Firemen's as an underinsured motorist carrier" had been conflated by the trial court; and that "[w]hether Firemen's agreed to waive its subrogation rights as to defendant is a matter for resolution between Firemen's and defendant and is of no concern to plaintiff," quoting *id.* at 305, 730 S.E.2d at 224. In addition, plaintiff asserted that the fact that the underinsured motorist carrier in *Wood* retained subrogation rights did not mean that a situation involving payment made by an underinsured motorist carrier that did waive its subrogation rights should be treated any differently. As a result, plaintiff urged the Court of Appeals to reverse the trial court's judgment.

Defendant, on the other hand, argued before the Court of Appeals that "[w]ell-established North Carolina case law sets forth the common law principle that plaintiffs should not be permitted a double recovery for a single injury," with this principle being applicable "both when payments are made by joint tortfeasors and when payments are made by sources other than joint tortfeasors." According to defendant, this Court's statement in *Holland v. Southern Public Utilities Co.*, 208 N.C. 289, 292, 180 S.E. 592, 593-94 (1935), that "any amount paid by anybody, whether they be joint tort-feasors or otherwise, for and on account of any injury or damage, should be held for a credit on the total recovery in any action for the same injury or damage" should be deemed controlling in this case, in which "the payment by Erie . . . was made 'on account of ' the injury claimed by [p]laintiff in the lawsuit." Any failure to order that the amount paid to plaintiff by Erie be credited against the amount owed to plaintiff by defendant would, according to defendant, permit "a double recovery, in contravention of North Carolina law." In defendant's

view, the Court of Appeals did not allow a double recovery for the plaintiff in *Wood* given the absence of any evidence that the underinsured motorist carrier had waived its subrogation rights.

Defendant argued that the underinsured motorist payment that plaintiff received from Erie should not be deemed subject to the collateral source rule in light of this Court's holding in *Williams v. Nationwide Mutual Insurance Co.*, 269 N.C. 235, 237, 152 S.E.2d 102, 105 (1967), that an insured cannot obtain a recovery from his or her uninsured motorist carrier unless he or she is "legally entitled to recover damages." According to defendant, *Williams* requires that the defendant's fault be established before the underinsured motorist carrier becomes liable to the plaintiff, rendering "the right to recover under a UIM endorsement" "derivative and conditional," citing *Braddy v. Nationwide Mutual Liability Insurance Co.*, 122 N.C. App. 402, 406, 470 S.E.2d 820, 822, *appeal dismissed and disc. rev. denied*, 343 N.C. 749, 473 S.E.2d 610-11 (1996). In defendant's view, a payment source that is "derivative and conditional" upon a defendant's liability cannot be considered collateral for purposes of the collateral source rule.

On 7 November 2017, the Court of Appeals filed a divided opinion holding "that the trial court did not err in allowing defendant Harward the credit against the judgment for . . . Erie's payment." *Hairston v. Harward*, ___ N.C. App. ___, ___, 808 S.E.2d 286, 288 (2017). As an initial matter, the Court of Appeals rejected plaintiff's argument "that UIM benefits are a collateral source, so defendant Harward cannot reduce his tort liability for those benefits," on the grounds that the collateral source rule does not apply when neither party attempts to introduce or exclude evidence relating to a payment made by a collateral source at trial. *Id.* at ___, 808 S.E.2d at 290 (quoting *Wilson v. Burch Farms, Inc.*, 176 N.C. App. 629, 638, 627 S.E.2d 249, 257 (2006) (brackets, citations, and internal quotation marks omitted) (stating that "[t]he purpose of the collateral source rule is to exclude evidence of payments made to the plaintiff by sources other than the defendant when this evidence is offered for the purpose of diminishing the defendant tortfeasor's liability to the injured plaintiff.") (emphasis omitted); *id.* at ___, 808 S.E.2d at 290-91 (citing and quoting *Badgett v. Davis*, 104 N.C. App. 760, 764, 411 S.E.2d 200, 203 (1991) (same), *disc. rev. denied*, 331 N.C. 284, 417 S.E.2d 248 (1992)).

After noting that "whether UIM coverage should be credited against payments made on a tort judgment when subrogation and the right of reimbursement have been waived is an issue this Court has not explicitly addressed," *id.* at ___, 808 S.E.2d at 291, the Court of Appeals held that

Erie's waiver of its right to be subrogated to plaintiff's claims required treating Erie's payments to plaintiff as a credit against the amount of the judgment entered against defendant, *id.* at ___, 808 S.E.2d at 292. According to the Court of Appeals, its own statement in *Wood* that a defendant could not receive credit for a payment made by plaintiff's underinsured motorist carrier "[b]ecause of [the insurance carrier's] statutory right of subrogation" supported a decision to reach this result. *Id.* at ___, 808 S.E.2d at 291 (quoting *Wood*, 222 N.C. App. at 307, 730 S.E.2d at 225). The Court of Appeals believed that "factoring in subrogation" at the judgment stage "helps prevent a windfall profit" for plaintiff, citing *Baity*, 122 N.C. App. at 646-47, 470 S.E.2d at 837-38, which applied the rule enunciated in *Holland*, 208 N.C. at 292, 180 S.E. at 593-94, that "any amount paid by anybody, whether they be joint tort-feasors or otherwise, for and on account of any injury or damage should be held for a credit on the total recovery in any action for the same injury or damage" in order to prevent a plaintiff from recovering twice for the same injury. *Hairston*, ___ N.C. App. at ___, 808 S.E.2d at 291-92 (quoting *Holland*, 208 N.C. at 292, 180 S.E. at 593-94). As a result, the majority of the Court of Appeals affirmed the trial court's order.

Judge Hunter dissented from the majority's decision on the grounds that "Defendant's tort liability is a separate entity from . . . Erie's contractual obligation," so that Erie's "release[ ] from its contractual liability to Plaintiff . . . does not mean Defendant is released from the $263,000.00 judgment he owes Plaintiff." *Id.* at ___, 808 S.E.2d at 293 (Hunter, Jr., J., dissenting). In concluding that the trial court's order should be reversed, Judge Hunter placed principal reliance upon the Court of Appeals' decision in *Wood*, which he described as "essentially identical to the case at bar," *id.* at ___, 808 S.E.2d at 293, and N.C.G.S. § 20-279.21(b)(4), and which, according to Judge Hunter, "provides no language stating that a tortfeasor is entitled to a credit from a plaintiff's UIM insurer" or that "a tortfeasor has a right to avoid the enforcement of a judgment," *id.* at ___, 808 S.E.2d at 294. Instead, Judge Hunter stated his belief that N.C.G.S. § 20-279.2(b)(4) "reveals the North Carolina public policy of an injured party's right to either enforce or not enforce a judgment against a tortfeasor." *Id.* at ___, 808 S.E.2d at 294. In Judge Hunter's opinion, N.C.G.S. § 20-279.2 "balances the interests of the tortfeasor, its liability insurer, the injured victim and the [underinsured motorist] insurer" by allowing a liability insurer to "protect[ ] its insured" by requiring that insurer to "seek resolution of the claim within its policy limits," while, at the same time, "provid[ing] opportunities for the UIM [carrier] to recoup the payments made to its insured," effectively protecting the interests of the underinsured motorist insurance carrier and "the victim's

contractual rights." *Id.* at ___, 808 S.E.2d at 294. Judge Hunter opined that allowing a tortfeasor to receive credit against the judgment amount based upon underinsured motorist payments would "upset[ ] the statutory balance among competing interests" and render "the statutory right of subrogation . . . meaningless." *Id.* at ___, 808 S.E.2d at 294. Plaintiff noted an appeal to this Court from the Court of Appeals' decision on the basis of Judge Hunter's dissent.

In seeking to persuade us to reverse the Court of Appeals' decision, plaintiff argues that "[t]he Court of Appeals erred when it failed to recognize that the collateral source rule is a substantive rule of law on damages in this State." In support of this contention, plaintiff asserts that "[t]he collateral source rule is well established in the common law and public policy nationally as both a rule of evidence and the substantive law on damages." According to plaintiff, the substantive component of the collateral source rule is demonstrated by this Court's statement in *Young*, 266 N.C. at 466, 146 S.E.2d at 446, that "the plaintiff's recovery will not be reduced . . . by some source collateral to defendant." In plaintiff's view, "[t]he collateral source rule is a rule of evidence *because it is the substantive law of the State*," citing *Cates v. Wilson*, 321 N.C. 1, 5, 361 S.E.2d 734, 737 (1987) (stating that "a plaintiff's recovery may not be reduced because [of] a source collateral to the defendant"), and *Brown v. Griffin*, 263 N.C. 61, 65-66, 138 S.E.2d 823, 826-27 (1964). Plaintiff suggests that "this Court should clarify that the collateral source/benefit rule is a substantive law on damages in this State in addition to a rule of evidence."

Moreover, plaintiff urges this Court to "adopt the overwhelming majority rule that UM/UIM coverage is a collateral source/collateral benefit and does not reduce the amount a tortfeasor owes on a judgment." Plaintiff argues that, like health and life insurance, underinsured motorist coverage is independent of and collateral to compensation provided by tortfeasors and asserts that a failure to treat payments made by a plaintiff's underinsured motorist carrier as a collateral benefit provides a windfall to tortfeasors. "To the extent [that] one party may be entitled to a 'windfall,' " plaintiff contends that "sound public policy dictates that it be the injured victim . . . and not the negligent person who caused the injury."

In plaintiff's view, the relevant North Carolina statutory provisions, through which an underinsured motorist carrier has subrogation and reimbursement rights that "typically work hand in hand" with the collateral source rule to prevent a plaintiff from receiving a double recovery, clearly indicate that underinsured motorist coverage should be considered a collateral source. Plaintiff argues that a contrary result "would

extinguish the [underinsured motorist] carrier's statutory subrogation and contractual reimbursement rights." According to plaintiff, an underinsured motorist "carrier may still seek recovery of any overpayment through the exercise of its rights to subrogation or reimbursement," with the ability of the carrier "to recoup any overpayment" "divest[ing]" "insureds [ ] of any so-called 'windfall,' " quoting *Lunsford v. Mills*, 367 N.C. 618, 628-29 n.1, 766 S.E.2d 297, 304 n.1 (2014).

Defendant, on the other hand, argues that this Court should affirm the Court of Appeals' decision because plaintiff cannot be allowed a "double recovery for a single injury" and because underinsured motorist coverage is not a collateral source. Defendant asserts that there is "a crucial distinction between collateral sources recognized by North Carolina law and underinsured motorists coverage," with sources of payment such as health and disability insurance, social security payments, and unemployment benefits being categorized as collateral sources because they "are all independent of the tortfeasor." Defendant contends that this Court should not categorize payments from underinsured motorist carriers as a collateral source on the grounds that such a decision would enable plaintiffs to recover underinsured motorist benefits without having to show that the other driver was at fault, resulting in what amounts to "no-fault accident insurance." In defendant's view, this Court should uphold the Court of Appeals' decision on public policy grounds given that a holding that underinsured motorist payments constitute a collateral source would likely result in increased automobile insurance premiums and fail to give "force and effect" to the jury's verdict and given that the General Assembly has not mandated that underinsured motorist proceeds be treated as a collateral source.

A careful review of the record reveals that no factual issues are in dispute between the parties. For that reason, the only issue before us in this case is whether the trial court and the Court of Appeals reached the correct legal conclusion with respect to whether defendant was entitled to have the amount that Erie paid to plaintiff credited against the judgment in light of the undisputed facts disclosed by the present record. "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) (citation omitted). As a result, the ultimate issue before us in this case is whether, following a de novo review, the trial court correctly decided to credit defendant with the payment made to plaintiff by Erie.

The proper resolution of this case hinges, in our opinion, upon the extent to which the payment made to plaintiff by Erie does or does not constitute a payment received from a collateral source.

> According to [the collateral source] rule a plaintiff's recovery may not be reduced because a source collateral to the defendant, such as "a beneficial society," the plaintiff's family or employer, or an insurance company, paid the plaintiff's expenses. *Id.* Rather, an injured plaintiff is entitled to recovery " '. . . for reasonable medical, hospital, or nursing services rendered him, whether these are rendered him gratuitously or paid for by his employer.' "

Cates v. Wilson, 321 N.C. at 5, 361 S.E.2d at 737 (ellipsis in original) (quoting *Young*, 266 N.C. at 466, 146 S.E.2d at 446); *see also* Restatement (Second) of Torts § 920A cmt. b (Am. Law. Inst. 1977) (stating that "[p]ayments made or benefits conferred by other sources are known as collateral-source benefits [and] do not have the effect of reducing the recovery against the defendant" and that "[t]he law does not differentiate between the nature of the benefits, so long as they did not come from the defendant or a person acting for him"); *Collateral-Source Rule*, *Black's Law Dictionary* (10th ed. 2014) (defining "collateral-source rule" as "[t]he doctrine that if an injured party receives compensation for the injuries from a source independent of the tortfeasor, the payment should not be deducted from the damages that the tortfeasor must pay. Insurance proceeds are the most common collateral source – Also termed *collateral- benefit rule*"); 1 Dan B. Dobbs, *Law of Remedies* § 3.8(1) at 372-73, (2d ed. 1993) (stating that "benefits received by the plaintiff from a source collateral to the defendant may not be used to reduce that defendant's liability for damages").

As the Court of Appeals noted, "the collateral source rule excludes evidence of payments made to the plaintiff by sources other than the defendant when this evidence is offered for the purpose of diminishing the defendant tortfeasor's liability to the injured plaintiff." *Hairston*, ___ N.C. App. at ___, 808 S.E.2d at 290 (majority opinion) (emphasis omitted) (quoting *Burch Farms*, 176 N.C. App. at 638, 627 S.E.2d at 257 (brackets, citations, and internal quotation marks omitted)). Like "a reference to the presence or absence of liability coverage for defendant," *Spivey v. Babcock & Wilcox Co.*, 264 N.C. 387, 390, 141 S.E.2d 808, 811 (1965) (*superseded by statute*, N.C.G.S. § 97-10.2(e) (1991), *as stated in Frugard v. Pritchard*, 338 N.C. 508, 511, 450 S.E.2d 744, 745-46 (1994)), evidence that a plaintiff received certain benefits "is inadmissible because it is not only irrelevant but also incompetent," id. at 390, 141 S.E.2d at 812, given "the probability that juries will consider the availability of collateral sources as indicative of the lack of any real damages" and alter their verdicts accordingly, *Cates*, 321 N.C. at 10, 361 S.E.2d at

740 (citation omitted). In addition to treating the collateral source rule as one governing the admission or exclusion of evidence, this Court has given substantive effect to the principle that a plaintiff's recovery should not be reduced by a payment received from a collateral source.

In *Young*, this Court recognized that the collateral source rule is a substantive rule concerning damages. 266 N.C. at 466, 146 S.E.2d at 446. In that case, the admission of evidence tending to show that the plaintiff's medical expenses had been paid by his employer's hospital insurance was not challenged before this Court on appeal. *Id.* at 466, 146 S.E.2d at 446. Had a challenge been made to the *admission* of such evidence, *Young* could be fairly read as treating the collateral source rule as nothing more than a rule of evidence. However, the actual error that this Court identified in *Young* involved the manner in which the trial court instructed the jury concerning the calculation of the plaintiff's damages. More specifically, this Court examined the correctness of the trial court's instruction that "[i]n this case the things you may consider in determining what amount you will award to the plaintiff, if you award him anything, are *actual monetary losses* he has had from medical expenses." *Id.* at 466, 146 S.E.2d at 446 (emphasis in the original). We concluded that this instruction was erroneous because, in light of the evidence that "the plaintiff's medical expenses had been paid by his employer as the result of hospital insurance carried for the benefit of its employees . . . the foregoing charge may well have led the jury to believe that no amount was to be included in its verdict on account of medical expenses unless paid by the plaintiff himself." *Id.* at 466, 146 S.E.2d at 446. In essence, we concluded that the trial court erred because, in instructing the jury concerning the substantive law governing the calculation of the plaintiff's damages, the trial court's instructions could have led the jury to reduce the plaintiff's recovery by the amount of his medical expenses that was paid by his employer-provided hospital insurance. In concluding that the trial court had erred in this manner, this Court necessarily treated the collateral source rule as a substantive rule of law concerning damages. Put another way, we would not have reached this result in the event that the collateral source rule is, as the Court of Appeals indicated, a simple rule of evidence. As a result, we must now determine whether payments received by a plaintiff who has purchased underinsured motorist coverage should be deemed to be a payment from a collateral source that cannot be used to reduce the amount of the judgment that plaintiff is entitled to have entered against defendant.

Although the collateral source rule is a well-established principle of North Carolina law, this Court has not clearly enunciated the factors

that should be taken into account in determining whether a payment source is or is not collateral to a defendant for purposes of the collateral source rule. On the one hand, we have long held that a payment made to an injured person by one person liable for an injury should be credited against a judgment entered against others who have been held liable for the same injury, rendering payments made by a joint tortfeasor to the plaintiff not subject to the collateral source rule. *See McNair v. Goodwin*, 262 N.C. 1, 4, 136 S.E.2d 218, 220 (1964) (stating that "[t]he remaining tort-feasors are entitled, however, to have the amount paid for the covenant [not to sue] credited on any judgment thereafter obtained against them by the injured party"). More generally, this Court stated in *Holland*, 208 N.C. at 292, 180 S.E. at 593-94, that "any amount paid by anybody, whether they be joint tort-feasors or otherwise, for and on account of any injury or damage should be held for a credit on the total recovery in any action for the same injury or damage." Although defendant places considerable reliance upon this language in arguing that the judgment amount in this case should be credited with the payment that plaintiff received from Erie, the continued viability of the collateral source rule clearly indicates that the quoted language from *Holland* cannot be properly understood as meaning that "any amount paid by anybody" that benefits plaintiff or covers costs that plaintiff incurred as the result of a compensable injury must be credited against the judgment amount.[6] *See Cates*, 321 N.C. at 4, 9, 361 S.E.2d at 737, 739 (holding that Medicaid benefits, checks received pursuant to the "Aid for Dependent Children" program, and child support payments constituted collateral sources); *Young*, 266 N.C. at 466-67, 146 S.E.2d at 446-47 (holding that medical expenses "paid by [the plaintiff's] employer as the result of hospital insurance carried for the benefit of its employees" should not be used to reduce the amount that the defendant owed the plaintiff); *Brown*, 263 N.C. at 65-66, 138 S.E.2d at 826-27 (determining that the trial court erred by reducing a jury verdict in the amount of payments from Southeastern Fire Insurance Company to plaintiff "under the Medical Payments coverage of [his] policy"). Thus, the extent to which

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6. The principle enunciated in *Holland* has been applied, for the most part, in cases involving joint tortfeasors or persons in essentially the same position such as the parties in *Holland*, 208 N.C. at 292-93, 180 S.E. at 594; Baity, 122 N.C. App. at 647, 470 S.E.2d at 838, and *Seafare Corp.*, 88 N.C. App. at 416, 363 S.E.2d at 652, and cases involving the receipt of both a tort recovery and worker's compensation benefits, such as *Schenk v. HNA Holdings, Inc.*, 170 N.C. App. 555, 562-63, 613 S.E.2d 503, 509, *disc. rev. denied*, 360 N.C. 177, 626 S.E.2d 649 (2005), and *Manning v. Fletcher*, 102 N.C. App. 392, 402 S.E.2d 648 (1991), *aff'd per curiam*, 331 N.C. 114, 413 S.E.2d 798 (1992). Using similar logic, we believe that gratuitous payments made against the judgment would also have to be credited against the judgment amount.

a judgment amount should or should not be reduced by the making of a particular payment hinges upon whether that payment was made from a collateral source for purposes of the collateral source rule.

Although the parties appear to agree that the defining characteristic of a collateral source is its independence from the tortfeasor, *see Fisher v. Thompson*, 50 N.C. App. 724, 731, 275 S.E.2d 507, 513 (1981) (stating that "[a] tort-feasor should not be permitted to reduce his own liability for damages by the amount of compensation the injured party receives from an independent source"), they focus upon differing sets of facts in attempting to determine whether a particular payment source is or is not sufficiently independent of the tortfeasor to justify treating that payment source as truly collateral. Plaintiff, on the one hand, contends that our analysis should focus upon the fact that, like other forms of insurance that have been deemed to be encompassed within the collateral source rule, plaintiff paid for the underinsured motorist coverage from which the payment at issue in this case was made and that this fact establishes the independence necessary to make such a payment subject to the collateral source rule. Defendant, on the other hand, focuses upon the fact that plaintiff would not have been entitled to receive payments on the basis of the underinsured motorist coverage that he purchased from Erie in the absence of the tortfeasor's negligence and argues that the payment at issue in this case was not independent of the tortfeasor for that reason. *See Williams*, 269 N.C. at 237, 152 S.E.2d at 105 (stating that, before being "entitled to the benefits of the endorsement," the insured "must show (1) he is legally entitled to recover damages, (2) from the owner or operator of an uninsured automobile, (3) because of bodily injury, (4) caused by accident, and (5) arising out of the ownership, maintenance, or use of the uninsured automobile"). In other words, plaintiff focuses upon the fact that he purchased the uninsured motorist coverage that led to the making of Erie's payment to plaintiff, while defendant focuses upon the fact that plaintiff would not have been entitled to receive any payment from Erie had he not been injured as the result of defendant's negligence.

Admittedly, this Court has not previously addressed whether payments made from underinsured motorist carriers are or are not within the scope of the collateral source rule. For that reason, defendant can, with perfect propriety, argue that no North Carolina decision reaches the result contended for by plaintiff while plaintiff can, with equal propriety, assert that no North Carolina decision reaches the result advocated for by defendant. Put another way, none of the sources of payment that this Court has determined to be collateral appear to require proof of

the defendant's negligence as a prerequisite for payment, while none of our decisions applying the collateral source rule hold that the fact that the payment in question stemmed from a source that a plaintiff had purchased, standing alone, renders that payment collateral in nature. As a result, the question before us is a close one that is not controlled by any of our earlier decisions. On balance, however, we are persuaded that treating payments made as the result of a plaintiff's decision to purchase optional underinsured motorist coverage as subject to the collateral source rule is more consistent with the policy justifications underlying the collateral source rule and the relevant statutory provisions than is the result contended for by defendant in this case.

"[T]he primary purpose of [the Motor Vehicle Safety and Financial Responsibility Act] is to compensate innocent victims of financially irresponsible motorists . . . ." *Bray v. N.C. Farm Bureau Mut. Ins. Co.*, 341 N.C. 678, 684, 462 S.E.2d 650, 653 (1995). As is the case with certain of the other sorts of payments that have been held to be subject to the collateral source rule, the payment that Erie made to plaintiff resulted from plaintiff's foresight in deciding to acquire underinsured motorist coverage. Such conduct is exactly the sort of action that the tort system should encourage. Even though plaintiff would not have been entitled to receive the payment in question in the absence of defendant's negligence, the fact remains that he would have been equally unable to receive it had he not voluntarily purchased optional underinsured motorist coverage. A decision that a plaintiff must credit the payment that he or she receives as a result of the decision to purchase such optional coverage against the judgment entered against the defendant whose negligence caused the plaintiff's injuries strikes us as likely to discourage North Carolina citizens from purchasing uninsured motorist coverage, a result that would have obvious deleterious consequences.

In seeking to persuade us to reach a different result, defendant argues that failing to require that the payment that plaintiff received from Erie be credited against the judgment amount could cause plaintiff to receive greater compensation for his injuries than the jury awarded him contrary to our general principle against double or multiple recoveries enunciated in decisions such as *Baity*, 122 N.C. App. at 647, 470 S.E.2d at 837-38, and *Seafare Corp.*, 88 N.C. App. at 416, 363 S.E.2d at 652. Aside from the fact that "[t]he law contains no rigid rule against overcompensation," with several well-established legal "doctrines, such as the collateral benefits rule, [serving to] recognize that making tortfeasors pay for the damage they cause can be more important than preventing overcompensation," *McDermott, Inc. v. AmClyde*, 511 U.S.

202, 219, 114 S. Ct. 1461, 1470-71, 128 L. Ed. 2d 148, 162-63 (1994) (footnote omitted), a narrow focus upon avoiding overcompensation in this case would create a countervailing inequity. Although a failure to credit the amount of the payment that Erie made to plaintiff against the judgment amount certainly creates a risk that plaintiff will receive more money as a result of his injuries than the total amount of the jury's verdict, a decision in defendant's favor with respect to the issue that is before us in this case would also mean that a defendant whose negligence caused a plaintiff's injuries would not be required to pay the full amount that he or she legally owed him for the injuries that the defendant caused the plaintiff to sustain. In other words, there is no escaping the fact that one party to this case or the other will receive what could be fairly characterized as a "windfall" as a result of our decision in this case. In light of that fact, we believe that the better option is to allow plaintiff to retain the "windfall" that results from his foresight in voluntarily electing to purchase underinsured motorist coverage rather than allowing defendant, who failed to purchase enough liability coverage to adequately compensate plaintiff for his injuries, to be the ultimate beneficiary of plaintiff's decision to procure additional insurance coverage.

The approach that we believe to be appropriate in this case is also consistent with the manner in which the General Assembly elected to address the "double recovery" problem upon which defendant relies in seeking to obtain a decision in his favor in this case. According to N.C.G.S. § 20-279.21(b)(4):

> [I]f an underinsured motorist insurer, following the approval of the application, pays in settlement or partial or total satisfaction of judgment moneys to the claimant, the insurer shall be subrogated to or entitled to an assignment of the claimant's rights against the owner, operator, or maintainer of the underinsured highway vehicle.

In accordance with this statutory provision, an underinsured motorist carrier has the right to recoup payments made by the insurer to a plaintiff who has purchased underinsured motorist coverage from the defendant in the event that the defendant has sufficient resources to make such a payment. As a result, in the event that Erie had refrained from waiving its subrogation rights, it could have sought to recoup some or all of the monies that it paid to plaintiff from defendant using its statutory subrogation rights. In fact, the existence of this right of subrogation was one of the factors that North Carolina appellate courts have considered in determining that other payment sources were collateral for purposes of the collateral source rule. *See Cates*, 321 N.C. at 6, 361 S.E.2d

at 738 (justifying its holding that Medicaid and other public benefit payments were a collateral source based, in part, upon the fact that N.C.G.S. § 108A-57 "entitles the state to full reimbursement for any Medicaid payments made on a plaintiff's behalf in the event the plaintiff recovers an award for damages" and prevents "any 'windfall profit' for the plaintiff"); *see also Lunsford*, 367 N.C. at 628, 766 S.E.2d at 304 (stating that, "given the General Assembly's provision of subrogation and reimbursement rights for the financial protection of insurers, we cannot agree with Farm Bureau's argument that the trial court's order resulted in a 'windfall' for Lunsford" in that "Farm Bureau could have preserved its subrogation rights by advancing its UIM policy limits"); *Kaminsky v. Sebile*, 140 N.C. App. 71, 80, 535 S.E.2d 109, 115 (2000) (noting that, "[u]nder *Cates*, if a plaintiff recovers for the past Medicaid payments he or she received and the state fails to seek reimbursement, the plaintiff would not then be required to return the money to the defendant-tortfeasor" and that, "[s]imilarly, defendant here should not receive a windfall because the government abandoned its right under the [Federal Medical Care Recovery Act]"). Had Erie refrained from waiving its subrogation rights and attempted to assert those rights against defendant, the same protection against a windfall recovery would exist in this case. We see no reason why defendant should be entitled to different treatment simply because Erie elected to waive its statutory subrogation rights rather than attempting to enforce them. As a result, the approach advocated by defendant in this case is simply inconsistent with the approach to addressing the double recovery problem embodied in N.C.G.S. § 20-279.21(b)(4) given that the underinsured motorist carrier, rather than the negligent tortfeasor, is benefitted by the statutory mechanism for addressing the double recovery problem.

Our decision that payments from underinsured motorist coverage are collateral for purposes of the collateral source rule is consistent with the decisions that have been made by almost every other state court that has been called upon to examine this issue. *See*, *e.g.*, *Int'l Sales-Rentals Leasing Co. v. Nearhoof*, 263 So. 2d 569, 570 (Fla. 1972) ("agree[ing] with and adopt[ing] the view" of the lower state court that "uninsured motorist coverage is equivalent to a separate contract such as hospitalization insurance so that recovery thereunder may not be set-off from a judgment against a tortfeasor"); *State Farm Mut. Auto. Ins. Co. v. Kern*, 976 N.E.2d 716, 720 (Ind. Ct. App. 2012) (concluding that a judgment "entered against a third-party tortfeasor . . . is not satisfied when the plaintiff's insurer compensates the plaintiff due to the third-party tortfeasor's being underinsured" on the grounds that the tortfeasor "is not entitled to benefit from [the plaintiff's] carefulness and assiduousness

in obtaining underinsured motorist insurance coverage"); *Schwartz v. Hasty*, 175 S.W.3d 621, 628-29 (Ky. Ct. App. 2005) (noting that "[t]he collateral source rule has two aspects: evidentiary and substantive," and "agree[ing] with the majority view that [underinsured motorist] payments fall within the collateral source rule"); *Estate of Rattenni v. Grainger*, 298 S.C. 276, 277-78, 379 S.E.2d 890, 890 (1989) (finding "no persuasive reason to distinguish underinsurance proceeds from other insurance proceeds that are subject to the collateral source rule" and agreeing with the trial court's determination "that the collateral source rule applied because the benefits received were from the injured party's own underinsurance policy for which she paid the premiums"); *Johnson v. Gen. Motors Corp.*, 190 W. Va. 236, 244, 438 S.E.2d 28, 36 (1993) (stating that UIM is a collateral source on the grounds that "the party at fault should not be able to minimize his damages by offsetting payments received by the injured party through his own independent arrangements" (quoting *Ratlief v. Yokum*, 167 W. Va. 779, 787, 280 S.E.2d 584, 590 (1981))). For this reason, our decision that payments received as the result of the purchase of underinsured motorist coverage should not be credited against the amount of the judgment entered against defendant in this case, rather than being some sort of outlier, is fully consistent with the general thrust of American jurisprudence with respect to this issue.

Thus, for all of these reasons, we hold that the Court of Appeals erred by affirming the trial court's determination that the payment that plaintiff received from Erie should be credited against the judgment that should be entered against defendant in this case. As a result, the Court of Appeals' decision is reversed with respect to that issue. This case is remanded to the Court of Appeals for further remand to the Superior Court, Davidson County, for further proceedings not inconsistent with this opinion. The remaining issues addressed by the Court of Appeals are not before this Court and its decisions as to these matters remain undisturbed.

REVERSED AND REMANDED.

IN RE WILL OF ALLEN

[371 N.C. 665 (2018)]

IN THE MATTER OF THE WILL OF JAMES PAUL ALLEN, DECEASED

No. 227PA17

Filed 7 December 2018

Wills—handwritten codicil—reference to amended portion—present testamentary intent ambiguous

Where a properly attested self-proving will contained a handwritten codicil that referenced a provision of the will—"DO NOT HONOR ARTICLE IV VOID ARTICLE IV"—the will and the holographic codicil together clearly evinced testamentary intent by referencing the portion of the will to amend. But a genuine issue of material fact existed as to whether the phrase "begin[n]ing 7-3-03" showed the testator's then-present testamentary intent.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 801 S.E.2d 380 (2017), reversing an order of summary judgment in favor of propounder entered on 14 September 2016 by Judge Jeffery B. Foster in Superior Court, Beaufort County, and remanding for entry of summary judgment in favor of caveators. Heard in the Supreme Court on 28 August 2018.

Ward and Smith, P.A., by John M. Martin; and Ranee Singleton for propounder-appellant Melvin Ray Woolard.

Lanier, King & Paysour, PLLC, by Jeremy Clayton King and Steven F. Johnson II, for caveator-appellees Hope Robinson and Christian Robinson.

NEWBY, Justice.

This case presents the question of whether a handwritten codicil that references a provision of a self-proving will is valid. The intent of the testator controls, and the language of the codicil must inform as to that intent. In this case the self-proving will and holographic codicil together clearly evince testamentary intent by simply referencing the applicable portion of the will to amend. Nonetheless, a genuine issue of material fact exists whether the phrase "begin[n]ing 7-7-03" shows the testator's then-present testamentary intent. Accordingly, this issue is not appropriate for summary judgment but instead presents a question of fact for the jury to resolve. As such, we reverse the decision of the Court of Appeals and remand this case to that court for further remand to the trial court to continue with the proceedings.

On 29 August 2002, the testator, James Paul Allen, executed a typewritten will, drafted by his attorney, that constituted a properly attested self-proving will according to the requirements of North Carolina General Statutes section 31-3.3 (hereinafter "the will"). N.C.G.S. § 31-3.3 (2017). The will included the following relevant dispositions:

> ARTICLE III
>
> I will, devise and bequeath all of my real and personal property of every sort, kind and description, both tangible and intangible, wheresoever located, in fee simple absolute unto, RENA T. ROBINSON . . . .
>
> ARTICLE IV
>
> In the event, RENA T. ROBINSON, does not survive me, I will and devise a life estate unto, MELVIN RAY WOOLARD, in all real property located in Beaufort, Hyde and Washington Counties with a vested remainder therein unto, HOPE PAIYTON ROBINSON and CHRISTIAN ANN ROBINSON, in equal shares, in fee simple absolute, subject to the life estate herein devised unto MELVIN RAY WOOLARD.
>
> ARTICLE V
>
> In the event, RENA T. ROBINSON, does not survive me, I will and bequeath, all remaining real and personal property both tangible and intangible, wheresoever located, to include all farming equipment unto my nephew, MELVIN RAY WOOLARD, in fee simple.

Thus, according to the will, Rena T. Robinson, with whom the testator had a relationship, received the testator's real and personal property in fee simple absolute should she survive him. If she did not, the testator's nephew, Melvin Ray Woolard (Woolard), would receive "all remaining real and personal property both tangible and intangible, wheresoever located." Woolard would likewise receive a life estate "in all real property located in Beaufort, Hyde and Washington Counties" subject to "a vested remainder therein [to] Hope Paiyton Robinson and Christian Ann Robinson" (the Robinsons), the granddaughters of Ms. Robinson.

Sometime after the will's execution, the following handwritten notation[1] was added to the will within the text of Article IV (pages 5 through 6 of the will):

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1. This opinion references the handwritten notation as "the codicil" based on the term's definition in *Black's Law Dictionary*, which includes that, "[w]hen admitted to probate, the codicil becomes a part of the will." *Codicil*, *Black's Law Dictionary* (10th ed. 2014).

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ARTICLE IV

In the event, RENA T. ROBINSON, does not survive me, I will and devise a life estate unto, MELVIN RAY WOOLARD, in all

BEGINING 7-7-03 DO NOT HONOR ARTICLE IV
VOID ARTICLE IV
James Paul Allen

real property located in Beaufort, Hyde and Washington Counties with a vested remainder therein unto, HOPE PAIYTON ROBINSON and CHRISTIAN ANN ROBINSON, in equal shares, in fee simple absolute, subject to the life estate herein devised unto MELVIN RAY WOOLARD.

Given that the will included no provision benefitting the Robinsons other than Article IV, that notation, if a valid codicil, modifies the will and disinherits the Robinsons in favor of Woolard.

Ms. Robinson died on 5 July 2012, and the testator died on 8 March 2014. On 13 March 2014, Woolard filed an affidavit for probate of the will with the codicil. The testator's niece averred that she found the will among the testator's valuable papers or effects, and two others averred that the codicil matched the testator's handwriting. On 1 October 2015, the Robinsons contested the will, asserting that the handwritten notes did not constitute a holographic codicil to the will. On 10 March 2016, the Clerk of Court transferred the matter to Superior Court, Beaufort County, which granted summary judgment in favor of Woolard and ordered the Clerk of Superior Court to probate the will as modified by the codicil. The Robinsons appealed, arguing that the trial court erred by ruling that the handwritten note disinheriting the Robinsons constituted a valid holographic codicil to the will.

On appeal the Court of Appeals held that, even if the testator handwrote the notation in the margin of the 29 August 2002 will, that notation did not meet the requirements for a valid holographic codicil to the will. *In re Will of Allen*, ___ N.C. App. ___, 801 S.E.2d 380, 385 (2017). Relying on *In re Will of Goodman*, 229 N.C. 444, 50 S.E.2d 34 (1948), and *In re Will of Smith*, 218 N.C. 161, 10 S.E.2d 676 (1940), the court reasoned that, "where the meaning or effect of holographic notes on a will requires reference to another part of the will, the holographic notations are not a valid holographic codicil to the will." *Id.* at ___, 801 S.E.2d at 384. Moreover, the court noted that, "[i]n addition to the requirement

discussed above, a codicil, whether typewritten or handwritten, must establish a present testamentary intention of the decedent, and not merely a plan for a possible future alteration to the decedent's will." *Id.* at ___, 801 S.E.2d at 385. Because the court found it "necessary to incorporate or refer to the contents of 'Article IV' to which the note refers" to understand the handwritten notation and determined that the provision "begin[n]ing 7-7-03" could have been an intent to make a future change to the will, it concluded that the handwritten notation is not a valid holographic codicil to the will. *Id.* at ___, 801 S.E.2d at 385. Thus, the Court of Appeals held the trial court erred in granting summary judgment for Woolard and directed the trial court to grant summary judgment for the Robinsons, the caveators. *Id.* at ___, 801 S.E.2d at 385-86. This Court allowed discretionary review. *In re Will of Allen*, 370 N.C. 693, 811 S.E.2d 158 (2018).

"This Court reviews appeals from summary judgment de novo." *Ussery v. Branch Banking & Trust Co.*, 368 N.C. 325, 334-35, 777 S.E.2d 272, 278 (2015) (citation omitted). A trial court may grant summary judgment if, when viewed in a light most favorable to the nonmoving party, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2017). Thus, "[t]he movant is entitled to summary judgment . . . when only a question of law arises based on undisputed facts." *Ussery*, 368 N.C. at 334, 777 S.E.2d at 278 (citation omitted). "A genuine issue of material fact 'is one that can be maintained by substantial evidence.' " *Id.* at 335, 777 S.E.2d at 278 (quoting *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)). " 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion' and means 'more than a scintilla or a permissible inference.' " *Id.* at 335, 777 S.E.2d at 278-79 (quoting *Thompson v. Wake Cty. Bd. of Educ.*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977)).

Regarding wills and codicils, above all, "[t]he discovery of the intent of the testator as expressed in his will is the dominant and controlling objective of testamentary construction, for the intent of the testator[,] as so expressed[,] is his will." *Moore v. Langston*, 251 N.C. 439, 443, 111 S.E.2d 627, 630 (1959) (quoting *Wachovia Bank & Tr. v. Schneider*, 235 N.C. 446, 451, 70 S.E.2d 578, 581 (1952)). Thus, the initial question is whether the language of the codicil can be understood to express testamentary intent. If so, the question for the trial court when considering a motion for summary judgment in a will caveat proceeding is whether that court can determine the testator's intent as a matter of law or

whether there is enough uncertainty about testamentary intent to present the issue as a jury question. *See generally In re Will of McCauley*, 356 N.C. 91, 100-01, 565 S.E.2d 88, 94-95 (2002) (noting that where conflicting evidence exists, summary judgment is inappropriate). "[I]f there is any question as to the weight of evidence[,] summary judgment should be denied." *In re Will of Jones*, 362 N.C. 569, 573-74, 669 S.E.2d 572, 576-77 (2008) (quoting *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 220, 513 S.E.2d 320, 325 (1999)).

A decedent may direct the distribution of his estate upon his death by executing a will. *See* N.C.G.S. § 31-3.2 (2017). "A holographic will is a will . . . (1) [w]ritten entirely in the handwriting of the testator . . . (2) [s]ubscribed by the testator . . . and (3) [f]ound after the testator's death among the testator's valuable papers or effects . . . ." *Id.* § 31-3.4(a) (2017). "A written will, or any part thereof, may be revoked only . . . [b]y a subsequent written will or codicil or other revocatory writing executed in the manner provided . . . for the execution of written wills . . . ." *Id.* § 31-5.1(1) (2017).

"A codicil is a supplement to a will, annexed for the purpose of expressing the testator's after-thought or amended intention." *Smith v. Mears*, 218 N.C. 193, 197, 10 S.E.2d 659, 661 (1940) (citation omitted). "[T]he mere making of a codicil gives rise to the inference of a change in the testator's intention, importing some addition, explanation, or alteration of a prior will." *Armstrong v. Armstrong*, 235 N.C. 733, 735, 71 S.E.2d 119, 121 (1952) (citations omitted). When a codicil does not revoke the entire will, "[t]he codicil and the will considered together as a whole constitute the final disposition of [the] testator's property." *In re Goodman*, 229 N.C. at 446, 50 S.E.2d at 35 (citations omitted).

Whether will or codicil, "[t]he maker [of the instrument] must intend at the time of making that the paper itself operate as a will, or codicil; an intent to make some future testamentary disposition is not sufficient." *In re Will of Mucci*, 287 N.C. 26, 30, 213 S.E.2d 207, 210 (1975); *see also In re Will of Johnson*, 181 N.C. 303, 306, 106 S.E. 841, 842 (1921) (concluding that a decedent's letter asking a friend to prepare a will for him and describing some of the intended provisions in the will, but which the decedent retained in lieu of mailing it to the addressee, was not a will because "[t]here [was] nothing in the paper to show a present purpose that it should be the final disposition of his property"). For holographic wills and codicils specifically, "the instrument itself" must indicate the existence of testamentary intent and be "found among the deceased's valuable papers after his death or in the possession of some person with whom the deceased had deposited it for safekeeping." *In re Mucci*,

287 N.C. at 30-31, 213 S.E.2d at 210 (citations omitted). Otherwise, "the instrument may not, as a matter of law, be admitted to probate." *Id.* at 31, 213 S.E.2d at 211. On the other hand, if "a holographic instrument on its face is *equivocal* on the question of whether it was written with testamentary intent and there is evidence that the instrument was found among the [deceased's] valuable papers . . . the [intent] issue is for the jury and parole evidence relevant to the issue may be properly admitted." *Id.* at 31, 213 S.E.2d at 211 (emphases added) (citations omitted).

Given the nature of a codicil as "an addition, explanation, or alteration of a prior will," a codicil by definition modifies a prior will. *Armstrong*, 235 N.C. at 735, 71 S.E.2d at 121. To be valid a codicil need not quote in its entirety any language of the will it intends to alter, and a court should not isolate the handwritten text from the will itself in construing the codicil. A testator's reference to a specific provision of the will without restating the entire provision is not an impermissible reference to the will. When considering the surrounding circumstances, particularly when the codicil is written on the will itself, the codicil must simply "manifest[ ] the final disposition [a decedent] wished made of her property." *Id.* at 446, 50 S.E.2d at 36. Any requirement to the contrary would undermine the stated purpose of will construction, which is to determine testamentary intent.

Though a holographic codicil by its name implies that all words must be entirely in the testator's handwriting, any typed words appearing on the paper "would not necessarily prevent the probate of a will" if those typed words are "not essential to the meaning of the words in such handwriting." *Id.* at 446, 50 S.E.2d at 35. For example, in *In re Will of Goodman* this Court held that the testator's handwritten notations placed throughout her typewritten, fully executed will constituted "a valid holographic codicil." *Id.* at 447, 50 S.E.2d at 36. There the testator handwrote the following provisions at various places on her typed will, followed by her signature: "To my nephew Burns Elkins 50 dollars"; "Mrs. Stamey gets one-half of estate if she keeps me to the end"; and "My diamond ring to be sold if needed to carry out my will, if not, given to my granddaughter Mary Iris Goodman." *Id.* at 444-45, 50 S.E.2d at 34. In assessing the handwritten provisions, the Court looked to both the handwritten notations themselves and the typed will to determine that the handwritten additions were "not so inconsistent with the provisions of the will as to constitute revocation." *Id.* at 445, 50 S.E.2d at 35. The Court then determined that "[t]he additional words placed by [the testator] on this will written in her own handwriting and again signed by her [were] sufficient, standing alone, to constitute a valid holograph will" because, looking at the surrounding circumstances, the handwritten

portions and typewritten will taken together "manifest[ed] the final disposition she wished made of her property." *Id.* at 446, 50 S.E.2d at 36. While understanding the language "one-half of estate" and "sold if needed" required referencing various provisions of the will, such references did not invalidate the codicil.

The rules applicable to will construction exist to help discern testamentary intent, which is the paramount consideration in evaluating testamentary devises. *See In re Will of Bennett*, 180 N.C. 5, 8, 103 S.E. 917, 918 (1920) (noting that "[t]he object of" the rules governing will construction "is that there may be no doubt as to the intention of the supposed testator"). Therefore, the rules must be applied to accomplish such a purpose, as occurred in *In re Goodman*.

Here the evidence, when viewed in a light most favorable to the nonmoving parties, clearly indicates that the will, including the handwritten provisions, was found among the testator's valuable papers and effects.[2] Moreover, the handwritten notation itself, "DO NOT HONOR ARTICLE IV VOID ARTICLE IV," evinces a clear intent regarding the desired disposition for the items contained in Article IV. Those words themselves explicitly show that the will should be modified to eliminate Article IV. Contrary to the Court of Appeals' conclusion, the testator did not need to rewrite all of Article IV for the handwritten notation to be sufficient.

Given that the language is sufficient to indicate testamentary intent to void Article IV of the will, the remaining question becomes whether the phrase "begin[n]ing 7-7-03" sufficiently indicates *present* testamentary intent. Had the testator simply written the date, no ambiguity would exist. The term "beginning," however, is sufficiently ambiguous to create a genuine issue of material fact sufficient to preclude summary judgment as to whether that provision indicates the required present testamentary intent. *See In re Johnson*, 181 N.C. at 306, 106 S.E. at 842 ("There is nothing in the paper to show a present purpose that it should be the

2. As previously noted, a holographic codicil must be entirely in the testator's handwriting. N.C.G.S. § 31-3.4(a)(1). The trial court granted summary judgment in favor of the propounder, concluding no genuine issue of material fact existed regarding whether the testator handwrote every portion of the codicil. Though the parties advanced arguments at the Court of Appeals about whether the provision was entirely in the testator's handwriting, the Court of Appeals did not reach that issue because it reversed the trial court's ruling and remanded for entry of summary judgment for the caveators. *In re Allen*, ___ N.C. App. at ___, 801 S.E.2d at 385. Because the parties did not advance arguments about the handwriting at this Court, we do not reach that issue in this opinion. On remand, the trial court may determine whether to revisit the handwriting issue, i.e., whether a genuine issue of material fact exists whether the handwritten provision was entirely in the testator's handwriting.

final disposition of his property . . . ."). In a case in which an ambiguity exists regarding present testamentary intent, the issue is one for the jury to determine. *See In re Mucci*, 287 N.C. at 31, 213 S.E.2d at 211. Such a factual question related to the language of the notation makes summary judgment inappropriate here.

Thus, while the will and the codicil together clearly evince testamentary intent by simply referencing the applicable portion of the will to amend, a genuine issue of material fact exists whether the phrase "begin[n]ing 7-7-03" indicates present testamentary intent. Therefore, summary judgment is inappropriate here because the issue presents a question of fact properly resolved by the jury. As such, we reverse the decision of the Court of Appeals, and remand this case to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

ANDREA MORRELL, G. PONY BOY MORRELL, AND THE PASTA WENCH, INC.
v.
HARDIN CREEK, INC., JOHN SIDNEY GREENE, AND HARDIN CREEK TIMBERFRAME AND MILLWORK, INC.

No. 318A17

Filed 7 December 2018

1. Landlord and Tenant—lease—exculpatory clause—insurance coverage

The trial court improperly granted summary judgment in favor of defendant Hardin Creek, the landlord in a landlord-tenant dispute, where the lease included a clause waiving liability for negligence. The lease explicitly exempted the parties from all claims and liabilities arising from or caused by any hazard covered by insurance on the leased premises regardless of the cause of the damage or loss.

2. Appeal and Error—record—insufficient

In a case concerning a leaking sprinkler system in a leased building, claims against several defendants were remanded for reconsideration where the record was not sufficiently developed for consideration of the involvement of those defendants.

3. Landlord and Tenant—lease—exculpatory clause—insurance coverage—counterclaims

The trial court correctly granted summary judgment for plaintiffs on a defendant's counterclaims in an action that rose from a leaking sprinkler system in a leased building. An exculpatory clause in the lease for damages covered by insurance barred the counterclaims.

Justice BEASLEY concurring in part and dissenting in part.

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. ___, 803 S.E.2d 668 (2017), reversing an order of summary judgment entered on 27 April 2016 by Judge William Coward in Superior Court, Watauga County, and remanding for further proceedings. On 1 November 2017, the Supreme Court allowed defendants' petition for discretionary review of additional issues. Heard in the Supreme Court on 14 May 2018 in session in the Old Burke County Courthouse in the City of Morganton pursuant to N.C.G.S. § 7A-10(a).

Capua Law Firm, P.A., by Paul A. Capua and Genevieve A. Mente, for plaintiff-appellees.

Wall Babcock LLP, by Joseph T. Carruthers and Lee D. Denton, for defendant-appellants.

MORGAN, Justice.

This contract interpretation case concerns the operation of the provisions of a commercial real estate lease, specifically those terms regarding insurance and liability, when a lessee seeks damages allegedly caused by the lessor's negligence. The specific question before this Court is whether the pertinent provisions of the lease at issue serve as a complete bar to plaintiff lessees' negligence-based claims against some or all of the named defendants, one of which is the lessor. The language of the lease arrangements indicates the clear intent of the parties to discharge each other from all claims and liabilities for damages resulting from hazards covered by insurance, and it is undisputed that the damages claimed by plaintiff lessees resulted from a hazard that was subject to their insurance coverage. Having elected to enter into the lease at issue here, plaintiff lessees are bound by the explicit terms of the contract and therefore are barred from bringing their claims against other

parties to whom the lease applies. Accordingly, we reverse the portion of the decision of the Court of Appeals holding that a critical paragraph in the lease is ambiguous and that, as a result, interpretation of the contract was a matter for a jury to resolve. We remand this matter for further proceedings as described below.

Factual and Procedural Background

Beginning in early 2011, defendant Hardin Creek, Inc. (Hardin Creek), a North Carolina company, began leasing commercial premises in Boone to plaintiff The Pasta Wench, Inc., a specialty pasta manufacturing and distribution business owned and operated by plaintiffs Andrea Morrell and her husband, G. Pony Boy Morrell (G. Morrell). The initial lease, dated 2 February 2011, covered the time period from February 2011 through February 2014, and defined "Landlord" as "Hardin Creek, Inc." and "Tenant" as "Andrea Morrell and G. Morrell (D.B.A.) The Pasta Wench, Inc." Defendant John Sidney Greene (S. Greene) signed the lease as President of Hardin Creek, and both Andrea and G. Morrell signed on behalf of themselves and The Pasta Wench. No other parties or third-party beneficiaries were named in or signed the lease.

The lease was a standard form lease prepared by Hardin Creek, and it included, *inter alia*, several provisions regarding insurance and liability. Relevant to the parties' arguments in this case are portions of two paragraphs. Paragraph 5, titled "Alterations," discusses The Pasta Wench's right, as "Tenant," to alter or remodel the premises to suit its needs and further states in pertinent part:

> (b) Tenant's Neglect. Subject to the provisions set forth in the following sentence, Tenant shall pay for the cost of any repairs or damage resulting from the negligence or the wrongful acts of his employees, representatives or visitors. However, and notwithstanding any other provision of this lease to the contrary, Landlord and Tenant and all parties claiming under them agree and discharge each other from all claims and liabilities arising from or caused by any hazard covered by insurance on the leased premises, or covered by insurance in connection with the property owned or activities conducted on the leased premises, regardless of the cause of the damage or loss, provided that such cause does not prevent payment of insurance proceeds to Landlord under the provisions of the applicable policy.

Paragraph 8, titled "Insurance," provides in its entirety:

> Tenant shall maintain insurance in accordance with the provisions of sub[-]paragraphs (a) and (b) of this paragraph, and Tenant shall indemnify Landlord in accordance with the provisions of sub-paragraph (c).
>
> (a) Property Insurance: Tenant shall hold Landlord harmless for loss or damage by fire with regard to all of Tenant's furniture, fixtures, and equipment about or within the leased premises.
>
> (b) Liability Insurance: Tenant shall provide and keep in force for the protection of the general public and Landlord liability insurance against claims for bodily injury or death upon or near the leased premises and the sidewalks, streets and service and parking areas adjacent thereto to the extent of not less than $500,000.00 in respect to bodily injur[i]es or death to any one person and the extent of not less than $500,000.00 for bodily injuries or death to any number of persons arising out of one accident or disaster, and property damage with limits of not less than $100,000.00. The Tenant shall furnish Landlord with satisfactory evidence of such insurance within thirty (30) days of execution of this lease.

Despite the reference in the first sentence of Paragraph 8 to "subparagraph (c)," there is no subparagraph (c) in Paragraph 8.

In early 2012 an inspection by the North Carolina Department of Agriculture and Consumer Services (NCDA&CS) revealed the need for modifications to the interior layout of the premises to comply with pertinent state regulations governing The Pasta Wench's food production activities. Specifically, the inspection noted the need for the addition of an enclosed ceiling for the "open" kitchen that was being used by lessees Andrea and G. Morrell in their business. Lessees discussed the NCDA&CS requirements with S. Greene and his son, John Ellis Greene (E. Greene). Both S. and E. Greene are licensed general contractors, with the two of them having different business connections to the leased premises. E. Greene owned the building containing the premises that plaintiffs leased, as well as the real property on which the building sits. In addition to owning lessor Hardin Creek, S. Greene also owned and operated defendant Timberframe and Millwork, Inc. (Timberframe), a construction company in the business of building and remodeling residential and commercial buildings.

After learning of the applicable regulatory requirements, Hardin Creek agreed to undertake the kitchen ceiling enclosure project in exchange for the Morrells' promise to extend the term of the lease from February 2014 through December 2018. An "Amending Agreement" attached to the 2011 lease also imposed a series of rent increases, the first of which went into effect on 1 June 2012. However, the Amending Agreement specifically provided that "[a]ll other terms and conditions from the original lease . . . will stay in effect." The parties do not dispute that the insurance and liability-related provisions of the 2011 lease quoted and discussed herein therefore remained in operation at all times relevant to this case.

The kitchen ceiling enclosure project was completed, but in their respective pleadings and depositions in the present case, the parties dispute who performed and supervised the renovation work. S. Greene denied that either he or Timberframe was involved and claimed that the Morrells themselves had supervised the project as the lessees. But, Adam Voss, an employee of Timberframe, testified that he performed the work while employed and being paid by Timberframe and at the direction of S. Greene. Voss also testified that all work on the ceiling project was conducted under the supervision of S. Greene and Timberframe alone. G. Morrell likewise testified that S. Greene had supervised and completed the project using Timberframe personnel.

The kitchen ceiling enclosure project was later discovered to have violated both general building codes and mechanical codes for fire sprinkler systems. The flawed nature of the work to enclose the ceiling of the kitchen was discovered after the mountain municipality of Boone experienced extremely low temperatures in January 2014, causing the fire sprinkler pipes on the leased premises to burst, to flood the Morrells' leased business space, and to destroy the lessees' inventory, ingredients, and specialty equipment. As the lessees, the Morrells claimed that these losses prevented The Pasta Wench from filling pending orders and that they halted new sales. Although the lessees had obtained insurance on the premises that covered the hazard of flooding, nevertheless the benefit limits of the policy that they purchased were insufficient to cover their alleged losses such that The Pasta Wench went out of business.

On 3 December 2014, plaintiff lessees filed an action in Superior Court, Watauga County, alleging negligence and breach of the duty of workmanlike performance against Hardin Creek, S. Greene, and Timberframe; constructive eviction and breach of contract against Hardin Creek; and unfair trade practices against S. Greene and Hardin

Creek. In their complaint, plaintiffs asserted that, after the flooding, they discovered acts and omissions attributable to Hardin Creek, Timberframe, and S. Greene which plaintiffs claim caused, or contributed to, the frozen pipes in the sprinkler system. These allegedly negligent acts and omissions included leaving a vent open near the roof so as to allow the entry of cold air, and establishing a thermal barrier between the newly enclosed kitchen and the open area above it, so as to render the thermostat ineffective for regulating the temperature above the kitchen ceiling where the fire sprinkler system pipes were located.

On 2 March 2015, defendants Hardin Creek, S. Greene, and Timberframe (the original defendants) filed an answer. Along with general denials and admissions, the answer averred that "plaintiffs and defendant Hardin Creek" were the only parties to the lease and that "the other two defendants [S. Greene and Timberframe] did not provide any services to plaintiffs in their (i.e., defendants') names." The original defendants also raised four affirmative defenses: plaintiffs' contributory negligence, assumption of risk, failure to mitigate damages, and the economic loss doctrine. Hardin Creek also reserved its "right to assert other affirmative defenses that become known through discovery." The original defendants also moved to dismiss plaintiffs' negligence, breach of warranty, and unfair and deceptive trade practices claims pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). On 8 March 2016, Hardin Creek amended the answer and added two counterclaims, one alleging that plaintiffs had breached their duty to maintain the premises and the other contending that plaintiffs had violated the terms of the lease. Hardin Creek sought monetary damages for these counterclaims.

On 14 April 2016, the original defendants moved for summary judgment contending, *inter alia*, that plaintiffs' claims against S. Greene and Timberframe must be dismissed because they were not parties to the lease and any work that was performed by Timberframe was on Hardin Creek's behalf. In addition, the original defendants asserted that the lease discharged Hardin Creek "from all claims and liabilities arising from or caused by any hazard covered by insurance . . . regardless of the cause of the damage or loss" pursuant to Paragraph 5(b) of the lease. On the next day, plaintiffs moved to amend their complaint to add E. Greene as a party defendant, alleging negligence and breach of the implied warranty of workmanlike performance. On the same date, plaintiffs filed a motion to continue and to extend the previously determined scheduling deadlines. On 22 April 2016, plaintiffs filed a third-party complaint against E. Greene, bringing all claims alleged in their complaint against him.

On 25 April 2016, the Honorable William Coward heard arguments on all parties' motions. On 27 April 2016, the trial court granted summary judgment in favor of defendants and dismissed the complaint with prejudice. The trial court found that: (1) plaintiffs "presented no plausible reasons why further discovery would shed any light on [P]aragraph 5(b) in the Lease," and (2) "[P]aragraph 5(b) in the lease is not ambiguous and is a complete defense to the claims raised in the Complaint." The trial court *sua sponte* granted summary judgment in favor of plaintiffs on Hardin Creek's counterclaims. Finally, the trial court dismissed with prejudice plaintiffs' third-party complaint against E. Greene and dismissed as moot plaintiffs' motion to amend complaint and motion to continue. Plaintiffs filed their notice of appeal to the Court of Appeals on 20 May 2016.

At the Court of Appeals, plaintiffs argued that the trial court erred in granting summary judgment in favor of defendants. Specifically, plaintiffs contended that the language of Paragraph 5(b) of the lease—that the parties "discharge[d] each other from all claims and liabilities arising from or caused by any hazard covered by insurance . . . regardless of the cause of the damage or loss, provided that such cause does not prevent payment of insurance proceeds to Landlord under the provisions of the applicable policy"—was ambiguous in that it did not clearly reflect the intent of the parties to bar *negligence* claims against each other. A majority of the Court of Appeals panel agreed with plaintiffs, concluding that the trial court's summary judgment ruling was erroneous. *Morrell v. Hardin Creek, Inc.*, ___ N.C. App. ___, 803 S.E.2d 668, 675 (2017). In reaching that result, the majority opined that the references in Paragraph 5(b) to "any hazard covered by insurance" and "payment of insurance proceeds" require that this provision be read in conjunction with Paragraph 8 of the lease, which

> purports to define the type and amount of insurance [d]efendants required [p]laintiffs to carry. Paragraph 8 also includes the terms under which [p]laintiffs would indemnify [d]efendants for damages covered by insurance. However, Paragraph 8 is incomplete. The opening sentence of Paragraph 8 states "Tenant shall maintain insurance in accordance with the provisions of subparagraphs (a) and (b) of this paragraph, and Tenant shall indemnify Landlord in accordance with the provisions of sub-paragraph (c)." The text of subparagraphs (a) and (b) follow this sentence. Subparagraph 8(a), titled "Property Insurance," contains indemnification language and states [p]laintiffs hold Hardin

> Creek harmless for damages or losses caused by fire to [p]laintiffs' furniture, fixtures, and equipment. Subparagraph 8(b), titled "Liability Insurance," defines the types and amounts of liability insurance [d]efendants required [p]laintiffs to carry. There is not a Subparagraph 8(c).
>
> Both [P]aragraph 5(b) and Paragraph 8 refer to limits on Hardin Creek's liability under the lease. The incomplete construction of Paragraph 8 creates an ambiguity as to the type and amount of insurance Hardin Creek required of [p]laintiffs. The incomplete construction of Paragraph 8 also creates an ambiguity relating to the scope of [P]aragraph 5(b). The language the trial court relied on in [P]aragraph 5(b) refers to any "hazard covered by insurance on the leased premises." However, when [P]aragraph 5(b) is read in connection with Paragraph 8, the exact meaning of the term "covered by insurance" is ambiguous. It is unclear whether that term refers to hazards covered only by insurance coverage as required by the lease, or whether that term is modified by the language in the missing subparagraph on indemnification.

Id. at ___, 803 S.E.2d at 674. The majority went on to observe that, even if the lease was unambiguous as to indemnification, the majority still would have concluded that Paragraph 5(b) did not serve as a bar against claims arising out of negligence because a "contract will never be so interpreted [to exempt liability for negligence] in the absence of clear and explicit words that such was the intent of the parties.' *Id.* at ___, 803 S.E.2d at 674 (alteration in original) (quoting *Winkler v. Appalachian Amusement Co.*, 238 N.C. 589, 596, 79 S.E.2d 185, 190 (1953)). Based upon its own cases applying this reasoning, the Court of Appeals reversed the trial court's entry of summary judgment in favor of all defendants and remanded the matter for further proceedings. *Id.* at ___, 803 S.E.2d at 674-76. The court further determined that it could not "review or resolve the issue of the various [d]efendants' degree of involvement in modifying the sprinkler system from our record on appeal" and added that "[t]his is an issue for the trial court which the trial court may be able to resolve upon motion for directed verdict." *Id.* at ___, 803 S.E.2d at 675-76. On remand, the trial court was also directed to "resolve and reconsider [p]laintiffs' motion to add E. Greene as [ ] a defendant to this action" because the trial court's denial of that motion in the first instance was a consequence of its order granting summary judgment in defendants' favor. *Id.* at ___, 803 S.E.2d at 676.

The dissenting judge would have held that the trial court's grant of summary judgment in favor of defendants was proper, based on his conclusion that Paragraph 5(b) "is unambiguous and operates as a complete defense to [all] claims raised by [p]laintiffs." *Id.* at ___, 803 S.E.2d at 676 (Berger, J., dissenting). Quoting *Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 467, 144 S.E.2d 393, 400 (1965), for the proposition that "when the language of the contract and the intent of the parties are clearly exculpatory, the contract will be upheld," the dissenting judge found that the language in Paragraph 5(b)—"notwithstanding any other provision of this lease to the contrary, Landlord and Tenant . . . agree and discharge each other from all claims and liabilities arising from or caused by any hazard covered by insurance . . . , regardless of the cause of the damage or loss"—showed that "the parties clearly and explicitly waived all claims, including claims for negligence." *Id.* at ___, 803 S.E.2d at 676-78. In addition, rather than finding ambiguity in the terms of Paragraph 8 regarding the parties' intent to waive negligence claims against each other, the dissenting judge determined that "[i]ncluding an insurance requirement is evidence of the parties' intent to relieve the other from any liability or damages, including damages related to negligence." *Id.* at ___, 803 S.E.2d at 679.

On 20 September 2017, defendants filed a notice of appeal based upon the dissent in the Court of Appeals. They also filed a petition for discretionary review of additional issues, which this Court allowed on 1 November 2017. *Morrell v. Hardin Creek, Inc.*, ___ N.C. ___, 805 S.E.2d 695 (2017).

Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2017). A ruling on a motion for summary judgment must consider the evidence in the light most favorable to the non-movant, drawing all inferences in the non-movant's favor. *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citations omitted). The standard of review of an appeal from summary judgment is de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted). Likewise, whether the language of a contract is ambiguous is a question of law to be reviewed de novo. *See Bicket v. McLean Secs., Inc.*, 124 N.C. App. 548, 553, 478 S.E.2d 518, 521 (1996) (citations omitted).

Analysis

A. Claims Against Hardin Creek

[1] "Interpreting a contract requires the court to examine the language of the contract itself for indications of the parties' intent at the moment of execution." *State v. Philip Morris USA Inc.*, 359 N.C. 763, 773, 618 S.E.2d 219, 225 (2005) (citing *Lane v. Scarborough*, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973)). "The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Gould Morris Elec. Co. v. Atl. Fire Ins. Co.*, 229 N.C. 518, 520, 50 S.E.2d 295, 297 (1948) (citation omitted). Although parties may generally contract "to bind themselves as they see fit," "contracts exempting persons from liability for negligence are not favored by the law, and are strictly construed against those relying thereon." *Hall v. Sinclair Ref. Co.*, 242 N.C. 707, 709, 89 S.E.2d 396, 397-98 (1955). For this reason, exculpatory clauses will not be "construed as to exempt the indemnitee from liability for his own negligence or the negligence of his employees in the absence of explicit language clearly indicating that such was the intent of the parties." *Hill v. Carolina Freight Carriers Corp.*, 235 N.C. 705, 710, 71 S.E.2d 133, 137 (1952). Thus, even when the issue before a court is whether an agreement exempts a party thereto from liability for its own negligence, the central question remains the same as in any contract interpretation case: what did the parties intend? "[W]hen the language of the contract and the intent of the parties are clearly exculpatory, the contract will be upheld." *Gibbs*, 265 N.C. at 467, 144 S.E.2d at 400.

As previously noted, the cases relied upon by the majority below are decisions of the Court of Appeals—*William F. Freeman, Inc. v. Alderman Photo Co.*, 89 N.C. App. 73, 365 S.E.2d 183 (1988), and *Lexington Insurance Co. v. Tires Into Recycled Energy & Supplies, Inc.*, 136 N.C. App. 223, 522 S.E.2d 798 (1999), *disc. rev. denied*, 351 N.C. 642, 543 S.E.2d 872 (2000)—that in turn were based upon this Court's decision in *Winkler*. We stated in *Winkler* that "[c]ontracts for exemption from liability for negligence are not favored by the law, and are strictly construed against the party asserting it. The contract will never be so interpreted *in the absence of clear and explicit words that such was the intent of the parties*." *Winkler*, 238 N.C. at 596, 79 S.E.2d at 190 (emphasis added) (citation omitted). A close examination of the facts in *Winkler* is useful in understanding why the Court of Appeals erred in finding that the lease in the instant case was ambiguous regarding the parties' intent to exempt each other for liability for negligence.

Winkler arose from an action brought by the plaintiff-landlord against his tenant for damages incurred when a theater building burned, allegedly as the result of the defendant-tenant's negligent operation of a popcorn machine. *Id.* at 589, 79 S.E.2d at 186. In the trial court, the defendant-tenant asserted, *inter alia*, "that the language of paragraphs 3 and 9 of the lease relieved the defendant from liability for damages by fire, no matter if caused by its own negligence" and the plaintiff-landlord was nonsuited. *Id.* at 594, 79 S.E.2d at 189. On appeal, just as in the instant case, this Court considered whether two lease provisions were ambiguous regarding the parties' intent as to the allocation of risk from the tenant's negligence:

> The first question involved is: Whether the words in the lease in paragraph 9 "the lessees agree that they will, at the expiration of this lease, deliver up and return possession of the premises to the lessors in as good order, repair and condition as at present, ordinary wear and tear excepted, and damage by fire . . . excepted," and the words in paragraph 3 "the lessees . . . shall, at their own cost and expense, *make any and all repairs* that may be necessary inside the portion of the building hereby demised, excepting in case of destruction or damage by fire," exempt the defendant from liability for damage by fire caused by its actionable negligence, if there was such actionable negligence on its part.

Id. at 596, 79 S.E.2d at 190-91 (ellipses in original) (emphasis added). This Court noted the "implied obligation on the part of the lessee to use reasonable diligence to treat the premises demised in such manner that no injury be done to the property, but that the estate may revert to the lessor undeteriorated by the willful or negligent act of the lessee," *Id.* at 594-95, 79 S.E.2d at 189, and then observed:

> Similar words [to those in the theatre lease] have been used in leases for many years to relieve the lessee from any liability caused by accidental fires, or fires caused by the wrongful act of another. Did these words mean that the lessee was to be exculpated from a fire which was the result of its own negligence? Such a concession would scarcely be looked for in a contract between business men. If the parties intended such a contract, we would expect them to so state in exact terms. It would be natural for the lessee, who had contracted to keep up repairs, to desire to escape liability for purely accidental fires and for

> the lessor to be willing to grant that relief, but it would not be natural that the lessor would be willing to release the lessee from damage caused by its own active negligence. In our opinion, the words in paragraphs 9 and 3 of the lease do not exempt the defendant from liability for fire damage, if caused by its actionable negligence.

Id. at 596, 79 S.E.2d at 191. This Court therefore determined that the requirements in paragraphs 3 and 9 that the theatre be returned to the landlord in "good order" and "undeteriorated" other than by ordinary wear and tear, and that the tenant bear the costs of all such needed repairs other than those caused by fire, did not reveal a clear intent to go beyond the typical or "natural" contractual bargain and waive a party's liability for damages caused by that party's own negligence. *Id.* at 598, 79 S.E.2d at 192.

The Court went on in *Winkler* to reject the defendant-tenant's contention that another paragraph of the lease providing "that the lessor shall keep the building insured to the extent of its full insurable value[ ] exculpate[d] the defendant from liability for fire damage caused proximately by its negligence." *Id.* at 597, 79 S.E.2d at 191. While acknowledging that "[u]pon paying a loss by fire, the insurer is entitled to subrogation to the rights of insured against the third person tort-feasor causing the loss, to the extent of the amount paid," the Court opined that the fact "that the insurer is entitled to recoup its loss out of what the defendant owes the plaintiff for having negligently destroyed the insured building is of no legal concern to the defendant." *Id.* at 597-98, 79 S.E.2d at 191-92. Accordingly, the Court concluded that "the language in the [theatre] lease does not expressly or impliedly exempt the defendant from liability for any damage by fire to the demised premises caused proximately by its negligence." *Id.* at 598, 79 S.E.2d at 192.

The language in Paragraph 5(b) in the case at bar cited as exculpatory by defendants and in the Court of Appeals dissent is readily distinguishable from the provisions in *Winkler* that were deemed to lack a clear demonstration of the parties' intent to indemnify each other for negligence. Rather than merely referring to the tenant's duty to return the premises in "good order" and to "make any and all repairs," the lease here explicitly exempted the parties "from *all claims and liabilities* arising from or caused by *any hazard* covered by insurance on the leased premises . . . *regardless of the cause of the damage or loss*." (Emphasis added). Indeed, plaintiffs acknowledge that "this language is broad and expansive enough to encompass a wide range of claims against Hardin Creek," while asserting that "it is that very breadth that

makes the clause unable to satisfy the exacting standard under North Carolina law for relieving Hardin Creek from liability for its own negligence." Plaintiffs' chameleonic construction of this contractual language is unworkable. Given the "broad and expansive" nature of the phrase "all claims and liabilities . . . regardless of the cause of the damage or loss," it is a challenging exercise to conjure up language in an exculpatory clause that would meet plaintiffs' implied standard for unambiguity regarding waiver of negligence-based claims other than to require such a waiver to explicitly mention the term "negligence." Neither *Winkler* nor any other precedent from this Court, however, requires that a contract expressly include the term "negligence" in order for an exculpatory clause to be enforced in the context of negligence claims. Instead, such provisions must simply contain "clear and explicit words that such was the intent of the parties." *Winkler*, 238 N.C. at 596, 79 S.E.2d at 190 (citation omitted). Here the phrase "from *all claims* and liabilities arising from or caused by any hazard covered by insurance on the leased premises . . . regardless of the cause of the damage or loss" is explicitly and effectively exculpatory as to "all claims," including those grounded in tort and caused by Hardin Creek's alleged negligence, which result from a "hazard covered by insurance . . . regardless of the cause of the damage or loss." (Emphasis added).

Plaintiffs argue that the language in Paragraph 5(b) cannot be read to obligate them to indemnify Hardin Creek from liability for claims for business losses—not covered by insurance—arising from Hardin Creek's negligence or other misconduct. Plaintiffs misapprehend the lease provision. A plain reading of Paragraph 5(b) reveals that the only limit on the scope of the exculpatory clause is not the type of *losses* suffered, but the type of *hazard* that caused those losses. If the hazard that caused plaintiffs' alleged damages was covered by insurance—and it is undisputed that the hazard of flooding that caused plaintiffs' alleged damages was covered by insurance—then plaintiffs are barred from bringing an action against Hardin Creek for "all claims and liabilities" caused thereby, including "business losses."

The dissent views the language at issue in Paragraph 5(b) of the lease in such a manner so as to gratuitously equate plaintiffs' interpretation of said language with defendants' construction of this provision. In examining this disputed language and evaluating the parties' respective positions concerning it, the dissent concludes that "each provides a plausible interpretation of the plain language." Based on the faulty premise that plaintiffs' version of the legal effect of the contested language in Paragraph 5(b) substantively establishes an ambiguity in the

provision's terminology, the dissent thereupon conveniently applies well-established rules of contract interpretation pertaining to ambiguities and resorts to consultation of other provisions of the lease in an effort to cultivate an ambiguity which was not planted in the contract. This approach is further exacerbated by the dissent's resolve to both stretch and invert this Court's reasoning in *Winkler* in an attempt to rationalize the applicability of such reasoning to the parties in the instant case, even though they occupy diametrically opposite positions from the parties in *Winkler*. Due to an initial erroneous supposition that plaintiffs' depiction of Paragraph 5(b)'s language at issue as ambiguous is meritorious, coupled with a misplaced reliance on the applicability of N.C.G.S. § 22B-1's public policy declarations which do not apply to a building outside of a contract "relative to the design, planning, construction, alteration, repair or maintenance," the dissent's resulting analyses are misoriented and the ultimate conclusions are unwarranted.

We likewise reject plaintiffs' contention that the above-quoted portion of Paragraph 5(b) is a waiver of subrogation clause that must be interpreted in context with the other provisions of the lease respecting insurance and not be enforced beyond the scope of the specific context in which it appears. In plaintiffs' view, this Court must look to the terms of Paragraph 8, which covers insurance requirements under the lease, to understand the parties' intent in Paragraph 5(b). Paragraph 8 required plaintiffs to maintain property insurance to "hold Landlord harmless for loss or damage by fire" and to maintain liability insurance to protect "the general public and Landlord . . . against claims for bodily injury or death." Plaintiffs suggest that those requirements delimit the reference to "any hazard covered by insurance on the leased premises" in Paragraph 5(b), and as a result, Paragraph 8 would not require plaintiffs to maintain property insurance for flood damage or for property damage greater than $100,000.00, and the exculpatory language in Paragraph 5(b) cannot apply to claims arising from those hazards. In effect, plaintiffs ask this Court to read into Paragraph 5(b) the equivalent of the following bracketed language:

> Landlord and Tenant and all parties claiming under them agree and discharge each other from all claims and liabilities [other than negligence and intentional torts] arising from or caused by any hazard covered by insurance [as specifically required under the terms of Paragraph 8 of this lease] on the leased premises, or covered by insurance [as specifically required under the terms of Paragraph 8 of this lease] in connection with the property owned or activities

> conducted on the leased premises, regardless of the cause of the damage or loss [excepting intentional or negligent acts of the Landlord], provided that such cause does not prevent payment of insurance proceeds to Landlord under the provisions of the applicable policy[; and with the proviso that the minimum policy limits of the insurance required in Paragraph 8 shall serve as the limits on the liability for claims brought pertinent to this provision].

The parties here could have entered into such an agreement that included the imagined terms bracketed above, which plaintiffs intimate should be inferred in construing Paragraph 5(b), but the parties did not do so. This Court cannot creatively interpret the parties' actual lease agreement in the manner urged by plaintiffs, and must instead enforce the parties' intent as evidenced by the clear and explicit language of the lease. *See Dawes v. Nash County*, 357 N.C. 442, 449, 584 S.E.2d 760, 764 (2003) (stating that "courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein" (quoting *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978))). The lease executed by plaintiffs and Hardin Creek unequivocally demonstrates the parties' intent to hold each other harmless regarding *all* liability for damage and loss arising from hazards covered by the insurance obtained for the premises. The parties do not dispute that the flooding of plaintiffs' leased premises was a hazard covered by insurance on the premises. Plaintiffs' complaint does not allege that the acts or omissions of any defendant prevented payment of insurance proceeds that became due as the result of covered hazards, although the complaint alleges that plaintiffs' damages exceeded their insurance policy limits. The trial court was correct in finding that Paragraph 5(b) is unambiguous and functions as a complete defense to plaintiffs' claims lodged against Hardin Creek, the only defendant that was undisputedly a party to the contract. Accordingly, we reverse the decision of the Court of Appeals with regard to all of plaintiffs' claims with regard to Hardin Creek and find that the trial court properly granted summary judgment in favor of Hardin Creek.

B. Claims Against S. Greene, Timberframe, and E. Greene

[2] The trial court granted summary judgment in favor of defendants S. Greene and Timberframe and also dismissed plaintiffs' third-party complaint against E. Greene with prejudice. The dissent below did not address these issues, but the Court of Appeals majority determined that the case should be remanded to the trial court to reconsider both

matters. We agree with the lower appellate court's approach regarding these claims, in light of the insufficiency of the record to allow this Court to fully assess the correctness of the trial court's allowance of the dispositive motions of defendants S. Greene, Timberframe, and E. Greene.

Although we reverse the Court of Appeals in its erroneous analysis of the lease, we agree that the record is not sufficiently developed for our consideration of the involvement of Timberframe and the individual defendants regarding modifications to the premises. Therefore, we remand these matters to the trial court for reconsideration of the remaining claims.

C. Hardin Creek's Counterclaims

[3] As previously noted, Hardin Creek's counterclaims for negligence and breach of contract were dismissed *sua sponte* by the trial court pursuant to N.C.G.S. § 1A-1, Rule 56(c). At the time that the trial court dismissed these counterclaims, no discovery had been conducted with respect to them, and they were not argued by the parties at the hearing on defendants' summary judgment motion. Under these circumstances, Hardin Creek contends that the basis for the trial court's dismissal of said counterclaims could only have been that the exculpatory clause, applying equally to Hardin Creek and to plaintiffs, concomitantly provided a complete defense to plaintiffs' claims and Hardin Creek's counterclaims. We agree that this is the only reasonable interpretation of the trial court's order, and therefore proceed on this premise.

In the Court of Appeals, Hardin Creek's brief addressed the dismissal of its counterclaims as follows:

> Without diminishing the strength of [d]efendants' argument that the Exculpatory Clause is valid and enforceable and bars [p]laintiffs' claims, [d]efendants, in the alternative, ask the [Court of Appeals] to apply the Exculpatory Clause equally to both parties; and if the summary judgment in favor of [d]efendants is reversed, the [c]ourt should reverse the dismissal of the counterclaims.

Plaintiffs characterized this language as only summarily addressing the dismissal of the counterclaims, and the Court of Appeals agreed, opining:

> [d]efendants fail to argue this issue and do not present this [c]ourt with a reason to disturb the trial court's order granting summary judgment in favor of [p]laintiffs as to [d]efendants' counterclaims. Defendants have abandoned this issue on appeal, and we consequently affirm the trial court's ruling as to [d]efendants' counterclaims.

Id. at ___, 803 S.E.2d at 676. We believe the Court of Appeals erred in determining that Hardin Creek abandoned this issue on appeal.

Whether the trial court erred in its resolution of Hardin Creek's counterclaims against plaintiffs depended on the same essential issue as did consideration of the trial court's resolution of plaintiffs' claims against Hardin Creek, namely, a determination of the meaning and effect of the exculpatory clause. Accordingly, the same facts, arguments, and authorities were pertinent to this element of the case. A repetition of these facts, arguments, and authorities would have served no useful purpose. Under the specific circumstances presented here, we therefore conclude that Hardin Creek did not abandon its counterclaims issue on appeal and instead sufficiently presented the matter for review.

In light of our determination that the exculpatory clause bars plaintiffs' claims against Hardin Creek, this provision also bars Hardin Creek's counterclaims against plaintiffs. Therefore, although we disavow the reasoning and holding of the Court of Appeals with regard to preservation of the counterclaims issue on appeal, the ultimate result as to the resolution of Hardin Creek's counterclaims remains the same. The trial court's grant of summary judgment in favor of plaintiffs on defendant Hardin Creek's counterclaims is upheld.

Conclusion

We affirm in part, affirm in part as modified, and reverse in part the decision of the Court of Appeals, and we remand this matter to that court for further remand to the trial court. While the summary judgment order is left undisturbed with regard to the claims of plaintiffs against Hardin Creek and Hardin Creek's counterclaims against plaintiffs, on remand the trial court should consider plaintiffs' claims against the other original defendants, plaintiffs' motion to add E. Greene as a defendant, and any discovery motions implicated thereby.

AFFIRMED IN PART; MODIFIED AND AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Justice BEASLEY, concurring in part and dissenting in part.

The majority today holds that an exculpatory clause in a commercial lease absolves the landlord from liability for his improper construction or oversight of construction of improvements pursuant to a lease modification agreement. In doing so, the majority construes the written contract in favor of the drafter, construes an exculpatory clause in favor

of the party benefiting thereunder, and approves of the grant of summary judgment in a case in which multiple genuine issues of material fact have yet to be determined. For these reasons, I must respectfully dissent in part from the majority's opinion.

Plaintiffs' claims against defendants included: (1) negligence against John Sidney Greene (S. Greene), Hardin Creek, Inc. (Hardin Creek), and Hardin Creek Timberframe and Millwork, Inc. (Timberframe); (2) breach of the implied warranty of workmanlike performance against the same defendants; (3) constructive eviction against Hardin Creek; (4) breach of the lease agreement's covenant of quiet enjoyment against Hardin Creek; and (5) unfair and deceptive trade practices against S. Greene and Hardin Creek.

In their motion for summary judgment, defendants alleged that Hardin Creek "was the entity responsible for getting the modifications done" and, therefore, no claim of negligence against S. Greene or Timberframe could lie. Defendants further alleged that there was no privity of contract between plaintiffs and S. Greene, or between plaintiffs and Timberframe and, therefore, no claims for breach of the implied warranty of workmanlike performance could lie against these defendants. Defendants alleged that Hardin Creek "was ready, willing, and able to restore the premises" after the flooding event, but plaintiffs quit the lease before repairs could be made. Therefore, defendant Hardin Creek could not be liable for constructive eviction or breach of the covenant of quiet enjoyment. Finally, defendants argued that paragraph 5(b) of the lease discharged any liability of Hardin Creek to plaintiffs as to all five of the claims brought against it.

The trial court found that paragraph 5(b) was "a complete defense to the claims raised in the Complaint" and that there were no genuine issues of material fact with respect to any of the claims raised in plaintiffs' complaint or the counterclaims raised in defendants' amended answer. The Court further found that plaintiffs' third-party complaint raised the same claims as the original complaint and was "substantively and substantially identical to the proposed Amended Complaint." Based upon those findings, the trial court summarily dismissed all claims against all parties.[1]

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1. Although the Court of Appeals did not reach this issue, I am compelled to briefly note the troubling litigation tactics employed by defendants in this case, which plaintiffs did raise on appeal to the Court of Appeals.

Defendants did not fully respond to discovery until being compelled by court order to do so on 26 February 2016, more than one year after discovery requests were first filed.

Analysis

I. Standard of Review

When the trial court allows or denies a motion for summary judgment, we review that ruling de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citing *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007)). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2017).

"[T]he real purpose of summary judgment is to . . . pierce the pleadings and determine whether there is a genuine issue of material fact," *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972), in order to "eliminate formal trials where only questions of law are involved." *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). "The party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of fact."

Over the next six weeks, plaintiffs learned that legal title to the leased premises was actually vested in S. Greene's son and that a previously undisclosed agency relationship existed, and their counsel was flooded with an amended answer containing counterclaims, 1,200 pages of new discovery, six scheduled depositions (two of which were expert witnesses that defendants cancelled just days prior), a mediation conference, a motion to strike, and a motion for summary judgment, which defendants noticed for 10:00 a.m. on 25 April 2016 with a request that it not *actually* be heard until after 4:00 p.m., or the next day, or later in the week, because the parties' previously scheduled mediation was *also* being held at 10:00 a.m. that same day. Plaintiffs moved to continue the hearing and were being heard on that motion when the trial court abruptly ordered summary judgment, in part *sua sponte*, for all defendants. Plaintiffs have, by all accounts, prosecuted their claims diligently and in good faith, while defendants have benefited from dilatory and prejudicial tactics.

Rule 6(b) of the North Carolina Rules of Civil Procedure provides that the trial court may, in its discretion and upon a showing of cause, enlarge the time within which any act is required to be done. N.C.G.S. § 1A-1, Rule 6(b) (2017). In deciding whether, in its discretion, to grant a motion for continuance, the chief consideration is whether the grant or denial will be in furtherance of substantial justice. *Shankle v. Shankle*, 289 N.C. 473, 483, 223 S.E.2d 380, 386 (1976). Additionally, we have stated that "it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so." *Conover v. Newton*, 297 N.C. 506, 512, 256 S.E.2d 216, 220 (1979). It is clear from the record before us that multiple issues of fact remained to be determined, that plaintiffs had diligently pursued discovery for the preceding nine months, and that plaintiffs reasonably expected to be given an opportunity to flesh out those remaining issues of fact by completing discovery. This Court would certainly have benefited from a more fully developed record. Under these circumstances, I would hold that the trial court abused its discretion in denying plaintiffs' motion to continue.

Singleton, 280 N.C. at 464, 186 S.E.2d at 403 (citation omitted). "An issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or establish any material element of a claim or defense." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citing *Bone International, Inc. v. Brooks*, 304 N.C. 371, 375, 283 S.E.2d 518, 520 (1981)).

II. Scope of Exculpatory Clause

Because the trial court allowed summary judgment solely based on paragraph 5(b) of the lease agreement, this is principally a matter of contract interpretation. "The heart of a contract," i.e., the genuine issue, "is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." *Gould Morris Elec. Co. v. Atl. Fire Ins. Co.*, 229 N.C. 518, 520, 50 S.E.2d 295, 297 (1948). When the intent of the parties is clearly expressed in a written contract that contains no ambiguities requiring resort to extrinsic evidence or consideration of disputed facts, the contract may be interpreted as a matter of law. *Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E.2d 622, 624 (1973). However, when an ambiguity exists, the intention of the parties is a genuine issue of material fact to be determined by the jury, and summary judgment is inappropriate. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 525, 723 S.E.2d 744, 748 (2012) (finding summary judgment improper when parties disputed the meaning of a provision in their contract and construction of the document was required to ascertain their intent).

"An ambiguity exists in a contract when either the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations." *Id.* at 525, 723 S.E.2d at 748 (quoting *Schenkel & Shultz, Inc. v. Hermon F. Fox & Assocs.*, 362 N.C. 269, 273, 658 S.E.2d 918, 921 (2008)); *see also St. Paul Fire & Marine Ins. Co. v. Freeman-White Assocs.*, 322 N.C. 77, 366 S.E.2d 480 (1988) (finding dismissal improper when parties' disagreement about extent of insurance waiver provisions and assignment of risk of loss indicated ambiguity). The majority declares that the lease uses "clear and explicit language" which "unequivocally demonstrates the parties' intent to hold each other harmless regarding *all* liability for damage and loss arising from hazards covered by the insurance obtained for the premises."

But the parties contest the applicability and scope of the subparagraph at issue, and each provides a plausible interpretation of the plain language thereof. The entire provision disputed by the parties reads as follows:

> (b) Tenant's Neglect. Subject to the provisions set forth in the following sentence, Tenant shall pay for the cost of any repairs or damage resulting from the negligence or the wrongful acts of his employees, representatives or visitors. However, and notwith-standing any other provision of this lease to the contrary, Landlord and Tenant and all parties claiming under them agree and discharge each other from all claims and liabilities arising from or caused by any hazard covered by insurance on the leased premises, or covered by insurance in connection with the property owned or activities conducted on the leased premises, regardless of the cause of the damage or loss, provided that such cause does not prevent payment of insurance proceeds to landlord under the provisions of the applicable policy.

Defendants argue that, under this provision of the lease, if the hazard is covered by insurance, then all claims and liabilities arising out of that hazard are discharged, regardless of the amount of insurance and regardless of the nature of the claim. Plaintiffs contend that the same language releases each party from liability for "any claim" that is (1) caused by hazard and (2) covered by insurance. The majority opinion adopts defendants' interpretation by zeroing in on the words "all claims . . . arising from . . . any hazard covered by insurance." In doing so, the majority asserts that the plain reading is that "covered by insurance" modifies "hazard," not "claims," and therefore, if the hazard that caused the damage was covered by insurance, plaintiffs are barred from bringing *any* claim against defendant landlord related to that hazard. While this is certainly a reasonable interpretation of that language, so too is the interpretation offered by plaintiffs. Because both interpretations of the exculpatory clause are reasonable, a genuine issue of material fact remains, and the task of ascertaining the true intent of the parties at the time of contract formation is one for the jury, not the Court.

Despite asserting that the language is "clear and explicit," the majority goes on to construe that language, and does so in contravention of well-established rules of interpretation by resolving the ambiguity in favor of the drafter, *Root v. Allstate Ins. Co.*, 272 N.C. 580, 585, 158 S.E.2d 829, 834 (1968) (noting the rule that any "ambiguity in a written contract is to be construed against the party who prepared the instrument" (citing *Wilkie v. New York Mut. Life Ins. Co.*, 146 N.C. 513, 521, 60 S.E. 427, 430 (1908)); expressly declining to consider the contract provision in the context of the whole agreement, *Jones v. Casstevens*, 222 N.C. 411, 413-14, 23 S.E.2d 303, 305 (1942) (stating the rule that

"[s]ince the object of construction is to ascertain the intent of the parties, the contract must be considered as an entirety" (quotation and citation omitted)); and, rather than strictly construing the exculpatory clause, giving it the broadest possible interpretation, *Hall v. Sinclair Ref. Co.*, 242 N.C. 707, 709, 89 S.E.2d 396, 397-98 (1955) (noting that "contracts exempting persons from liability for negligence are not favored by the law, and are strictly construed against those relying thereon"); *Hill v. Carolina Freight Carriers Corp.*, 235 N.C. 705, 710, 71 S.E.2d 133, 137 (1952) (stating that strict construction requires "explicit language clearly indicating that such was the intent of the parties"). The majority also fails to adhere to the principle that, in this procedural posture, we are required to view the evidence in the light most favorable to the nonmovant, the plaintiff lessees. These rules combine to mean that, in this case, any time we are asked to choose between the meaning assigned by or most favorable to defendant landlord (the drafter and party seeking benefit of the exculpatory clause) and the meaning assigned by or most favorable to plaintiff lessees, the latter must prevail for purposes of determining whether summary judgment was appropriate. Not only that, but to give the language the meaning urged by defendants, we must find that it clearly and expressly states the parties intention to exculpate defendant from liability for his own negligence, and is clearly not susceptible to the meaning offered by plaintiffs.

The majority distinguishes the contract provision at issue here from the provision considered by this Court in *Winkler v. Appalachian Amusement Co.*, 238 N.C. 589, 79 S.E.2d 185 (1953). The majority finds the distinction between the exculpatory language at issue in *Winkler* and this lease's exculpatory language so significant as to warrant a completely contrary holding. But the underlying reasoning of the holding in *Winkler* is entirely applicable to the case at bar. There we noted that:

> It would be natural for the lessee, who had contracted to keep up repairs, to desire to escape liability for purely accidental fires and for the lessor to be willing to grant that relief, but it would not be natural that the lessor would be willing to release the lessee from damage caused by its own active negligence.

Id. at 596, 79 S.E.2d at 190-91. The same reasoning is applicable here where the liabilities are reversed. It would be natural for the lessor, who had contracted to make a repair, to desire to escape liability for purely accidental hazards and for the lessee to be willing to grant that relief, but it would not be natural that the lessee would be willing to release the lessor from damage caused by the lessor's own active negligence. In *Winkler* we concluded that the language at issue did not evince a clear

intent to go beyond the "natural" contractual bargain by waiving one party's liability to the other for its own active negligence. *Id.* at 596, 79 S.E.2d at 191. Evidence of that clear intent is necessary because, as the majority correctly notes, we must strictly construe contracts that purport to exempt a party from its own negligence. *Hall*, 242 N.C. at 709, 89 S.E.2d at 397-98.

I agree with plaintiffs that the broad and expansive language of paragraph 5(b) cannot be read by this Court to explicitly express an intention that the lessor be exculpated from its own active negligence. This argument is not "chameleonic." It is a correct interpretation of this Court's holdings spanning more than sixty years. *See*, *e.g.*, *Schenkel & Shultz*, 362 N.C. at 274-75, 658 S.E.2d at 922 (distinguishing indemnity clauses which may be broadly construed "to cover all losses, damages, and liabilities which reasonably appear to have been within the contemplation of the parties" from exculpatory clauses which "are not favored by the law" and must be "strictly construed against the party asserting it" (first quoting *Dixie Container Corp. v. Dale*, 273 N.C. 624, 627, 160 S.E.2d 708, 711 (1968), then quoting *Hill*, 235 N.C. at 710, 71 S.E.2d at 137)); *Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 467, 144 S.E.2d 393, 400 (1965) (noting that in "contracts whereby one seeks to wholly exempt himself from liability for the consequences of his negligent acts," both the language of the contract and intent of the parties must be "clearly exculpatory" and will be strictly construed (citing *Winkler*, 238 N.C. 589, 79 S.E.2d 185)); *Dixie Fire & Cas. Co. v. Esso Standard Oil Co.*, 265 N.C. 121, 126, 143 S.E.2d 279, 283 (1965) (strictly construing lease provision requiring lessor to make all repairs and declining to exempt lessee from its own negligence thereunder); *Hill*, 235 N.C. at 710, 71 S.E.2d at 137 (noting the "universal rule" that a clause exempting a person from liability for his own negligence is "strictly construed against the party asserting it"); *cf. Hall*, 242 N.C. at 709-11, 89 S.E.2d at 397-98 (strictly construing a contract provision which discharged a defendant "from any and all claims, demands and liability for any loss, damage, or injury, . . . by reason of any other casualty, whether due to the negligence of [the defendant] or otherwise" and finding the language sufficiently clear and explicit (first alteration in original)). If a party intends to be released from liability for its own active or passive negligence, it must so state in explicit terms. Hardin Creek did not. I can find no reason why the language at issue here differs so materially from that at issue in *Winkler* as to require a contrary holding.

The majority also rejects outright plaintiffs' reasonable contention that the exculpatory clause must be interpreted in the context of the whole agreement, particularly with respect to the other provisions of

the lease requiring coverage by insurance. The Court of Appeals correctly looked to the entire contract, noting that the phrases in paragraph 5(b)—"any hazard covered by insurance" and "payment of insurance proceeds"—required reference to another paragraph of the lease setting out the parties' intentions as to the required insurance coverages and the assignment of risk between them. *Morrell v. Hardin Creek, Inc.*, ___ N.C. App. ___, ___, 803 S.E.2d 668, 674 (2017). The majority today claims that it cannot look to other provisions of the lease without adding language to the disputed paragraph explicitly referencing the other provision. I can find no support in the law for this reasoning. In fact, the majority's rationale appears contrary to the fundamental law of contracts. *See, e.g.*, Restatement (Second) of Contracts § 202(2) (Am. Law Inst. 1979) ("A writing is interpreted as a whole . . . ."); 17A C.J.S. *Contracts* § 399, at 287 (collecting cases and stating the rule that "[a] contract must be interpreted or considered as a whole, or in its entirety"); R. Lord, 11 Williston on Contracts § 32:1, at 603 (4th ed. 2012) ("Primary rules of interpretation are always used by the courts to determine the meaning of particular words or clauses found in a contract, and the contract as a whole, regardless of whether the parties' writing is clear or ambiguous."). It is not necessary that paragraph 5(b) expressly reference paragraph 8. We need not be directed by the drafter to look at another paragraph. Our rules of construction require that we do so to ascertain the meaning which, as nearly as possible, approximates the parties' intentions at the time of contract formation. *Atl. & N.C. R. Co. v. Atl. & N.C. Co.*, 147 N.C. 368, 61 S.E 185, 189-90 (1908) (discussing the need to review contract language in light of the whole agreement). The majority acknowledges that its reading of the disputed paragraph requires reference to "the insurance obtained for the premises" and then refuses to consider the text of the lease setting out what that insurance might be. We are required to construe the language of paragraph 5(b) not as a singular clause, but as a clause contained within a larger paragraph which is part of the whole contract which in its totality expresses the intention of the parties. Determining the intention of the parties requires reference to the entire contract. Again, the task of ascertaining the parties' intention at the time of contract formation is one for the jury, not this Court.

Additionally, I agree with plaintiffs that, by statute, this promise to alter the building cannot include a waiver of liability for negligence[2] because such agreements are explicitly against public policy:

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2. In addition to the statutory mandate that one who contracts to improve a building may not seek to exculpate himself for negligence relative thereto, the landlord who undertakes to make repairs is also under a duty, implied by law, to do so with care. *Bolkhir ex rel. Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988). Additionally,

> Any promise or agreement . . . relative to the . . . alteration, repair or maintenance of a building . . . purporting to indemnify or hold harmless the promisee, the promisee's independent contractors, agents, employees, or indemnities against liability for damages arising out of . . . damage to property proximately caused by or resulting from the negligence . . . of the promisee, its independent contractors, agents, employees, or indemnitees, is against public policy and is void and unenforceable.

N.C.G.S. § 22B-1 (2017).[3] Therefore, even if we assume, *arguendo*, that the parties originally intended to discharge the lessor from liability for his own negligence, to the extent that the agreement for the alteration of the building incorporated paragraph 5(b), the exculpatory clause cannot apply to the lessor's promise to alter the building. Our General Assembly has expressly declared such a promise to be void as against public policy, and this Court therefore has no jurisdiction to enforce it. *See Associated Mech. Contractors, Inc. v. HDR Eng'g Inc. of the Carolinas*, 178 F.3d 1282, 1999 WL 253539, at *5 (per curiam) (unpublished) (4th Cir. 1999) (noting that the statute allows the promisor to indemnify the promissee for damages caused solely by the promisor's negligence, but that defendant's indemnification provision could not be otherwise enforced); *accord Jackson v. Associated Scaffolders & Equip. Co.*, 152 N.C. App. 687, 690-91, 568 S.E.2d 666, 668 (2002) (applying the statute to hold indemnity clause in construction contract void as against public policy and therefore unenforceable).

Conclusion

I would hold that determination of the full scope of paragraph 5(b) relative to the alteration of the leased premises is a genuine issue of material fact that ought to be submitted to a jury and that the trial court

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enforcement of exculpatory clauses between parties whose legal relationship gives rise to special duties is against public policy. *See Hall*, 242 N.C. at 710, 89 S.E.2d at 398 (recognizing that public policy prohibits a public utility from contracting to discharge its own negligence and that "[t]he limitation is likewise uniformly applied to certain relationships such as that of master and servant" (quoting *Miller's Mut. Fire & Ins. Ass'n of Alton, Ill. v. Parker*, 234 N.C. 20, 22, 65 S.E.2d 341, 342 (1951))).

3. The majority contends that the statute is inapplicable because the contract between the parties is not "relative to the design, planning, construction, alteration, repair or maintenance" of a building. This assertion fails, however, to recognize that the damage involved was, at least arguably, caused by the negligent "alteration" of the building by S. Greene who very well may have been acting at the time in his capacity as a licensed general contractor, rather than in his capacity as agent for the landlord. Again, these are genuine issues of material fact more appropriately resolved by a jury.

must determine whether, to the extent the exculpatory clause purports to shield defendants from liability for their own negligence in altering the building, it is void as against public policy. I would also hold that paragraph 5(b) is ambiguous as demonstrated by the parties' differing, reasonable interpretations of its meaning; and that resolution of the ambiguity requires determination of issues of fact properly within the province of the jury. Consequently, I would affirm the decision of the Court of Appeals below which held that the trial court erred in allowing the motion for summary judgment in favor of defendant Hardin Creek and remand to that court with instructions to further remand for determination of these issues by the trial court.

I concur in that part of the majority's opinion which affirms the Court of Appeals' decision to remand this matter to the trial court for reconsideration of the liability of the remaining parties; however, I dissent as to that part of the opinion which concludes that the lease provision at issue is a complete bar to plaintiffs' claims against Hardin Creek, and for the same reasons, I also dissent as to that part of the majority's opinion which disavows the Court of Appeals' decision with regard to preservation of defendants' counterclaims.

NORTH CAROLINA ACUPUNCTURE LICENSING BOARD
v.
NORTH CAROLINA BOARD OF PHYSICAL THERAPY EXAMINERS

No. 380A17

Filed 7 December 2018

Physical Therapy—declaratory ruling issued by Board of Physical Therapy Examiners—dry needling as physical therapy—consistent with statutes and administrative rules

Where the N.C. Board of Physical Therapy Examiners (Physical Therapy Board) issued a declaratory ruling that dry needling constitutes physical therapy, the Supreme Court affirmed the decision of the Business Court upholding the declaratory ruling. Because the Physical Therapy Board's declaratory ruling and underlying policy statement were consistent with the statutes and administrative rules that the Board was charged with interpreting and administering, the Supreme Court deferred to the Board's interpretations of those same statutes and rules in concluding that dry needling is a

part of the practice of physical therapy. The Supreme Court rejected the N.C. Acupuncture Licensing Board's arguments that the Physical Therapy Board inappropriately used a policy statement to usurp the authority of the Rules Review Commission, that the Physical Therapy Board expanded the scope of the practice of physical therapy in contravention of the Administrative Procedure Act, and that dry needling could not be part of the practice of physical therapy because it is acupuncture.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order and opinion on petition for judicial review dated 2 August 2017 entered by Judge Louis A. Bledsoe, III, Special Superior Court Judge for Complex Business Cases, in Superior Court, Wake County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 18 April 2018.

Everett Gaskins Hancock LLP, by E.D. Gaskins, Jr., Katherine A. King, and James M. Hash; and Stevens Martin Vaughn & Tadych, PLLC, by Michael J. Tadych, for plaintiff-appellant.

Ellis & Winters LLP, by Stephen D. Feldman, James M. Weiss, and Troy D. Shelton, for defendant-appellee.

JACKSON, Justice.

In this case we must determine whether the Business Court erred by affirming a declaratory ruling issued by the North Carolina Board of Physical Therapy Examiners (Physical Therapy Board) pursuant to N.C.G.S. § 150B-4 determining that dry needling constitutes physical therapy. Because we conclude that the Physical Therapy Board's decision was consistent with its enabling statutes and administrative rules, we affirm the final judgment of the Business Court that upheld the Physical Therapy Board's declaratory ruling.

In May 2016, the North Carolina Acupuncture Licensing Board (Acupuncture Board) requested a declaratory ruling from the Physical Therapy Board "that 'dry needling' is not within the scope of the Physical Therapy Act," and further requesting that Board to withdraw its "[contradictory] position statement . . . because it is in conflict with the determination of the Rules Review Commission . . . ." Both the Acupuncture Board and the Physical Therapy Board are administrative agencies created by the state legislature, and both are authorized to adopt rules and regulations governing the licensing and performance of their respective

occupations. This case arises from a nearly decade-long debate over whether "dry needling" is confined to the practice of acupuncture, thus placing dry needling within the exclusive regulatory purview of the Acupuncture Board. As stated in the record on appeal, the Acupuncture Board defines dry needling as "the insertion of solid filament needles into specific trigger points in a patient's muscle tissue to relieve pain."

The history of the regulation of dry needling is instructive. In 2002 the Physical Therapy Board wrote in its newsletter that dry needling "is a form of acupuncture" and should not be performed by physical therapists who are not also licensed by the Acupuncture Board. Subsequently, in 2010 the Physical Therapy Board, referencing new scientific studies and practice developments, reconsidered this position and issued an informal position statement concluding that dry needling falls within the practice of physical therapy because it involves "intramuscular manual therapy." The Acupuncture Board disagreed with this conclusion and in 2011 requested an opinion from the Attorney General's office whether dry needling fell within the scope of physical therapy. In lieu of a formal opinion, the Attorney General issued an Advisory Letter taking the position that dry needling is "distinct from acupuncture" and that the Physical Therapy Board must therefore regulate the practice in the interest of public safety. Accordingly, the Physical Therapy Board proposed a formal rule, with an effective date of 1 February 2015, regulating the practice of dry needling by physical therapists. In compliance with N.C.G.S. § 150B-21.8, the Physical Therapy Board submitted the rule to the Rules Review Commission for its consideration. During the public hearing on the proposed rule, several acupuncturists opposed it, and the Commission decided to object to the rule based upon a lack of statutory authority to adopt it. The Physical Therapy Board did not appeal the Commission's decision but instead promptly posted a notice on its website indicating physical therapists could continue to practice dry needling in accordance with existing standards of competence consistent with its 2010 position statement. In 2015 the Acupuncture Board filed an action against the Physical Therapy Board in Superior Court, Wake County seeking to enjoin the practice of dry needling by physical therapists. That action was designated as a mandatory complex business case and assigned to the Business Court, which dismissed the 2015 complaint based upon the Acupuncture Board's failure to exhaust its administrative remedies before filing the action in superior court.

Thereafter, in order to exhaust its administrative remedies the Acupuncture Board requested the declaratory ruling from the Physical Therapy Board that is at issue in this case. In its 27 June 2016 declaratory ruling, the Physical Therapy Board "reaffirm[ed] the conclusion

that dry needling constitutes physical therapy" pursuant to the relevant statutes and Board rules. The Acupuncture Board appealed this ruling, and the Business Court affirmed the Physical Therapy Board's declaratory ruling. The Acupuncture Board then appealed to this Court.

In this appeal the Acupuncture Board argues that dry needling is part of the practice of acupuncture rather than physical therapy. Therefore, it argues, the Physical Therapy Board erred in determining dry needling is within the scope of physical therapy. We disagree.

A decision made in a declaratory ruling by an administrative agency is subject to judicial review. N.C.G.S. §§ 150B-4, -43 to -52 (2017). "On judicial review of an administrative agency's final decision, the substantive nature of each assignment of error dictates the standard of review." *Wetherington v. N.C. Dep't of Pub. Safety*, 368 N.C. 583, 590, 780 S.E.2d 543, 546 (2015) (quoting *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004)). In its petition for judicial review, the Acupuncture Board claimed that the Physical Therapy Board's decision was made in excess of statutory authority, rendered upon unlawful procedure, and affected by other errors of law. Pursuant to N.C.G.S. § 150B-51(c), all three of these types of asserted errors are reviewed de novo. "Under the *de novo* standard of review, the trial court 'consider[s] the matter anew[ ] and freely substitutes its own judgment for the agency's.' " *Wetherington*, 368 N.C. at 590, 780 S.E.2d at 547 (alterations in original) (quoting *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895).

While " '[t]he responsibility for determining the limits of statutory grants of authority to an administrative agency is a judicial function for the courts to perform,' " when "making this determination we apply the enabling legislation practically so that the agency's powers include all those the General Assembly intended the agency to exercise." *High Rock Lake Partners v. N.C. Dep't of Transp.*, 366 N.C. 315, 319, 735 S.E.2d 300, 303 (2012) (internal citations omitted) (quoting *In re Broad & Gales Creek Cmty. Ass'n*, 300 N.C. 267, 280, 266 S.E.2d 645, 654 (1980)). This Court gives "great weight to an agency's interpretation of a statute it is charged with administering; however, 'an agency's interpretation is not binding.' " *Id.* at 319, 735 S.E.2d at 303 (internal citations omitted) (quoting *Lee v. Gore*, 365 N.C. 227, 229-30, 717 S.E.2d 359, 358 (2011)). "The weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *N.C. Sav. & Loan League v. N.C. Credit Union Comm'n*, 302 N.C. 458, 466, 276 S.E.2d 404, 410 (1981) (alteration in original) (quoting

Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S. Ct. 161, 164 (1944)). We will not "follow an administrative interpretation in direct conflict with the clear intent and purpose of the act under consideration." *High Rock Lake Partners*, 366 N.C. at 319, 735 S.E.2d at 303 (quoting *Watson Indus. v. Shaw*, 235 N.C. 203, 211, 69 S.E.2d 505, 511 (1952)). This Court's "primary task in construing a statute is to effectuate the intent of the legislature." *Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 207, 593 S.E.2d 764, 774 (2004) (first citing *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 399, 269 S.E.2d 547, 561 (1980); and then citing *In re Beatty*, 286 N.C. 226, 229, 210 S.E.2d 193, 195 (1974)). We previously have identified the " 'best indicia of . . . legislative purpose' to be 'the language of the statute, the spirit of the act, and what the act seeks to accomplish.' " *Id.* at 207, 593 S.E.2d at 774 (ellipsis in original) (quoting *State ex rel. Comm'r of Ins.*, 300 N.C. at 399, 269 S.E.2d at 561) (citation omitted).

With respect to the scope of physical therapy, the General Assembly has stated:

> "Physical therapy" means the evaluation or treatment of any person by the use of physical, chemical, or other properties of heat, light, water, electricity, sound, massage, or therapeutic exercise, or other rehabilitative procedures, with or without assistive devices, for the purposes of preventing, correcting, or alleviating a physical or mental disability. Physical therapy includes the performance of specialized tests of neuromuscular function, administration of specialized therapeutic procedures, interpretation and implementation of referrals from licensed medical doctors or dentists, and establishment and modification of physical therapy programs for patients. *Evaluation and treatment of patients may involve physical measures, methods, or procedures as are found commensurate with physical therapy education and training and generally or specifically authorized by regulations of the Board.* Physical therapy education and training shall include study of the skeletal manifestations of systemic disease. Physical therapy does not include the application of roentgen rays or radioactive materials, surgery, manipulation of the spine unless prescribed by a physician licensed to practice medicine in North Carolina, or medical diagnosis of disease.

N.C.G.S. § 90-270.90(4) (2017) (emphasis added).

Here, as shown by the plain language of the statute, the General Assembly defined the practice of physical therapy broadly and left open the opportunity for the Board to further define physical therapy "generally or specifically . . . by regulations." *Id.* It is clear the intent of the legislature was to allow for the evolution of treatments used in the practice of physical therapy. Specifically, the language in the definition encompasses what is taught in educational programs and training as appropriate for regulation by the Board. This language does not limit the Board's authority to adopt rules to accomplish this purpose.[1] The only prohibitions set forth by the General Assembly are explicit: "Physical therapy does not include the application of roentgen rays or radioactive materials, surgery,[2] manipulation of the spine unless prescribed by a physician licensed to practice medicine in North Carolina, or medical diagnosis of disease." *Id.* The General Assembly gave the Physical Therapy Board the power to "[a]dopt, amend, or repeal any rules or regulations necessary to carry out the purposes of this Article and the duties and responsibilities of the Board." N.C.G.S. § 90-270.92(9) (2017). The General Assembly specifically expressed that the "powers and duties enumerated [for the Board] are granted for the purpose of enabling the Board to safeguard the public health, safety and welfare against unqualified or incompetent practitioners of physical therapy, and are to be *liberally* construed to accomplish this objective." *Id.* § 90-270.92 (2017). (emphasis added). This language vests the Board with broad authority to regulate the practice of physical therapy and adopt administrative rules and regulations governing the profession. Although not dispositive, the Physical Therapy Board's construction of the statutory term "physical therapy" so as to encompass dry needling is persuasive authority for this Court.

Here the Physical Therapy Board determined that dry needling falls within the statutory definition of physical therapy. Specifically, the Physical Therapy Board concluded that "dry needling is a treatment that

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1. N.C.G.S. § 150B-2(8a) (2017) defines a "[r]ule" as "any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly . . . ."

2. The Acupuncture Board attempts to argue that dry needling qualifies as "surgery" based upon a definition promulgated by the North Carolina Medical Society; however, the Medical Society, a voluntary membership association, has no authority to define or regulate surgery. Rather, the Medical Board, which was established pursuant to N.C.G.S. § 90-2, is charged with the authority "to regulate the practice of medicine and surgery for the benefit and protection of the people of North Carolina." For purposes of our review in the instant case, neither the Medical Board nor the Medical Society have asserted that they play a role in governing the practice of physical therapy. Therefore, we are not persuaded by this argument.

uses physical or rehabilitative procedures, with assistive devices, for the purpose of correcting or alleviating myofascial pain, a physical disability." In determining the weight to give this interpretation, the Court considers: "[1] the thoroughness evident in its consideration, [2] the validity of its reasoning, [3] its consistency with earlier and later pronouncements, and [4] all those factors which give it power to persuade." *N.C. Sav. & Loan League*, 302 N.C. at 466, 276 S.E.2d at 410 (quoting *Skidmore*, 323 U.S. at 140, 65 S. Ct. at 164).

The Physical Therapy Board reached its conclusion in a detailed, forty-nine page declaratory ruling that included references to numerous scientific articles, reports, and books describing the history, efficacy, and safety of dry needling. In making this determination, the Physical Therapy Board looked not only to North Carolina law and experience but also to the conclusions reached by similar administrative agencies in other states. The Physical Therapy Board applied its experience and expertise in construing the enabling statute and rules adopted by the Board to determine that dry needling falls within the statutory definition of physical therapy. Given the Physical Therapy Board's extensive review of a variety of substantial studies and other evidence in conjunction with the involvement of technical and specialized terms specific to physical therapy, we conclude that the Board's reasoning is sound. The Physical Therapy Board's determination also is consistent with its earlier statements, specifically in 2010, that were confirmed in 2011 by the North Carolina Attorney General's staff, and again in 2015 via the Board's publication clarifying that physical therapists "can continue to perform dry needling so long as they possess the requisite education and training required by N.C.G.S. § 90-270.24(4) [2015]."[3]

The posture of this case is not one we typically see when reviewing a dispute concerning administrative law and an occupational licensing board's interpretation of the statutes governing its profession. Ordinarily, an administrative agency would either promulgate a rule that would undergo notice and comment rulemaking, or the agency could respond to a request for declaratory ruling. Chapter 150B clearly covers both of these scenarios and does not provide that either path is exclusive. Ultimately, both are subject to exhaustion of administrative remedies and to judicial review.

Here, we note that the Physical Therapy Board initially chose to exercise its authority to adopt a rule stating that: "Physical therapy is

3. Subsection 90-270.24(4), defining "physical therapy," was later recodified as N.C.G.S. § 90-270.90(4) (2017).

presumed to include any acts, tests, procedures, modalities, treatments, or interventions that are routinely taught in educational programs or in continuing education programs for physical therapists and are routinely performed in practice settings." 21 NCAC 48C .0101(a) (2018). Part of the Physical Therapy Board's rationale for its declaratory ruling was that relevant literature and other evidence showed that dry needling is being taught in educational and continuing education programs for physical therapists and is routinely performed in practice settings. Specifically, the Physical Therapy Board repeatedly pointed out that eighty-six percent of the knowledge requirements for competency in dry needling are taught in entry-level physical therapy programs, and the additional competencies are obtained through continuing education programs for licensed physical therapists. Because of these findings, the Physical Therapy Board applied its rule stating that "[a] physical therapist who employs . . . procedures . . . in which professional training has been received through education or experience is considered to be engaged in the practice of physical therapy" and concluded that dry needling falls within the practice of physical therapy. *Id.* § .0101(b) (2018). Because the Physical Therapy Board's interpretation of its own rule is consistent with both the statute and the language of the rule, the Board's interpretation "must be given 'controlling weight.' " *Morrell ex rel. Long v. Flaherty*, 338 N.C. 230, 238, 449 S.E.2d 175, 180 (1994) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S. Ct. 2381, 2386 (1994)), *cert. denied*, 515 U.S. 1122, 115 S. Ct. 2278 (1995)).

The Acupuncture Board also argues that the Physical Therapy Board has inappropriately used a policy statement to usurp the authority of the Rules Review Commission, which objected to a proposed rule by the Physical Therapy Board regarding training requirements for the practice of dry needling. However, the Rules Review Commission's authority over a proposed rule is generally limited to deciding whether to approve or object to the rule. *See* N.C.G.S. § 150B-21.10 (2017). In doing so, the Rules Review Commission does not consider questions relating to the quality or efficacy of the proposed rule but rather determines whether a rule meets four criteria:

> (1) It is within the authority delegated to the agency by the General Assembly.
>
> (2) It is clear and unambiguous.
>
> (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall

> consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
>
> (4) It was adopted in accordance with Part 2 of this Article.

Id. § 150B-21.9(a) (2017). As this Court previously has opined, "[t]he Commission is tasked only with the responsibility to review [a] Board's rules from a procedural perspective for clarity and to ensure that the rules are adopted in compliance with the APA. Such a review does not require special expertise . . . ." *N.C. State Bd. of Educ. v. State*, __ N.C. __, __, 814 S.E.2d 54, 65 (2018). "[I]f an agency such as [a] Board desires to challenge the Commission's exercise of its delineated duties, '[w]hen the Commission returns a permanent rule to an agency . . . the agency may file an action for declaratory judgment in Wake County Superior Court.' " *Id.* at __, 814 S.E.2d at 65 (third and fourth alterations in original) (quoting N.C.G.S. § 150B-21.8(d) (2017)). The Commission's rejection of the Physical Therapy Board's proposed rule on required training for the use of dry needling in no way conflicts with or affects the Physical Therapy Board's policy statements interpreting the definition of physical therapy. Both the 2002 and the 2010 policy statements by the Physical Therapy Board regarding dry needling are "[n]onbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule." N.C.G.S. § 150B-2(8a)(c) (2017). As such, they are necessarily not "statement[s] of general applicability" that would require formal rulemaking. *Id.* § 150B-2(8a), *see id.* § 150B-18 (2017). Therefore, this change in policy is not forbidden by the Rules Review Commission's subsequent rejection of a rule on a related subject.

Additionally, the Acupuncture Board contends that because of the Physical Therapy Board's 2002 policy statement excluding dry needling from the practice of physical therapy, the 2010 policy statement expanded the scope of the practice of physical therapy in contravention of the Administrative Procedure Act. *See id.* § 150B-19(2) (2017) ("An agency may not adopt a rule that . . . [e]nlarges the scope of a profession, occupation, or field of endeavor for which an occupational license is required.") This argument misapprehends that provision of the Administrative Procedure Act. *Id.* This subsection prevents an agency from expanding the activities that require a license beyond those identified by the legislature, but the provision does not relate to how an agency regulates those it licenses. The Physical Therapy Board's 2010 policy statement does not expand the class of persons required to be licensed, but simply indicates that when licensed physical therapists

engage in dry needling, they must comply with the relevant general rules promulgated by the Physical Therapy Board.

Finally, the Acupuncture Board also argues that dry needling cannot be part of the practice of physical therapy because it is acupuncture. We first note that although the Physical Therapy Board's observation that dry needling does not employ acupuncture methods of diagnosis and treatment is persuasive, the Physical Therapy Board lacks authority or expertise to determine whether a particular practice falls within the scope of acupuncture. This is because the law prohibiting the unauthorized practice of acupuncture, like many laws governing the practice of various occupations and professions, must be strictly construed. *See Elliott v. N.C. Psychology Bd.*, 348 N.C. 230, 235, 498 S.E.2d 616, 619 (1998) ("Thus, the Psychology Practice Act should be strictly construed because it is both in derogation of the common law and penal in nature."). "Strict construction of statutes requires only that their application be limited to their express terms . . . ." *Turlington v. McLeod*, 323 N.C. 591, 594, 374 S.E.2d 394, 397 (1988) (citing *Harrison v. Guilford County*, 218 N.C. 718, 12 S.E.2d 269 (1940)). As this Court has already affirmed, when there is ambiguity in the statutory language defining the role of an agency concurrent authority is assumed. *See Trayford v. N.C. Psychology Bd.*, 360 N.C. 396, 627 S.E.2d 462 (2006), *aff'g per curiam* 174 N.C. App 188, 619 S.E.2d 862 (2005) (holding that the Psychology Board could not regulate an individual's professional counselor license, regulated by the North Carolina Board of Licensed Professional Counselors, solely based on the fact he was also licensed as a psychological associate and that the Psychology Practice Act, N.C.G.S. § 90-270.4(g) provided for licensees to "comply with all conditions, requirements, and obligations imposed by [the Board or Act]").

The Acupuncture Board attempts to distinguish this case from *Trayford*. It argues that the Physical Therapy Act explicitly mandates that the Physical Therapy Board cannot limit the activities of other licensed professionals. *See* N.C.G.S. § 90-270.34(b)(1) (2015)[4] ("Nothing in this Article shall be construed to prohibit . . . [a]ny act in the lawful practice of a profession by a person duly licensed in this State . . . .") The Acupuncture Board argues that the Acupuncture Act contains no similar provision, *see id.* § 90-452 (2017); however, these provisions provide a limitation on enforcement actions by the covered boards, not a limitation on their areas of authority. This Court does not determine the

4. This provision was recodified as N.C.G.S. § 90-270.101(b)(1) (2017); the quoted language is the same in both statutes.

outcome of hypothetical enforcement actions, and "[i]t is no part of the function of the courts to issue advisory opinions." *Wise v. Harrington Grove Cmty Ass'n*, 357 N.C. 396, 408, 584 S.E.2d 731, 740 (2003) (citing *City of Greensboro v. Wall*, 247 N.C. 516, 519, 101 S.E.2d 413, 416 (1958)).

Both the Physical Therapy Board's declaratory ruling and underlying policy statement are consistent with the statutes and administrative rules that the Board is charged with interpreting and administering. Therefore, we defer to the Physical Therapy Board's interpretations of those same statutes and rules in reaching the conclusion that dry needling is a part of the practice of physical therapy. Accordingly, we affirm the decision of the Business Court affirming the Physical Therapy Board's declaratory ruling reaffirming that dry needling falls within the scope of physical therapy in North Carolina.

AFFIRMED.

PATRICIA PINE, EMPLOYEE
v.
WAL-MART ASSOCIATES, INC. #1552, EMPLOYER

NATIONAL UNION FIRE INSURANCE CO., CARRIER
(CLAIMS MANAGEMENT, INC., THIRD-PARTY ADMINISTRATOR)

No. 335A17

Filed 7 December 2018

Workers' Compensation—findings—insufficient—reliance on Parsons presumption not clear

A workers' compensation case was remanded for further findings clarifying the basis of the award where it was not clear whether the Industrial Commission made a finding of causation independent of any presumption.

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 769 (2017), affirming an opinion and award filed on 10 November 2015 by the North Carolina Industrial Commission. On 1 March 2018, the Supreme Court allowed plaintiff's petition for discretionary review of additional issues. Heard in the Supreme Court on 29 August 2018.

Shelby, Pethel and Hudson, P.A., by David A. Shelby, for plaintiff-appellant/appellee.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, Holly M. Stott, and Linda Stephens, for defendant-appellants/appellees.

Sumwalt Law Firm, by Vernon Sumwalt, for North Carolina Advocates for Justice, amicus curiae.

HUDSON, Justice.

Defendants, Wal-Mart Associates, Inc. (Wal-Mart) and National Union Fire Insurance Company, appealed the opinion and award of the North Carolina Industrial Commission (the Commission), which awarded plaintiff, Patricia Pine, ongoing disability compensation and medical compensation for her right shoulder, left knee, right carpal tunnel syndrome, right sagittal band rupture, right hand dystrophic condition, right carpal boss, and neck injuries. On appeal, a divided panel of the Court of Appeals affirmed, holding that while the Commission erred in ostensibly applying a presumption of compensability for plaintiff's medical conditions, the Commission concluded in the alternative that plaintiff had met her burden of proving causation absent any presumption. *Pine v. Wal-Mart Assocs.*, ___ N.C. App. ___, ___, 804 S.E.2d 769, 779 (2017). Because we cannot determine from this record the extent to which the Commission relied on a presumption of causation or whether it had an independent, alternate basis for its determination of causation, we conclude that we must reverse and remand this case for further findings and proceedings before the Commission.

Background

Plaintiff was employed by Wal-Mart in the electronics department, where she had worked for almost twenty-two years. On 29 December 2011, plaintiff tripped and fell forward over the bottom of a stairway ladder. When plaintiff attempted to break her fall with her right arm, her right wrist struck the cement floor, followed by her body falling on top of her right shoulder area. Her left knee also hit the floor before striking her in the chest near her collarbone. Plaintiff experienced pain in her right side up to her shoulder and collarbone. One of plaintiff's coworkers observed the fall and confirmed that plaintiff complained of pain in her left knee, right hand, right wrist, and right shoulder.

At the direction of Wal-Mart, plaintiff went to ProMed later that afternoon, where she was seen by Clifford Callaway, M.D. At that visit, plaintiff complained primarily of pain in her right shoulder area; Dr. Callaway diagnosed her with a shoulder sprain and ordered x-rays. Due to continued pain in her right wrist, right arm, right shoulder, left knee, and neck, plaintiff followed up several times with Dr. Callaway, who diagnosed her with a left knee sprain, right wrist sprain, and cervical strain.

Dr. Callaway referred plaintiff to James Comadoll, M.D., an orthopedic specialist with Pinnacle Orthopedic Associates. Plaintiff visited Dr. Comadoll on 6 February 2012 and complained of pain in her left knee and "decreased range of motion and pain with use of [her] right arm." Dr. Comadoll diagnosed plaintiff with a possible right rotator cuff tear and a left knee contusion, "ordered an MRI of her right shoulder, and released her to return to work with restrictions, including no use of her right arm and no standing or walking over one hour." In a follow-up visit on 21 February 2012, plaintiff "complained more about her neck with soreness and pain on range of motion," and in additional follow-up visits over successive months, plaintiff continued to complain of pain in her neck, right shoulder, and left knee. Due to concern about possible nerve entrapment, Dr. Comadoll ordered an EMG, which was performed on 31 May 2012. The EMG revealed that plaintiff had "median nerve compression in the wrist, i.e. carpal tunnel syndrome," which Dr. Comadoll testified could be caused by trauma. On 23 July 2012, Dr. Comadoll performed carpal tunnel release surgery on plaintiff's right hand, after which plaintiff continued to experience pain in her right hand. Dr. Comadoll ordered an MRI of plaintiff's left knee, which revealed a possible lateral meniscus anterior horn tear.

For plaintiff's complaints of pain in her neck and upper extremities, Dr. Comadoll referred her to Michael Getter, M.D., a board-certified orthopedic surgeon specializing in spinal surgery. On 17 December 2012, plaintiff saw Dr. Getter, who wrote a note taking her completely out of work and ordered a cervical MRI, which revealed "degenerative disc disease causing stenosis compressing the nerve at C4-5, C5-6, and C6-7." Based on the MRI results, Dr. Getter "recommended surgery to decompress the nerve and to prevent progressive neurological problems and muscle atrophy."

Defendants requested that plaintiff also have her right shoulder and right hand examined by Joseph Estwanik, M.D., whom she saw on 12 February 2013. After examining plaintiff, "Dr. Estwanik diagnosed a partial full thickness tear of the right rotator cuff for which he recommended arthroscopic surgery." Additionally, on 10 September 2014,

plaintiff saw Louis Koman, M.D., a board-certified orthopedic surgeon with a certificate of subspecialty in hand surgery. Dr. Koman "diagnosed Plaintiff with a carpal boss, a traumatic sagittal band rupture at the index of the metacarpophalangeal, and cervical spine pathology that was causing some residual symptoms in the right upper extremity despite the carpal tunnel release."[1]

Plaintiff timely filed a Form 18 Notice of Accident to Employer in which she described the injuries involved as "RUE, LLE, neck and any other injuries causally related." On 4 October 2012, defendants filed a Form 60 with the Commission accepting plaintiff's claim as compensable and describing the body parts involved in the injuries by accident as "Right shoul[d]er/arm." Defendants later filed a Form 61 on 5 August 2013 denying compensability for the "new injury outside of her employment to her cervical spine and further contend[ing] that Employee-Plaintiff's current disability, if any, is unrelated to the original compensable injury." Plaintiff filed a Form 33 on 28 August 2013 requesting that her claim be assigned for hearing.

Deputy Commissioner Kim Ledford heard this matter on 19 March 2014. On 14 November 2014, Deputy Commissioner Ledford entered an opinion and award concluding, *inter alia*, that "by the greater weight of competent medical opinion, . . . Plaintiff sustained injury to her right shoulder, which has been admitted, and to her right wrist, and her left knee, and also aggravated her pre-existing cervical disc disease." Accordingly, Deputy Commissioner Ledford awarded plaintiff disability compensation and medical compensation, "including any recommended surgery for Plaintiff's right shoulder, right wrist, neck and left knee." Both parties appealed to the Full Commission.

The Full Commission heard the case on 22 April 2015. The Commission issued an opinion and award on 10 November 2015, finding in pertinent part:

> 20. Based upon a preponderance of the evidence, the Full Commission places greater weight on the testimony of Dr. Callaway, Dr. Comadoll, Dr. Getter, and Dr. Koman, than that of Dr. Estwanik, and finds that Plaintiff's pre-existing cervical disc disease was aggravated by her fall

1. The Commission found that, "[c]arpal boss is osteoarthritis of the hand at the back, near the wrist" and "[t]he sagittal band is the extensor mechanism that pulls the fingers up over the metacarpophalangeal joint."

> at work on December 29, 2011. Additional medical treatment with Dr. Getter, including but not limited to surgery, is reasonable and necessary to effect a cure, give relief, or lessen the period of disability related to this injury.
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> . . . .
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> 22. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff's carpal tunnel syndrome and sagittal band rupture were caused by the December 29, 2011 injury by accident. The Full Commission further finds, by a preponderance of the evidence[,] that Plaintiff's carpal boss was materially aggravated by the December 29, 2011 injury by accident. Additional medical treatment, including but not limited to surgery with Dr. Koman, is reasonable and necessary to effect a cure, give relief, or lessen the period of disability related to these injuries.

In its conclusions of law, the Commission determined that defendants' filing of a Form 60 admitting compensability created a rebuttable presumption, commonly referred to as the *Parsons* presumption, *see Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), that plaintiff's other injuries were causally related to her 29 December 2011 accident and that defendants must rebut that presumption with evidence to the contrary. (First citing *Perez v. Am. Airlines/AMR Corp.*, 174 N.C. App. 128, 620 S.E.2d 288 (2005), *disc. rev. improvidently allowed per curiam*, 360 N.C. 587, 634 S.E.2d 887 (2006); and then citing *Wilkes v. City of Greenville*, 243 N.C. App. 491, 777 S.E.2d 282 (2015), *aff'd in part, aff'd as modified in part, and remanded*, 369 N.C. 730, 799 S.E.2d 838 (2017).) The Commission concluded that here:

> 3. Defendants failed to present sufficient evidence to rebut the presumption that Plaintiff's carpal tunnel syndrome, carpal boss, sagittal band rupture, dystrophic right hand symptoms, neck, and left knee problems are causally related to the December 29, 2011 injury by accident. However, Defendants did rebut the presumption that Plaintiff's Dupuytren's condition is related to the December 29, 2011 injury by accident.

(Citing *Gonzalez v. Tidy Maids, Inc.*, 239 N.C. App. 469, 768 S.E.2d 886 (2015).) Accordingly, the Commission awarded disability compensation and medical compensation for plaintiff's right shoulder, right carpal tunnel syndrome, right sagittal band rupture, right hand dystrophic

condition, right carpal boss, left knee, and neck injuries. Defendants appealed from the Commission's opinion and award.

At the Court of Appeals, defendants challenged the Commission's conclusions of law, asserting that the Commission erred in applying the *Parsons* presumption to injuries not specifically listed by defendants in the Form 60. *Pine*, ___ N.C. App. at ___, 804 S.E.2d at 773. In a divided opinion filed on 5 September 2017, the Court of Appeals affirmed the Commission's award of benefits. *Id.* at ___, 804 S.E.2d at 779. The majority noted that following this Court's decision in *Wilkes v. City of Greenville*,[2] the legislature amended N.C.G.S. § 97-82(b) to provide that "[a]n award of the Commission arising out of G.S. 97-18(b) or G.S. 97-18(d) shall not create a presumption that medical treatment for an injury or condition not identified in the form prescribed by the Commission pursuant to G.S. 97-18(b) or G.S. 97-18(d) is causally related to the compensable injury." *Id.* at ___, 804 S.E.2d at 775 (emphasis omitted) (quoting Act of June 29, 2017, ch. 124, sec. 1.(a), 2017-4 N.C. Adv. Legis. Serv. 71, 71 (LexisNexis)). According to the majority, "[t]he statutory amendment binds our decision in this case because Section 1.(c) provides that the statute applies to all claims 'accrued or pending prior to, on, or after' the date on which the amendment became law." *Id.* at ___, 804 S.E.2d at 775 (quoting ch. 124, sec. 1.(c), 2017-4 N.C. Adv. Legis. Serv. at 72). Accordingly, the majority held that the Commission erred in applying the *Parsons* presumption to plaintiff's conditions that were not listed by defendants in the Form 60 and opined that "[g]enerally, such an error would require a remand to the Commission for the application of the correct legal standard." *Id.* at ___, 804 S.E.2d at 775.

Nonetheless, the Court of Appeals majority determined that "the error does not require reversal because the Commission made adequate findings that Plaintiff met her burden of proving causation without the presumption" and therefore had "an alternative factual basis for its award." *Id.* at ___, ___, 804 S.E.2d at 773, 775. According to the majority:

> [T]he Commission also found that Plaintiff had proved by a preponderance of the evidence—the applicable standard of proof absent the *Parsons* presumption—that her additional injuries were causally related to her workplace accident and are therefore compensable. The Commission's Finding of Fact Number 20, . . . expressly states that

2. 369 N.C. at 740, 799 S.E.2d at 846 ("Accordingly, we conclude that an admission of compensability approved under N.C.G.S. § 97-82(b) entitles an employee to a presumption that additional medical treatment is causally related to his compensable injury.").

> "[b]ased upon *a preponderance of the evidence*, the Full Commission . . . *finds* that Plaintiff's pre-existing [condition] *was aggravated* by her fall at work . . . ." (emphasis added). The Commission's Finding of Fact Number 22, . . . expressly states that "[b]ased upon *a preponderance of the evidence*, the Full Commission *finds* that Plaintiff's [medical conditions not admitted by Wal-Mart] *were caused* by . . . [her] accident." (emphasis added).
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> The Commission's use of affirmative language in these findings of fact indicates it placed the burden of proof on Plaintiff to demonstrate causation of her disputed additional medical conditions. By contrast, had the Commission placed the burden of proof on Defendants for these findings, the Opinion and Award would have stated that "the Full Commission *does not find* that Plaintiff's injuries were *not caused* by her accident."

Id. at ___, 804 S.E.2d at 776 (all alterations except first and fourth ellipses in original). Thus, the majority held "that regardless of the Commission's discussion of the *Parsons* presumption in its Conclusions of Law, its Opinion and Award should be affirmed because the Commission found that Plaintiff proved by a preponderance of the evidence a causal relationship between her compensable injury by accident and the medical conditions for which she now seeks compensation." *Id.* at ___, 804 S.E.2d at 776.

The majority also addressed defendants' challenges to the Commission's Finding of Fact 14, pertaining to Dr. Getter's causation opinion, and Finding of Fact 19, pertaining to Dr. Koman's causation opinion. *Id.* at ___, 804 S.E.2d at 777. Defendants argued that "the[se] expert opinions . . . were unsupported by the record evidence, based on speculation and conjecture, and therefore are not competent evidence." *Id.* at ___, 804 S.E.2d at 777. According to defendants, "without this evidence, Plaintiff failed to prove that her neck, hand, and wrist injuries were causally related to her workplace accident." *Id.* at ___, 804 S.E.2d at 777. The majority disagreed, stating that "a full review of Dr. Koman's testimony demonstrates that his opinion was based on more than merely *post hoc, ergo propter hoc*," *id.* at ___, 804 S.E.2d at 778, "which 'denotes "the fallacy of . . . confusing sequence with consequence," ' " *id.* at ___, 804 S.E.2d at 777 (quoting *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 232, 538 S.E.2d 912, 916 (2000) (alteration in original)). The majority concluded that the causation opinions of Dr. Koman and Dr. Getter were not "so speculative as to render them incompetent" and that

"[t]heir testimony along with the others cited by the Commission and the evidence contained in the record support the Commission's conclusion that the additional medical conditions complained of by Plaintiff were causally related to Plaintiff's fall." *Id.* at ___, 804 S.E.2d at 778.

In a separate opinion, one member of the panel concurred with the majority's determination that the Commission erroneously applied the *Parsons* presumption but dissented from the conclusion that the Commission made an alternative determination that plaintiff had met her burden of proving causation independent of any presumption. *Id.* at ___, 804 S.E.2d at 779 (Tyson, J., concurring in part, dissenting in part). According to the dissenting opinion, the Commission's "Conclusions of Law 1 and 3 clearly indicate the Commission solely predicated its Opinion and Award for Plaintiff on the *Parsons* presumption and *Wilkes* being applicable to these facts." *Id.* at ___, 804 S.E.2d at 781-82. The dissenter further opined that while Findings of Fact 20 and 22 "state[ ] the required standard of proof," nowhere did the Commission "state[ ] that Plaintiff had carried her burden of proof." *Id.* at ___, 804 S.E.2d at 782. The dissenting opinion then concluded that "[t]he Opinion and Award is wholly unclear upon which party the Commission placed, or considered as having, the burden of proof to show or rebut causation. As such, the Award must be set aside and remanded." *Id.* at ___, 804 S.E.2d at 783.

The dissenting opinion also disagreed with the majority's determination that Dr. Koman's testimony constituted competent evidence. *Id.* at ___, 804 S.E.2d at 784. The dissenting judge would have concluded that Dr. Koman's testimony is not competent because "he solely relied on the '*post hoc*, *ergo propter hoc*' fallacy in concluding Plaintiff's carpal boss aggravation and sagittal band rupture were causally related to her fall on 29 December 2011." *Id.* at ___, 804 S.E.2d at 785.

Pursuant to N.C.G.S. § 7A-30(2), defendants appealed to this Court on the basis of the dissenting opinion in the Court of Appeals. Plaintiff filed a petition for discretionary review of additional issues, namely, whether retroactive application of N.C.G.S. § 97-82(b) violates her substantive due process rights protected by the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution. We allowed plaintiff's petition for discretionary review on 1 March 2018.

Analysis

Defendants argue that the Court of Appeals erred by failing to remand this case to the Commission for additional findings and conclusions. We agree that remand is necessary and therefore reverse the Court of Appeals.

We review a decision of the Commission to determine "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 (2017). "Under our Workers' Compensation Act, 'the Commission is the fact finding body.' 'The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (first quoting *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962); then quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). But, "[w]hen the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard." *Ballenger v. ITT Grinnell Indus. Piping, Inc.*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987) (citing, *inter alia*, *Conrad v. Cook-Lewis Foundry Co.*, 198 N.C. 723, 153 S.E. 266 (1930)). 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)).

After the Commission issued its opinion and award, and after briefs were filed and oral arguments heard at the Court of Appeals, the legislature amended N.C.G.S. § 97-82(b) to provide that "[a]n award of the Commission arising out of G.S. 97-18(b) or G.S. 97-18(d) shall not create a presumption that medical treatment for an injury or condition not identified in the form prescribed by the Commission pursuant to G.S. 97-18(b) or G.S. 97-18(d) is causally related to the compensable injury." Ch. 124, sec. 1.(a), 2017-4 N.C. Adv. Legis. Serv. at 71. Because the legislation stated that "[t]his section is effective when it becomes law and applies to claims accrued or pending prior to, on, or after that date," *id.*, sec. 1.(c), 2017-4 N.C. Adv. Legis. Serv. at 72, the amended section could apply to plaintiff's claim.

Here defendants listed only "Right shoul[d]er/arm" in the Form 60 they filed with the Commission, and they therefore argue that under the amended N.C.G.S. § 97-82(b), plaintiff was not entitled to any presumption that her other injuries or conditions were causally related to her 29 December 2011 injury by accident. Thus, defendants argue the Commission erred in applying a presumption to those other injuries.

The Commission's Findings of Fact 20 and 22 read in part[3] as follows:

3. These findings are quoted more fully above.

> 20. Based upon a preponderance of the evidence, the Full Commission places greater weight on the testimony of Dr. Callaway, Dr. Comadoll, Dr. Getter, and Dr. Koman, than that of Dr. Estwanik, and finds that Plaintiff's pre-existing cervical disc disease was aggravated by her fall at work on December 29, 2011. . . .
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> . . . .
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> 22. Based upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff's carpal tunnel syndrome and sagittal band rupture were caused by the December 29, 2011 injury by accident. The Full Commission further finds, by a preponderance of the evidence[,] that Plaintiff's carpal boss was materially aggravated by the December 29, 2011 injury by accident.

While these findings can be read to suggest that the Commission independently found, absent any presumption, that plaintiff's further injuries were causally related to her 29 December 2011 injury by accident, this reading is seemingly at odds with the Commission's Conclusions of Law 1 and 3, which state:

> 1. . . . In order to rebut the presumption, Defendants must present expert testimony or affirmative medical evidence tending to show that the treatment Plaintiff seeks is not directly related to the compensable injury. . . .
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> . . . .
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> 3. Defendants failed to present sufficient evidence to rebut the presumption that Plaintiff's carpal tunnel syndrome, carpal boss, sagittal band rupture, dystrophic right hand symptoms, neck, and left knee problems are causally related to the December 29, 2011 injury by accident. However, Defendants did rebut the presumption that Plaintiff's Dupuytren's condition is related to the December 29, 2011 injury by accident.

(Citations omitted.) We cannot determine from the record if the Commission, as the Court of Appeals majority concluded, made findings of causation independent of the application of any presumption. As the dissenting judge below noted, "The Opinion and Award is wholly unclear upon which party the Commission placed, or considered as having, the burden of proof to show or rebut causation. As such, the Award must be

set aside and remanded." *Pine*, ___ N.C. App. at ___, 804 S.E.2d at 783. Because of this apparent confusion within the opinion, we reverse the Court of Appeals and remand this case to that court for further remand to the Commission to make additional findings clarifying the basis for its award and for additional proceedings as necessary.[4]

We dismiss as improvidently allowed plaintiff's petition for discretionary review, while expressing no opinion on the constitutionality of the application of N.C.G.S. § 97-82(b) to plaintiff's case. *See Powe v. Odell*, 312 N.C. 410, 416, 322 S.E.2d 762, 765 (1984) ("It is a well settled rule of this Court that we will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below." (citing, *inter alia*, *State v. Woods*, 307 N.C. 213, 297 S.E.2d 574 (1982)); *see also Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (per curiam) ("[T]he courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds." (first citing *State v. Crabtree*, 286 N.C. 541, 543, 212 S.E.2d 103, 105 (1975); then citing *Rice v. Rigsby*, 259 N.C. 506, 512, 131 S.E.2d 469, 473 (1963))). This dismissal is without prejudice to plaintiff's ability to raise this issue in the future.[5]

REVERSED AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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4. Given that we are remanding this case to the Commission for further proceedings, we decline to address defendants' second contention that the Court of Appeals erred by failing to reverse the Commission's findings concerning the causation of plaintiff's sagittal band rupture, carpal boss, and dystrophic hand symptoms.

5. Because the amendment to N.C.G.S. § 97-82(b) occurred after the Court of Appeals heard arguments in this case on 9 August 2016, plaintiff's first opportunity to raise this issue was in her petition for discretionary review before this Court.

STATE v. FOWLER

[371 N.C. 718 (2018)]

STATE OF NORTH CAROLINA
v.
MELVIN LEROY FOWLER

No. 173PA17

Filed 7 December 2018

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 800 S.E.2d 724 (2017), finding reversible error in a judgment entered on 2 March 2016 by Judge A. Graham Shirley in Superior Court, Wake County, vacating defendant's conviction, and granting him a new trial. Heard in the Supreme Court on 30 August 2018.

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

Jason Christopher Yoder 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. Malachi*, ___ N.C. ___, ___ S.E.2d ___ (2018) (142PA17).

VACATED AND REMANDED.

STATE v. MALACHI

[371 N.C. 719 (2018)]

STATE OF NORTH CAROLINA
v.
TERANCE GERMAINE MALACHI

No. 142PA17

Filed 7 December 2018

1. Criminal Law—jury instructions—actual and constructive possession—one theory of possession not supported by evidence

Where defendant was on trial for possession of a firearm by a felon and the trial court instructed the jury, over defendant's objection, on both actual and constructive possession even though the evidence only supported the theory of *actual* possession, the Court of Appeals correctly determined that the trial court erred by allowing the jury to potentially convict defendant of possession of a firearm by a felon on the basis of a constructive possession theory.

2. Criminal Law—jury instructions—unsupported instruction—subject to harmless error analysis

Where defendant was on trial for possession of a firearm by a felon and the trial court instructed the jury, over defendant's objection, on a theory of possession unsupported by the evidence, the Supreme Court held that defendant's challenge to the delivery of the trial court's unsupported instruction was subject to traditional harmless error analysis. The Court declined defendant's request to adopt a rule that such error is requires automatic reversal.

3. Criminal Law—jury instructions—unsupported instruction—no prejudice

Where defendant was on trial for possession of a firearm by a felon and the trial court instructed the jury, over defendant's objection, on both actual and constructive possession even though the evidence only supported the theory of *actual* possession, defendant failed to satisfy the Supreme Court that there was a reasonable possibility that, in the absence of the erroneous constructive possession instruction, the jury would have acquitted defendant.

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. ___, 799 S.E.2d 645 (2017), finding prejudicial error in a judgment entered on 28 January

2016 by Judge Yvonne Mims Evans in Superior Court, Mecklenburg County, vacating defendant's convictions, and granting defendant a new trial. Heard in the Supreme Court on 29 August 2018.

Joshua H. Stein, Attorney General, by John R. Green, Jr., Special Deputy Attorney General, for the State-appellant.

Glenn Gerding, Appellate Defender, by Aaron Thomas Johnson, Assistant Appellate Defender, for defendant-appellee.

ERVIN, Justice.

The issue before the Court in this case is whether the Court of Appeals erred by vacating the judgment entered by the trial court based upon defendant's convictions for possession of a firearm by a felon and having attained habitual felon status on the grounds that the trial court had erroneously instructed the jury that it could convict defendant based upon a constructive possession theory that lacked sufficient evidentiary support. After careful consideration of the record in light of the applicable law, we reverse the decision of the Court of Appeals and remand this case to that court for consideration of defendant's remaining challenges to the trial court's judgment.

Shortly after midnight on 14 August 2014, the Charlotte-Mecklenburg Police Department received an anonymous call from a person who stated that he had just seen an African-American male wearing a red shirt and black pants insert a handgun into his pants while in the parking lot of Walker's Express, a convenience store that was located at 3416 Freedom Drive. Upon arriving at Walker's Express approximately three minutes later, Officers Ethan Clark and Jason Van Aken of the Charlotte-Mecklenburg Police Department saw approximately six to eight people standing in the parking lot, including a man later identified as defendant, who was the only person present who matched the description provided by the caller.

As Officer Clark pulled his patrol vehicle into the parking lot, defendant looked directly at the officer, "squared to [Officer Clark], and then immediately looked away towards the ground, blading his body."[1] Upon

1. According to Officer Clark, the occurrence of "blading" suggests that the person in question is attempting to conceal the fact that he or she has a weapon on his or her person by adopting a stance that is perpendicular to the person or persons making the observation.

making this observation, Officer Clark and Officer Van Aken grabbed defendant's arms and walked him out of the group with which he had been standing. During that process, defendant "kept moving and tugging" and "was very squirmy." As the officers frisked and handcuffed defendant, Officer Van Aken removed a revolver from the waistband on the right side of defendant's pants. Officer Kevin Hawkins arrived as Officer Van Aken was in the process of taking the firearm into his custody. After Officer Van Aken seized the firearm, defendant pointed to another individual in the parking lot and stated that this individual had given him the firearm "and told him to hold on to it."

On 16 November 2015, the Mecklenburg County Grand Jury returned bills of indictment charging defendant with possession of a firearm by a felon and carrying a concealed weapon. Previously, on 2 February 2015, defendant was indicted for having attained habitual felon status. The charges against defendant came on for trial before the trial court and a jury at the 19 January 2016 criminal session of the Superior Court, Mecklenburg County. During the trial, defendant stipulated that he had been convicted of a felony prior to 14 August 2014. At the jury instruction conference, the State requested the trial court to instruct the jury in accordance with N.C. Pattern Jury Instruction Crim. No. "104.41, actual possession." Defendant objected to the State's request on the grounds that,

> when it gives the definition of possession it refers to actual or constructive. The [S]tate's evidence was that it was actual possession; there was no constructive possession. . . . It's not in terms of if it was near him or on him; there are witnesses stating it was on him, so therefore I would contend you should deny that instruction.

In overruling defendant's objection, the trial court told the prosecutor that "I think [the State] may have a good argument for actual, but nothing for constructive. And if the jury believes the witnesses, they're going to believe actual possession, right?" As a result, the trial court instructed the jury that:

> Possession of an article may be either actual or constructive. A person has actual possession of an article if he has it on his person and is aware of its presence, or has both the power and intent to control its disposition or use. A person has constructive possession of an article if the person does not have it on his person but is aware of its presence and both the power and intent to control

> its disposition or use. A person's awareness of an article and a person's power and intent to control its disposition or use may be shown by direct evidence, or it may be inferred by the circumstances.
>
> . . . .
>
> The [d]efendant has been charged with possessing a firearm after having been convicted of a felony. For you to find the [d]efendant guilty of this offense, the State must prove two things beyond a reasonable doubt.
>
> First, that prior to August 14th, 2014, the [d]efendant was convicted of a felony that was committed in violation of the law of the State of North Carolina; and second, that thereafter the [d]efendant possessed a firearm. If you find from the evidence beyond a reasonable doubt that the [d]efendant was convicted of a felony i[n] Superior Court and that the [d]efendant thereafter possessed a firearm, it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

As it deliberated, the jury requested "a legal definition of possession of a firearm [and] a definition of a concealed weapon." Before responding to the jury's inquiry, the trial court addressed the parties, stating that "I will re-read the definition of possession of firearm by a felon, and in that definition I'll include actual and constructive possession; and I will re-read the concealed weapon instruction." Defendant unsuccessfully renewed his objection to the trial court's proposed possession instruction "based on due process grounds, on the possession instruction."

On 21 January 2016, the jury returned a verdict convicting defendant of possession of a firearm by a felon and acquitting him of carrying a concealed weapon. Seven days later, defendant entered a plea of guilty to attaining habitual felon status. Based upon the jury's verdict and defendant's guilty plea, the trial court entered a judgment sentencing defendant to a term of 100 to 132 months imprisonment. Defendant noted an appeal to the Court of Appeals from the trial court's judgment.

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 instructing the jury that it could find him guilty of possession of a firearm by a felon on the basis of a constructive possession theory.

State v. Malachi, ___ N.C. App. ___, ___, 799 S.E.2d 645, 647 (2017).[2] In awarding defendant a new trial on the basis of this contention, the Court of Appeals began by determining that "the State's evidence supported an instruction only for actual possession and that the trial court erroneously instructed the jury on constructive possession."[3] *Id.* at ___, 799 S.E.2d at 649. After noting that "a trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial," *id.* at ___, 799 S.E.2d at 648 (quoting *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 94 S. Ct. 3195, 41 L. Ed. 2d 1153 (1974)), and that "[o]ur courts [ ] have consistently held that a trial court's inclusion of a jury instruction unsupported by the evidence presented at trial is an error requiring a new trial,"*id.* at ___, 799 S.E.2d at 648, first citing *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990); and then citing in the following order *State v. Pakulski*, 319 N.C. App. 562, 574, 356 S.E.2d 319, 326 (1987); *State v. Johnson*, 183 N.C. App. 576, 584-85, 646 S.E.2d 123, 128 (2007); *State v. Hughes*, 114 N.C. App. 742, 746, 443 S.E.2d 76, 79, *disc. rev. denied*, 337 N.C. 697, 448 S.E.2d 546 (1994); and *State v. O'Rourke*, 114 N.C. App. 435, 442, 442 S.E.2d 137, 140 (1994)), the Court of Appeals acknowledged that, in *State v. Boyd*, 366 N.C. 548, 742 S.E.2d 798 (2013), this Court had reversed a Court of Appeals decision on the basis of a dissenting opinion stating that "errors [arising from trial court instructions allowing the jury to potentially convict a criminal defendant on the basis of a legal theory lacking sufficient evidentiary support that were] not objected to at trial are not plain error *per se*," with "the burden [being instead] on the defendant to show that [such] an erroneous . . . jury instruction had a probable impact on the jury's verdict," *id.* at ___, 799 S.E.2d at 649 (citing *Boyd*, 222 N.C. App. 160, 173, 730 S.E.2d 193, 201) (2012) (Stroud, J., dissenting)). The Court of Appeals interpreted our decision in *Boyd* to be limited to "plain error review" rather than eliminating "the long established presumption that

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2. Defendant also argued that the trial court had erred by denying his motion to suppress the firearm seized from his person. As a result of its decision to grant defendant a new trial on the basis of the trial court's decision to allow the jury to convict defendant on the basis of the doctrine of constructive possession, the Court of Appeals did not reach defendant's search-related claim.

3. Although the State argued "that the evidence was sufficient to support constructive possession because during the time after officers removed the revolver from [d]efendant, he theoretically could have broken free from the officers and taken hold of the revolver," *id.* at ___, 799 S.E.2d at 649, the Court of Appeals determined that, even though "[d]efendant certainly was aware of the presence of the revolver taken from him by police, no evidence was presented that he had the power to control its disposition or use by the officers who had secured it," *id.* at ___, 799 S.E.2d at 650. The State has not attempted to bring this argument forward for our consideration.

the jury relied on an erroneous disjunctive instruction not supported by the evidence when given over an objection by the defendant's trial counsel." *Id.* at ___, 799 S.E.2d at 649. As a result, since *Boyd* "does not address erroneous disjunctive jury instructions given over the objection of a defendant's trial counsel" and since the jury's verdict in this case did not specify the theory upon which that body based its decision to convict defendant, the Court of Appeals determined that defendant was entitled to a new trial based upon the trial court's erroneous decision to allow the jury to convict defendant on the basis of constructive possession. *Id.* at ___, 799 S.E.2d at 649. In addition, the Court of Appeals determined that defendant should receive a new trial "[e]ven if *Boyd* were interpreted to eliminate the presumption of prejudice by jury instructions unsupported by the evidence and objected to at trial" given that "there is a reasonable possibility that the jury would have reached a different result had the trial court not provided instruction about the theory of constructive possession." *Id.* at ___, 799 S.E.2d at 650.

On 23 May 2017, the State filed a petition seeking discretionary review of the Court of Appeals' decision in this case. In seeking further review by this Court, the State asserted that the trial court did not err by instructing the jury concerning the doctrine of constructive possession because " 'actual possession' is simply a subset of the broader concept" of constructive possession. In addition, the State argued that the Court of Appeals had misapplied *Boyd* and failed to conduct an appropriate prejudice analysis. According to the State, *Boyd* established that, regardless of whether a contemporaneous objection had been lodged at trial, "where an instruction is given on alternative theories of an offense despite one of the theories being unsupported, the erroneous instruction is to be analyzed for prejudice." The State contends that, although "plain error" analysis was appropriate in *Boyd* given the defendant's failure to object to the challenged instruction at trial, "[i]n this case, where there was an objection, the prejudice analysis would properly take the form of regular prejudicial error review." As a result, the State requested this Court to grant further review of the Court of Appeals' decision and to determine that there was no reasonable possibility that the jury convicted defendant on constructive possession grounds in light of the state of the evidence.

Defendant sought to dissuade the Court from granting discretionary review to consider "three separate legal questions, each of which has been settled for decades." As an initial matter, defendant argued that this Court had long distinguished between actual and constructive possession. Secondly, defendant argued that "it is erroneous to instruct the

jury on a theory unsupported by evidence." Thirdly, defendant urged this Court to reject the State's assertion that errors resulting from jury instructions allowing the jury to consider defendant's guilt on the basis of a legal theory that lacks sufficient evidentiary support should be subjected to a prejudice analysis in lieu of "the *per se* error rule followed by this Court for at least three decades." Finally, defendant asserted that the Court of Appeals had, in fact, conducted a prejudice analysis and determined that there was "a reasonable possibility that the jury would have reached a different result had the trial court not provided instruction about the theory of constructive possession." (Quoting *Malachi*, ___ N.C. App. at ___, 799 S.E.2d at 647). As a result, defendant urged this Court to refrain from granting further review in this case. We allowed the State's discretionary review petition on 1 November 2017.

In seeking to persuade us to overturn the Court of Appeals' decision, the State begins by asserting that the Court of Appeals erred by finding that the trial court had erroneously instructed the jury concerning the doctrine of constructive possession. According to the State, actual and constructive possession, instead of being mutually exclusive, "are definitions that partake of each other," with "what we think of as 'actual possession' [being] simply a subset of the broader concept [of constructive possession.]" The State asserts that, "[o]riginally, possession meant physical custody," with "constructive possession" constituting a "legal fiction" "employed to cover those scenarios where possession 'in the real sense of the word' was not present." (Quoting 3 Wayne R. LaFave, *Substantive Criminal Law* § 19.1(a)(2) (2d ed. 2003).) Over time, however, the State contends that this Court has "used constructive possession to broaden the scope of possessory crimes in general." (First citing *State v. Myers*, 190 N.C. 239, 243, 129 S.E. 600, 601 (1925); then citing *State v. Baxter*, 285 N.C. 735, 738, 208 S.E.2d 696, 698 (1974).) "At some point, possession itself adopted the more general definition—the power and intent to control," (citing *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 713 (1972)), so that "actual possession" "became one form or subset of possession," (citing *State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986)), with constructive possession becoming "possession's paradigm."

According to the State, the approach adopted by the Court of Appeals' decision in this case conflicts with its recognition in *State v. Barkley*, 233 N.C. App. 787, 759 S.E.2d 713, 2014 WL 1792716 (2014) (unpublished), that, "[r]ather than presenting an alternative theory of the offense, as defendant claims, the instructions as given simply provided the jury with an accurate legal definition of possession, which includes both actual and constructive possession." (Citing *Barkley*, 2014 WL 1792716, at *4.)

Similarly, the State contends that this Court has "recognized the overlap" between the two concepts by acknowledging that "actual and constructive possession 'often so shade into one another that it is difficult to say where one ends and the other begins.' " (Quoting *State v. McNeil*, 359 N.C. 800, 808, 617 S.E.2d 271, 276 (2005).) As a result, the State concludes, "given this Court's recognition that the boundary between actual and constructive possession is indefinite and that evidence of the one can constitute evidence of the other, the instructions given in this case were not erroneous at all."

Secondly, the State argues that, even if actual and constructive possession constitute "distinct theories" rather than "definitional components," the Court of Appeals misapplied *Boyd* by concluding that any error that the trial court might have committed was prejudicial. (Citing *Boyd*, 366 N.C. at 210, 739 S.E.2d at 838.) According to the State, this Court's decision in *Boyd* established that an error arising from the delivery of an instruction concerning a theory of guilt devoid of sufficient evidentiary support does not require an award of appellate relief unless the error in question was prejudicial regardless of whether a contemporaneous objection was lodged against the challenged instruction at trial. After acknowledging that *Boyd* arose in a plain error, rather than a preserved error, context, the State asserts that the only difference between these two situations stemmed from the nature of the required prejudice analysis, with the relevant inquiry, in a case in which a contemporaneous objection had been lodged at trial, being "whether, but for the instruction on the unsupported theory, there was a reasonable possibility of a different verdict." (Citing N.C.G.S. § 15A-1443(a) (2015).)

According to the State, this Court had held, prior to *Pakulski*, that the erroneous submission of an alternative theory of guilt that was not supported by evidence was not *always* prejudicial. (Citing *State v. Moore*, 315 N.C. 738, 749, 340 S.E.2d 401, 408 (1986) (stating that "[i]t is generally prejudicial error for the trial judge to permit a jury to convict upon a theory not supported by the evidence").) Although our decision in *Pakulski* relied upon *State v. Belton*, 318 N.C. 141, 165, 347 S.E.2d 755, 770 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 677, 483 S.E.2d 483, 414 (1997), *cert. denied*, 522 U.S. 900, 118 S. Ct. 248, 139 L. Ed. 2d 177 (1997), the State asserts that the holding in *Pakulski* "that submission of an alternative theory to the jury unsupported by evidence resulted in *per se* prejudice even if overwhelming evidence supported the other theory submitted to the jury" differed "significantly" "from *Belton*'s holding that submission of an alternative theory to the jury supported by evidence but legally invalid resulted in *per se* prejudice."

In addition, the State contends that the United States Supreme Court has clarified that the decisions upon which this Court relied in *Belton* "do not apply to instructions on an alternative theory of guilt unsupported by evidence" and only apply "to instructions on an alternative theory of guilt supported by evidence but otherwise legally unavailable." In spite of its acknowledgment that the United States Supreme Court's decision in *Griffin v. United States* does not control the resolution of the state law issue before us in this case, the State cites *Griffin* for the proposition that "a defendant is not entitled to a new trial when a jury returns a general verdict of guilty that could have been premised on a theory for which insufficient evidence was presented so long as another theory of guilt was supported by sufficient evidence." (Citing *Griffin v. United States*, 502 U.S. 46, 59, 112 S. Ct. 466, 474, 116 L. Ed. 2d 371, 383-84 (1991).) As a result, the State urges us to hold, in reliance upon the logic of *Griffin*, that when a trial court instructs on an alternative theory of guilt that lacks sufficient evidentiary support, defendant is not entitled to an award of appellate relief in the absence of a showing of prejudice.

Finally, the State argues that the Court of Appeals erred by holding, in the alternative, that the trial court's decision to allow the jury to convict defendant of possession of a firearm by a felon on the basis of a constructive possession theory that lacked sufficient evidentiary support prejudiced defendant. According to the State, the record contains "overwhelming and uncontroverted evidence that defendant was a felon and that he possessed a firearm—it was removed from his person and he acknowledged to police that he had been holding it," making it exceedingly doubtful that the jury relied upon a theory of constructive possession, rather than actual possession, in deciding to convict defendant.

Defendant, on the other hand, asserts that this Court should affirm the Court of Appeals' decision. In defendant's view, the State's contention that this Court has "erased" the distinction between actual and constructive possession is meritless. As an initial matter, defendant notes that the State had failed to assert that "this Court, over time, has effectively dissolved this distinction" between actual and constructive possession before either the trial court or the Court of Appeals. (Citing N.C. R. App. P. 10(a), (c); *id* at R. 28(a).) Instead, defendant states that the State argued before both the trial court and the Court of Appeals that "both theories of possession were supported by sufficient evidence to submit them to the jury," requested the trial court to instruct the jury concerning both of these possible theories of guilt, and drew a distinction between actual and constructive possession throughout its brief

before the Court of Appeals. In addition, defendant argues that, to the extent that the "trial court erred by failing to instruct the jury in accordance with the [S]tate's new understanding of possession, that error was invited by the [S]tate," given that the State requested, "*over repeated objection*, that the trial court instruct the jury on both actual and constructive possession." (First citing *Bell v. Harrison*, 179 N.C. 190, 198, 102 S.E. 200, 204 (1920); then citing *Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994); and then citing *State v. McPhail*, 329 N.C. 636, 643, 406 S.E.2d 591, 596 (1991)). As a result, for all of these reasons, defendant contends that the State has waived the right to argue before this Court that actual and constructive possession do not represent different theories of guilt.

Secondly, defendant argues that the State's attempt to describe actual possession as a subset of constructive possession "runs counter to a century of precedent from this Court," ranging from our decision last year in *State v. Jones*, 369 N.C. 631, 634, 800 S.E.2d 54, 57 (2017) (holding that "this Court has stated that '[a] person is in constructive possession of a thing when, while not having actual possession, he has the intent and capability to maintain control and dominion over that thing' ") (quoting *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986)), to our 1913 decision in *State v. Lee*, 164 N.C. 533, 535-36, 80 S.E. 405, 405-06 (1913) (interpreting a statute prohibiting the possession of intoxicating liquors for sale as encompassing both "actual and constructive possession"). As a result, defendant contends that the State's argument that the trial court did not err by instructing the jury concerning the doctrine of constructive possession ignores "[a] century of precedent [which] confirms that actual and constructive possession are mutually exclusive because constructive possession, *by definition*, can only occur where actual possession does not."

In addition, defendant contends that, even if the State's defense of the trial court's constructive possession instruction is correct, the trial court's decision to deliver a constructive possession instruction to the jury was still erroneous. According to defendant, it is "well established that 'a trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial.' " (Quoting *Cameron*, 284 N.C. at 171, 200 S.E.2d at 191.) Defendant argues that the evidence, when taken in the light most favorable to the State, merely suggested that defendant had actual possession of the firearm that was discovered on his person. As a result, defendant claims that the trial court erred by instructing the jury that it could convict defendant on the basis of a constructive possession theory.

Similarly, defendant contends that the Court of Appeals correctly held that the trial court's decision to deliver the erroneous constructive possession instruction was "presumptively reversible." According to defendant, a series of decisions by this Court clearly demonstrates "the command of *stare decisis*" that a trial court's decision to instruct the jury on a theory of guilt unsupported by the evidence requires appellate relief unless the reviewing court can conclusively determine from the record that the jury did not rely upon the unsupported decision in deciding to convict the defendant. (First citing *State v. Petersilie*, 334 N.C. 169, 193, 432 S.E.2d 832, 846 (1993); then citing, in the following order, *Lynch*, 327 N.C. at 219, 393 S.E.2d at 816; *Pakulski*, 319 N.C. at 574, 356 S.E.2d at 326; *Moore*, 315 N.C. at 749, 340 S.E.2d at 408; *State v. Dammons*, 293 N.C. 263, 272, 237 S.E.2d 834, 840 (1977); *State v. Lee*, 287 N.C. 536, 541, 215 S.E.2d 146, 149 (1975); *State v. Duncan*, 264 N.C. 123, 127, 141 S.E.2d 23, 26-27 (1965); *State v. Knight*, 248 N.C. 384, 389-90, 103 S.E.2d 452, 455-56 (1958).). In defendant's view, neither this Court's decision in *Boyd*, nor *Pakulski*'s citation to *Belton* justify a departure from the rule "that it is reversible error for the trial court to instruct the jury on a theory unsupported by the evidence." Defendant asserts that *Pakulski* was "neither the genesis nor the last statement of the [per se reversible error] rule, but one of a decades-long series of cases from this Court applying it." For that reason, defendant argues that any attempt to distinguish between the "legally-unsupported" jury instruction in *Belton* and the "factually-unsupported" jury instruction in *Pakulski* represents a misreading of this Court's precedent.

In a similar vein, defendant rejects the State's assertion that our recent decision in *Boyd* applies to more than "unpreserved instructional and evidentiary error" subject to a plain error standard of review. (Citing *Boyd*, 366 N.C. at 210, 739 S.E.2d at 838.) In view of the fact that defendant repeatedly objected to the delivery of a constructive possession instruction at trial, defendant asserts that his challenge to the trial court's constructive possession instruction is simply not subject to plain error review, rendering *Boyd* irrelevant to the proper resolution of this case. As a result, defendant argues that the delivery of an erroneous instruction concerning a theory of guilt that lacks sufficient evidentiary support is not subject to prejudicial error analysis and necessarily requires an award of appellate relief.

Defendant contends the "traditional rule," which he describes as presuming prejudice in instances in which a trial court instructs the jury concerning a theory of guilt lacking sufficient evidentiary support, "accords with the purposes and incentives governing preservation"

by "urg[ing] both parties to speak up at trial where errors can be corrected." In the aftermath of *Boyd*, defendant claims that "[t]he presumption that the jury convicted based on the unsupported legal theory" only applies when the defendant objected to the delivery of the unsupported instruction and "there is a general verdict, rather than a special verdict specifying the theory underlying the conviction." As a result, defendant argues that the "traditional rule" properly gives the State the incentive to request that the trial court instruct the jury to render a special, rather than a general, verdict, thereby assuring that the jury reached its decision on the basis of a correct understanding of the applicable law.

Finally, even if this Court decides that the erroneous delivery of an instruction allowing the jury to convict a defendant on the basis of a theory that lacks sufficient record support is subject to prejudicial error analysis, defendant argues that the Court of Appeals correctly determined that "there is a reasonable possibility that there would have been a different outcome had the trial court instructed the jury correctly." According to defendant, the Court of Appeals correctly held that the trial court's decision to deliver a constructive possession instruction created a risk that the jury would be confused about the meaning of "possession," with the existence of such confusion being evidenced by the jury's request for a further instruction concerning possession during the deliberation process. In addition, defendant suggests that the jury could have had doubts about the credibility of the State's evidence given its decision to acquit defendant of carrying a concealed weapon and the existence of evidence tending to show that Officer Van Aken had an altercation with defendant that resulted in defendant's hospitalization and the termination of Officer Van Aken's employment, that Officers Clark and Hawkins did not prepare their written statements on the day of the incident underlying the charges that were lodged against defendant or mention the altercation between Officer Van Aken and defendant in their statements, that Officer Hawkins remained in contact with Officer Van Aken after the latter's employment was terminated, and that no audio or video recordings of the discovery of the firearm on defendant's person had been made. As a result, defendant urges us to uphold the Court of Appeals' decision to award him a new trial.

[1] "It is well established that possession may be actual or constructive." *State v. Bradshaw*, 366 N.C. 90, 93, 728 S.E.2d 345, 348 (2012) (citing *State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986)). "Actual possession requires that a party have physical or personal custody of the item." *State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998) (citation omitted). "[A] person is in constructive possession of a thing

when, while not having actual possession, he has the intent and capability to maintain control and dominion over that thing." *Jones*, 369 N.C. at 634, 800 S.E.2d at 57 (quoting *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986)). According to well-established North Carolina law, "it is error for the trial judge to charge on matters which materially affect the issues when they are not supported by the evidence." *State v. Jennings*, 276 N.C. 157, 161, 171 S.E.2d 447, 449 (1970) (First citing *State v. Knight*, 248 N.C. 384, 389-90, 103 S.E.2d 452 455-56 (1958); then citing *State v. McCoy*, 236 N.C. 121, 124, 71 S.E.2d 921, 923 (1952)).

Assuming, without in any way deciding, that the State has neither waived the right to assert that actual possession is a subset of constructive possession nor invited any error that the trial court might have made by treating actual and constructive possession as separate concepts in its jury instructions, this Court has, as defendant notes, long recognized a distinction between actual and constructive possession. Simply put, the prior decisions of this Court treat constructive possession as an alternative means of showing the possession of an item necessary for guilt of certain offenses that becomes available in the event that the State is unable to establish that the defendant actually possessed an item. Although a person in actual possession of an object might well have "the intent and capability to maintain control and dominion over" that object, the essence of the two types of possession revolves around the extent to which the person in question either did or did not physically have the object in his or her possession, with there being no need for a showing of "the intent and capability to maintain control and dominion over that object" in the event that the defendant physically possessed the relevant item. As a result, we hold that the Court of Appeals correctly determined that the trial court erred by allowing the jury to potentially convict defendant of possession of a firearm by a felon on the basis of a constructive possession theory.

[2] In awarding defendant a new trial, the Court of Appeals held, first, that the trial court's error was not subject to prejudicial error review and, then, that, even if prejudicial error review were appropriate, the trial court's erroneous constructive possession instruction prejudiced defendant. In urging us to uphold the validity of the first of these two decisions, defendant argues that an erroneous instruction concerning a legal theory that lacks sufficient evidentiary support is "presumptively erroneous"[4] and requires automatic reversal, with this assertion resting

4. In his brief, defendant appears to use the terms "presumptively erroneous" and "per se erroneous" as if they were synonymous. As this Court has previously noted,

upon defendant's interpretation of a series of decisions by this Court. In other words, defendant argues that the extent to which a prejudice inquiry should be conducted in cases involving errors such as the one at issue here has already been resolved, so that the Court of Appeals' decision must be upheld on stare decisis grounds.

Admittedly, the decisions upon which defendant relies in attempting to establish that this Court has adopted an automatic reversal rule consistently grant appellate relief in the event that a trial judge allows the jury to convict a defendant on the basis of a legal theory that lacks sufficient evidentiary support without explicitly engaging in any sort of prejudice inquiry. On the other hand, none of the decisions upon which defendant relies explicitly holds that a prejudice inquiry would be inappropriate in such instances,[5] and a number of them contain language that suggest that such a prejudice analysis should be conducted. *Moore*, 315 N.C. at

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"[p]resumption is a term which is often loosely used." *Henderson County v. Osteen*, 297 N.C. 113, 117, 254 S.E.2d 160, 163 (1979). As a general proposition, evidentiary presumptions are either "permissive," "conclusive," or "mandatory," with a permissive presumption involving a situation in which, once "the basic fact underlying the presumption has been established," "the presumed fact may or may not be found," *Dobson v. Harris*, 352 N.C. 77, 82 n.3, 530 S.E.2d 829, 835 n.3 (2000); a mandatory presumption, which may or may not be rebuttable, involving a situation in which, "[once] the basic fact has been established, the presumed . . . fact *must* be found unless sufficient evidence of its nonexistence is forthcoming," *id.* at 82 n.3, 530 S.E.2d at 835 n.3 (alterations in original) (quoting Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 44, at 148 (5th ed. 1998)); and a conclusive presumption being another term for an irrebutable mandatory presumption, *State v. Reynolds*, 307 N.C. 184, 189, 297 S.E.2d 532, 535 (1982) (stating that "[a] conclusive presumption provides that upon proof of the basic fact, the presumed fact must be found and cannot be overcome by rebutting evidence" (quoting John M. Schmolesky, *County Court of Ulster County v. Allen and Sandstrom v. Montana: The Supreme Court Lends an Ear but Turns Its Face*, 33 Rutgers L. Rev. 261, 265 (1981))). As we understand defendant's argument, the presumption arising from the delivery of an instruction authorizing the jury to convict the defendant on the basis of a legal theory lacking sufficient evidentiary support to which the defendant made a contemporaneous objection is a conclusive one—if such an event occurs, a new trial must be awarded without any further inquiry.

5. This Court did discuss the harmless error issue in *Pakulski*, in which the State sought a finding of non-prejudice on the grounds that "the jury could have based its verdict solely on the robbery felony." *Pakulski*, 319 N.C. at 574, 356 S.E.2d at 326. After noting that "the verdict form does not reflect the theory upon which the jury based its finding of guilty of felony murder" and that "we cannot discern from the record upon which theory the jury relied," this Court declined to "assume that the jury based its verdict on the theory for which it received a proper instruction." *Id.* at 574, 356 S.E.2d at 326. However, given that the State's evidence tying defendant to the homicide for which he was convicted consisted of little, if anything, more than accomplice testimony and given that the defendant presented both alibi evidence and other testimony challenging the accomplice's credibility, *id.* at 566-67, 356 S.E.2d at 322-23, the evidence of defendant's guilt was clearly subject to serious dispute. Similarly, in *Lynch*, the record contained evidence which a juror might

749, 340 S.E.2d at 408 (stating that "[i]t is generally prejudicial error for the trial judge to permit a jury to convict upon a theory not supported by the evidence"); *Dammons*, 293 N.C. at 272, 237 S.E.2d at 840 (stating that "[i]t is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the evidence"); *Lee*, 287 N.C. at 541, 215 S.E.2d at 149 (stating that "where the trial court in a criminal case permits the jury to return a verdict of guilty upon a legal theory or a state of facts not supported by the evidence it is prejudicial error entitling the defendant to a new trial"); *Knight*, 248 N.C. at 389-90, 103 S.E.2d at 455-56 (stating that the trial court's instructions, which "permitted the jury to rest its verdict on a theory not supported by the evidence," "was calculated to prejudice, and may have prejudiced, the defendant").[6] As a result, given that our existing jurisprudence does not conclusively establish that existing North Carolina law encompasses an automatic reversal rule of the type contended for by defendant, we must determine whether we should adopt such a rule.[7]

As this Court has said on numerous occasions, litigants are not entitled to receive "perfect" trials; instead, they are entitled to receive "a fair trial, free of prejudicial error." *State v. Ligon*, 332 N.C. 224, 243, 420 S.E.2d 136, 147 (1992). "In order to obtain a new trial it is incumbent on a defendant to not only show error but also to show that the error was so prejudicial that without the error it is likely that a different result would have been reached." *State v. Loren*, 302 N.C. 607, 613, 276 S.E.2d 365, 369 (1981); *see also State v. Alston*, 307 N.C. 321, 339, 298 S.E.2d 631, 644 (1983) (stating that "[t]he defendant is not entitled to a new trial

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have mistakenly believed to support the lying in wait theory that the Court ultimately determined to lack adequate evidentiary support, while the State's evidence of defendant's guilt on the basis of malice, premeditation, and deliberation was essentially circumstantial in nature. *Lynch*, 327 N.C. at 214-15, 393 S.E.2d at 813-14. As a result, neither of these decisions explicitly rejects the use of harmless error analysis in similar circumstance, while the outcomes in both cases are consistent with what seems to us to be an appropriately conducted harmless error analysis.

6. Similar language, which could be construed as dicta, appears in *State v. Dick*, 370 N.C. 305, 308, 807 S.E.2d 545, 547 (2017), which cites *Lynch*, 327 N.C. at 219, 393 S.E.2d at 816, for the proposition that "insufficient evidence regarding one theory submitted to the jury, when prejudicial, was reversible error requiring [a] new trial."

7. The State has argued, in reliance upon *Griffin* and *Belton*, that an automatic reversal rule arising from an instruction allowing the jury to convict a criminal defendant on an invalid legal theory would only be appropriate in the event that the legal theory in question was unavailable to the State as a matter of law rather than because that theory lacked sufficient evidentiary support. We do not find this argument persuasive given this Court's repeated decisions to grant appellate relief in cases in which the trial court allowed the jury to convict the defendant based upon a legal theory that lacked sufficient record support.

based on trial errors unless such errors were material and prejudicial"); *State v. Galloway*, 304 N.C. 485, 496, 284 S.E.2d 509, 516 (1981) (stating that "[i]t has long been the rule in this jurisdiction that not every erroneous ruling on the admissibility of evidence will result in a new trial being ordered," with the burden being "on the appellant not only to show error but also to show that there is a reasonable possibility 'that, had the error in question not been committed, a different result would have been reached at the trial.' ") (quoting N.C.G.S. § 15A–1443 (1978)). "The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence" and "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 3105, 92 L. Ed. 2d 460, 470 (1986) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S. Ct. 1431, 1436, 89 L. Ed. 2d 674, 684-85 (1986) (first citing, *United States v. Nobles*, 422 U.S. 225, 230, 95 S. Ct. 2160, 2166, 45 L. Ed. 2d 141, 148 (1975); then citing R. Traynor, *The Riddle of Harmless Error* 50 (1970))).[8] As a result, a showing of prejudice is generally required before appellate relief is granted in this jurisdiction.

An automatic reversal rule has, however, been deemed appropriate in some circumstances. As the United States Supreme Court has stated in discussing the concept of structural error, " 'while there are some errors to which [harmless-error analysis] does not apply, they are the exception and not the rule,' " with "harmless-error analysis [being applicable] to instructional errors so long as the error at issue does not categorically ' "vitiat[e] *all* the jury's findings" ' " and with "[a]n instructional error arising in the context of multiple theories of guilt no more vitiat[ing] *all* the jury's findings than does omission or misstatement of an element of the offense when only one theory is submitted." *Hedgepeth v. Pulido*, 555 U.S. 57, 61, 129 S. Ct. 530, 532, 172 L. Ed. 2d 388, 391-92 (2008) (per curiam) (first alteration in original) (first quoting

8. Although we agree with defendant that our recent decision in *Boyd*, which was made in a plain error context, does not control the outcome of this case given that defendant properly preserved his challenge to the trial court's erroneous constructive possession instruction for purposes of appellate review, it does tend to call into question any contention that harmless error concepts are completely irrelevant to errors such as the one at issue in this case and to suggest that our usual approach to harmless error analysis, under which unpreserved errors are reviewed under a plain error standard of review while errors that were the subject of a contemporaneous objection at trial are reviewed for harmlessness under the standards enunciated in either N.C.G.S. § 15A-1443(a) or N.C.G.S. § 15A-1443(b), applies in cases like this one.

Clark, 478 U.S. at 578, 106 S. Ct. at 3106, 92 L. Ed. 2d at 471; and then quoting *Neder v. United States*, 527 U.S. 1, 11, 119 S. Ct. 1827, 1834, 144 L. Ed. 2d 35, 48 (1999) (third alternation in original) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S. Ct. 2078, 2082, 124 L. Ed. 2d 182, 190-91 (1993)).[9] Similarly, this Court has treated some errors as being sufficiently serious as to merit an award of appellate relief without the necessity for a showing of prejudice. *State v. Hucks*, 323 N.C. 574, 581, 374 S.E.2d 240, 245 (1988) (holding that a failure to appoint two counsel to represent a defendant in a capital trial constitutes prejudicial error per se); *State v. Mitchell*, 321 N.C. 650, 659, 365 S.E.2d 554, 559 (1988) (holding that a trial court's "refusal to permit both [of the defendant's trial] counsel to address the jury during the defendant's final arguments constitute[d] prejudicial error per se in both the guilt-innocence and sentencing phases" of the defendant's capital trial); *State v. Bindyke*, 288 N.C. 608, 627, 220 S.E.2d 521, 533 (1975) (holding that the presence of an alternate juror in the jury room during deliberations constitutes prejudicial error per se). However, this Court has generally refrained from finding prejudicial error per se even in the face of serious evidentiary and instructional errors. For example, this Court has deemed errors such as the admission of "other bad acts evidence" in violation of N.C.G.S. § 8C-1, Rule 404(b), *see State v. McKoy*, 317 N.C. 519, 529, 347 S.E.2d 374, 380 (1986) (holding that the admission of evidence tending to show other criminal conduct on the part of one of the defendants involved in a multi-defendant trial in violation of N.C.G.S. § 8C-1, Rule 404(b) constituted harmless error with respect to both that defendant and a codefendant), a violation of a defendant's constitutional right to be informed of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), *see State v. Hicks*, 333 N.C. 467, 481, 428 S.E.2d 167, 175 (1993) (holding that, in light of "the extremely incriminating evidence properly admitted at trial," "the admission of the defendant's first confession in violation of the *Miranda* exclusionary rule was harmless

9. We do not, of course, wish to be understood as treating the United States Supreme Court's structural error jurisprudence as controlling with respect to the issue of when, under North Carolina's law, harmless error analysis is and is not appropriate. Instead, as is discussed more fully in the text of this opinion, "North Carolina courts also apply a form of structural error known as error per se," under which "error per se is automatically deemed prejudicial and thus reversible without a showing of prejudice." *State v. Lawrence*, 365 N.C. 506, 514, 723 S.E.2d 326, 331-32 (2012) (first citing N.C.G.S. § 15A–1443(a) (2009); then citing *State v. Parker*, 350 N.C. 411, 421, 426, 516 S.E.2d 106, 114, 117 (1999), *cert. denied*, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000); and then citing *State v. Brown*, 325 N.C. 427, 428, 383 S.E.2d 910, 910 (1989) (per curiam)). As a result of the fact that "federal structural error and state error per se have developed independently," *Lawrence*, 365 N.C. at 514, 723 S.E.2d at 332, the same error might or might not be deemed structural by the federal courts and error per se by the North Carolina courts.

beyond a reasonable doubt"), *abrogated on other grounds by State v. Buchanan*, 353 N.C. 332, 340, 543 S.E.2d 823, 828 (2001)), a violation of the defendant's right to confront the witnesses for the prosecution, *see State v. Ortiz-Zape*, 367 N.C. 1, 13-14, 743 S.E.2d 156, 164-65 (2013) (holding, in the alternative, that any violation of the defendant's confrontation rights resulting from the admission of expert witness opinion testimony that analyzed data from lab tests performed by another chemist was harmless beyond a reasonable doubt), *cert. denied*, 572 U.S. 1134, 134 S. Ct. 2660, 189 L. Ed. 2d 208 (2014)), and the omission of an element of the crime charged from the trial court's substantive instructions to the jury, *see State v. Bunch*, 363 N.C. 841, 845, 689 S.E.2d 866, 869 (2010) (holding "that the trial court's omission of elements of a crime in its recitation of jury instructions is reviewed under the harmless error test"), to be subject to harmless error analysis. The instructional error under consideration in this case more closely resembles the types of errors in which a showing of prejudice is required before an award of appellate relief is deemed appropriate than the fundamental, difficult to evaluate, errors that this Court has deemed to constitute prejudicial error per se, and defendant has failed to demonstrate why the instructional error at issue in this case should be treated differently than similar instructional errors. As a result, like the United States Supreme Court, we are not persuaded that the error at issue in this case is so potentially serious as to justify adopting an automatic reversal rule, which essentially treats errors like the one at issue in this case as prejudicial error per se.

The only argument advanced in defendant's brief in support of the adoption of an automatic reversal rule other than the assertion that this Court's prior decisions require such a decision is a contention that such an automatic reversal rule, as modified in *Boyd*, "recognizes the nature of the error and the simple steps that can be taken to address any resulting harm." In essence, defendant argues that, under the automatic reversal rule as modified by *Boyd*, "[t]he presumption that the jury convicted on the unsupported legal theory [ ] applies only where there is a general verdict rather than a special verdict specifying the theory underlying the conviction." In defendant's view, "[i]f, despite an objection, the [S]tate insists on an unsupported theory," it "can request a special verdict specifying the theory on which the jury convicted," with this "minimal step" "cost[ing] the [S]tate virtually nothing." According to defendant, it is only fair to place the burden of requesting the use of a special verdict upon the State, since it "is the party requesting the unsupported jury instruction" "over objection" and should "bear the responsibility of curing the problems the unsupported instruction would cause" and since placing the burden on defendant to request a special instruction may

result in a decision that defendant "has abandoned her original objection" or "joined in requesting the instruction." As a result, defendant contends that "[a] rule presuming prejudice where the defendant has objected to the unsupported instruction [ ] puts the incentives in all of the right places," with defendant being given an incentive to object in order to either preclude the delivery of the unsupported instruction or permit "[t]he resulting error [to] be corrected on appellate review" and with the State being given "an incentive to request a special verdict form to cure the problem it created."

We are not persuaded by defendant's incentive-based argument. As an initial matter, defendant's argument rests upon the apparent assumption that the only way in which the delivery of an instruction allowing defendant's conviction on the basis of an unsupported legal theory could ever be deemed harmless is in the event that the reviewing court is provided with an ironclad guarantee that the jury did not rely upon the unsupported legal theory in deciding to convict defendant. Needless to say, insistence upon such a guarantee would not be consistent with this Court's usual approach to the resolution of harmless error-related issues, which the relevant statutory language indicates must rest upon an assessment of the likelihood that the outcome at trial would have been different had an error not occurred. In addition, defendant's argument overlooks the fact that errors like the one at issue here do not necessarily occur at the behest of the State. On the contrary, the trial court may elect to deliver an instruction like the one at issue here on its own motion or even over the State's objection. Moreover, the trial court might reject a request by the State for the submission of a special verdict form to the jury. Even so, defendant's approach suggests that an automatic reversal would be appropriate in each of those instances. Finally, defendant fails to take into account the fact that, as long as a defendant lodges a contemporaneous objection to the delivery of an instruction like the one at issue here, the defendant's claim will be reviewed utilizing the more easily satisfied "reasonable possibility" standard set out in N.C.G.S. § 15A-1443(a) instead of the more stringent "reasonable probability" standard enunciated for use in "plain error" situations in *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 (stating that, in order to establish plain error, "a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty' " (first quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983); then citing *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986))). On the other hand, in the event that the State failed to seek to obtain the submission of a special verdict form or failed to persuade the trial court to submit one, it would have

passed up a chance to potentially eliminate any need for the reviewing court to undertake a "reasonable possibility" analysis. Defendant's implicit argument to the contrary notwithstanding, the approach to the harmless error issue that we deem to be appropriate in this case does, in fact, provide the State with an incentive to ask that the jury be required to return a special verdict. As a result, for all of these reasons, we hold that defendant's challenge to the delivery of the trial court's unsupported constructive possession instruction is subject to traditional harmless error analysis.

[3] As a general proposition, a defendant seeking to obtain appellate relief on the basis of an error to which he or she lodged an appropriate contemporaneous objection at trial must establish that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a) (2017).[10] However, the history of this Court's decisions in cases involving the submission of similar erroneous instructions and our consistent insistence that jury verdicts concerning a defendant's guilt or innocence have an adequate evidentiary foundation persuade us that instructional errors like the one at issue in this case are exceedingly serious and merit close scrutiny to ensure that there is no "reasonable possibility" that the jury convicted the defendant on the basis of such an unsupported legal theory. However, in the event that the State presents exceedingly strong evidence of defendant's guilt on the basis of a theory that has sufficient support and the State's evidence is neither in dispute nor subject to serious credibility-related questions, it is unlikely that a reasonable jury would elect to convict the defendant on the basis of an unsupported legal theory.[11]

According to the undisputed evidence elicited at trial, investigating officers went to a convenience store parking lot after receiving a report

10. Defendant suggests that the Court should treat the trial court's decision to allow the jury to convict defendant on the basis of a constructive possession theory as a constitutional violation subject to harmless review pursuant to N.C.G.S. § 15A-1443(b) (requiring the State to show that the alleged error was harmless beyond a reasonable doubt). In view of the fact that the Court of Appeals did not find that the trial court's error was constitutional in nature and the fact that defendant did not petition this Court to allow consideration of such a constitutional issue, we decline to adopt defendant's alternative argument concerning the manner in which the required harmless error analysis should be conducted.

11. According to defendant, the State waived the right to argue that the trial court's error was harmless on the grounds that the State had failed to advance such an argument in its discretionary review petition. Admittedly, the question to be presented stated in the State's petition refers to the Court of Appeals' "fail[ure] to conduct a prejudice analysis." However, the State's petition contained an argument heading asserting that the Court of

that an individual possessed a firearm and discovered such a weapon while searching an individual who matched the description of the person in question and who turned out to be defendant. In the event that the jury found this undisputed evidence to be credible beyond a reasonable doubt, it would have been required, under the trial court's instruction, to convict defendant of possession of a firearm by a felon on the basis of an actual possession theory. As a result, the ultimate issue before this Court is whether there is a reasonable possibility that the jury would have sufficiently questioned the credibility of the investigating officers' testimony to return a verdict of acquittal.

Defendant claims that the jury could have questioned the credibility of the investigating officers' testimony for a number of reasons, including the injuries that Officer Van Aken inflicted upon defendant during a post-arrest altercation, the fact that Officer Van Aken's employment was terminated and that he was charged with assaulting defendant based upon this post-arrest altercation, the fact that the statements provided by various officers were not written immediately after defendant's arrest, and the fact that the officers' interactions with defendant were not recorded and that the other officers remained in contact with Officer Van Aken after his termination. Almost all of the reasons that defendant has advanced in support of his contention that the testimony of the investigating officers is subject to serious question rest upon events that occurred after defendant was placed under arrest for possessing a firearm. For that reason, defendant's implicit suggestion that investigating officers attempted to "frame" defendant in order to protect Officer Van Aken seems to us to rest upon a logical inconsistency. Moreover, while defendant's arguments predicated upon the officers' failure to record their interaction with defendant and the delay in the drafting of their reports cannot be dismissed upon the basis of similar logic, they do not strike us as particularly compelling. Finally, the Court of Appeals' emphasis upon the fact that the jury asked for further instructions concerning the possession issue and the fact that the jury acquitted defendant of carrying a concealed weapon does not tend to show prejudice, at least in our opinion, given the absence of any explanation for why the jury might have sought clarification about the meaning of possession and

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Appeals had "fail[ed]to conduct a prejudice analysis in accord with" *Boyd* and *Griffin* and an argument that there was no "reasonable possibility" that the jury would have convicted defendant on the basis of a constructive possession theory "since the evidence was uncontroverted that defendant possessed the firearm" given that "it was removed from his person and he acknowledged to police that he was holding it." As a result, we conclude that the issue of whether the delivery of the constructive possession instruction constituted prejudicial error is properly before us.

the fact that guilt of carrying a concealed weapon, unlike the charge of possession of a firearm by a felon, requires proof of intentional concealment. *State v. Gilbert*, 87 N.C. 527, 528 (1882) (stating that "*[t]o conceal a weapon*[ ] means something more than the mere act of having it where it may not be seen" and "implies an assent of the mind, and a *purpose* to so carry it, that it may not be seen"). As a result, defendant has not satisfied us that there is a reasonable possibility that, in the absence of the erroneous constructive possession instruction, the jury would have acquitted defendant.

Thus, for all of these reasons, we hold that the Court of Appeals erred by holding that challenges to jury instructions allowing juries to convict criminal defendants on the basis of legal theories that lack evidentiary support are not subject to harmless error analysis and by holding that, even if such a harmlessness analysis were appropriate, there was a reasonable possibility that the outcome at defendant's trial would have been different had the trial court refrained from allowing the jury to convict defendant on the basis of a constructive possession theory. As a result, the Court of Appeals' decision in this case is reversed and this case is remanded to the Court of Appeals for consideration of defendant's remaining challenges to the trial court's judgment.

REVERSED AND REMANDED.

Justice MORGAN dissenting.

While I agree with my learned colleagues in the majority that the Court of Appeals correctly determined that the trial court erred by allowing the jury to potentially convict defendant of the offense of possession of a firearm by a felon on the basis of a constructive possession theory, I nonetheless disagree with their conclusion that the lower appellate court erred in its determination that there was a reasonable possibility that the outcome of defendant's trial would have been different if the trial court had refrained from allowing the jury to potentially convict defendant on the basis of a theory of constructive possession. Based on my position, I am inclined to affirm the Court of Appeals' decision to vacate the trial court's judgment and grant defendant a new trial.

My departure from the majority in this case stems from the liberties that I believe the majority improperly takes to discount the reasonable possibility that, had the error of the submission of the constructive possession of firearm by defendant not been submitted to the jury as a theory for his guilt, a different result would have been reached at the trial

out of which this appeal arises. The majority expressly utilizes "close scrutiny to ensure that there is no 'reasonable possibility' that the jury convicted the defendant on the basis of such an unsupported legal theory"—namely, constructive possession—while introducing a new evaluative standard that "in the event that the State presents exceedingly strong evidence of defendant's guilt on the basis of a theory that has sufficient support and the State's evidence is neither in dispute nor subject to *serious* credibility-related questions"—here, actual possession—"it is unlikely that a reasonable jury would elect to convict the defendant on the basis of an unsupported legal theory." (Emphasis added.) As I assess this newly minted doctrine by the majority cobbled together from selected principles enunciated in our decisions of *Bradshaw*, *Jones*, *Ligon*, *Loren*, *Alston*, and *Galloway*, coupled with the majority's willingness to couch the trial jury's ability to "potentially convict defendant of the offense of possession of a firearm by a felon on the basis of a constructive possession theory" as insufficient wrongful exposure to warrant a new trial for defendant, my recognition of the fundamental concepts of trial evidence, the application of the appropriate law to the evidence, and the respective roles of the judicial forum and the jury leads me in a different direction from my fellow jurists in this case.

"Every criminal conviction involves facts (i.e., what actually occurred) and the application of the law to the facts . . . . In a jury trial the judge instructs jurors on the law, and the jury finds the facts and applies the law." *State v. Arrington*, ___ N.C. ___, ___, 819 S.E.2d 329, 331 (2018). Courts must not "invade the province of the jury, which is to assess the credibility of the witnesses and determine the facts from the evidence adduced." *State v. Rhodes*, 290 N.C. 16, 24, 224 S.E.2d 631, 636 (1976) (first citing *State v. Canipe*, 240 N.C. 60, 81 S.E.2d 173 (1954); and then citing 7 Strong's North Carolina Index 2d Trial § 18 (1968)); *see also State v. Ward*, 364 N.C. 133, 153, 694 S.E.2d 738, 750 (2010) (Newby, J., dissenting) (observing that "it is the role of the jury to make any final determination regarding the weight to be afforded to the evidence" (quoting *Crocker v. Roethling*, 363 N.C. 140, 150, 675 S.E.2d 625, 632 (2009) (Martin, J., concurring)). By opining upon the reasonableness of the jury's two potential theories underlying a verdict of guilty, when there is no evidence to support one theory and sufficient evidence to support the other theory, the majority is engaging in an exercise that invades the established province of the jury. I do not consider it to be within a judicial forum's proper purview to sift through the evidence and to speculate as to which theory, between or among multiple ones, a jury considered to be persuasive to reach its verdict, yet the majority has effectively done so here.

In a similar vein, the majority states that "the ultimate issue before this Court is whether there is a reasonable possibility that the jury would have sufficiently questioned the credibility of the investigating officers' testimony to return a verdict of acquittal." "[A]ssess[ing] the credibility of the witnesses" is a matter for the jury. *Rhodes*, 290 N.C. at 24, 224 S.E.2d at 636. While the majority acknowledges that "defendant suggests that the jury could have had doubts about the credibility of the State's evidence" regarding the investigating law enforcement officers, nonetheless, the members of the majority assess the manner in which the trial jury could have determined issues of credibility with respect to the submitted theories of defendant's culpability and conclude that it "seems to us to rest upon a logical inconsistency." Just as this Court in the case at bar should refrain from conducting a review of the potential effect of erroneous jury instructions upon a jury's verdict of guilty by invading the province of the jury as to which submitted legal theory may have prompted its finding of guilty, this Court should also take care to refrain from conducting such a review by invading the province of the jury by conducting its own examination of witness credibility issues.

For the reasons stated, I would affirm the decision of the Court of Appeals in this case.

STATE OF NORTH CAROLINA
v.
PATTY MEADOWS

No. 400PA17

Filed 7 December 2018

1. Appeal and Error—nonconstitutional sentencing issues—failure to object—preserved for review

Defendant's nonconstitutional sentencing issues were preserved for appellate review even though she failed to object before the sentencing court. N.C. Rule of Appellate Procedure 10(a)(1) did not require a contemporaneous objection because the trial court knew or should have known that defendant sought the minimum possible sentence. The issues were also preserved for review by N.C.G.S. § 15A-1446(d)(18), which has been upheld because it does not conflict with the N.C. Rules of Appellate Procedure.

2. Sentencing—safekeeping order—not overruled

Defendant was not entitled to relief where she argued that the judge who sentenced her overruled the safekeeping order of the trial judge trial by sentencing her. A judge other than the trial judge may conduct a sentencing hearing, and there was no indication that the trial judge wished to retain jurisdiction over the matter or delay sentencing.

3. Sentencing—within statutory limit—presumed regular and valid

Defendant was not entitled to relief where she argued that the judge who sentenced her abused his discretion. The sentence was within the statutory limit and thus presumed regular and valid where the record showed no indication that the judge considered irrelevant or improper matters in determining the severity of the sentence.

4. Appeal and Error—constitutional sentencing issue—failure to object—not preserved for review

Where defendant failed to lodge a contemporaneous objection to a constitutional issue before the sentencing court, appellate review of the Eighth Amendment argument was barred by N.C. Rule of Appellate Procedure 14(b)(2) and the Supreme Court's previous holdings that constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 806 S.E.2d 682 (2017), finding no error after appeal from judgments entered on 7 and 8 April 2016 by Judge Gary M. Gavenus in Superior Court, Madison County upon a jury verdict finding defendant guilty following a trial before Judge R. Gregory Horne. Heard in the Supreme Court on 2 October 2018.

Joshua H. Stein, Attorney General, by Daniel Snipes Johnson, Special Deputy Attorney General, for the State.

Michael E. Casterline for defendant-appellant.

BEASLEY, Justice.

This case requires the Court to consider whether Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure precludes appellate review of sentencing arguments not raised before the sentencing court.

We conclude that defendant waived her Eighth Amendment arguments by failing to raise them before the sentencing court; defendant's nonconstitutional sentencing issues were preserved for appellate review despite her failure to lodge a contemporaneous objection, but are nonetheless meritless. Accordingly, we modify and affirm the decision of the Court of Appeals. As to defendant's ineffective assistance claim, we hold that discretionary review was improvidently allowed.

Following a jury trial, defendant Patty Meadows was convicted of one count each of trafficking opium by sale, trafficking opium by delivery, and trafficking opium by possession. All three counts arose from the same transaction, in which defendant sold seventy-five oxycodone pills to a confidential informant. At trial, after the close of all evidence, defendant sought emergency medical treatment, which prevented her attendance at closing arguments and the jury charge. After deliberating for less than an hour, the jury returned its verdict of guilty on all counts in defendant's absence. Noting that a defendant's presence is required for sentencing, Judge R. Gregory Horne continued the matter to the following day. The next day, defense counsel produced a doctor's note indicating that defendant was medically unable to be present in court at that time. Judge Horne entered a written safekeeping order directing the Sheriff of Madison County to "place the defendant . . . in the custody of the Warden of Central Prison, Wake County, Raleigh, North Carolina for safekeeping pursuant to [N.C.G.S. §] 162-39 until such time as [s]he is needed to face the charges held against [her] in Court or Release Conditions have been satisfied." After Judge Horne entered the safekeeping order, Judge Gary M. Gavenus assumed the bench to conduct the administrative session scheduled for that day. Later that afternoon, defendant was brought to court and presented to Judge Gavenus for sentencing. Without objection from defendant, Judge Gavenus conducted defendant's sentencing hearing. After hearing the State's summary of the trial evidence and both parties' arguments, Judge Gavenus imposed a minimum sentence of seventy months' imprisonment on each count, with the sentences for two counts to be served concurrently and the third sentence to be served consecutively to the first two.

Defendant appealed, arguing that: (1) defendant received ineffective assistance of counsel; (2) by sentencing defendant, Judge Gavenus improperly overruled Judge Horne's safekeeping order; (3) Judge Gavenus abused his discretion in imposing consecutive sentences on an elderly first offender for a single drug transaction; and (4) defendant's sentences are grossly disproportionate to her offenses in violation of the Eighth Amendment to the United States Constitution. The Court

of Appeals found no error in defendant's convictions and sentences, concluding that defendant failed to preserve arguments related to her sentencing as required by Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure and that defendant was not denied effective assistance of counsel. *State v. Meadows*, ___ N.C. App. ___, ___, 806 S.E.2d 682, 686-96 (2017). Defendant petitioned for discretionary review of each issue, which this Court allowed on 9 May 2018. *Meadows*, ___ N.C. ___, 812 S.E.2d 847 (2018)

Defendant's arguments relate mostly to the sentence imposed by Judge Gavenus. As she argued before the Court of Appeals, defendant challenges her sentence as an abuse of discretion, an illegal overruling of one superior court judge by another, and a violation of the Eighth Amendment's prohibition against cruel and unusual punishments.

Despite her failure to voice any objection to her sentence or the sentencing proceedings in the trial court, defendant contends she is entitled to raise these arguments on appeal. Before the Court of Appeals, defendant relied on a line of cases decided by that court holding that the issue preservation requirements of Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure do not apply to errors occurring during a sentencing hearing. The Court of Appeals disagreed, concluding that Rule 10(a)(1) applies to sentencing hearings; accordingly, the Court of Appeals held that defendant had waived her sentencing arguments. *Meadows*, ___ N.C. App. at ___, 806 S.E.2d at 689-96. Before this Court, defendant now argues that sentencing issues are statutorily preserved by N.C.G.S. § 15A-1446(d)(18) (2017); thus, no contemporaneous objection is required.

[1] Under the Constitution of North Carolina, this Court possesses "exclusive authority to make rules of procedure and practice for the Appellate Division." N.C. Const. art. IV, § 13, cl. 2. Accordingly, this Court has promulgated Appellate Rule 10, which states:

> 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. . . . Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, including, but not limited to, whether the judgment is

> supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, may be made the basis of an issue presented on appeal.

N.C. R. App. P. 10(a)(1). Thus, the Appellate Rules generally require that parties take some action to preserve an issue for appeal. *Id.* Exceptions exist, however, allowing a party to raise an issue on appeal that was not first presented to the trial court.

This Court addressed one such scenario in *State v. Canady*, 330 N.C. 398, 410 S.E.2d 875 (1991). There, the defendant raised for the first time on appeal an alleged error in the trial court's finding of an aggravating factor to support an increased sentence. *Id.* at 400, 410 S.E.2d at 877. We held that Rule 10(b)(1), the text of which is now found in Rule 10(a)(1),[1] did not apply to the case because the rule is "directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal." *Id.* at 401, 410 S.E.2d at 878.

The *Canady* opinion has inspired a string of decisions in the Court of Appeals holding that Rule 10(a)(1) categorically does not apply to errors committed during a sentencing hearing. *See State v. Pettigrew*, 204 N.C. App. 248, 258, 693 S.E.2d 698, 704-05, *appeal dismissed*, 364 N.C. 439, 706 S.E.2d 467 (2010); *State v. Curmon*, 171 N.C. App. 697, 703-04, 615 S.E.2d 417, 422-23 (2005); *State v. Hargett*, 157 N.C. App. 90, 92-93, 577 S.E.2d 703, 705 (2003). To derive such a categorical rule from *Canady*, however, one must ignore the opinion's rationale. In that case, we considered the purpose of Rule 10(a)(1): "to require a party to call the court's attention to a matter upon which he or she wants a ruling before he or she can assign error to the matter on appeal." *Canady*, 330 N.C. at 401, 410 S.E.2d at 878. Thus, we noted that the rule discourages gamesmanship; a party may not simply "allow evidence to be introduced or other things to happen during a trial as a matter of trial strategy and then assign error to them if the strategy does not work." *Id.* at 402, 410 S.E.2d at 878. Rather than create a categorical rule, we concluded that the danger of gamesmanship was not present in *Canady* and held

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1. Rule 10 was amended effective 1 October 2009, and certain provisions were changed and subsections moved. *Compare N.C. Rules of Appellate Procedure*, 363 N.C. 902, 935-38 (2009), *with N.C. Rules of Appellate Procedure*, 287 N.C. 672, 698-702 (1975). Prior to the 2009 amendment, the language currently contained in subdivision (a)(1) was located in subdivision (b)(1).

that no contemporaneous objection was required to preserve the issue for appellate review in that case. *Id.* at 402, 410 S.E.2d at 878 ("The defendant did not want the court to find the aggravating factor, and the court knew or should have known it. This is sufficient to [preserve the issue for appellate review].").

Here, defendant requested that all three sentences be consolidated, which would have resulted in a sentence of seventy to ninety-three months' imprisonment. Defense counsel argued in support of the requested sentence, noting defendant's advanced age, poor health, and previously clean criminal record. After hearing arguments, Judge Gavenus consolidated only two of the three sentences, resulting in a 140-month minimum term of imprisonment. As in *Canady*, the sentencing court "knew or should have known" defendant sought the minimum possible sentence. Accordingly, defendant need not have voiced a contemporaneous objection to preserve her nonconstitutional sentencing issues for appellate review.

Defendant's sentencing issues are also preserved by statute. In N.C.G.S. § 15A-1446(d) (2017), the General Assembly enumerated a list of issues it deems appealable without preservation in the trial court. One such issue is an argument that "[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law." *Id.* § 15A-1446(d)(18). Although this Court has held several subdivisions of subsection 15A-1446(d) to be unconstitutional encroachments on the rulemaking authority of the Court,[2] subdivision (18) is not one of them. In *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010), the Court explained that a statutory provision governing the preservation of issues for purposes of appellate review is unconstitutional only if it

2. *See State v. Stocks*, 319 N.C. 437, 439, 355 S.E.2d 492, 493 (1987) (holding N.C.G.S. § 15A-1446(d)(5) unconstitutional because its provision that errors based on insufficiency of evidence are reviewable without objection at trial conflicted with Appellate Rule 10(b)(3), which prohibited a defendant from "assign[ing] as error the insufficiency of the evidence to prove the crime charged unless he moves to dismiss the action, or for judgment as in case of nonsuit, at trial"); *State v. Bennett*, 308 N.C. 530, 535, 302 S.E.2d 786, 790 (1983) (holding unconstitutional N.C.G.S. § 15A 1446(d)(13), which allowed for appellate review of errors in the jury charge without an objection having been raised at trial, despite then-Appellate Rule 10(b)(2)'s provision to the contrary); *State v. Elam*, 302 N.C. 157, 159-61, 273 S.E.2d 661, 663-64 (1981) (holding unconstitutional N.C.G.S. § 15A-1446(d)(6), which provided that a defendant may appeal based on an argument made for the first time on appeal that the defendant "was convicted under a statute that is in violation of the Constitution of the United States or the Constitution of North Carolina," although Appellate Rule 14(b)(2) required that a constitutional challenge be "timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not)").

conflicts with a "specific provision[ ] of our appellate rules rather than the general rule stated in Rule of Appellate Procedure 10(a)." Because no such conflict existed, the Court upheld subdivision 15A-1446(d)(18). Accordingly, defendant's nonconstitutional sentencing arguments are preserved by statute.

[2] Nonetheless, although it was error for the Court of Appeals to decline to address defendant's sentencing arguments, defendant is not entitled to relief on appeal because those arguments are meritless.

Defendant's argument that Judge Gavenus "overruled" Judge Horne's safekeeping order by sentencing her is unavailing. First, a judge other than the trial judge may conduct a defendant's sentencing hearing. *State v. Sauls*, 291 N.C. 253, 263-64, 230 S.E.2d 390, 396 (1976), *cert. denied*, 431 U.S. 916, 53 L. Ed. 2d 226 (1977). Furthermore, neither the order nor Judge Horne's oral remarks indicated that he wished to retain jurisdiction over the matter or to delay sentencing. The order merely stated that defendant was to be held in custody "*until such time as [she] is needed* to face the charges held against [her] in Court or Release Conditions have been satisfied." From the bench, Judge Horne stated that the Department of Adult Correction should "evaluate [defendant's] situation *until such time as sentencing can be scheduled* and entered before *a court* of competent jurisdiction." (emphasis added). Judge Horne could have, but did not, say defendant should be held "until *I* can sentence her" or "until she can be brought before *me* for sentencing." Instead, Judge Horne's oral remarks and written order indicate an awareness that defendant might be sentenced by some other judge, so long as that judge presided over a court of competent jurisdiction.

[3] Defendant's argument that Judge Gavenus abused his discretion in sentencing her is similarly meritless. A sentence "within the statutory limit will be presumed regular and valid," unless "the record discloses that the court considered irrelevant and improper matter[s] in determining the severity of the sentence." *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987) (citing and quoting *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977)). Defendant here states that Judge Gavenus must have been influenced by defendant's decision to take her case to trial because there is no other explanation for the harshness of the imposed sentence. Defendant's conclusory accusation lacks any support in the record. Because there is no reason to believe Judge Gavenus was influenced by irrelevant or improper considerations, the within-limits sentence imposed here is presumed proper.

[4] Although defendant's nonconstitutional sentencing issues are preserved without contemporaneous objection consistent with *Canady* and N.C.G.S. § 15A-1446(d), constitutional issues are not. Rule 14(b)(2) of the North Carolina Rules of Appellate Procedure requires that a constitutional issue must have been "timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not)" as a prerequisite to appellate review in this Court. Further, this Court has consistently held that "[c]onstitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010) (quoting *State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004), *cert. denied sub nom. Queen v. North Carolina*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005)). This is true even when a sentencing issue is intertwined with a constitutional issue. *See*, *e.g.*, *id.* at 301-02, 698 S.E.2d at 67 (holding that the defendant's constitutional double jeopardy argument was waived for failure to object at trial); *State v. Madric*, 328 N.C. 223, 231, 400 S.E.2d 31, 36 (1991) (same). Because defendant failed to argue to the sentencing court that the sentence imposed violates the Eighth Amendment, she may not raise that argument on appeal.

For the reasons stated, we hold that defendant waived her Eighth Amendment argument by failing to raise it before the sentencing court. Moreover, with regard to defendant's nonconstitutional sentencing arguments, we conclude that they were preserved for appellate review, but are meritless. Finally, we hold that discretionary review was improvidently allowed as to defendant's ineffective assistance claim.

MODIFIED AND AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

STATE OF NORTH CAROLINA
v.
DARRELL LEE MELTON

No. 253PA17

Filed 7 December 2018

Criminal Law—solicitation—distinguished from attempt

The trial court should have granted defendant's motion to dismiss charges of attempted murder where defendant arranged with a hired killer (actually an undercover officer) to kill his former wife, counseled the hired killer on how to complete that action, and paid the hired killer in full. North Carolina's definition of "attempt" has developed through the common law rather than through the model penal code, as it has some other states. Defendant's acts were all part of the solicitation, not the execution of the crime solicited. There was no evidence to establish that defendant committed an overt act that would have resulted in the killing in the ordinary and likely course or things.

Justice MORGAN 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. ___, 801 S.E.2d 392 (2017), finding no error after appeal from judgments entered on 21 April 2016 by Judge Mark E. Powell in Superior Court, Transylvania County. Heard in the Supreme Court on 15 May 2018 in session in the Henderson County Historic Courthouse in the City of Hendersonville, pursuant to section 18B.8 of Chapter 57 of the 2017 North Carolina Session Laws.

Joshua H. Stein, Attorney General, by Matthew Tulchin, Special Deputy Attorney General, for the State.

Glenn Gerding, Appellate Defender, by Kathryn L. VandenBerg, Assistant Appellate Defender, for defendant-appellant.

HUDSON, Justice.

This case comes to us by way of defendant's petition for discretionary review of the Court of Appeals' decision. Specifically, defendant has asked us to determine whether the Court of Appeals erred by (1) upholding defendant's conviction for attempted murder, and (2) holding that punishing defendant for both solicitation and attempted murder based on the same conduct did not violate double jeopardy. We hold that the Court of Appeals erred in upholding defendant's conviction for attempted murder, and accordingly, we reverse the decision of the Court of Appeals. Because of this holding, we need not reach the double jeopardy issue.

I. Factual and Procedural Background

The scene underlying this case began when defendant left telephone messages for an acquaintance, Lawrence Sorkin, in late fall of 2014 and January of 2015. At the time, defendant was involved in an ongoing child custody dispute with his former wife. In his first message, defendant asked if he could have a few minutes of Sorkin's time to discuss something that would be "beneficial" to defendant. In the message in January, defendant stated that he would be willing to give Sorkin $200 for his time. The two agreed to meet at a Waffle House in Brevard in late January.

When they met, Sorkin mentioned defendant's offer of $200 and told defendant that the payment was not necessary; defendant paid the restaurant bill, and they continued their conversation near defendant's car. While they were outside, defendant told Sorkin that he was feeling pressured by his child custody case, that he felt it was not getting any better, and that he was tired of going to court. According to Sorkin, defendant also recalled an earlier conversation between them in which Sorkin jokingly recalled that his father mentioned he had connections to some men in Jacksonville, Florida who could "break a few legs." By the end of the conversation, Sorkin feared that defendant meant to hurt his former wife.

Later that same day, Sorkin went to the Transylvania County Sheriff's Department to report his discussion with defendant. From that point on, Sorkin cooperated with the Sheriff's Office and helped arrange a meeting between defendant and an undercover officer in a Walmart parking lot. Sorkin's role in arranging the meeting involved multiple telephone conversations and in-person meetings with defendant, in which Sorkin acted as if he was contacting a "resource" on defendant's behalf who could "take care of the matter however [defendant] wanted."

The meeting between defendant and the undercover officer at the Walmart parking lot occurred on 3 February 2015. Sorkin was also present, and he directed defendant to the undercover officer's car. Sorkin left immediately after defendant made contact with the officer. When defendant entered the car, the officer, playing the role of a hired killer, scanned defendant and asked him if he had a wire or a recording device. Later, defendant mentioned the $2,500 that he was told to bring to the meeting. The officer instructed defendant to show him the money.

After seeing the money, the officer began to ask defendant questions about his former wife. Defendant provided her name, address, and cell phone number. At some point during the meeting, defendant also provided pictures of his former wife. The officer then asked defendant how he could "get" defendant's former wife "by herself." In response, defendant gave the undercover officer the name of his daughter's elementary school and the drop-off times at the school. In response to questions, defendant then gave a description of his former wife's car and informed the officer that she was always alone in the car after she dropped their daughter off at school.

Next, the undercover officer instructed defendant on how they would communicate and how defendant would pay the remaining $7,500. Specifically, the officer told defendant that he had just purchased a phone that he would have for six days only. He told defendant that in two days, defendant should buy a "Verizon burn phone," and text him from that number. The officer told defendant that, "[w]hen it's done," he would instruct defendant on where to send the remaining $7,500. The officer then told defendant that "when we're done," defendant should destroy the Verizon burn phone.

After giving defendant these last instructions, the undercover officer asked defendant where he wanted his former wife's dead body. Defendant responded that he was "having trouble understanding." After this response, the officer asked defendant, "Why am I here?" and defendant responded, "I need to be the sole parent making every decision with my daughter all the time, and no chance of any more court cases. Totally no chance." The officer then stated that he was not a lawyer, and defendant indicated that he understood that. While pushing defendant to clarify his intent, the officer told defendant that if he wanted sole custody, he could "give [defendant] sole custody." Defendant responded that he wanted sole custody. Then after again being asked where he wanted his former wife's dead body and how defendant "want[ed] [him] to do it," defendant told the officer that "as long as there's no chance that I will answer questions or be involved, I want – I want to make sure my

daughter is with me all the time, only me, no chance of any further court cases or anything." Defendant ultimately told the officer that he did not "want any bodies moved."

After stating that he did not want any bodies moved, defendant explained to the undercover officer how he could do the job without defendant's daughter being present. Defendant said, "I pick [my daughter] up Monday, and she's with me. Six days is – what's we're in. During school is fine. Thursday is a half day, they got off at noon." After the officer asked defendant again how he "want[ed] it done," defendant ultimately responded, "I don't care about any details."

Before defendant left the vehicle, the undercover officer asked whether defendant would have any trouble acquiring the rest of the $7,500. Defendant responded that he had the full $10,000 with him, and he gave it to the officer. After defendant handed over the money, the officer told him they would have no more communication and that defendant would know once his former wife was dead. Next, the officer asked defendant if the $10,000 was all from one bank. Defendant responded that the money was withdrawn at "[d]ifferent times" and that he "saved a while." The officer next said to defendant that his former wife could "disappear . . . Thursday or not." Defendant then responded "Yes, sir" to whether "Thursday it is okay?" At that point, defendant left the officer's car, and he was arrested as he returned to his own car. At the time of defendant's arrest, the undercover officer had left the Walmart parking lot.

Following his arrest, defendant was indicted on 9 February 2015 on charges of attempted first-degree murder and solicitation to commit first-degree murder. Defendant filed a motion to continue on 7 April 2016 requesting more time to obtain a neuropsychiatrist to examine the results of an MRI done on defendant's brain. The court denied defendant's motion to continue.[1] Defendant's trial began on 18 April 2016, and the facts summarized above were placed into evidence, primarily through the testimonies of Sorkin, the undercover officer who met with defendant, and defendant himself.

At the close of the State's evidence, defendant moved to dismiss, arguing that "attempted murder . . . . falls outside of the purview of the statute under the evidence . . . here." The motion was denied. At

1. Defendant supplemented his Motion to Continue at trial by requesting extra time to review discovery that he had received from the prosecutor the previous week and that he had been having trouble accessing. The Court withheld ruling on this motion until defendant was able to review the discovery during a break in the trial. Defense counsel did not renew this motion.

the close of all evidence, defendant renewed his motion to dismiss, arguing that "on the attempted murder charge . . . the act or the res that is being used, as I understand it . . . was in point of fact subsumed in the solicitation and not indicative of an attempt." The court denied defendant's renewed motion to dismiss.

The jury found defendant guilty of attempted first-degree murder and solicitation to commit first-degree murder. The court sentenced him to a term of 157 to 201 months for attempted first-degree murder and a consecutive term of 58 to 82 months for solicitation to commit first-degree murder. Defendant gave oral notice of appeal at trial.

The Court of Appeals first held that the trial court did not err in denying defendant's motion to dismiss the attempted murder charge because there was "sufficient evidence of an overt act to permit the case to go to the jury." *State v. Melton*, ___ N.C. App. ___, 801 S.E.2d 392, 2017 WL 2644445, at *2 (2017) (unpublished). Specifically, the Court of Appeals concluded that the evidence sufficiently showed an overt act because "[defendant] hired another man to kill his ex-wife." *Melton*, 2017 WL 2644445, at *2. The Court of Appeals also pointed to evidence indicating that defendant "provid[ed] details to ensure that the killer could carry out that act." *Id.* The Court of Appeals recognized that such details included

> his ex-wife's name, phone number, and daily routine; a photograph of her; and a description of her car. Melton gave the man a specific day to carry out the murder and even discussed what to do with the body. Finally, Melton gave the man $10,000 to pay for the murder. He then got out of the man's car and walked away, believing the murder would be carried out.

Id. Based on this evidence, the Court of Appeals reasoned that defendant had committed an overt act because, "[a]t that point, Melton had taken every step necessary to complete this contract killing." *Id.* The Court of Appeals added:

> All that remained was for the hitman (had he not been an undercover agent) to kill Melton's ex-wife. Melton provided the killer with everything he needed to complete the job, including key information on the target and the money to pay for the deed. In short, Melton took a key "step in a direct movement towards the commission of the offense[.]"

Id. (brackets in original) (quoting *State v. Parker*, 224 N.C. 524, 526, 31 S.E.2d 531, 531-32 (1944), *overruled in part on other grounds by State v. Hageman*, 307 N.C. 1, 14 n.1, 296 S.E.2d 433, 441 n.1 (1982)).

Additionally, the Court of Appeals observed without elaboration that "our holding is consistent with those in other jurisdictions, which uniformly hold that, although mere solicitation is insufficient to constitute attempt, specific acts taken to complete a murder-for-hire, such as those taken by [defendant] here, can satisfy the elements of attempted murder." *Id.* at *3 (citations omitted).

Second, the Court of Appeals held that the trial court did not violate defendant's right to be free from double jeopardy in punishing him for both solicitation and attempted murder based on the same conduct because "[e]ach of these two offenses 'requires proof of [an additional] fact which the other does not.' " *Id.* (quoting *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306, 309 (1932)). Specifically, the Court of Appeals observed that "[a]ttempt, unlike solicitation, requires an overt act," *id.* (quoting *State v. Clemmons*, 100 N.C. App. 286, 290, 396 S.E.2d 616, 618 (1990)), and "[s]olicitation, unlike attempt, requires 'enticing or inducing' another to commit a crime." *Id.* (quoting *State v. Tyner*, 50 N.C. App. 206, 207, 272 S.E.2d 626, 627 (1980), *disc. rev. denied*, 302 N.C. 633, 280 S.E.2d 451 (1981)).

Following the decision by the Court of Appeals, defendant filed a petition for discretionary review, which we allowed on 1 November 2017. In his petition, defendant requested that we examine whether the Court of Appeals erred by (1) upholding defendant's conviction for attempted murder, and (2) holding that there was no double jeopardy violation in punishing defendant for both solicitation and attempted murder based upon the same conduct. We conclude that the evidence was insufficient to show that defendant committed attempted murder as defined by North Carolina law. Therefore, we reverse the decision upholding the denial of defendant's motion to dismiss the attempted murder charge. Because of this holding, we need not address the double jeopardy issue.

II. Analysis

We first conclude here that the Court of Appeals' reliance upon cases from other jurisdictions, all of which have statutory frameworks different from our own, provides inadequate support for its decision. Second, but more important, we conclude that under North Carolina law, the State's evidence adequately showed solicitation but fell short of showing the required overt acts for attempted first-degree murder, so that defendant's motion to dismiss that charge should have been allowed.

This Court reviews the decision of the Court of Appeals to determine whether it contains any errors of law. N.C. R. App. P. 16(a); *State v. Mumford*, 364 N.C. 394, 398, 699 S.E.2d 911, 914 (2010) (citation omitted). "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. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 549 (2018) (quoting *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781, *cert. denied*, 537 U.S. 1005, 123 S. Ct. 495, 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 492, 809 S.E.2d at 549 (quoting *Mann*, 355 N.C. at 301, 560 S.E.2d at 781)). "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." *Id.* at 492, 809 S.E.2d at 549-50 (quoting *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)). "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." *Id.* at 492, 809 S.E.2d at 550 (quoting *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016)).

A. <u>The Court of Appeals Relied on Inapposite Case Law from Other Jurisdictions in Concluding Defendant Committed Attempted Murder</u>.

Under North Carolina law, "[t]he elements of an attempt to commit any crime are: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996) (first citing *State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993); then citing *State v. Smith*, 300 N.C. 71, 265 S.E.2d 164 (1980)).

The general rule in North Carolina for determining when conduct constitutes an overt act has developed at common law:

> In order to constitute an attempt, it is essential that the defendant, with the intent of committing the particular crime, should have done some overt act adapted to, approximating, and which in the ordinary and likely course of things would result in the commission thereof. Therefore, the act must reach far enough towards the

> accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory. In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made.

Id. at 668, 477 S.E.2d at 921 (quoting *State v. Price*, 280 N.C. 154, 158, 184 S.E.2d 866, 869 (1971)); *see Parker*, 224 N.C. at 525-26, 31 S.E.2d at 531-32; *State v. Addor*, 183 N.C. 687, 689, 110 S.E. 650, 651 (1922).

Although our General Assembly has not defined this offense in a statutory enactment as other states have done, the legislature has clearly expressed its policy preferences that solicitation and attempt are two different crimes and that attempt is to be punished more harshly than solicitation. N.C.G.S. § 14-2.5 (2017) ("Unless a different classification is expressly stated, an attempt to commit a misdemeanor or a felony is punishable under the *next lower* classification as the offense which the offender attempted to commit. An attempt to commit a Class A or Class B1 felony is a Class B2 felony, an attempt to commit a Class B2 felony is a Class C felony, an attempt to commit a Class I felony is a Class 1 misdemeanor, and an attempt to commit a Class 3 misdemeanor is a Class 3 misdemeanor." (emphasis added)); *id.* § 14-2.6(a) (2017) ("Unless a different classification is expressly stated, a person who solicits another person to commit a felony is guilty of a felony that is *two classes lower* than the felony the person solicited the other person to commit, except that a solicitation to commit a Class A or Class B1 felony is a Class C felony, a solicitation to commit a Class B2 felony is a Class D felony, a solicitation to commit a Class H felony is a Class 1 misdemeanor, and a solicitation to commit a Class I felony is a Class 2 misdemeanor."(emphasis added)). We may or may not agree with these policy choices, but we are not a legislative body and decline to engage in that analysis here.

In support of its conclusion that defendant committed an overt act, the Court of Appeals relied on several cases from other jurisdictions that it says "uniformly hold that, although mere solicitation is insufficient to constitute attempt, specific acts taken to complete a murder-for-hire, such as those taken by [defendant] here, can satisfy the elements of attempted murder." *Melton*, 2017 WL 2644445, at *3 (citing *State v. Mandel*, 78 Ariz. 226, 229-30, 278 P.2d 413, 416 (1954)); *People v. Superior Court*, 41 Cal. 4th 1, 11-12, 157 P.3d 1017, 1024 (2007); *Howell v. State*, 157 Ga. App.

451, 454-55, 278 S.E.2d 43, 46 (1981) (*cert. denied*, Apr. 10, 1981); *State v. Montecino*, 2004-0892, pp. 7-8 (La. App. 1 Cir. 2/11/05); 906 So. 2d 450, 454, *cert. denied*, 2005-0717 (La. 6/3/05); 903 So. 2d 456; *State v. Group*, 98 Ohio St. 3d 248, 2002-Ohio-7247, 781 N.E.2d 980 at ¶96. Having carefully considered these decisions, we conclude that to the extent the Court of Appeals relied on them, it erred because each comes from a jurisdiction whose attempt law is derived from a statutory framework materially different than our own.

Two of these decisions are from Georgia and Ohio, jurisdictions that have generally adopted the Model Penal Code (MPC). *See Howell*, 157 Ga. App. at 456, 278 S.E.2d at 47 (stating that the "substantial step" language in Georgia's criminal code was adopted from the MPC); *see also Group*, 98 Ohio St. 3d 248, 2002-Ohio-7247, 781 N.E.2d, at ¶¶ 101-102 (quoting and citing *State v. Woods*, 48 Ohio St. 2d 127, 132, 357 N.E.2d 1059, 1063 (1976), *judgment vacated and case remanded*, 438 U.S. 910, 98 S. Ct. 3133, 57 L. Ed. 2d 1153 (1978), which adopted the MPC's "substantial step" test to determine when an overt act has been committed). The MPC has been recognized as "broaden[ing] the scope of attempt liability." 2 Wayne R. LaFave, *Substantive Criminal Law* § 11.4(e), at 313 (3d ed. 2018) [hereinafter LaFave, *Substantive Criminal Law*] (citing Model Penal Code § 5.01 cmt. 6, at 329-30 (Am. Law Inst. 1985)); *see also Howell*, 157 Ga. App. at 456, 278 S.E.2d at 47 ("It is expected, in the normal case, that this approach will broaden the scope of attempt liability."). This broader scope of liability appears to result from the MPC's distinct concern with "restraining dangerous persons." LaFave, *Substantive Criminal Law* § 11.4(e), at 313 (citing Model Penal Code § 5.01 cmt. 6, at 329-30); *see also* Model Penal Code § 5.01(2), at 296 (stating that conduct will satisfy the Code's "substantial step" test if it is "strongly corroborative of the actor's criminal purpose"). In addition to widening the scope of attempt liability, the MPC switches the focus of the attempt analysis to "what the actor has already done rather than what remains to be done." LaFave, *Substantive Criminal Law* § 11.4(e), at 313; *see also State v. Daniel B.*, 164 Conn. App. 318, 328-29, 137 A.3d 837, 846 (2016); *People v. Hawkins*, 311 Ill. App. 3d 418, 424, 723 N.E.2d 1222, 1226-27 (2000); *State v. Lammers*, 479 S.W.3d 624, 633 (Mo. 2016) (en banc).

North Carolina has not adopted the MPC approach to attempt, nor has our legislature defined attempt by statute; instead, our definition of attempt has developed from the common law, which differs from the MPC approach in important respects. Specifically, our common law definition of attempt does not include conduct that is merely "*strongly corroborative* of the actor's criminal purpose." Model Penal Code

§ 5.01(2), at 296 (emphasis added). Our attempt law includes as overt acts conduct that "stand[s] either as the first or some subsequent step in *a direct movement towards the commission of the offense* after the preparations are made." *Miller*, 344 N.C. at 668, 477 S.E.2d at 921 (emphasis added) (quoting *Price*, 280 N.C. at 158, 184 S.E.2d at 869); *see Parker*, 224 N.C. at 526, 31 S.E.2d at 531-32; *Addor*, 183 N.C. at 689, 110 S.E. at 651. Simply put, our attempt law requires conduct more overt than that required under the MPC. Also, in determining whether the conduct is a "first or some subsequent step," our approach considers what remains to be done, and therefore differs in focus from the MPC. *Miller*, 344 N.C. at 668, 477 S.E.2d at 921 (quoting *Price*, 280 N.C. at 158, 184 S.E.2d at 869); *see Parker*, 224 N.C. at 526, 31 S.E.2d at 531; *Addor*, 183 N.C. at 689, 110 S.E. at 651.

Two of the other cases mentioned by the Court of Appeals are from jurisdictions that allow an overt act to be shown by "slight acts" when an intent to commit a crime is "clearly shown." *Mandel*, 78 Ariz. at 228, 278 P.2d at 415 (citations omitted); *People v. Superior Court*, 41 Cal. 4th at 8, 157 P.3d at 1022 (citations omitted). As noted above, North Carolina's attempt law varies from the MPC; our law also differs from the slight acts approach. Beyond mere "slight acts in furtherance" of a criminal intent, *Mandel*, 78 Ariz. at 228, 278 P.2d at 415 (citations omitted); *People v. Superior Court*, 41 Cal. 4th at 8, 157 P.3d at 1022 (citations omitted), our Court has required a defendant's conduct to "stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made." *Miller*, 344 N.C. at 668, 477 S.E.2d at 921 (quoting *Price*, 280 N.C. at 158, 184 S.E.2d at 869); *see Parker*, 224 N.C. at 526, 31 S.E.2d at 531-32; *Addor*, 183 N.C. at 689, 110 S.E. at 651.[2]

Finally, the Court of Appeals cited a case from Louisiana, a jurisdiction whose attempt statute did not require the defendant to have committed an act that would "have actually accomplished" the criminal purpose.

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2. It should be noted that we have quoted "slight acts" language in at least one prior case, *State v. Bell*, 311 N.C. 131, 141, 316 S.E.2d 611, 616 (1984) ("[W]henever the design of a person to commit a crime is clearly shown, slight acts in furtherance of the design will constitute an attempt." (quoting 21 Am. Jur. 2d *Criminal Law* § 159, at 316 (1981)); however, we have not adopted this approach for determining when an overt act has occurred. In *Bell* this language was included in our analysis of intent, not overt acts, and we included it to demonstrate that an intent to commit the underlying offense can be shown from the commission of an overt act. *See id.* at 140-41, 316 S.E.2d at 616 ("While it is true that the actual physical assault on [the victim] took place outside the presence of [the defendant], we nevertheless believe that . . . the attempt was complete upon [the] defendant's act in ordering the women to remove their clothes, an act which served to make the intent unequivocal.").

See Montecino, 2004-0892 at p. 6; 906 So.2d at 453 ("Any person who . . . does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt . . . and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose." (quoting La. Rev. Stat. Ann. § 14:27(A) (2005))). Unlike the approach in *Montecino*, North Carolina law requires a defendant to commit an act that "in the ordinary *and likely* course of things *would result in the commission thereof*." *Miller*, 344 N.C. at 668, 477 S.E.2d at 921 (emphases added) (quoting *Price*, 280 N.C. at 158, 184 S.E.2d at 869; *see Parker*, 224 N.C. at 525, 31 S.E.2d at 531; *Addor*, 183 N.C. at 689, 110 S.E. at 651.

For the above reasons, we conclude that the cases from other jurisdictions referenced and relied on by the Court of Appeals are rooted in jurisprudence inconsistent with the North Carolina legal framework and definition of attempt. Accordingly, we decline to follow this approach.

B. The Evidence Did Not Show an "Overt Act" Amounting to Attempt as Defined By North Carolina Law.

As discussed already, our legislature has not chosen to statutorily define the crime of attempt, although it has set forth the punishment structure. The contours of our law of attempt have thus evolved through the common law.

Our common law has developed several guidelines to distinguish acts of preparation from overt acts. In *Addor* we quoted the decision of the California Supreme Court in *People v. Murray* which provided that "[b]etween preparation for the attempt and the attempt itself[ ] there is a wide difference. The preparation[s] consist[ ] in devising or arranging the means or measures necessary for the commission of the offense[.] [T]he attempt is the direct movement toward[s] the commission after the preparations are made." *Addor*, 183 N.C. at 690, 110 S.E. at 651 (quoting *People v. Murray*, 14 Cal. 159, 159, 1859 WL 1186, at *1 (1859)). We then applied this test to determine that "the alleged attempt did not amount to a direct ineffectual act towards the present manufacture of spirituous liquors, to a 'commencement of the consummation,' " *id.* at 690, 110 S.E. at 652 (quoting *Hicks v. Commonwealth*, 86 Va. 223, 226, 9 S.E. 1024, 1025 (1889)), "but, as indicated in the opinion of *Chief Justice Fields* in the *California* case, the said acts consisted only in 'devising or arranging the means or measures necessary [to] the commission of the offense.' " *Id.* at 690, 110 S.E. at 652 (quoting *Murray*, 14 Cal. at 159, 1859 WL 1186, at *1).

Furthermore, in both *Addor* and *Parker* we stated that an overt act is committed when the act is, at least, "in part execution of a criminal design." *Parker*, 224 N.C. at 526, 31 S.E.2d at 532 (citations omitted); *Addor*, 183 N.C. at 688, 110 S.E. at 650 (citation omitted). Additionally, in both *Addor* and *Parker* we concluded that an overt act occurs when the act is "apparently adapted to produce the result intended." *Parker*, 224 N.C. at 526, 31 S.E.2d at 532 (citing *Addor*, 183 N.C. at 689, 110 S.E. at 651).

The Court of Appeals concluded that defendant attempted to kill his former wife by taking the following steps: (1) hiring another man to kill his former wife, (2) providing him the details necessary to complete the killing, (3) helping the hired killer formulate a plan to kill his former wife, and (4) paying the hired killer to commit the killing. *Melton*, 2017 WL 2644445, at *2. The Court of Appeals reasoned that "[a]ll that remained was for the hitman (had he not been an undercover agent) to kill [defendant's] ex-wife." *Id.*

We are not persuaded that the Court of Appeals properly applied our common law to these facts; while the evidence of defendant's conduct does show a completed solicitation, his actions fall short of an overt act constituting attempt. Specifically, in meeting with the supposed hired killer, tendering the $2,500 in cash as an initial payment, providing the hired killer the details necessary to complete the killing of defendant's former wife, and helping the hired killer plan how to get his former wife alone and how to kill her out of the presence of their daughter, defendant engaged in ample and horrifying acts of solicitation. "The gravamen of the offense of soliciting lies in counseling, enticing or inducing another to commit a crime." *State v. Furr*, 292 N.C. 711, 720, 235 S.E.2d 193, 199 (citation omitted), *cert. denied*, 434 U.S. 924, 98 S. Ct. 402, 54 L. Ed. 2d 281 (1977). Furthermore, evidence can still prove solicitation "when the solicitation is of no effect." *State v. Hampton*, 210 N.C. 283, 284, 186 S.E. 251, 252 (1936). The evidence here reveals that, intending that his wife be killed, defendant counseled the hired killer concerning how to complete that criminal objective. Moreover, evidence established that defendant enticed and induced the hired killer to commit the crime by tendering the $2,500 initial payment.

Nonetheless, evidence of these preparatory acts, calculating as they are, does not amount to proof of overt acts amounting to attempt under our law. Specifically, by providing details to the supposed hired killer to carry out the killing and giving him an initial payment, defendant certainly "devis[ed] or arrang[ed] the means or measures necessary for the commission of the offense." *Addor*, 183 N.C. at 690, 110 S.E. at 651

(quoting *Murray*, 14 Cal. at 159, 1859 WL1186, at *1). Yet, at that point, defendant had not begun to "execut[e]" the "criminal design" that he helped concoct. *Parker*, 224 N.C. at 526, 31 S.E.2d at 532; *Addor*, 183 N.C. at 688, 110 S.E. at 650. Moreover, the act of planning the killing and making an initial payment to the hired killer would not, without additional conduct, inexorably result in the commission of the offense in the "ordinary and likely course of things." *Miller*, 344 N.C. at 668, 477 S.E.2d at 921 (quoting *Price*, 280 N.C. at 158, 184 S.E.2d at 869); *see Parker*, 224 N.C. at 525, 31 S.E.2d at 531; *Addor*, 183 N.C. at 689, 110 S.E. at 651.

Furthermore, in striking an agreement with the hired killer to kill his former wife and paying the supposed hired killer in full, defendant engaged in more conduct than that minimally necessary for a solicitation; however, he did not commit an overt act amounting to attempt.[3]

We conclude that even though hiring and paying a hired killer exceeds the minimum conduct required to prove solicitation, such acts do not satisfy our requirement of overt acts necessary to prove attempt.[4] The Court of Appeals concluded that defendant had committed an overt act because "[a]ll that remained was for the hitman (had he not been an undercover agent) to kill [defendant's] ex-wife." *Melton*, 2017 WL 2644445, at *2. But, even in giving the State the benefit of every reasonable inference from these facts, we conclude that defendant's actions, reprehensible as they were, failed to qualify as attempt under

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3. Here the "hitman" was an undercover police officer who had no intention of killing defendant's former wife, and as such, defendant was not charged with conspiracy. Under North Carolina law, a conspiracy exists when "*two or more* persons" agree to "do an unlawful thing or to do a lawful thing in an unlawful way by unlawful means." *State v. Horton*, 275 N.C. 651, 656, 170 S.E.2d 466, 469 (1969) (emphasis added) (quoting *State v. Gallimore*, 272 N.C. 528, 532, 158 S.E.2d 505, 508 (1968)), *cert. denied*, 398 U.S. 959, 90 S. Ct. 2175, 26 L. Ed. 2d 545 (1970); *State v. Goldberg*, 261 N.C. 181, 202, 134 S.E. 2d 334, 348 (emphasis added), *cert. denied*, 377 U.S. 978, 84 S. Ct. 1884, 12 L. Ed. 2d 747 (1964), *disapproved on other grounds by News & Observer Publ'g Co. v. State ex rel. Starling*, 312 N.C. 276, 283, 322 S.E.2d 133, 138 (1984). "No overt act is necessary to complete the crime of conspiracy." *Goldberg*, 261 N.C. at 202, 134 S.E. 2d at 348 (citing *State v. Davenport*, 227 N.C. 475, 494, 42 S.E.2d 686, 699 (1947)). "The crime is complete when the agreement is made." *Horton*, 275 N.C. at 656, 170 S.E.2d at 469 (quoting *Gallimore*, 272 N.C. at 532, 158 S.E.2d at 508). Here, had the hired killer not actually been an undercover officer, and had the hired killer actually agreed to kill defendant's former wife, this gap where new conduct did not give rise to new criminal liability would have been filled by the conspiracy doctrine.

4. Because a solicitation is complete under North Carolina law even if it is "of no effect," *Hampton*, 210 N.C. at 284, 186 S.E. at 252, defendant had committed the solicitation even before he paid the hired killer in full and, earlier still, before he and the hired killer even reached an agreement.

our common law. Furthermore, although defendant and the supposed hired killer agreed to a "criminal design," neither defendant nor his apparent agent had begun to "execut[e]" it at the time defendant exited the "hitman's" car. *Parker*, 224 N.C. at 526, 31 S.E.2d at 532; *Addor*, 183 N.C. at 688, 110 S.E. at 650. We must conclude that, without more, none of defendant's conduct would have resulted in the commission of the offense in the "ordinary and likely course of things." *Miller*, 344 N.C. at 668, 477 S.E.2d at 921 (quoting *Price*, 280 N.C. at 158, 184 S.E.2d at 869); *see Parker*, 224 N.C. at 525, 31 S.E.2d at 531; *Addor*, 183 N.C. at 689, 110 S.E. at 651. Unless and until our legislature decides to define attempt differently by statute or to alter its current policy and equate solicitation with attempt, this evidence shows only solicitation.

Our conclusion here is strengthened by comparing these facts with those in other cases in which this Court has analyzed attempt. In *Addor* we concluded that there was "no unlawful attempt to commit the crime" of "unlawful manufacture of liquor." *Addor*, 183 N.C. at 691, 110 S.E. at 652. Specifically, we concluded that the defendants had not committed an overt act, because "at the time [they] had never made any liquor, did not have a still, and had not been able to procure one, thus showing that the perpetration of the alleged crime was at the time obviously impossible." *Id.* at 690, 110 S.E. at 652. Accordingly we reasoned that the defendants merely "devis[ed] or arrang[ed] the means or measures necessary [to] the commission of the offense." *Id.* at 690, 110 S.E. at 652 (quoting *Murray*, 14 Cal. at 159, 1859 WL 1186, at *1). This conclusion was supported by the fact that, at the time of arrest, the defendants merely

> "had some meal and bran; that, at the time of being arrested, defendants stated to the sheriff that they intended to make some liquor out of said meal and bran; that defendants did not have a still, but stated that some one had promised to let them have a still later; that defendants intended to make some liquor, if they could get a still, but they never got a still and never made any liquor."
>
> The above constitutes all the defendants did.

Id. at 688, 110 S.E. at 650 (quoting the jury's special verdict).

By contrast, we concluded in *Parker* that the defendants "with the intent to feloniously receive stolen property, knowing it to have been stolen, made an attempt" to do so when they "in the nighttime went to the place of concealment and were in the act of having [the property] rolled out to their truck." *Parker*, 224 N.C. at 526, 31 S.E.2d at 532. We concluded that "[t]his was more than an act of mere preparation. It was

an act that amounted to the commencement of the consummation, an act apparently adapted to produce the result intended." *Id.* at 526, 31 S.E.2d at 532.

In *Price* we also concluded that the evidence was sufficient to find that the defendant "attempt[ed] to rob another of personal property . . . with the use of a dangerous weapon, whereby the life of a person [was] endangered or threatened." 280 N.C. at 157, 184 S.E.2d at 869. There the defendant "entered the store with the intent to rob [the victim], struck him in the head with a blackjack, a dangerous weapon, for the purpose of accomplishing the intended robbery and thereby endangered his life." *Id.* at 158, 184 S.E.2d at 869. These overt acts amounted to an attempt. *Id.* at 158, 184 S.E.2d at 869.

In *Miller* we concluded that "there is sufficient evidence of intent to commit armed robbery and overt acts toward its commission, and so, by extension, to support the convictions for attempted armed robbery and first-degree murder under the felony murder rule." *Miller*, 344 N.C. at 669, 477 S.E.2d at 922. We concluded that sufficient evidence showed attempt based on the following facts:

> Here, defendant clearly intended to rob [the victim] and took substantial overt actions toward that end. His intent is evidenced by, *inter alia*, his statement to his cousin and his own admission to the authorities. In furtherance of the intended robbery, defendant took out his nine-millimeter handgun, sneaked up on [the victim], tried to fire, took the gun back down, removed the safety, and then fired two lethal shots into the head of the victim. It was only *after* seeing what he had done that defendant became scared and ran away. The sneak approach to the victim with the pistol drawn and the first attempt to shoot were each more than enough to constitute an overt act toward armed robbery, not to mention the two fatal shots fired thereafter.

Id. at 668-69, 477 S.E.2d at 922 (citing *State v. Powell*, 277 N.C. 672, 677-79, 178 S.E.2d 417, 420-21 (1971)).

We conclude the facts here are more comparable to *Addor* than to *Parker*, *Price*, or *Miller*. As in *Addor*, "the perpetration of the alleged crime was at the time obviously impossible," because a necessary component of the underlying crime was not within defendant's, or his agent's, reach. *Addor*, 183 N.C. at 690, 110 S.E. at 652. At the time of their arrest,

the defendants in *Addor* "did not have a still," *id.* at 690, 110 S.E. at 652; similarly, at the time of defendant's arrest here, no evidence showed that defendant had a weapon or an action plan other than for someone else to carry out the underlying crime. Moreover, at that time, the intended victim's whereabouts were not known, and the agent, as an undercover officer, was never actually going to kill defendant's former wife.

As discussed above, the evidence here showed acts by defendant that were all part of the solicitation, not the execution, of the crime solicited. We see no evidence here to establish that defendant committed an overt act that, "in the ordinary and likely course of things," would have resulted in the killing. *Miller*, 344 N.C. at 668, 477 S.E.2d at 921 (quoting *Price*, 280 N.C. at 158, 184 S.E.2d at 869); *see Parker*, 224 N.C. at 525, 31 S.E.2d at 531; *Addor*, 183 N.C. at 689, 110 S.E. at 651. Therefore, defendant's motion to dismiss was improperly denied.

III. Conclusion

Accordingly, we reverse the Court of Appeals' decision upholding defendant's conviction for attempted first-degree murder. Because of this holding, we need not address the double jeopardy issue. This case is remanded to the Court of Appeals for further remand to the trial court with instructions to vacate defendant's conviction for attempted first-degree murder and the judgment entered thereon, and for resentencing consistent with this opinion.

REVERSED IN PART; VACATED IN PART AND REMANDED.

Justice MORGAN dissenting.

I respectfully dissent from the majority's determination that defendant's motion to dismiss the charge of attempted first-degree murder was improperly denied by the trial court. In applying the well-established legal standards to assess the sufficiency of evidence offered by the prosecution in a criminal case in the face of a defendant's motion to dismiss, I strongly disagree with the ultimate conclusion of my learned colleagues in the majority that there is "*no* evidence here to establish that defendant committed an overt act that, 'in the ordinary and likely course of things,' would have resulted in the killing." (Emphasis added.) I would affirm the decision of the Court of Appeals in this matter and agree with its well-reasoned analysis that defendant's acts under review satisfied the elements of an attempt to commit first-degree murder.

It is well-established that

> [w]hen reviewing a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, this Court determines "whether the State presented 'substantial evidence' in support of each element of the charged offense. " ' "Substantial evidence" is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion.' " In this determination, all evidence is considered " 'in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence.' ". . . "[I]f there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied."

State v. Hunt, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012) (quoting *State v. Abshire*, 363 N.C. 322, 327-28, 677 S.E.2d 444, 449 (2009) (citations omitted), *superseded on other grounds by statute*, An Act to Protect North Carolina's Children / Sex Offender Law Changes, ch. 247, Sec. 8(a), 2005 N.C. Sess. Laws (Reg. Sess. 2006) 1065, 1070-71, *as recognized in State v. Barnett*, 368 N.C. 710, 714-15, 782 S.E.2d 885, 889 (2016)). "Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009) (citations omitted). Both competent and incompetent evidence must be considered. *State v. Allen*, 279 N.C. 406, 407, 183 S.E.2d 680, 681 (1971). "[S]o long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also 'permits a reasonable inference of the defendant's innocence.' " *Miller*, 363 N.C. at 99, 678 S.E.2d at 594 (quoting *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 140 (2002)).

"The elements of an attempt to commit any crime are: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense." *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996) (citations omitted). With regard to the second element, this Court has opined that:

> it is essential that the defendant, with the intent of committing the particular crime, should have done some overt

> act adapted to, approximating, and which in the ordinary and likely course of things would result in the commission thereof. Therefore, the act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It must not be merely preparatory. In other words, while it need not be the last proximate act to the consummation of the offense attempted to be perpetrated, it must approach sufficiently near to it to stand either as the first or some *subsequent step in a direct movement towards the commission of the offense after the preparations are made*.

Id. at 668, 477 S.E.2d at 921 (quoting *State v. Price*, 280 N.C. 154, 158, 184 S.E.2d 866, 869 (1971) (emphasis added)).

In applying these unassailable and fundamental legal principles to the unique facts which are presented in the instant case, in my view it is clear that the State has presented *some* evidence to establish that defendant committed an overt act that, in the ordinary and likely course of things, would have resulted in the killing of defendant's ex-wife, but for the intended "hitman" actually being an undercover law enforcement officer. As the majority notes, the evidence produced at trial by the State showed that defendant originally disclosed to his acquaintance Lawrence Sorkin that defendant was feeling pressured by defendant's ongoing child custody dispute with his ex-wife, that defendant was willing to pay Sorkin $200 to discuss something that would be "beneficial" to defendant, that defendant was tired of going to court, and that defendant reminded Sorkin of an earlier conversation between the two of them in which Sorkin had stated that Sorkin's father had connections to men who could "break a few legs." This discussion led Sorkin to fear that defendant was actively contemplating the prospect of bringing harm upon defendant's ex-wife. After this conversation, defendant was amenable to participating in a meeting that transpired less than a month later in which Sorkin arranged for defendant to talk with someone unknown to defendant—the undercover officer posing as a "hitman"—with said meeting occurring in a retail store parking lot, initiated by defendant's entry into an unknown person's car at Sorkin's direction after which defendant was immediately queried by the "hitman" about the presence of any recording device on defendant's person. Upon the request of the "hitman," defendant readily displayed the $2500 in cash which defendant was instructed to bring to the meeting. The unknown "hitman" asked for detailed information about defendant's ex-wife, which defendant readily provided: her name, address, cellular telephone number, and car description. Defendant also supplied photographs of his ex-wife

to the "hitman." In response to this individual's questions about the manner in which he could get the ex-wife alone, defendant gave the "hitman" the name of their daughter's elementary school, the times at which the ex-wife would drop off the child at said school, and he informed the "hitman" that the ex-wife was always alone in her car after the daughter was taken to school. After obtaining this information, the undercover officer posing as the "hitman" gave defendant specific instructions concerning the payment of the remaining balance of $7500 for the "hit" on defendant's ex-wife, the six-day duration of time in which the "hitman" would purchase a telephone and during which defendant should obtain a certain kind of telephone at a specified time and send a text message to the "hitman" from defendant's designated telephone, defendant's receipt of information on where to send the outstanding $7500 when "it's done," and defendant's need to destroy defendant's designated telephone "when we're done." The "hitman" went on to ask defendant where defendant wanted his ex-wife's dead body, and after a further exchange, defendant stated, "I need to be the sole parent making every decision with my daughter all the time, and no chance of any more court cases. Totally no chance." When the "hitman" assured defendant that the "hitman" could provide defendant with sole custody of his daughter if this was defendant's desire, defendant reiterated that he wanted sole custody. As to where defendant wanted his ex-wife's dead body and the manner in which defendant wanted the "hitman" to "do it," defendant said, "[A]s long as there's no chance that I will answer questions or be involved, I want—I want to make sure that my daughter is with me all the time, only me, no chance of any further court cases or anything." Defendant then offered examples of school days and school time periods to the "hitman" at which times the "hit" could be accomplished in the absence of the daughter. On the subject posed by the "hitman" regarding how defendant "wanted it done," defendant replied, "I don't care about any details." Towards the end of the meeting, defendant voluntarily tendered the total sum of $10,000 for the killing of defendant's ex-wife to the "hitman," after which the "hitman" informed defendant that the two of them would have no further communication, and defendant would know when the ex-wife was dead. As the discussion ended, when the undercover law enforcement officer representing himself as the "hitman" told defendant that defendant's ex-wife could "disappear," defendant answered that he wanted her to "disappear." At that point, all but the actual "hit" was complete. From defendant's perspective, he had done all that he could do to achieve the murder of his ex-wife.

In light of the totality of these evidentiary facts adduced at trial, I would find that the State's presentation was sufficient to withstand

defendant's motion to dismiss the attempted first-degree murder charge and that the trial court correctly denied the motion. The State presented substantial evidence in support of each element of the charged offense of attempted first-degree murder. With the State's entitlement to the benefit of every reasonable inference supported by the evidence regarding whether or not defendant committed the criminal offense of attempted first-degree murder, it was up to the jury at trial to determine if defendant's state of mind, acts, statements, representations, suggestions, and offers—or the lack thereof—during his interactions with his acquaintance Sorkin and the undercover officer posing as a "hitman" all combined to render defendant guilty of the charged offense. In my view, the State in the case sub judice clearly established, in accordance with this Court's decision in *Miller*, that defendant had the intent to commit the substantive offense of first-degree murder of his ex-wife through his detailed arrangements with, and voluntary full payment of funds to, the supposed "hitman"; that defendant performed an overt act toward commission of the killing beyond mere preparation, by virtue of these detailed arrangements regarding the myriad of informational items supplied to the "hitman" about the ex-wife along with the full payment to the "hitman" of the price for the deadly deed; and that defendant had no part in the ultimate outcome here, namely the incompletion of the substantive offense of first-degree murder because of the actual nonexistence of the "hitman" with whom defendant assumed he had hired to perform the killing.

The majority here adopts the position that the evidence at trial did not satisfy the second prong of the three-part *Miller* test regarding the elements of an attempt to commit a crime because no overt act by defendant rose to the level of an attempt beyond mere solicitation of the undercover officer posing as a "hitman" to perpetrate the killing. According to the majority's scale of measure, the evidentiary facts that I delineated earlier and which the Court of Appeals likewise identified in its opinion do not "amount to proof of overt acts amounting to attempt under our law" or constitute any overt act "apparently adapted to produce the result intended" because "the act of planning the killing and making an initial payment to the hired killer would not, without additional conduct, inexorably result in the commission of the offense in the 'ordinary and likely course of things.' " The majority further deems defendant's conduct to constitute only solicitation and not an overt act amounting to attempt because "although defendant and the supposed hired killer agreed to a 'criminal design,' neither defendant nor his apparent agent had begun to 'execut[e]' it at the time defendant exited the 'hitman's' car." I believe that the majority has unconsciously and unfortunately

elevated the commission of an overt act as an element of attempt with these analytical conclusions, because defendant's willingness to allow the "hitman" to choose among the plethora of times, places, and circumstances that defendant himself has identified as potential aspects of the killing and the futuristic aspects of specific directives identified by the "hitman" regarding timelines of the perpetration of the plan, should not be deemed as fundamentally fatal to the prosecution's ability to allow the jury to determine whether or not defendant committed an overt act as an element of the offense of attempted first-degree murder. Under the circumstances presented in this case, particularly defendant's voluntary payment in full of the "hitman's" required sum, defendant had completed his role in his plan to murder his ex-wife.

For the reasons stated, I would affirm the opinion of the Court of Appeals in this case.

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

BREE RUSHING STOKES
v.
WILLIAM COREY STOKES, II

No. 82A18

Filed 7 December 2018

Venue—motion to change—as of right and discretionary—interlocutory

An answer is not required before the filing of a motion for a discretionary change of venue, and the trial court in this case had the authority to consider such a motion. However, the trial court's discretionary determination was interlocutory and affected no substantial right of either party and was properly dismissed by the Court of Appeals.

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. ___, 811 S.E.2d 693 (2018), dismissing an interlocutory appeal from an order changing venue entered on 9 February 2017 by Judge N. Hunt Gwyn in District Court, Union County. Heard in the Supreme Court on 30 August 2018.

Collins Family Law Group, by Rebecca K. Watts, for plaintiff-appellant.

Passenant & Shearin Law, by Brione B. Pattison, for defendant-appellee.

NEWBY, Justice.

In this case we consider the appropriate timing of a trial court's consideration of a motion to change venue based upon the convenience of witnesses and whether such a decision is an interlocutory order subject to immediate appellate review. In doing so, we must decide if filing an answer is a prerequisite for the trial court to enter a discretionary order changing venue. The trial court and Court of Appeals determined defendant's motion challenging venue was proper because it was equivalent to an "answer." While defendant's filing was not an answer under our Rules of Civil Procedure, we nonetheless hold that the trial court had the authority to enter the discretionary order changing venue. Defendant's appeal from this order is interlocutory and not subject to immediate review. Accordingly, we modify and affirm the decision of the Court of Appeals dismissing the appeal.

In April 2016, plaintiff Bree Stokes and defendant William Stokes separated after fourteen years of marriage. Plaintiff and defendant have two minor children. On 20 October 2016, plaintiff and the children moved from Pitt County to Union County without defendant's knowledge. On 24 October, four days after moving there, plaintiff filed a complaint in Union County seeking child custody, child support, and equitable distribution. On 26 October, seemingly before he was served with plaintiff's action, defendant filed a complaint in Pitt County seeking child custody.

In early November 2016, defendant filed in Union County a "Motion for Emergency *Ex Parte* Custody and Motion to Dismiss for Improper Venue, or in the alternative, Motion to Change Venue." Defendant argued that Union County was a legally improper venue because plaintiff and defendant continued to reside in Pitt County. Alternatively, defendant argued the trial court should order the venue changed to Pitt County for the convenience of the witnesses. Defendant alleged that both parties resided in Pitt County until plaintiff moved, that they own property and a business in Pitt County, and that their friends and family, who will likely be witnesses, are located in Pitt County. Defendant further alleged that the children have been lifelong residents of Pitt County and currently attend school in Pitt County, that the children's health care providers,

therapists, and counselors who could provide firsthand knowledge of the children's well-being are all located in Pitt County, and that the Pitt County Department of Social Services has had an ongoing investigation into plaintiff's alleged abuse of the children.

At the trial court hearing on 6 December 2016, defendant accused plaintiff of forum shopping by filing her action in Union County instead of Pitt County. Defendant also noted that he intentionally filed his motion without having first filed an answer for the apparent purpose of avoiding waiver of his legal venue objection. The trial court determined:

> 10. N.C.G.S. § 1-82 allows for the proper venue of cases to be heard in the county in which the Plaintiff's [sic] or the Defendant's [sic] reside with the emphasis on the word "or." The disjunctive allows some cases, such as this one, to be in either venue.
>
> 11. . . . . The Defendant filed a written response . . . within the time for answering and it is a written request of the court to change venue along with other relief requested. The Court finds this is a responsive pleading amounting to an answer and that was timely filed.

The trial court entered an order on 8 February 2017 denying defendant's motion to dismiss for legally improper venue but granting defendant's motion to change venue to Pitt County. Plaintiff appealed.

A divided panel of the Court of Appeals dismissed plaintiff's appeal as interlocutory. *Stokes v. Stokes*, ___ N.C. App. ___, ___, 811 S.E.2d 693, 699 (2018). The Court of Appeals determined that the trial court granted the motion to change venue for the convenience of the witnesses, N.C.G.S. § 1-83(2) (2017), and not for legally improper venue, *id.* § 1-83(1) (2017). *Stokes*, ___ N.C. App. at ___, 811 S.E.2d at 697. Relying upon this Court's decision in *Hartford Accident & Indemnity Co. v. Hood*, 225 N.C. 361, 34 S.E.2d 204 (1945), the Court of Appeals concluded defendant could only file the motion to change venue for the convenience of the witnesses either with or after filing an answer. *Stokes*, ___ N.C. App. at ___, 811 S.E.2d at 698 (quoting *Hartford*, 225 N.C. at 362, 34 S.E.2d at 204-05). Because the Court of Appeals concluded that defendant's filing "amount[ed] to an answer," the court determined that defendant simultaneously and timely filed his motion to change venue with his "answer." *Id.* at ___, 811 S.E.2d at 698-99. After further determining that the trial court's order for discretionary change of venue was interlocutory and did not affect a substantial right, the Court of Appeals

dismissed plaintiff's appeal. *Id.* at ___, 811 S.E.2d at 699 (citing *Kennon v. Kennon*, 72 N.C. App. 161, 164, 323 S.E.2d 741, 743 (1984)). The dissent argued that defendant's filing was not an answer. Therefore, defendant's motion was untimely, and the trial court's order changing venue should have been reversed. *Id.* at ___, 811 S.E.2d at 699 (Murphy, J., dissenting).

Venue is "[t]he proper or a possible place for a lawsuit to proceed, usu[ally] because the place has some connection either with the events that gave rise to the lawsuit or with the plaintiff or defendant." *Venue*, *Black's Law Dictionary* (10th ed. 2014). Section 1-82 of the North Carolina General Statutes states that venue is proper "in the county in which the plaintiffs or the defendants . . . reside at [the action's] commencement." N.C.G.S. § 1-82 (2017). Improper venue is not jurisdictional, and it is subject to waiver. *See id.* § 1A-1, Rule 12(h)(1) (2017) ("A defense of . . . improper venue . . . is waived (i) if omitted from a motion [raising other Rule 12 defenses], or (ii) if it is neither made by motion under this rule nor included in a responsive pleading . . . ."); *see also*, *e.g.*, *Hawley v. Hobgood*, 174 N.C. App. 606, 609-10, 622 S.E.2d 117, 119 (2005) ("[S]ince venue is not jurisdictional it may be waived . . . ." (quoting *Miller v. Miller*, 38 N.C. App. 95, 97, 247 S.E.2d 278, 279 (1978))).

A party may move for a change of venue (1) when the venue is legally improper or (2) when the change would promote "the convenience of witnesses and the ends of justice." N.C.G.S. § 1-83(1)-(2). Our cases treat the first of these venue changes as mandatory; the second is discretionary. *See Zetino–Cruz v. Benitez–Zetino*, ___ N.C. App. ___, ___, 791 S.E.2d 100, 105 (2016).

Regarding legally improper venues, section 1-83 of the North Carolina General Statues provides:

> If the county designated . . . in the summons and complaint is not the proper [venue], the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.

N.C.G.S. § 1-83 (2017). Thus, if "before the time of answering expires" a party demonstrates the venue is legally improper, it has a right to a change of venue. *Id.* § 1-83(1). An interlocutory order changing venue as of right affects a substantial right and thus is immediately appealable. *See id.* § 7A-27(b)(3)(a) (2017) (providing appeal of right for an interlocutory order if it affects a substantial right); *Gardner v. Gardner*,

300 N.C. 715, 719, 268 S.E.2d 468, 471 (1980) ("[A] right to venue established by statute is a substantial right.").

While a party has a right to a legally proper venue, a party does not have a right to a preferred venue. When the current venue is proper, a party may nonetheless request a venue change in the court's discretion. A party may file a motion to change venue for the convenience of the witnesses at any time before trial if the party can make the required showing. A trial court may grant such a discretionary venue change "[w]hen the convenience of witnesses and the ends of justice would be promoted by the change." N.C.G.S. § 1-83(2). Though "an appeal from a discretionary ruling as to venue is interlocutory, does not affect a substantial right, and is not immediately appealable," either party may appeal the venue change order upon final judgment. *Its Leasing, Inc. v. Ram Dog Enters.*, 206 N.C. App. 572, 574, 696 S.E.2d 880, 882 (2010) (citing *Kennon*, 72 N.C. App. at 164, 323 S.E.2d at 743); *see also, e.g.*, *Kennon*, 72 N.C. App. at 163-65, 323 S.E.2d at 742-43 (considering the trial court's discretionary decision to change venue upon appeal from the trial court's final judgment).

The courts below believed that a defendant must file an answer before a court could consider a discretionary change of venue. This perception arose from this Court's decision in *Hartford*, a case decided in 1945 under code pleading and predating the Rules of Civil Procedure. *See generally Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970) (noting and discussing North Carolina's transition to the Rules of Civil Procedure in 1970). In *Hartford* the defendant moved for a discretionary venue change before filing his answer. On appeal this Court determined that because "it is impossible to anticipate what issues may be raised" by a defendant, the court could not exercise its discretion "until the allegations of the complaint [were] traversed." *Hartford*, 225 N.C. at 362, 34 S.E.2d at 204-05. At that time, "traverse" may have implied the need for a formal answer under our code pleading system. *See Traverse*, *Black's Law Dictionary* (10th ed. 2014) (defined as "[a] formal denial of a factual allegation made in the opposing party's pleading").

Under our current notice pleading system, however, neither the Rules of Civil Procedure nor the plain text of N.C.G.S. § 1-83 prohibits a party from filing a motion for a discretionary venue change before filing an answer. The Rules of Civil Procedure merely require that a party provide the court sufficient information in a written motion so the trial court may appropriately exercise discretion to rule on the motion's merits. *See* N.C.G.S. § 1A-1, Rule 7(b)(1) (2017) (stating that motions typically "shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought"). *Hartford*'s

underlying rationale and principal holding that the defendant failed to provide sufficient information contesting the plaintiff's venue choice in a formal filing thus parallels the modern requirements under the Rules of Civil Procedure. As long as the party provides sufficient information in a motion, the trial court's discretionary venue change does not need to await a party's filing of an answer.[1]

Before filing an answer, defendant here moved to change venue both as of right and in the court's discretion. The trial court first found that, even though plaintiff recently moved to Union County, the venue was legally proper and could not be changed as of right. The trial court then properly evaluated whether to grant defendant's discretionary motion to change venue. Defendant's motion contained many facts affecting venue, such as the parents' and children's current and past residency information, as well as the location of the children's school, disputed assets, potential witnesses with firsthand knowledge, and the ongoing child abuse investigation.[2] Thus, defendant gave the trial court sufficient information, which allowed that court to exercise its discretion and order the venue changed to Pitt County. While the trial court had sufficient information to rule on the timely motion, the trial court's discretionary determination is interlocutory and affects no substantial right of either party. Therefore, plaintiff's appeal is premature and must be dismissed, though plaintiff may still challenge the trial court's discretionary venue decision in an appeal taken from a final judgment, if the issue is properly preserved.

In sum, we hold that defendant's motion, though not an answer, was timely filed and properly considered by the trial court. We further hold that plaintiff's appeal from the trial court's order is interlocutory and warrants dismissal. Accordingly, we modify and affirm the decision of the Court of Appeals dismissing the appeal as interlocutory.

MODIFIED AND AFFIRMED.

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1. While defendant's motion clearly contests many allegations of the complaint, it is, as captioned, a motion under Rule 7(b) of the Rules of Civil Procedure and not an answer under Rule 8(b). *See* N.C.G.S. § 1A-1, Rule 7(b); *id.*, Rule 8(b) (2017).

2. Plaintiff raises a question about whether the trial court should have considered discretionary venue change at the motion hearing. Any argument that addresses the merits of the trial court's decision to grant a discretionary change of venue, as compared to its authority to do so, is more properly addressed in an appeal from any final judgment in this case, if properly preserved. As a result, we express no opinion concerning whether the trial court may have erred in granting defendant's discretionary change of venue motion; instead, we simply hold that the trial court had the authority necessary to make such a decision.

IN RE THE ADOPTION OF	)	
	)	From New Hanover County
K.P.J. AND K.L.J., MINOR CHILDREN	)	

No. 284P18

SPECIAL ORDER

Upon consideration of the petition filed by intervenor on 31 August 2018 in this matter for writ of certiorari to review the order of the North Carolina Court of Appeals dismissing intervenor's appeal, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

Allowed for the limited purpose of vacating the order of the Court of Appeals entered 27 July 2018 and remanding to the Court of Appeals with instructions that: (1) intervenor's appeal be treated in all respects as timely filed and procedurally proper; and (2) that the Court of Appeals reach the following issues presented by intervenor on appeal:

I. Was there error in the trial court's assertion of jurisdiction over an adoption of Indian children covered by the federal Indian Child Welfare Act when the tribal court initially exercising jurisdiction over the children continued to assert jurisdiction?

II. Did the trial court err in failing to give full faith and credit to the tribal court's earlier determination that the appellant was an Indian custodian of the children entitled to their return?

The parties are ordered to settle the record on appeal within thirty-five days.

By order of the Court in Conference, this the 7th day of December, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of December, 2018.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

INTERSAL, INC.	)	
	)	
v.	)	From Wake County
	)	
SUSI H. HAMILTON, SECRETARY, NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES, IN HER OFFICIAL CAPACITY, NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES, STATE OF NORTH CAROLINA, AND FRIENDS OF QUEEN ANNE'S REVENGE, A NON-PROFIT CORPORATION	)	

No. 115A18

ORDER

Because plaintiff's original notice of appeal designated the incorrect court, plaintiff's appeal based upon a right of appeal is dismissed. Thus, we allow "State Defendants' Motion to Dismiss Appeal" and "Defendant's (Friends of Queen Anne's Revenge) Motion to Dismiss Appeal." Nonetheless, plaintiff's "Petition for Writ of Certiorari to Review Order of Business Court" is allowed.

Defendants' "Motion to Stay Briefing" is dissolved. The Court sets the following briefing schedule: Plaintiff has already filed the record and its appellant brief. Defendants' appellee briefs will be due 8 January 2019. Should appellant wish to file a reply brief, the reply brief will be due on 22 January 2019.

By Order of the Court in Conference, this 5th day of December, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of December, 2018.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Cumberland County
	)	
EDWARD M. ALONZO	)	

No. 288P18

ORDER

The Petition for Discretionary Review filed by defendant in this case on 25 September 2018 is decided as follows: defendant's petition is allowed for the limited purpose of considering the first issue listed in defendant's petition. Except as specifically allowed in this order, defendant's Petition for Discretionary Review is denied.

By order of the Court in conference, this the 5th day of December, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of December, 2018.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
Assistant Clerk, Supreme Court of
North Carolina

STATE v. FORTE

[371 N.C. 779 (2018)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Wilson County
	)	
JIMMY LEE FORTE	)	

No. 223P18

ORDER

The Petition for Discretionary Review filed by the State of North Carolina in this case on 6 August 2018 is decided as follows: The State's petition is allowed for the limited purpose of remanding this case to the Court of Appeals for the purpose of reconsidering defendant's challenge to the validity of the habitual felon indictment returned against him in this case in light of this Court's decision in *State v. Langley*, ___ N.C. ___, 817 S.E.2d 191 (2018), with the Court of Appeals' proceeding on remand to include consideration of any aspect of defendant's challenge to the habitual felon indictment that was not reached during the Court of Appeals' initial consideration of this case.

By order of the Court in conference, this the 5th day of December, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of December, 2018.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
Assistant Clerk, Supreme Court of
North Carolina

STATE v. KING

[371 N.C. 780 (2018)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Durham County
	)	
ERNEST A. KING	)	

No. 69A94-3

ORDER

Upon consideration the "Petition for Writ of Mandamus" is allowed for the limited purpose of reissuing the attached order from this Court and directing the Superior Court, Durham County, to reconsider defendant's "Motion for Appropriate Relief in light of this Court's opinion in *State v. McHone*, 348 N.C. 254, 499 S.E.2d 761 (1998)" and to enter an appropriate order. *See McHone*, 348 N.C. at 258-60, 499 S.E.2d at 763-64 (holding that the defendant was entitled to an evidentiary hearing prior to a ruling on his Motion for Appropriate Relief where some of the asserted grounds for relief raised unresolved questions of fact).

By Order of the Court in Conference, this 5th day of December, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of December, 2018.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

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3 APRIL 1998

30 JULY 1998

RALEIGH
1999

IN THE SUPREME COURT 507

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

STATE v. KELLY

No. 138P98

Case below: 129 N.C.App. 117

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 July 1998.

STATE v. KING

No. 69A94-2

Case below: Durham County Superior Court

Petition by defendant for writ of certiorari allowed 8 July 1998 for the limited purpose of remanding this case to the Superior Court, Durham County, for reconsideration of defendant's motion for appropriate relief in light of this Court's opinion in *State v. McHone*, 348 N.C. 254; in all other respects, the petition is denied.

STATE v. McCARVER

No. 384A92-2

Case below: Cabarrus County Superior Court

Petition by defendant for writ of certiorari to review the order of the Superior Court, Cabarrus County denied 8 July 1998.

STATE v. RANSOM

No. 140P98

Case below: 128 N.C.App. 753

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 July 1998.

STATE v. ROBINSON

No. 171P98

Case below: 129 N.C.App. 117

Petition by defendant pro se for writ of certiorari to review the decision of the North Carolina Court of Appeals denied 8 July 1998.

STATE v. MILLER

[371 N.C. 783 (2018)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	UNION COUNTY
	)	
MARVIN LOUIS MILLER, JR.	)	

No. 268P18

ORDER

Upon consideration of the Petition for Discretionary Review filed by the State on 11 September 2018, the Petition is ALLOWED for the limited purpose of remanding to the Court of Appeals for reconsideration in light of *State v. Rogers*, ___ N.C. ___, 817 S.E.2d 150 (2018).

By Order of this Court in Conference, this 5th day of December, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of December, 2018.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Mecklenburg County
	)	
EDWARD ALAN WOLD, JR.	)	

No. 328P18

ORDER

The Petition for Discretionary Review filed by defendant in this case on 24 September 2018 is decided as follows: The defendant's petition is allowed for the limited purpose of remanding this case to the Court of Appeals for the purpose of reconsidering defendant's petition for writ of certiorari in light of this Court's decision in *State v. Ledbetter*, ___ N.C. ___, 814 S.E.2d 39 (2018), with the Court of Appeals' proceeding on remand to include an exercise of its discretion to determine whether it should grant or deny defendant's petition for writ of certiorari.

By order of the Court in conference, this the 5th day of December, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 7th day of December, 2018.

AMY L. FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
Assistant Clerk, Supreme Court of
North Carolina

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

5 DECEMBER 2018

020P18-2	Vincent J. Mastanduno, Employee v. National Freight Industries, Employer and American Zurich Insurance Company, Carrier	1. Plt's Motion for Temporary Stay 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's Petition for *Writ of Certiorari* to Review Order of COA	1. Denied **11/05/2018** 2. Denied **11/05/2018** 3.
034P14-2	State v. George Lee Nobles	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-576) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. State's Conditional PDR Under N.C.G.S. § 7A-31	1. --- 2. Allowed 3. Allowed 4. Allowed
041P17-4	Arthur O. Armstrong v. Wilson County, et al.	Plt's *Pro Se* Motion for Petition for Rehearing	Dismissed
069A94-3	State v. Ernest A. King	Def's Petition for *Writ of Mandamus*	Special Order
115A18	Intersal, Inc. v. Susi H. Hamilton, Secretary, North Carolina Department of Natural and Cultural Resources, in her Official Capacity, North Carolina Department of Natural and Cultural Resources, State of North Carolina, and Friends of Queen Anne's Revenge, a Non-Profit Corporation	1. Plt's Petition for *Writ of Certiorari* to Review Order of Business Court 2. State Defs' Motion to Dismiss Appeal 3. Plt's Motion for Extension of Time to File Response 4. Plt's Motion for Extension of Time to Respond to Motion to Dismiss 5. Def's (Friends of Queen Anne's Revenge) Motion to Dismiss Appeal 6. Defs' Motion to Stay Briefing 7. Defs' Motion in the Alternative for Extension of Time to File Brief	1. Special Order 2. Special Order 3. Allowed **10/12/2018** 4. Allowed up to and including 19 October 2018 **10/02/2018** 5. Special Order 6. Allowed **11/08/2018** Dissolved by Special Order **12/05/2018** 7. Special Order

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140P18	State v. Robert Dwayne Lewis	1. State's Motion for Temporary Stay (COA17-888) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/17/2018** 2. Allowed 3. Allowed 4. Allowed
141P18	State v. Robert Dwayne Lewis	1. State's Motion for Temporary Stay (COA17-1051) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/17/2018** 2. Allowed 3. Allowed 4. Allowed
143P18	State v. Ramelle Milek Lofton	1. State's Motion for Temporary Stay (COA17-716) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/21/2018** 2. Allowed 3. Allowed
151P18	State v. Ramar Dion Benjamin Crump	Def's PDR Under N.C.G.S. § 7A-31 (COA17-488)	Allowed
169P18	State v. James Bernard Bennett	Def's PDR Under N.C.G.S. § 7A-31 (COA17-986)	Denied
179A14-3	State v. Torrey Grady	1. American Civil Liberties Union Foundation and American Civil Liberties Union of North Carolina Legal Foundation's Motion for Leave to File Amicus Brief 2. Motion to Admit Brandon Jerel Buskey *Pro Hac Vice* 3. Motion to Admit Nathan Freed Wessler *Pro Hac Vice*	1. Allowed **11/06/2018** 2. Allowed **11/06/2018** 3. Allowed **11/06/2018**
181P18	State v. Toni Turnage	1. Def's Motion for Temporary Stay (COA17-803) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/20/2018** Dissolved **12/05/2018** 2. Denied 3. Denied

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183P16-2	The City of Charlotte, a Municipal Corporation v. University Financial Properties, LLC, a North Carolina Limited Liability Company f/k/a University Bank Properties Limited Partnership; Bank of America, N.A. f/k/a NCNB National Bank of North Carolina, Tenant; and Any Other Parties in Interest	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA17-388) 2. Def's (University Financial Properties, LLC) Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed
193P18-4	State v. Joshua Bolen	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **11/20/2018**
210P16-3	Dale Patrick Martin v. Mike Slagle (Supt.)	1. Petitioner's *Pro Se* Petition for *Writ of Mandamus* (COAP18-632) 2. Petitioner's *Pro Se* Motion to Rebut Answer Response to *Habeas Corpus*	1. Denied 2. Denied **11/27/2018**
214P18	Melesio Ramirez v. Stuart Pierce Farms, Inc., Employer, FCCI Insurance Group, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-525)	Denied
218P18	State v. Rodney Veney	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-1323) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
223P18	State v. Jimmy Lee Forte, Jr.	1. State's Motion for Temporary Stay (COA17-669) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/18/2018** Dissolved **12/05/2018** 2. Dismissed as moot 3. Special Order 4. Denied

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227P14-3	State v. Max Tracy Earls	Def's *Pro Se* Motion for Rehearing *En Banc* Constitutional Question	Dismissed
229P18	Serafino Vince Cordaro, Plaintiff v. Harrington Bank, FSB, n/k/a Bank of North Carolina, a North Carolina Bank, Defendant ——————— Bank of North Carolina, Third-Party Plaintiff v. Danny D. Goodwin d/b/a Danny Goodwin Appraisals, Third-Party Defendant	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-1032)	Denied
230P17-3	State v. Anthony Lee McNair	Def's *Pro S*e Motion for Respond and Reply for Remedy and Relief to the State's	Dismissed
231A18	The Committee to Elect Dan Forest, a Political Committee v. Employees Political Action Committee (EMPAC), a Political Committee	1. Def's Notice of Appeal Based Upon a Dissent (COA17-569) 2. Def's PDR as to Additional Issues	1. --- 2. Allowed
236P18	State v. Dennis Raynard Steele	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-868)	Denied
239A18	State v. Neil Wayne Hoyle	1. State's Motion for Temporary Stay (COA17-1324) 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 PDR as to Additional Issues	1. Allowed **08/03/2018** 2. Allowed 3. --- 4. Allowed 5. Allowed

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245P18	State v. Manno Heshumi Beam	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-1232) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
246P18	State v. Nashid Porter	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-738) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
247P16-4	State v. Jonathan Eugene Brunson	1. Def's *Pro Se* Motion for PDR (COAP16-399) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Amend PDR	1. Dismissed 2. Allowed 3. Dismissed as moot
249P18	Russ Carroll Bryan v. Suzanne Dailey	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-788)	Denied
251PA18	Sykes, et al. v. Health Network Solutions, Inc., et al.	1. Plts' Motion to Seal Portions of Appellants' Brief 2. Plts' Motion to Substitute Brief and to Deem Substitute Brief Timely Filed	1. Allowed **10/31/2018** 2. Allowed **10/31/2018**
254P18	State v. Jimmy A. Sevilla-Briones	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 Appoint Counsel	1. Dismissed 2. Dismissed as moot
257P18	State v. Sydney Shakur Mercer	1. State's Motion for Temporary Stay (COA17-1279) 2. State's Petition for *Writ of Supersedeas* 3. State's Motion to File Petition for *Writ of Supersedeas* and Application for Temporary Stay with Corrected Certificate of Service 4. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/21/2018** 2. Allowed 3. Allowed **09/28/2018** 4. Allowed

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260P18	State v. Bobby Tray Wyche	1. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Durham County 2. State's Motion for Extension of Time to File Response	1. Dismissed 2. Allowed **08/31/2018**
264P18	In the Matter of B.O.A.	1. Petitioner's Motion for Temporary Stay (COA18-7) 2. Petitioner's Petition for *Writ of Supersedeas* 3. Petitioner's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/23/2018** 2. Allowed 3. Allowed
265P18	State v. Shenondoah Perry and Earl Lamont Powell	1. State's Motion for Temporary Stay (COA17-714) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/22/2018** Dissolved **12/05/2018** 2. Denied 3. Denied
268P18	State v. Marvin Louis Miller, Jr.	1. State's Motion for Temporary Stay (COA17-1215) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/23/2018** Dissolved **12/05/2018** 2. Dismissed as moot 3. Special Order
271A18	State *ex rel.* Utilities Commission v. Attorney General	Joint Motion to Consolidate Appeals and to Enter Briefing Schedule	Allowed **11/29/2018**
276P18	State v. Dominick Romeo Delegge	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-1002)	Denied **Ervin, J., recused**
277P18-2	State v. Gabriel Adrian Ferrari	Def's *Pro Se* Motion to Strike Notice/Letter	Dismissed
281P18-2	State v. Jason Robert Vickers	Def's PDR Under N.C.G.S. § 7A-31 (COA18-35)	Denied

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283P18	Steven Grodensky v. Roger McLendon, MD, Duke University Health System, Inc. d/b/a Duke University Medical Center, Associated Health Services, Inc., Duke Medicine Global Support Corporation, The Duke University School of Medicine Research Foundation, and Private Diagnostic Clinic	Def's (Roger McLendon, MD) PDR Under N.C.G.S. § 7A-31 (COA17-1258, COA17-1258-2)	Denied
284P18	In re The Adoption of K.P.J. and K.L.J., Minor Children	1. Intervenor Appellant's (Jean Caudle Coffman) PDR Under N.C.G.S. § 7A-31 (COA17-1390) 2. Intervenor Appellant's (Jean Caudle Coffman) Petition in the Alternative for *Writ of Certiorari* to Review Order of COA 3. Intervenor Appellant's (Jean Caudle Coffman) Petition in the Alternative for *Writ of Mandamus*	1. Dismissed as moot 2. Special Order 3. Dismissed as moot
286P18	Karene McLean v. Harnett County Child Support Enforcement, Corrine Mathis, Paulette Strickland	1. Petitioner's *Pro Se* Petition for *Writ of Mandamus* 2. Petitioner's *Pro Se* Motion for Command to Terminate and Vacate as a Matter of Law 3. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of District Court, Harnett County	1. Dismissed 2. Dismissed 3. Dismissed
288P18	State v. Edward M. Alonzo	1. Def's Application for Temporary Stay (COA17-1186) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31 4. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/07/2018** 2. Allowed 3. Special Order 4. Allowed

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289P18	DM Trust, LLC, a North Carolina Limited Liability Company; and Mary Anne Owen v. McCabe and Company	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-1193) 2. Plts' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
290P15-2	State v. Jeffrey Tryon Collington	1. State's Motion for Temporary Stay (COA17-726) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. State's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA	1. Allowed **04/27/2018** 2. Allowed 3. Allowed 4. Dismissed as moot
291P18	State v. Jasen Wilson	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1317)	Denied
292P18	State v. Alfonso Moore	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-75)	Denied
293P18	Debra S. Jones v. Wells Fargo Company and Joshua Hodgin	Plt's Petition for *Writ of Certiorari* to Review Decision of COA (COA18-96)	Denied
297P18	State v. Antwaun Kyral Sims	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-45) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Allowed 3. Allowed
299A18	State v. Samuel Calleros Alvarez	1. Def's Notice of Appeal Based Upon a Dissent (COA17-945) 2. Def's PDR as to Additional Issues	1. --- 2. Denied
301A18	State v. Aaron Kenard Westbrook	1. State's Motion for Temporary Stay (COA18-32) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent 4. Def's Motion to Dismiss State's Appeal 5. Def's Motion to Stay Briefing Schedule Until Resolution of Motion to Dismiss	1. Allowed **09/13/2018** 2. Allowed **09/13/2018** 3. 4. 5. Allowed **11/08/2018**

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302A18	State v. Michelle Smith White	1. State's Motion for Temporary Stay (COA18-39) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent 4. Def's Motion to Dismiss State's Appeal 5. Def's Motion to Stay Briefing Schedule Until Resolution of the Motion to Dismiss	1. Allowed **09/13/2018** 2. Allowed **09/13/2018** 3 4. 5. Allowed **11/08/2018**
310P18	Christopher Charles Harris v. Iredell County, et al.	Plt's *Pro Se* Motion to Compel Iredell County Superior Court to Allow Plaintiff to Proceed as Indigent	Denied **Ervin, J., recused**
316P18	State v. Johnny Jermain McMillan	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1305)	Denied
317P18	State v. Jeffrey Michael Charette	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1238)	Denied
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. –– **11/01/2017** 2. Allowed **11/01/2017** 3. Dismissed as moot 4. Denied **11/01/2017** 5. Allowed **11/01/2017**
320P18	State v. Jeffrey Keith Hobson	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1052)	Denied
322P18	Town of Littleton v. Layne Heavy Civil, Inc. f/d/b/a Reynolds, Inc.; Layne Inliner, LLC f/d/b/a Reynolds Inliner, LLC; and Mack Gay Associates, P.A.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA17-1137) 2. Plt's Motion to Amend PDR	1. 2. Allowed **11/07/2018**

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324P18	State v. Howard Earl Bates	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-970) 2. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Rutherford County	1. Denied 2. Denied
325A18	Albert S. Daughtridge, Jr. and Mary Margret Holloman Daughtridge v. Tanager Land, LLC	1. Plts' Notice of Appeal Based Upon a Dissent (COA17-554) 2. Plts' Conditional PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal 4. Def's Motion for Extension of Time to File Appellee Brief	1. --- 2. Allowed 3. Allowed 4. Dismissed as moot
328P18	State v. Edward Alan Wold, Jr.	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COA17-1219)	Special Order
333P18	State v. Douglas Wayne Stanaland	1. Def's *Pro Se* Motion for Discovery 2. Def's *Pro Se* Motion for Production of Documents 3. Def's *Pro Se* Motion to Take Judicial Notice	1. Dismissed 2. Dismissed 3. Denied
338P18	State v. Shane Michael White	Def's PDR Under N.C.G.S. § 7A-31 (COA18-36)	Denied
340P18	State v. Charles T. Mathis	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-1302)	Denied
345P18	State v. Mark Leon Conner	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1293)	Denied
347P18	State v. Derald Hafner	1. Def's *Pro Se* Motion for Petition for *Writ of Error Coram [N]obis* 2. Def's *Pro Se* Petition for *Writ of Certiorari*	1. Dismissed 2. Dismissed
349P18	State v. Frederick Lynn Atwater	1. Def's *Pro Se* Motion for Notice of Appeal (COAP16-128) 2. Def's *Pro Se* Motion for PDR	1. Dismissed 2. Dismissed
350P18	In the Matter of Harry James Fowler v. Honorable Gary M. Gavenus	Plt's *Pro Se* Motion for *De Novo* Appeal	Dismissed **Ervin, J., recused**

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351P18	State v. Jamier Stevon Heard	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-1242) 2. Def's *Pro Se* Motion to Deem Petition Timely Filed	1. Denied 2. Dismissed as moot
353P18	State v. David Kenneth Fowler	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-723) 2. Def's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA	1. Denied 2. Denied
356P18	Briana Washington Glover, and Husband, Randie Janson Glover, Individually v. The Charlotte-Mecklenburg Hospital Authority, a North Carolina Hospital Authority, d/b/a Carolinas Healthcare System, Carolinas Medical Center, Carolinas Healthcare System University, Carolinas Medical Center-University, CMC-University, Carolinas Healthcare System Mercy, Carolinas Medical Center Mercy, CMC-Mercy, Greater Carolinas Women's Center, and Carolinas Laboratory Network; and Glen Ellis Powell, II, MD, Individually	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA17-1398) 2. North Carolina Association of Defense Attorneys' Conditional Motion for Leave to File Amicus Brief 3. Plts' Conditional PDR Under N.C.G.S. § 7A-31 4. Motion for Temporary Stay of the Decision of the COA 5. Petition for *Writ of Supersedeas*	1. 2. 3. 4. Allowed **11/01/2018** 5.
358P18	State v. Assante M. Sims	Def's *Pro Se* Motion of Dismissal	Dismissed

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361P18	Celina Quevedo-Woolf v. Merry Eileen Overholser and Daniel Carter	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA17-1344, 17-675)	1.
		2. Plt's PDR Under N.C.G.S. § 7A-31	2.
		3. Plt's Motion for Temporary Stay	3. Allowed **11/05/2018**
		4. Plt's Petition for *Writ of Supersedeas*	4.
		5. Plt's Motion for Addendum	5.
		6. Plt's Motion to Stay 6 November 2018 Trial Court Hearing	6. Denied **11/05/2018**
365A18	State v. Gabriel Arthur Thabet	1. Def's Notice of Appeal Based Upon a Dissent (COA17-1417)	1. ---
		2. Def's Conditional PDR Under N.C.G.S. § 7A-31	2. Denied
		3. State's Motion to Dismiss Appeal	3. Allowed
377P18	State v. Joshua James Goff	Def's *Pro Se* Motion for PDR (COAP18-204)	Dismissed
378P18	State v. Napier Sandford Fuller	1. Def's *Pro Se* Petition for *Writ of Mandamus* (COAP18-623)	1. Denied **10/31/2018**
		2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA	2. Denied **10/31/2018**
		3. Def's *Pro Se* Motion in Alternative for Temporary Stay	3. Denied **10/31/2018**
		4. Def's *Pro Se* Motion to Seal Portions of Petition of *Writ of Certiorari* and *Mandamus*	4. Allowed **10/31/2018**
		5. Def's *Pro Se* Motion for Addendum to Petition for *Writ of Certiorari* and *Mandamus*	5. Denied **10/31/2018**
381P18	State v. Ferrante Vermond Perry	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Mecklenburg County	1. Denied
		2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	2. Allowed
384P18	State v. Wendell Curtis Owenby	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-151)	Denied

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386P18	State v. Harold J. Brandon	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Durham 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
387P18	In the Matter of the Imprisonment of Jashawn A. Summers	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **11/02/2018**
388P18	Adam T. Cheatham, Sr. v. Town of Taylortown	Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COA18-625)	Denied
391P18	Joseph Lee Ham v. Supt. David Millis, et al.	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **11/27/2018**
393P18	Paul Painter v. North Carolina Department of Public Safety, et al.	1. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP18-542) 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
395P18	State v. Roderick Jerome Wooten	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Durham 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
401A18	State *ex rel*. Utilities Commission v. Attorney General	Joint Motion to Consolidate Appeals and to Enter Briefing Schedule	Allowed **11/29/2018**
407P18	State v. James Daren Sisk	1. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA18-211) 2. Def's Motion to Withdraw *Pro Se* PDR 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	1. 2. 3. Allowed **11/21/2018** 4. 5.

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410P18	Town of Apex v. Beverly L. Rubin	1. Plt's Motion for Temporary Stay (COA17-955) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/21/2018** 2. 3.
416P18	State v. Joseph Gill	1. State's Motion for Temporary Stay (COA18-191) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **11/21/2018** 2.
417P18	State v. Rudolph Coles, Jr.	1. State's Motion for Temporary Stay (COA18-357) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **11/26/2018** 2.
420P18	State v. Temon Tavoi McNeil	1. State's Motion for Temporary Stay (COA18-175) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **11/28/2018** 2.
426P17-2	Annah Awartani; Gilma Varinia Bonilla; Crystal Kim Parker, Individually and for Others Similarly Situated v. The Moses H. Cone Memorial Hospital Operating Corporation	1. Plts' Notice of Appeal Based Upon a Constitutional Question (COA17-1300) 2. Plts' PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. --- 2. Denied 3. Allowed 4. Dismissed as moot
435P15-3	State v. Sulyaman Alisla Wasalaam	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **11/21/2018**
480P06-2	State v. Devon Maurice Glynn	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **11/06/2018**

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

No. 409PA17

Filed 21 December 2018

Governor—Cabinet—senatorial confirmation—separation of powers

The Supreme Court held that senatorial confirmation of members of the Governor's Cabinet did not violate the separation of powers clause because the Governor retained the power to nominate them, had strong supervisory authority over them, and had the power to remove them at will. The appointments provision of N.C.G.S. § 143B-9(a) did not unconstitutionally impede the Governor's ability to take care that the laws be faithfully executed, and the constitution did not otherwise prohibit the General Assembly from requiring senatorial confirmation of members of the Governor's Cabinet.

On discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal of right of a substantial constitutional question pursuant to N.C.G.S. § 7A-30(1) of a unanimous, per curiam decision of the Court of Appeals, ___ N.C. App. ___, 807 S.E.2d 176 (2017), affirming an order of summary judgment entered on 17 March 2017 in Superior Court, Wake County, by a three-judge panel under N.C.G.S. § 1-267.1. Heard in the Supreme Court on 2 October 2018.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Daniel F.E. Smith, Jim W. Phillips, Jr., and Eric M. David, for plaintiff-appellant.

Nelson Mullins Riley & Scarborough LLP, by D. Martin Warf, Noah H. Huffstetler, III, and Candace Friel, for defendant-appellees.

MARTIN, Chief Justice.

The Governor is our state's chief executive. He or she bears the ultimate responsibility of ensuring that our laws are properly enforced. *See State ex rel. McCrory v. Berger*, 368 N.C. 633, 635, 781 S.E.2d 248, 250 (2016). Indeed, the Constitution of North Carolina enshrines this

executive duty: "The Governor shall take care that the laws be faithfully executed." N.C. Const. art. III, § 5(4).

But the Governor is not alone in this task. Our state constitution establishes nine other offices in the executive branch. *See id.* art. III, §§ 2, 7. These offices are elected and consist of the Lieutenant Governor, Secretary of State, Auditor, Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance. *Id.* Collectively, these ten offices are known as the Council of State. *See id.* art. III, § 8.[1]

To further assist the executive branch in fulfilling its purpose, our constitution requires the General Assembly to "prescribe the functions, powers, and duties of the administrative departments and agencies of the State." *Id.* art. III, § 5(10). The heads of the administrative departments that are not headed by members of the Council of State are appointed to their posts rather than being elected by the people. *See* N.C.G.S. § 143B-9(a) (2017). These appointed officers make up the membership of the Governor's Cabinet. *See*, *e.g.*, *id.* § 126-6.3 (2017 & Supp. 2018) (referring to the administrative departments created by Chapter 143B of the North Carolina General Statutes as "Cabinet agencies"); *id.* § 143-745(a)(1) (2017) (defining "Agency head" as "the Governor, a Council of State member, *a cabinet secretary*, . . . and other independent appointed officers with authority over a State agency" (emphasis added)). "[T]o perform his constitutional duty," the Governor must have "enough control" over the members of his Cabinet to take care that the laws be faithfully executed. *McCrory*, 368 N.C. at 646, 781 S.E.2d at 256.

In this case, plaintiff Roy A. Cooper, III, the Governor of North Carolina, challenges the appointments provision of N.C.G.S. § 143B-9(a),

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1. The historical roots of the Council of State can be traced to the advisory councils of the English monarchs. The Research Branch, Div. of Archives & History, N.C. Dept. of Cultural Res., *The Council of State in North Carolina: An Historical Research Report* 8 (1986). In North Carolina, the use of an executive council predates our earliest constitution. *See generally id.* at 8-127 (discussing the development of the Council of State before the American Revolution). At the founding, the Council of State consisted of seven persons appointed by the General Assembly to advise the Governor. N.C. Const. of 1776, § XVI. With the passage of the Constitution of 1868, "the Council of State became a body of directly elected officers, with executive duties of their own." John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 124-25 (2d ed. 2013); *see also* N.C. Const. of 1868, art. III, § 14 ("The Secretary of State, Auditor, Treasurer, Superintendent of Public Works, and Superintendent of Public Instruction, shall constitute, *ex officio*, the Council of State . . . . The Attorney General shall be, *ex officio*, the legal adviser of the Executive Department."). The most recent iteration of the Council of State—consisting of the ten elected Article III officers that we have just listed—has remained unchanged since our current constitution was ratified. *See* N.C. Const. art III, §§ 7-8.

which grants the North Carolina Senate the power to confirm the people that he nominates to serve in his Cabinet. Plaintiff alleges that senatorial confirmation undermines his control over the views and priorities of those who serve in his administration and violates the separation of powers that our constitution guarantees. *See* N.C. Const. art. I, § 6.

We hold that senatorial confirmation of the members of the Governor's Cabinet does not violate the separation of powers clause when, as is the case here, the Governor retains the power to nominate them, has strong supervisory authority over them, and has the power to remove them at will. The Governor's power to nominate is significant, and the ultimate appointee will be a person that he alone has chosen, subject only to an up-or-down vote by the Senate. The Governor's supervisory and removal powers, moreover, ensure that the Governor retains ample post-appointment control over how his Cabinet members perform their duties. As a result, subsection 143B-9(a)'s senatorial confirmation requirement leaves the Governor with enough control to take care that the laws be faithfully executed, and therefore does not violate the separation of powers clause.

I

N.C.G.S. § 143A-11 creates ten principal administrative departments headed by the members of the Council of State—sometimes called the "Council of State agencies." *See*, *e.g.*, N.C.G.S. § 126-6.3; *see also* N.C. Const. art. III, §§ 2, 7, 8. Supplementing these departments are eleven additional principal administrative departments named in N.C.G.S. § 143B-6—the Community Colleges System Office and the Departments of Natural and Cultural Resources, Health and Human Services, Revenue, Public Safety, Environmental Quality, Transportation, Administration, Commerce, Information Technology, and Military and Veterans Affairs. These eleven departments are sometimes called "Cabinet agencies." *See*, *e.g.*, *id.* § 126-6.3. The constitution does not directly mention any of these departments; they are statutory creations.

The heads of these departments—i.e., the members of the Governor's Cabinet—are statutory officers; they hold offices created by statute. *See*, *e.g.*, *id.* § 143B-52 (2017) (naming the Secretary of Natural and Cultural Resources as the head of the corresponding department); *id.* § 143B-139 (2017) (doing likewise for the Secretary of Health and Human Services). These officers are appointed according to a process defined by statute. That statute currently grants the Governor the power to "appoint[ ]" individuals to fill each Cabinet position, "subject to senatorial advice and consent in conformance with Section 5(8) of Article III of the North

Carolina Constitution [i.e., the constitution's appointments clause]." *Id.* § 143B-9(a); *see also* N.C. Const. art. III, § 5(8) ("The 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.").

Other provisions of Chapter 143B address the Governor's ability to supervise and remove Cabinet members. N.C.G.S. § 143B-4 reiterates the Governor's role as "the Chief Executive Officer of the State." *See also* N.C. Const. art III, § 1 (vesting the executive power of the State in the Governor). That same statute gives the Governor final authority to "formulat[e] and administer[ ] the policies of the executive branch." N.C.G.S. § 143B-4 (2017). In addition, Cabinet members must provide the Governor with extensive information about the work of their respective departments. For example, Cabinet members must "submit to the Governor an annual plan of work" and "an annual report covering programs and activities for each fiscal year." *Id.* § 143B-10(h) (2017). Cabinet members must also "develop and report to the Governor legislative, budgetary, and administrative programs to accomplish" long-term policy goals. *Id.* § 143B-10(i) (2017). If the Governor wishes to remove any of the members of his Cabinet, he or she may do so at any time, for any reason. *See id.* § 143B-9(a).

Plaintiff alleges that the appointments process for Cabinet members set forth in N.C.G.S. § 143B-9(a) is unconstitutional. On 30 December 2016, plaintiff filed a complaint in Superior Court, Wake County, challenging the constitutionality of another act of the General Assembly.[2] On 10 January 2017, plaintiff amended his complaint to allege that a separate act requiring senatorial confirmation of his Cabinet members violates the appointments clause and the separation of powers clause of our state constitution. *See* N.C. Const. art. I, § 6 (separation of powers clause); *id.* art. III, § 5(8) (appointments clause). Plaintiff sought a declaration that this aspect of subsection 143B-9(a)'s appointments process is unconstitutional and a permanent injunction barring the operation of section 143B-9 as written.

A divided three-judge panel of the superior court determined that the appointments process in subsection 143B-9(a) does not violate the constitution and granted summary judgment to defendants. Plaintiff appealed this decision to the Court of Appeals. On 7 November 2017, the Court of Appeals issued a per curiam opinion affirming the trial court's

2. The legislative act initially challenged is not a subject of this appeal.

decision. *Cooper v. Berger*, ___ N.C. App. ___, ___, 807 S.E.2d 176, 181-82 (2017) (per curiam). Plaintiff then filed a notice of appeal of a substantial constitutional question pursuant to N.C.G.S. § 7A-30(1) and also petitioned this Court for discretionary review of the same constitutional question pursuant to N.C.G.S. § 7A-31. We retained plaintiff's notice of appeal and allowed plaintiff's petition.

II

North Carolina courts have the power and the duty to determine whether challenged acts of the General Assembly violate the constitution. *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 6-7 (1787). This Court interprets the provisions of the Constitution of North Carolina with finality. *E.g.*, *McCrory*, 368 N.C. at 638, 781 S.E.2d at 252; *Hart v. State*, 368 N.C. 122, 130, 774 S.E.2d 281, 287 (2015). We review constitutional questions de novo. *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001).

Plaintiff alleges that the Senate's "authority to approve, or disapprove, the persons selected by the Governor to serve" as Cabinet members pursuant to subsection 143B-9(a) "improperly encroaches upon the Governor's constitutional authority." In his own words, plaintiff's challenge pertains to "the structure created by" subsection 143B-9(a) and to the degree of control that subsection 143B-9(a) allows the Senate to exercise, "not [to] whether the [Senate] actually exerted that control." *Cf. McCrory*, 368 N.C. at 647, 781 S.E.2d at 257 (indicating that, when legislative involvement in the appointment of executive officers is at issue, the separation of powers clause requires this Court to evaluate how much control the legislation in question "*allows* the General Assembly to exert over the execution of the laws" (emphasis added)). Plaintiff's challenge thus amounts to a facial challenge to the constitutionality of N.C.G.S. § 143B-9(a)—that is, a challenge that subsection 143B 9(a)'s advice-and-consent provision is unconstitutional in all circumstances. *Cf. Hart*, 368 N.C. at 131, 774 S.E.2d at 288 ("[T]he party making [a] facial challenge [must] meet the high bar of showing 'that there are no circumstances under which the statute might be constitutional.' " (quoting *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009))).[3]

3. While it is possible to envision a scenario in which the Senate's arbitrary rejection of capable nominees for a particular office might violate the separation of powers clause, "[t]he fact that a statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 486 (2005) (quoting *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998)).

When reviewing an act of the General Assembly, we presume that the act is constitutional, and we will declare it invalid only if it violates the constitution beyond a reasonable doubt. *Id.* at 131, 774 S.E.2d at 287-88 (citing *Baker v. Martin*, 330 N.C. 331, 334-35, 410 S.E.2d 887, 889 (1991)). "[A] facial challenge to the constitutionality of an act . . . is the most difficult challenge to mount successfully." *Id.* at 131, 774 S.E.2d at 288. "We seldom uphold facial challenges because it is the role of the legislature, rather than this Court, to balance disparate interests and find a workable compromise among them." *Beaufort Cty. Bd. of Educ.*, 363 N.C. at 502, 681 S.E.2d at 280. These well-established principles provide the lens through which we view this case.

A

The separation of powers clause states 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. This concept is "a cornerstone of our state and federal governments." *State ex rel. Wallace v. Bone*, 304 N.C. 591, 601, 286 S.E.2d 79, 84 (1982). Separating the powers of the government preserves individual liberty by safeguarding against the tyranny that may arise from the accumulation of power in one person or one body. *See* Montesquieu, *The Spirit of the Laws* 151-52 (Thomas Nugent trans., Hafner Press 1949) (asserting that "there can be no liberty" where two or more of these governmental powers "are united in the same person"). "The clearest violation of the separation of powers clause occurs when one branch exercises power that the constitution vests exclusively in another branch." *McCrory*, 368 N.C. at 645, 781 S.E.2d at 256. Whether or not a violation of this kind has occurred is a binary question, not a question of degree; one branch either is, or is not, exercising power vested exclusively in another branch.

In *State ex rel. Wallace v. Bone*, for example, we considered the constitutionality of a law providing for the appointment of four sitting legislators to the North Carolina Environmental Management Commission (EMC). 304 N.C. at 591-92, 606-07, 286 S.E.2d at 79, 87. The General Assembly created the EMC as a commission of one of the Cabinet agencies and tasked it with "promulgat[ing] rules and regulations" aimed at protecting our state's water and air. *Id.* at 607, 286 S.E.2d at 87-88. The EMC's powers included "grant[ing] and revok[ing] permits," investigating regulatory violations, and "issu[ing] special orders pursuant to certain statutes to any person whom the commission finds responsible" for regulatory violations. *Id.* at 607, 286 S.E.2d at 88. This Court found it "crystal clear" that the EMC's functions and duties were "administrative or executive in character." *Id.* at 608, 286 S.E.2d at 88. We held that the

General Assembly "cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation *by appointing legislators to the governing body of the instrumentality*." *Id.* (emphasis added). In other words, legislators were wielding executive power, which violated the per se rule prohibiting one branch of government from exercising powers vested exclusively in another branch.

In this case, though, the per se rule from *Wallace* does not apply. As we held in *McCrory*, the appointments clause "authorizes the Governor to appoint all *constitutional* officers whose appointments are not otherwise provided for by the constitution." 368 N.C. at 644, 781 S.E.2d at 255 (emphasis added). The appointments clause therefore does not prohibit the General Assembly from appointing, or from confirming the nominations of, *statutory* officers. *See id.*[4] And this Court has long held "that appointing statutory officers is not an exclusively executive prerogative." *See id.* at 648, 781 S.E.2d at 258 (first citing *Cunningham v. Sprinkle*, 124 N.C. 638, 643, 33 S.E. 138, 139 (1899); and then citing *Trs. of Univ. of N.C. v. McIver*, 72 N.C. 76, 85 (1875)). Because the power to appoint statutory officers is not vested exclusively in any branch, the lesser power to *confirm* statutory officers is not vested exclusively in any branch, either. As a result, no branch can, in exercising the power to confirm statutory officers, violate the per se separation of powers rule that *Wallace* established.

Cabinet members are statutory officers. Their existence stems directly from the Executive Organization Act of 1973, codified in Chapter 143B of our General Statutes, not from any provision of the constitution. It follows that the appointments process in subsection 143B-9(a), which governs the appointments of these statutory officers, does not violate the per se *Wallace* rule.

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4. Our state constitution's appointment model thus differs from the federal appointment model, in which "[t]he [United States Constitution's] Appointments Clause prescribes the *exclusive* means of appointing 'Officers.' " *Lucia v. SEC*, ___ U.S. ___, ___,138 S. Ct. 2044, 2051 (2018) (emphasis added); *see also McCrory*, 368 N.C. at 640 n.3, 781 S.E.2d at 252 n.3 (quoting *Buckley v. Valeo*, 424 U.S. 1, 132, 96 S. Ct. 612, 688 (1976) (per curiam)) (explaining that the federal appointments clause "deliberately denie[s] Congress" any appointment power over officers, and highlighting how that clause differs from our state constitution's appointments clause). Because of the nature of the federal model, the relevant inquiry under the Federal Constitution is not whether the office is constitutional or statutory, but whether the appointee is an officer or a "non-officer employee[ ]." *See Lucia*, ___ U.S. at ___, 138 S. Ct. at 2051 (stating that, if the appointees in question are non-officer employees, "the Appointments Clause cares not a whit about who named them").

B

Next, we must address whether the challenged process satisfies the functional separation of powers test set forth in *McCrory*—which, unlike *Wallace*'s per se rule, *is* a question of degree. *Cf. McCrory*, 368 N.C. at 646-47, 781 S.E.2d at 257 ("*We cannot adopt a categorical rule* that would resolve every separation of powers challenge to the legislative appointment of executive officers. . . . [W]e must examine *the degree of control* that the challenged legislation allows the General Assembly to exert over the execution of the laws." (emphases added)). When the challenge involves the Governor's constitutional authority, we must ask "whether the actions of a coordinate branch 'unreasonably disrupt a core power of the executive.' " *Id.* at 645, 781 S.E.2d at 256 (quoting *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001)).

Our constitution gives the Governor the power and the duty to "take care that the laws be faithfully executed." N.C. Const. art. III, § 5(4); *see also McCrory*, 368 N.C. at 645, 649, 781 S.E.2d at 256, 258. While, as we have just discussed, the appointments clause places no per se restrictions on the appointment of statutory officers, the separation of powers clause requires that the Governor have "enough control over" executive officers "to perform his constitutional duty" under the take care clause. *McCrory*, 368 N.C. at 646, 781 S.E.2d at 256.[5] Because there is no categorical rule that determines whether a statutory framework which involves the General Assembly in the appointment of executive-branch statutory officers affords the Governor enough control over those officers, "we must resolve each challenge by carefully examining its specific factual and legal context." *Id.* at 646-47, 781 S.E.2d at 257.

As we have previously indicated, the degree of control that the Governor has over executive officers can be measured by considering "his ability to appoint [them], to supervise their day-to-day activities, and to remove them from office." *Id.* at 646, 781 S.E.2d at 256. In *McCrory*, we considered the balance between these factors within the statutory frameworks of three administrative commissions. *See id.* at 636, 781 S.E.2d at 250. In each framework, the General Assembly had granted itself the majority of appointments on the commission in question, had insulated the commission from gubernatorial supervision, and had allowed the Governor to remove commissioners only for cause. *Id.*

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5. As in *McCrory*, "[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." *Id.* at 646 n.5, 781 S.E.2d at 256 n.5.

at 646, 781 S.E.2d at 256-57. These frameworks, we noted, "le[ft] the Governor with little control over the views and priorities of the officers that the General Assembly appoints" and enabled "the General Assembly . . . [to] exert most of the control over . . . executive policy . . . in any area of the law that the commission[s] regulate[d]." *Id.* at 647, 781 S.E.2d at 257. We therefore found that the provisions challenged there violated the separation of powers clause. *See id.*

Turning to the facts of this case, we first acknowledge that the officers at issue here are not just members of administrative commissions; they are the heads of entire administrative departments. As department heads, Cabinet members have far more discretion, and wield far more executive power, than the commissioners in *McCrory* did. Among other things, they have the authority to reorganize their departments, to create and fill subordinate staff positions, and to establish advisory committees. N.C.G.S. § 143B-10 (2017). In addition, Cabinet members are some of the Governor's closest deputies, and are critical to the Governor's ability to take care that the laws be faithfully executed.

So the authority of these appointees is undoubtedly substantial. But a faithful application of the three-factor test set forth in *McCrory* shows that the Governor retains enough control over them to perform his constitutional duties. In short, senatorial confirmation of Cabinet members does not unconstitutionally impede the Governor's power and duty under the take care clause because the Governor still has the power to nominate them, has strong supervisory authority over them, and has the power to remove them at will.

With respect to the first *McCrory* factor, senatorial confirmation curtails the Governor's appointment power only minimally. As Federalist 76 suggests, the power to nominate is superior to the power to confirm. "In the act of nomination, [the chief executive's] judgment alone would be exercised . . . ." The Federalist No. 76 (Alexander Hamilton); *see also Myers v. United States*, 272 U.S. 52, 121, 47 S. Ct. 21, 27 (1926) (observing that, in the federal model, the Senate's rejection of a nominee "does not greatly embarrass [the President] in the conscientious discharge of his high duties in the selection of those who are to aid him, because the President usually has an ample field from which to select for office, according to his preference, competent and capable men"). The universe of people from whom the Governor may choose is open—he may nominate any eligible person to serve as a member of his Cabinet. In granting the Senate the power to confirm Cabinet nominees, the General Assembly has undoubtedly granted the Senate some piece of the appointment power. But the Governor retains the most important

role in the process: the ability to choose, from the universe of all eligible people, the person on whom the Senate will have an up-or-down vote.

This arrangement starkly contrasts with the statutory frameworks at issue in our recent separation-of-powers-clause decisions. In *McCrory*, we struck down legislation in which the General Assembly had granted itself the unilateral authority to appoint a majority of the commissioners on each of the commissions at issue. 368 N.C. at 637, 781 S.E.2d at 251. And in *Cooper v. Berger*, we rejected a framework in which the Governor had to choose his appointees from two short lists prepared "by the State party chair[s] of the two political parties with the highest number of registered affiliates," with an equal number of members to be drawn from each list. 370 N.C. 392, 396, 809 S.E.2d 98, 101 (2018). Here, the Governor may select his nominees from a virtually unlimited pool of qualified people.

With respect to the second *McCrory* factor, moreover, the Governor's supervisory powers augment his control over the views and priorities of his Cabinet members. The Governor is ultimately "responsible for formulating and administering the policies of the executive branch of the State government." N.C.G.S. § 143B-4. Each Cabinet member must "submit to the Governor an annual plan of work for the next fiscal year," *id.* § 143B-10(h), and "report to the Governor legislative, budgetary, and administrative programs to accomplish comprehensive, long-range coordinated planning and policy formulation in the work of his department," *id.* § 143B-10(i). And many of the Cabinet members' discretionary decisions regarding department organization and operation require the Governor's approval before taking effect. *See*, *e.g.*, *id.* § 143B-10(b) (providing that each principal State department head may, "[w]ith the approval of the Governor, . . . establish or abolish . . . any division" within the department head's department); *id.* § 143B-10(j)(2) (providing that each principal State department head "may adopt . . . [r]ules, approved by the Governor, to govern the management of the department, which shall include the functions of planning, organizing, staffing, directing, coordinating, reporting, budgeting, and budget preparation which affect private rights or procedures available to the public"). In short, the Governor has extensive supervisory power, allowing him to directly manage his Cabinet members in virtually every aspect of their authority.

Finally, with respect to the third *McCrory* factor, members of the Governor's Cabinet "serve at the Governor's pleasure," *id.* § 143B-9(a), meaning that the Governor may remove them for any reason or for no reason at all. If a Cabinet member's performance does not conform to the Governor's wishes, the Governor may remove him or her. If a

Cabinet member acts too slowly to implement the Governor's policies, the Governor may remove him or her. If the Governor decides to change directions in a given policy area and the corresponding Cabinet member is not willing to be flexible, the Governor may remove him or her. In other words, the Governor retains plenary authority to remove the members of his Cabinet. With that authority, he may prevent any member of his Cabinet from refusing to properly implement his preferred policies.

In light of the Governor's broad power to supervise and remove his Cabinet members, and in light of the open universe from which the Governor may select his Cabinet nominees, the confirmation power gives the Senate little ability to determine who will be executing the law or how they will do so. Once confirmed, Cabinet members are—to the extent that they are subject to control by another government official—subject to complete control by the Governor. It follows that any effort by the Senate to block one qualified nominee in the hopes that the Governor would then nominate someone who shares the views and priorities of a majority of senators (assuming that the views and priorities of a majority of senators differ from those of the Governor) would likely be futile. Thus, although the Governor does not have sole appointment power under subsection 143B-9(a), he has immense influence over who serves in his Cabinet and over what his Cabinet members do. More fundamentally, he retains enough control over the members of his Cabinet to take care that the laws be faithfully executed.

Applying these factors to the statutory scheme as a whole, we hold that senatorial confirmation of the Governor's Cabinet nominees does not unconstitutionally impede the Governor's ability to take care that the laws be faithfully executed.

III

Plaintiff makes four additional arguments to support his contention that senatorial confirmation of Cabinet members is unconstitutional. Although these arguments deal with many of the same concepts as separation-of-powers-clause challenges do, they do not themselves arise out of the separation of powers clause. Instead, they purport to use methods of constitutional construction, or methods of construction that apply to legal texts more broadly, to establish the unconstitutionality of subsection 143B-9(a)'s appointments process.

Each argument revolves, in one way or another, around two constitutional provisions that specify some form of legislative confirmation of gubernatorial appointees. First, plaintiff cites the appointments clause, which requires constitutional officers whose appointments are

not otherwise provided for by the constitution to be nominated by the Governor and confirmed by a majority of the Senate. N.C. Const. art. III, § 5(8); *McCrory*, 368 N.C. at 644, 781 S.E.2d at 255. Second, he cites Article IX, Section 4(1), which states that "eleven members" of the State Board of Education shall be "appointed by the Governor, subject to confirmation by the General Assembly in joint session."[6]

Plaintiff argues, based on these two provisions, that senatorial confirmation of members of the Governor's Cabinet is unconstitutional based on the canon of *expressio unius est exclusio alterius*. Plaintiff essentially claims that, because the constitution twice mentions some form of legislative confirmation for certain constitutional officers but fails to require any form of legislative confirmation for statutory officers, the constitution implicitly prohibits the General Assembly from requiring legislative confirmation of statutory officers.

"Under the doctrine of *expressio unius est exclusio alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list." *Evans v. Diaz*, 333 N.C. 774, 779-80, 430 S.E.2d 244, 247 (1993) (citing *Alberti v. Manufactured Homes, Inc.*, 329 N.C. 727, 732, 407 S.E.2d 819, 822 (1991)). "The canon depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which is abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded." *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81, 122 S. Ct. 2045, 2050 (2002). In other words, sometimes a provision is written (or a set of provisions are written) in such a way that a reasonable negative inference can and should be drawn. *See, e.g.*, *Jennings v. Rodriguez*, ___ U.S. ___, ___, 138 S. Ct. 830, 844 (2018). Because the application of the *expressio unius* canon "depends so much on context," however, "it must be applied with great caution." Antonin Scalia & Bryan Garner, *Reading Law* 107 (2012).

Context significantly limits the application of this canon in cases like this one, in which the scope of the General Assembly's power is at issue. "[O]ur State Constitution is not a grant of power. All power which

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6. To the extent that plaintiff asserts in his reply brief that "the power of appointment is an executive power," this premise directly conflicts with our prior decisions. The power of appointment is not inherently executive, *see Cunningham v. Sprinkle*, 124 N.C. 638, 643, 33 S.E. 138, 139 (1899) ("[T]he election of officers is not an executive, legislative or judicial power, but only a mode of filling the offices created by law . . . ."), and therefore is not an "executive power of the State . . . vested in the Governor" by Article III, Section 1 of our state constitution. *See, e.g.*, *McCrory*, 368 N.C. at 648, 781 S.E.2d at 258 (first citing *Cunningham*, 124 N.C. at 643, 33 S.E. at 139; and then citing *McIver*, 72 N.C. 76, 85).

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." *State ex rel. Martin v. Preston*, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989) (citation omitted) (first citing *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961); then citing *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 (1959); and then citing *Greensboro-High Point Airport Auth. v. Johnson*, 226 N.C. 1, 8, 36 S.E.2d 803, 809 (1946)).[7] "Unless the Constitution *expressly* or by *necessary implication* restricts the actions of the legislative branch, the General Assembly is free to implement legislation as long as that legislation does not offend some specific constitutional provision." *Baker*, 330 N.C. at 338-39, 410 S.E.2d at 891-92; *see id.* at 343, 410 S.E.2d at 896 (Mitchell, J., dissenting) (asserting that the *expressio unius* canon "should not be applied blindly in cases of state constitutional interpretation"). In the context of finding limitations on the General Assembly's power, therefore, the constitution must *necessarily imply* any reasonable negative inference if we are to draw that inference through the use of the *expressio unius* canon.

The two provisions in question here do have a necessary implication, but not one that limits the General Assembly's power. The necessary inference to be drawn from the fact that the constitution *requires* some form of legislative confirmation as to certain constitutional officers—but stays silent on the method of selection of statutory officers—is that the constitution *does not require* some form of legislative confirmation as to statutory officers. That is essentially what we held in *McCrory*. In saying that the appointments clause, standing alone, does not prohibit the General Assembly from giving itself the power to appoint certain statutory officers outright, we were saying that the appointments process did not have to conform to the processes specified in the two constitutional provisions in question. *See McCrory*, 368 N.C. at 644, 781 S.E.2d at 255. In other words, the reasonable inference to be drawn

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7. This is a fundamental distinction between our state and federal constitutions. The Constitution of the United States is a grant of power to the federal government—that is, the federal government can act only in ways *permitted* by the Constitution. *See, e.g.*, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) (stating that the federal government "is acknowledged by all to be one of enumerated powers" that "can exercise only the powers granted to it"). Our state constitution, by contrast, functions in the opposite manner—that is, the General Assembly is generally free to act unless *prohibited* by our constitution. *See, e.g.*, *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570-71, 21 S.E. 787, 787 (1895) ("The only limitation upon [the General Assembly's] power is found in the organic law, as declared by the delegates of the people in convention assembled from time to time.").

from the constitution's failure to specify how statutory officers are to be appointed or otherwise selected is that the constitution simply leaves this matter to be determined by the political process.

We reached a similar decision in *In re Spivey*, where we addressed the respondent's argument that, because district attorneys are "independent constitutional officer[s]," they can be removed only by impeachment. *In re Spivey*, 345 N.C. 404, 410, 480 S.E.2d 693, 696 (1997). We used the *expressio unius* canon[8] to hold that, because the constitution and an arguably pertinent statute "expressly provide[d] that most constitutional officers are removable by impeachment" but did not "provide[ ] that district attorneys are subject to removal by impeachment," neither the constitution nor the statute subjected district attorneys to removal by impeachment. *Id.* at 412, 480 S.E.2d at 697. *Spivey* therefore construed the absence of a method of removal that is stated elsewhere in the constitution to mean that the constitution does not *require* that method of removal where it is absent. That is precisely analogous to how we construe the constitutional provisions that plaintiff raises here: the absence of a legislative confirmation requirement elsewhere in the constitution means that the constitution does not require statutory officers to be confirmed by the legislature. Nothing more, nothing less.

In contrast, plaintiff suggests that, when the constitution requires a process in one circumstance, it implicitly *prohibits* that process from being used in all other circumstances. But if we drew *that* inference, plaintiff's argument would be self-defeating. After all, the constitution delegates to the Governor the power to nominate or appoint a number of constitutional officers—in these two provisions and in others. *See also*, *e.g.*, N.C. Const. art. III, § 7(3) (granting the Governor the power to fill vacant offices in the Council of State); *id.* art. IV, § 19 (granting the Governor the power to fill vacant Article IV offices unless another process is constitutionally specified). As with the two provisions that give the General Assembly some form of confirmation power over constitutional officers, these provisions give the *Governor* the power to nominate or appoint constitutional officers. But, just as no constitutional provision gives the General Assembly the power to confirm statutory officers, no constitutional provision gives the Governor the power to nominate or appoint statutory officers. Thus, applying plaintiff's

8. In *Spivey*, we called the *expressio unius* canon by its alternative name—"*inclusio unius est exclusio alterius* (inclusion of one is exclusion of another)," *id.* at 412, 480 S.E.2d at 697; *see also* Scalia & Garner, at 107 (explaining that *expressio unius* and *inclusion unius* are interchangeable names for the same interpretive canon).

suggested interpretation, it would follow that the Governor could not nominate or appoint statutory officers. This does *not* follow, however, and the constitution permits, but does not require, the Governor to be able to nominate and appoint statutory officers. It likewise permits, but does not require, the General Assembly to be able to confirm statutory officers.

In so concluding, we acknowledge that plaintiff cites several cases from our sister states in support of his *expressio unius* argument. But using out-of-state cases as persuasive authority in interpreting our own constitution can be ill-advised; each state constitution has its own unique history of development, both in terms of the constitutional text itself and of the judiciary's interpretation of that text. *See*, *e.g.*, *McCrory*, 368 N.C. at 640-44, 781 S.E.2d at 253-55 (discussing the history of the appointment power in North Carolina with reference to a number of state-specific constitutional ratifications and amendments); *Rampton v. Barlow*, 464 P.2d 378, 379 (Utah 1970) (discussing the connection between the Constitution of Utah and the Organic Act creating the Territory of Utah). The opinions that plaintiff cites from Alaska and Utah are a case in point. They stand only for the proposition that, *when the appointment power is an executive power*, the legislature may not confirm gubernatorial appointees unless the state constitution expressly permits it to do so. *See Bradner v. Hammond*, 553 P.2d 1, 7 (Alaska 1976) ("[U]nder Alaska's constitution the appointment of subordinate executive officers by the governor is an executive function . . . ."); *Matheson v. Ferry*, 657 P.2d 240, 245 (Utah 1982) (Stewart, J., concurring). But as we have already discussed, our courts have long held that the appointment power in North Carolina is "not an executive, legislative or judicial power, but only a mode of filling the offices created by law." *Cunningham*, 124 N.C. at 643, 33 S.E. at 139; *see also McCrory*, 368 N.C. at 648, 781 S.E.2d at 258 ("[A]ppointing statutory officers is not an exclusively executive prerogative.").[9] Thus, these opinions reach a different result than we do because they rest on a different premise that arises from different texts and histories.

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9. Though the states are not unanimous in this view of the appointment power, North Carolina is hardly an outlier in this respect. This theory of the appointment power is long established and remains the law both here and in a number of other jurisdictions. *See*, *e.g.*, *Clinton v. Clinton*, 305 Ark. 585, 590, 810 S.W.2d 923, 926 (1991) (reaffirming "that there was no inherent appointment power in the Governor" (emphasis omitted) (citing *Cox v. State*, 72 Ark. 94, 78 S.W. 756 (1904))); *Marine Forests Soc'y v. Cal. Coastal Comm'n*, 36 Cal. 4th 1, 34, 113 P.3d 1062, 1080 (2005) (reaffirming the principle that "[t]he power to fill an office is political, and this power is exercised in common by the Legislatures, the Governors, and other executive officers, of every State in the Union, unless it has been expressly withdrawn, by the organic law of the State" (quoting *People ex rel. Aylett v. Langdon*, 8 Cal. 1, 16 (1857))); *Stroger v. Reg'l Transp. Auth.*, 201 Ill. 2d 508, 527, 778

In declining to adopt plaintiff's application of the *expressio unius* canon, we do not, as he suggests, render superfluous the language of the two constitutional provisions that require some form of legislative confirmation. Consider the appointments clause: "The 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." N.C. Const. art. III, § 5(8) (emphasis added). If one were to remove the language that we have italicized, the Governor is left with the complete power to "nominate and appoint" constitutional officers—a power that is not subject to any form of legislative confirmation. Alternatively, if one were to remove the italicized language plus the word "and" before it and the word "appoint" after it, the appointments clause would be incomplete; it would describe only how constitutional officers "whose appointments are not otherwise provided for" are to be *nominated*, not how they are to be appointed. Either way, removing the language requiring senatorial confirmation would alter the meaning of the appointments clause. Thus, that language is not superfluous, even if one rejects plaintiff's *expressio unius* argument.

So too with the Board of Education provision. If one were to remove the confirmation requirement from Article IX, Section 4(1), the clause in question would simply provide for "eleven members" of that Board to be "appointed by the Governor"—full stop. That too would morph the Governor's appointment power from one that is subject to legislative confirmation to one that is not, even accepting our application of the *expressio unius* canon. As a result, the legislative confirmation language in this provision is also not superfluous.

N.E.2d 683, 694 (2002) (reaffirming the principle that "[t]he power to appoint to office is not inherent in the executive department unless conferred by the constitution or the legislature" and that "[t]he creation of officers, the delegation and regulation of the powers and duties of officers and the prescribing of the manner of their appointment or election are legislative functions, which are restrained only by the Constitution" (quoting *People ex rel. Gullett v. McCullough*, 254 Ill. 9, 16, 98 N.E. 156, 158 (1912))); *Schisler v. State*, 394 Md. 519, 584, 907 A.2d 175, 213-14 (2006) (explaining "that the Legislature can by express provision in a prospective statute commit the appointment process to entities other than the Executive," reaffirming that court's earlier holding in *Mayor of Baltimore v. State*, 15 Md. 376, 455 (1860)); *State ex rel. Clarke v. Irwin*, 5 Nev. 111, 127 (1869) (stating that, "[i]n the Constitution of the State of Nevada, the appointing power of the Legislature is neither cut up by the roots, nor in any manner hampered, save where the Constitution itself . . . provides for filling a vacancy"); *Richardson v. Young*, 122 Tenn. 471, 515-16, 125 S.W. 664, 674 (1909) ("We have no difficulty in coming to the conclusion that [the appointment] power, under the constitution of this State, is not an executive function, inherently in the executive department when not otherwise expressly vested, but a political power, which, consistently with the distribution of powers of government, may properly be vested in either the legislative, executive, or judicial departments by the general assembly.").

Next, quoting the report of the North Carolina Study Commission that drafted our current constitution, plaintiff argues that—because our constitution restricts, rather than enumerates, the General Assembly's power—a constitutional provision that "may appear in form to be a grant of authority to the General Assembly to act on a particular matter normally is in legal effect a limitation, not a grant." *Report of the North Carolina State Constitution Study Commission* 2 (1968). In light of the rule expressed in this statement, plaintiff concludes that the two provisions of the constitution that confer confirmation capability on the General Assembly show that the General Assembly has no *general* power to confirm. Accordingly, plaintiff maintains, these provisions must actually *limit* the General Assembly's ability to confirm to the two constitutionally specified instances.

We do not have to decide, and do not decide, whether the statement from the Commission report that plaintiff quotes is accurate. It is enough to say that its use of the word "normally" permits exceptions to its purported rule, and that, even if that rule is correct, the two constitutional provisions in question would both qualify as exceptions to it. The grant of power to the General Assembly in those provisions must be viewed hand-in-hand with the power that those provisions grant to the Governor. When viewed in this way, it is easy see that, when the constitution creates appointments processes in which both the General Assembly and the Governor have a role, it needs to specify the power of both actors in those processes. That is all that the constitution has done here. Accordingly, those provisions specifying the appointments processes of constitutional officers should not be read as limitations on the General Assembly as to the appointments of statutory officers.

Finally, plaintiff takes issue with the language of subsection 143B-9(a) that requires Cabinet members to be confirmed "in conformance with" the appointments clause. He claims that, because the appointments clause applies only to constitutional officers, the appointments clause cannot "authorize" the General Assembly to require senatorial confirmation of Cabinet members.

But, as plaintiff concedes, our constitution does not enumerate the powers of the General Assembly. As we have already mentioned, unlike the powers of Congress in the federal model, the General Assembly has the power to legislate on all matters unless the constitution prohibits it from doing so. *See McIntyre*, 254 N.C. at 515, 119 S.E.2d at 891 ("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."); *see also Pope v. Easley*, 354 N.C. 544, 546,

556 S.E.2d 265, 267 (2001) (per curiam) ("[T]he power [that] remains with the people . . . is exercised through the General Assembly . . . ."). Thus, the General Assembly need not identify the constitutional source of its power when it enacts statutes. In fact, in most instances, there will be no particular grant of constitutional authority on which the General Assembly will rely. It will instead rely on its general power to legislate, which it retains as an arm of the people.

Plaintiff's argument therefore makes sense only in conjunction with one or more of his earlier arguments that the constitution implicitly limits the General Assembly's legislative confirmation power to the two instances enumerated in the appointments clause and in Article IX, Section 4(1). His argument is predicated, in other words, on the theory that the constitution elsewhere limits the General Assembly's authority to confirm executive officers, which would then require express constitutional authorization for the General Assembly to be able to call for senatorial confirmation in this instance. Because plaintiff's earlier arguments are unavailing, though, this argument is as well.

Notably, under our analysis, subsection 143B-9(a) would still be constitutional even if the General Assembly had mistakenly intended the "in conformance with" phrase to identify the constitutional source of its authority. The General Assembly would still *in fact* have the authority to enact this statutory provision as long as its enactment was not otherwise prohibited by the constitution—which it is not. And we would therefore uphold the statute as a valid exercise of that authority—even if the General Assembly had not properly identified the source of its authority.

But it is also worth noting that the "in conformance with" language does not appear to be intended to provide constitutional authority for the General Assembly's enactment anyway. *McCrory* clearly holds that the appointments clause refers only to constitutional officers, not to statutory ones. *See* 368 N.C. at 644, 781 S.E.2d at 255. We have long held that "[t]he Legislature is presumed to know the law." *Purnell v. Page*, 133 N.C. 125, 130, 45 S.E. 534, 536 (1903). And it is undisputed that the General Assembly added the senatorial confirmation language to subsection 143B-9(a) after we handed down *McCrory*. We therefore presume that the General Assembly knew that the appointments clause could not be the source of its authority to require senatorial confirmation of Cabinet members. The best reading of the "in conformance with" language, then, is that it does *not* provide the source of the General Assembly's constitutional authority; rather, it simply requires that the appointments process for Cabinet members mirror the process recited in the appointments clause. After all, if one removes the phrase

"in conformance with Section 5(8) of Article III of the North Carolina Constitution" from subsection 143B-9(a), the statute would fail to tell us how many senators must consent in order to confirm the Governor's appointees. By including that language, the statute appears to be telling us that a majority of senators must consent in order for a Cabinet member to be confirmed.

Because none of plaintiff's arguments about how to properly construe the two legislative confirmation provisions in the constitution are convincing, these arguments do not give us any basis on which to hold the senatorial confirmation provision in subsection 143B-9(a) unconstitutional.

It has long been the practice of the General Assembly, moreover, to require confirmation of certain gubernatorial nominees to statutory offices. *See, e.g.*, An Act of March 8, 1941, ch. 97, sec. 2, 1943 N.C. Pub. [Sess.] Laws 151, 151 (codified as amended at N.C.G.S. § 62-10(a) (2017 & Supp. 2018)) (requiring legislative confirmation of gubernatorial nominees for the North Carolina Utilities Commission); *see also* Current Operations and Capital Improvements Appropriations Act of 2014, ch. 100, sec. 18B.6, 2013 N.C. Sess. Laws (Reg. Sess. 2014) 328, 539 (codified as amended at N.C.G.S. § 7A-45.1(a10) (2017)) (requiring legislative confirmation of gubernatorial nominees for special superior court judgeships); Protecting and Putting North Carolina Back to Work Act, ch. 287, sec. 17, 2011 N.C. Sess. Laws 1087, 1099 (codified as amended at N.C.G.S. § 97-77(a), (a1) (2017 & Supp. 2018)) (requiring legislative confirmation of gubernatorial nominees for the North Carolina Industrial Commission). Because these appointments processes are consistent with the demands of the constitution, "it is entirely within the power of the Legislature to deal with [statutory officers] as public policy may suggest and public interest may demand." *N.C. State Bd. of Educ. v. State*, ___ N.C. ___, ___, 815 S.E.2d 67, 74 (2018) (quoting *Mial v. Ellington*, 134 N.C. 131, 162, 46 S.E. 961, 971 (1903)).

* * *

The separation of powers clause safeguards the Governor's ability to have enough control over his Cabinet members to perform his duty under the take care clause. Because Cabinet members play such a critical role in executive branch functions, the Governor's control over them must be significant. Here, however, the Governor has unfettered power to nominate any eligible individual to serve in his Cabinet, has significant supervisory power over his Cabinet members, and has the power to remove Cabinet members at will. The constitution, moreover, does not otherwise prohibit the General Assembly from requiring senatorial

confirmation of members of the Governor's Cabinet. As a result, the appointments provision of subsection 143B-9(a) withstands plaintiff's facial constitutional challenge. We therefore affirm the decision of the Court of Appeals.

AFFIRMED.

BILLY BRUCE JUSTUS, 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

No. 255A17

Filed 21 December 2018

1. Trials—medical malpractice—verdict set aside

The Court of Appeals correctly concluded that the trial court did not abuse its discretion by setting aside a verdict in a medical malpractice action based on N.C. Civil Procedure Rule 59(a)(7). The trial judge is in the best position to determine whether a verdict is against the greater weight of the evidence, including whether the jurors were affected by misleading suggestions from expert witnesses.

2. Costs—medical malpractice—expert witnesses

The trial court did not abuse its discretion in an award of costs in a medical malpractice action against a doctor and hospitals where the doctor contended that it was improper to assess fees for the testimony of experts whose testimony concerned the only the hospitals. The experts did address issues relating to the doctor in addition to the hospitals. There was no issue concerning N.C.G.S. § 7A-305(d)(11), which authorizes certain costs.

3. Appeal and Error—partial retrial ordered—authority of Court of Appeals

On the unusual facts of the case, the Court of Appeals did not err by awarding a partial rather than a full retrial in a medical malpractice case where the trial court set aside the verdict and entered an amended verdict. The only remedy available to the trial court was a new trial in whole or in part, the trial court's substantive decision to grant plaintiff relief from the original verdict was not disturbed on appeal, and the Court of Appeals had ample authority to

order implementation of the relief that could be properly afforded to plaintiff on remand.

Chief Justice MARTIN concurring in part and dissenting in part.

Justice JACKSON joins in this opinion.

Justice NEWBY 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. ___, 802 S.E.2d 142 (2017), affirming an order awarding costs, affirming in part and reversing in part an order granting plaintiff's motion to alter or amend judgment, and vacating an amended judgment, all entered on 3 March 2015 by Judge Zoro J. Guice, Jr. in Superior Court, Henderson County, and remanding for a new trial on damages. On 28 September 2017, the Supreme Court allowed defendants' petition for discretionary review of additional issues. Heard in the Supreme Court on 12 March 2018.

Law Offices of Wade Byrd, P.A., by Wade E. Byrd, for plaintiff-appellee.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for defendant-appellants, Michael J. Rosner, M.D. and Michael J. Rosner, M.D., P.A.

HUDSON, Justice.

Here we consider whether the trial court erred in setting aside the jury's verdict in this medical malpractice suit on the ground that the jury awarded insufficient damages to plaintiff Billy Bruce Justus (plaintiff) after finding that defendant Michael J. Rosner, M.D. performed unnecessary surgeries on plaintiff's now-deceased wife, Pamela Jane Justus. For the reasons stated below, we affirm the decision of the Court of Appeals to remand this action for a new trial.

I. FACTUAL AND PROCEDURAL BACKGROUND

Pamela came to Dr. Rosner in 2000 after suffering from serious neurological symptoms for many years and being treated by a variety of neurologists and pain clinics since the mid-1990s. She complained to Dr. Rosner of severe pain in the back of her neck and right temple as well

as diminished memory and cognition, dizziness, and balance problems. Based upon his examination, Dr. Rosner discussed with Pamela the possibility of performing a laminectomy surgery to decompress her spinal cord. Pamela elected to undergo the laminectomy, which Dr. Rosner performed in June 2000.

By December 2000, Pamela reported to Dr. Rosner that she was doing "horribly" and experiencing severe neck pain. Based upon Dr. Rosner's advice, Pamela agreed to undergo a C1 laminectomy and suboccipital craniectomy, which Dr. Rosner performed in February 2001. Dr. Rosner last saw Pamela as a patient on 21 March 2001. During that appointment, she was advised to return in two months and to contact Dr. Rosner's office several weeks beforehand if she had not improved significantly so that an MRI could be ordered. Pamela called Dr. Rosner's office on 29 May 2001 complaining of severe neck pain and an inability to hold her head up. Dr. Rosner's physician's assistant advised Pamela to return for an MRI, but Pamela refused to return, stating that she was "afraid" to come back to the office and that her insurance was no longer accepted.

Over the following months and years, Pamela saw numerous doctors for diagnosis and treatment of her neck condition. In just the year after she stopped seeing Dr. Rosner, she made at least nine medical visits for various reasons and procedures, including: an MRI in August 2001; possible treatments for vocal cord damage stemming from Dr. Rosner's February 2001 surgery; neurological evaluations at multiple practices; and injections for nerve pain.

In April 2004 Domagoj Coric, M.D. performed a fusion surgery on Pamela's neck to address her inability to lift her head off of her chest. After that surgery did not solve the problem, Dr. Coric performed a second operation in 2011. Pamela passed away in September 2012; her death certificate listed non-alcohol related kidney and liver problems as her immediate cause of death.

In June 2003, plaintiff and Pamela filed suit against Dr. Rosner; and his medical practice, Michael J. Rosner, P.A. (defendants); and Fletcher Hospital, Inc. d/b/a Park Ridge Hospital, Adventist Health System, and Adventist Health System Sunbelt Healthcare Corporation (the hospital defendants). The complaint included claims against Dr. Rosner for negligence, lack of informed consent, fraud, loss of consortium, the value of services rendered to Pamela, and willful and wanton conduct. The thrust of the suit was that Dr. Rosner performed unwarranted, unnecessary, and contraindicated experimental surgeries on Pamela and failed to fully inform her of their novelty and risks. This case, along with twenty-four related actions against Dr. Rosner, was designated as exceptional

under Rule 2.1 of the General Rules of Practice for the Superior and District Courts. After Pamela passed away in 2012, plaintiff, in his capacity as administrator of her estate, was substituted as a party plaintiff for Pamela and allowed to amend the complaint to assert claims for wrongful death and civil conspiracy.

The case was tried in Superior Court, Henderson County, beginning on 28 July 2014 before Judge Zoro J. Guice, Jr. During the trial, Dr. Rosner offered the testimony of several expert witnesses who suggested that Pamela could have avoided the chin-on-chest deformity she developed as a result of Dr. Rosner's surgeries if she had returned specifically to him for follow-up care. For instance, Michael Seiff, M.D. testified in pertinent part as follows:

> Q. And to your knowledge, did [Pamela] follow up as instructed *with Dr. Rosner*?
>
> A. No.
>
> Q. Had she done so, as an expert in the field of neurosurgery, do you believe that this chin-on-chest deformity could have been avoided with appropriate follow-up by [Pamela] *with Dr. Rosner*?
>
> A. Absolutely.

(Emphases added.) Similarly, an exchange with Konstantin Slavin, M.D. went as follows:

> Q. . . . [D]id you know that Pam Justus stopped going to Dr. Rosner and was essentially -- I don't want to say lost in follow-up. She refused to return *to Dr. Rosner* following her second operation. Were you aware of that?
>
> A. That's my understanding, yes.
>
> Q. Do you believe, Doctor, had she followed up *with Dr. Rosner*, that this deformity, this chin-to-chest, this kyphosis, could have been caught earlier and remedied earlier, had she simply been following up as she should have?
>
> A. That's a definite possibility, yes.

(Emphases added.) Likewise, the examination of Donald Richardson, M.D. included the following exchange:

> Q. . . .[H]ave you, as a neurosurgeon, who's looked at the films, who's looked at the records, have you formed

> an opinion to a reasonable degree of medical certainty about whether or not Pam Justus's failure to follow up *with Dr. Rosner* was a proximate cause of her development of chin-on-chest deformity? The question is simply yes or no.
>
> A. Yes.

(Emphasis added.)

The jury returned its verdict on 25 September 2014 finding defendants liable for negligence and finding no liability against defendants on other grounds or against the hospital defendants.[1] On its verdict form, the jury found that Pamela had suffered damages in the amount of $512,162.00 but that her damages should be reduced by $512,161.00 because of her "unreasonable failure . . . to avoid or minimize her damages." Accordingly, the trial court entered judgment in the amount of $1.00.

On 31 October 2014, plaintiff moved to alter or amend the judgment under Rule 59 of the North Carolina Rules of Civil Procedure. Specifically, plaintiff asserted that the jury's finding regarding Pamela's failure to mitigate damages was "contrary to the greater weight of credible testimony" and "contrary to law," and displayed "a manifest disregard of the jury to the instructions of the [c]ourt." Plaintiff asserted that the principal evidence to support the mitigation finding was that Pamela did not return to Dr. Rosner for follow-up care and that, as a matter of law, "she had no duty to seek medical attention specifically from Dr. Rosner rather than from other health care providers." Plaintiff also argued that the evidence showed that Pamela affirmatively took reasonable steps to mitigate damages by seeing numerous doctors in the wake of Dr. Rosner's negligent surgeries.

Following a hearing, the trial court entered an order on 3 March 2015 granting plaintiff's Rule 59 motion. Regarding the jury's mitigation of damages verdict, the court found that (1) Dr. Rosner's expert witnesses in neurology "testified that Mrs. Justus' condition could have been ameliorated had she promptly sought follow-up care from Dr. Rosner" and (2) "the overall impression created by these witnesses (and thus communicated to the jury) is that Mrs. Justus had an obligation to return specifically to *Dr. Rosner*; and that, by failing to do so, she allowed her condition to worsen." The court further found that "[t]here was no evidence presented that Ms. Justus unreasonably delayed trying to have her

1. Plaintiff dismissed his individual claims during the charge conference.

problems diagnosed and corrected" and that, "[g]iven the uncontested evidence that Ms. Justus promptly and persistently made diligent efforts to obtain treatment from other physicians after she terminated her relationship with Dr. Rosner, no reasonable person could conclude that she failed to exercise reasonable care to mitigate her damages." In addition, the court found that "the amount of the jury's mitigation finding—i.e., that Mrs. Justus' condition was almost *entirely her own fault* (except for $1.00)—vastly exceeds, and is grossly disproportionate to, the extent to which, according to Dr. Rosner's neurosurgical experts, her condition could have been ameliorated had she timely sought follow-up care."

In its conclusions of law, the trial court determined that "[p]atients have no legal obligation to seek medical treatment from any particular health care provider" and that "[t]he testimony by Dr. Rosner's neurosurgical experts suggesting that Mrs. Justus had a duty to return specifically to Dr. Rosner was inaccurate and misleading." The court also concluded that "Dr. Rosner presented no legally competent evidence sufficient to support a finding that Mrs. Justus unreasonably failed to mitigate her damages" and that the "jury's $1.00 damage award is manifestly inadequate." The court further concluded that the "jury also appears to have reduced its damage finding ($512,161.00) under the influence of passion or prejudice; specifically, the cumulative impact of misleading testimony from multiple experts." The court also noted that "[e]ven aside from the lack of evidence to support *any* mitigation finding at all, the influence of passion or prejudice is further manifested in the grossly excessive *amount* of the jury's mitigation finding."

As a result of these and other findings and conclusions, the trial court set aside the jury's verdict and the court's judgment and entered an amended judgment awarding damages in the amount of $512,162.00. The court also entered an order awarding costs to plaintiff in the amount of $175,547.59. Defendants appealed from the order granting the motion to alter or amend the judgment, the amended judgment, and the order awarding costs.

At the Court of Appeals, defendants argued that the trial court erred by setting aside the jury verdict based on the mitigation of damages issue. In the alternative, they argued that even if the trial court did not err in granting the Rule 59 motion, it erred by entering an amended judgment rather than granting a new trial on all issues, including the defense of contributory negligence, upon which the trial court had declined to instruct the jury. Defendants also argued that the trial court's award of costs constituted reversible error. The Court of Appeals issued a partially divided opinion on 20 June 2017 in which the majority upheld the trial

court's decisions to set aside the jury verdict, deny defendants' request to instruct the jury on contributory negligence, and award costs. *Justus v. Rosner*, ___ N.C. App. ___, 802 S.E.2d 142 (2017). It concluded, however, that the trial court erred by entering an amended judgment rather than ordering a new trial. The Court of Appeals vacated the amended judgment and remanded for a new trial on damages. The dissent agreed with the majority that the trial court properly refused to deliver a contributory negligence instruction and that, once it decided to set aside the verdict, the trial court should have ordered a new trial rather than entering an amended judgment; however, the dissenting judge disagreed that the trial court had sufficient grounds to set aside the verdict or enter its order of costs. Defendants filed a notice of appeal to this Court based on the dissent. We also allowed defendants' petition for discretionary review on the issues of contributory negligence and whether the new trial should again address defendants' liability for Pamela's injuries, rather than being confined only to the issue of damages.

II. ANALYSIS

A. Rule 59

[1] In their appeal based on the dissenting opinion, defendants contend that the Court of Appeals majority erred by upholding the trial court's decision to grant plaintiff's motion to set aside the jury verdict under Rule 59(a). Although the trial court and the Court of Appeals touched upon a number of potential grounds for setting aside the verdict, we need only conclude that one ground supports the trial court's decision to grant relief pursuant to Rule 59 in order to affirm that ruling. Rule 59 states, in part, that "[a] new trial may be granted to all or any of the parties and on all or part of the issues" based upon, among other grounds, "[i]nsufficiency of the evidence to justify the verdict or that the verdict is contrary to law." N.C. R. Civ. P. 59(a)(7). Here the trial court concluded that "Dr. Rosner presented no legally competent evidence sufficient to support a finding that Mrs. Justus unreasonably failed to mitigate her damages," that "[t]he jury's $1.00 damage award is manifestly inadequate," and that "the influence of passion or prejudice is further manifested in the grossly excessive *amount* of the jury's mitigation finding," which falls within Rule 59(a)(7)'s ground of "[i]nsufficiency of the evidence to justify the verdict."

"[A] motion for a new trial for insufficiency of the evidence pursuant to Rule 59(a)(7) is addressed to the discretion of the trial court." *In re Will of Buck*, 350 N.C. 621, 624, 516 S.E.2d 858, 860 (1999) (citing *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 380-81, 329 S.E.2d 333,

343-44 (1985)); *see also Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982) (plurality opinion) ("It has been long settled in our jurisdiction that an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." (citing *Goldston v. Chambers*, 272 N.C. 53, 59, 157 S.E.2d 676, 680 (1967))). Accordingly, "in the absence of an abuse of discretion, a trial court's ruling on a motion for a new trial due to the insufficiency of evidence is not reversible on appeal." *In re Buck*, 350 N.C. at 624, 516 S.E.2d at 860.

We have explained that in the Rule 59(a)(7) context, the phrase " 'insufficiency of the evidence' means that the verdict 'was against the greater weight of the evidence.' " *Id.* at 624, 516 S.E.2d at 860 (quoting *Nationwide Mut. Ins. Co. v. Chantos*, 298 N.C. 246, 252, 258 S.E.2d 334, 338 (1979)). Therefore, "[t]he trial court has discretionary authority to appraise the evidence and to 'order a new trial whenever in [its] opinion the verdict is contrary to the greater weight of the credible testimony.' " *Id.* at 624-25, 516 S.E.2d at 860 (quoting *Britt v. Allen*, 291 N.C. 630, 634, 231 S.E.2d 607, 611 (1977)). Finally, in applying the abuse of discretion standard, "[a]n appellate court should not disturb a *discretionary* Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Id.* at 625, 516 S.E.2d at 861 (quoting *Anderson v. Hollifield*, 345 N.C. 480, 483, 480 S.E.2d 661, 663 (1997) (emphasis added)).

Here, the trial court's order granting plaintiff's Rule 59 motion included the following findings of fact:

> 5. Dr. Rosner contended at trial that Mrs. Justus unreasonably failed to mitigate her damages.
>
> 6. To support the foregoing defense, Dr. Rosner called four neurosurgical experts (Drs. Michael Seiff, Donald Richardson, Peter Jannetta, and Konstantin Slavin) to testify on his behalf.
>
> 7. These neurosurgical experts testified that Mrs. Justus' condition could have been ameliorated had she promptly sought follow-up care from Dr. Rosner.
>
> 8. Based upon the Court's opportunity to observe the evidence as it was presented and the attendant circumstances, together with the demeanor of Dr. Rosner's neurosurgical experts and considering all of their testimony

in context, this Court finds that the overall impression created by these witnesses (and thus communicated to the jury) is that Mrs. Justus had an obligation to return specifically *to Dr. Rosner*; and that, by failing to do so, she allowed her condition to worsen.

9. That Dr. Rosner elicited this testimony from four different experts, moreover, intensified its cumulative impact upon the jury.

10. There was no evidence presented that Ms. Justus unreasonably delayed trying to have her problems diagnosed and corrected.

11. On the contrary, her attempts to mitigate her damages were reasonable and all that could be expected.

12. Given the uncontested evidence that Ms. Justus promptly and persistently made diligent efforts to obtain treatment from other physicians after she terminated her relationship with Dr. Rosner, no reasonable person could conclude that she failed to exercise reasonable care to mitigate her damages.

The trial court's conclusions of law included the following:

1. Patients have no legal obligation to seek medical treatment from any particular health care provider.

2. Mrs. Justus therefore had no duty to return to Dr. Rosner, rather than to other health care providers.

3. The testimony by Dr. Rosner's neurosurgical experts suggesting that Mrs. Justus had a duty to return specifically to Dr. Rosner was inaccurate and misleading.

4. The misleading effect of the foregoing testimony was compounded by its repetition from four different expert witnesses.

5. Dr. Rosner presented no legally competent evidence sufficient to support a finding that Mrs. Justus unreasonably failed to mitigate her damages.

The Court of Appeals majority held that "the trial court's actions, in determining evidence of mitigation of damages was insufficient to justify the verdict, did not amount to an abuse of discretion." *Justus*, ___ N.C. App. at ___, 802 S.E.2d at 151. We agree.

Regarding a plaintiff's duty to mitigate damages,

> [t]he rule in North Carolina is that an injured plaintiff, whether h[er] case be tort or contract, must exercise reasonable care and diligence to avoid or lessen the consequences of the defendant's wrong. If [s]he fails to do so, for any part of the loss incident to such failure, no recovery can be had. This rule is known as the doctrine of avoidable consequences or the duty to minimize damages. Failure to minimize damages does not bar the remedy; it goes only to the amount of damages recoverable.

Miller v. Miller, 273 N.C. 228, 239, 160 S.E.2d 65, 73-74 (1968) (first citing *Johnson v. Atl. Coast Line R.R., Co.*, 184 N.C. 101, 113 S.E. 606 (1922); and then citing 22 Am. Jur. 2d *Damages* §§ 30-32 (1965)).

In their brief to this Court, defendants challenge the trial court's determination that the jury's finding that Pamela failed to mitigate all but $1.00 in damages resulted from the impression created by defendants' experts that Pamela's damages were principally caused by her failure to return specifically to Dr. Rosner for follow-up care after the second surgery he performed on her. As the excerpts from the expert testimonies set forth above show, however, there was evidence at trial to support the trial court's finding that defendants' experts created the impression that Pamela had a duty to return to Dr. Rosner in particular and that this impression influenced the jury's decision to award only nominal damages.[2]

Moreover, defendants do not argue that a patient's failure to seek additional treatment from the doctor who provided negligent medical care to her—care which caused or contributed to the very harm the patient needed to mitigate—constitutes a failure to mitigate damages. Defendants do not dispute that a plaintiff is required only to "exercise reasonable care and diligence to avoid or lessen the consequences of

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2. Defendants find "particularly troublesome" that in Finding No. 8 the trial court characterized the "demeanor" of defendants' experts as contributing to an impression that Pamela had an obligation to return specifically to Dr. Rosner and that she allowed her condition to worsen by failing to do so. This challenge to the trial court's discussion of demeanor is unpersuasive because one of the very reasons we apply an abuse of discretion standard to a trial court's ruling on a Rule 59 motion is that the trial judge is present at trial and is thus in the best position to assess the impact of witnesses' testimony on the jury. *See In re Buck*, 350 N.C. at 628, 516 S.E.2d at 863 ("Only the trial court has directly observed the evidence as it was presented and the attendant circumstances, *as well as the demeanor and characteristics of the witnesses*." (emphasis added)).

the defendant's wrong." *Miller*, 273 N.C. at 239, 160 S.E.2d at 74. We have already noted that the evidence showed that, after leaving Dr. Rosner's care, Pamela *did* seek and obtain further medical care from a variety of other medical professionals, including undergoing an MRI on 17 August 2001—the same diagnostic test recommended to Pamela by Dr. Rosner's physician's assistant during the 29 May 2001 phone call.

The jury's determination of "failure . . . to minimize damages" is further undermined by the evidence that much of the pain and suffering Pamela experienced as a result of Dr. Rosner's negligent surgeries occurred before she would have had the opportunity to mitigate damages. Even so, the jury found that she completely failed to mitigate damages except for $1.00.

Given this evidence, we cannot say that the trial court's decision to set aside the jury's verdict was an abuse of discretion because we are not "convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *In re Buck*, 350 N.C. at 625, 516 S.E.2d at 861 (quoting *Anderson*, 345 N.C. at 483, 480 S.E.2d at 663)). As we have reiterated over the years,

> our appellate courts should place great faith and confidence in the ability of our trial judges to make the right decision, fairly and without partiality, regarding the necessity [of] a new trial. Due to their active participation in the trial, their first-hand acquaintance with the evidence presented, their observa[tions] of the parties, the witnesses, the jurors and the attorneys involved, and their knowledge of various other attendant circumstances, presiding judges have the superior advantage in best determining what justice requires in a certain case.

Id. at 626, 516 S.E.2d at 861 (quoting *Worthington*, 305 N.C. at 487, 290 S.E.2d at 605). The trial court here was in the best position to determine whether the jury's verdict on mitigation of damages went against the greater weight of the evidence, including whether the jurors were affected by the experts' suggestion that Pamela's failure to return specifically to Dr. Rosner caused her health to deteriorate. Accordingly, we affirm the Court of Appeals majority's conclusion that the trial court did not abuse its discretion in setting aside the verdict based on Rule 59(a)(7).[3]

3. Like the Court of Appeals majority, we decline to address the appropriateness of awarding relief under other subsections of Rule 59.

B. Costs

[2] In the second issue in their appeal based on the dissenting opinion, defendants argue that the Court of Appeals majority erred by affirming the trial court's assessment of $175,547.59 in costs against them. Defendants contend that the trial court lacked authority to assess expert witness costs for experts whose testimony concerned the hospital defendants—which the jury did not find liable—rather than Dr. Rosner.

"In actions where allowance of costs is not otherwise provided by the General Statutes, costs may be allowed in the discretion of the court. Costs awarded by the court are subject to the limitations on assessable or recoverable costs set forth in G.S. 7A-305(d), unless specifically provided for otherwise in the General Statutes." N.C.G.S. § 6-20 (2017). N.C.G.S. 7A-305(d) states in pertinent part:

> (d) The following expenses, when incurred, are assessable or recoverable, as the case may be. The expenses set forth in this subsection are complete and exclusive and constitute a limit on the trial court's discretion to tax costs pursuant to G.S. 6-20:
>
> (1) Witness fees, as provided by law.
>
> . . . .
>
> (10) Reasonable and necessary expenses for stenographic and videographic assistance directly related to the taking of depositions and for the cost of deposition transcripts.
>
> (11) Reasonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings.

Id. § 7A-305(d) (2017). Although the assessment of costs is generally within the discretion of the trial court, *see id.* § 6-20, "when the validity of an award of costs hinges upon the extent to which the trial court properly interpreted the applicable statutory provisions, the issue before the appellate court is one of statutory construction, which is subject to de novo review." *Lassiter ex rel. Baize v. N.C. Baptist Hosps., Inc.*, 368 N.C. 367, 375, 778 S.E.2d 68, 73 (2015) (citation omitted).

Here plaintiff requested various costs from defendants, including $89,789.84 for depositions, $85,757.75 for experts at trial, and $458,089.30 for "additional expert witness fees." The trial court ordered

that defendants pay plaintiff a lump sum of $175,547.59, which totals the costs requested for depositions and experts' trial testimony.

Defendants contend that this assessment was improper because it included fees connected to the trial testimonies of experts—Drs. Arthur Caplan, Brian Currie, and David Barton Smith—who testified against the hospital defendants rather than against Dr. Rosner. That is, defendants argue, the testimonies of these medical experts cannot support an award of costs against defendants because "[e]ach of these experts expressly did not offer criticisms of Dr. Rosner and, instead, limited their testimony to criticisms of the Hospital Defendants, whom the jury found not liable."

The Court of Appeals rejected this argument, concluding that "defendant [Rosner] fails to establish that ordering payment of these expert fees was an abuse of discretion," *Justus*, ___ N.C. App. at ___, 802 S.E.2d at 156 (citation omitted). The dissent, however, rejected both the majority's result as well as the abuse of discretion standard of review it employed. The dissent stated that the question of which experts' trial testimony could support the assessment of costs against defendants is a legal question because it "hinges upon the extent to which the trial court properly interpreted the applicable statutory provisions . . . , which is subject to de novo review." *Id.* at ___, 802 S.E.2d at 160 (Tyson, J., concurring in part and dissenting in part) (quoting *Lassiter ex rel. Baize*, 368 N.C. at 375, 778 S.E.2d at 73). The dissent then concluded that "the trial court misinterpreted N.C. Gen. Stat. § 7A-305(d)(11) and awarded costs for three of plaintiff's expert witnesses, who offered testimonies directed against actions by the hospital defendant[s], which were acquitted by the jury, and did not testify to Dr. Rosner's standard of care or alleged acts of negligence." *Id.* at ___, 802 S.E.2d at 160.

These experts' testimonies did, however, address issues relating to Dr. Rosner in addition to the hospital defendants. For instance, both Dr. Caplan and Dr. Smith testified that Dr. Rosner's surgeries were experimental, which was one aspect of the negligence claim against him. And Dr. Currie testified to another aspect of Dr. Rosner's alleged negligence in that he allowed the hospital to market his services inaccurately. Given that the testimonies of these experts did bear to some extent upon issues concerning Dr. Rosner's negligence, we do not face the statutory construction issue defendants assert is present.

Accordingly, rather than applying de novo review, the only question here is whether the trial court abused its discretion in its award of costs. As plaintiff observes, the total award of $175,547.59 corresponds to the

costs itemized in plaintiff's motion for the stenographic and videographic costs of taking depositions ($89,789.84) and the expert fees incurred to provide trial testimony ($85,757.75), both categories of costs allowable under statute. *See* N.C.G.S. § 7A-305(d)(10) ("Reasonable and necessary expenses for stenographic and videographic assistance directly related to the taking of depositions and for the cost of deposition transcripts."); *Id.* § 7A-305(d)(11) ("Reasonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings."). We cannot conclude that the trial court abused its discretion in its award of costs and we therefore affirm the Court of Appeals on this issue.

Defendants' remaining arguments are based upon our allowing their petition for discretionary review on the following issues:

> ADDITIONAL AND ALTERNATIVE ISSUES TO BE BRIEFED
>
> I. The trial court erroneously granted directed verdict against Defendants-Appellants on their contributory negligence defense where the evidence showed Ms. Justus' medical problems including kyphosis were caused by her failure to follow medical advice and continue a course of treatment or seek treatment for worsening symptoms.
>
> II. The Court of Appeals erroneously granted Plaintiff a partial new trial on the sole issue of damages where: (A) Plaintiff did not challenge the jury's damage calculation; and (B) Plaintiff's efforts to overturn the jury verdict implicated the entire verdict requiring a new trial on both liability and damages.

The dissenting opinion of the Court of Appeals, on which the Notice of Appeal was based, concurred with the majority's holding that the trial court did not err in granting directed verdict on contributory negligence; that issue is raised by Issue I above in defendants' petition for discretionary review. As to this issue, we now conclude that discretionary review was improvidently allowed.

[3] In their argument in support of Issue II above, defendants contend that the Court of Appeals erroneously remanded for a new trial on damages only. The dissenting opinion specifically agreed with the majority's conclusion that the trial court erred in altering the amount of damages to be awarded. The dissenting opinion, however, did not address the following portion of the majority opinion:

> Rule 59(a) authorizes a new trial limited to issues that do not affect the entire verdict, such as, in this case, damages. Accordingly, we remand this matter to the trial court for a new trial on the issue of damages only. Defendant is not restricted from presenting any evidence which bears on plaintiff's alleged damages and Pamela Justus's failure to mitigate her damages.

Justus, ___ N.C. App. at ___, 802 S.E.2d at 153.

As to the second issue in defendant's petition for discretionary review, we conclude that the Court of Appeals was within its authority to vacate the trial court's amended judgment and order that a new trial be held with respect to the issue of damages. In seeking relief from the original judgment, plaintiff relied upon N.C.G.S. § 1A-1, Rule 59(a), which authorizes a trial judge to grant "[a] new trial" "to all or any of the parties and on all or part of the issues" for a number of different reasons. For the reasons stated by the Court of Appeals, we conclude that the trial court erred by simply striking the jury's mitigation determination and entering judgment in favor of plaintiff and against defendant in the amount of the jury's damages award. *Bethea v. Town of Kenly*, 261 N.C. 730, 732, 136 S.E.2d 38, 40 (1964) (per curiam) (holding that, while "the judge should have set aside the verdict . . . if he deemed it against the weight of the evidence or considered the damages excessive," instead, "he attempted to change the verdict, . . . and this he could not do" (citing *Winn v. C.W. Finch & Son*, 171 N.C. 272, 277, 88 S.E. 332, 334-35 (1916))). Moreover, we see no reason why the Court of Appeals was required to remand this case to the trial court for a determination either of whether relief should be granted at all or whether to grant a full or partial new trial.

While we are unaware of any decision of this Court involving a fact pattern identical to the unusual one here, even a cursory examination of the record reveals that the trial court determined that plaintiff was entitled to relief from what the jury did when it greatly reduced the damages awarded due to Pamela's alleged failure to mitigate. Furthermore, the plain language of N.C.G.S. § 1A-1, Rule 59(a) states explicitly that, once that determination had been made, the only relief that the trial court may award to plaintiff is a new trial. Because this one and only remedy was available to the trial court, and because the trial court's substantive decision that plaintiff was entitled to relief from the jury's original verdict has not been disturbed on appeal, we see no reason why this case should be remanded to the trial court to choose between awarding plaintiff a new trial or denying plaintiff any relief from the jury's verdict

at all.[4] As a result, given that the trial court has already decided that relief should be afforded to plaintiff and given that the trial court's only option was to award a new trial in whole or in part in the event of such a determination, we conclude that the Court of Appeals had ample authority to order implementation of the relief that could be properly afforded to plaintiff on remand.

In addition, we conclude that the Court of Appeals did not err by awarding plaintiff a new trial on the issue of damages only. This Court has previously held that, in the event that a reviewing court determines that a trial court has erred ruling on a motion made pursuant to N.C.G.S. § 1A-1, Rule 59(a), the reviewing court has the authority to determine the scope of the new trial that should be awarded even though the trial court did not address that issue. *Robertson v. Stanley*, 285 N.C. 561, 568, 206 S.E.2d 190, 195 (1974) (overturning the trial court's decision to deny the plaintiff's motion for a partial new trial predicated upon an inconsistent jury verdict and ordering a full new trial on the grounds that "[i]t is settled beyond controversy that it is entirely discretionary with the Court, Superior or Supreme, whether it will grant a partial new trial" (quoting *Table Rock Lumber Co. v. Branch*, 158 N.C. 251, 253, 73 S.E. 164, 165 (1911))). In addition, we are not persuaded that "the error in

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4. Although we have stated on many occasions that, "[w]here a ruling is based upon a misapprehension of the applicable law, the cause will be remanded in order that the matter may be considered in its true legal light," *Nationwide Mut. Ins. Co. v. Chantos*, 298 N.C. 246, 252, 258 S.E.2d 334, 338 (1979) (citing 1 Strong's North Carolina Index 3d: *Appeal and Error* § 63), we do not believe that this principle has any bearing upon the proper resolution of this issue. Instead, the "misapprehension" rule has typically been applied to require the remanding of trial court decisions concerning issues in which either the exercise of discretion was appropriate, *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 523, 398 S.E.2d 586, 603 (1990) (overturning a trial court's decision to deny a motion for leave to amend a complaint to add an additional third-party defendant based upon the mistaken belief that none of the claims asserted in the plaintiffs' original complaint survived the defendants' summary judgment motion); *Chantos*, 298 N.C. at 251-52, 258 S.E.2d at 337-38 (overturning a trial court's refusal to set aside the verdict as against the greater weight of the evidence based upon the mistaken belief that this Court had determined that the issue in question could only be resolved by a jury), or to resolve a disputed issue of substantive law in light of the relevant facts, *Hanford v. McSwain*, 230 N.C. 229, 233-34, 53 S.E.2d 84, 87-88 (1949) (overturning a trial court decision denying a defendant's request for relief from a judgment because the defendant had failed to show the existence of a meritorious defense when the defendant had, in fact, demonstrated the potential existence of such a defense); *McGill v. Town of Lumberton*, 215 N.C. 752, 754, 3 S.E.2d 324, 326 (1939) (overturning an Industrial Commission decision to deny an application for workers' compensation benefits on the grounds that the Commission had failed to recognize the existence of a presumption that a compensable injury had occurred when the employee suffered a violent death). As a result of the fact that the trial court had no authority to grant any relief aside from a new trial, the "misapprehension" principle simply does not apply here.

assessing damages tainted the entire verdict," making it "unfair to the defendant to order a partial new trial on the issue of damages alone." *Id.* at 569, 206 S.E.2d at 196. Unlike in *Robertson*, the jury here did not find, in essence, that a minor plaintiff who might or might not have been contributorily negligent and who suffered injuries that resulted in $1,970.00 in medical expenses was entitled to no compensatory damages at all. Instead, the jury here was properly instructed to determine the amount of damages that plaintiff was entitled to recover only after having resolved the issue of liability. *Housing, Inc. v. Weaver*, 305 N.C. 428, 443, 290 S.E.2d 642, 651 (1982) (noting, in upholding the trial court's decision to award a partial new trial on the issue of damages, that when the case was initially tried, "[t]he jurors were instructed further specifically to answer the question of liability *before considering the issue of the amount of damages*"). The jury then reduced the amount of damages awarded to plaintiff by what the trial court believed to have been an unjustified finding of "failure to mitigate" based upon a misapprehension of the steps plaintiff was required to take to properly mitigate her damages. Despite the fact that the jury did not specify the theory upon which it found defendants to have been negligent, the record contains no indication that the applicable measure of damages would have varied depending upon the theory of liability that the jury found to have merit. *Weyerhaeuser Co. v. Godwin Bldg. Supply Co.*, 292 N.C. 557, 564, 234 S.E.2d 605, 609 (1977) (requiring a full new trial, rather than a partial new trial on the issues of damages alone, on the grounds that "it is impossible for us to determine upon what theory the jury relied in finding a breach [of contract] and whether the different theories of breach would have resulted in different measures of damages"). The trial court clearly did not believe that the jury's verdict with respect to the mitigation issue tainted its verdict on the liability issue, since it simply struck the jury's mitigation verdict without in any way disturbing the liability verdict. We see no reason to second-guess that determination or the Court of Appeals' decision to implement that determination in the proper manner. As a result, even though the $1.00 difference between the amount of the jury's damage award and the amount of the "failure to mitigate" offset that the jury deemed to be appropriate appears to be anomalous, nothing in the record persuades us that this anomaly stemmed from a compromise involving the issue of liability rather than the jury's acceptance of the argument that the trial court found to have been erroneously advanced by defendants' expert witnesses—specifically, that Pamela failed to properly mitigate her damages because she did not return to defendant Rosner for further treatment. Therefore, in light of the unusual facts disclosed by the record here, we cannot say

that the Court of Appeals erred by awarding a partial, rather than a full, new trial in this case.

III. CONCLUSION

For the foregoing reasons, we affirm the decision of the Court of Appeals to vacate the trial court's amended judgment and order a new trial with respect to the issue of damages and remand this case to that court for further remand to the Superior Court, Henderson County, for retrial. Moreover, we affirm the decision of the Court of Appeals on the issue of costs. As for Issue I in defendants' petition for discretionary review, we conclude that discretionary review was improvidently allowed; accordingly, the Court of Appeals' disposition of this issue remains undisturbed. As for Issue II in defendants' petition for discretionary review, we affirm for the reasons discussed here.

AFFIRMED IN PART AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

Chief Justice MARTIN concurring in part and dissenting in part.

I agree with the majority that the trial court did not abuse its discretion when it determined that plaintiff was entitled to some form of relief under North Carolina Rule of Civil Procedure 59(a)(7).[1] I also agree with the majority, as well as both parties and the dissent, that the relief that the trial court ordered was not permitted under Rule 59 and that only a new trial, in whole or in part, could have been granted. I do not agree with the majority, however, that either we or the Court of Appeals should usurp the critical role of the trial court under Rule 59 and determine what parts of a new trial are justified in this complex medical malpractice case based on the cold appellate record. In my view, once a trial court appropriately decides to grant a new trial, Rule 59 leaves the trial court in the best position to determine the scope of that new trial. *See* N.C. R. Civ. P. 59(a) ("A new trial may be granted to *all or any* of the parties and on *all or part* of the issues") (emphasis added). Once the Court of Appeals determined that the trial court misapprehended the law in this case by choosing relief that cannot be granted after a jury trial under Rule 59, it would uphold best practices for the Court of Appeals (and this Court) to remand the case for reconsideration under the proper legal standard.

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1. Rule 59 provides that a new trial may be granted on several grounds, including the "[i]nsufficiency of the evidence to justify the verdict or [when] the verdict is contrary to law." N.C. R. Civ. P. 59(a)(7).

In this case, after a jury verdict, plaintiff filed a motion under Rule 59 seeking an amended judgment or, in the alternative, a new trial on the issue of damages. The trial court granted the motion and amended the judgment, rather than granting a new trial. But, as the Court of Appeals properly held and no party challenges here, the trial court misapprehended the applicable law when it amended the judgment. *See Justus v. Rosner*, ___ N.C. App. ___, ___, 802 S.E.2d 142, 152 (2017). While Rule 59 establishes grounds that allow a trial court to grant a new trial "on all or part of the issues," Rule 59 does not let the court "direct the entry of a new judgment" after a verdict by a jury. *See* N.C. R. Civ. P. 59(a). The rule allows entry of a new judgment only "in an action tried *without* a jury." *See id.* (emphasis added).

When this Court (or any court acting as an appellate court) finds that a trial court's ruling on a motion is based on a misapprehension of law, that ruling should be vacated or reversed and the case should be remanded to the trial court to decide the motion according to a proper understanding of the law. *See Concerned Citizens of Brunswick Cty. Taxpayers Ass'n v. State ex rel. Rhodes*, 329 N.C. 37, 54-55, 404 S.E.2d 677, 688 (1991) ("When the order or judgment appealed from was entered under a misapprehension of the applicable law, the judgment, including the findings of fact and conclusions of law on which the judgment was based, will be vacated and the case remanded for further proceedings."). We have applied this rule, for instance, when a trial court misapprehended one factor in a multi-factor test, which, in effect, led the trial court to apply the wrong legal rule, *see Concerned Citizens*, 329 N.C. at 45-46, 404 S.E.2d at 682-83; when a trial court denied, under a misapprehension of law, a motion to terminate a requirement to register as a sex offender, *see State v. Moir*, 369 N.C. 370, 389-90, 794 S.E.2d 685, 698-99 (2016); when a trial court necessarily applied an incorrect articulation of the law of judicial estoppel, *see Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 38, 591 S.E.2d 870, 894 (2004); and when a trial court mistakenly concluded that it had no discretion to extend the time for service of a summons, *Lemons v. Old Hickory Council, Boy Scouts of Am., Inc.*, 322 N.C. 271, 277, 367 S.E.2d 655, 658 (1988). I see no compelling reason for us to depart from this rule here.[2]

2. Although this Court has previously stated that "[i]t is settled beyond controversy that it is entirely discretionary with the Court, Superior or Supreme, whether it will grant a partial new trial," *Robertson v. Stanley*, 285 N.C. 561, 568, 206 S.E.2d 190, 195 (1974) (quoting *Table Rock Lumber Co. v. Branch*, 158 N.C. 251, 253, 73 S.E. 164, 165 (1911)), I am skeptical of the application of Rule 59 discretionary authority here. No one can seriously dispute that the trial court is in the best institutional position to exercise the type of discretionary authority envisioned by Rule 59(a). Moreover, I do not see how the majority

Here, after a jury verdict in a complex medical malpractice trial, the trial court found that Rule 59 relief was warranted, but then amended the judgment—a form of relief that Rule 59 does not permit after a jury trial. In doing so, the trial court misapprehended the law as to what relief Rule 59 would allow in this case. Because, here, the trial court only had the discretion to order "[a] new trial . . . on all or part of the issues," N.C. R. Civ. P. 59(a), we should remand this case to the trial court so that the trial court may determine which issue(s) require a new trial. In this case, that means the trial court should determine if the new trial should address liability, damages, mitigation, or some combination of these and the myriad other issues decided by the jury. As appellate courts, both we and the Court of Appeals should be mindful of our appellate role, which in this instance means exercising restraint and reviewing the trial court's discretionary decision under Rule 59. In doing so, we can identify that the trial court ordered impermissible relief under Rule 59 and that the only permissible relief in this case would have been a new trial, in whole or in part. But we should not then substitute our own discretion—or encourage the Court of Appeals to do so—to determine, in the first instance, the *scope* of the new trial.

This standard of appellate review is not just more consistent with our institutional role as an appellate court. It also squares with the reason that appellate courts generally review Rule 59 orders for abuse of discretion instead of de novo—namely, that the trial court is better positioned to exercise the discretion that this standard of review vests in it. We have previously held that determining if a verdict has "been given under the influence of passion or prejudice," N.C. R. Civ. P. 59(a)(6), requires more than interpreting a cold record. It requires a complete understanding of the nuances and subtleties of the entire proceeding—something which is only available to the judicial officer who presided over the trial. *See Worthington v. Bynum*, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982) (plurality opinion) (recognizing that "[d]ue to their active participation in the trial, their first-hand acquaintance with the evidence presented, their observances of the parties, the witnesses, the jurors and the attorneys involved, and their knowledge of various other attendant circumstances, presiding judges have the superior advantage in best determining what justice requires"). Similar reasoning applies to other grounds listed in Rule 59. For example, the trial judge who evaluated the

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can possibly ensure, in its order for a partial new trial on damages only based on this cold record, that "no possible injustice can be done to either party." *Id.* Finally, even a casual observer would quickly discern that *Robertson* relies on *Table Rock*, a case that precedes both the state and federal rules of civil procedure.

evidence when crafting jury instructions is in the best position to determine if there was "[m]anifest disregard by the jury of the instructions of the court." N.C. R. Civ. P. 59(a)(5).

The same logic applies to determining the scope of relief to be granted under Rule 59(a). Once the trial court determines that one or more of the grounds for relief under Rule 59(a) have been shown, it uses the knowledge and experience gained from its unique vantage point to fashion an appropriate form of relief. The trial court may have to determine, for example, which issues were infected by problematic evidence. That determination would affect the proper scope of the new trial—whether it needed to cover damages, liability, mitigation, or some combination of issues. In other words, because the *scope of the relief* to be granted under Rule 59 is so closely linked to the *decision to grant* Rule 59 relief, it is generally best for the trial judge to decide both questions in the first instance, and for those decisions to then be reviewed only for abuse of discretion. *Cf. Worthington*, 305 N.C. at 487, 290 S.E.2d at 605 ("We believe that our appellate courts should place great faith and confidence in the ability of our trial judges to make the right decision, fairly and without partiality, regarding the necessity for a new trial."). This is especially true in this case, where the trial court has found multiple grounds for relief under Rule 59(a), while we only consider the legal sufficiency of one.

Admittedly, no party has raised the issue of whether an appellate court should substitute its own discretion to determine the scope of a new trial under a Rule 59 motion in this case. That is not surprising. The parties in this case want the issue to be decided *in their favor*; they likely care little, if they care at all, about *which court* decides the issue. But, as this State's appellate court of last resort, we should care about the role of the trial courts and their " 'institutional advantages' over appellate courts in the 'application of facts to fact-dependent legal standards.' " *Whitacre P'ship*, 358 N.C. at 38, 591 S.E.2d at 894 (quoting *Augur v. Augur*, 356 N.C. 582, 586, 573 S.E.2d 125, 129 (2002)). Otherwise, we leave it to parties appearing before us to determine the scope of appellate remedial authority as they alone see fit. Put simply, we should be vigilant to protect the salutary practice of allowing our trial courts to make this type of discretionary decision under Rule 59 in the first instance.

We should not depart from our customary appellate role here. Now that we have corrected the trial court's misapprehension of law, it would be best to let that court exercise its discretion within its proper bounds—discretion that would, of course, be subject to appellate review in the

ordinary course for abuse of discretion. I therefore concur in part and dissent in part from the majority opinion.

Justice JACKSON joins in this opinion.

Justice NEWBY dissenting.

Jury trials constitute the bedrock of our common law system. Since 1776 our state constitutions have safeguarded the right to a trial by jury. Thus, trial courts have always given great deference to juries' decisions. Only in limited, rare circumstances will courts invade the province of the jury. We afford particular deference to juries when cases have been fairly and fully litigated and a verdict is returned in the form of a general finding, not referencing any particular theory of liability or damages on which the jury made its determination. When the trial court takes the unusual step of overturning a jury's verdict, it must do so in a well-reasoned, legally sound manner. If the court proceeds under a misapprehension of law, the role of the appellate court is to correct the error and then return the matter to the trial court to proceed again, this time with the correct legal basis.

In this case, over the course of a two-month trial, the jury considered a complex medical malpractice case involving several parties. The jury heard multiple expert witnesses testify about numerous questions of liability and damages. In its instructions, based on the evidence, the trial court presented the jury with fifteen theories of negligence against defendant Rosner as well as an instruction to consider plaintiff's legal duty to mitigate her damages. Though the jury found defendant Rosner negligent, it did not specify upon which of those theories it relied. Despite the finding of negligence, the jury significantly reduced the damages awarded to plaintiff, concluding plaintiff failed to mitigate her damages. During this lengthy trial, plaintiff did not object to the mitigation evidence. Moreover, plaintiff furnished the language generally used for the trial court's jury instruction on mitigation. After the jury issued the verdict, plaintiff asked the trial court to modify the amount of damages. The trial court, laboring under a misapprehension of law, revised the damages awarded to plaintiff. Indisputably, this revision was error. Upon review the Court of Appeals should have accurately set forth the law and remanded the case to the trial court to make an informed post-trial determination; instead, the appellate court assumed the role of the trial court and crafted a different remedy for plaintiff: a new trial solely on damages. With little analysis, the majority now compounds this error by giving unwarranted deference to the Court of Appeals' decision

to grant a new trial solely on damages despite the findings by the trial court which support a completely new trial. Because I believe these actions constitute an improper invasion of the roles of the jury and the trial court, I dissent.

On 12 June 2003, three years after her first surgery, plaintiff[1] filed a complaint against defendant Rosner, his medical practice, Michael J. Rosner, M.D., P.A.,[2] Fletcher Hospital, Inc. d/b/a Park Ridge Hospital, Adventist Health System, and Adventist Health System Sunbelt Healthcare Corporation. The complaint included claims for negligence, lack of informed consent, fraud, loss of consortium, and willful and wanton conduct. Plaintiff later amended the complaint to include claims for conspiracy and wrongful death. Plaintiff advanced fifteen theories of how defendant Rosner was negligent, which included performing unnecessary and medically unsound procedures, failing to obtain informed consent and adequately inform plaintiff of the nature of the surgical procedures, misleading plaintiff about her condition and the necessity of the procedures, and conspiring with the hospital to dishonestly market the surgical procedures at issue. Plaintiff contended that the hospital defendants were similarly negligent in failing to monitor these procedures or take actions to prevent them, that the hospital defendants knew or should have known Rosner was performing unnecessary surgeries, and that all defendants conspired, *inter alia*, to promote their reputations and enhance their profits from these procedures.

During the almost two-month trial in August and September 2014, defendant Rosner presented evidence that the surgeries were necessary and in line with the standard of care for neurosurgeons in the community, and that plaintiff knew and consented to the procedures despite the commonly known risks associated with them. Throughout trial defendant Rosner introduced evidence of plaintiff's failure to mitigate damages, including plaintiff's failure to seek appropriate follow-up treatment, failure to properly address her pre-existing and ongoing health issues, and her continued smoking before surgery and post surgery.[3]

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1. Though plaintiff Pamela Justus initiated the action and underwent the surgeries at issue, after her death during the pendency of litigation, the administrator of her estate was substituted as plaintiff in this action. For simplicity, the term "plaintiff" encompasses both and should be read in context.

2. For simplicity, defendant Michael J. Rosner, M.D. and his medical practice Michael J. Rosner, M.D., P.A. are referred to as "defendant Rosner" throughout.

3. The allegations that plaintiff failed to mitigate her damages primarily related to plaintiff's injury arising from her inability to support her head, i.e., kyphosis or chin-on-chest

While various witnesses indicated that plaintiff's conditions worsened when she did not follow up with Rosner, defendant presented a plethora of evidence about plaintiff's general failure to pursue proper care in a timely manner.[4]

For example, on recross-examination, one of defendant's expert witnesses testified, "So the fact that [plaintiff's deformity] was chin on chest was because it went unaddressed for about three years before the time she presented to [Dr.] Coric. If she had been following up, as she should have, it would have been detected that she was developing a post-laminectomy kyphotic deformity and she would have had the appropriate surgery much sooner than when she presented with a chin-on-chest deformity." Another one of defendant's expert witnesses testified on cross-examination that he believed that plaintiff was not injured by the surgeries, which actually helped an ongoing condition, but that plaintiff "had a progressive descending spiral . . . and didn't get any care" for her slowly declining condition. A third expert testified on direct examination that, had plaintiff received physical therapy and worn a neck brace, her condition "could have been avoided probably." Over the course of this multi-week trial, plaintiff's counsel did not object to any of the failure to mitigate evidence as misleading, and the trial court did not intervene.

At the jury charge conference, defendant argued that sufficient evidence existed to show plaintiff was contributorily negligent. While plaintiff's counsel objected to any proposed instruction on contributory negligence, plaintiff's counsel gave extensive input on the mitigation instructions and jury verdict form. Several times, plaintiff's counsel requested to add language to the jury instruction referencing the reasonableness of plaintiff's failure to follow up specifically with Dr. Rosner. The trial court agreed to give a modified version of the mitigation instruction requested by plaintiff, instructing the jury on the nature of plaintiff's duty to mitigate damages.

After the charge conference, the trial court instructed the jury, *inter alia*, that it must determine whether defendant Rosner was negligent. In doing so, the trial court submitted fifteen theories on which the jury

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deformity that developed post surgery, and involved whether plaintiff delayed seeking appropriate and timely preventative treatment after her procedures.

4. The majority opinion states that plaintiff "saw numerous doctors for diagnosis and treatment of her neck condition" following her surgeries. Most of these appointments with pain doctors, however, only addressed plaintiff's symptoms. The record reflects plaintiff's being seen at Wake Forest Baptist and Duke University Hospitals during the critical period after she left Rosner's care, but plaintiff did not properly follow up with either.

could find defendant liable, instructing the jury that it could find defendant liable if it determined that defendant:

> 1: Performed unnecessary surgery on Pamela Justus;
>
> 2: Performed surgery on Pam Justus which was not medically indicated by imaging studies;
>
> 3: Performed surgery on Pam Justus which was not medically indicated by clinical signs and symptoms;
>
> 4: Performed surgery on Pam Justus without first obtaining adequate informed consent;
>
> 5: Misleading Pam Justus as to her condition regarding radiographic information;
>
> 6: Obtained Pam Justus's consent to surgery by misrepresenting that the surgery was necessary;
>
> 7: Fraudulently induced Pam Justus to undergo surgery that was not medically indicated;
>
> 8: Performed experimental surgery on Pam Justus;
>
> 9: Performed surgery on Pam Justus without adequate peer review and/or oversight;
>
> 10: Performed traditional surgery on Pam Justus for nontraditional reasons;
>
> 11: Performed surgeries on Pam Justus for conditions not treatable by surgery;
>
> 12: Failed to apply evidence-based medicine in treating Pam Justus;
>
> 13: By allowing the Hospital to dishonestly market his surgeries;
>
> 14: Conspired with the Hospital defendants to perform medically unnecessary surgeries on Pam Justus and others similarly situated at Park Ridge Hospital;
>
> And 15: Failed to assure that Pam Justus was aware of the controversial nature of the diagnosis claimed by Dr. Rosner as a reason for such surgery.

Having received input from and consent of plaintiff's counsel, the trial court also instructed the jury that it should determine "[b]y what

amount, if any, should the plaintiffs' actual damages be reduced because of Pamela Justus's unreasonable failure to avoid or minimize her damages?" The trial court then gave the following mitigation instruction, which is a slightly modified version of the pattern jury instruction:

> A person injured by the negligent conduct of another is nonetheless under a duty to use that degree of care which a reasonable person would use under the same or similar circumstances to seek treatment to get well and to avoid or minimize the harmful consequences of her injury. A person is not permitted to recover for injuries she could have avoided by using means which a reasonably prudent person would have used to cure her injury or alleviate her pain.
>
> However, a person is not prevented from recovering damages she could have avoided unless her failure to avoid those damages was unreasonable.
>
> If you find that a healthcare provider advised the plaintiff to follow up in her care and treatment, you would not necessarily conclude that Pamela Justus acted unreasonably in declining such advice. In determining whether Pamela Justus' conduct was reasonable, you must consider all of the circumstances as they appeared to Pamela Justus at the time she chose not to follow the healthcare provider's advice.
>
> These may include the financial condition of the plaintiff, the degree of risk involved, the amount of pain involved, the chances for success, the benefits to be obtained from the procedures and treatment, the availability of alternate procedures and treatment, or the knowledge or lack of knowledge of the plaintiff Pamela Justus.

On 25 September 2014, the jury returned its verdict finding defendant Rosner liable under some unspecified theory of negligence but not liable for all other claims against him. The jury also found no liability against any other defendants. Though the trial court instructed the jury on numerous theories of negligence and several factors of mitigation, the jury verdict sheet only included the following questions related to defendant Rosner:

> 1. Was Pamela Justus injured by the negligence of the defendant, Michael J. Rosner, M.D.? (Answer "YES" or "NO" in the space provided below.)

ANSWER: Yes

. . . .

3. Was the death of Pamela Justus caused by the negligence of the defendant, Michael J. Rosner, M.D.? (Answer "YES" or "NO" in the space provided below.)

ANSWER: No

. . . .

5. Was the plaintiff damaged by the fraud of the defendants?: (A) Michael J. Rosner, MD; . . . . (Answer this issue "Yes" or "No" as to each of the . . . defendants.)

A. Michael J. Rosner MD No

. . . .

6. Did the defendants take advantage of a position of trust and confidence to bring about the surgeries of Pamela Justus? (Answer this issue "Yes" or "No" only as to any Defendant for which you answered "NO" in Issue No. 5 above.)

A. Michael J. Rosner MD No

. . . .

If you answered Issue No. 6 "YES" as to any Defendant, then you must answer Issue No. 7 as to that Defendant(s).

7. Did the defendants act openly, fairly and honestly in bringing about the surgeries of Pamela Justus? (Answer this issue "Yes" or "No" as to each of the following defendants.)

A. Michael J. Rosner MD _____

. . . .

8. Did Dr. Rosner conspire with Adventist Health System and/or Park Ridge Hospital to allow or enable Dr. Rosner to perform on members of the public, including Pamela Justus, surgeries which were unnecessary or not medically indicated with the intent and purpose of generating income for Dr. Rosner and Park Ridge Hospital? (Answer "YES" or "NO" in the space provided below.)

ANSWER: No

While the jury also indicated on its verdict form that plaintiff suffered unspecified damages totaling $512,162.00, the jury reduced that award by $512,161.00 due to plaintiff's "unreasonable failure . . . to avoid or minimize her damages." The trial court entered judgment accordingly, awarding plaintiff $1.00.

On 30 October 2014, plaintiff moved to alter or amend the verdict, citing Rule 59(a)(7). *See* N.C.G.S. § 1A-1, Rule 59(a)(7) (2017) ("Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law").[5] Specifically, in her motion plaintiff asserted that defendants' expert witness testimony led the jury to believe that plaintiff had a duty to return to Dr. Rosner to mitigate her damages, which plaintiff was not required to do by law. The motion argued:

> 8. The Plaintiff alleges and contends that the verdict of the jury as to [the mitigation issue] was and is contrary to the greater weight of credible testimony; that the jury was misled by unreliable testimony into rendering an erroneous verdict. . . .
>
> . . . .
>
> 10. That the verdict as to [the mitigation issue] is contrary to law.
>
> 11. That, as to [the mitigation issue], the burden is upon the Defendant(s). As a matter of fact and of law alike, the Defendants failed to carry that burden, for they presented legally insufficient evidence to support the jury's finding as to [mitigation]. Defendants' sole evidence that [plaintiff] supposedly failed to mitigate her damages is that she did not allow Dr. Rosner to perform corrective surgery. As a matter of law, however, she had no duty to seek medical attention specifically from Dr. Rosner rather than from other health care providers.

Thus, plaintiff requested that the court amend the verdict to award $512,161.00 in damages or, alternatively, order a new trial on damages. In addition, plaintiff moved for costs for, *inter alia*, expenses related to expert witness depositions and trial testimony.

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5. Though plaintiff also cited Rule 59(a)(5) in her initial motion, plaintiff's counsel expressly stated that he was abandoning this argument at the trial court hearing. *See* N.C.G.S. § 1A-1, Rule 59(a)(5) (2017) ("Manifest disregard by the jury of the instructions of the court").

On 3 March 2015, the trial court entered an order granting plaintiff's motion to alter or amend the judgment by setting aside the jury's mitigation finding and entering judgment for $512,162.00. The trial court determined that "the overall impression created by [the expert] witnesses (and thus communicated to the jury) is that [plaintiff] had an obligation to return specifically to *Dr. Rosner*; and that, by failing to do so, she allowed her condition to worsen." The trial court further found that "[t]here was no evidence presented that [plaintiff] unreasonably delayed trying to have her problems diagnosed and corrected." Thus, the trial court noted that, "[g]iven the uncontested evidence that Ms. Justus promptly and persistently made diligent efforts to obtain treatment from other physicians after she terminated her relationship with Dr. Rosner, no reasonable person could conclude that she failed to exercise reasonable care to mitigate her damages."

Based on these findings of fact, the trial court made the following conclusions of law:

> 3. The testimony by Dr. Rosner's neurosurgical experts suggesting that Mrs. Justus had a duty to return specifically to Dr. Rosner was inaccurate and misleading.
>
> 4. The misleading effect of the foregoing testimony was compounded by its repetition from four different expert witnesses.
>
> 5. Dr. Rosner presented no legally competent evidence sufficient to support a finding that [plaintiff] unreasonably failed to mitigate her damages.
>
> 6. This Court committed prejudicial error in submitting [mitigation] to the jury.
>
> 7. The jury's $1.00 damage award is manifestly inadequate.
>
> 8. The jury appears to have made its initial damage finding ($512,161.00) under the influence of passion or prejudice, for the finding entirely omits any sum for pain and suffering despite the uncontroverted evidence that [plaintiff] experienced severe pain and suffering.
>
> 9. The jury also appears to have reduced its damage finding ($512,161.00) under the influence of passion or prejudice; specifically, the cumulative impact of misleading testimony from multiple experts.

> 10. Even aside from the lack of evidence to support *any* mitigation finding at all, the influence of passion or prejudice is further manifested in the grossly excessive *amount* of the jury's mitigation finding.

Believing it had the authority to modify the judgment as requested by plaintiff, the trial court revised the amount of damages from $1.00 to $512,162.00. The trial court did not award a new trial for damages or make any alternative holding. Finally, the trial court granted plaintiff's motion for costs, awarding plaintiff $175,547.59, the amount that plaintiff requested for depositions and all experts' trial testimony.

In reviewing the trial court's determination, the Court of Appeals unanimously concluded that the trial court erred by modifying the judgment. *Justus v. Rosner*, ___ N.C. App. ___, ___ n.5, ___, 802 S.E.2d 142, 149 n.5, 152-53 (2017). Nonetheless, the majority crafted a new remedy in awarding a new trial solely on damages. *Id.* at ___, 802 S.E.2d at 152-53. The Court of Appeals believed that, though the trial court had proceeded under a misapprehension of law, based on the trial court's findings of fact and conclusions of law, this new remedy was appropriate. *Id.* at ___, 802 S.E.2d at 152-53. In its analysis the majority added to plaintiff's rationale as presented to the trial court under Rule 59(a)(7) and considered additional grounds under Rule 59(a)(6). *Id.* at ___, 802 S.E.2d at 152. The Court of Appeals majority recognized that the trial court had improperly relied on Rule 59(a)(8), allowing the court to order a new trial for an "[e]rror in law occurring at the trial," because plaintiff did not, as required by that provision, object to the evidence at any point during trial. *Id.* at ___, 802 S.E.2d at 152. Ultimately, the Court of Appeals vacated the trial court's modified damages award and granted a new trial on damages only. *Id.* at ___, 802 S.E.2d at 144.

Though the dissenting judge agreed that the trial court erred by rewriting the damages award, he argued that plaintiff was not entitled to relief on any Rule 59 grounds. *Id.* at ___, 802 S.E.2d at 156 (Tyson, J., concurring in part and dissenting in part). The dissent noted that, in granting plaintiff relief, the trial court "substitute[d] its judgment for that of the jury's without knowing which theory or theories of negligence the jury's verdict relies upon." *Id.* at ___, 802 S.E.2d at 157. Moreover, the dissent noted that plaintiff's failure to "seek appropriate medical treatment to mitigate her damages" is a "proper area of expert medical testimony" that is solely a factual issue appropriate for the jury to decide. *Id.* at ___, 802 S.E.2d at 158. The dissent also asserted that plaintiff and the trial court put "their own emphasis upon the questions and answers posed to Dr. Rosner's experts" when, in fact, "[t]he expert witnesses *did*

not state and the jury *was not instructed* that [plaintiff] was required to return specifically to Dr. Rosner." *Id.* at ___, 802 S.E.2d at 159. Viewed in light of all the evidence, the dissent opined that the "un-objected to testimonies of defendant's medical experts on areas within their expertise does not support the trial court's decision to set aside the jury verdict." *Id.* at ___, 802 S.E.2d at 159. Therefore, the dissent would vacate the trial court's order and remand for that court to reinstate the jury's verdict. *Id.* at ___, 802 S.E.2d at 160.

Defendant Rosner appealed the decision of the Court of Appeals based on the dissenting opinion. This Court also granted defendant Rosner's petition for discretionary review on the issue of whether, if a new trial is necessary, the new trial should encompass both damages and liability.[6]

The majority agrees that the trial court erred in some of its rationale and in its granting a revised damages award. The majority nonetheless, with little analysis, upholds the appellate court-created remedy of a new trial as to damages only by mistakenly applying a deferential standard of review. As the cases hold, trial court decisions receive a deferential standard of review, *not* those of the Court of Appeals. Thus, with only conclusory statements, the majority allows the remedy of a new trial solely as to damages. In reaching its conclusion, the majority contravenes precedent by wrongly invading the jury room and somehow pinpointing the single theory of negligence the jury chose. After selecting one of the fifteen possible theories of negligence, the majority then determines the damages are "insufficient" under that particular theory but nonetheless concludes the verdict did not represent a compromise.

Because the trial court labored under a misapprehension of the law in its assessment of plaintiff's motion and its remedy, this Court should return the matter to the trial court for a proper review of plaintiff's motion. The trial court should limit itself to the legal grounds raised by plaintiff's motion and fairly assess the un-objected to evidence presented at trial. The trial court should not guess which theory of negligence the jury found, but should inquire whether any theory of negligence supports the jury's assessment of damages. Likewise, the trial court should

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6. This Court likewise granted defendant Rosner's petition for discretionary review regarding the issue of contributory negligence. Defendant Rosner argued that the trial court should have instructed the jury on contributory negligence because, in his view, much of what plaintiff conceded was mitigation evidence actually supported a defense of contributory negligence. This Court decides that it improvidently allowed discretionary review of the contributory negligence issue.

not reweigh the mitigation evidence, but looking carefully at all of it, consider whether any evidence supports the jury's mitigation decision.

I.

While "[i]t is impossible to place precise boundaries on the trial court's exercise of its discretion to grant a new trial," a trial court's decision to interfere with a jury verdict should be made with "great care and exceeding reluctance." *In re Will of Buck*, 350 N.C. 621, 626, 516 S.E.2d 858, 861 (1999) (emphasis omitted); *see also Bird v. Bradburn*, 131 N.C. 488, 489, 42 S.E. 936, 937 (1902) (noting that a trial judge "will be reluctant to set his opinion against that of the twelve [jurors]" (parentheses omitted)). "This is so because the exercise of this discretion sets aside a jury verdict and, therefore, will always have some tendency to diminish the fundamental right to trial by jury in civil cases which is guaranteed by our Constitution." *In re Buck*, 350 N.C. at 626, 516 S.E.2d at 861; *see also Worthington v. Bynum*, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982) ("[T]rial judges of this state have traditionally exercised their discretionary power to grant a new trial in civil cases quite sparingly in proper deference to the finality and sanctity of the jury's findings."); *State v. Little*, 174 N.C. 800, 802, 94 S.E. 1, 2 (1917) ("It is the province of the jury to weigh the testimony and to sift the true from the false." (citations omitted)).

Rule 59 of the North Carolina Rules of Civil Procedure codifies the authority of a trial court to set aside a jury verdict by granting a new trial or altering or amending a jury verdict in limited circumstances. *See* N.C.G.S. § 1A-1, Rule 59 (2017); *Bird*, 131 N.C. at 489, 42 S.E. at 936 (recognizing the trial court's inherent power to set aside a jury verdict as a matter of discretion). Under Rule 59, the parties in a case may move for a new trial or an altered or amended judgment, or alternatively, the trial court may order a new trial on its own initiative so long as it does so "[n]ot later than 10 days after entry of judgment." N.C.G.S. § 1A-1, Rule 59(d). Specifically, Rule 59(a)(7) allows the trial court to grant a new trial "on all or part of the issues" when there is "[i]nsufficien[t] . . . evidence to justify the verdict or . . . the verdict is contrary to law." *Id.*, Rule 59(a)(7). A trial court should grant a motion under Rule 59(a)(7) in only "those exceptional situations where the verdict is contrary to the evidence presented and [where the verdict] will result in a miscarriage of justice." *In re Buck*, 350 N.C. at 628, 516 S.E.2d at 862.

When a trial court properly addresses a Rule 59 motion, a trial court's action is reviewed only for an abuse of discretion. *See id.* at 625, 516 S.E.2d at 860-61 ("Like any other ruling left to the discretion of a trial

court, the trial court's appraisal of the evidence and its ruling on whether a new trial is warranted due to the insufficiency of evidence is *not* to be reviewed on appeal as presenting a question of law."); *Worthington*, 305 N.C. at 487, 290 S.E.2d at 605 ("[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice."). We afford this deference because the trial court, unlike an appellate court, "active[ly] participat[es] in the trial," is "acquaint[ed] with the evidence presented," and observes all parties involved. *Worthington*, 305 N.C. at 487, 290 S.E.2d at 605.

A trial court abuses its discretion when it misapprehends the applicable law. *See*, *e.g.*, *In re Estate of Skinner*, 370 N.C. 126, 139-40, 804 S.E.2d 449, 457-58 (2017). For instance, while Rule 59 affords the trial court the ability to alter or amend the verdict, the trial court may not increase the monetary judgment for a reason other than to award interest. *See Bethea v. Town of Kenly*, 261 N.C. 730, 732, 136 S.E.2d 38, 40 (1964) (per curiam) ("It is a cardinal rule that the judgment must follow the verdict, and if the jury have given a specified sum as damages, the court cannot increase or diminish the amount, except to add interest, where it is allowed by law and has not been included in the findings of the jury." (first quoting 2 McIntosh, *North Carolina Practice and Procedure* § 1691 (2d ed. 1956); and then citing *City of Durham v. Davis*, 171 N.C. 305, 88 S.E. 433 (1916))).

When the trial court commits such an error of law, an appellate court should not usurp the role of the trial court; rather, the appropriate remedy is to vacate the order or judgment on that issue, state the law, and remand to the appropriate lower court 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) ("Since the judge's order was signed under a misapprehension of the law, we believe the better approach is to vacate the order and remand for reconsideration of plaintiffs' motion . . . in light of our opinion in this case . . . ."); *Nationwide Mut. Ins. Co. v. Chantos*, 298 N.C. 246, 252, 258 S.E.2d 334, 338 (1979) (reasoning that, when a trial judge misunderstood his authority under Rule 59, the proper remedy would be to remand the case to the trial court to make the appropriate determination); *Hanford v. McSwain*, 230 N.C. 229, 233, 53 S.E.2d 84, 87 (1949); *see also In re Skinner*, 370 N.C. at 146, 804 S.E.2d at 462 (Morgan, J., dissenting) (citations omitted).

It is clear that the trial court misapprehended the law by rewriting the damages award for reasons other than awarding interest. Acting under this misapprehension of law, the trial court made various findings of fact

unsupported by the evidence, considered various Rule 59 grounds not argued by plaintiff to support its decision, and crafted a legally invalid remedy. For example, the trial court relied on its findings that "passion or prejudice" permeated the jury's initial damage award and subsequent decision to reduce damages. Passion and prejudice, however, are not an appropriate consideration under plaintiff's Rule 59(a)(7) motion.[7] Rule 59 confines a trial court's consideration to the Rule 59 grounds asserted by a plaintiff.[8] Moreover, the trial court deemed evidence of plaintiff's attempt to receive follow-up treatment as "uncontroverted" to support its conclusion that there was a "lack of evidence to support *any* mitigation finding at all." Throughout the almost two-month trial, however, the parties debated and discussed in depth whether plaintiff took appropriate mitigation actions after the surgery. During the trial and charge conference the mitigation issue was central and clearly not "uncontroverted." Thus, the proper remedy when the trial court proceeded under a misapprehension of law is for the appellate court to state the applicable law and remand the case to the trial court to determine the motion under the proper legal standard.[9]

II.

Nonetheless, if a new trial is warranted, the majority also errs by upholding with little analysis the remedy of a new trial solely on damages instead of on all issues. "It is settled beyond controversy that it is entirely discretionary with the [Trial] Court . . . whether it will grant a partial new trial." *Table Rock Lumber Co. v. Branch*, 158 N.C. 251, 253, 73 S.E. 164, 165 (1911). A trial court will typically grant a partial new trial "when the error, or reason for the new trial, is confined to one issue, which is entirely separable from the others and it is perfectly clear that there is no danger of complication." *Id.* at 253, 73 S.E. at 165. Importantly, however, "[w]here it appears that the verdict was the result of a compromise, such error taints the entire verdict and requires a new

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7. Passion and prejudice are a proper consideration under Rule 59(a)(6) and in crafting the remedy of the scope of a new trial. *See* discussion infra II.

8. If upon review the trial court determined of its own accord that different grounds warranted setting aside the verdict under Rule 59, it must have acted within ten days after its entry of judgment, which it did not do. Otherwise, the trial court is limited to the grounds specified by the moving party. *See* N.C.G.S. § 1A-1, Rule 59(d).

9. Because the trial court's findings of fact and conclusions of law appear to be tainted by its misapprehension of law, the case should be remanded to the trial court. Nonetheless, for the reasons stated herein and in the dissenting opinion at the Court of Appeals, I think many of the trial court's findings of fact are unsupported and its conclusions of law are in error.

trial as to all of the issues in the case." *Robertson v. Stanley*, 285 N.C. 561, 569, 206 S.E.2d 190, 195 (1974) (quoting 58 Am. Jur. 2d *New Trial* § 27, at 213 (1971) [hereinafter *New Trial*]).

"Courts are reluctant to grant a new trial as to damages alone unless it is clear that the error in assessing damages did not affect the entire verdict." *Id.* at 568, 206 S.E.2d at 195. Moreover, "[a] new trial as to damages alone should not be granted where there is ground for a strong suspicion that the jury awarded inadequate damages to the plaintiff as a result of a compromise involving the question of liability." *Id.* at 569, 206 S.E.2d at 196 (alteration in original) (quoting M.C. Dransfield, Annotation, *Propriety of Limiting to Issue of Damages Alone New Trial Granted on Ground of Inadequacy of Damages Awarded*, 29 A.L.R.2d 1199, § 10 (1953)).

This Court has previously recognized that a "grossly inadequate" award of damages may indicate "that the jury was actuated by bias or prejudice, or that the verdict was a compromise." *Id.* at 569, 206 S.E.2d at 195-96 (quoting *New Trial* § 27, at 213). "[W]here, in an action for personal injuries the severity of the injury was beyond contention, a verdict for a grossly inadequate sum was in itself almost a conclusive demonstration that it was the result, not of justifiable concession of views, but of improper compromise of the vital principles which should have controlled the decision." *Bartholomew & Co. v. Parrish*, 186 N.C. 81, 84, 118 S.E. 899, 900 (1923). In such a case "the court must set aside the verdict in its entirety and award a new trial on all issues." *Robertson*, 285 N.C. at 569, 206 S.E.2d at 196 (quoting *New Trial* § 27).

Here the jury was instructed on fifteen different theories of liability and multiple factors of mitigation. Though the jury found defendant negligent and initially awarded plaintiff damages totaling $512,161.00 (being comparable to the amount plaintiff submitted as her medical bills), the jury reduced plaintiff's damages to $1.00 due to her failure to mitigate. Such an award, depending on the theory of negligence, appears to be the exact type of "inadequate sum" of damages this Court has previously determined can indicate a compromise verdict. In addition, the jury found no liability against any other defendant, rejected plaintiff's claim that the surgeries were performed as part of a conspiracy between these parties, and found defendant Rosner not responsible for plaintiff's death. Given that plaintiff advanced fifteen different theories of negligence, including that defendant Rosner failed to properly inform plaintiff of the procedures and their risks and performed unnecessary surgeries, the jury's finding of negligence in conjunction with its $1.00 damage award may indicate various compromises.

Improper jury motive leading to an inadequate verdict appears to be the precise issue with which the trial court was concerned, evinced by its findings on three separate occasions that passion or prejudice permeated the jury award. Likewise, the majority opinion agrees the damage award was insufficient. It appears the trial court and majority acknowledge the presence of the precise factors indicating a compromise verdict, warranting a completely new trial.

Further, given this outcome, the jury may not have actually believed the theory on which it found defendant liable or concluded that its finding of negligence was more theoretical than practical, thereby leading jurors to issue a nominal damage award as the result of a compromise. Similarly, the compromise was perhaps to find negligence but award only $1.00 in damages. As such, the jury's verdict is tainted so that a new trial on damages only would not be proper. Such a finding supports a new trial on all issues; it is impossible to say the finding of liability is untainted, but the damages amount is not. *See Robertson*, 285 N.C. at 569, 206 S.E.2d at 196.

Nonetheless, the Court of Appeals creates a remedy of a new trial as to damages only. Then, at this Court, without analysis the majority grants the deference reserved for the trial court to the Court of Appeals' determination to create a new remedy. While the majority at this Court recognizes that a *trial court's* ability to set aside a judgment is reviewed for abuse of discretion, the majority now applies the same review to the Court of Appeals' decision to create its own remedy. The trial court, not the Court of Appeals, would be the proper court to determine whether plaintiff should receive a new trial and if so, on what issues. Nonetheless, this Court prefers to speculate as to what a fully informed trial court would do instead of simply allowing it to act.

The majority's decision further exacerbates the errors of the trial court and Court of Appeals by clearly invading the jury room, sifting through plaintiff's fifteen theories of negligence and award of damages, and speculating as to the jury's actual reasoning and conclusions. From the cold record, the majority makes these declarations: of the fifteen possible grounds for negligence, the jury found defendant liable on one particular ground, characterized by the majority as "perform[ing] unnecessary surgeries"; the majority's selected theory of negligence required damages for pain and suffering; the amount of damages awarded by the jury does not include any amount for pain and suffering; and the jury based its mitigation decision solely on plaintiff's failure to return specifically to Rosner. To reach these conclusions, the majority isolates several lines of testimony that occurred over an almost two-month trial.

Because the record does not indicate the theory on which the jury made its decision, our jurisprudence is clear that this Court should not substitute itself for the jury and "presume to know" the theory upon which the jury relied. *McGill v. French*, 333 N.C. 209, 215-16, 424 S.E.2d 108, 111-12 (1993) (restating the well-established "principle that a reviewing court cannot appropriately determine, absent clear showing of record, upon what basis a jury renders its verdict" (citations omitted)); *id.* at 216, 424 S.E.2d at 112 ("We therefore hold that the Court of Appeals erred in assuming that the particular act of negligence upon which the jury based its verdict was defendant's alleged failure to inform the plaintiff of his cancer.")

Therefore, a new trial on all issues is particularly appropriate in this case because a new jury will not know the theory of negligence on which the jury relied and which corresponding damages may be appropriate.

III.

When a trial court proceeds under a misapprehension of law, an appellate court should state the law and remand the case to the trial court for proper consideration. It is unclear whether, had the trial court correctly known the law, it would have awarded a new trial, and if so, whether it would limit a new trial solely to damages. Even given the majority's approach that a new trial is warranted, plaintiff should receive "a new trial [on] all of the issues." *Robertson*, 285 N.C. at 569, 206 S.E.2d at 195 (quoting *New Trial* § 27, at 213). As such, any review of costs would be premature at this time.

The Court of Appeals erred in crafting its own remedy, a new trial on damages only, and this Court errs by applying a deferential standard to that remedy. If a new trial were justified, the trial should be on all issues. Accordingly, I respectfully dissent.

SILVER v. HALIFAX CTY. BD. OF COMM'RS

[371 N.C. 855 (2018)]

LATONYA SILVER, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF BRIANNA SILVER, LARRY SILVER III, AND DOMINICK SILVER; BRENDA SLEDGE, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF ALICIA JONES; FELICIA SCOTT, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF JAMIER SCOTT; HALIFAX COUNTY BRANCH #5401, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; AND COALITION FOR EDUCATION AND ECONOMIC SECURITY

v.

THE HALIFAX COUNTY BOARD OF COMMISSIONERS

No. 338A17

Filed 21 December 2018

Schools and Education—county's method of sales tax distribution—Leandro challenge—State responsibility

The trial court did not err by granting a N.C. Civil Procedure Rule 12(b)(6) dismissal of a claim brought under *Leandro v. State*, 346 N.C. 336 (1997), where an action challenged a county's choice of method of distribution for local sales tax revenue to a tripartite school system. The claim was untenable because it assumed that a county board of commissioners had a constitutional duty to provide a sound basic education; county boards of commissioners had no such duty. The remedy for these harms rested with the State.

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. ___, 805 S.E.2d 320 (2017), affirming an order entered on 2 February 2016 by Judge W. Russell Duke, Jr. in Superior Court, Halifax County. Heard in the Supreme Court on 16 April 2018.

Mark Dorosin and Elizabeth Haddix for plaintiff-appellants.

Garris Neil Yarborough and M. Glynn Rollins, Jr. for defendant-appellee.

Jane R. Wettach for Children's Law Clinic, Duke University School of Law; Youth Justice Project of the Southern Coalition for Social Justice, by Peggy Nicholson and K. Ricky Watson, Jr., for Public Schools First NC; and Celia Pistolis, Aisha Forte, and Jennifer Story for Legal Aid of North Carolina, Inc. – Advocates for Children's Services, amici curiae.

Tin Fulton Walker & Owen, PLLC, by S. Luke Largess and Cheyenne N. Chambers, for North Carolina Advocates for Justice, amicus curiae.

Womble Bond Dickinson (US) LLP, by Beth Tyner Jones, Rebecca C. Fleishman, and Matthew Tilley, for North Carolina Association of County Commissioners, amicus curiae.

JACKSON, Justice.

In this case we consider whether plaintiffs have stated a claim for violations of their right to receive the sound basic education guaranteed by the North Carolina Constitution sufficient to survive defendant's motion 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 the State—and not a board of county commissioners—is solely responsible for guarding and preserving the right of every child in North Carolina to receive a sound basic education pursuant to the North Carolina Constitution, we affirm the decision of the Court of Appeals.

The case sub judice is related to, yet distinguishable from, this Court's landmark decision in *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997) (*Leandro I*). The plaintiffs in *Leandro I* were students, parents or their legal guardians, and local boards of education from five relatively low wealth counties.[1] One of the plaintiffs was Halifax County Public Schools, a local board of education which is one of the school systems relevant to this case but is not a party. The plaintiffs in *Leandro I* sued the State and the North Carolina State Board of Education alleging that their state constitutional rights relating to education were being violated. *Id.* at 342, 488 S.E.2d at 252. They sought declaratory and injunctive relief to secure their right to fundamental educational opportunities that were severely lacking allegedly due to inadequate funding from the State. *Id.* at 342, 488 S.E.2d at 252. In *Leandro I* we concluded that "Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools" and that this includes a right to a qualitatively adequate education.[2] *Id.* at

1. *Leandro I* also featured a number of plaintiff-intervenors, who were students and their parents or legal guardians from relatively large and wealthy counties and those counties' respective boards of education.

2. In so doing, we noted that a qualitative "sound basic education" is one that would provide students with at least:

> (1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make

347, 488 S.E.2d at 255. We remanded the case to the trial court for a determination of whether the defendants in that case had violated their constitutional duty to provide every child an opportunity to receive a sound basic education, with instructions to the trial court to provide declaratory or other relief if it was found that they had violated this duty. *Id.* at 357-58, 488 S.E.2d at 261. Seven years later, the case returned to this Court in *Hoke County Board of Education v. State*, 358 N.C. 605, 599 S.E.2d 365 (2004) (*Leandro II*). This Court reviewed, among other things, the trial court's order on remand, which found that the State had failed to meet its constitutional duties regarding education outlined in *Leandro I* by inefficiently allocating and spending funds for education and directed the State to remedy the deficiencies that caused this violation. *Id.* at 608-09, 647-48, 599 S.E.2d at 372-73, 396. We affirmed the trial court's order, which left to the State the "nuts and bolts" of educational resource expenditures as they relate to providing a sound basic education while generally instructing the State to "assume the responsibility for, and correct, those educational methods and practices that contribute to the failure to provide students with a constitutionally-conforming education." *Id.* at 609, 599 S.E.2d at 373.

According to the factual allegations in plaintiffs' complaint, which we take as true for the purpose of reviewing an order on a motion to dismiss pursuant to Rule 12(b)(6), *see Krawiec v. Manly*, 370 N.C. 602, 604, 811 S.E.2d 542, 545 (2018) (citing *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 442, 666 S.E.2d 107, 114 (2008)), plaintiffs are five children who live and attend school in Halifax County, their respective parents or legal guardians, and two interested organizations: the local branch of the National Association for the Advancement of Colored People and the Coalition for Education and Economic Security. Defendant is the Halifax County Board of Commissioners, which, plaintiffs allege, is required by the North Carolina statutes to provide funding for each of the three local boards of education in Halifax County and is authorized to maintain or supplement school programs, facilities, and equipment for the local school boards.

> informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society.

Leandro I, 346 N.C. at 347, 488 S.E.2d at 255 (citations omitted).

In contrast to most North Carolina counties that have just one local education area (LEA), Halifax County has three: Halifax County Public Schools (HCPS), Weldon City Schools (WCS), and Roanoke Rapids Graded School District (RRGSD). According to plaintiffs' complaint, in the 2014 to 2015 school year, the student populations of HCPS and WCS were overwhelmingly black, with HCPS's student population of 2988 schoolchildren 85% black and 4% white, and WCS's student population of 940 students 94% black and 4% white. At the same time, RRGSD's student population of 2929 schoolchildren was only 26% black and 65% white. Furthermore, the vast majority of students attending school in HCPS and WCS schools are considered "at risk." Our decision in *Leandro II* recognized that students may be considered "at risk" if, "due to circumstances such as an unstable home life, poor socio-economic background, and other factors, [they] either enter or continue in school from a disadvantaged standpoint, at least in relation to other students who are not burdened with such circumstances."[3] *Leandro II*, 358 N.C. at 632 n.13, 599 S.E.2d at 387 n.13.

The facts alleged in plaintiffs' complaint are, unfortunately, all too familiar to this Court, as they mirror those of the plaintiffs in *Leandro I*. Plaintiffs allege that defendant's continued support and maintenance of this tripartite school district system and its refusal to manage and distribute resources efficiently among the school districts has resulted in defendant's failure to provide the students of Halifax County an opportunity to receive a sound basic education. They compare defendant's "inputs" and "outputs"[4] in the HCPS and WCS districts with those in

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3. In expounding upon the definition of an "at risk" student in *Leandro II*, we noted that an "at risk" student generally

> holds or demonstrates one or more of the following characteristics: (1) member of low-income family; (2) participate in free or reduced-cost lunch programs; (3) have parents with a low-level education; (4) show limited proficiency in English; (5) are a member of a racial or ethnic minority group; (6) live in a home headed by a single parent or guardian.

358 N.C. at 636 n.16, 599 S.E.2d at 389 n.16.

4. In the *Leandro* cases we used these terms as shorthand for various actions the State takes and the results it achieves, in educational policy to help determine whether it was providing a sound basic education. The term "inputs" includes indicators like the amount of funding received and its allocation, educational programs and opportunities provided to students, teacher certification standards, and overall quality of administrators and teachers. *Leandro II*, 358 N.C. at 631-32, 599 S.E.2d at 386-87. The term "outputs" generally is considered to measure overall student performance, and includes indicators such as comparative standardized test score data, student graduation rates, employment potential, and post-secondary education success (or a lack of post-secondary education participation). *Id.* at 623, 599 S.E.2d at 381.

RRGSD to bolster their allegations. As to "inputs," plaintiffs state that HCPS and WCS school buildings and facilities are woefully inadequate, with crumbling infrastructure and regularly failing heating and cooling systems. Plaintiffs also include a report that students at Northwest High School in HCPS recently have had to walk through sewage to move between classes because of defective plumbing. In addition, HCPS and WCS school students frequently lack textbooks and other basic curricular materials, with teachers relying on donations from parents to purchase books and other basic classroom necessities. Meanwhile, plaintiffs point out that the facilities at RRGSD schools are well kept and regularly renovated, and students have access to Advanced Placement classes and many other curricular and extra-curricular activities that are not available to HCPS and WCS students. Plaintiffs argue that funding disparities make it extremely difficult for HCPS and WCS to attract and retain quality, or even fully licensed, teachers and administrators, with these schools commonly resorting to hiring teachers from the Teach for America program or teachers with little or no experience. The percentage of fully licensed teachers in these districts ranges from 63 to 89%. In contrast, 95 to 100% of the teachers in RRGSD schools are fully licensed.

Plaintiffs claim this disparity in inputs is largely attributable to the way defendant has structured its system of local sales tax distribution pertaining to education. Pursuant to legislation enacted by the General Assembly, each year defendant selects one of two methods by which local sales tax revenues are distributed within the county to provide additional funding to the local school districts. Defendant may use either the per capita method, in which local sales tax revenue is divided between defendant and all municipalities within the county on a per capita basis using the resident population of each, N.C.G.S. § 105-472(b)(1) (2017), or the ad valorem method, in which local sales tax revenue is divided between all "taxing entities" in the county, including municipalities and eligible LEAs, *id.* § 105-472(b)(2) (2017). Defendant routinely chooses to employ the ad valorem method, which plaintiffs allege netted RRGSD $4.5 million in local sales and use tax revenue and WCS $2.5 million in local sales and use tax revenue between 2006 and 2014. HCPS, which does not have a supplemental property tax and is therefore not a taxing entity, receives no money pursuant to the ad valorem method of distribution. Plaintiffs claim that defendant's continued use of the ad valorem method, as opposed to the per capita method, routinely leaves HCPS with fewer resources to increase "inputs" and exacerbates existing funding disparities, which in turn reduces the chance that students in HCPS schools will receive a sound basic education. Differing supplemental property tax rates similarly result in disparate funding between the three LEAs within the county.

Plaintiffs' complaint also alleges large disparities in "outputs." Plaintiffs point out that since 2002, the students in HCPS and WCS schools have scored anywhere from 15 to 30% lower than students in RRGSD schools on end-of-course tests and that a majority of students in HCPS and WCS schools score below grade level in standardized statewide end-of-grade exams. HCPS and WCS students consistently score 150 to 250 points lower than RRGSD students on the SAT college entrance exam. Students in HCPS and WCS schools are much more likely than students in RRGSD schools to be suspended, with HCPS having suspended a higher percentage of high school students than any other school district in the state during the 2013 to 2014 school year.

In August 2016, plaintiffs commenced this action alleging that defendant has violated plaintiffs' fundamental constitutional right to receive the sound basic education guaranteed in Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution. Plaintiffs requested that the trial court issue a declaratory judgment and use its equitable powers to order defendant to develop and implement a plan to cure the alleged violation. Defendant filed a motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. In February 2016, the trial court granted defendant's motion to dismiss, noting that no provision of the North Carolina Constitution affirmatively requires a board of county commissioners to implement and maintain a public education system in the county in which it sits, thereby absolving the board of any constitutional duty to provide its students the opportunity to receive a sound basic education. Plaintiffs appealed to the Court of Appeals, asserting that defendant is constitutionally responsible for securing a child's right to a sound basic education. After reviewing the plain language of our constitution and our decisions in the *Leandro* cases, the Court of Appeals affirmed the decision of the trial court in a divided decision, holding that the State, standing alone, has the obligation to provide a sound basic education to the children of North Carolina. *Silver v. Halifax Cty. Bd. of Comm'rs*, ___ N.C. App. ___, ___, 805 S.E.2d 320, 323 (2017). The Court of Appeals determined that plaintiffs' correct course of action would be to have their concerns addressed in the ongoing *Leandro* proceedings. *Id.* at ___, 805 S.E.2d at 329-330. Chief Judge McGee dissented, writing that she would hold that plaintiffs have properly stated a claim against defendant and that a board of county commissioners may be held responsible for ensuring that schoolchildren have the opportunity to receive a sound basic education. *Id.* at ___, 805 S.E.2d at 344 (McGee, C.J., dissenting). Chief Judge McGee reasoned that the responsibility for providing the right to a sound basic education is the result of the assignment of powers over

education to a local entity by the General Assembly pursuant to Article IX, Section 2(2). *Id.* at ___, 805 S.E.2d at 345 (McGee, C.J., dissenting). In October 2017, plaintiffs appealed to this Court as of right pursuant to N.C.G.S. § 7A-30(2) to obtain review of the Court of Appeals' determination that the trial court appropriately dismissed their complaint.

On appeal from an order dismissing a claim pursuant to Rule 12(b)(6), we conduct de novo review. *Krawiec*, 370 N.C. at 606, 811 S.E.2d at 546 (citing *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448, 781 S.E.2d 1, 8 (2015)). An action will be dismissed pursuant to Rule 12(b)(6) if the complaint "[f]ail[s] to state a claim upon which relief can be granted." N.C.G.S. § 1A-1, Rule (12)(b)(6). We have determined that a complaint fails to state a claim and will be dismissed 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." *Krawiec*, 370 N.C. at 606, 811 S.E.2d at 546 (quoting *Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)). In conducting our review of a complaint dismissed pursuant to Rule 12(b)(6), we take all of the factual allegations stated in plaintiffs' complaint as true. *Id.* at 604, 811 S.E.2d at 545 (citing *Ridgeway Brands*, 362 N.C. at 442, 666 S.E.2d at 114).

The trial court dismissed plaintiffs' constitutional claim for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) on the basis that plaintiffs could not have their constitutional rights enforced by defendant because defendant does not possess any constitutional duties relating to public education. Plaintiffs contend that, along with the State, a board of county commissioners is obliged to provide the opportunity for the children of North Carolina to receive a sound basic education. We disagree.

In analyzing defendant's constitutional duties with respect to providing a sound basic education, first we must carefully consider the pertinent language of the constitution itself. Section 15 of the North Carolina Declaration of Rights states: "The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15. The provision more relevant to the case sub judice, Article IX, Section 2, entitled "Uniform system of schools" states:

> (1) General and uniform system: term. — The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which

> shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.
>
> (2) Local responsibility. — The General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate. The governing boards of units of local government with financial responsibility for public education may use local revenues to add to or supplement any public school or post-secondary school program.

Id. art. IX, § 2. Acting together, these two sections of Article I and Article IX create a mandate that guarantees every child in the state the opportunity to receive a sound basic education. We interpret our constitution and our statutes in the same manner, meaning that if the language in the instrument is clear and unambiguous on its face, we do not search for meaning elsewhere. *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478-79 (1989) (citing *Elliott v. State Bd. of Equalization*, 203 N.C. 749, 753, 166 S.E. 918, 920-21 (1932)).

As we read these provisions of our constitution, it is clear that no express provision requires boards of county commissioners to provide for or preserve any rights relating to education. Section 2(1) of Article IX requires the General Assembly to create and maintain a system of free public schools. N.C. Const. art. IX, § 2(1) ("The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools . . . ."). The constitution also notes expressly that units of local government, such as county boards of commissioners, may bear the burden for some of the financial needs of local education by using local revenues if the General Assembly so allows. *Id.* art. IX, § 2(2) ("The General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate."). Indeed, the General Assembly has chosen to enact many statutes making county boards of commissioners responsible for certain costs associated with LEA operations. *See*, *e.g.*, N.C.G.S. § 115C-408(b) (2017) ("[T]he facilities requirements for a public education system will be met by county governments."); *id.* §§ 115C-521(b), -524(b) (2017) (requiring boards of commissioners to provide funds for the erection of "school buildings equipped with suitable school furniture and apparatus" and to ensure that these buildings are in "good repair" and "at all times in proper condition for use"); *id.* § 115C-522(c) (2017) (making it the combined duty of boards of county commissioners and local school boards "to provide suitable supplies for the school buildings . . . . includ[ing]

. . . proper window shades, blackboards, reference books, library equipment, maps, and equipment for teaching the sciences" as well as "provide every school with a good supply of water"). Furthermore, the legislature gives boards of county commissioners the option to supplement monies for public education with certain taxes if they choose to do so. *Id.* § 105-464 (2017) (affording "the counties and municipalities of this State with opportunity to obtain an added source of revenue . . . by providing all counties of the State with authority to levy a one percent (1%) sales and use tax"); *id.* § 115C-501(a) (2017) (granting local taxing authorities the "authority to ascertain the will of the voters as to whether there shall be levied and collected a special tax in the several local school administrative units, districts, and other school areas . . . to supplement the funds from State and county allotments"); *id.* § 115C-511(a) (2017) ("If a local school administrative unit or district has voted a tax to operate schools of a higher standard than that provided by State and county support," the board of county commissioners is authorized to levy a tax on all property located in the LEA to supplement the local current expense fund.).

Plaintiffs assert that Article IX, Section 2(2) and the statutes enacted pursuant to this constitutional provision make local entities responsible for providing a sound basic education. We disagree. As we noted in *Leandro I*, boards of county commissioners have a long history of involvement in local education, and this notion is ingrained in our State's educational structure:

> The idea that counties are to participate in funding their local school districts has a long history. In 1890, for example, Chief Justice Merriman wrote for this Court that: "the funds necessary for the support of public schools—the public school system—are not derived exclusively from the State. The Constitution plainly contemplates and intends that the several counties, as such, shall bear a material part of the burden of supplying such funds."

Leandro I, 346 N.C. at 349, 488 S.E.2d at 256 (quoting *City of Greensboro v. Hodgin*, 106 N.C. 182, 187-88, 11 S.E. 586, 588 (1890)). While the framers of our state constitution may have intended that Article IX, Section 2(2) *allow* for supplementing of school funding by boards of county commissioners, it clearly does not *require* the General Assembly to do so. The language utilized obviously is precatory, not mandatory. In examining the two pertinent constitutional provisions, we note the importance of the framers' choice of "shall" in subsection (1) and "may" in subsection (2). "As used in statutes, the word 'shall' is generally imperative or mandatory." *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757

(1979) (citing *Black's Law Dictionary* 1541 (4th rev. ed. 1968)). In contrast, "may" is generally intended to convey that the power granted can be exercised in the actor's discretion, but the actor need not exercise that discretion at all.[5] *In re Hardy*, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978) ("Ordinarily when the word 'may' is used in a statute, it will be construed as permissive and not mandatory." (first citing *Felton v. Felton*, 213 N.C. 194, 195 S.E. 533 (1938); and then citing *Rector v. Rector*, 186 N.C. 618, 120 S.E. 195 (1923))). If we assume, *arguendo*, that the General Assembly declined to exercise its Article IX, Section 2(2) discretion and assign financial responsibilities to the local boards of county commissioners or allow them to levy taxes for education, boards of county commissioners could not exercise any authority over local education. It is inapposite then to suggest, as plaintiffs have, that boards of county commissioners have some inherent constitutional duty to provide a sound basic education, much less any other constitutional power related to education. If they did possess such inherent powers, then a situation like the one described above—in which the General Assembly has granted no financial responsibility to local units of government—would leave a board of county commissioners in the impossible situation of perpetually violating the constitution by not providing a sound basic education while lacking the means to do so.

Justice Story's ideas of constitutional construction from his seminal opinion in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), provide a useful analog. In *Hunter's Lessee* the United States Supreme Court was tasked with, *inter alia*, deciding whether it could hear a case on direct appeal from a state court without the case first passing through the lower federal courts. *Id.* at 323-24. The Court determined that it could. Recognizing that the Constitution stated that Congress "shall" (i.e., must) create a Supreme Court but merely "may" (i.e., can) create inferior courts, *id.* at 328, the Supreme Court reasoned that inferior courts need not be created at all. If Congress did not create inferior

5. We do recognize that this Court occasionally reads the word "may" to carry the same meaning as "shall" when such an interpretation "will best express the legislative intent" and "it is employed in a statute to delegate a power, the exercise of which is important for the protection of public or private interests." *Puckett v. Sellars*, 235 N.C. 264, 268, 69 S.E.2d 497, 500 (1952); *see also Johnston v. Pate*, 95 N.C. 68, 71 (1886) (observing that "[t]he term 'may' is often construed as mandatory when the statute is intended to give relief" or "when a statute directs the doing of a thing for the sake of justice or the public good"). Here we see no reason to define "may" in the context of Article IX, Section 2(2) to be mandatory, as the provision was not intended to provide any party with relief or protect public or private rights or interests. Indeed, the purpose of the provision is to promote efficiency, as it gives the General Assembly a mechanism to supplement the costs and financial administration of the education system that it is required to set up and maintain.

courts, the Supreme Court, whose "judicial power (which includes appellate power) shall extend to all cases," *id.* at 338, would naturally be able to hear cases on appeal directly from the states because the vested federal judicial power over the Constitution and laws of the United States would have to be exercised in some way and arise from somewhere, *id.* at 338-39. "Any other construction, upon this supposition," Justice Story wrote, "would involve this strange contradiction, that a discretionary power vested in congress, and which they might rightfully omit to exercise, would defeat the absolute injunctions of the constitution in relation to the whole appellate power." *Id.* at 340. The same general reasoning may be applied to the case sub judice, as the General Assembly may refuse to grant any financial responsibility to local entities, thereby making it impossible for said local entities to carry out any education related duties, much less provide a sound basic education. This leaves the State, and the State alone, with the power to create and maintain a system of public education, which includes effectuating the right to a sound basic education. Just as "congress may lawfully omit to establish inferior courts, it might follow, that in some of the enumerated cases the judicial power could nowhere exist," *id.* at 330, the General Assembly may lawfully refuse to grant power concerning education to local governments, which, if plaintiffs' claims were correct, would create a situation in which a local government entity would have a constitutional duty to act without the means to do so. We cannot read our constitution to permit such a contradiction.

It has been suggested by both plaintiffs and the Court of Appeals dissent that the constitutional duty to provide a sound basic education is vested in or delegated to a unit of local government when the General Assembly enacts a law giving it financial responsibility concerning public education. This reasoning has been foreclosed by our decision in *Leandro II*. There we affirmed the order of the trial court which found that the State, "and by the State we mean the legislative and executive branches which are constitutionally responsible for public education," was not providing a sound basic education to Hoke County students because it failed to ensure that available resources were being allocated appropriately. *Leandro II*, 358 N.C. at 635, 599 S.E.2d at 389. The State contended that it could not be exclusively responsible for providing the opportunity for a sound basic education because the Hoke County Board of Education was at least in part responsible for this failure to properly allocate resources and provide a sound basic education. *Id.* at 635, 599 S.E.2d at 389. We concluded otherwise, noting that the State was responsible for providing a sound basic education and "the trial court's

ruling simply placed responsibility for the school board's actions on the entity—the State—that created the school board and that authorized the school board to act on the State's behalf." *Id.* at 635, 599 S.E.2d at 389.

The interrelationship between the State and local school boards discussed in *Leandro II* is comparable to that between the State and a county board of commissioners and is useful to our analysis in this case. In *Moore v. Board of Education*, 212 N.C. 499, 193 S.E. 732 (1937), this Court noted that local school boards are agencies of the State, with the General Assembly having close to plenary power over them. *Id.* at 502, 193 S.E. at 733-34 (stating that local governmental organizations, including school boards, "are intended to be instrumentalities and agencies employed to aid in the administration of the government" and "are the creatures of the legislative will and subject to its control, and such agencies can only exercise such powers as may be conferred upon them and in the way and manner prescribed by law"). Like local school boards, counties and their respective boards of county commissioners also are "creatures of the General Assembly and serve as agents and instrumentalities of State government." *Stephenson v. Bartlett*, 355 N.C. 354, 364, 562 S.E.2d 377, 385 (2002). "[A] county's 'powers . . . both express and implied, are conferred by statutes, enacted from time to time by the General Assembly.' " *Lanvale Props., LLC v. County of Cabarrus*, 366 N.C. 142, 150, 731 S.E.2d 800, 807 (2012) (ellipsis in original) (quoting *Martin v. Board of Comm'rs of Wake Cty.*, 208 N.C. 354, 365, 180 S.E. 777, 783 (1935); *id.* at 150, 731 S.E.2d at 807 (stating that a county is "an instrumentality of the State, by means of which the State performs certain of its governmental functions within its territorial limits" (quoting *Martin*, 208 N.C. at 365, 180 S.E. at 783)). If, according to *Leandro II*, the General Assembly may not delegate or shift some of its responsibility to provide an opportunity for a sound basic education to a local school board, an agency of the State, then it follows that the General Assembly also may not pass this same responsibility on to a county board of commissioners, also an agency of the State. The trial court's order at issue in *Leandro II* found "that the *State bore ultimate responsibility* for the actions and/or inactions of the local school board, and that it was the State that must act to correct those actions and/or inactions of the school board that fail to provide a *Leandro*-conforming educational opportunity," and we upheld this determination. 358 N.C. at 635, 599 S.E.2d at 389 (emphasis added). Following this reasoning, any complications born of the incompetence or obstinance of a county board of county commissioners relating to the finances of local education are the

"ultimate responsibility" of the State, which must step in and ameliorate the errors.[6]

Plaintiffs have expressed concern that a determination that only the State is responsible for providing children the opportunity to receive a sound basic education will give local governments the ability to disregard their obligations relating to education by allowing them to refuse to provide funds for, among other things, books, equipment, school transportation, and maintenance or construction of school facilities. In effect, plaintiffs say county governments would thus be allowed to abandon their fiscal responsibility regarding education with impunity and pass their alleged constitutional duties along to the State. This is not the case. Plaintiffs' line of reasoning is arguably sound only if one presupposes that counties have such constitutional duties in the first place, and we have determined that they do not. Furthermore, irrespective of a county's constitutional powers relating to education, no entity is free to ignore the mandates of the General Assembly. Nothing in this opinion should be read to suggest that a county board of commissioners, or

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6. Defendant argues that our decision in *King v. Beaufort County Board of Education*, 364 N.C. 368, 704 S.E.2d 259 (2010), is irreconcilable with our holding today. In *King* we held that a student who is suspended and denied access to alternative education must be given a reason why he or she is not allowed to participate in an alternative education program. *Id.* at 370, 704 S.E.2d at 260-61. Plaintiffs assert that because the local school board in *King* was the only proper defendant in the litigation, a local entity may be responsible for providing a sound basic education to students. We disagree, as *King* does not stand for such a broad proposition. Notwithstanding our decision in *Leandro II*, in which we noted that the State may not delegate its overall responsibility of providing a sound basic education to local school boards, *King* is not controlling here and may be distinguished from the *Leandro* decisions and the present case.

King is, primarily, a decision regarding school discipline, based upon statutes enacted by the General Assembly which require LEAs to offer at least one alternative education program and create strategies for assigning long-term suspended students to it when feasible and appropriate. *King* clearly expressed that there is no fundamental right to an alternative education. 364 N.C. at 372, 704 S.E.2d at 261 ("In acknowledging a statutory right to alternative education, we stress that a fundamental right to alternative education does not exist under the state constitution."). The State, in its discretion and outside the *Leandro* mandate that requires it to provide every child an opportunity for a sound basic education, has chosen to provide for the continued schooling of children who have misbehaved and been removed from the schoolhouse. *King* was not concerned with the local board of education providing a sound basic education to its students but rather with how the statutorily created right to receive an alternative education was to be preserved. As such, we held that "*insofar as the General Assembly has provided a statutory right* to alternative education, a suspended student excluded from alternative education has a state constitutional right to know the reason for her exclusion." *Id.* at 372, 704 S.E.2d at 261 (emphasis added).

any other local entity with duties imposed by General Assembly enactments, may ignore statutory requirements laid out by the legislature. Furthermore, to the extent that a county, as an agency of the State, hinders the opportunity for children to receive a sound basic education, it is the State's constitutional burden to take corrective action.

It is important to note that the legislature has provided statutory relief from inadequate funding in an LEA if a local board of education determines that the funds appropriated to it by the county board of commissioners are "not sufficient to support a system of free public schools." N.C.G.S. § 115C-431 (2017) (titled "Procedure for resolution of dispute between board of education and board of county commissioners."). This process involves the chairs of both the local board of education and the board of county commissioners jointly meeting with a mediator to "make a good-faith attempt to resolve the differences that have arisen between them," but if they cannot and a subsequent attempt at mediation fails, the local board of education may file an action in superior court where a jury may decide the appropriate budget for the school year. *Id.* § 115C-431(a)-(c). Plaintiffs note that there is no similar statutory action against boards of county commissioners available to parents or students seeking to vindicate their right to a sound basic education. If a local school board chooses not to pursue a section 115C-431 action, plaintiffs contend that relief from the courts is the only manner by which they may vindicate their right to a sound basic education as it pertains to county funding of local schools. Again, plaintiffs' claim is untenable because it assumes that a county board of commissioners has some constitutional duty to provide a sound basic education in the first instance. As we concluded above, county boards of commissioners have no such duty, so plaintiffs are precluded from asserting constitutional claims against them concerning this specific constitutional right.

If a section 115C-431 course of action is deficient, as plaintiffs have suggested, parents and students are still free to assert a child's constitutional right to receive a sound basic education directly against the State. The Court of Appeals suggested this very remedy, opining that the correct avenue for relief in this case would be for plaintiffs to raise the issues alleged in their complaint with the superior court overseeing the ongoing *Leandro* litigation, *Silver*, ___ N.C. App. at ___, 805 S.E.2d at 329-30, but plaintiffs contend that this, too, is inadequate. Plaintiffs maintain that this Court's decisions in the *Leandro* cases are concerned with the scope of the right to a sound basic education and whether the amount and spending of resources provided by the State properly guarantee this right. Plaintiffs further claim that intervention in

the *Leandro* case is procedurally impractical because that litigation has been in a remedial phase for nearly fifteen years and no substantive rulings have issued in *Leandro* aside from a decision pertaining to pre-kindergarten programs in 2011. Regardless of the feasibility of intervention in the *Leandro* litigation, plaintiffs have not advanced any reason—and we can find none—why they cannot bring an action directly against the State in order to cure the alleged constitutional violations.

In *Leandro II* we noted that "[t]he children of North Carolina are our state's most valuable renewable resource. If inordinate numbers of [students] are wrongfully being denied their constitutional right to the opportunity for a sound basic education, our state courts cannot risk further and continued damage because the perfect civil action has proved elusive." *Leandro II*, 358 N.C. at 616, 599 S.E.2d at 377. This Court's statement in *Leandro II* remains true today. However, here, we are not confronted by a civil action that is merely imperfect, but rather we have been presented with an action that must fail because plaintiffs simply cannot obtain their preferred remedy against this particular defendant on the basis of the claim that they have attempted to assert in this case. The allegations in plaintiffs' complaint, if true, are precisely the type of harm *Leandro I* and its progeny are intended to address. In keeping with *Leandro*, however, the duty to remedy these harms rests with the State, and the State alone. Accordingly, we affirm the decision of the Court of Appeals that affirmed the trial court's order dismissing the action for failure to state a claim upon which relief can be granted.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
BOBBY JOHNSON

No. 57PA17

Filed 21 December 2018

1. Confessions and Incriminating Statements—questioning before Miranda warnings—Miranda and voluntariness inquiries

Where defendant voluntarily met with detectives at the police station and was questioned for just under five hours before being placed under arrest and *Mirandized*, the Court of Appeals erred by condensing the *Miranda* and voluntariness inquiries into one in its opinion concluding that defendant's inculpatory statements to law enforcement were involuntary.

2. Appeal and Error—failure to preserve argument for appeal

Where defendant voluntarily met with detectives at the police station and was questioned for just under five hours before being placed under arrest and *Mirandized*, the trial's court's determination that the waiver forms introduced into evidence by the State "accurately reflect[ed] the required *Miranda* warnings" was supported by competent evidence in the record and not challenged by defendant. Defendant did not preserve the argument that officers employed the "question first, warn later" technique to obtain his confession in violation of *Miranda* and *Seibert*.

3. Confessions and Incriminating Statements—voluntariness—findings and conclusion supported

Where defendant voluntarily met with detectives at the police station and was questioned for just under five hours before being placed under arrest and *Mirandized*, the trial court's conclusion that defendant's inculpatory statements were voluntarily made was adequately supported by its findings of fact, and those findings were supported by competent evidence in the record.

Justice HUDSON concurring in result.

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 625 (2017), finding no prejudicial error after appeal from a judgment entered on 6 October 2015 by Judge Eric L. Levinson in Superior Court, Mecklenburg County. On 3 May 2017, the Supreme Court allowed

defendant's conditional petition for discretionary review as to an additional issue. Heard in the Supreme Court on 8 January 2018.

Joshua H. Stein, Attorney General, by Derrick C. Mertz, Special Deputy Attorney General, for the State-appellant/appellee.

Marilyn G. Ozer for defendant-appellant/appellee.

BEASLEY, Justice.

The Court of Appeals concluded that defendant's inculpatory statements to law enforcement were given under the influence of fear or hope caused by the interrogating officers' statements and actions and were therefore involuntarily made. *State v. Johnson*, ___ N.C. App. ___, ___, 795 S.E.2d 625, 639-40 (2017). The unanimous Court of Appeals panel held that the confession should have been suppressed but concluded the error was harmless beyond a reasonable doubt due to the overwhelming evidence of defendant's guilt. *Id.* at ___, 795 S.E.2d at 641. For the reasons stated below, we uphold the trial court's conclusion that, under the totality of the circumstances, defendant's inculpatory statements were voluntary. Therefore, we modify and affirm the decision of the Court of Appeals.

Background

In the early morning hours of 2 May 2007, three men robbed a Charlotte motel where the victim, Anita Jean Rychlik, worked as manager and her husband worked as a security guard. After pistol whipping and robbing the security guard in the parking lot, two of the men entered the victim's room, where the victim was shot once in the back of her neck and killed. The men escaped, and no one was charged in the murder until October 2011. DNA evidence collected from beneath the victim's fingernails and analyzed in 2009 indicated defendant was the likely contributor.

Defendant voluntarily met with detectives on 24 October 2011 at the police station, where he was questioned in an interview room for just under five hours before being placed under arrest and warned of his rights as required by *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). After being advised of his rights, defendant signed a written waiver of those rights and made inculpatory statements. Defendant was indicted on 7 November 2011 for first-degree murder for the killing of Rychlik.

Defendant was tried before Judge Eric L. Levinson at the 28 September 2015 criminal session of Superior Court, Mecklenburg County. On 6 October 2015, a jury found defendant guilty of first-degree murder under the felony murder rule with armed robbery as the underlying felony. That same day, the trial court sentenced defendant to life imprisonment without parole.

Defendant made a number of pretrial motions, including a motion to suppress statements he made to law enforcement while being interrogated on 24 October 2011. Defendant argued that he was subjected to custodial interrogation before being informed of his rights as required by *Miranda*, and that his inculpatory statements were made in response to improper statements by detectives inducing a hope that his confession would benefit him. The trial court denied the motion to suppress, concluding that "[b]ased on the totality of the circumstances during the entirety of the interview, the statements made by Defendant were voluntary."

Defendant appealed his conviction to the Court of Appeals, arguing that the trial court's findings of fact "seem[ed] to intentionally downplay the influence of hope and fear" during his interrogation and were insufficient to support its conclusion that the *Miranda* warnings in this case were effective under *Missouri v. Seibert*, 542 U.S. 600, 159 L. Ed. 2d 643 (2004). The Court of Appeals panel determined that defendant was subject to custodial interrogation before being *Mirandized* and then analyzed whether the entirety of the interrogation, from the time defendant first should have been advised of his rights under *Miranda* until the time defendant made inculpatory statements, rendered those statements involuntary. *Johnson*, ___ N.C. App. at ___, 795 S.E.2d at 638-39.

The Court of Appeals concluded that the detectives used the "question first, warn later" technique held invalid in *Seibert*, but that defendant did not make inculpatory statements prior to being advised of his rights as required by *Miranda*. *Id.* at ___, 795 S.E.2d at 637-38. Because of that distinction, the Court of Appeals did not determine whether the postwarning statement should have been suppressed under *Miranda* and *Seibert*, and instead analyzed the overall voluntariness of the statements. *Id.* at ___, 795 S.E.2d at 637-38. The Court of Appeals held that the circumstances under which defendant made inculpatory statements were at least as coercive as those at issue in *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975), and therefore, any statements given were involuntary and inadmissible. *Johnson*, ___ N.C. App. at ___, 795 S.E.2d at 638. Despite its conclusion that the statements should have been suppressed, the panel determined that admission of defendant's statements was harmless beyond a reasonable doubt due to the overwhelming additional evidence of defendant's guilt, including DNA evidence,

eyewitness testimony, and accomplice testimony. *Id.* at ___, 795 S.E.2d at 640-41. This Court allowed both the State's and defendant's petitions for discretionary review on 3 May 2017.

Analysis

I. – Standard of Review

We evaluate a trial court's denial of a motion to suppress evidence to determine "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994)). If the trial court's findings of fact are supported by competent evidence, they "are conclusive on appeal, . . . even if the evidence is conflicting." *State v. Hammonds*, 370 N.C. 158, 161, 804 S.E.2d 438, 441 (2017) (quoting *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001)). Conclusions of law, however, "are fully reviewable on appeal" and "must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *Id.* at 161, 804 S.E.2d at 441 (first citing *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992); then quoting *Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826).

Determinations regarding the voluntariness of a defendant's waiver of his *Miranda* rights or the voluntariness of incriminating statements made during the course of interrogation are conclusions of law, which we review de novo. *State v. Knight*, 369 N.C. 640, 646, 799 S.E.2d 603, 608 (2017) (citation omitted); *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994) (citation omitted).

II. – Voluntariness and *Miranda*

[1] At common law a confession obtained through inducements, promises, or threats of violence lacked the presumption of reliability ordinarily afforded such statements, and therefore, was not admissible at trial. *State v. Roberts*, 12 N.C. (1 Dev.) 259, 260 (1827) (per curiam) (declining to allow admission of a confession when "the defendant ha[d] been influenced by any threat or promise"); *cf. Hopt v. Utah*, 110 U.S. 574, 585, 28 L. Ed. 262, 267 (1884) (holding a confession admissible when not made as a result of inducements, threats, or promises preying on the "fears or hopes of the accused"). In short, "coerced confessions are inherently untrustworthy." *Dickerson v. United States*, 530 U.S. 428, 433, 147 L. Ed. 2d 405, 412 (2000) (citations omitted).

Compliance with *Miranda* is a threshold requirement for admissibility of such statements when made as a result of custodial interrogation

and does not abrogate the need for confessions to be obtained in compliance with traditional notions of due process under both the federal and state constitutions. *Seibert*, 542 U.S. at 617 n.8, 159 L. Ed. 2d at 658 n.8 (plurality opinion) (declining to "assess the actual voluntariness of the statement" where *Miranda* warnings were inadequate); *New York v. Quarles*, 467 U.S. 649, 655 n.5, 81 L. Ed. 2d 550, 556 n.5 (1984) (noting that "failure to provide *Miranda* warnings in and of itself does not render a confession involuntary" and suggesting the defendant was "free on remand to argue that his statement was coerced under traditional due process standards"). " '[T]he mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion' as to any subsequent, warned statement." *United States v. Mashburn*, 406 F.3d 303, 307 (4th Cir. 2005) (quoting *Oregon v. Elstad*, 470 U.S. 298, 314, 84 L. Ed. 2d 222, 235 (1985)). And conversely, compliance with *Miranda* does not necessarily raise a presumption of voluntariness. Consequently, even when a defendant's *Miranda* rights are respected, and even when those rights are voluntarily, knowingly, and intelligently waived, the confession itself must also be voluntary under traditional notions of due process. "If, looking to the totality of the circumstances, the confession is 'the product of an essentially free and unconstrained choice by its maker,' then 'he has willed to confess [and] it may be used against him;' where, however 'his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.' " *Hardy*, 339 N.C. at 222, 451 S.E.2d at 608 (alteration in original) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26, 36 L. Ed. 2d 854, 862 (1973)).

Whether the defendant's rights under *Miranda* and its progeny have been respected is a factor to be considered when assessing the overall voluntariness of a defendant's confession. *See*, *e.g.*, *id.* at 222, 451 S.E.2d at 608 (listing compliance with *Miranda* as a factor to be considered in the voluntariness inquiry). Consequently, assessing the admissibility of a statement given in response to police questioning requires an assessment of both compliance with *Miranda* and the overall voluntariness of the statement. We agree with the State that the Court of Appeals erred by compressing these steps to analyze voluntariness alone. *Johnson*, ___ N.C. App. at ___, 795 S.E.2d at 634. Compliance with *Miranda* is a factor to be considered when evaluating voluntariness in light of the totality of the circumstances under which the statement was given. Whether the State has complied with *Miranda* necessarily involves a determination whether the person being interviewed was subjected to custodial interrogation, which is itself a totality of the circumstances analysis. While these two analyses will require the Court to examine interrelated

and overlapping facts, one is not a replacement for the other. Likewise, determining whether a defendant has voluntarily waived his rights under *Miranda* does not abrogate the need to evaluate the voluntariness of the statement itself.

III. – Compliance with *Miranda* in light of *Seibert*

[2] "*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' " *Oregon v. Mathiason*, 429 U.S. 492, 495, 50 L. Ed. 2d 714, 719 (1977) (per curiam). There is no question that defendant was read the *Miranda* warnings when he was formally placed under arrest and that he signed a form acknowledging his waiver of those rights. The parties disagree, however, as to whether those warnings, when given, were sufficient to comply with *Miranda* in light of the United States Supreme Court's decision in *Seibert*, 542 U.S. at 600, 159 L. Ed. 2d at 643. Defendant relies on *Seibert* to argue that the officers' use of the "question first, warn later" method of interrogation violated *Miranda*. The State argues that there is no evidence that officers intentionally used the "question first, warn later" technique at issue in *Seibert*, and therefore, this case is distinguishable and should be analyzed instead under the rationale of *Oregon v. Elstad*, 470 U.S. 298, 84 L. Ed. 2d 222 (1985). We do not find the reasoning of *Elstad* distinguishable from *Seibert* in this way. Rather, the two cases stand for the same proposition: *Miranda* warnings must be given in a manner that meaningfully apprises the interviewee of his choice to give an admissible statement or stop talking before he is taken into custody and questioned.

In *Seibert*, the officer testified that he purposefully did not place the defendant under arrest until after he had questioned her for some time and she had fully confessed. *Seibert*, 542 U.S. at 604-07, 159 L. Ed. 2d at 650-51. By doing so, he was able to secure a confession without apprising the defendant of her constitutional rights as required by *Miranda*. *Id.* at 604-07, 159 L. Ed. 2d at 651. He then gave the obligatory warnings, confronted her with her prewarning statements, and repeated the questions to confirm what had already been said. *Id.* at 605, 159 L. Ed. 2d at 650-51. According to the Court, the manifest purpose of this interrogation technique was to obtain "a confession the suspect would not make if he understood his rights at the outset," thereby intentionally circumventing *Miranda* and undermining the purposes it sought to serve—combatting interrogation tactics designed to trick, pressure, or coerce a suspect into incriminating himself without knowing or understanding he had the right not to do so. *Id.* at 613, 159 L. Ed. 2d at 655. The Court explained that the practice of administering *Miranda* warnings

in the midst of coordinated and continuing interrogation undermines the defendant's ability to knowingly and intelligently waive the right to remain silent by placing him in a state of confusion as to why his rights are being discussed *after* he has been interrogated. *Id.* at 613-14, 159 L. Ed. 2d at 656. Doing so is "likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.' " *Id.* at 613-14, 159 L. Ed. 2d at 656 (alteration in original) (quoting *Moran v. Burbine*, 475 U.S. 412, 424, 89 L. Ed. 410, 422 (1986)).

The prewarning statement at issue in *Elstad*, on the other hand, was not made in a station house interrogation but rather in the defendant's home where officers had come to execute an arrest warrant. *Id.* at 300-01, 84 L. Ed. 2d at 226-27. The officers allowed the defendant to get dressed before placing him under arrest and taking him to the sheriff's department for interrogation, where the defendant was read the *Miranda* warnings before being questioned. *Id.* at 300-01, 84 L. Ed. 2d at 226-27. The defendant's initial statements were made in casual conversation with an officer in the defendant's own home, while his subsequent statements were made after being transported to the police station in a patrol car and placed in an interrogation room for questioning. The Court concluded that, under such circumstances, "a subsequent administration of *Miranda* warnings . . . should suffice to remove the conditions that precluded admission of the earlier statement," *id.* at 314, 84 L. Ed. 2d at 235; those "conditions" being his lack of information essential to understanding the nature of his rights and the consequences of abandoning them. Consequently, under both *Elstad* and *Seibert*, the question for a reviewing court remains whether, under the totality of the circumstances, the warnings so given could function effectively to apprise the suspect that he had a real choice to either give an admissible statement or stop talking.

The Court of Appeals here "agree[d] that the detectives in the present case used the same objectionable technique considered in *Seibert*," but held that because defendant "did not confess until after he was given his *Miranda* warnings," the court needed only to determine whether his statements were involuntary. *Johnson*, ___ N.C. App. at ___, 795 S.E.2d at 637-38. This was error. When a defendant asserts that his or her *Miranda* rights have been violated as a result of successive rounds of custodial interrogation, some portion of which was unwarned, the question for the court is whether the warnings effectively apprised him of his rights and whether he made a voluntary, knowing, and intelligent waiver of his right to remain silent. Whether a defendant made prewarning

inculpatory statements may be a factor that affects that analysis, but it does not change the nature of the question to be asked.

While defendant has argued vigorously on appeal that his *Miranda* rights were violated by the officers' use of the "question first" technique, he did not make that argument to the trial court. He did not assert to the trial court that his postwarning statements suffered from the same constitutional infirmity as any prewarning statements, because there were no such inadmissible prewarning statements upon which he could base such an argument. Rather, he argued that the totality of his interaction with officers was involuntary because of the substance of his unwarned conversations with officers that morning. Although his motion to suppress includes an assertion that the officers "initially . . . did not ascertain that he knowingly and voluntarily waived his rights to remain silent," he did not argue that the waiver of his rights under *Miranda* in the afternoon was not voluntary, knowing, and intelligent, nor that he did not understand his right to remain silent at the time he was *Mirandized*; only that officers should have obtained the waiver earlier in the day.[1] In fact, he conceded to the trial court that "the technical requirements of Miranda may have been met," but contended that his statement should have been suppressed nonetheless because it was involuntary.

The trial court found as fact that the waiver forms introduced into evidence by the State "accurately reflect[ed] the required *Miranda* warnings." This determination is supported by competent evidence in the record and has not been challenged by defendant. Consequently, it is binding on appeal. Having made an appropriate waiver of his rights under *Miranda*, the finding supports the trial court's conclusion that "[t]he requirements of *Miranda* were satisfied." We therefore proceed to defendant's claim that his statements were involuntary.

IV. – Voluntariness

[3] Although defendant does not argue that his postwarning statements failed to comply with *Miranda*, he does argue that they were

1. Because defendant did not seek to suppress any statements made to officers during the first several hours of his interrogation, before he was formally arrested and *Mirandized*, and in light of defendant's concession that "the technical requirements of *Miranda* may have been met," we do not find it necessary to determine whether he was "in custody" for purposes of *Miranda* before he was formally arrested. This position, taken at the hearing on the motion to suppress, appears to conflict with the motion itself which stated that "[u]se of Defendant's statement would be in violation of Fifth, Sixth and Fourteenth Amendment rights . . . under case law of the United States Supreme Court, *Miranda v. Arizona*, and its progeny."

involuntarily procured as a result of the statements made by officers during the first "round" of interrogation before he was *Mirandized*. Defendant contends that the officers' statements improperly induced hope that his confession would benefit him. His motion to suppress cites *State v. Pruitt* for the proposition that "a confession obtained by the slightest emotions of hope or fear ought to be rejected." 286 N.C. at 455, 212 S.E.2d at 101. The State argues that both defendant's and the Court of Appeals' reliance on *Pruitt* is misplaced because, in the State's view, the "*per se*" voluntariness analysis in that case and its predecessors has been circumscribed by our more recent decisions that favor a totality of the circumstances analysis of the voluntariness of a confession. The Court of Appeals quoted *Pruitt* extensively and ultimately determined that "the circumstances in the present case were at least as coercive as those in *Pruitt*" and therefore held "that Defendant's inculpatory statements 'were made under the influence of fear or hope, or both, growing out of the language and acts of those who held him in custody.' " *Johnson*, ___ N.C. App. at ___, 795 S.E.2d at 639-40 (quoting *Pruitt*, 286 N.C. at 458, 212 S.E.2d at 103). We hold that the trial court's conclusion that defendant's inculpatory statements were voluntarily made was adequately supported by its findings of fact and that those findings are supported by competent evidence in the record. We therefore modify and affirm the decision of the Court of Appeals.

We assess the voluntariness of a confession by determining whether, under the "totality of the circumstances, the confession is 'the product of an essentially free and unconstrained choice by its maker,' " in which case it is admissible against him, or conversely, whether " 'his will has been overborne and his capacity for self-determination critically impaired,' " in which case " 'the use of his confession offends due process.' " *Hardy*, 339 N.C. at 222, 451 S.E.2d at 608 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26, 36 L. Ed. 2d 854, 862 (1973)). In addition to considering whether the defendant's rights under *Miranda* have been heeded, when conducting this review of the totality of the circumstances, the Court should also consider: (1) circumstances under which the interrogation was conducted, for example the location, the presence or absence of restraints, and the suspect's opportunity to communicate with family or an attorney; (2) treatment of the suspect, for example the duration of the session or consecutive sessions, availability of food and drink, opportunity to take breaks or use restroom facilities, and the use of actual physical violence or psychologically strenuous interrogation tactics; (3) appearance and demeanor of the officers, for example whether they were uniformed, whether weapons were displayed, and whether they used raised voices or made shows of violence;

(4) statements made by the officers, including threats or promises or attempts to coerce a confession through trickery or deception; and (5) characteristics of the defendant himself, including his age, mental condition, familiarity with the criminal justice system, and demeanor during questioning.[2] None of these factors standing alone will necessarily be dispositive, *State v. Kemmerlin*, 356 N.C. 446, 458, 573 S.E.2d 870, 881 (2002) (citing *State v. Barlow*, 330 N.C. 133, 141, 409 S.E.2d 906, 911 (1991)), and the court is certainly free to look to a host of other facts and circumstances surrounding the act of confessing to determine whether, under the totality of the circumstances, the defendant was truly capable of making, and did in fact make, a free and rational decision to confess his guilt.

In this case the trial court's findings of fact indicate that defendant came to the police department headquarters on his own without police escort, was not shackled or handcuffed,[3] and retained possession of his personal cell phone while inside the interview room. Defendant was placed in an interview room with two plainclothes police officers on the second floor of a secure law enforcement facility. At one point, his cell phone rang and it appears from the record that officers would have allowed him to answer had he chosen to do so. Officers made no threats of physical violence but did interrogate defendant rigorously and raised their voices. Defendant was told, contradictorily and repeatedly, that officers both could not promise him anything and that the district

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2. *See*, *e.g.*, *State v. Kemmerlin*, 356 N.C. 446, 458, 573 S.E.2d 870, 881 (2002) (citing, *inter alia*, *State v. Hyde*, 352 N.C. 37, 45, 530 S.E.2d 281, 288 (2000), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001)) (listing factors, including "whether defendant was in custody, whether her *Miranda* rights were violated, whether she was held incommunicado, whether there were threats of violence, whether promises were made to obtain the confession, the age and mental condition of defendant, and whether defendant had been deprived of food," as well as the "defendant's familiarity with the criminal justice system, length of interrogation, and amount of time without sleep"); *Hardy*, 339 N.C. at 221-22, 451 S.E.2d at 607-08 (listing same factors and additionally considering the environment and duration of the interview; demeanor and characteristics of the interviewee; officers' civilian dress, lack of weapons, and demeanor; and subjective belief of the defendant, including whether he asked to leave, requested an attorney, felt he was free to leave, and believed what officers were telling him); *State v. Jackson*, 308 N.C. 549, 573-74, 304 S.E.2d 134, 147-48 (1983) (finding the defendant's statement voluntary even though officers fabricated evidence because the defendant: was not in custody; was *Mirandized*; was not threatened, touched, or intimidated; was driven by officers to his chosen destination at the conclusion of the first interview; and had extensive experience with interrogation), *overruled on other grounds as stated in State v. Abbott*, 320 N.C. 475, 481, 358 S.E.2d 365, 369 (1987).

3. The Court of Appeals recited as fact that defendant was made to shackle himself to the floor of the interrogation room after he was placed under arrest, four and one-half hours after questioning began. Defendant has not challenged the trial court's finding that he was not shackled or handcuffed and that finding is therefore binding on appeal.

attorney would "work with him" and would "go easier on him" if he cooperated and gave them truthful information. After a lengthy interrogation, officers asked whether defendant believed he would be able to go home that day and defendant responded, "No." The following conversation ensued:

> Officer 1: Then you're under arrest for murder.
>
> Officer 2: If you don't believe you can get up and walk out of here, then I have no choice. You just told me you believe you're going to jail.
>
> Officer 1: Did you just say that, yes or no?
>
> Defendant: Yes, sir.
>
> Officer 1: Then I'm going to have to place you under arrest and then I've got some stuff to do before I continue. Because to be voluntary, you've got to believe you can walk out of here.
>
> . . . .
>
> Officer 1: If you feel like you can leave, then we're good. But if not, then we'll have to do something different. Do you think you can get up and walk out of here any time?
>
> Defendant: Not at any time, only after you free me to go.
>
> Officer 2: That's different, Bobby. Do you think you can walk out of here right now?
>
> Defendant: Yes.

The unwarned portion of the interrogation lasted about five hours. When defendant was formally arrested, officers *Mirandized* him and secured a written waiver of his rights. Questioning continued for another four hours. During the unwarned portion of the interrogation defendant was given coffee and cigarettes and was offered food. He had access to the restroom if needed and was offered a wastebasket when he began to feel ill. Defendant was, at times, left alone in the interview room. There was no guard or police officer stationed at the door. Defendant was in his mid-thirties, had obtained his GED, and was articulate, intelligent,

literate, and knowledgeable about the criminal justice system and its processes. As the trial court found, defendant at times appeared eager to assist the officers in their investigation and offered to help, offered to wear a wire, and offered to do whatever else he could to help with the investigation.

The trial court concluded as a matter of law that, "[b]ased on the totality of the circumstances during the entirety of the interview, the statements made by Defendant were voluntary," and that "[t]he confession was not obtained as a result of hope or fear instilled by the detectives." Defendant argues that the trial court's findings of fact failed to disclose material circumstances regarding the giving of his confession and therefore do not support the trial court's conclusion of law. Defendant has challenged five of the trial court's findings of fact:

> 5 The Defendant was not told he was under arrest[.]
>
> 19[ ] The Defendant was emotional at times[.]
>
> 20 The Defendant cried at times[.]
>
> 21 The defendant expressed concern with his ability to "keep food down[.]"
>
> 26[ ] While there were no specific promises or threats made by law enforcement, the detectives conducting the interview did represent to the Defendant that the District Attorney "might look favorably" at the Defendant if he made a confession[.]

Defendant asserts that finding of fact 5 is "at best an incomplete finding," as he was told he would be arrested if he did not state that he was there voluntarily. While we agree that a more detailed finding may have preserved for the record a more nuanced understanding of the exchanges that took place between defendant and the interviewing officers, there is competent evidence in the record to support the finding as written. Consequently, the finding is conclusive on appeal.

Defendant similarly asserts that findings of fact 19, 20 and 21 "downplay" the actual circumstances of the encounter. Again, while it may be true that a more detailed set of findings would have more thoroughly described defendant's physical and emotional state, the findings as written are not erroneous. Instead, these findings are supported by the evidence in the record and it is not the duty of this Court to reweigh the evidence presented to the trial court. Consequently, we are also bound by these findings.

Finally, defendant challenges finding of fact 26 as inaccurate. Defendant argues that detectives threatened him when they told him that they had sufficient evidence to convict him of capital murder and that he would "wear" the whole charge himself unless he provided them the names of his accomplices. However, we have held that informing a defendant of the charge he is facing does not constitute a threat. *See State v. Richardson*, 316 N.C. 594, 602, 342 S.E.2d 823, 829-30 (1986). We find sufficient evidence in the record to support finding of fact 26 as written, and we are consequently bound by it for purposes of appellate review.

In addition to challenging several of the trial court's findings of fact, defendant also argues that his statements were involuntary as a result of statements made by officers before he was *Mirandized* that "improperly induced hope that his confession would benefit him." Defendant's arguments incorporate the division of the interrogation into "rounds" as in the United State Supreme Court's analysis in *Seibert*, 542 U.S. at 615, 159 L. Ed. 2d at 658, and defendant asks that this Court evaluate the voluntariness of the statement he gave after receiving the *Miranda* warnings in the second "round" of questioning through the lens of the statements by officers in the first "round." To do as defendant asks is unnecessary given the trial court's totality of the circumstances analysis which requires that the entire encounter be evaluated to determine whether defendant freely and voluntarily chose to make a confession. The question is not simply whether the officers made a promise or made a threat, no matter when such statements were made during the encounter, but whether any such statements made by the officers resulted in defendant's will being overborne such that his capacity for self-determination was so impaired that the giving of his confession cannot be thought to be voluntary.

Defendant did not argue to the trial court that officers made specific promises to him or threatened him. He simply argued that their statements "improperly induced hope that his confession would benefit him." We note that the presiding judge watched the entirety of the interrogation interview and concluded that defendant's statements were voluntarily made. The trial court had the benefit of observing the testifying witnesses and heard extensive arguments from counsel. The trial court's findings of fact are supported by sufficient competent evidence and support the conclusion that, under the totality of the circumstances, defendant was not coerced or induced through hope or fear into giving his confession and that his confession was in fact voluntarily given.

V. – Conclusion

We hold that the Court of Appeals erred in condensing the *Miranda* and voluntariness inquiries into one. We also hold that defendant did not preserve the argument that officers employed the "question first, warn later" technique to obtain his confession in violation of *Miranda* and *Seibert*. The trial court's conclusion that the requirements of *Miranda* were met is adequately supported by its findings of fact, as is its conclusion that defendant's statements to officers were voluntarily made. We therefore modify and affirm the decision of the Court of Appeals.

MODIFIED AND AFFIRMED.

Justice HUDSON concurring in result.

I concur in the result reached by the majority. Here the Court of Appeals determined that although defendant's constitutional rights were violated by the trial court's failure to suppress his inculpatory statements, this error was harmless beyond a reasonable doubt due to the overwhelming evidence of defendant's guilt. *State v. Johnson*, ___ N.C. App. ___, ___, 795 S.E.2d 625, 640-41 (2017); *see also State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988) ("Significantly, this Court has held that the presence of overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt." (citing *State v. Brown*, 306 N.C. 151, 164, 293 S.E.2d 569, 578, *cert. denied*, 459 U.S. 1080, 103 S. Ct. 503, 74 L. Ed. 2d 642 (1982))). Specifically, the Court of Appeals stated:

> [W]e hold that the overwhelming evidence of Defendant's guilt of first-degree murder, based upon the evidence that Anita was murdered in the course of a robbery in which Defendant played an essential part, renders this error harmless beyond a reasonable doubt.
>
> Both Josh and Tony, whose testimony Defendant did not move to suppress, identified Defendant as the third man involved in the robbery and shooting, and both stated Defendant was wearing a mask that covered his face. They both testified that Defendant and Tony entered the motel while Josh remained outside, and both claimed Defendant was carrying a gun. Brandy testified that there were two younger men without their faces covered, and an older, larger man whose face was covered by a mask. Brandy testified it was the older, larger man who held the

> gun, and who entered the motel with one of the younger men. Most importantly, Defendant's DNA was recovered from under Anita's fingernails. Although Defendant's admission of participation in the crime, which we have held was involuntary, clearly prejudiced Defendant, in light of the overwhelming evidence presented pointing to Defendant as one of the three men involved in the robbery and murder, we hold the prejudice to Defendant was harmless beyond a reasonable doubt. We reach this holding on these particular facts, and because the jury was instructed on acting in concert and felony murder based upon killing in the course of a robbery. The State did not have to prove that Defendant shot Anita, only that he was one of the three men involved in the robberies and murder. The evidence that Defendant was one of the three men involved was overwhelming, and the State has shown beyond a reasonable doubt that Defendant would have been convicted even had his motion to suppress his inculpatory statements been granted.

Johnson, ___ N.C. App. at ___, 795 S.E.2d at 640-41 (footnote omitted). In my opinion, the Court of Appeals properly concluded that there was overwhelming evidence of defendant's guilt of felony murder, particularly in light of the evidence of defendant's DNA recovered from under the victim's fingernails.

Accordingly, this Court's analysis and determination regarding defendant's constitutional rights is unnecessary, in my view. *See James v. Bartlett*, 359 N.C. 260, 266, 607 S.E.2d 638, 642 (2005) ("However, appellate courts must 'avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds.' " (quoting *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (per curiam))); *see, e.g.*, *State v. Powell*, 340 N.C. 674, 686, 459 S.E.2d 219, 224 (1995) ("Assuming *arguendo* that the trial court erred by admitting the statements defendant made after [the police officer] destroyed the [*Miranda*] waiver form, we hold that the error is harmless beyond a reasonable doubt." (citing N.C.G.S. § 15A-1443(b) (1988))), *cert. denied*, 516 U.S. 1060, 116 S. Ct. 739, 133 L. Ed. 2d 688 (1996). Because I conclude that any error by the trial court was harmless beyond a reasonable doubt, I would affirm the Court of Appeals on that basis alone. Therefore, I respectfully concur in the result.

STATE OF NORTH CAROLINA
v.
ANGELA MARIE RANKIN

No. 23A18

Filed 21 December 2018

Indictment and Information—felony littering—unauthorized persons and locations

The indictment charging defendant with felony littering was facially invalid because it failed to allege an essential element of the statutory crime—that defendant was an unauthorized person who deposited refuse on property not designated for such activity. Facts satisfying N.C.G.S § 14-399(a)(1) needed to be alleged because the statement of the offense of littering was not complete unless it excluded authorized locations and persons from its definition.

Chief Justice MARTIN dissenting.

Justice NEWBY 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. ___, 809 S.E.2d 358 (2018), vacating defendant's conviction upon appeal from a judgment entered on 6 July 2016 by Judge Michael D. Duncan in Superior Court, Guilford County. Heard in the Supreme Court on 27 August 2018.

Joshua H. Stein, Attorney General, by Teresa M. Postell, Assistant Attorney General, for the State-appellant.

Sarah Holladay for defendant-appellee.

BEASLEY, Justice.

In this case we consider whether the Court of Appeals erred in vacating defendant's conviction under N.C.G.S § 14-399(a) for felony littering upon concluding that the indictment failed to allege an essential element of the statutory crime and was fatally defective, thus depriving the trial court of jurisdiction over the accused. Because we conclude that the indictment was facially invalid, we affirm the decision of the Court of Appeals.

On 27 April 2014, defendant Angela Rankin located a large metal tank containing fuel oil near a residential driveway on North Elam Avenue in Greensboro, North Carolina. Defendant wanted to take the tank to sell it as scrap metal. When she tried to lift the tank into her vehicle, she discovered that the oil inside made it too heavy to maneuver. So that the tank "wouldn't be as heavy," defendant drained the fuel oil onto the ground and then left the scene with the metal tank. The tank was reported stolen to the City of Greensboro Police Department, and an investigation revealed that defendant had committed the theft.

On 21 July 2014, defendant was indicted for felony littering of hazardous waste, misdemeanor larceny, and misdemeanor conspiracy to commit larceny. On 5 July 2016, a jury trial was held in Superior Court, Guilford County. Defendant moved to dismiss all charges at the close of the evidence, and the trial court dismissed the conspiracy charge. The jury found defendant guilty of felony littering of hazardous waste and not guilty of misdemeanor larceny. The trial court sentenced defendant to five to fifteen months of imprisonment, suspended the sentence, and placed her on supervised probation for eighteen months.

Defendant appealed her conviction to the Court of Appeals, arguing that the trial court lacked jurisdiction because the indictment failed to allege an essential element of the crime of felony littering of hazardous waste. The Court of Appeals majority agreed and vacated the conviction. *State v. Rankin*, ___ N.C. App. ___, ___, 809 S.E.2d 358, 365 (2018). One judge dissented, asserting that the indictment was facially valid because the statutory language omitted from the indictment is an affirmative defense, not an essential element of the crime. *Id.* at ___, 809 S.E.2d at 368 (Berger, J., dissenting). The State filed a notice of appeal with this Court based on the issues raised in the dissenting opinion.

"[A] valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony." *State v. Campbell*, 368 N.C. 83, 86, 772 S.E.2d 440, 443 (2015) (quoting *State v. Sturdivant*, 304 N.C. 293, 308, 283 S.E.2d 719, 729 (1981)). A valid indictment, among other things, serves to "identify the offense" being charged with certainty, to "enable the accused to prepare for trial," and to "enable the court, upon conviction, to pronounce the sentence." *State v. Saults*, 294 N.C. 722, 726, 242 S.E.2d 801, 805 (1978).

To be sufficient, an indictment must include, *inter alia*, "[a] plain and concise factual statement" asserting "facts supporting every element of a criminal offense and the defendant's commission thereof." N.C.G.S. § 15A-924(a)(5) (2017). If the indictment fails to state an essential

element of the offense, any resulting conviction must be vacated. *See, e.g.*, *Campbell*, 368 N.C. at 86, 772 S.E.2d at 443; *see also State v. Wagner*, 356 N.C. 599, 601, 572 S.E.2d 777, 779 (2002) (per curiam). The law disfavors application of rigid and technical rules to indictments; so long as an indictment adequately expresses the charge against the defendant, it will not be quashed. *See Sturdivant*, 304 N.C. at 311, 283 S.E.2d at 731. For example, in *State v. Mostafavi* the defendant argued that the indictment charging him with obtaining property by false pretenses omitted an essential element of the crime because it failed to allege the precise amount of money the defendant received when he pawned the property obtained. 370 N.C. 681, 683, 811 S.E.2d 138, 140 (2018). This Court held that the indictment was facially valid because it clearly identified "the conduct which [was] the subject of the accusation" by alleging that the defendant received United States currency by pawning stolen property as if it were his own. *Id.* at 687, 811 S.E.2d at 142 (quoting N.C.G.S. § 15A-924(a)(5) (2017)).

But an indictment will be quashed "when an indispensable allegation of the charge is omitted." *State v. Russell*, 282 N.C. 240, 245, 192 S.E.2d 294, 297 (1972) (citations omitted). For example, in *State v. Murrell* the defendant challenged an indictment charging him with robbery with a dangerous weapon, arguing that an essential element of the crime—presence of a dangerous weapon—was not alleged. 370 N.C. 187, 190-91, 804 S.E.2d 504, 506-07 (2017). We noted that "the possession, use, or threatened use of firearms, or other dangerous weapon, implement, or means" was an essential element of the offense. *Id.* at 194, 804 S.E.2d at 509 (footnote omitted). Furthermore, this Court found the indictment facially invalid, observing that "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." *Id.* at 196, 804 S.E.2d at 510 (alterations in original).

Likewise, when an indictment charges a defendant with a statutory offense, the document must allege all the essential elements of the offense. *Id.* at 193, 804 S.E.2d at 508 (citations omitted). If the words of a statute do not "set forth all the essential elements of the specified act intended to be punished, such elements must be charged in the bill [of indictment]." *State v. Greer*, 238 N.C. 325, 329, 77 S.E.2d 917, 920 (1953) (quoting *State v. Cole*, 202 N.C. 592, 597, 163 S.E. 594, 597 (1932)); *see also*, *e.g.*, *State v. Hunter*, 299 N.C. 29, 41, 261 S.E.2d 189, 197 (1980) (stating that although an indictment need not track the language of the statute completely, an indictment charging the violation of a statute in general terms only can be insufficient to confer jurisdiction on the trial

court); *State v. Cook*, 272 N.C. 728, 158 S.E.2d 820 (1968) (holding that the language of a warrant for driving while license revoked, which referred to a statutory provision with intent to charge the offense therein, was facially invalid for failing to allege an essential element: that the defendant drove on a public highway).

The indictment in this case charged that defendant:

> unlawfully, willfully and feloniously did intentionally and recklessly spill and dispose of litter on property not owned by the defendant, the property owned and controlled by the City of Greensboro and not into a litter receptacle as defined in General Statute 14-399(A)(2). The litter discarded was hazardous waste.

The statute at issue here states:

> (a) No person, including any firm, organization, private corporation, or governing body, agents or employees of any municipal corporation shall intentionally or recklessly throw, scatter, spill or place or intentionally or recklessly cause to be blown, scattered, spilled, thrown or placed or otherwise dispose of any litter upon any public property or private property not owned by the person within this State or in the waters of this State including any public highway, public park, lake, river, ocean, beach, campground, forestland, recreational area, trailer park, highway, road, street or alley except:
>
> (1) When the property is designated by the State or political subdivision thereof for the disposal of garbage and refuse, and the person is authorized to use the property for this purpose; or
>
> (2) Into a litter receptacle in a manner that the litter will be prevented from being carried away or deposited by the elements upon any part of the private or public property or waters.

N.C.G.S § 14-399(a) (2017 & Supp. 2018). The indictment indisputably failed to allege facts satisfying subdivision (a)(1). The ultimate question before us is whether such facts are required; that is, whether subdivision (a)(1) sets out an affirmative defense or an essential element of felony littering. The former need not be alleged in a valid indictment, while the latter must be. Because the language of the statute does not explicitly resolve this issue, we turn to the well-established tenets of statutory interpretation.

The goal of statutory interpretation is to determine the meaning that the legislature intended upon the statute's enactment. *See State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 276-77 (2005) (citations omitted). Therefore, we must construe the statute while mindful of the criminal conduct that the legislature intends to prohibit. *In re Banks*, 295 N.C. 236, 244 S.E.2d 386 (1978). "The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish." *State v. Langley*, ___ N.C. ___, ___, 817 S.E.2d 191, 196 (2018) (quoting *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016)). "The Court will not adopt an interpretation which result[s] in injustice when the statute may reasonably be otherwise consistently construed with the intent of the act." *Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. 482, 494, 467 S.E.2d 34, 41 (1996) (quoting *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989)).

When the General Assembly uses an "unambiguous word without providing an explicit statutory definition, that word will be accorded its plain meaning." *Fidelity Bank v. N.C. Dep't of Revenue*, 370 N.C. 10, 19, 803 S.E.2d 142, 149 (2017) (citations omitted). However, if a literal interpretation of a word or phrase's plain meaning will lead to "absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control." *Beck*, 359 N.C. at 614, 614 S.E.2d at 277 (quoting *Mazda Motors of Am., Inc. v. Sw. Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979)). "Parts of the same statute dealing with the same subject matter must be considered and interpreted as a whole." *State ex rel. Comm'r of Ins. v. N.C. Auto. Rate Admin. Office*, 294 N.C. 60, 66, 241 S.E.2d 324, 328 (1978) (citations omitted).

An indictment need not include affirmative defenses to statutory crimes in order to be sufficient. *See Sturdivant*, 304 N.C. at 310, 283 S.E.2d at 731 ("[A]n indictment need not negate a defense to the stated crime; rather, it is left to the defendant to show his defenses at trial."). The characteristics of an affirmative defense are further defined in *State v. Sanders*, in which we stated that "[w]hen [a] defendant relies upon some independent, distinct, substantive matter of exemption, immunity or defense, *beyond the essentials of the legal definition of the offense itself*, the onus of proof as to such matter is upon the defendant." 280 N.C. 81, 85, 185 S.E.2d 158, 161 (1971) (emphasis added) (quoting *State v. Johnson*, 229 N.C. 701, 706, 51 S.E.2d 186, 190 (1949)). Furthermore, "[a]llegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage" and thus

should not be included in an indictment. *State v. Birdsong*, 325 N.C. 418, 422, 384 S.E.2d 5, 7 (1989) (quoting *State v. Taylor*, 280 N.C. 273, 276, 185 S.E.2d 677, 680 (1972)).

Whether an exception to a statutorily defined crime is an essential element of that crime or an affirmative defense to it depends on whether the statement of the offense is complete and definite without inclusion of the language at issue. *See State v. Dobbins*, 277 N.C. 484, 502, 178 S.E.2d 449, 460 (1971) (citations omitted). The criminal conduct that the statute seeks to prohibit here is the depositing of litter in unauthorized locations by unauthorized persons. N.C.G.S. § 14-399(a) (prohibiting persons and entities from intentionally or recklessly throwing, scattering, or spilling any litter upon any public or private property within this state). Therefore, in addition to the required language of subdivision (a), the offense of littering is not complete unless it excludes authorized locations and persons from its definition. *See Dobbins*, 277 N.C. at 502, 178 S.E.2d at 460. Subdivision (a)(1) does just that. Therefore, we hold that to be valid, the indictment charging felony littering must allege that the accused is an unauthorized person who deposited refuse on property not designated for such activity.

In the dissent's view, this Court should categorize subdivision (a)(1) as either an exception or qualification without regard to whether (a)(1) is a part of the complete legal definition of littering. This is because, according to the dissent, N.C.G.S. § 14-399(a) "creates criminal liability to redress the societal ill of littering." Using this standard, the dissent concludes that subsection (a) of N.C.G.S. § 14-399 contains a complete and definite description of littering, and the only matter left to decide is what kind of proviso subdivision (a)(1) is as these are described in *State v. Norman*, 13 N.C. (2 Dev.) 222, 226 (1829). *Norman* described two kinds of provisos, one "which withdraws the case provided for from the operation of the act" and "the other adding a qualification, whereby a case is brought within that operation." *Id.* at 226.

This view is problematic for two reasons. First, it contradicts well-established binding precedent from this Court holding that the complete and definite description of a crime is one in which each essential element necessary to constitute that crime is included. *Johnson*, 229 N.C. at 706, 51 S.E.2d at 190 (observing that the State carries the burden of establishing the "essentials of the legal definition of the offense itself"); *State v. Edwards*, 190 N.C. 322, 324, 130 S.E. 10, 11 (1925) ("[I]n indictments on a statute the essential words descriptive of the offense or their just equivalent must be given . . . " (quoting *State v. Mooney*, 173 N.C. 798, 800, 92 S.E. 610, 611 (1917))); *see also* N.C.G.S. § 15A-924(a)(5) ("A

criminal pleading must contain . . . facts supporting every element of a criminal offense."). Furthermore, framing the issue in this narrow manner—whether subdivision (a)(1) is an exception or qualification—impermissibly limits the scope of the statutory interpretation and construction in which this Court was prompted to engage by the Court of Appeals' dissent: whether (a)(1) is an essential element or an exception to the crime of littering.

Even if we considered subdivision (a)(1) to be a proviso, that would not end our inquiry into whether it is an essential element of littering. In *State v. Connor* we observed that a proviso can be so "mixed up with the description of the offense" that it comprises an essential part of the statement of the crime. 142 N.C. 700, 704, 55 S.E. 787, 789 (1906). We hold that subdivision (a)(1) is so intertwined with the description of the offense of littering that it forms an essential element of the crime. As discussed further below, to hold otherwise would result in an absurdity. Likewise, concluding that subdivision (a)(1) is an exception, meaning it "withdraws the case provided for from the operation of the act," *Norman*, 13 N.C. (2 Dev) at 226, would necessitate the conclusion that the authorized persons described in (a)(1) are engaging in a form of "authorized littering" which by statutory definition is legally impossible because littering is the depositing of litter in unauthorized locations by unauthorized persons. Subdivision (a)(1) is a part of the definition of littering in that it describes the opposite of littering: authorized persons depositing refuse in authorized locations. In sum, subsection (a) describes what littering is, while subdivision (a)(1) describes what it is not. Finally, subdivision (a)(1) could not be a qualification, because it does not bring a case within the operation of the act.

Additionally, in *Connor*, immediately after stating the test for when a proviso may be omitted from an indictment, this Court emphasized:

> The test here suggested, however, is not universally sufficient, and a careful examination of the principle will disclose that the rule and its application depends not so much on the placing of the qualifying words, or whether they are preceded by the terms, "provided" or "except;" but rather on the nature, meaning and purpose of the words themselves.
>
> And if these words, though in the form of a proviso or an exception, are in fact, and by correct interpretation, but a part of the definition and description of the offense, they must be negatived in the bill of indictment.

> In such case, this is necessary, in order to make a complete statement of the crime for which defendant is prosecuted.

142 N.C. at 702, 55 S.E. at 788. In other words, the Court's primary task is to interpret the statutory language—its nature, meaning and purpose—to decide whether subdivision (a)(1) is an essential element of the crime of littering. No formulaic rule statement can replace the holistic inquiry required by statutory interpretation and construction.

The Court of Appeals dissent proffers that the language of the statute preceding the word "except" is the complete legal definition of the crime because that language essentially encompasses the literal meaning of the phrase "to litter"—"to scatter about carelessly"—and criminalizes that act while withdrawing persons authorized by subdivision (a)(1) from criminal liability for littering. *Rankin*, ___ N.C. App. at ___, 809 S.E.2d at 366 (quoting *Litter*, *Webster's New World College Dictionar*y (5th ed. 2014)). Nonetheless, the plain meaning of a phrase will apply only if an unambiguous term is actually *used* and not defined in the statute. *See Fidelity Bank*, 370 N.C. at 19, 803 S.E.2d at 149 ("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." (emphasis added)) "To litter" does not appear in this statute, and while the language of the statute may encompass the literal meaning of the phrase "to litter," the legal definition extends beyond that phrase as evidenced by the surrounding language.[1] *See* N.C.G.S. § 14-399(a) (prohibiting intentional or reckless throwing, spilling, and placing, in addition to carelessly scattering, litter); *see also N.C. Auto. Rate Admin. Office*, 294 N.C. at 66, 241 S.E.2d at 328 (instructing that related parts of a statute must be interpreted as a whole).

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1. While the phrase 'to litter' does not appear in this statute, the word 'litter' is statutorily defined:

> any garbage, rubbish, trash, refuse, can, bottle, box, container, wrapper, paper, paper product, tire, appliance, mechanical equipment or part, building or construction material, tool, machinery, wood, motor vehicle or motor vehicle part, vessel, aircraft, farm machinery or equipment, sludge from a waste treatment facility, water supply treatment plant, or air pollution control facility, dead animal, or discarded material in any form resulting from domestic, industrial, commercial, mining, agricultural, or governmental operations. While being used for or distributed in accordance with their intended uses, "litter" does not include political pamphlets, handbills, religious tracts, newspapers, and other similar printed materials the unsolicited distribution of which is protected by the Constitution of the United States or the Constitution of North Carolina.

N.C.G.S. § 14-399(i)(4) (2017 & Supp. 2018).

Moreover, N.C.G.S. § 14-399(a) must be read to incorporate subdivision (a)(1) as part of the legal definition of the crime to prevent absurd results. As noted by the Court of Appeals majority, "a trash collector disposing of waste in a city dump could be charged with littering and then have the burden of showing that his actions fell within an 'exception' to the littering statute." *Rankin*, ___ N.C. App. at ___, 809 S.E.2d at 364-65 (majority opinion). If the General Assembly wanted to enable a trash collector to be criminally charged for doing his or her job and forced to demonstrate his or her innocence by proving an affirmative defense at trial, it could have indicated as much in the statute.[2] Construing this statute accordingly and applying widely accepted principles of statutory interpretation, while avoiding absurd results, compels the conclusion that the crime of littering has not occurred at all if the actor is a waste management professional disposing of garbage at a landfill.[3] *See State v. Jones*, 367 N.C. 299, 306, 758 S.E.2d 345, 350 (2014) (applying the tenet that if "a literal interpretation of the language of a statute will lead to absurd results . . . the reason and purpose of the law shall control and the strict letter thereof shall be disregarded" (quoting *Beck*, 359 N.C. at 614, 614 S.E.2d at 277)).

The dissent opines that the absurdity doctrine is erroneously applied in our analysis here because it "applies to the act of *interpreting* a statute—to determining the statute's meaning" whereas this dispute

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2. The Court of Appeals also discussed *State v. Hinkle*, 189 N.C. App. 762, 659 S.E.2d 34 (2008), wherein the Court of Appeals held that subdivision (a)(2) of N.C.G.S. § 14-399(a) constituted an essential element of littering. In that case the Court of Appeals applied the absurdity doctrine, opining that "[w]ithout the 'except . . . [i]nto a litter receptacle' language, placing a broken rubber band into a trash can at our Court would be littering." *Hinkle*, 189 N.C. App. at 769, 659 S.E.2d at 38 (second and third alterations in original). It is significant that in the ten years since *Hinkle* was decided, the legislature has not revised N.C.G.S. § 14-399 to contradict this holding. In *Rankin*, the Court of Appeals concluded that "[b]ecause subsections (a)(1) and (a)(2) serve identical purposes in this statute, it would be illogical to suggest that one is an essential element but the other is not." *Rankin*, ___ N.C. App. at ___, 809 S.E.2d at 363.

3. By way of analogy, the crime of assault on a female requires that the victim be a female and the accused a male who is at least eighteen years of age. N.C.G.S. § 14-33(c)(2) (2017 & Supp. 2018); *State v. Herring*, 322 N.C. 733, 743, 370 S.E.2d 363, 370 (1988) ("The elements of assault on a female are (1) an assault, (2) upon a female person, (3) by a male person (4) who is at least eighteen years old."). Therefore, the crime has not occurred if the victim is not a female, or if the accused is under eighteen or is not a male. Likewise here, the crime of littering has not occurred if the accused is a sanitation worker disposing of waste at an authorized location. Just as it would be absurd to assert that a female charged with assault on a female must plead her gender as an affirmative defensive, it is equally unfair to burden a sanitation worker with the task of establishing his or her authorization to dispose of waste.

"is about how to *classify* the proviso in [subdivision] (a)(1), not how to interpret it." However, as previously discussed, classifying the language in subdivision (a)(1) as an essential element or an exception to the crime of littering *is* a matter of statutory interpretation. The role of the absurdity doctrine in this process is to provide a means to test the implications of a proposed interpretation of the statute against legislative intent. We must consider the possible results of our interpretation to determine whether that interpretation aligns with the intent of the legislature as evidenced by the history, context, goals, and spirit of the law.

We applied the absurdity doctrine thusly in *State v. Jones* and concluded that a strict construction of the statute would have allowed "individuals to escape criminal liability [for identity theft] simply by stating or signing a name that differ[ed] from the cardholder's name," a result we determined could not have been within the intent of the legislature when adopting the statute criminalizing identity fraud. 367 N.C. at 306, 758 S.E.2d at 350 (citing *Beck*, 359 N.C. at 614, 614 S.E.2d at 277). Likewise, if we *interpret* subdivision (a)(1) to be an exception to, rather than an essential element of, littering, an absurdity will result. Exposing a faulty interpretation of the statute, far from distorting the issue, is a necessary analytical exercise in resolving this case.

We conclude that subdivision (a)(1), which requires that the accused be an unauthorized person depositing refuse on land not designated by the State for such use, is an essential element of the crime of felony littering, however, we acknowledge the legislature's power to determine otherwise.[4] The State has conceded that the indictment upon which defendant was convicted failed to allege the portion of the definition

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4. It is notable that the General Assembly has, in other circumstances, expressly treated certain facts as constituting affirmative defenses. *See*, *e.g.*, N.C.G.S. § 15A-905(c) (2017) (describing the procedure required to give notice when the accused anticipates raising any one of various affirmative defenses: alibi, duress, entrapment, insanity, mental infirmity, diminished capacity, self-defense, accident, automatism, involuntary intoxication, or voluntary intoxication). In the context of criminal littering statutes, several legislatures in other states have created clear distinctions between an affirmative defense to the crime of littering and essential elements of the crime. *See*, *e.g.*, Cal. Penal Code § 374(a) (West 2018) ("Littering means the willful or negligent throwing, dropping, placing, depositing, or sweeping, or causing any such acts, of any waste matter on land or water *in other than appropriate storage containers or areas designated for such purposes*." (emphasis added)); Colo. Rev. Stat. Ann. § 18-4-511(2)(a) (West 2018) ("It shall be an affirmative defense [to littering] that: Such property is an area designated by law for the disposal of such material and the person is authorized by the proper public authority to so use the property . . . . "); Fla. Stat. § 403.413(6)(h) (2018) ("[T]he state does not have the burden of proving that the person did not have the right or authority to dump the litter. The defendant has the burden of proving that he or she had authority to dump the litter . . . ").

of littering contained in subdivision (a)(1). To sufficiently give notice to a defendant and allow her to prepare a defense, an indictment must include "[a] plain and concise factual statement" that "asserts facts supporting every element of a criminal offense and the defendant's commission thereof." N.C.G.S. § 15A-924(a)(5). The indictment in this case failed to allege each element of the crime of littering, thereby depriving defendant of sufficient notice. Because the indictment failed to sufficiently allege all indispensable, essential elements of the offense, it was facially invalid and the trial court had no jurisdiction to enter a conviction on the charge against defendant. Accordingly, we affirm the Court of Appeals' decision to vacate defendant's conviction for felony littering of hazardous waste.

A significant portion of the dissenting opinion is devoted to the idea that the Criminal Procedure Act that took effect in July 1975 abrogated the common law rule that a defective indictment deprives a criminal court of jurisdiction. Not only is discussion of this issue outside the scope of review applicable to this case, but statutory interpretation reveals that the legislature intentionally left the common law remedy for invalid indictments intact when it enacted comprehensive revisions to the Criminal Procedure Act.

This case is before this Court based on a dissent in the Court of Appeals. *See* N.C.G.S. § 7A-30(2) (2017). Thus, the scope of review is "limited to those questions on which there was division in the intermediate appellate court," *C.C. Walker Grading & Hauling, Inc. v. S.R.F. Mgmt. Corp.*, 311 N.C. 170, 175, 316 S.E.2d 298, 301 (1984) (discussing N.C. R. App. P. 16 (1984)), and this Court's review is "properly limited to the single issue addressed in the [Court of Appeals] dissent," *Blumenthal v. Lynch*, 315 N.C. 571, 577, 340 S.E.2d 358, 361 (1986). In their briefs to this Court, respectively, neither party asked this Court to address the remedy flowing from an invalid indictment, and had they attempted to do so, their effort would likely have been rejected. *Id.* at 577-78, 340 S.E.2d at 361-62 ("[W]e strongly disapprove of and discourage attempts by appellate counsel to bring additional issues before this Court without its appropriate order allowing counsel's motion to allow review of additional issues."). Absent exceptional circumstances,[5] it is vital that we adhere to the procedural rules as they are enforced against litigants

5. "Where "issues of importance which are frequently presented to state agencies and the courts require a decision in the public interest," this Court will invoke Rule 2 of the North Carolina Rules of Appellate Procedure to address those issues. *Blumenthal*, 315 N.C. at 578, 340 S.E.2d at 362. However, whether the Criminal Procedure Act abrogated the common law remedy for invalid indictments is not a question frequently presented to state agencies or courts, so the invocation of Rule 2 would be inappropriate in this case.

by this Court. Moreover, deciding this issue in the procedural context of this case deprives both parties of their opportunity to be heard with respect to this issue. Nonetheless, given that the dissent here has discussed the effect of the Criminal Procedure Act on the common law remedy for invalid indictments, we will briefly address the issue.

In the absence of a contrary decision by the General Assembly, the common law remains in effect in North Carolina. N.C.G.S. § 4-1. Whether a particular statute supplants a common law remedy is a question of statutory interpretation. *See, e.g.*, *Quick v. United Benefit Life Ins. Co.*, 287 N.C. 47, 54-56, 213 S.E.2d 563, 568-69 (1975) (applying tenets of statutory interpretation to determine whether N.C.G.S. § 31A-15 supplanted the common law principle prohibiting a person from profiting from his or her wrongdoing); *Orange County. v. Heath*, 282 N.C. 292, 296-97, 192 S.E.2d 308, 310-11 (1972) (using principles of statutory interpretation to determine whether N.C.G.S. § 1A-1, Rule 65 abrogated the common law rule of governmental immunity for municipalities). Therefore, the previously stated rules that guide statutory interpretation are applicable, as well as rules relating to statutory abrogation of common law.

In determining legislative intent, we must consider the history of the statute and the reason for its enactment. *See Black v. Littlejohn*, 312 N.C. 626, 630, 325 S.E.2d 469, 473 (1985). "It is always presumed that the legislature acted with care and deliberation and with full knowledge of prior and existing law." *State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970). Furthermore, in the quest to interpret a statute, courts will not presume that the legislature intended to repeal a law by implication. *Id.* at 658, 174 S.E.2d at 604.

The dissent explores the history and context behind the enactment of the Criminal Procedure Act, including an in-depth report prepared for the legislature by a special committee proceeding adoption of the Act. *Legislative Program and Report to the General Assembly of North Carolina by the Criminal Code Commission* (1973). The documented history of the purpose and function of indictments along with the legislature's efforts to assess the impact of the previous enactment of the criminal code provide ample evidence that the legislature was well aware of the common law remedy for invalid indictments. Still, there are no provisions that contradict or abrogate this remedy. The absence of such provisions demonstrates that the General Assembly did not intend to change the common law discussed in the dissent.

The provisions related to indictments in the Act, codified in the North Carolina General Statutes at chapter 15A, evidence the legislature's

intent to preserve the common law rule that an indictment is required to invoke the court's jurisdiction in felony cases. Article 32 mandates that for felony charges "prosecutions originating in the superior court *must* be upon pleadings. " N.C.G.S. § 15A-642(a) (emphasis added), and that the appropriate pleading for a felony charge is an indictment. N.C.G.S. § 15A-923(a). Further, the remedy for a facially invalid indictment is thus: "Upon motion of a defendant under G.S. 15A-952(b) the court *must* dismiss the charges contained in a pleading which fails to charge the defendant with a crime[6] in a manner required by subsection (a) . . . " N.C.G.S. § 15A-924(e) (emphasis added). In other words, pursuant to the Act, the court cannot continue criminal prosecution if the indictment fails to charge the defendant with a crime. These provisions represent the statutory adoption of the common law rule that a valid indictment is required for a court to retain jurisdiction to prosecute a felony charge, as well as the common law remedy for lack of jurisdiction—dismissal.

Any assertion that the legislature implicitly abrogated the common law rule by enacting the Criminal Procedure Act would be unjustified in light of the legislature's initial comprehensive reform of the Act and the detailed commentary included with the codified statutes. The Criminal Code Commission's proposal emerged after a total of thirty-eight meeting days, in which it "carefully considered the best of North Carolina practice" before submitting final recommendations. *Legislative Program and Report to the General Assembly of North Carolina by the Criminal Code Commission* at i-ii (1973).

The General Assembly acknowledged and approved of the common law remedy for invalid indictments with the enactment of the revised Criminal Procedure Act. The official commentary accompanying N.C.G.S. § 15A-924 states in part: "The pleading rule, requiring factual (but not evidentiary) allegations to support each element, is in accord with our traditional ideas and provides a concise statutory statement." N.C.G.S. § 15A-924 official cmt. (citing *Greer*, 238 N.C. 325, 77 S.E.2d 917). In *Greer* we held that an indictment is facially invalid when it omits any essential elements of the crime to be charged. *Id.* As a result of

6. Although the dissent interprets N.C.G.S. § 15A-954(a) to preclude trial judges from dismissing fatally defective indictments on their own motion, nothing in the statutory language limits their authority to situations in which the defendant makes a dismissal motion. In addition, the fact that the General Assembly has adopted short form indictments for certain offenses does not undercut the validity of the common law rule, given that the same lack of jurisdiction exists when an indictment fails to comply with the statutory requirements for such pleadings.

the defective indictment, the Court in *Greer* applied the common law remedy for defective indictments. *Id.* The official commentary referencing *Greer* demonstrates that the legislature explicitly endorsed the common law rules for indictments as stated in that case, including the common law remedy for invalid indictments. *See Greer*, 238 N.C. at 332, 77 S.E.2d at 922. Furthermore, in the decades since the enactment of the revised Criminal Procedure Act, the common law remedy for invalid indictments has been applied time and again by the appellate courts. *See*, *e.g.*, *State v. Simpson*, 302 N.C. 613, 616, 276 S.E.2d 361, 363 (1981) ("[A] valid bill of indictment is essential to the jurisdiction of the court to try defendant for a felony."); *State v. Mostafavi*, 370 N.C. 681, 684, 811 S.E.2d 138, 141 (2017) (observing that "a valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony" (quoting *Sturdivant*, 304 N.C. at 308, 283 S.E.2d at 729)). The General Assembly, no doubt aware of this practice, has never acted to abrogate this common law rule, although it does retain the right to do so for policy-related reasons. There is no unsettled question of whether the common law remedy for invalid indictments was abrogated by the Criminal Procedure Act.

We conclude that subdivision (a)(1), which requires that the accused be an unauthorized person depositing refuse on land not designated by the State for such use, is an essential element of the crime of felony littering. Accordingly, we affirm the holding of the Court of Appeals.

AFFIRMED.

Chief Justice MARTIN dissenting.

I write separately to discuss the significant failings of the jurisdictional approach the majority uses to evaluate the sufficiency of criminal indictments. Taking my cue from *United States v. Cotton*, 535 U.S. 625, 122 S. Ct. 1781 (2002), the time has come to reconsider this antiquated approach to flawed indictments in light of the extensive statutory, constitutional, and conceptual changes in criminal procedure during the twentieth century. Moreover, the General Assembly may wish to consider revisions to our criminal code to lessen the detrimental impact of the common law jurisdictional approach on the administration of justice in North Carolina.

In addition to my concerns about the common law jurisdictional rule, I also write separately because the majority creates (under the guise of interpretation) its own criminal offense and fails to grapple

with or apply our precedents on the classification of criminal statutory provisos. And, in so doing, the majority creates significant uncertainty by failing to establish a discernible method to assist lower courts and prosecutors in distinguishing between elements and defenses.

I

A valid indictment must comply with requirements of form and substance, *see* N.C.G.S. §§ 15A-644(a), -924(a) (2017), including the statutory requirement that an indictment contain facts supporting every element of the charged offense, *id.* § 15A-924(a)(5).

The State indicted defendant for felony littering under N.C.G.S. § 14-399.In relevant part, that statute provides:

> (a) No person . . . shall intentionally or recklessly throw, scatter, spill or place . . . or otherwise dispose of any litter upon any public property or private property not owned by the person within this State or in the waters of this State . . . except:
>
> (1) When the property is designated by the State or political subdivision thereof for the disposal of garbage and refuse, and the person is authorized to use the property for this purpose . . . .
>
> . . . .
>
> (e) Any person who violates subsection (a) of this section in an amount exceeding 500 pounds or in any quantity for commercial purposes, or who discards litter that is a hazardous waste . . . is guilty of a Class I felony.

Id. § 14-399 (2017). According to the majority, the merits of this case hinge on whether the proviso in subdivision (a)(1) is an element of felony littering or an affirmative defense.

In deciding this issue, we are confronted with a two-part inquiry. First, the Court must ask whether, omitting the proviso, the primary provision in the statute states a "complete and definite" description of the crime. *State v. Dobbins*, 277 N.C. 484, 502, 178 S.E.2d 449, 460 (1971) (quoting *State v. Connor*, 142 N.C. 700, 701, 55 S.E. 787, 788 (1906)). If it does not, then any proviso that completes the description must be included in the indictment. *See id.* (quoting *Connor*, 142 N.C. at 701, 55 S.E. at 788). Alternatively, if the primary provision *does* state a complete and definite description of the crime, then our next task is to classify the proviso as either an exception or a qualification. *Connor*, 142 N.C.

at 701-02, 55 S.E. at 788-89; *see also State v. Norman*, 13 N.C. (2 Dev.) 222, 226 (1829) (describing the two kinds of provisos). This distinction—used by this Court since at least 1829—is fairly straightforward: exceptions remove certain cases from the operation of the statute, while qualifications bring a case within the operation of the statute. *Norman*, 13 N.C. (2 Dev.) at 226. An exception does not need to be negated in the indictment; the onus is on the defendant to raise the exception as a defense. *Id.* But if the proviso is a qualification, "the indictment must bring the case within the proviso." *Id.*

In *State v. Moore*, for example, this Court considered an indictment for the illegal sale of intoxicating liquors. The relevant statute provided "[t]hat it shall be unlawful for any person . . . *other than druggists and medical depositaries [sic] duly licensed thereto*, to engage in the business of selling, exchanging, bartering, giving away for the purpose of direct or indirect gain, or otherwise handling spirituous, vinous or malt liquors." 166 N.C. 284, 285-86, 81 S.E. 294, 295 (1914) (emphasis added) (quoting Act of Mar. 3, 1913, ch. 44, sec. 1, 1913 N.C. Pub. [Sess.] Laws 76, 76-77). The defendant challenged the sufficiency of the charging warrant[1] because it failed to allege that he was not a druggist or a medical depository. *Id.* at 286, 81 S.E. at 295. But this Court rejected that challenge because "the exception in the statute is no part of the definition or description of the offense, but simply withdraws certain persons from its operation." *Id.* at 288, 81 S.E. at 296.

Before we determine whether the primary provision of the statute states a "complete and definite" description of a crime, we must bear in mind the respective roles of the legislative and judicial branches. The General Assembly, as the lawmaking arm of the people, has the power to define criminal activity. *See* N.C. Const. art. II, § 1; *State v. Hill*, 272 N.C. 439, 443, 158 S.E.2d 329, 332 (1968) ("It is the General Assembly which is to define crimes and ordain their punishment." (quoting *State v. Whitehurst*, 212 N.C. 300, 303, 193 S.E. 657, 660 (1937))). The courts, on the other hand, have the power to interpret the laws passed by the General Assembly and to determine whether these laws, either facially or as applied, violate the constitution. *See* N.C. Const. art. IV, § 1; *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 6-7 (1787).

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1. The defendant was charged by use of a warrant rather than an indictment because the charged crime was a misdemeanor. *See Moore*, 166 N.C. at 286, 81 S.E. at 295. This distinction does not affect the analysis of whether a proviso is an exception or a qualification for the purpose of a charging instrument, though. *See id.* at 288-89, 81 S.E. at 296 (stating that "[c]riminal accusations, *whether in the form of warrants or indictments*, must" meet certain requirements (emphasis added)).

Here, the statute's primary provision states that "[n]o person . . . shall intentionally or recklessly throw, scatter, spill or place . . . any litter upon any public property or private property not owned by the person." N.C.G.S. § 14-399(a). This provision creates criminal liability to redress the societal ill of littering. It defines the required culpability—intent or recklessness. It is, therefore, a complete and definite statement of a crime: no person may intentionally or recklessly throw or spill litter on any public property or on private property that he or she does not own.

But the majority today usurps the role of the General Assembly by summarily declaring—as part of a so-called "holistic inquiry"—that the crime of littering "is not complete unless it excludes authorized locations and persons from its definition." In other words, the majority declares that the crime of littering must, by definition, be committed without privilege or consent to be a crime. But this conclusion not only arrogates to this Court a power that is properly left in the General Assembly's hands; it also causes the majority's reasoning to collapse under the weight of past precedent. This Court has, on more than one occasion, stated that

> [t]hough the general rule is, that a proviso contained in the same section of the law . . . in which the defence is defined, must be negatived [in the indictment], yet where the charge itself is of such a nature that the formal statement of it is equivalent in meaning to such negative averment, *there is no reason for adhering to the rule*, and such a case constitutes an exception to it.

State v. Sturdivant, 304 N.C. 293, 310, 283 S.E.2d 719, 730-31 (1981) (ellipsis in original) (emphasis added) (quoting *State v. Bryant*, 111 N.C. 693, 694, 16 S.E. 326, 326 (1892)). Stated differently, if the crime, by its very nature, must be committed without privilege or consent, then the indictment does not need to negate privilege or consent. It follows that if the majority's characterization of the crime of littering is correct—that a person can litter only if he or she does so without privilege or consent—then it is unnecessary to specifically assert the lack of privilege or consent in the indictment.

Because subsection (a) is a complete and definite description of the crime, the appropriate next step for this Court is to determine whether subdivision (a)(1) is an exception or a qualification to subsection (a). And, when analyzed under our long-standing precedent, subdivision (a)(1) is unquestionably an exception.

Once again, this analysis is straightforward: does the proviso subtract from the crime described in subsection (a), or does it bring

additional cases within its operation? *See Norman*, 13 N.C. (2 Dev.) at 226. Subsection (a) prohibits disposing of litter on public property or private property belonging to another person. N.C.G.S. § 14-399(a). But subdivision (a)(1) allows disposal of litter on land "designated . . . for the disposal of garbage and refuse" by persons "authorized to use the property for [that] purpose." *Id.* § 14-399(a)(1). This proviso removes a specific act (disposing of litter on land designated for that purpose) committed by a specific class of persons (persons authorized to use that land) from the general definition in subsection (a). It is therefore an "exception in the statute [that] is no part of the definition or description of the offense." *Moore*, 166 N.C. at 288, 81 S.E. at 296. Accordingly, subdivision (a)(1) need not be alleged in the indictment.

By contrast, subsection (e) provides a qualification. For the conduct described in subsection (a) to be a felony, the litter must be hazardous waste, litter "in an amount exceeding 500 pounds," or litter "in any quantity for commercial purposes." N.C.G.S. § 14-399(e). This proviso qualifies the offense described in subsection (a), and an indictment that tracks only the language of subsection (a) would not support a conviction for felony littering. Thus, a felony littering indictment must include the qualification in subsection (e). In this case, the indictment did so, asserting that "[t]he litter discarded was hazardous waste," which "br[ought] the case within the proviso." *Norman*, 13 N.C. (2 Dev.) at 226.

The majority opinion objects to the classification of subdivision (a)(1) as an exception, raising the Court of Appeals' example of a sanitation worker being "criminally charged for doing his or her job" to show how this classification might lead to absurd results. The majority then purports to apply the absurdity doctrine to justify its construction of the littering statute to avoid this hypothetical injustice. But, contrary to the majority's theoretical musings, the ability to conjure up absurd hypothetical scenarios should not change the way that we classify subdivision (a)(1). This principle is easily demonstrated by *State v. Sturdivant*, in which the defendant was indicted for, among other things, kidnapping under N.C.G.S. § 14-39, which prohibited a person from "confin[ing], restrain[ing], or remov[ing] 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." N.C.G.S. § 14-39(a) (1981); *see Sturdivant*, 304 N.C. at 309, 283 S.E.2d at 730. In *Sturdivant*, this Court considered, among other issues, whether an indictment "was fatally defective under" the kidnapping statute "because it failed to allege specifically that the kidnapping was effected *without the victim's consent*." 304 N.C. at 308,

283 S.E.2d at 730. Because "the crime of kidnapping cannot be committed if one consents to the act," this Court determined that consent was a defense that did not need to be negated in the indictment. *Id.* at 310, 283 S.E.2d at 731.

Had this majority decided *Sturdivant*, it would have reached the opposite result. After all, under *Sturdivant*'s reasoning, an innocent school bus driver may be arrested and forced to stand trial for multiple kidnapping charges "for doing his or her job." This would never happen, of course—because no judge or magistrate would issue the arrest warrant, *see* N.C.G.S. § 15A-304(b)(1) (Supp. 2018), no prosecutor would pursue the charges, and no grand jury would indict the bus driver.[2]

In any event, the majority has misapplied the absurdity doctrine. Under that doctrine, "where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) (quoting *Mazda Motors of Am., Inc. v. Sw. Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979)); *see also State v. Jones*, 367 N.C. 299, 306, 758 S.E.2d 345, 350 (2014) (applying the absurdity doctrine). The absurdity doctrine, in other words, applies to the act of *interpreting* a statute—to determining the statute's meaning.

The absurdity doctrine does not apply here, however, because this is not a dispute about the statute's meaning. *This* dispute is about how to *classify* the proviso in subdivision (a)(1), not how to interpret it. It is about whether the proviso is an element, not about what the proviso means. So the absurdity doctrine should have no place in our analysis especially when, as here, the hypothetical injustices conjured up by the majority are factually unrelated to this defendant's crime.

In the course of its improper use of the absurdity canon, moreover, the majority has distorted the issue in this case. We are not being asked to decide whether it would be legally proper for a prosecutor or a grand jury to *charge* someone (for example, a sanitation worker) who clearly falls under the auspices of subdivision (a)(1) with a crime. We are being

2. This outlandish illustration highlights the *real* absurdity in this case: the majority's lack of confidence in the men and women serving as grand jurors in our criminal justice system. Despite the majority's dystopian predictions, I find it hard to imagine that a grand jury anywhere in our State would indict hapless bus drivers, sanitation workers, or other hard-working citizens for simply doing their jobs.

asked to decide whether an indictment of a defendant who clearly did *not* fall within the auspices of subdivision (a)(1) needs to include facts that support that self-evident contention. These two issues are not the same at all, but the majority has unhelpfully blended them together.

For all of these reasons, the majority has erred by failing to apply the only correct test to the question at hand—namely, whether subdivision (a)(1) amounts to an exception or a qualification under *Norman* and related cases. It is clear, once one applies the exception-versus-qualification paradigm correctly, that subdivision (a)(1) is an exception, and that the indictment here thus did not have to plead any facts to support it. By not applying this paradigm at all, and by reaching a result contrary to the one reached by its proper application, the majority has erred. Furthermore, by abandoning textual analysis in favor of a nebulous "holistic inquiry," the majority leaves trial courts and prosecutors in the untenable position of having to guess how the Supreme Court will ultimately define a criminal offense.

II

Moving beyond the majority's error on the merits, this Court should reconsider whether vacating the judgment is the appropriate remedy when, as here, defendant failed to object to the indictment at the trial court stage. The Supreme Court of the United States, addressing a similar question in *United States v. Cotton*, concluded that a defective indictment did not deprive a court of jurisdiction. 535 U.S. at 631, 122 S. Ct. at 1785 (stating that "[i]nsofar as [*Ex parte Bain*, 121 U.S. 1, 7 S. Ct. 781 (1887)] held that a defective indictment deprives a court of jurisdiction, *Bain* is overruled"). In light of the many changes to our state's criminal procedure during the twentieth century, a reassessment of this common law jurisdictional rule is long overdue.[3]

In *Cotton*, the Supreme Court reevaluated its own long-standing rule that a flawed indictment deprives a criminal court of jurisdiction over a case. That jurisdictional rule emerged at the federal level in 1887 in *Ex parte Bain*, a case in which the Supreme Court concluded that an amendment to an indictment "was improper and that therefore 'the jurisdiction of the offence [was] gone, and the court [had] no right to proceed any further in the progress of the case for want of an indictment.' " *Id.* at 629, 122 S. Ct. at 1784 (alterations in original) (quoting *Bain*, 121 U.S. at 13, 7 S. Ct. at 788).

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3. Given the significant import of this question of law to North Carolina criminal procedure, this Court should request supplemental briefing. So, to be clear, I am not suggesting that we rule on this question without input from the parties.

Reevaluating the rule's propriety more than a century later, the Supreme Court reasoned that

> *Bain*'s elastic concept of jurisdiction is not what the term "jurisdiction" means today, *i.e.*, "the courts' statutory or constitutional *power* to adjudicate the case." This latter concept of subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court. In contrast, the grand jury right can be waived.

Id. at 630, 122 S. Ct. at 1785 (citations omitted) (first quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 89. 118 S. Ct. 1003, 1010 (1998); then citing *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S. Ct. 42, 43 (1908); and then citing Fed. R. Crim. P. 7(b) and *Smith v. United States*, 360 U.S. 1, 6, 79 S. Ct. 991, 995 (1959)). After cataloguing other cases that departed from the *Bain* rule throughout the twentieth century, the Court overruled the holding in *Bain* that "a defective indictment deprives a court of jurisdiction." *Id.* at 630-31, 122 S. Ct. at 1785.

Our State adopted a number of significant changes to our criminal procedure laws during the twentieth century. In 1950, the voters approved a constitutional amendment permitting criminal defendants to waive their right to indictment in most cases.[4] *State v. Thomas*, 236 N.C. 454, 457, 73 S.E.2d 283, 285 (1952); *see also* N.C. Const. art. I, § 22 ("[A]ny person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases."). Twenty-four years later, our General Assembly enacted the Criminal Procedure Act, bringing sweeping changes to our rules of criminal procedure. *See generally* Act of Apr. 11, 1974, ch. 1286, 1973 N.C. Sess. Laws (2d Sess. 1974) 490. But in the forty-four years since passage of the Criminal Procedure Act, this Court has never squarely considered whether the statute abrogated the common law rule that a defective indictment deprives a criminal court of jurisdiction. Instead,

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4. At least one commentator has argued that the rule permitting waiver of indictments at the federal level is unconstitutional. *See generally* Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 Minn. L. Rev. 398, 430-48 (2006) (describing the friction between the United States Constitution and reformers' desire to circumvent the grand jury requirement). Whatever constitutional deficiencies may or may not plague the federal rule permitting waiver, the adoption of a constitutional amendment in our state removes any such questions concerning waiver.

the majority opinion today once again carries forward this relic of the code pleading era.

A

At our founding, many of our laws were derived from the British common law. *See State v. Owen*, 5 N.C. (1 Mur.) 452, 462 (1810) ("[I]t might be asked what the common law of England was when it was adopted by this country, for such as it was, it must be observed."). All of our constitutions have adopted elements of Magna Carta and the English Declaration of Rights. *See* John V. Orth, *The Past is Never Dead: Magna Carta in North Carolina*, 94 N.C. L. Rev. 1635, 1637-38 (2016); John V. Orth, *The Strange Career of the Common Law in North Carolina*, 36 Adel. L. Rev. 23, 23-24 (2015) [hereinafter Orth, *Career of the Common Law*]. And by statute, the General Assembly "re-adopted the colonial legislation and received 'such Parts of the Common Law, as were heretofore in Force and Use within this Territory'." Orth, *Career of the Common Law* at 24 (quoting Act of 1778, ch. 5, sec. 2, 24 *State Records of North Carolina* 162, 162 (photo. reprint 1994) (Walter Clark ed., 1905)); *see also* N.C.G.S. § 4-1 (2017). Indictments were no exception; some of our earliest cases on indictments drew their rules from English common law. *See*, *e.g.*, *State v. Trexler*, 4 N.C. (Car. L. Rep.) 188, 192-93 (1815); *State v. Adams*, 1 N.C. (Mart.) 56, 58 (1793).

The common law imposed rigid technical requirements on indictments. For example, at common law, an indictment alleging homicide "occasioned by a wound" had to describe the dimensions of the wound "where they [we]re capable of description." *Owen*, 5 N.C. (1 Mur.) at 461. An indictment that failed to comply with these requirements also failed to confer on the court the power to proceed to judgment on the charge. *See*, *e.g.*, *Owen*, 5 N.C. (1 Mur.) at 464 (quashing an indictment that did not describe the mortal wound).

At least as early as 1810, our courts questioned the usefulness of imposing such high standards on indictments. As the Court stated in *Owen*:

> [T]here is, in the ancient reasoning on this branch of the law, a degree of metaphysical and frivolous subtilty strongly characteristic of the age in which it was introduced, when at the revival of letters the first efforts of learning were laborious and rude, and scarcely a ray of common sense penetrated the clouds of pedantry. Were a system now to be established, it is probable that much of the jargon of the law would be exploded, and that no

> objection would prevail against an indictment, or any other instrument, which conveyed to the mind, in an intelligible form, its intended impression. But we must follow in the footsteps of those who have preceded us until the Legislature think fit to interfere; though we have no wish to extend the particularity further.

Id. at 458; *see also id.* at 461 ("HENDERSON, J., observed, that if the Court were now about to decide on the propriety of requiring the dimensions of any wound charged in an indictment to be mortal, to be set out, he should be clearly of opinion that it was unnecessary."); *id.* at 463 ("All modern writers agree that the dimensions of the wound must be stated—not for any good reason, he admitted, but it was not for the Court to legislate, but to decide, as they had sworn to do, according to the law.").

In 1811, the General Assembly enacted a statute intended to alleviate some of these technical requirements—likely as a response to *Owen*. *State v. Hunt*, 357 N.C. 257, 268, 582 S.E.2d 593, 600-01 (2003) (citing *State v. Moses*, 13 N.C. (2 Dev.) 452, 463 (1830)). Still in effect today, that enactment provided that an indictment "is sufficient . . . if it expresses the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment." *Id.* at 268, 582 S.E.2d at 601 (alteration in original) (quoting N.C.G.S. § 15-153 (2001)).

Throughout the nineteenth and twentieth centuries, our legislature took further steps to simplify indictments. In 1887, the General Assembly alleviated some of the technical burdens of pleading by permitting short-form indictments for murder. That statute, now codified at N.C.G.S. § 15-144, declares an indictment for murder sufficient if it "allege[s] that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder" the named victim. N.C.G.S. § 15-144 (2017); *see also Hunt*, 357 N.C. at 268-69, 582 S.E.2d at 601 (quoting N.C.G.S. § 15-144 (2001)). When the General Assembly separated murder into two degrees in 1893, it reasserted this desire to simplify murder indictments, declaring that "[n]othing contained in the statute law dividing murder into degrees shall be construed to require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree." N.C.G.S. § 15-172 (2017); *see also Hunt*, 357 N.C. at 269, 582 S.E.2d at 601 (quoting N.C.G.S.

§ 15-172 (2001)). The practical consequence of these statutes is that an indictment need not allege all essential elements of first-degree murder to sustain a guilty verdict for first-degree murder. *Compare* N.C.G.S. § 14-17(a) (2017) ("A murder which shall be perpetrated by means of a nuclear, biological, or chemical weapon of mass destruction . . . , poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree . . . .") *with id.* § 15-144 (permitting an indictment to omit certain elements of first-degree murder as long as it "allege[s] that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder" the named victim).

Our courts joined the General Assembly in its push toward simplifying the standard for indictments. *See State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953). For indictments not alleging homicide, the rule that emerged was that the indictment must allege all of the essential elements of the charged offense. *E.g.*, *id.*; *State v. Morgan*, 226 N.C. 414, 415, 38 S.E.2d 166, 167 (1946); *State v. Johnson*, 188 N.C. 591, 593, 125 S.E. 183, 184 (1924). This rule ensured that indictments provided criminal defendants with due process by identifying the crime charged, enabling defendants to prepare for trial, and protecting them from double jeopardy. *See State v. Coker*, 312 N.C. 432, 434-35, 323 S.E.2d 343, 346 (1984) (first citing *State v. Squire*, 292 N.C. 494, 506, 234 S.E.2d 563, 570 (1977); and then citing *State v. Russell*, 282 N.C. 240, 243-44, 192 S.E.2d 294, 296 (1972)).

Nevertheless, our criminal law and procedure became "hopelessly outdated," requiring a significant overhaul from the legislature. *See Legislative Program and Report to the General Assembly of North Carolina by the Criminal Code Commission*, at i (1973). In 1974, the General Assembly enacted a comprehensive reform of our criminal procedure, codified now at Chapter 15A of our General Statutes. Ch. 1286, 1973 N.C. Sess. Laws (2d Sess. 1974) 490. The General Assembly intended these enactments to "mak[e] the law more understandable and improv[e] the administration of justice." *State v. Freeman*, 314 N.C. 432, 436, 333 S.E.2d 743, 746 (1985). As part of this sweeping reform, the General Assembly enacted statutory standards for indictments. N.C.G.S. § 15A-924(a). These standards included a restatement of the common law rule that the indictment contain facts supporting each essential element of the charged offense. *Id.* § 15A-924(a)(5) (requiring that each

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 or defendants of the conduct which is the subject of the accusation").

Despite its comprehensive nature, though, the Criminal Procedure Act did not directly address whether indictments that do not meet the Act's statutory standards fail to confer jurisdiction on the court; there is no single provision that explicitly adopts or rejects the common law jurisdictional rule. Compounding this omission is a dearth of cases analyzing whether the Criminal Procedure Act carried forward or abrogated the common law jurisdictional rule. Instead, our cases have reflexively incorporated the common law remedy of arresting judgment on indictments that fail to meet the standards set forth in N.C.G.S. § 15A-924(a). For example, in *State v. Simpson*, 302 N.C. 613, 276 S.E.2d 361 (1981), this Court arrested a judgment based on an indictment that failed to name or identify the defendant in violation of section 15A-924(a)(1). For the rule that a flawed indictment deprived our courts of jurisdiction, *Simpson* relied on *State v. Crabtree*, 286 N.C. 541, 212 S.E.2d 103 (1975). *See Simpson*, 302 N.C. at 616, 276 S.E.2d at 363. But this Court decided *Crabtree* on 12 March 1975—before the effective date of the Criminal Procedure Act. Ch. 1286, sec. 31, 1973 N.C. Sess. Laws (2d Sess. 1974) at 557 (declaring the effective date of the act as 1 July 1975). In contrast, the facts in *Simpson* occurred on 3 July 1979. 302 N.C. at 614, 276 S.E.2d at 362. While the Criminal Procedure Act did not apply to the defendant in *Crabtree*, it *did* apply in *Simpson*. So instead of summarily relying on this common law rule, this Court arguably could have analyzed the Criminal Procedure Act to determine whether the common law rule articulated in *Crabtree* still applied. But it did not.

The cases relied upon by today's majority trace their lineage back to this faulty origin. The majority draws today's rule from *State v. Campbell*, 368 N.C. 83, 86, 772 S.E.2d 440, 443 (2015), in a quote which finds its origins in *Sturdivant*, 304 N.C. at 308, 283 S.E.2d at 729. *Sturdivant*, in turn, drew its rule directly from *Simpson* and *Crabtree*.[5] *See Sturdivant*, 304 N.C. at 308, 283 S.E.2d at 729. Today, the majority perpetuates this obsolescent rule by adding another link to this flawed chain.

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5. The majority also relies on *State v. Wagner*, 356 N.C. 599, 601, 572 S.E.2d 777, 779 (2002) (per curiam). *Wagner* cites directly to *State v. Vestal*, 281 N.C. 517, 520, 189 S.E.2d 152, 155 (1972), another case that predates the Criminal Procedure Act.

Nearly half a century after the passage of the Criminal Procedure Act, this Court continues to apply the common law rule requiring that convictions based on flawed indictments be vacated without determining whether the Criminal Procedure Act abrogated that common law rule. *E.g.*, *State v. Langley*, ___ N.C. ___, ___, 817 S.E.2d 191, 195 (2018) (relying on the common law rule articulated in *State v. McBane*, 276 N.C. 60, 65, 170 S.E.2d 913, 916 (1969)); *State v. McGaha*, 306 N.C. 699, 702-03, 295 S.E.2d 449, 451 (1982) (relying on the common law rule articulated in *State v. Benton*, 275 N.C. 378, 381-82, 167 S.E.2d 775, 777-78 (1969), and *State v. Coppedge*, 244 N.C. 590, 591, 94 S.E.2d 569, 570 (1956)); *cf. State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (2000) (relying on the common law rule articulated in *McGaha* and *State v. Sellers*, 273 N.C. 641, 645, 161 S.E.2d 15, 18 (1968)). Admittedly, at this juncture, the doctrine of stare decisis may justify this unwillingness to consider this question; however, the failings of the common law jurisdictional rule seem to invite legislative reexamination of this question.

B

A thorough analysis of the Criminal Procedure Act reveals significant evidence that the Act should have displaced the common law jurisdictional rule. "When the General Assembly as the policy making agency of our government legislates with respect to the subject matter of any common law rule, the statute supplants the common law and becomes the law of the State." *News & Observer Publ'g Co. v. State ex rel. Starling*, 312 N.C. 276, 281, 322 S.E.2d 133, 137 (1984) (citing *McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956)).

The Criminal Procedure Act was a comprehensive overhaul of the rules of criminal procedure in our state. As with all aspects of criminal procedure, the Act thoroughly addresses indictments and other charging instruments, including the form of these documents, the methods of challenging their sufficiency, and the available remedies in the event that these instruments are flawed. Article 49 covers pleadings and joinder in criminal cases. N.C.G.S. ch. 15A, art. 49 (2017). This article provides for the use of pleadings in felony cases, *see id.* § 15A-923 (2017), and establishes clear expectations about the substance of indictments, *see id.* § 15A-924. But nothing in Chapter 15A, Article 49 indicates that the requirements of section 15A-924(a) are essential to the jurisdiction of the court.

The majority asserts that the General Assembly "explicitly endorsed" the common law jurisdictional rule by citing to *State v. Greer* in the official commentary to section 15A-924. *See* N.C.G.S. § 15A-924 official

cmt. (2017). But the official commentary cites *Greer* only for the proposition that "[t]he pleading rule, requiring factual (but not evidentiary) allegations to support each element, is in accord with traditional ideas." *Id.* (citing *Greer*, 238 N.C. 325, 77 S.E.2d 917). Far from "explicitly endors[ing]" the common law jurisdictional rule, the commentary cites *Greer* to clarify the rule that an indictment include "[a] plain and concise factual statement in each count which . . . asserts facts supporting every element of a criminal offense." *Id.* § 15A-924(a)(5). At best, the commentary is silent on the common law jurisdictional rule.

In fact, the Criminal Procedure Act provides a separate article solely for jurisdictional rules—Article 2, entitled "Jurisdiction." Article 2 is reserved entirely for future codification. N.C.G.S. ch. 15A, art. 2 (2017). And the official commentary to Article 3 ("Venue") indicates that criminal jurisdiction is presently governed by Chapter 7A of our General Statutes. *Id.*, ch. 15A, art. 3 official cmt. (2017) (noting that Article 2 is vacant and that "jurisdiction of courts is still primarily covered in Chapter 7A of the General Statutes"). No provision of Chapter 7A mandates that flawed indictments have the effect of depriving the trial court of jurisdiction. *See*, *e.g.*, *id.* § 7A-271 (2017) (setting the boundaries of the superior court's jurisdiction). Our General Statutes thus comprehensively provide for criminal pleadings and criminal jurisdiction—the two subjects of the common law jurisdictional rule. And nowhere has the General Assembly demonstrated any intent to adopt the common law rule. The omission from Articles 2 and 49 of Chapter 15A and from Chapter 7A of any jurisdictional rules concerning indictments therefore indicates that the Criminal Procedure Act probably abrogated the common law jurisdictional rule.

In addition, the statutes establishing remedies for flawed pleadings are not conceptually compatible with a jurisdictional rule for indictments. For example, the Act requires dismissal of charges in a pleading that fails to comply with the requirements of subsection (a). *Id.* § 15A-924(e). But, as the majority aptly highlights, the statute permits this remedy only "[u]pon motion of a defendant." This does not fit within our typical conception of subject-matter jurisdiction. Contrast this with our rules of civil procedure, which require the court to dismiss an action that has jurisdictional defects—even *on its own motion*. *See* N.C. R. Civ. P. 12(h)(3); *accord* Fed. R. Civ. P. 12(h)(3). Similarly, section 15A-955 allows the court to dismiss a case for certain procedural flaws in the grand jury proceedings. But the court may do so only "on motion of the defendant." N.C.G.S. § 15A-955 (2017).

In only one instance does the court have the power to assess, on its own, the validity of the indictment under the current statutory framework. Under Article 29 of the Criminal Procedure Act (entitled "First Appearance Before District Court Judge"), the district court judge is required to examine the charging instrument "and determine whether each charge against the defendant charges a criminal offense within the original jurisdiction of the superior court." *Id.* § 15A-604(a) (2017). But even if the judge finds the charging instrument flawed, he or she is not required to dismiss the charge. *Id.* § 15A-604(b) (2017); *see also* N.C. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the action." (emphasis added)).

The conclusion that the Criminal Procedure Act supplants the common law rule receives further support from provisions regarding motions and appeals. If in fact the General Assembly had intended to leave the common law rule in place, many of these provisions are redundant. "[A] statute should not be interpreted in a manner which would render any of its words superfluous." *State v. Coffey*, 336 N.C. 412, 417, 444 S.E.2d 431, 434 (1994) (first citing *In re Watson*, 273 N.C. 629, 634, 161 S.E.2d 1, 6-7 (1968); and then citing *State v. Cloninger*, 83 N.C. App. 529, 531, 350 S.E.2d 895, 897 (1986)). "We construe each word of a statute to have meaning, where reasonable and consistent with the entire statute, because '[i]t is always presumed that the legislature acted with care and deliberation . . . .' " *Id.* at 418, 444 S.E.2d at 434 (alterations in original) (quoting *State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970)).

When one applies this principle of statutory construction to the Criminal Procedure Act, it becomes even more apparent that the General Assembly did not intend to carry forward the common law jurisdictional rule. Many provisions within the Criminal Procedure Act separate the concepts of jurisdictional flaws and failure to plead—sometimes even in the same sentence. For example, one provision states that "[m]otions concerning jurisdiction of the court *or the failure of the pleading to charge an offense* may be made at any time." N.C.G.S. § 15A-952(d) (2017) (emphasis added). Another provision requires the court to dismiss the charges on motion of the defendant if it finds that "[t]he court has no jurisdiction of the offense charged" or "[t]he pleading fails to charge an offense." *Id.* § 15A-954(a)(8), (10) (2017). And the Act automatically preserves for appeal any errors based upon "[l]ack of jurisdiction of the trial court over the offense of which the defendant was convicted," or if "[t]he pleading fails to state essential elements of an alleged violation, as required by G.S. 15A-924(a)(5)." *Id.* § 15A-1446(d)(1), (4) (2017). If

the General Assembly had intended for the failure to "assert[ ] facts supporting every element of a criminal offense" to deprive the trial court of jurisdiction, as it did under the common law, then these provisions are plainly superfluous.

The Criminal Procedure Act comprehensively overhauled every aspect of our criminal procedure, including indictments and other charging instruments. But nothing in the Act indicates that the failure to comply with the requirements of section 15A-924(a) would flatly deprive the trial court of jurisdiction to hear the case. "The Criminal Procedure Act was 'designed to remove from our law unnecessary technicalities which tend to obstruct justice.' " *Jones*, 367 N.C. at 313, 758 S.E.2d at 354 (Martin, J., concurring in part and dissenting in part) (quoting *Freeman*, 314 N.C. at 436, 333 S.E.2d at 746). By carrying over the common law rules of indictments, this Court has "engraft[ed] additional unnecessary burdens upon the due administration of justice." *Freeman*, 314 N.C. at 436, 333 S.E.2d at 746.

C

In addition to undermining a fundamental purpose of the Criminal Procedure Act, the jurisdictional rule flips the entire purpose of grand jury indictments on its head. By treating section 15A-924(a) as a jurisdictional barrier to criminal prosecution in all cases *except* those charging homicide and certain sex offenses, this Court has given greater protections to littering defendants than to capital defendants.[6]

The technicalities imposed on indictments—and the remedies for the failure to comply with them—emerged in England at a time "when the punishment of crime was so severe as in many cases to shock the moral sense of lawyers, judges and the people generally." *Greer*, 238 N.C. at 327, 77 S.E.2d at 919; Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 Fla. St. U. L. Rev. 1, 6-7 (1997) (noting that defendants accused by early iterations of the grand jury "were tried by ordeal, which forced the suspects to prove their innocence by overcoming the laws of nature"—a process that was "punishing, if not actually fatal"); *see generally* George J. Edwards, Jr., *The Grand Jury: An Essay* 4-9 (1906) (discussing the various modes of trial and punishment in use when early iterations of

6. Admittedly, the General Assembly relaxed the requirements for a murder indictment, relative to most other felonies, in the nineteenth century. *See* N.C.G.S. § 15-144. But as this section discusses, while the original motivation for the common law jurisdictional rule was to protect defendants in capital cases, it now protects everyone *but* defendants in capital cases.

the grand jury emerged in England). Around the time of the American Founding, the English criminal code—later dubbed the "bloody code"—contained approximately 200 capital offenses. Phil Handler, *Forging the Agenda: The 1819 Select Committee on the Criminal Laws Revisited*, 25 J. Legal Hist. 249, 249 (2004). Many of these capital crimes are treated as low-level felonies today. *Compare id.* at 251-52 (discussing the sharp increase in executions for forgery in the eighteenth and nineteenth centuries) *with* N.C.G.S. § 14-119(a) (2017) (classifying forgery generally as a Class I felony).

Grand jury indictments thus arose to protect the *lives* of defendants. As Blackstone stated:

> [F]or so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any *capital offence*, unless by the unanimous voice of twenty-four of his equals and neighbors: that is, by twelve at least of the grand jury, in the first place, assenting to the accusation; and afterwards, by the whole petit jury, of twelve more, finding him guilty upon his trial.

4 William Blackstone, Commentaries *306 (emphasis added); *see also* John Somers, *The Security of Englishmen's Lives* 4 (London, Effingham Wilson 1821) (1681) ("For this purpose it is made a fundamental in our government, that, unless it be by parliament, no man's *life* should be touched for any crime whatsoever, save by the judgment of at least twenty-four men . . . ." (emphasis added)).

Because we adopted the English common law at the founding, North Carolina's criminal law in some ways reflected the draconian bloody code. The case of *State v. Norman* discussed above for its distinction between elements and exceptions in indictments, was a prosecution for bigamy in which the defendant had been sentenced to death. *See* 13 N.C. (2 Dev.) at 227. And other eighteenth and nineteenth century cases reveal a number of capital sentences for stealing horses. *See*, *e.g.*, *State v. Coulter*, 2 N.C. (1 Hayw.) 3, 3 (1791).

In time, the number of capital offenses in our state decreased. With the adoption of the Constitution of 1868, our state limited capital punishment to convictions for murder, arson, burglary, and rape. N.C. Const. of 1868, art. XI, § 2 ("The object of punishments, being not only to satisfy justice, but also to reform the offender, and thus prevent crime, murder, arson, burglary, and rape, and these only, may be punishable with death, if the General Assembly shall so enact."). Today, murder is the only crime punishable by death in our state. *See* N.C.G.S. § 14-17 (2017).

And yet, murder is one of only a handful of crimes for which the General Assembly has permitted short-form indictments. *Id.* § 15-144.

Viewed through this lens, the folly of continued application of the common law jurisdictional rule reveals itself. A defendant convicted of first-degree murder and sentenced to die has no recourse where his indictment fails to "assert[ ] facts supporting every element of" capital murder. But a defendant convicted of felony littering and sentenced to a suspended prison sentence and 18 months of probation may appeal the indictment, overturn her conviction, and receive a new trial without ever raising the issue at the trial court.

That runs counter to the purpose and history of grand jury indictments. And it incentivizes conduct at trial that may undermine the proper administration of justice. After all, by continuing to apply this common law rule, we are giving a defendant with a defective indictment a reason to "sandbag." *See Wainwright v. Sykes*, 433 U.S. 72, 89, 97 S. Ct. 2497, 2508 (1977). Fully informed of the charges against him, the defendant may proceed to trial hoping for a favorable verdict. If he is found guilty, he may then challenge the indictment on appeal for failing to assert facts supporting an element of the crime. If he is successful, he receives a new trial and a second bite at the apple, even if the facts omitted from the indictment had been uncontestably proven at trial by the prosecution.

This case provides a clear illustration of how the administration of justice can be undermined by operation of the common law jurisdictional rule. Defendant's indictment for felony littering alleges that she "unlawfully, willfully and feloniously did intentionally and recklessly spill and dispose of litter on property not owned by the defendant, the property owned and controlled by the City of Greensboro and not into a litter receptacle . . . . The litter discarded was hazardous waste." This indictment identified the crime charged, enabled defendant to prepare for trial, and protected her from double jeopardy, thereby satisfying constitutional due process requirements. *Cf. Coker*, 312 N.C. at 434-35, 323 S.E.2d at 346. Neither defendant nor her attorney challenged the pleading during the two-year period between her indictment and her conviction. And, after her conviction, defendant's initial proposed issues on appeal related to the sufficiency of the evidence—not to the sufficiency of the indictment.

Notably, defendant ultimately raised only one issue on appeal to the Court of Appeals: that the indictment failed to allege that the property where she littered was not "designated . . . for the disposal of garbage and refuse." N.C.G.S. § 14-399(a)(1). Defendant did not raise this issue at

the trial court, and for good reason. Assuming arguendo that this provision is an essential element of felony littering, its omission did not prejudice her case in any way. The evidence presented at trial showed that she dumped heating fuel in the grass at 709 Elam Avenue in Greensboro and into the street. Defendant could not plausibly argue that the prosecution failed to establish that the land on which she poured heating oil was not publicly designated for that purpose. Had the State been compelled to issue a superseding indictment, its issuance would have had no effect whatsoever on defendant's ability to defend herself or on the trial court proceedings as a whole. The whole exercise would have been nonsensical.

Nevertheless, defendant appealed the omission. And today, defendant succeeds in dumping fuel oil in someone else's yard without consequence, not for the sake of justice, but only because of the rigid technical rules of a bygone era.

III

While the common law jurisdictional rule is outdated, imprudent, and unnecessary, indictment by grand jury still plays a critical role in protecting individual liberty. The grand jury has long been considered "one of the greatest safeguards of the freedom of the citizen." *State v. Barker*, 107 N.C. 913, 919, 12 S.E. 115, 117 (1890); *see also In re Russo*, 53 F.R.D. 564, 568 (C.D. Cal. 1971) (referring to the grand jury as "a bulwark against . . . oppression and despotism"); *but see generally* Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 Am. Crim. L. Rev. 701 (1972) (explaining that "the grand jury's history evidences the vulnerability of that institution to pressure, abuse and manipulation by determined partisans" and exploring famous examples). I do not suggest that the grand jury's role as a protective shield has diminished. But the common law jurisdictional rule, when compared to other approaches, imposes substantial burdens on the judicial system without appreciably advancing those celebrated protections. By discarding the common law jurisdictional rule in favor of plain error review, this Court can protect judicial economy and improve the administration of justice while still safeguarding the rights of criminal defendants.

This Court first adopted the plain error rule in *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). In *Odom*, this Court accepted the federal courts' definition of plain error as "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *Id.* (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (emphasis omitted)). "Our decisions have

recognized plain error only 'in truly exceptional cases' when 'absent the error the jury probably would have reached a different verdict.' " *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)). Presently, this Court invokes the plain error rule to review jury instructions and evidentiary issues. *Id.*

In *Cotton*, the United States Supreme Court, after rejecting the federal common law jurisdictional rule, applied plain error review to the challenged indictment. 535 U.S. at 631, 122 S. Ct. at 1785. The federal plain error test allows appellate courts to correct "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights[,]' . . . but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.' " *Id.* at 631-32, 122 S. Ct. at 1785 (quoting *Johnson v. United States*, 520 U.S. 461, 467, 117 S. Ct. 1544, 1549 (1997) (first and third brackets in original)). Observing the " 'overwhelming' and 'essentially uncontroverted' " evidence in the record of the element of the offense that was omitted from the indictment, *id.* at 633, 122 S. Ct. at 1786 (quoting *Johnson*, 520 U.S. at 470, 117 S. Ct. at 1550), the Court held that the failure to include the element in the indictment "did not seriously affect the fairness, integrity, or public reputation of judicial proceedings," *id.* at 632-33, 122 S. Ct. at 1786.

In the sixteen years since the Supreme Court decided *Cotton*, "a growing list of states has flatly rejected earlier rulings characterizing the failure to allege all material elements as a jurisdictional defect." *State v. Duncan*, 505 S.W.3d 480, 489 n.10 (Tenn. 2016) (citing Wayne LaFave et al., 5 Crim. Proc. § 19.2(e) (4th ed. 2015)); *see also Ex parte Seymour*, 946 So. 2d 536, 538 (Ala. 2006) (listing states that reject the common law jurisdictional rule). Many of these states apply plain error review (or some minor variation) when a defendant challenges a defective indictment without objecting before the trial court. *E.g.*, *State v. Maldonado*, 223 Ariz. 309, 313, 223 P.3d 653, 657 (2010) (en banc) (applying a "fundamental error" standard); *State v. Ortiz*, 162 N.H. 585, 590, 34 A.3d 599, 604 (2011) (explaining that the failure to object to the indictment before the trial court "confines our review to plain error"); *State v. Schrempp*, 2016 S.D. 79, ¶ 13, 887 N.W.2d 744, 748 (2016) (stating that the court "can only review for plain error" when the defendant fails to raise a timely objection to the indictment). And in at least one state retaining the jurisdictional rule, "defects 'which are tardily challenged are liberally construed in favor of validity.' " *State v. Jones*, 140 Idaho 755, 759, 101 P.3d 699, 703 (2004) (quoting *State v. Cahoon*, 116 Idaho 399, 400, 775 P.2d 1241, 1242 (1989)).

Applying our own plain error rule in cases in which the defendant failed to object to a defective indictment at trial would lead to better outcomes by properly aligning defendants' incentives with the aims of justice. After all, one serious threat to the "fairness, integrity, and public reputation of judicial proceedings" arises when defendants, despite "overwhelming and uncontroverted evidence," avoid punishment for crimes because of "error[s] that w[ere] never objected to at trial." *Cotton*, 535 U.S. at 634, 122 S. Ct. at 1787 (citing *Johnson*, 520 U.S. at 470, 117 S. Ct. at 1550).

But our state has seen this unpalatable scenario play out repeatedly through the application of the common law jurisdictional rule. For example, in *State v. Murrell*, this Court affirmed a Court of Appeals decision to vacate a conviction for robbery with a dangerous weapon. 370 N.C. 187, 197, 804 S.E.2d 504, 511 (2017). In *Murrell*, the defendant robbed a bank by handing the teller a note demanding cash and informing the teller that he was armed. *Id.* at 188, 804 S.E.2d at 505. After his arrest, the defendant admitted to the robbery and told police that he had a weapon in his possession during the robbery. *Id.* at 190, 804 S.E.2d at 506. The indictment charging the defendant with robbery with a dangerous weapon alleged that he committed the robbery "by way of it reasonably appearing to the victim . . . that a dangerous weapon was in the defendant's possession." *Id.* The defendant was convicted, and he appealed his conviction on the grounds that the indictment was defective—an issue he failed to raise before the trial court. *See id.* The Court of Appeals arrested the judgment, holding that the indictment "failed to name any dangerous weapon that defendant allegedly employed." *Id.* at 191, 804 S.E.2d at 507. This Court affirmed that holding. *Id.* at 197, 804 S.E.2d at 511. Thus, despite the threatening note and the defendant's admission to having a pistol at the time of the robbery, the defendant's armed robbery conviction was vacated.

Murrell is hardly an outlier. Indeed, there is no shortage of convictions in North Carolina that were vacated due to a technical deficiency in an indictment that was not challenged before conviction and that had no bearing on the fairness, integrity, or public reputation of judicial proceedings. *See*, *e.g.*, *State v. Randall*, 228 N.C. App. 282, 748 S.E.2d 775, 2013 WL 3356878 (2013) (unpublished) (vacating a conviction for being a registered sex offender unlawfully on the premises of an elementary school because the indictment failed to specify what his previous offense was or indicate that it involved a victim under the age of sixteen); *State v. Harris*, 219 N.C. App. 590, 597, 724 S.E.2d 633, 638-39 (2012) (same). In *State v. Wynn*, the Court of Appeals vacated a conviction for trafficking

in cocaine by sale. 204 N.C. App. 371, 696 S.E.2d 203, 2010 WL 2163766, at *3 (2010) (unpublished). Evidence presented to the trial court in that case showed that, through video and audio surveillance, police witnessed the defendant selling cocaine to a confidential informant. *Id.* at *1. Almost immediately after the sale, police surrounded the defendant and searched his vehicle. *Id.* Inside the vehicle, police found cocaine, crack cocaine, cash, digital scales with white powder residue, and a cell phone. *Id.* At trial, the defendant did not object to the sufficiency of the indictment, choosing instead to raise that issue for the first time when appealing his conviction. *Id.* at *2. Despite the overwhelming evidence of the sale presented at trial, the Court of Appeals vacated the defendant's conviction for trafficking in cocaine by sale because the indictment failed to allege "the name of the individual to whom Defendant allegedly sold the cocaine," even though the State knew the name of that person. *Id.* at *3; *see also State v. Calvino*, 179 N.C. App. 219, 221-22, 632 S.E.2d 839, 842 (2006) (vacating a conviction for sale and delivery of cocaine on similar grounds).

These decisions clearly illustrate the shortcomings of the common law jurisdictional rule. Compared with alternative approaches to reviewing flawed indictments, as utilized in federal court and the courts of other states, the common law jurisdictional rule unnecessarily hinders the proper administration of justice. This Court can—and should—reconsider its rigid adherence to this archaic rule. Alternatively, I respectfully request that the General Assembly reexamine a rule that perpetuates misaligned incentives and undermines the criminal justice system.

* * *

In summary, the majority opinion misconstrues and mischaracterizes N.C.G.S. § 14-399 to discover an essential element of littering that the text of the statute does not contain to correct an injustice that does not exist. In so doing, the majority engages in an amorphous "holistic inquiry" instead of providing lower courts and practitioners with a meaningful standard for distinguishing elements from affirmative defenses. More fundamentally, the Court misses an opportunity to reevaluate an obsolete rule that detrimentally impacts the administration of justice in our State. I therefore respectfully dissent.

Justice NEWBY joins in this dissenting opinion.

STATE v. WILSON

[371 N.C. 920 (2018)]

STATE OF NORTH CAROLINA
v.
TERRY JEROME WILSON

No. 295PA17

Filed 21 December 2018

Search and Seizure—SWAT perimeter—defendant walking through —heavy object in pocket

The search and seizure of defendant did not violate the Fourth Amendment where a SWAT team was conducting a sweep of a house in a dangerous area; defendant walked through the perimeter of SWAT officers stationed around the house, stating that he was going to get his moped; and defendant had a heavy object in his pocket that appeared to an officer to be a firearm. The rule in *Michigan v. Summers*, 452 U.S. 692 (1981), justified the seizure because defendant, who was within the immediate vicinity of the premises to be searched and present during the execution of a search warrant, qualified as an occupant under *Summers* because he posed a real threat to the safe and efficient completion of the search. Further, the search and seizure were supported by individualized suspicion under *Terry v. Ohio*, 392 U.S. 1 (1968).

Justice HUDSON concurring in part and concurring in the result in part.

Justices BEASLEY and MORGAN join in this concurring opinion.

Justice BEASLEY concurring in the result only.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 698 (2017), reversing and vacating a judgment entered on 13 April 2016 and reversing an order denying defendant's motion to suppress entered on 4 May 2016, both by Judge John O. Craig, III in Superior Court, Forsyth County. Heard in the Supreme Court on 27 August 2018.

Joshua H. Stein, Attorney General, by Derrick C. Mertz, Special Deputy Attorney General, for the State-appellant.

Glenn Gerding, Appellate Defender, and Sterling Rozear, Assistant Appellate Defender, for defendant-appellee.

MARTIN, Chief Justice.

A SWAT team was sweeping a house so that the police could execute a search warrant. Several police officers were positioned around the house to create a perimeter securing the scene. Defendant penetrated this SWAT perimeter, stating that he was going to get his moped. In so doing, he passed Officer Christian, who was stationed at the perimeter near the street. Defendant then kept going, moving up the driveway and toward the house to be searched. Officer Ayers, who was stationed near the house, confronted defendant. After a brief interaction, Officer Ayers searched defendant based on his suspicion that defendant was armed. Officer Ayers found a firearm in defendant's pocket. Defendant, who had previously been convicted of a felony, was arrested and charged with being a felon in possession of a firearm. Before trial, defendant moved to suppress evidence of the firearm on the grounds that the search violated, *inter alia*, his Fourth Amendment right under the United States Constitution "to be secure . . . against unreasonable searches and seizures." U.S. Const. amend. IV. The trial court found that Officer Ayers "had a reasonable and articulable suspicion that the Defendant might have been armed and presently dangerous" and denied defendant's motion. Defendant then pleaded guilty, while reserving his right to appeal the denial of his motion to suppress.

Defendant appealed. The Court of Appeals held that the search was invalid because the trial court's order did not show that the search was supported by reasonable suspicion. *State v. Wilson*, ___ N.C. App. ___, 803 S.E.2d 698, 2017 WL 3480940, at *6 (Aug. 15, 2017) (unpublished). The State petitioned this Court for review, arguing that the Court of Appeals' reliance on the individualized suspicion standard was inconsistent with the decision of the Supreme Court of the United States in *Michigan v. Summers*, 452 U.S. 692, 101 S. Ct. 2587 (1981), and that Officer Ayers nevertheless reasonably suspected that Defendant was armed. We allowed the State's petition for review of this issue.

We hold that the rule in *Michigan v. Summers* justifies the seizure here because defendant, who passed one officer, stated he was going to get his moped, and continued toward the premises being searched, posed a real threat to the safe and efficient completion of the search. *See Bailey v. United States*, 568 U.S. 186, 200-01, 133 S. Ct. 1031, 1041-42 (2013) (citing *Summers*, 452 U.S. at 702-03, 101 S. Ct. at 2594). We also hold that both the search and seizure of defendant were supported by individualized suspicion and thus did not violate the Fourth Amendment. *See Terry v. Ohio*, 392 U.S. 1, 28, 88 S. Ct. 1868, 1883 (1968). We therefore reverse the decision of the Court of Appeals.

The following facts are not in dispute. At around 11:00 p.m. on 21 March 2014, officers of the Winston-Salem Police Department executed a search warrant for the premises at 2300 North Glenn Avenue. This address was a residential lot with a driveway that was about eighty feet long leading to a house and another building. While the initial sweep was being conducted by a SWAT team, several uniformed officers maintained a perimeter at the edge of the property to protect the SWAT team from outside interference. The officers maintaining the perimeter wore uniforms that clearly identified them as police officers, as well as safety equipment such as Kevlar vests and ballistic helmets. In its findings of fact, the trial court stated that the police presence at 2300 North Glenn Avenue that night was such that it would be clear to any passerby that police were engaged in an operation and intended to exclude the general public from the property. Officers Ayers and Christian were among the uniformed officers maintaining the perimeter during the search. Officer Ayers knew the area to be dangerous, having previously responded to discharges of firearms, narcotics activity, and a shooting at the location of the search.

Defendant walked onto the premises while the SWAT team was still actively securing the house. Officer Christian was standing near where the driveway connected to the street, and Officer Ayers was standing farther up the driveway, a few feet from the house. Officer Ayers saw defendant walk past Officer Christian and heard defendant say something about wanting to get his moped. Officer Ayers walked toward defendant and noticed a heavy object in defendant's pocket. Applying his training and expertise, Officer Ayers believed that the object was a firearm based on its size, shape, and apparent weight. Officer Ayers asked defendant if he was carrying any weapons, and defendant said that he was not. Officer Ayers then told defendant that he was going to frisk him for weapons and instructed defendant to turn around. When defendant turned around, Officer Ayers saw the grip of a handgun protruding from defendant's pocket. At this point, Officer Ayers seized the weapon and detained defendant. Defendant was ultimately charged with, and pleaded guilty to, possession of a firearm by a felon.

In its argument to this Court, the State asks us to apply the categorical rule from *Michigan v. Summers* to the facts of this case.[1] In

1. We disagree with the concurring justice's contention that the State waived merits review of the very issue—applicability of the *Summers* rule—that we accepted for discretionary review. The record shows that the trial judge considered whether the police had the authority to stop a person to protect the integrity of a scene during the execution of a search warrant. This inquiry is substantially equivalent to considering whether the

Summers, the Supreme Court of the United States reasoned that "for Fourth Amendment purposes, . . . a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Summers*, 452 U.S. at 705, 101 S. Ct. at 2595. The Supreme Court justified this rule, at least in part, on the basis that "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Id.* at 702-03, 101 S. Ct. at 2594 (citing 2 Wayne R. LaFave, *Search and Seizure* § 4.9, at 150-51 (1978)). The Court has further emphasized three governmental interests that, when taken together, "justify the detention of an occupant who is on the premises during the execution of a search warrant: officer safety, facilitating the completion of the search, and preventing flight." *Bailey*, 568 U.S. at 194, 133 S. Ct. at 1038 (citing *Summers*, 452 U.S. at 702-03, 101 S. Ct. at 2594). The Court has stated that "[a]n officer's authority to detain incident to a search is categorical; it does not depend on the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.' " *Muehler v. Mena*, 544 U.S. 93, 98, 125 S. Ct. 1465, 1470 (2005) (quoting *Summers*, 452 U.S. at 705 n.19, 101 S. Ct. at 2595 n.19).

The Supreme Court has further defined the category covered by the *Summers* rule on two occasions. First, in *Muehler v. Mena*, the plaintiff, suing several police officers, challenged both the use of handcuffs incident to a *Summers* seizure and the two- to three-hour duration of the seizure. *See id.* at 95-96, 125 S. Ct. at 1468-69. In finding the use of handcuffs permissible, the Court again recognized the need for police executing a search warrant to "routinely exercise unquestioned command of the situation." *Id.* at 99, 125 S. Ct. at 1470 (quoting *Summers*, 452 U.S. at 703, 101 S. Ct. at 2594). The Court also held that the seizure was permissible

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Summers rule applies, so the trial judge appears to have determined (and we agree) that the *Summers* grounds for relief "were . . . apparent from context" and were thus preserved for appellate review. N.C. R. App. P. 10(a)(1). Furthermore, the State was the appellee at the Court of Appeals and the *Summers* rule is an alternate basis in law supporting upholding the trial court's decision. Our rules allow an appellee to argue a preserved alternate basis in law on appeal and that is what the State in fact did at the Court of Appeals. *See* N.C. R. App. P. 10(c). Put simply, given that the State prevailed before the trial court and was the appellee before the Court of Appeals, "[t]he question for review is whether the ruling of the trial court was correct" rather than "whether the reason given therefor is sound or tenable." *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 6 41, 650 (citing *State v. Blackwell*, 246 N.C. 642, 644, 90 S.E.2d 867, 869 (1957)), *cert. denied*, 484 U.S. 916, 108 S. Ct. 267, 98 L. Ed. 2d 224 (1987). As a result, the State can raise the *Summers* issue here as the appellant challenging the Court of Appeals decision.

during the entirety of the execution of the search warrant. *See id.* at 100, 125 S. Ct. at 1471 (holding that "the 2- to 3-hour detention in handcuffs . . . [did] not outweigh the government's continuing safety interests").

Second, in *Bailey v. United States*, the Supreme Court was confronted with a defendant who was arrested almost one mile away from the location being searched. *See* 568 U.S. at 194, 133 S. Ct. at 1038. The Court clarified that "[t]he categorical authority to detain incident to the execution of a search warrant must be limited to the immediate vicinity of the premises to be searched." 568 U.S. at 199, 133 S. Ct. at 1041. Ultimately, the Court held that the seizure in *Bailey* was unlawful because the defendant "was detained at a point beyond any reasonable understanding of the immediate vicinity of the premises in question." *Id.* at 201, 133 S. Ct. at 1042. But the Court has identified several factors that courts can consider "to determine whether an occupant was detained within the immediate vicinity of the premises to be searched, including the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location, and other relevant factors." *Id.*

Based on this doctrinal trilogy, we can identify three parts of the *Summers* rule: "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain [(1)] the occupants," *Summers*, 452 U.S. at 705, 101 S. Ct. at 2595, (2) who are "within the immediate vicinity of the premises to be searched," *Bailey*, 568 U.S. at 201, 133 S. Ct. at 1042, and (3) who are present "during the execution of a search warrant," *id.* at 194, 133 S. Ct. at 1038 (citing *Summers*, 452 U.S. at 702-03, 101 S. Ct. at 2594); *see also Muehler*, 544 U.S. at 102, 125 S. Ct. at 1472 (holding that "the officers' detention of Mena in handcuffs during the execution of the search warrant was reasonable and did not violate the Fourth Amendment"). These three parts roughly correspond to the "who," "where," and "when" of a lawful suspicionless seizure incident to the execution of a search warrant.

As we have discussed, the Supreme Court has already provided clear guidance as to the second and third parts of the *Summers* rule. And the application of that guidance to this case is straightforward. No one disputes that defendant was seized during the execution of a search warrant. It is also evident that defendant was seized within the immediate vicinity of the premises being searched. Defendant walked past Officer Christian, who was standing close to where the driveway connected to the street, and proceeded toward Officer Ayers, who was standing near the house being searched. When Officer Ayers stopped him, defendant was well within the lawful limits of the property containing the

house being searched. And, had he not been stopped by police, defendant could easily have accessed the house. Thus the spatial requirements of the *Summers* rule were met here. *See Bailey*, 568 U.S. at 201, 133 S. Ct. at 1042.

As to the remaining part of our formulation of the *Summers* rule, we acknowledge that the Supreme Court has not directly resolved the issue of who qualifies as an "occupant" for the purposes of the *Summers* rule. Nevertheless, using the Supreme Court's reasoning that developed through the trilogy of *Summers* cases as our guidepost, we will now attempt to determine the "proper limit [that] accords with the rationale of the [*Summers*] rule." *Id.*

In *Bailey*, the Supreme Court recognized that the search of a residence "has a spatial dimension" and that the *Summers* rule must be limited "to the area in which an occupant poses a real threat to the safe and efficient execution of a search warrant." *Id.* Notably, this does not confine the *Summers* rule to the premises identified in the search warrant, but extends that rule to the immediate vicinity of those premises. *Id.* The reasoning in *Bailey* comports with the justification in *Summers* because someone who is sufficiently close to the premises being searched *could* pose just as real a threat to officer safety and to the efficacy of the search as someone who is within the premises. Applying the Supreme Court's reasoning in *Bailey* as to the spatial dimension of a search, we believe that a person is an occupant for the purposes of the *Summers* rule if he "poses a real threat to the safe and efficient execution of a search warrant." *Id.*

We believe defendant posed a real threat to the safe and efficient execution of the search warrant in this case. He approached the house being swept, announced his intent to retrieve his moped from the premises, and appeared to be armed. It was obvious that defendant posed a threat to the safe completion of the search. Defendant argues that he was not an *occupant* of the premises being searched in the ordinary sense of the word. Given defendant's actions here, however, it was apparent to Officer Ayers that defendant was attempting to enter the area being searched—or, stated another way, defendant would have *occupied* the area being searched if he had not been restrained. This understanding of occupancy is necessary given the Supreme Court's recognition that officers may constitutionally mitigate the risk of someone entering the premises during a search "by taking routine precautions, for instance by erecting barricades or posting someone on the perimeter or at the door." *Id.* at 195, 133 S. Ct. at 1039. Indeed, if such precautionary measures did not carry with them some categorical authority for police to detain

individuals who attempt to circumvent them, it is not clear how officers could practically "search without fear that occupants, who are on the premises and able to observe the course of the search, [would] become disruptive, dangerous, or otherwise frustrate the search." *Id.* at 195, 133 S. Ct. at 1038.

Defendant's own actions here caused him to satisfy the first part, the "who," of the *Summers* rule. As we have discussed, the second and third parts of the *Summers* rule, the "where" and "when," are also satisfied. The *Summers* rule, therefore, justified the seizure of defendant here.

But, because the Supreme Court has only used the *Summers* rule to justify *detentions* incident to the execution of search warrants, *see*, *e.g.*, *Bailey*, 568 U.S. at 194, 133 S. Ct. at 1038; *Muehler*, 544 U.S. at 98, 125 S. Ct. at 1470, we must determine separately whether the search of defendant's person was justified. In *Terry v. Ohio*, the Supreme Court determined that a brief stop and frisk did not violate a defendant's Fourth Amendment rights when "a reasonably prudent man would have been warranted in believing [the defendant] was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior." 392 U.S. at 28, 88 S. Ct. at 1883. In other words, an officer may constitutionally conduct what has come to be called a *Terry* stop if that officer can "reasonably . . . conclude in light of his experience that criminal activity may be afoot." *Id.* at 30, 88 S. Ct. at 1884. "The reasonable suspicion standard is a 'less demanding standard than probable cause' and 'a considerably less [demanding standard] than preponderance of the evidence.' " *State v. Bullock*, 370 N.C. 256, 258, 805 S.E.2d 671, 674 (2017) (alteration in original) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673, 675-76 (2000)). To meet this standard, an officer "must be able to point to specific and articulable facts" and to "rational inferences from those facts" justifying the search or seizure at issue. *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880. "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*, 370 N.C. 32, 34-35, 803 S.E.2d 137, 139 (2017) (citation omitted) (first quoting *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 695 (1981); and then quoting *Ornelas v. United States*, 517 U.S. 690, 696, 116 S. Ct. 1657, 1661-62 (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.' " *Bullock*, 370 N.C.

at 258, 805 S.E.2d at 674 (alterations in original) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)).

Here, Officer Ayers was the sole witness who testified at the suppression hearing, and the facts that he testified to were uncontested. Based on that testimony, the trial court found that the police were conducting a search at a location where there had been numerous reports of gun violence and were openly maintaining a perimeter to prevent public access to the property in question during the search. Defendant then approached the premises during the search, passing one officer in a manner that "was very unusual for a member of the general public." Officer Ayers approached defendant and observed that defendant had something in his pocket. Based on the size, weight, and shape of the object, Officer Ayers believed that the object was a gun or other weapon. Defendant told Officer Ayers that he was there to get his moped and that he was not armed. The trial court concluded that "a reasonable and prudent police officer would find [defendant's behavior] unusual" and that, based on the totality of these circumstances, Officer Ayers "had a reasonable and articulable suspicion that the Defendant might have been armed and presently dangerous."

We find no error in the trial court's reasoning. Defendant breached a police perimeter during an active SWAT team sweep. Based on his training, experience, and observations, it was reasonable for Officer Ayers to suspect that defendant was armed. Defendant then appeared to lie about being armed. Given the circumstances of the ongoing search and defendant's actions, it was reasonable to suspect that defendant was there to attack police officers on the premises or otherwise violently interfere with the execution of the search warrant. Because any such violence would constitute criminal activity, Officer Ayers had reasonable suspicion, based on these circumstances, that criminal activity was afoot. *See Terry*, 392 U.S. at 30, 88 S. Ct. at 1884. Thus, the trial court correctly denied defendant's motion to suppress.

In this case, the Court of Appeals erred by focusing solely on one finding of fact instead of the totality of the circumstances, as *Terry* requires. *See Johnson*, 370 N.C. at 34-35, 803 S.E.2d at 139. The Court of Appeals correctly stated that " 'unusual' behavior does not necessarily equal behavior leading a reasonable officer to believe criminal activity was afoot." *Wilson*, 2017 WL 3480940, at *5. This reasoning, though, does not take into account the *particular* unusual behavior at issue here and the totality of the circumstances surrounding it. These circumstances include police officers having responded to shootings at and near the house in the past, Officer Ayers' observation that defendant was likely

armed, and defendant's apparent lie about possessing a weapon.[2] Combining these circumstances with defendant's unusual choice to cross a police perimeter to purportedly retrieve his moped during an active SWAT team sweep, there were more than enough facts to establish a reasonable suspicion that criminal activity may have been afoot. *See Terry*, 392 U.S. at 30, 88 S. Ct. at 1884. The warrantless detention and search of defendant therefore did not violate the Fourth Amendment.

For the reasons stated above, we reverse the decision of the Court of Appeals.

REVERSED.

Justice HUDSON, concurring in part and concurring in the result in part.

Although I agree with the majority's decision that defendant's seizure was justified here because the circumstances constituted reasonable suspicion that criminal activity was afoot under the United States Supreme Court's decision in *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884, 20 L. Ed. 2d 889, 911 (1968), and that our granting of discretionary review allowed the State to argue whether *Michigan v. Summers*, 452 U.S. 692, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981), applies, I disagree with the majority on four specific points. First, the majority need not have applied *Summers* when the constitutionality of the seizure and subsequent search is wholly resolved by *Terry*. Second, the trial court's colloquy with defendant's counsel during the hearing on defendant's motion to dismiss did not preserve the *Summers* issue for our review, because the interchange was not "substantially equivalent" to a *Summers* analysis. Third, the "*Summers* grounds for relief" were not "apparent from the context" at the trial court, and therefore, the *Summers* issue was not adequately preserved for review pursuant to Rule 10(a)(1) of our Rules of Appellate Procedure. *See* N.C. R. App. P. 10(a)(1). Finally, in my view our decision in *State v. Austin* does not stand for the principle that the State, as an appellee before the Court of Appeals, can bring an unpreserved constitutional issue for the first time on appeal. 320 N.C. 276, 357 S.E. 2d 641, *cert. denied*, 484 U.S. 916, 108 S. Ct. 267, 98 L. Ed. 2d 224 (1987).

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2. The fact that defendant was actually lying is not relevant to a finding of reasonable suspicion because the lie was not confirmed until after the search. However, the fact that Officer Ayers had a reasonable suspicion that defendant was armed means that he also had a reasonable suspicion that defendant was lying when defendant said that he was not armed.

Concerning the application of *Summers* to the facts of this case, I fully agree with Justice Beasley's concurring opinion that "[b]ecause the instant case is fully resolved by application of the familiar and well-settled *Terry* standard, I would not extend the *Summers* rule to justify the search of defendant." In its opinion, the majority also concluded that *Terry* justified both the seizure and the search of defendant. Therefore, it was unnecessary to apply *Summers* to the facts here.

With regard to preservation, we have long held that "[c]onstitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *State v. Davis*, 364 N.C. 297, 301, 698 S.E. 2d 65, 67 (2010) (alteration in original) (quoting *State v. Tirado*, 358 N.C. 551, 571, 599 S.E. 2d 515, 529 (2004), *cert. denied*, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005)). The majority asserts that the *Summers* issue was adequately raised in the trial court by "the trial judge consider[ing] whether the police had authority to stop a person to protect the integrity of a scene during the execution of a search warrant." The majority reasoned that "[t]his inquiry is substantially equivalent to considering whether the *Summers* rule applies, so the trial judge appears to have determined (and we agree) that the *Summers* grounds for relief 'were . . . apparent from context.' "

I do not agree that the trial judge's inquiry with defense counsel at the hearing on defendant's motion to suppress substantially equated to the *Summers* issue. The inquiry to which the majority references does not demonstrate that the *Summers* issue was "raised and passed on" at the hearing on defendant's motion to suppress. *Davis*, 364 N.C. at 301, 698 S.E. 2d at 67 (quoting *Tirado*, 358 N.C. at 571, 599 S.E. 2d at 529). The majority refers us to a section of the trial transcript in which the trial court questioned the defendant's attorney in the following manner:

> THE COURT: Right. But isn't -- if he -- if Mr. Wilson's walking up the driveway and part of the purpose for [the officer] telling him to stop is to protect the integrity of the scene where the search warrant is taking place, that's a sufficient reason just to tell him to stop where he is, isn't it?
>
> I mean, if there's an ongoing search of the premises, you don't want a citizen who may or may not be related to the premises just walking on up there and starting to look for his moped while they're trying to conduct the search.

The majority asserts that "this inquiry is substantially equivalent to considering whether the *Summers* rule applied." It is not. It is important to note that the trial court did not mention *Summers* in this excerpt, and

although it inquired about the effect that the execution of the search warrant might have on the propriety of the stop, the trial court did not make any findings of fact or conclusions of law on these matters.

Also, to the extent the trial court engaged in analysis during this colloquy, the exchange was not "substantially equivalent" to a *Summers* analysis. In *Summers*, the Court considered: (1) that "[a] neutral and detached magistrate had found probable cause to believe that the law was being violated in that house and had authorized a substantial invasion of the privacy of the persons who resided there," 452 U.S. at 701, 101 S. Ct. at 2593, 69 L. Ed. 2d at 349; (2) "the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found," *id.* at 702, 101 S. Ct. at 2594, 69 L. Ed. 2d at 349; (3) that "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation," *id.* at 702-03, 101 S. Ct. at 2594, 69 L. Ed. 2d at 350 (citation omitted); (4) that "the orderly completion of the search may be facilitated if the occupants of the premises are present," *id.* at 703, 101 S. Ct. at 2594, 69 L. Ed. 2d at 350; and (5) that "[t]he connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant," *id.* at 703-04, 101 S. Ct. at 2594-95, 69 L. Ed. 2d at 350.

In *Bailey v. United States*, the Court seemingly limited the interests identified in *Summers* to: (1) whether the individual detained was an occupant, (2) officer safety, (3) facilitating the completion of the search, and (3) preventing flight. *See Bailey*, 568 U.S. 186, 195, 133 S. Ct. 1031, 1038, 185 L. Ed. 2d 19, 29 (2013). In addition, *Bailey* expressly limited the holding in *Summers* to cases in which the person was detained within "the immediate vicinity of the premises to be searched." *Id.* at 199, 133 S. Ct. at 1041, 185 L. Ed. 2d at 32.

Here, even if the trial court's inquiry could be construed to have considered and made findings on any of the *Summers* factors, the court certainly did not make a finding regarding whether defendant was an occupant of the premises being searched. The trial court merely stated that "I mean, if there's an ongoing search of the premises, you don't want a citizen who *may* or *may not* be related to the premises just walking up there." As such, the trial court, in its inquiry, made no findings on whether or not defendant was an occupant of the premises.

Whether the person detained is an occupant of the premises being searched is an indispensable aspect of the *Summers* analysis. *See Bailey*, 568 U.S. at 200, 133 S. Ct. at 1041, 185 L. Ed. 2d at 32-33 (stating that in *Summers* the Court recognized that "[b]ecause the detention occurs

in the *individual's own home*, 'it could add only minimally to the public stigma associated with the search itself and would involve neither the inconvenience nor the indignity associated with a compelled visit to the police station' " (emphasis added) (quoting *Summers*, 452 U.S. at 702, 101 S. Ct. at 2594, 69 L. Ed. 2d at 349)); *Muehler v. Mena*, 544 U.S. 93, 98, 125 S. Ct. 1465, 1469, 161 L. Ed. 2d 299, 306 (2005) ("In *Michigan v. Summers*, 452 U.S. 692 (1981), we held that officers executing a search warrant for contraband have the authority 'to detain the occupants of the premises while a proper search is conducted.' " (quoting *Summers*, 452 U.S. at 705, 101 S. Ct. at 2595, 69 L. Ed. 2d at 351)); *Summers*, 452 U.S. at 701, 101 S. Ct. at 2593, 69 L. Ed. 2d at 349 ("Of *prime importance* in assessing the intrusion is the fact that the police had obtained a warrant to search *respondent's house* for contraband.") emphases added)). As a result, by failing to find whether defendant was an occupant of the premises being searched, the trial court, in its inquiry, failed to engage in an analysis equivalent to *Summers*. Therefore, in my view "the *Summers* grounds for relief" are not "apparent" from the trial court's inquiry. N.C. R. App. P. 10(a)(1).

The "*Summers* grounds for relief" are also not "apparent" from the trial court's order denying defendant's motion to suppress. N.C. R. App. P. 10(a)(1). In fact, the order demonstrates that the *Summers* issue was not "raised and passed on by the trial court." *Davis*, 364 N.C. at 301, 698 S.E. 2d at 67 (quoting *Tirado*, 358 N.C. at 571, 599 S.E. 2d at 529). Specifically, the trial court, in its conclusions of law, analyzed defendant's detention only under *Terry v. Ohio* and neither defendant nor the trial court mentioned *Summers*. Further, the order contains no findings relevant to the rule discussed by the majority that a person is an occupant for the purposes of *Summers* when the person "poses a real threat to the safe and efficient execution of a search warrant." *Bailey*, 568 U.S. at 201, 133 S. Ct. at 1042, 185 L. Ed. 2d at 33. Specifically, the trial court's order made no findings concerning whether defendant was a threat. Therefore, the majority's assertions that "[w]e believe defendant posed a real threat to the safe and efficient execution of the search warrant in this case," and "[i]t was obvious that the defendant posed a threat" are not reflected by findings or conclusions in the actual order.

Lastly, contrary to the majority's conclusion, our decision in *Austin* does not stand for the principle that the State, as the appellee before the Court of Appeals, can argue an unpreserved constitutional issue. The majority relies on a quote of *Austin* in which we stated that "[t]he question for review is whether the ruling of the trial court was correct and not whether the reason given therefor is sound or tenable." *Austin*, 320

N.C. at 290, 357 S.E. 2d at 650 (citing *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E. 2d 867, 869 (1957)). Although this language may appear to support the majority's assertion, this Court in *Austin* did not allow a party to bring an unpreserved constitutional argument on appeal.

In *Austin*, defendant challenged the trial court's denial of his motion to suppress, arguing that the trial judge applied an incorrect legal standard on the issue of whether intoxication invalidated his voluntary consent to a search. *See id.* at 289-90, 357 S.E. 2d at 649-650. In denying defendant's motion to suppress, the trial court concluded that defendant's intoxication did not invalidate his consent to the search, because it did not "amount[ ] to a mania as to lead the user to be unconscious of the meaning of his words." *Id.* at 289, 357 S.E. 2d at 650. Defendant contended that this was an improper legal standard. *Id.* at 290, 357 S.E. 2d at 650. Rejecting defendant's argument, this Court reasoned that "[a]ssuming arguendo that the trial court's reasoning for denying defendant's motion to suppress was incorrect, we are not required on this basis alone to determine that the ruling was erroneous." *Id.* at 290, 357 S.E. 2d at 650 (citing *State v. Gardner*, 316 N.C. 605, 342 S.E. 2d 872 (1986)). We added that "[a] correct decision of a lower court will not be disturbed on review simply because an insufficient or superfluous reason is assigned. The question for review is whether the ruling of the trial court was correct and not whether the reason given therefor is sound or tenable." *Id.* at 290, 357 S.E. 2d at 650 (citing *Blackwell*, 246 N.C. at 644, 99 S.E. 2d at 869). We concluded, ultimately, that "[t]he crucial inquiry for this Court is admissibility and whether the ultimate ruling was supported by the evidence." *Id.* at 290, 357 S.E. 2d at 650.

The facts of *Austin*, however, are distinguishable from the facts here, because in *Austin* defendant explicitly raised the issue of the voluntariness of his consent to the search before the trial court. *See id.* at 290, 357 S.E. 2d at 650 ("[D]efendant challenged the voluntariness of his consent on two grounds: his alleged intoxication; and his low intelligence . . . ."). Therefore, *Austin* did not involve an unpreserved constitutional argument. *See id.* at 290, 357 S.E. 2d at 650.

Here, as demonstrated above, the trial court's inquiry with defendant's counsel did not preserve the *Summers* issue. Further, as demonstrated above, neither the trial court's inquiry, nor its order denying defendant's motion to suppress made the *Summers* issue "apparent from the context." N.C. R. App. P. 10(a)(1). Moreover, the *Summers* issue was not "apparent" from the State's argument before the trial court on defendant's motion to suppress. N.C. R. App. P. 10(a)(1). The State asserted that the case was "just as the thrust of the written motion

seems to indicate, purely a *Terry* issue." The State then proceeded to frame its constitutional claim as a *Terry* issue without ever mentioning *Summers*. As a result, the majority cannot rely on *Austin* for the principle that an unpreserved constitutional issue can be argued for the first time on appeal. *Austin* did not abrogate our general rule that "[c]onstitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal." *Davis*, 364 N.C. at 301, 698 S.E. 2d at 67 (alteration in original) (quoting *Tirado*, 358 N.C. at 571, 599 S.E. 2d at 529).

For the above reasons, I agree with the majority that defendant's detention was justified under *Terry*, and that our granting of the State's petition for discretionary review allowed it to argue *Summers* before this Court. However, I disagree with the majority's application of *Summers* here because *Terry* wholly resolved the issue of whether the seizure and search of defendant were constitutional, the trial judge's colloquy with defense counsel did not adequately preserve the *Summers* issue, the *Summers* issue was not "apparent from the context" of the discussion in the trial court as Rule 10(a)(1) of our Rules of Appellate Procedure contemplates, and our decision in *Austin* does not stand for the principle that an appellee before the Court of Appeals can bring an unpreserved constitutional issue for the first time on appeal. Therefore, I respectfully concur in part and concur in the result in part.

Justice BEASLEY and Justice MORGAN join in this concurring opinion.

Justice BEASLEY, concurring in the result only.

I join in Justice Hudson's concurring opinion. Nonetheless, I write separately to make clear that, regardless of whether the State's *Summers* argument was preserved for appellate review, I would decline to address it in this case. Because the instant case is fully resolved by application of the familiar and well-settled *Terry* standard, I would not extend the *Summers* rule to justify the search of defendant. Thus, for the reasons stated below, I concur only in the result reached by the majority.

The majority concludes that "a person is an occupant for the purposes of the *Summers* rule if he 'poses a real threat to the safe and efficient execution of a search warrant.' " *Majority Opinion* at 9 (quoting *Bailey v. United State*s, 568 U.S. 186, 201, 185 L. Ed. 2d 19, 33 (2013)). In addition to being only tangentially related to the rationales underlying *Summers*, this definition suffers from both overbreadth and vagueness.

In *Michigan v. Summers*, the Supreme Court held "that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." 452 U.S. 692, 705, 69 L. Ed. 2d 340, 351 (1981) (footnotes omitted). The Court has not defined the term "occupants" for purposes of the *Summers* doctrine, but it did explicitly state the rationales justifying the categorical rule: (1) the risk of the occupant fleeing the searched premises if contraband is found; (2) the risk of harm to law enforcement in the event of "sudden violence or frantic efforts to conceal or destroy evidence,"[1] and (3) the possibility that "the orderly completion of the search may be facilitated" by the presence of the occupants of the premises. *Id.* at 702-03, 69 L. Ed. 2d at 349-50.

Given the Court's stated justifications for *Summers*'s categorical rule, the term "occupant" can most reasonably be interpreted as a resident of the searched premises or a person physically on the premises that are the subject of the search warrant at the time the search is commenced.[2] A nonresident arriving on the scene after the search has commenced has no reason to flee upon the discovery of contraband, to attempt to dispose of evidence, to interfere with the search, or to harm law enforcement officers because, unlike a resident or a person found at the scene when the officers arrive to conduct the search, evidence of wrongdoing discovered on the premises could not reasonably be attributed to him.[3] Furthermore, the presence of a nonresident could

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1. Notably, the Court did not rely on a generalized officer safety rationale, but on the specific threat to officers presented by the presence of an individual attempting to destroy or conceal evidence—someone who would reasonably be implicated in criminal activity should contraband be found.

2. Such an interpretation would also be consistent with the plain meaning of the word, *see Occupant*, *Black's Law Dictionary* (10th ed. 2014) ("1. Someone who has possessory rights in, or control over, certain property or premises. 2. Someone who acquires title by occupancy."); *Occupant*, *The American Heritage Dictionary of the English Language* 1215 (4th ed. 2000) ("1. One that occupies a position or place . . . 2. One who has certain legal rights to or control over the premises occupied; a tenant or owner. 3. *Law* One that is the first to take possession of something previously unowned."), and with the Court's later language on the topic, *see Bailey v. United States*, 568 U.S. 186, 201, 185 L. Ed. 2d 19, 33-34 (2013) (noting that one factor to consider in determining whether a person is subject to *Summers*'s categorical rule is "whether the occupant was within the line of sight of *his dwelling*" (emphasis added)). The majority's definition renders the word "occupant" interchangeable with terms no more specific than "person" or "individual."

3. That a nonresident who arrives on the scene after the search commences is not categorically subject to suspicionless detention does not mean he cannot be detained. As in the instant case, law enforcement officers may detain an individual when the totality of the circumstances supports reasonable suspicion that criminal activity is afoot, and officers may search him when they reasonably believe he is armed. *See Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1968).

do little to facilitate the search—a nonresident would not be able to open locked doors or containers and would have no interest in avoiding "the use of force that is not only damaging to property but may also delay the completion of the [search]," as contemplated by the Court in *Summers*. *See id.* at 703, 69 L. Ed. 2d at 350. Moreover, the existence of a valid search warrant—the foundation on which *Summers*'s categorical rule is built—is premised on a judicial officer's determination that "police have probable cause to believe that *someone in the home* is committing a crime." *Id.* at 703, 69 L. Ed. 2d at 350 (emphasis added). That finding of probable cause does not extend reasonably to a nonresident or a person who is not in the home during the search.

The majority's definition of "occupant" requires no connection whatsoever to the property that is the subject of a search warrant or the suspected criminal activity—only that the person detained "poses a real threat to the safe and efficient execution" of the warrant. It is not unusual for a crowd of curious onlookers to gather along a police perimeter. How an officer executing a search warrant might differentiate a person posing a real threat from a neighbor or an innocent bystander is unclear, as any person in the vicinity of a police search could potentially interfere with the search or harm officers. Moreover, if an officer were able to conclude that a person posed such a threat, invocation of *Summers*'s categorical rule would be unnecessary because, as was the case here, the detention and search of that person would be justified by *Terry*.

The majority contends that law enforcement officers' authority to "mitigate the risk of someone entering the premises during a search by taking routine precautions, for instance by erecting barricades or posting someone on the perimeter or at the door," gives rise to "some categorical authority for police to detain individuals who attempt to circumvent them." *Majority Opinion* at 9-10 (citations omitted). The power to exclude, however, is not the same as the power to detain; no Fourth Amendment issue arises from an individual's mere exclusion from an area. Law enforcement officers can, and routinely do, exclude members of the public from geographical areas for a variety of reasons, including during the execution of search warrants. The proper response when a person attempts to circumvent officers' instructions is an entirely separate question from whether all individuals in the vicinity of an active search—any of whom could conceivably pose a threat to officers—should be subject to suspicionless detention. Where, as here, an individual *does* attempt to bypass a police perimeter, his suspicious behavior likely justifies a *Terry* stop. Thus, the majority's extension

of *Summers*'s categorical rule dramatically expands the government's power over individuals but provides no additional protection for officers in the field.

Accordingly, I concur only in today's result.

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

19 DECEMBER 2018

023A18	State v. Angela Marie Rankin	Def's Motion for Appropriate Relief (COA17-396)	Dismissed as moot
140PA18	State v. Robert Dwayne Lewis	1. Joint Motion for Extension of Time to File Brief 2. Joint Motion to Consolidate	1. Allowed 2. Allowed
141PA18	State v. Robert Dwayne Lewis	1. Joint Motion for Extension of Time to File Brief 2. Joint Motion to Consolidate	1. Allowed 2. Allowed
409PA17	Cooper v. Berger, et al.	Defs' Motion to Strike Portions of Reply Brief	Denied

APPENDIXES

ADMINISTRATION OF THE STATE BAR

ADMINISTRATIVE COMMITTEE

CONTINUING LEGAL EDUCATION

LEGAL SPECIALIZATION

CERTIFICATION OF PARALEGALS

ADMISSION TO THE PRACTICE OF LAW

FORMAL ADVISORY OPINION

RULES OF APPELLATE PROCEDURE

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 July 27, 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 .0400, be amended by adding the following new provisions in lieu of the former rule.

27 N.C.A.C. 1A, Section .0400, Organization of the North Carolina State Bar

.0406 Vacancies and Succession [NEW RULE]

(a) Succession Upon Mid-term Vacancy in Office. Officer vacancies shall be filled as follows:

(1) A vacancy in the office of president shall be filled by the president-elect, who shall serve as president for the unexpired term and for the next term.

(2) A vacancy in the office of president-elect shall be filled by the vice-president, who shall serve as president-elect for the unexpired term. At the end of the unexpired term, the office of president-elect will become vacant and the council shall elect a president-elect in accordance with Rule .0404 of this subchapter. A former vice-president who served an unexpired term as president-elect pursuant to this subsection will be eligible to stand for election as president-elect.

(3) The council shall elect a person to fill the unexpired term created by any vacancy in the office of vice-president or secretary. The election shall occur at a special meeting of the council or at the next regularly scheduled meeting of the council.

(4) If there is a vacancy in the office of president or president-elect and there is no available successor under these provisions, the council shall elect a person to fill the unexpired term created by such vacancy. The election shall occur at a special meeting of the council or at the next regularly scheduled meeting of the council.

(b) Temporary Inability to Preside at Meetings. If the president is absent or is otherwise unable to preside at any meeting of the North

Carolina State Bar or the council, the president-elect shall preside. If the president-elect is absent or is otherwise unable to preside, then the vice-president shall preside. If none of the president, president-elect, or vice-president are present and able to preside, then the council shall elect a member to preside during the meeting.

(c) Temporary Inability to Perform Duties. If the president is absent or is otherwise temporarily unable to perform the duties of office, the president-elect shall perform those duties until the president returns or becomes able to resume the duties. If the president-elect is absent or is otherwise temporarily unable to perform the duties of the president, then the council shall select one of its members to perform those duties for the period of the president's absence or inability.

(d) Temporary Inability of Secretary to Perform Duties. If the secretary is absent or is otherwise temporarily unable to perform the duties of office, the assistant director and director for management, finance, and communications shall perform those duties until the secretary returns or becomes able to resume the duties. If the assistant director and director for management, finance, and communications is absent or is otherwise unable to perform those duties, the counsel of the State Bar shall perform those duties until the secretary returns or becomes able to resume the duties. If neither the assistant director and director for management, finance, and communications nor the counsel are able to perform those duties, then the president may select a member of the State Bar staff to perform those duties for the period of the secretary's absence or inability.

~~(a) If the office of president becomes vacant for any reason, including resignation, death, disqualification, or permanent inability, the president-elect shall become president for the unexpired term and the next term. If the office of the president-elect becomes vacant because the president-elect must assume the presidency under the foregoing provision of this section, then the vice-president shall become the president-elect for the unexpired term and at the end of the unexpired term to which the vice-president ascended the office will become vacant and an election held in accordance with Rule .0304 of this subchapter; if the office of president-elect becomes vacant for any other reason, the vice-president shall become the president-elect for the unexpired term following which said officer shall assume the presidency as if elected president-elect. If the office of vice-president or secretary becomes vacant for any reason, including resignation, death, disqualification, or permanent inability, or if the office of president or president-elect becomes vacant without an available successor under these provisions then the office will be filled by election by the council at a special meeting of the council with such~~

~~notice as required by Rule .0602 of this subchapter or at the next regularly scheduled meeting of the council.~~

~~(b) If the president is absent or unable to preside at any meeting of the North Carolina State Bar or the council, the president-elect shall preside, or if the president-elect is unavailable, then the vice-president shall preside. If none are available, then the council shall elect a member to preside during the meeting.~~

~~(c) If the president is absent from the state or for any reason is temporarily unable to perform the duties of office, the president-elect shall assume those duties until the president returns or becomes able to resume the duties. If the president-elect is unable to perform the duties, then the council may select one of its members to assume the duties for the period of inability.~~

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 July 27, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 12th day of September, 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 20th day of September, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of September, 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 July 27, 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 .1400, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .1400, Rulemaking Procedures

.1401 Publication for Comment

(a) As a condition precedent to adoption, a proposed rule or amendment to a rule must be published for comment as provided in subsection (c).

(b) A proposed rule or amendment to a rule must be presented to the Executive Committee and the council prior to publication for comment, and specifically approved for publication by both.

(c) A proposed rule or amendment to a rule must be published for comment in an official printed or digital publication of the North Carolina State Bar that is mailed or emailed to the membership at least 30 days in advance of its final consideration by the council. The publication of any such proposal must be accompanied by a prominent statement inviting all interested parties to submit comment to the North Carolina State Bar at a specified postal or e-mail address prior to the next meeting of the Executive Committee, the date of which shall be set forth.

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 July 27, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 10th day of September, 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 20th day of September, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of September, 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 July 27, 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 .1400, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .1400, Rulemaking Procedures

.1403 Action by the Council and Review by the North Carolina Supreme Court

(a) Whenever the Executive Committee recommends adoption of any proposed rule or amendment to a rule in accordance with the procedure set forth in Rule .1402 above, the council at its next regular business meeting shall consider the proposal, the Executive Committee's recommendation, and any comment received from interested parties, and:

(1) decide whether to adopt the proposed rule or amendment, subject to the approval of the North Carolina Supreme Court as described in G.S. 84-21;

(2) reject the proposed rule or amendment; or

(3) refer the matter back to the Executive Committee for reconsideration.

(b) Any proposed rule or amendment to a rule adopted by the council shall be transmitted by the secretary to the North Carolina Supreme Court for its review on a schedule approved by the Court, but in no event later than 120 days following the council's adoption of the proposed rule or amendment.

(c) ~~No~~ A proposed rule or amendment to a rule adopted by the council shall take effect ~~unless and until~~ when it is ~~approved by order~~ entered upon the minutes of the North Carolina Supreme Court.

(d) ...

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 July 27, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 10th day of September, 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 20th day of September, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of September, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ADMINISTRATIVE COMMITTEE

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 20, 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 the Administrative Committee, as particularly set forth in 27 N.C.A.C. 1D, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

.0902 Reinstatement from Inactive Status

(a) Eligibility to Apply for Reinstatement...

(c) Requirements for Reinstatement

(1) Completion of Petition ...

(2) CLE Requirements ~~for Calendar Year~~ Before Inactive
Unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter or is subject to the requirements in paragraph (c)(5) of this rule, the member must satisfy the minimum continuing legal education requirements, as set forth in Rule .1518 of this subchapter, for the calendar year ~~immediately preceding the calendar year~~ in which the member was transferred to inactive status (the "subject year") if such transfer occurred on or after July 1 of the subject year, including any deficit from a prior calendar year that was carried forward and recorded in the member's CLE record for the subject year.

(3) Character and Fitness to Practice ....

(d) Service of Reinstatement Petition ...

.0904 Reinstatement from Suspension

(a) Compliance Within 30 Days of Service of Suspension Order...

(d) Requirements for Reinstatement

(1) Completion of Petition...

(2) CLE Requirements ~~for Calendar Years~~ Before Suspended Unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter or is subject to the requirements in paragraph (d)(4) of this rule, the member must satisfy the minimum continuing legal education (CLE) requirements, as set forth in Rule .1518 of this subchapter, for the calendar year ~~immediately preceding the year~~ in which the member was suspended (the "subject year") if such transfer occurred on or after July 1 of the subject year, including any deficit from a prior year that was carried forward and recorded in the member's CLE record for the subject year. The member shall also sign and file any delinquent CLE annual report form.

(3) Additional CLE requirements….

(e) Procedure for Review of Reinstatement Petition ...

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 20, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 10th day of September, 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 20th day of September, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the

Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of September, 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 April 20, 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) ...

(c) Definitions:

(1) ...

(17) "Technology training" shall mean a program, or a segment of a program, devoted to education on information technology (IT) or cybersecurity (see N.C. Gen. Stat. §143B-1320(a)(11), or successor statutory provision, for a definition of "information technology"), including education on an information technology product, device, platform, application, or other tool, process, or methodology. To be eligible for CLE accreditation as a technology training program, the program must satisfy the accreditation standards in Rule .1519 of this subchapter: specifically, the primary objective of the program must be to increase the participant's professional competence and proficiency as a lawyer. Such programs include, but are not limited to, education on the following: a) an IT tool, process, or methodology designed to perform tasks that are specific or uniquely suited to the practice of law; b) using a generic IT tool process or methodology to increase the efficiency of performing tasks necessary to the practice of law; c) the investigation, collection, and introduction of social media evidence; d) e-discovery; e) electronic filing of legal documents; f) digital forensics for legal investigation or litigation; and g) practice management software. See Rule .1602 of this subchapter for additional information on accreditation of technology training programs.

(18) ~~(17)~~ ...

.1518 Continuing Legal Education Program

(a) Annual Requirement. Each active member subject to these rules shall complete 12 hours of approved continuing legal education during each calendar year beginning January 1, 1988, as provided by these rules and the regulations adopted thereunder.

Of the 12 hours:

(1) at least 2 hours shall be devoted to the areas of professional responsibility or professionalism or any combination thereof; ~~and~~

(2) at least 1 hour shall be devoted to technology training as defined in Rule .1501(c)(17) of this subchapter and further explained in Rule .1602(e) of this subchapter; and

(3) ~~(2)~~ effective January 1, 2002, at least once every three calendar years, each member shall complete an hour of continuing legal education instruction on substance abuse and debilitating mental conditions as defined in Rule .1602 (a). This hour shall be credited to the annual 12-hour requirement but shall be in addition to the annual professional responsibility/professionalism requirement. To satisfy the requirement, a member must attend an accredited program on substance abuse and debilitating mental conditions that is at least one hour long.

(b) Carryover ...

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 20, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 10th day of September, 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 20th day of September, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of September, 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 April 20, 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

.1522 Annual Report and Compliance Period

(a) Annual Written Report. Commencing in 1989, each active member of the North Carolina State Bar shall provide an annual written report to the North Carolina State Bar in such form as the board shall prescribe by regulation concerning compliance with the continuing legal education program for the preceding year or declaring an exemption under Rule .1517 of this subchapter. The annual report form shall be corrected, if necessary, signed by the member, and promptly returned to the State Bar via mail or online filing. Upon receipt via mail or online filing of a signed annual report form, appropriate adjustments shall be made to the member's continuing legal education record with the State Bar...

(b) Compliance Period ...

(c) Report. Prior to January 31 of each year, the prescribed report form concerning compliance with the continuing legal education program for the preceding year shall be available on the State Bar's CLE website and a notice of its posting shall be mailed or emailed to all active members of the North Carolina State Bar.

(d) Late Filing Penalty ...

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 20, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 10th day of September, 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 20th day of September, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of September, 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 April 20, 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

.1602 Course Content Requirements

(a) ...

(c) Law Practice Management ~~Courses~~ Programs - A CLE accredited ~~course~~ program on law practice management must satisfy the accreditation standards set forth in Rule .1519 of this subchapter with the primary objective of increasing the participant's professional competence and proficiency as a lawyer. The subject matter presented in an accredited ~~course~~ program on law practice management shall bear a direct relationship to either substantive legal issues in managing a law practice or a lawyer's professional responsibilities, including avoidance of conflicts of interest, protecting confidential client information, supervising

subordinate lawyers and nonlawyers, fee arrangements, managing a trust account, ethical legal advertising, and malpractice avoidance. The following are illustrative, non-exclusive examples of subject matter that may earn CLE credit: employment law relating to lawyers and law practice; business law relating to the formation and operation of a law firm; calendars, dockets and tickler systems; conflict screening and avoidance systems; law office disaster planning; handling of client files; communicating with clients; and trust accounting. If appropriate, a law practice management ~~course~~ program may qualify for professional responsibility (ethics) CLE credit. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit: marketing; networking/rainmaking; client cultivation; increasing productivity; developing a business plan; improving the profitability of a law practice; selling a law practice; and purchasing office equipment (including computer and accounting systems).

(d) Skills and Training ~~Courses~~ Programs - A ~~course~~ program that teaches a skill specific to the practice of law may be accredited for CLE if it satisfies the accreditation standards set forth in Rule .1519 of this subchapter with the primary objective of increasing the participant's professional competence and proficiency as a lawyer. The following are illustrative, non-exclusive examples of subject matter that may earn CLE credit: legal writing; oral argument; courtroom presentation; and legal research. A ~~course~~ program that provides general instruction in non-legal skills shall NOT be accredited. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit: learning to use software for an application that is not specific to the practice of law (e.g. word processing); learning to use office equipment (except as permitted by paragraph (e) of this rule); public speaking; speed reading; efficiency training; personal money management or investing; career building; marketing; and general office management techniques.

(e) Technology Training ~~Courses~~ Programs – ~~A course on a specific information technology product, device, platform, application, or other technology solution (IT solution) may be accredited for CLE if the course satisfies the accreditation standards in Rule .1519 of this subchapter; specifically, the primary objective of the course must be to increase the participant's professional competence and proficiency as a lawyer. The following are illustrative, non-exclusive examples of courses that may earn CLE credit: electronic discovery software for litigation; document automation/assembly software; document management software; practice management software; digital forensics for litigation; and digital security.~~ A ~~course~~ program on the selection of an ~~IT solution~~ information technology (IT) product, device, platform, application, web-based

technology, or other technology tool, process, or methodology, or the use of an IT ~~solution~~ tool, process, or methodology to enhance a lawyer's proficiency as a lawyer or to improve law office management may be accredited as technology training if the requirements of paragraphs (c) and (d) of this rule are satisfied. A ~~course~~ program that provides general instruction on an IT ~~solution~~ tool, process, or methodology but does not include instruction on the practical application of the IT ~~solution~~ tool, process, or methodology to the practice of law shall not be accredited. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit: generic education on how to use a tablet computer, laptop computer, or smart phone; training courses on Microsoft Office, Excel, Access, Word, Adobe, etc., programs; and instruction in the use of a particular desktop or mobile operating system. No credit will be given to a ~~course~~ program that is sponsored by a manufacturer, distributor, broker, or merchandiser of ~~the~~ an IT ~~solution~~ tool, process, or methodology unless the course is solely about using the IT ~~solution~~ tool, process, or methodology to perform tasks necessary or uniquely suited to the practice of law and information about purchase arrangements is not included in the accredited segment of the program. A sponsor may not accept compensation from a manufacturer, distributor, broker, or merchandiser of an IT ~~solution~~ tool, process, or methodology in return for presenting a CLE program about ~~the~~ an IT ~~solution~~ tool, process, or methodology. ~~Presenters may include representatives of a manufacturer, distributor, broker, or merchandiser of the IT solution but they may not be the only presenters at the course and they may not determine the content of the course.~~

(f) ...

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 20, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 10th day of September, 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 20th day of September, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of September, 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 July 27, 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 .2900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .2900, Certification Standards for the Elder Law Specialty

.2905 Standards for Certification as a Specialist in Elder Law

Each applicant for certification as a specialist in elder law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in elder law:

(a) Licensure and Practice...

(c) Substantial Involvement Experience Requirements - In addition to the showing required by Rule .2905(b), an applicant shall show substantial involvement in elder law by providing information regarding the applicant's participation, during the five years immediately preceding the date of the application, in at least sixty (60) elder law matters in the categories set forth in Rule .2905(c)(3) below...

(3) Experience Categories:

(A) health and personal care planning including giving advice regarding, and preparing, advance medical directives (medical powers of attorney, living wills, and health care declarations) and counseling older persons, attorneys-in-fact, and families about medical and life-sustaining choices, and related personal life choices.

(B) pre-mortem legal planning including giving advice and preparing documents regarding wills, trusts, durable general or financial powers of attorney, real estate, gifting, and the financial and tax implications of any proposed action.

(C) fiduciary representation including seeking the appointment of, giving advice to, representing, or serving as executor, personal representative, attorney-in-fact, trustee, guardian, conservator, representative payee, or other formal or informal fiduciary.

(D) legal capacity counseling including advising how capacity is determined and the level of capacity required for various legal activities, and representing those who are or may be the subject of guardianship/conservatorship proceedings or other protective arrangements.

(E) public benefits advice including planning for and assisting in obtaining Medicaid, supplemental security income, and veterans benefits.

(F) special needs counseling, including the planning, drafting, and administration of special/supplemental needs trusts, housing, employment, education, and related issues.

(G) advice on insurance matters including analyzing and explaining the types of insurance available, such as health, life, long term care, home care, COBRA, medigap, long term disability, dread disease, and burial/funeral policies.

(H) resident rights advocacy including advising patients and residents of hospitals, nursing facilities, continuing care retirement communities, assisted living facilities, adult care facilities, and those cared for in their homes of their rights and appropriate remedies in matters such as admission, transfer and discharge policies, quality of care, and related issues.

(I) housing counseling including reviewing the options available and the financing of those options such as: mortgage alternatives, renovation loan programs, life care contracts, and home equity conversion.

(J) employment and retirement advice including pensions, retiree health benefits, unemployment benefits, and other benefits.

(K) counseling with regard to age and/or disability discrimination in employment and housing.

(L) litigation and administrative advocacy in connection with any of the above matters, including will contests, contested capacity issues, elder abuse (including financial or consumer fraud), fiduciary administration, public benefits, nursing home torts, and discrimination.

(d) Continuing Legal Education - An applicant must earn forty-five (45) hours of accredited continuing legal education (CLE) ~~credits~~ in elder law ~~and related fields, as specified in this rule~~, during the three full calendar years preceding application and the year of application, with not less than nine (9) credits earned in any of the three calendar years. ~~Of the 45 CLE credits, at least ten (10) credits must be earned attending elder law–specific CLE programs.~~ Elder law CLE is any accredited program on a subject identified in the experience categories described in subparagraph (c)(3) of this rule. ~~Related fields shall include the following: estate planning and administration, trust law, health and long-term care planning, public benefits, veterans' benefits, surrogate decision-making, older persons' legal capacity, social security disability, Medicaid/Medicare claims, special needs planning, and taxation. No more than twenty (20) credits may be earned in the related fields of estate taxation or estate administration.~~

(e) Peer Review - ...

.2906 Standards for Continued Certification as a Specialist in Elder Law

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 .2906(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 - ...

(b) Continuing Legal Education - The specialist must earn seventy-five (75) hours of accredited continuing legal education (CLE) credits in elder law ~~or related fields~~ during the five calendar years preceding application, with not less than ten (10) credits earned in any calendar year. Elder law CLE is any accredited program on a subject identified in the experience categories described in Rule .2905(c)(3) of this subchapter. ~~Related fields shall include the following: estate planning and administration, trust law, health and long term care planning, public benefits, surrogate decision-making, older persons' legal capacity, social security disability, Medicaid/Medicare claims and taxation. No more than forty (40) credits may be earned in the related fields of estate taxation or estate administration.~~

(c) Peer Review - ….

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 July 27, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 10th day of September, 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 20th day of September, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of September, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING 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 April 20, 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 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

.0118 Certification Committee

(a) The board shall establish a separate certification committee. The certification committee shall be composed of seven members appointed by the board~~, one of whom shall be designated annually by the chairperson of the board as chairperson of the certification committee~~. At least two members of the committee shall be lawyers, licensed and currently in good standing to practice law in this state, and two members of the committee shall be certified paralegals. The remaining members of the committee shall be either lawyers, licensed and currently in good standing to practice law in this state, or certified paralegals. The paralegals appointed to the inaugural committee shall be exempt from the certification requirement during their initial term but each such member shall be eligible, during the shorter of such initial term or the alternative qualification period, for certification by the board upon the board's determination that the committee member meets the requirements for certification in Rule .0119(b).

(b) The chair of the Board of Paralegal Certification shall appoint one member of the committee to serve for a one-year term as chair of the committee and one member of the committee to serve for a one-year term as vice chair of the committee. The chair and vice chair may be reappointed to multiple terms in these positions.

~~(b)~~ (c) Members shall hold office for three years, except those members initially appointed who shall serve as hereinafter designated...

~~(c)~~ (d) ...

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 scheduled meeting on April 20, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 10th day of September, 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 20th day of September, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of September, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING 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 April 20, 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 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

.0122 Right to Review and Appeal to Council

(a) Lapsed Certification ...

~~(c) Failure of Written Examination. Within 30 days of the mailing of the notice from the board's executive director that an individual has failed the written examination, the individual may review his or her examination upon the condition that the individual will not take the examination again until such time as the entire content of the examination has been replaced. Review of the examination shall be at the office of the board at a time designated by the executive director. The individual shall be allowed not more than three hours for such review and shall not remove the examination from the board's office or make photocopies of any part of the examination.~~

> ~~(1) Request for Review by the Board. Within 30 days of individual's review of his or her examination, the individual may request review by the board pursuant to the procedures set forth in paragraph (c) of this rule. The request should set out in detail the area or areas which, in the opinion of the individual, have been incorrectly graded. Supporting information may be filed to substantiate the individual's claim.~~

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 20, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 12th day of September, 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 20th day of September, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

s/Morgan, J.
For the Court

AMENDMENT TO THE RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

The following amendment to the Rules Governing Admission to the Practice of Law was duly approved by the Council of the North Carolina State Bar at its quarterly meeting on April 20, 2018.

BE IT RESOLVED by the Council of the North Carolina State Bar that the amendment to Section .0500 of the Rules Governing Admission to the Practice of Law proposed by the North Carolina Board of Law Examiners be approved as follows (additions are underlined, deletions are interlined):

Section .0500 Requirements for Applicants

.0501 Rules Governing Admission to the Practice of Law in North Carolina

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 at the time the license is issued;

(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 formal application as a general applicant in accordance with Section .0400 of this Chapter;

(5) pass the written bar examination 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 taken and passed the Multistate Professional Responsibility Examination within the twenty-four (24) month period next preceding the beginning day of the written bar examination which applicant passes as prescribed 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 service member as defined in the 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 service member's commanding officer stating that the service member's current military duty prevents attendance for the examination, stating that military leave is not authorized for the service member at the time of the letter, and stating when the service member would be authorized military leave to take the examination.

(7) 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 ending 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~~.~~, within the twenty-four (24) month period next preceding the beginning day of the written bar examination which applicant passes as prescribed above, or 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 service member as defined in the 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 service member's commanding officer stating that the service member's current military duty prevents the service member from completing the State-Specific Component within the 24 month period next preceding the beginning day of the written bar examination which applicant passes as prescribed above, or within the 12 month period thereafter.

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 Governing Admission to the Practice of Law was duly approved by the Council of the North Carolina State Bar on April 20, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 12th day of September, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendment to the Rules Governing Admission to the Practice of Law as approved 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 20th day of September, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

On this date, the foregoing amendment to the Rules Governing Admission to the Practice of Law was entered upon the minutes of the Supreme Court. The amendment shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of September, 2018.

s/Morgan, J.
For the Court

AMENDMENT TO THE RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

The following amendments to the Rules Governing Admission to the Practice of Law were duly approved by the Council of the North Carolina State Bar at its quarterly meeting on July 27, 2018.

BE IT RESOLVED by the Council of the North Carolina State Bar that the amendment to Section .0600 of the Rules Governing Admission to the Practice of Law proposed by the North Carolina Board of Law Examiners be approved as follows (additions are underlined, deletions are interlined):

Section .0600 Moral Character and General Fitness

.0604 – Bar Candidate Committee

Every General Applicant and Transfer A~~a~~pplicant shall appear before a bar candidate committee, appointed by 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.

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 Governing Admission to the Practice of Law was duly approved by the Council of the North Carolina State Bar on July 27, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 11th day of September, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendment to the Rules Governing Admission to the Practice of Law as approved 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 20th day of September, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

On this date, the foregoing amendment to the Rules Governing Admission to the Practice of Law was entered upon the minutes of the Supreme Court. The amendment shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of September, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

The following amendments to the Rules Governing Admission to the Practice of Law were duly approved by the Council of the North Carolina State Bar at its quarterly meeting on July 27, 2018.

BE IT RESOLVED by the Council of the North Carolina State Bar that the amendments to Section .1200 of the Rules Governing Admission to the Practice of Law proposed by the North Carolina Board of Law Examiners be approved as follows (additions are underlined, deletions are interlined):

.1201 Nature of Hearings

(1) Any 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~~ All comity~~,~~ and military spouse comity~~, or transfer~~ applicants shall appear before the Board or a Panel, either in person or by electronic means as directed by the Board, to satisfy the Board that he or she has met all the requirements of Rule .0502~~,~~ or Rule .0503 ~~or Rule.0504~~.

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 were duly approved by the Council of the North Carolina State Bar on July 27, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 11th day of September, 2018.

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 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 20th day of September, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

On this date, the foregoing amendments to the Rules Governing Admission to the Practice of Law were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of September, 2018.

s/Morgan, J.
For the Court

JUDICIAL STANDARDS COMMISSION
STATE OF NORTH CAROLINA

FORMAL ADVISORY OPINION: 2018-01

December 17, 2018

QUESTION:

May a judge serve as a manager in a real estate investment limited liability company (LLC) for the purpose of managing the judge's personal real estate investments or those of the judge's close family members?

CONCLUSION:

Yes. Canon 5C(2) of the North Carolina Code of Judicial Conduct allows judges to hold and manage their personal financial and real estate investments and the financial and real estate investments of "the judge's spouse, children, or parents . . . ." Canon 5C(2) further provides that judges may also engage "in other remunerative activity not otherwise inconsistent with the provisions of this Code but should not serve as an officer, director or manager of any business." This language creates a clear distinction between managing a judge's real estate investments and "other remunerative activity." While a judge may engage in "other remunerative activity," the language of Canon 5C(2) imposes an additional restriction that a judge may not serve as an "officer, director or manager of any business." As such, when managing a judge's personal or family real estate investments, a judge may create and serve as a manager of a LLC created for that purpose, subject to any other applicable limitations imposed in Canon 5C. If engaging in other types of remunerative activity to generate outside income, however, a judge may not serve as an officer, director or manager of a business.

DISCUSSION:

Canon 5C(2) of the North Carolina Code of Judicial Conduct provides that ". . . a judge may hold and manage the judge's own personal investments or those of the judge's spouse, children, or parents, including real estate investments, and may engage in other remunerative activity not otherwise inconsistent with the provisions of this Code but should not serve as an officer, director or manager of any business." This language distinguishes between a judge's activity in managing the judge's personal or family real estate investments and "other remunerative activity." The restriction on serving as an officer, director or manager is indicative of a restriction on the ability of a judge to earn outside income from sources other than the judge's personal financial or real estate investments. For example, the North Carolina Supreme Court

in *In re Belk*, 364 N.C. 114, 691 S.E.2d 685 (2010) made clear that the restriction in Canon 5C(2) strictly prohibits a judge from serving as on the board of directors of a for-profit business corporation. *See id.* at 123-24, 691 S.E.2d at 692.

Although a judge may serve as the manager of a real estate investment LLC that manages the personal real estate interests of the judge or the judge's close family members, such service continues to be limited by the other applicable provisions of Canon 5C. Even with permitted business and financial dealings, judges must "refrain from financial and business dealings" that either reflect adversely on the judge's impartiality, interfere with the proper performance of the judge's judicial duties, exploit the judge's judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves. *See* Canon 5C(1). Based on these restrictions, a judge should not voluntarily serve as a manager of a LLC formed to manage the judge's real estate investments if other members are available who could otherwise serve in that role, and a judge should avoid that role when practicable in order to ensure that serving as a manager does not create the appearance of exploiting the judge's judicial position or unnecessarily adding business obligations where other members of the LLC could easily undertake those same duties. A judge should also not serve as a manager of a real estate investment LLC formed for the purpose of holding and managing the judge's personal or family real estate interests if doing so would create a need for frequent disqualification. *See* Canon 5C(3).

The Commission distinguishes this conclusion from Formal Advisory Opinion 2009-01, which addressed the question of whether a judge could remain the sole member and manager of a Professional Limited Liability Company (PLLC) established for the practice of law if the PLLC was placed in "inactive status." The Commission distinguished the language in Canon 5C(2) allowing judges to hold and manage personal investments from the language allowing judges to engage in "other remunerative activity" so long as not serving "as an officer, director or manager" for a business concern. In the case of a PLLC formed for the purpose of engaging in the practice of law, the Commission also notes that under Canon 5F, judges are prohibited from engaging in the practice of law and thus should not serve as a manager of an entity created solely for that purpose.

References:

Canon 5C and Canon 5F of the North Carolina Code of Judicial Conduct
In re Belk, 364 N.C. 114, 691 S.E.2d 685 (2010)
Formal Advisory Opinion No. 2009-01

ORDER AMENDING THE RULES OF APPELLATE PROCEDURE

Pursuant to Article IV, Section 13(2), of the Constitution of North Carolina, the Court hereby amends the North Carolina Rules of Appellate Procedure. This order affects Rules 3, 3.1, 4, 9, 11, 12, 13, 18, 26, 28, 30, 37, 41, 42 (new) and Appendixes A, B, and D.

* * *

Rule 3. Appeal in Civil Cases—How and When Taken

(a) **Filing the Notice of Appeal**. Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subsection (c) of this rule.

(b) **Special Provisions**. Appeals in the following types of cases shall be taken in the time and manner set out in the General Statutes and Rules of Appellate Procedure sections noted:

(1) Juvenile matters pursuant to N.C.G.S. § 7B-2602~~; the identity of persons under the age of eighteen at the time of the proceedings in the trial division shall be protected pursuant to Rule 3.1(b).~~

(2) Appeals pursuant to N.C.G.S. § 7B-1001 shall be subject to the provisions of Rule 3.1.

(c) **Time for Taking Appeal**. In civil actions and special proceedings, a party must file and serve a notice of appeal:

(1) within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure; or

(2) within thirty days after service upon the party of a copy of the judgment if service was not made within that three-day period; provided that

(3) if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party, as provided in subdivisions (1) and (2) of this subsection (c).

In computing the time for filing a notice of appeal, the provision for additional time after service by mail in Rule 27(b) of these rules and Rule 6(e) of the Rules of Civil Procedure shall not apply.

If timely notice of appeal is filed and served by a party, any other party may file and serve a notice of appeal within ten days after the first notice of appeal was served on such party.

(d) **Content of Notice of Appeal**. The notice of appeal required to be filed and served by subsection (a) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(e) **Service of Notice of Appeal**. Service of copies of the notice of appeal may be made as provided in Rule 26.

* * *

~~Rule 3.1. Appeal in Qualifying Juvenile Cases—How and When Taken; Special Rules~~

~~(a) **Filing the Notice of Appeal**. Any party entitled by law to appeal from a trial court judgment or order rendered in a case involving termination of parental rights and issues of juvenile dependency or juvenile abuse and/or neglect, appealable pursuant to N.C.G.S. § 7B-1001, may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in the time and manner set out in Chapter 7B of the General Statutes of North Carolina. Trial counsel or an appellant not represented by counsel shall be responsible for filing and serving the notice of appeal in the time and manner required. If the appellant is represented by counsel, both the trial counsel and appellant must sign the notice of appeal, and the appellant shall cooperate with counsel throughout the appeal. All such appeals shall comply with the provisions set out in subsection (b) of this rule and, except as hereinafter provided by this rule, all other existing Rules of Appellate Procedure shall remain applicable.~~

~~(b) **Protecting the Identity of Juveniles**. For appeals filed pursuant to this rule and for extraordinary writs filed in cases to which this rule applies, the identity of involved persons under the age of eighteen at the time of the proceedings in the trial division (covered juveniles) shall be referenced only by the use of initials or pseudonyms in briefs, petitions, and all other filings, and shall be similarly redacted from all documents, exhibits, appendixes, or arguments submitted with such filings. If the parties desire to use pseudonyms, they shall stipulate in~~

~~the record on appeal to the pseudonym to be used for each covered juvenile. Courts of the appellate division are not bound by the stipulation, and case captions will utilize initials. Further, the addresses and social security numbers of all covered juveniles shall be excluded from all filings and documents, exhibits, appendixes, and arguments. In cases subject to this rule, the first document filed in the appellate courts and the record on appeal shall contain the notice required by Rule 9(a).~~

~~The substitution and redaction requirements of this rule shall not apply to settled records on appeal; supplements filed pursuant to Rule 11(c); objections, amendments, or proposed alternative records on appeal submitted pursuant to Rule 3.1(c)(2); and any verbatim transcripts submitted pursuant to Rule 9(c). Pleadings and filings not subject to substitution and redaction requirements shall include the following notice on the first page of the document immediately underneath the title and in uppercase typeface: FILED PURSUANT TO RULE [3(b)(1)] [3.1(b)] [4(e)]; SUBJECT TO PUBLIC INSPECTION ONLY BY ORDER OF A COURT OF THE APPELLATE DIVISION.~~

~~Filings in cases governed by this rule that are not subject to substitution and redaction requirements will not be published on the Court's electronic-filing site and will be available to the public only with the permission of a court of the appellate division. In addition, the juvenile's address and social security number shall be excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c).~~

~~(c) **Expediting Filings**. Appeals filed pursuant to these provisions shall adhere strictly to the expedited procedures set forth below:~~

~~(1) **Transcripts**. Within one business day after the notice of appeal has been filed, the clerk of superior court shall notify the court-reporting coordinator of the Administrative Office of the Courts of the date the notice of appeal was filed and the names of the parties to the appeal and their respective addresses or addresses of their counsel. Within two business days of receipt of such notification, the court-reporting coordinator shall assign a transcriptionist to the case.~~

~~When there is an order establishing the indigency of the appellant, the transcriptionist shall produce and deliver a transcript of the designated proceedings to the appellant and provide copies to the office of the clerk of the Court of Appeals and to the respective parties to the appeal at the addresses provided within thirty-five days from the date of assignment.~~

~~When there is no order establishing the indigency of the appellant, the appellant shall have ten days from the date that the transcriptionist is assigned to make written arrangements with the assigned transcriptionist for the production and delivery of the transcript of the designated proceedings. If such written arrangement is made, the transcriptionist shall produce and deliver a transcript of the designated proceedings to the appellant and provide copies to the office of the clerk of the Court of Appeals and to the respective parties to the appeal at the addresses provided within forty-five days from the date of assignment. The non-indigent appellant shall bear the cost of the appellant's copy of the transcript.~~

~~When there is no order establishing the indigency of the appellee, the appellee shall bear the cost of receiving a copy of the requested transcript.~~

~~Motions for extensions of time to produce and deliver transcripts are disfavored and will not be allowed by the Court of Appeals absent extraordinary circumstances.~~

(2) ~~**Record on Appeal**. Within ten days after receipt of the transcript, the appellant shall prepare and serve upon all other parties a proposed record on appeal constituted in accordance with Rule 9. Trial counsel for the appealing party shall have a duty to assist appellate counsel, if separate counsel is appointed or retained for the appeal, in preparing and serving a proposed record on appeal. Within ten days after service of the proposed record on appeal upon an appellee, the appellee may serve upon all other parties:~~

~~a. a notice of approval of the proposed record;~~

~~b. specific objections or amendments to the proposed record on appeal; or~~

~~c. a proposed alternative record on appeal.~~

~~If the parties agree to a settled record on appeal within twenty days after receipt of the transcript, the appellant shall file three legible copies of the settled record on appeal in the office of the clerk of the Court of Appeals within five business days from the date the record was settled. If all appellees fail within the times allowed them either to serve notices of approval or to serve objections, amendments, or proposed alternative records on appeal, the appellant's proposed record on appeal shall constitute~~

the settled record on appeal, and the appellant shall file three legible copies thereof in the office of the clerk of the Court of Appeals within five business days from the last date upon which any appellee could have served such objections, amendments, or proposed alternative record on appeal. If an appellee timely serves amendments, objections, or a proposed alternative record on appeal and the parties cannot agree to the settled record within thirty days after receipt of the transcript, each party shall file three legible copies of the following documents in the office of the clerk of the Court of Appeals within five business days after the last day upon which the record can be settled by agreement:

a. the appellant shall file his or her proposed record on appeal; and

b. an appellee shall file his or her objections, amendments, or proposed alternative record on appeal.

No counsel who has appeared as trial counsel for any party in the proceeding shall be permitted to withdraw, nor shall such counsel be otherwise relieved of any responsibilities imposed pursuant to this rule, until the record on appeal has been filed in the office of the clerk of the Court of Appeals as provided herein.

(3) **Briefs.** Within thirty days after the record on appeal has been filed with the Court of Appeals, the appellant shall file his or her brief in the office of the clerk of the Court of Appeals and serve copies upon all other parties of record. Within thirty days after the appellant's brief has been served on an appellee, the appellee shall file his or her brief in the office of the clerk of the Court of Appeals and serve copies upon all other parties of record. An appellant may file and serve a reply brief as provided in Rule 28(h). Motions for extensions of time to file briefs will not be allowed absent extraordinary circumstances.

(d) **No-Merit Briefs**. In an appeal taken pursuant to N.C.G.S. § 7B-1001, if, after a conscientious and thorough review of the record on appeal, appellate counsel concludes that the record contains no issue of merit on which to base an argument for relief and that the appeal would be frivolous, counsel may file a no-merit brief. In the brief, counsel shall identify any issues in the record on appeal that might arguably support the appeal and shall state why those issues lack merit or would not alter the ultimate result. Counsel shall provide the appellant with a

~~copy of the no-merit brief, the transcript, the record on appeal, and any Rule 11(c) supplement or exhibits that have been filed with the appellate court. Counsel shall also advise the appellant in writing that the appellant has the option of filing a pro se brief within thirty days of the date of the filing of the no-merit brief and shall attach to the brief evidence of compliance with this subsection.~~

~~(e) **Calendaring Priority**. Appeals filed pursuant to this rule will be given priority over other cases being considered by the Court of Appeals and will be calendared in accordance with a schedule promulgated by the Chief Judge. Unless otherwise ordered by the Court of Appeals, cases subject to the expedited procedures set forth in this rule shall be disposed of on the record and briefs and without oral argument.~~

Rule 3.1. Review in Cases Governed by Subchapter I of the Juvenile Code

(a) **Scope.** This rule applies in appeals filed under N.C.G.S. § 7B-1001 and in cases certified for review by the appellate courts in which the right to appeal under this statute has been lost.

(b) **Filing the Notice of Appeal.** Any party entitled to an appeal under N.C.G.S. § 7B-1001(a) and (a1) may take appeal by filing notice of appeal with the clerk of superior court and serving copies of the notice on all other parties in the time and manner set out in N.C.G.S. § 7B-1001(b) and (c).

(c) **Expediting the Delivery of the Transcript.** The clerk of superior court must complete the Expedited Juvenile Appeals Form within one business day after the notice of appeal is filed. The court reporting manager of the Administrative Office of the Courts must assign a transcriptionist for the appeal within five business days after the clerk completes the form.

The transcriptionist must produce the transcript of the entire proceedings at the State's expense if there is an order that establishes the indigency of the appellant. Otherwise, the appellant has ten days after the transcriptionist is assigned to contract for the transcription of the entire proceedings. In either situation, the transcriptionist must deliver electronically the transcript to each party to the appeal within forty days after receiving the assignment.

(d) **Expediting the Filing of the Record on Appeal**. The parties may settle the record on appeal by agreement at any time before the record on appeal is settled by any other procedure described in this subsection.

Absent agreement, the appellant must serve a proposed record on appeal on each party to the appeal within fifteen days after delivery of the transcript. Within ten days after having been served with the proposed record on appeal, the appellee may serve on each party to the appeal:

(1) a notice of approval of the proposed record on appeal;

(2) specific objections or amendments to the proposed record on appeal; or

(3) a proposed alternative record on appeal.

If the appellee serves a notice of approval, then this notice settles the record on appeal. If the appellee serves specific objections or amendments, or a proposed alternative record on appeal, then the provisions of Rule 11(c) apply. If the appellee fails to serve a notice of approval, specific objections or amendments, or a proposed alternative record on appeal, then the expiration of the ten-day period to serve one of these documents settles the record on appeal.

The appellant must file the record on appeal within five business days after the record is settled.

(e) **No-Merit Briefs**. When counsel for the appellant concludes that there is no issue of merit on which to base an argument for relief, counsel may file a no-merit brief. The appellant then may file a pro se brief within thirty days after the date of the filing of counsel's no-merit brief.

In the no-merit brief, counsel must identify any issues in the record on appeal that arguably support the appeal and must state why those issues lack merit or would not alter the ultimate result. Counsel must provide the appellant with a copy of the no-merit brief, the transcript, the printed record on appeal, and any supplements or exhibits that have been filed with the appellate court. Counsel must inform the appellant in writing that the appellant may file a pro se brief and that the pro se brief is due within thirty days after the date of the filing of the no-merit brief. Counsel must attach evidence of this communication to the no-merit brief.

(f) **Word-Count Limitations Applicable to Briefs**. Briefs must comply with Rule 28(j).

(g) **Motions for Extensions of Time**. Motions for extensions of time to produce and deliver the transcript, to file the record on appeal, and to file briefs are disfavored and will be allowed by the appellate courts only in extraordinary circumstances.

(h) **Duty of Trial Counsel**. Trial counsel for the appellant has a duty to assist appellate counsel with the preparation and service of appellant's proposed record on appeal.

(i) **Electronic Filing Required**. Unless granted an exception for good cause, counsel must file all documents electronically.

* * *

Rule 4. Appeal in Criminal Cases—How and When Taken

(a) **Manner and Time**. Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a criminal action may take appeal by:

(1) giving oral notice of appeal at trial, or

(2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment or order or within fourteen days after a ruling on a motion for appropriate relief made during the fourteen-day period following entry of the judgment or order. Appeals from district court to superior court are governed by N.C.G.S. §§ 15A-1431 and -1432.

(b) **Content of Notice of Appeal**. The notice of appeal required to be filed and served by subdivision (a)(2) of this rule shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(c) **Service of Notice of Appeal.** Service of copies of the notice of appeal may be made as provided in Rule 26.

(d) **To Which Appellate Court Addressed.** An appeal of right from a judgment of a superior court by any person who has been convicted of murder in the first degree and sentenced to death shall be filed in the Supreme Court. In all other criminal cases, appeal shall be filed in the Court of Appeals.

~~(e) Protecting the Identity of Juvenile Victims of Sexual Offenses. For appeals filed pursuant to this rule and for extraordinary writs filed in cases to which this rule applies, the identities of all victims of sexual offenses the trial court record shows were under the age of eighteen when the trial division proceedings occurred, including documents or other materials concerning delinquency proceedings in district court, shall be protected pursuant to Rule 3.1(b).~~

* * *

Rule 9. The Record on Appeal

(a) **Function; Notice in Cases Involving Juveniles; Composition of Record**. In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal, the verbatim transcript of proceedings, if one is designated, and any other items filed pursuant to this Rule 9. Parties may cite any of these items in their briefs and arguments before the appellate courts.

~~All filings involving juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e) shall include the following notice in uppercase typeface:~~

~~FILED PURSUANT TO RULE [3(b)(1)] [3.1(b)] [4(e)]; SUBJECT TO PUBLIC INSPECTION ONLY BY ORDER OF A COURT OF THE APPELLATE DIVISION.~~

(1) **Composition of the Record in Civil Actions and Special Proceedings**. The record on appeal in civil actions and special proceedings shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons with return, or of other papers showing jurisdiction of the trial court over persons or property, or a statement showing same;

d. copies of the pleadings, and of any pretrial order on which the case or any part thereof was tried;

e. so much of the litigation, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given; and identification of the omitted instruction by setting out the requested instruction or its substance in the record on appeal immediately following the instruction given;

g. copies of the issues submitted and the verdict, or of the trial court's findings of fact and conclusions of law;

h. a copy of the judgment, order, or other determination from which appeal is taken;

i. a copy of the notice of appeal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

j. copies of all other papers filed and statements of all other proceedings had in the trial court which are necessary to an understanding of all issues presented on appeal unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2);

k. proposed issues on appeal set out in the manner provided in Rule 10;

l. a statement, where appropriate, that the record of proceedings was made with an electronic recording device;

m. a statement, where appropriate, that a supplement compiled pursuant to Rule 11(c) is filed with the record on appeal; and

n. any order (issued prior to the filing of the record on appeal) ruling upon a motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

(2) **Composition of the Record in Appeals from Superior Court Review of Administrative Boards and Agencies**. The record on appeal in cases of appeal from judgments of the superior court rendered upon review of the proceedings of administrative boards or agencies, other than those specified in Rule 18(a), shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. a copy of the summons, notice of hearing, or other papers showing jurisdiction of the board or agency over persons or property sought to be bound in the proceeding, or a statement showing same;

d. copies of all petitions and other pleadings filed in the superior court;

e. copies of all items properly before the superior court as are necessary for an understanding of all issues presented on appeal;

f. so much of the litigation in the superior court, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

g. a copy of any findings of fact and conclusions of law and of the judgment, order, or other determination of the superior court from which appeal is taken;

h. a copy of the notice of appeal from the superior court, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is filed pursuant to Rule 9(c)(2) and (3);

i. proposed issues on appeal relating to the actions of the superior court, set out in the manner provided in Rule 10; and

j. any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

(3) **Composition of the Record in Criminal Actions**. The record on appeal in criminal actions shall contain:

a. an index of the contents of the record, which shall appear as the first page thereof;

b. a statement identifying the judge from whose judgment or order appeal is taken, the session at which the judgment or order was rendered, or if rendered out of session, the time and place of rendition, and the party appealing;

c. copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court;

d. copies of docket entries or a statement showing all arraignments and pleas;

e. so much of the litigation, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the entire verbatim transcript of the proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating portions of the transcript to be so filed;

f. where an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given; and identification of the omitted instruction by setting out the requested instruction or its substance in the record on appeal immediately following the instruction given;

g. copies of the verdict and of the judgment, order, or other determination from which appeal is taken; and in capitally-tried cases, a copy of the jury verdict sheet for sentencing, showing the aggravating and mitigating circumstances submitted and found or not found;

h. a copy of the notice of appeal or an appropriate entry or statement showing appeal taken orally; of all orders establishing time limits relative to the perfecting of the appeal; of any order finding defendant indigent for the purposes of the appeal and assigning counsel; and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings, if one is to be filed pursuant to Rule 9(c)(2);

i. copies of all other papers filed and statements of all other proceedings had in the trial courts which are necessary

for an understanding of all issues presented on appeal, unless they appear in the verbatim transcript of proceedings which is being filed with the record pursuant to Rule 9(c)(2);

j. proposed issues on appeal set out in the manner provided in Rule 10;

k. a statement, where appropriate, that the record of proceedings was made with an electronic recording device;

l. a statement, where appropriate, that a supplement compiled pursuant to Rule 11(c) is filed with the record on appeal; and

m. any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

~~(4) **Exclusion of Social Security Numbers from Record on Appeal**. Social security numbers shall be deleted or redacted from any document before including the document in the record on appeal~~.

(b) **Form of Record; Amendments**. The record on appeal shall be in the format prescribed by Rule 26(g) and the appendixes to these rules.

(1) **Order of Arrangement**. The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(2) **Inclusion of Unnecessary Matter; Penalty**. It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the issues presented on appeal~~, such as social security numbers referred to in Rule 9(a)(4)~~. The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(3) **Filing Dates and Signatures on Papers**. Every pleading, motion, affidavit, or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who

verified it. Every judgment, order, or other determination shall show the date on which it was entered. The typed or printed name of the person signing a paper shall be entered immediately below the signature.

(4) **Pagination; Counsel Identified**. The pages of the printed record on appeal shall be numbered consecutively, be referred to as "record pages," and be cited as "(R p ___)." Pages of the Rule 11(c) or Rule 18(d)(3) supplement to the record on appeal shall be numbered consecutively with the pages of the record on appeal, the first page of the record supplement to bear the next consecutive number following the number of the last page of the printed record on appeal. These pages shall be referred to as "record supplement pages" and be cited as "(R S p ___)." Pages of the verbatim transcript of proceedings filed under Rule 9(c)(2) shall be referred to as "transcript pages" and be cited as "(T p ___)." At the end of the record on appeal shall appear the names, office addresses, telephone numbers, State Bar numbers, and e-mail addresses of counsel of record for all parties to the appeal.

(5) **Additions and Amendments to Record on Appeal**.

a. **Additional Materials in the Record on Appeal**. If the record on appeal as settled is insufficient to respond to the issues presented in an appellant's brief or the issues presented in an appellee's brief pursuant to Rule 10(c), the responding party may supplement the record on appeal with any items that could otherwise have been included pursuant to this Rule 9. The responding party shall serve a copy of those items on opposing counsel and shall file ~~three copies of~~ the items in a volume captioned "Rule 9(b)(5) Supplement to the Printed Record on Appeal." The supplement shall be filed no later than the responsive brief or within the time allowed for filing such a brief if none is filed.

b. **Motions Pertaining to Additions to the Record**. On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party, the appellate court may order any portion of the record on appeal or transcript amended to correct error shown

as to form or content. Prior to the filing of the record on appeal in the appellate court, such motions may be filed by any party in the trial court.

(c) **Presentation of Testimonial Evidence and Other Proceedings**. Testimonial evidence, voir dire, statements and events at evidentiary and non-evidentiary hearings, and other trial proceedings necessary to be presented for review by the appellate court may be included either in the record on appeal in the form specified in Rule 9(c)(1) or by designating the verbatim transcript of proceedings of the trial tribunal as provided in Rule 9(c)(2) and (3). When an issue presented on appeal relates to the giving or omission of instructions to the jury, a transcript of the entire charge given shall be included in the record on appeal. ~~Verbatim transcripts or narration utilized in a case subject to Rules 3(b)(1), 3.1(b), or 4(e) initiated in the trial division under the provisions of Subchapter I of Chapter 7B of the General Statutes shall be produced and delivered to the office of the clerk of the appellate court to which the appeal has been taken in the manner specified by said rules.~~

(1) **When Testimonial Evidence, Voir Dire, Statements and Events at Evidentiary and Non-Evidentiary Hearings, and Other Trial Proceedings Narrated—How Set Out in Record**. When an issue is presented on appeal with respect to the admission or exclusion of evidence, the question and answer form shall be utilized in setting out the pertinent questions and answers. Other testimonial evidence, voir dire, statements and events at evidentiary and non-evidentiary hearings, and other trial proceedings required by Rule 9(a) to be included in the record on appeal shall be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form. Parties shall use that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants. Parties may object to particular narration on the basis that it does not accurately reflect the true sense of testimony received, statements made, or events that occurred; or to particular questions and answers on the basis that the testimony might with no substantial loss in accuracy be summarized in narrative form at substantially less expense. When a judge or referee is required to settle the record on appeal under Rule 11(c) and there is dispute as to the form, the judge or referee shall settle the form in the course of settling the record on appeal.

(2) **Designation that Verbatim Transcript of Proceedings in Trial Tribunal Will Be Used**. Appellant may designate in the record on appeal that the testimonial evidence will be presented in the verbatim transcript of the evidence of the trial tribunal in lieu of narrating the evidence and other trial proceedings as permitted by Rule 9(c)(1). When a verbatim transcript of those proceedings has been made, appellant may also designate that the verbatim transcript will be used to present voir dire, statements and events at evidentiary and non-evidentiary hearings, or other trial proceedings when those proceedings are the basis for one or more issues presented on appeal. Any such designation shall refer to the page numbers of the transcript being designated. Appellant need not designate all of the verbatim transcript that has been made, provided that when the verbatim transcript is designated to show the testimonial evidence, so much of the testimonial evidence must be designated as is necessary for an understanding of all issues presented on appeal. When appellant has narrated the evidence and other trial proceedings under Rule 9(c)(1), the appellee may designate the verbatim transcript as a proposed alternative record on appeal.

(3) **Verbatim Transcript of Proceedings—Settlement, Filing, Copies, Briefs**. Whenever a verbatim transcript is designated to be used pursuant to Rule 9(c)(2):

a. it shall be settled, together with the record on appeal, according to the procedures established by Rule 11;

b. appellant shall cause the settled record on appeal and transcript to be filed pursuant to Rule 7 with the clerk of the appellate court in which the appeal has been docketed;

c. in criminal appeals, upon settlement of the record on appeal, the district attorney shall notify the Attorney General of North Carolina that the record on appeal and transcript have been settled; and

d. the briefs of the parties must comport with the requirements of Rule 28 regarding complete statement of the facts of the case and regarding appendixes to the briefs.

(4) **Presentation of Discovery Materials**. Discovery materials offered into evidence at trial shall be brought forward, if relevant, as other evidence. In all instances in which discovery materials are considered by the trial tribunal, other than as

evidence offered at trial, the following procedures for presenting those materials to the appellate court shall be used: Depositions shall be treated as testimonial evidence and shall be presented by narration or by transcript of the deposition in the manner prescribed by this Rule 9(c). Other discovery materials, including interrogatories and answers, requests for admission, responses to requests, motions to produce, and the like, pertinent to issues presented on appeal, may be set out in the record on appeal or may be sent up as documentary exhibits in accordance with Rule 9(d)(2).

(5) **Electronic Recordings**. When a narrative or transcript has been produced from an electronic recording, the parties shall not file a copy of the electronic recording with the appellate division except at the direction or with the approval of the appellate court.

(d) **Exhibits**. Any exhibit filed, served, submitted for consideration, admitted, or made the subject of an offer of proof may be made a part of the record on appeal if a party believes that its inclusion is necessary to understand an issue on appeal.

(1) **Documentary Exhibits Included in the Printed Record on Appeal**. A party may include a documentary exhibit in the printed record on appeal if it is of a size and nature to make inclusion possible without impairing the legibility or original significance of the exhibit.

(2) **Exhibits Not Included in the Printed Record on Appeal**. A documentary exhibit that is not included in the printed record on appeal can be made a part of the record on appeal by filing ~~three copies~~ a copy of the exhibit with the clerk of the appellate court. The ~~three copies~~ copy shall be paginated. If multiple exhibits are filed, an index must be included in the filing. ~~Copies~~ A copy that ~~impair~~ impairs the legibility or original significance of the exhibit may not be filed. An exhibit that is a tangible object or is an exhibit that cannot be copied without impairing its legibility or original significance can be made a part of the record on appeal by having it delivered by the clerk of superior court to the clerk of the appellate court. When a party files a written request with the clerk of superior court that the exhibit be delivered to the appellate court, the clerk must promptly have the exhibit delivered to the appellate court in a manner that ensures its security and availability for use in further trial proceedings. The party requesting

delivery of the exhibit to the appellate court shall not be required to move in the appellate court for delivery of the exhibit.

(3) ~~**Exclusion of Social Security Numbers from Exhibits**. Social security numbers must be deleted or redacted from copies of exhibits.~~[Reserved]

(4) **Removal of Exhibits from Appellate Court**. All models, diagrams, and exhibits of material placed in the custody of the clerk of the appellate court must be taken away by the parties within ninety days after the mandate of the Court has issued or the case has otherwise been closed by withdrawal, dismissal, or other order of the Court, unless notified otherwise by the clerk. When this is not done, the clerk shall notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the clerk shall destroy them, or make such other disposition of them as to the clerk may seem best.

* * *

Rule 11. Settling the Record on Appeal

(a) **By Agreement**. ~~This rule applies to all cases except those subject to expedited schedules in Rule 3.1.~~

Within thirty-five days after the court reporter or transcriptionist certifies delivery of the transcript, if such was ordered (seventy days in capitally-tried cases), or thirty-five days after appellant files notice of appeal, whichever is later, the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with Rule 9 as the record on appeal.

(b) **By Appellee's Approval of Appellant's Proposed Record on Appeal**. If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9. Within thirty days (thirty-five days in capitally-tried cases) after service of the proposed record on appeal upon an appellee, that appellee may serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(c) **By Agreement, by Operation of Rule, or by Court Order After Appellee's Objection or Amendment**. Within thirty days (thirty-five days in capitally-tried cases) after service upon appellee of appellant's proposed record on appeal, that appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate. An appellant who objects to an appellee's response to the proposed record on appeal shall make the same specification in its request for judicial settlement. The formatting of the proposed record on appeal and the order in which items appear in it are the responsibility of the appellant.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the record on appeal shall consist of each item that is either among those items required by Rule 9(a) to be in the record on appeal or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal. If a party requests that an item be included in the record on appeal but not all other parties to the appeal agree to its inclusion, then that item shall not be included in the printed record on appeal, but shall be filed by the appellant with the printed record on appeal in ~~three copies of~~ a volume captioned "Rule 11(c) Supplement to the Printed Record on Appeal," along with any verbatim transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to these rules; provided that any item not filed, served, submitted for consideration, or admitted, or for which no offer of proof was tendered, shall not be included. Subject to the additional requirements of Rule 28(d), items in the Rule 11(c) supplement may be cited and used by the parties as would items in the printed record on appeal.

If a party does not agree to the wording of a statement or narration required or permitted by these rules, there shall be no judicial settlement to resolve the dispute unless the objection is based on a contention that the statement or narration concerns an item that was not filed, served, submitted for consideration, admitted, or tendered in an offer of proof, or that a statement or narration is factually inaccurate. Instead, the objecting party is permitted to have inserted in the settled record on appeal a concise counter-statement. Parties are strongly encouraged to reach agreement on the wording of statements in records on appeal. Judicial settlement is not appropriate for disputes that concern only the

formatting of a record on appeal or the order in which items appear in a record on appeal.

The Rule 11(c) supplement to the printed record on appeal shall contain an index of the contents of the supplement, which shall appear as the first page thereof. The Rule 11(c) supplement shall be paginated as required by Rule 9(b)(4) and the contents should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal. If a party does not agree to the inclusion or specification of an exhibit or transcript in the printed record, the printed record shall include a statement that such items are separately filed along with the supplement.

If any party to the appeal contends that materials proposed for inclusion in the record or for filing therewith pursuant to these rules were not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that a statement or narration permitted by these rules is not factually accurate, then that party, within ten days after expiration of the time within which the appellee last served with the appellant's proposed record on appeal might have served amendments, objections, or a proposed alternative record on appeal, may in writing request that the judge from whose judgment, order, or other determination appeal was taken settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court and served upon all other parties. Each party shall promptly provide to the judge a reference copy of the record items, amendments, or objections served by that party in the case.

The functions of the judge in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, to settle narrations of proceedings under Rule 9(c)(1), and to determine whether the record accurately reflects material filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by either party is relevant to the issues on appeal, non-duplicative, or otherwise suited for inclusion in the record on appeal.

The judge shall send written notice to counsel for all parties setting a place and a time for a hearing to settle the record on appeal. The hearing shall be held not later than fifteen days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than twenty days after service of the request for hearing upon the judge. If requested, the judge shall return the record items submitted for reference during the judicial-settlement process with the order settling the record on appeal.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is timely sought, the record is deemed settled as of the expiration of the ten-day period within which any party could have requested judicial settlement of the record on appeal under this Rule 11(c).

Provided that, nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

(d) **Multiple Appellants; Single Record on Appeal**. When there are multiple appellants (two or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal. The proposed issues on appeal of the several appellants shall be set out separately in the single record on appeal and attributed to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the judge from whose judgment, order, or other determination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs.

(e) **Extensions of Time**. The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

* * *

Rule 12. Filing the Record; Docketing the Appeal; Copies of the Record

(a) **Time for Filing Record on Appeal**. Within fifteen days after the record on appeal has been settled by any of the procedures provided in Rule 11 or Rule 18, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.

(b) **Docketing the Appeal**. At the time of filing the record on appeal, the appellant shall pay to the clerk the docket fee fixed pursuant to N.C.G.S. § 7A-20(b), and the clerk shall thereupon enter the appeal upon the docket of the appellate court. If an appellant is authorized to appeal *in forma pauperis* as provided in N.C.G.S. §§ 1-288 or 7A-450 et seq., the clerk shall docket the appeal upon timely filing of the record on appeal. An appeal is docketed under the title given to the action in the trial division, with the appellant identified as such. The clerk shall forthwith give notice to all parties of the date on which the appeal was docketed in the appellate court.

(c) **Copies of Record on Appeal**. The appellant shall file one copy of the printed record on appeal, ~~three copies~~ one copy of each exhibit designated pursuant to Rule 9(d), ~~three copies~~ one copy of any supplement to the record on appeal submitted pursuant to Rule 11(c) or Rule 18(d)(3), one copy of any paper deposition or administrative hearing transcript, and shall cause any court proceeding transcript to be filed electronically pursuant to Rule 7. The clerk will reproduce and distribute copies of the printed record on appeal as directed by the court, billing the parties pursuant to these rules.

* * *

Rule 13. Filing and Service of Briefs

(a) **Time for Filing and Service of Briefs**.

(1) **Cases Other Than Death Penalty Cases**. Within thirty days after the ~~clerk of~~ record on appeal has been filed with the appellate court ~~has mailed the printed record to the parties~~, the appellant shall file a brief in the office of the clerk of the appellate court and serve copies thereof upon all other parties separately represented. ~~The mailing of the printed record is not service for purposes of Rule 27(b); therefore, the provision of that rule allowing an additional three days after service by mail does not extend the period for the filing of an appellant's brief.~~ Within thirty days after appellant's brief has been served on an appellee, the appellee shall similarly file and serve copies of a brief. An appellant may file and serve a reply brief as provided in Rule 28(h).

(2) **Death Penalty Cases**. Within sixty days after the ~~clerk of~~ record on appeal has been filed with the Supreme Court ~~has mailed the printed record to the parties~~, the appellant in a criminal appeal which includes a sentence of death shall file a brief in the office of the clerk and serve copies thereof upon all other parties separately represented. ~~The mailing of the printed record is not service for purposes of Rule 27(b); therefore, the provision of that rule allowing an additional three days after service by mail does not extend the period for the filing of an appellant's brief.~~ Within sixty days after appellant's brief has been served, the appellee shall similarly file and serve copies of a brief. An appellant may file and serve a reply brief as provided in Rule 28(h).

(b) **Copies Reproduced by Clerk**. A party need file but a single copy of a brief. At the time of filing the party may be required to pay to

the clerk of the appellate court a deposit fixed by the clerk to cover the cost of reproducing copies of the brief. The clerk will reproduce and distribute copies of briefs as directed by the court.

(c) **Consequence of Failure to File and Serve Briefs**. If an appellant fails to file and serve a brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. If an appellee fails to file and serve its brief within the time allowed, the appellee may not be heard in oral argument except by permission of the court.

* * *

Rule 18. Taking Appeal; Record on Appeal—Composition and Settlement

(a) **General**. Appeals of right from administrative agencies, boards, commissions, or the Office of Administrative Hearings (referred to in these rules as "administrative tribunals") directly to the appellate division under N.C.G.S. § 7A-29 shall be in accordance with the procedures provided in these rules for appeals of right from the courts of the trial divisions, except as provided in this Article.

(b) **Time and Method for Taking Appeals**.

(1) The times and methods for taking appeals from an administrative tribunal shall be as provided in this Rule 18 unless the General Statutes provide otherwise, in which case the General Statutes shall control.

(2) Any party to the proceeding may appeal from a final decision of an administrative tribunal to the appropriate court of the appellate division for alleged errors of law by filing and serving a notice of appeal within thirty days after receipt of a copy of the final decision of the administrative tribunal. The final decision of the administrative tribunal is to be sent to the parties by Registered or Certified Mail. The notice of appeal shall specify the party or parties taking the appeal; shall designate the final administrative tribunal decision from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

(3) If a transcript of fact-finding proceedings is not made as part of the process leading up to the final administrative tribunal decision, the appealing party may contract with a court reporter for production of such parts of the

proceedings not already on file as it deems necessary, pursuant to the procedures prescribed in Rule 7.

(c) **Composition of Record on Appeal**. The record on appeal in appeals from any administrative tribunal shall contain:

(1) an index of the contents of the record on appeal, which shall appear as the first page thereof;

(2) a statement identifying the administrative tribunal from whose judgment, order, or opinion appeal is taken; the session at which the judgment, order, or opinion was rendered, or if rendered out of session, the time and place of rendition; and the party appealing;

(3) a copy of the summons with return, notice of hearing, or other papers showing jurisdiction of the administrative tribunal over persons or property sought to be bound in the proceeding, or a statement showing same;

(4) copies of all other notices, pleadings, petitions, or other papers required by law or rule to be filed with the administrative tribunal to present and define the matter for determination, including a Form 44 for all workers' compensation cases which originate from the Industrial Commission;

(5) a copy of any findings of fact and conclusions of law and a copy of the order, award, decision, or other determination of the administrative tribunal from which appeal was taken;

(6) so much of the litigation before the administrative tribunal or before any division, commissioner, deputy commissioner, or hearing officer of the administrative tribunal, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2) and (3);

(7) when the administrative tribunal has reviewed a record of proceedings before a division or an individual commissioner, deputy commissioner, or hearing officer of the administrative tribunal, copies of all items included in the record filed with the administrative tribunal which are necessary for an understanding of all issues presented on appeal;

(8) copies of all other papers filed and statements of all other proceedings had before the administrative tribunal or any

of its individual commissioners, deputies, or divisions which are necessary to an understanding of all issues presented on appeal, unless they appear in the verbatim transcript of proceedings being filed pursuant to Rule 9(c)(2) and (3);

(9) a copy of the notice of appeal from the administrative tribunal, of all orders establishing time limits relative to the perfecting of the appeal, of any order finding a party to the appeal to be a civil pauper, and of any agreement, notice of approval, or order settling the record on appeal and settling the verbatim transcript of proceedings if one is filed pursuant to Rule 9(c)(2) and (3);

(10) proposed issues on appeal relating to the actions of the administrative tribunal, set out as provided in Rule 10;

(11) a statement, when appropriate, that the record of proceedings was made with an electronic recording device;

(12) a statement, when appropriate, that a supplement compiled pursuant to Rule 18(d)(3) is filed with the record on appeal; and

(13) any order (issued prior to the filing of the record on appeal) ruling upon any motion by an attorney who is not licensed to practice law in North Carolina to be admitted pursuant to N.C.G.S. § 84-4.1 to appear in the appeal. In the event such a motion is filed prior to the filing of the record but has not yet been ruled upon when the record is filed, the record shall include a statement that such a motion is pending and the date that motion was filed.

(d) **Settling the Record on Appeal**. The record on appeal may be settled by any of the following methods:

(1) **By Agreement**. Within thirty-five days after filing of the notice of appeal, or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with this Rule 18 as the record on appeal.

(2) **By Appellee's Approval of Appellant's Proposed Record on Appeal**. If the record on appeal is not settled by agreement under Rule 18(d)(1), the appellant shall, within thirty-five days after filing of the notice of appeal, or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), serve upon all other parties a

proposed record on appeal constituted in accordance with the provisions of Rule 18(c). Within thirty days after service of the proposed record on appeal upon an appellee, that appellee may serve upon all other parties a notice of approval of the proposed record on appeal or objections, amendments, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate. An appellant who objects to an appellee's response to the proposed record on appeal shall make the same specification in its request for judicial settlement. The formatting of the proposed record on appeal and the order in which items appear in it is the responsibility of the appellant. Judicial settlement is not appropriate for disputes concerning only the formatting or the order in which items appear in the settled record on appeal. If all appellees within the times allowed them either serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(3) **By Agreement, by Operation of Rule, or by Court Order After Appellee's Objection or Amendment**. If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the record on appeal shall consist of each item that is either among those items required by Rule 18(c) to be in the record on appeal or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal, in the absence of contentions that the item was not filed, served, or offered into evidence. If a party requests that an item be included in the record on appeal but not all parties to the appeal agree to its inclusion, then that item shall not be included in the printed record on appeal, but shall be filed by the appellant with the record on appeal in ~~three copies of~~ a volume captioned "Rule 18(d)(3) Supplement to the Printed Record on Appeal," along with any verbatim transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to these rules;

provided that any item not filed, served, submitted for consideration, admitted, or for which no offer of proof was tendered shall not be included. Subject to the additional requirements of Rule 28(d), items in the Rule 18(d)(3) supplement may be cited and used by the parties as would items in the printed record on appeal.

If a party does not agree to the wording of a statement or narration required or permitted by these rules, there shall be no judicial settlement to resolve the dispute unless the objection is based on a contention that the statement or narration concerns an item that was not filed, served, submitted for consideration, admitted, or tendered in an offer of proof, or that a statement or narration is factually inaccurate. Instead, the objecting party is permitted to have inserted in the settled record on appeal a concise counterstatement. Parties are strongly encouraged to reach agreement on the wording of statements in records on appeal.

The Rule 18(d)(3) supplement to the printed record on appeal shall contain an index of the contents of the supplement, which shall appear as the first page thereof. The Rule 18(d)(3) supplement shall be paginated consecutively with the pages of the record on appeal, the first page of the supplement to bear the next consecutive number following the number of the last page of the record on appeal. These pages shall be referred to as "record supplement pages," and shall be cited as "(R S p ___)." The contents of the supplement should be arranged, so far as practicable, in the order in which they occurred or were filed in the administrative tribunal. If a party does not agree to the inclusion or specification of an exhibit or transcript in the printed record, the printed record shall include a statement that such items are separately filed along with the supplement.

If any party to the appeal contends that materials proposed for inclusion in the record or for filing therewith pursuant to these rules were not filed, served, submitted for consideration, admitted, or offered into evidence, or that a statement or narration permitted by these rules is not factually accurate, then that party, within ten days after expiration of the time within which the appellee last served with the appellant's proposed record on appeal might have served amendments, objections, or a proposed alternative record on appeal, may in writing request

that the administrative tribunal convene a conference to settle the record on appeal. A copy of that request, endorsed with a certificate showing service on the administrative tribunal, shall be served upon all other parties. Each party shall promptly provide to the administrative tribunal a reference copy of the record items, amendments, or objections served by that party in the case.

The functions of the administrative tribunal in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, to settle narrations of proceedings under Rule 18(c)(6), and to determine whether the record accurately reflects material filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by either party is relevant to the issues on appeal, non-duplicative, or otherwise suited for inclusion in the record on appeal.

Upon receipt of a request for settlement of the record on appeal, the administrative tribunal shall send written notice to counsel for all parties setting a place and time for a conference to settle the record on appeal. The conference shall be held not later than fifteen days after service of the request upon the administrative tribunal. The administrative tribunal or a delegate appointed in writing by the administrative tribunal shall settle the record on appeal by order entered not more than twenty days after service of the request for settlement upon the administrative tribunal. If requested, the settling official shall return the record items submitted for reference during the settlement process with the order settling the record on appeal.

When the administrative tribunal is a party to the appeal, the administrative tribunal shall forthwith request the Chief Judge of the Court of Appeals or the Chief Justice of the Supreme Court, as appropriate, to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of these rules and the appointing order.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is sought, the record is deemed settled as of the expiration of the ten-day period within

which any party could have requested judicial settlement of the record on appeal under this Rule 18(d)(3).

Nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by administrative tribunal decision.

(e) **Further Procedures and Additional Materials in the Record on Appeal**. Further procedures for perfecting and prosecuting the appeal shall be as provided by these rules for appeals from the courts of the trial divisions.

(f) **Extensions of Time**. The times provided in this rule for taking any action may be extended in accordance with the provisions of Rule 27(c).

* * *

Rule 26. Filing and Service

(a) **Filing**. Papers required or permitted by these rules to be filed in the trial or appellate divisions shall be filed with the clerk of the appropriate court. Filing may be accomplished by mail or by electronic means as set forth in this rule.

(1) **Filing by Mail.** Filing may be accomplished by mail addressed to the clerk but is not timely unless the papers are received by the clerk within the time fixed for filing, except that motions, responses to petitions, the record on appeal, and briefs shall be deemed filed on the date of mailing, as evidenced by the proof of service.

(2) **Filing by Electronic Means**. Filing in the appellate courts may be accomplished by electronic means by use of the electronic-filing site at https://www.ncappellatecourts.org. Many documents may be filed electronically through the use of this site. The site identifies those types of documents that may not be filed electronically. A document filed by use of the electronic-filing site is deemed filed as of the time that the document is received electronically. Responses and motions may be filed by facsimile machines, if an oral request for permission to do so has first been tendered to and approved by the clerk of the appropriate appellate court. In all cases in which a document has been filed by facsimile machine pursuant to this rule, counsel must forward the following items by first class mail, contemporaneously with the transmission:

the original signed document, the electronic-transmission fee, and the applicable filing fee for the document, if any. The party filing a document by electronic means shall be responsible for all costs of the transmission, and neither they nor the electronic transmission fee may be recovered as costs of the appeal. When a document is filed to the electronic-filing site at https://www.ncappellatecourts.org, counsel may either have his or her account drafted electronically by following the procedures described at the electronic-filing site, or counsel must forward the applicable filing fee for the document by first class mail, contemporaneously with the transmission.

(b) **Service of All Papers Required**. Copies of all papers filed by any party and not required by these rules to be served by the clerk shall, at or before the time of filing, be served on all other parties to the appeal.

(c) **Manner of Service**. Service may be made in the manner provided for service and return of process in Rule 4 of the Rules of Civil Procedure and may be so made upon a party or upon its attorney of record. Service may also be made upon a party or its attorney of record by delivering a copy to either or by mailing a copy to the recipient's last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper is filed. Delivery of a copy within this rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the paper enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service, or, for those having access to such services, upon deposit with the State Courier Service or Inter-Office Mail. When a document is filed electronically to the electronic-filing site, service also may be accomplished electronically by use of the other counsel's correct and current e-mail address(es), or service may be accomplished in the manner described previously in this subsection.

(d) **Proof of Service**. Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. Proof of service shall appear on or be affixed to the papers filed.

(e) **Joint Appellants and Appellees**. Any paper required by these rules to be served on a party is properly served upon all parties joined in the appeal by service upon any one of them.

(f) **Numerous Parties to Appeal Proceeding Separately**. When there are unusually large numbers of appellees or appellants proceeding separately, the trial tribunal, upon motion of any party or on its own initiative, may order that any papers required by these rules to be served by a party on all other parties need be served only upon parties designated in the order, and that the filing of such a paper and service thereof upon the parties designated constitutes due notice of it to all other parties. A copy of every such order shall be served upon all parties to the action in such manner and form as the court directs.

(g) **Documents Filed with Appellate Courts**.

(1) **Form of Papers**. Papers presented to either appellate court for filing shall be letter size (8½ x 11") with the exception of wills and exhibits. All printed matter must appear in font no smaller than 12-point and no larger than 14-point, using a proportionally spaced font with serifs. Examples of proportionally spaced fonts with serifs include, but are not limited to, Constantia and Century typeface as described in Appendix B to these rules. Unglazed white paper of 16- to 20-pound substance should be utilized so as to produce a clear, black image, leaving a margin of approximately one inch on each side. The body of text shall be presented with double spacing between each line of text. Lines of text shall be no wider than 6½ inches. The format of all papers presented for filing shall follow the additional instructions found in the appendixes to these rules. The format of briefs shall follow the additional instructions found in Rule 28(j).

(2) **Index Required**. All documents presented to either appellate court other than records on appeal, which in this respect are governed by Rule 9, shall, unless they are less than ten pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and textbooks cited, with references to the pages where they are cited.

(3) **Closing**. The body of the document shall at its close bear the printed name, post office address, telephone number, State Bar number and e-mail address of counsel of record, and in addition, at the appropriate place, the manuscript signature of counsel of record. If the document has been filed electronically by use of the electronic-filing site at https://www.ncappellatecourts.org, the manuscript signature of counsel of record is not required.

~~(4) **Protecting the Identity of Certain Juveniles**. Parties shall protect the identity of juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e) pursuant to said rules.~~

* * *

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, non-argumentative 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**. 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 30. Oral Argument and Unpublished Opinions

(a) **Order and Content of Argument**.

(1) The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Oral arguments should complement the written briefs, and counsel will therefore not be permitted to read at length from briefs, records, and authorities.

(2) ~~In cases involving juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e), counsel shall refrain from using a juvenile's name in oral argument and shall refer to the juvenile pursuant to said rules.~~ In matters listed in Rule 42(b), counsel must use initials or a pseudonym in oral argument instead of the minor's name.

(b) **Time Allowed for Argument**.

(1) **In General**. Ordinarily a total of thirty minutes will be allowed all appellants and a total of thirty minutes will be allowed all appellees for oral argument. Upon written or oral application of any party, the court for good cause shown may extend the times limited for argument. Among other causes, the existence of adverse interests between multiple appellants or between multiple appellees may be suggested as good cause for such an extension. The court of its own initiative may direct argument on specific points outside the times limited.

Counsel is not obliged to use all the time allowed, and should avoid unnecessary repetition; the court may terminate argument whenever it considers further argument unnecessary.

(2) **Numerous Counsel**. Any number of counsel representing individual appellants or appellees proceeding separately or jointly may be heard in argument within the times herein limited or allowed by order of court. When more than one counsel is heard, duplication or supplementation

of argument on the same points shall be avoided unless specifically directed by the court.

(c) **Non-Appearance of Parties**. If counsel for any party fails to appear to present oral argument, the court will hear argument from opposing counsel. If counsel for no party appears, the court will decide the case on the written briefs unless it orders otherwise.

(d) **Submission on Written Briefs**. By agreement of the parties, a case may be submitted for decision on the written briefs, but the court may nevertheless order oral argument before deciding the case.

(e) **Unpublished Opinions**.

(1) In order to minimize the cost of publication and of providing storage space for the published reports, the Court of Appeals is not required to publish an opinion in every decided case. If the panel that hears the case determines that the appeal involves no new legal principles and that an opinion, if published, would have no value as a precedent, it may direct that no opinion be published.

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

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

Rule 28(g). When citing an unpublished opinion, a party must indicate the opinion's unpublished status.

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

(f) **Pre-Argument Review; Decision of Appeal Without Oral Argument**.

(1) At any time that the Supreme Court concludes that oral argument in any case pending before it will not be of assistance to the Court, it may dispose of the case on the record and briefs. In those cases, counsel will be notified not to appear for oral argument.

(2) The Chief Judge of the Court of Appeals may from time to time designate a panel to review any pending case, after all briefs are filed but before argument, for decision under this rule. If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument will not be of assistance to the Court, the case may be disposed of on the record and briefs. Counsel will be notified not to appear for oral argument.

* * *

Rule 37. Motions in Appellate Courts

(a) **Time; Content of Motions; Response**. An application to a court of the appellate division for an order or for other relief available under these rules may be made by filing a motion for such order or other relief with the clerk of the court, with service on all other parties. Unless another time is expressly provided by these rules, the motion may be filed and served at any time before the case is called for oral argument. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion and shall state with particularity the grounds on which it is based and the order or relief sought. If a motion is supported by affidavits, briefs, or other papers, these shall be served and filed with the motion. Within ten days after a

motion is served or until the appeal is called for oral argument, whichever period is shorter, a party may file and serve copies of a response in opposition to the motion, which may be supported by affidavits, briefs, or other papers in the same manner as motions. The court may shorten or extend the time for responding to any motion.

(b) **Determination**. Notwithstanding the provisions of Rule 37(a), a motion may be acted upon at any time, despite the absence of notice to all parties and without awaiting a response thereto. A party who has not received actual notice of such a motion, or who has not filed a response at the time such action is taken, and who is adversely affected by the action may request reconsideration, vacation, or modification thereof. Motions will be determined without argument, unless the court orders otherwise.

(c) ~~**Protecting the Identity of Certain Juveniles**. Parties shall protect the identity of juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e) pursuant to said rules.~~[Reserved]

(d) **Withdrawal of Appeal in Criminal Cases**. Withdrawal of appeal in criminal cases shall be in accordance with N.C.G.S. § 15A-1450. In addition to the requirements of N.C.G.S. § 15A-1450, after the record on appeal in a criminal case has been filed in an appellate court but before the filing of an opinion, the defendant shall also file a written notice of the withdrawal with the clerk of the appropriate appellate court.

(e) **Withdrawal of Appeal in Civil Cases**.

(1) Prior to the filing of a record on appeal in the appellate court, an appellant or cross-appellant may, without the consent of the other party, file a notice of withdrawal of its appeal with the tribunal from which appeal has been taken. Alternatively, prior to the filing of a record on appeal, the parties may file a signed stipulation agreeing to dismiss the appeal with the tribunal from which the appeal has been taken.

(2) After the record on appeal has been filed, an appellant or cross-appellant or all parties jointly may move the appellate court in which the appeal is pending, prior to the filing of an opinion, for dismissal of the appeal. The motion must specify the reasons therefor, the positions of all parties on the motion to dismiss, and the positions of all parties on the allocation of taxed costs. The appeal may be dismissed by order upon such terms as agreed to by the parties or as fixed by the appellate court.

(f) **Effect of Withdrawal of Appeal**. The withdrawal of an appeal shall not affect the right of any other party to file or continue such party's appeal or cross-appeal.

* * *

Rule 41. Appeal Information Statement

~~(a) The Court of Appeals has adopted an Appeal Information Statement (AIS) which will be revised from time to time. The purpose of the AIS is to provide the Court the substance of an appeal and the information needed by the Court for effective case management.~~

~~(b) Each appellant shall complete, file, and serve the AIS as set out in this rule.~~

~~(1) The clerk of the Court of Appeals shall furnish an AIS form to all parties to the appeal when the record on appeal is docketed in the Court of Appeals.~~

~~(2) Each appellant shall complete and file the AIS with the clerk of the Court of Appeals at or before the time his or her appellant's brief is due and shall serve a copy of the AIS upon all other parties to the appeal pursuant to Rule 26. The AIS may be filed by mail addressed to the clerk and, if first class mail is utilized, is deemed filed on the date of mailing as evidenced by the proof of service. Parties shall protect the identity of juveniles covered by Rules 3(b)(1), 3.1(b), or 4(e) pursuant to said rules.~~

~~(3) If any party to the appeal concludes that the AIS is in any way inaccurate or incomplete, that party may file with the Court of Appeals a written statement setting out additions or corrections within seven days of the service of the AIS and shall serve a copy of the written statement upon all other parties to the appeal pursuant to Rule 26. The written statement may be filed by mail addressed to the clerk and, if first class mail is utilized, is deemed filed on the date of mailing as evidenced by the proof of service.~~

The appellant must complete an Appeal Information Statement using the electronic-filing site at https://www.ncappellatecourts.org before the appellant's brief is filed.

* * *

Rule 42. Protecting Identities—Sealed Items and Identification Numbers

(a) **Items Sealed in the Trial Tribunal**. Items sealed in the trial tribunal remain under seal in the appellate courts. When these items are filed with the appellate courts, counsel must attach a copy of the order, statute, or other legal authority that sealed the item below.

(b) **Items Sealed by Operation of Rule**. By virtue of this subsection, items filed with the appellate courts are under seal in the following matters:

(1) Appeals filed under N.C.G.S. § 7B-1001;

(2) Appeals filed under N.C.G.S. § 7B-2602;

(3) Appeals filed under N.C.G.S. § 7A-27 that involve a sexual offense committed against a minor; and

(4) Cases in which the right to appeal under one of these statutes has been lost.

In briefs, motions, and petitions filed in these matters, counsel must use initials or a pseudonym instead of the minor's name. Counsel for each party must agree on the initials or pseudonym and must include a stipulation that evidences this agreement in the record on appeal.

(c) **Items Sealed by the Appellate Courts**. If an item was not sealed in the trial tribunal or by operation of rule, then counsel may move the appellate court to seal that item. Items subject to a motion to seal will be held under seal pending the appellate court's disposition of the motion.

(d) **Labeling Sealed Items**. Documents filed with the appellate courts that are under seal must display at the top of the first page this notice:

UNDER SEAL AND SUBJECT TO PUBLIC INSPECTION ONLY BY ORDER OF A COURT OF THE APPELLATE DIVISION

If the document under seal is included within another document, then this notice must also be displayed at the top of the first page of that other document. Non-documentary items filed with the appellate courts that are under seal must be submitted in an envelope or box that displays the same notice.

(e) **Identification Numbers**. Driver license numbers, financial account numbers, social security numbers, and tax identification numbers

must be excluded or redacted from all documents that are filed with the appellate courts unless the number is necessary to the disposition of the appeal. If the number is necessary to the disposition of the appeal, then counsel may move to seal the documents in which the number appears.

* * *

Appendix A. Timetables for Appeals

Timetable of Appeals from Trial Division and Administrative Tribunals Under Articles II and IV of the Rules of Appellate Procedure

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Taking Appeal (Civil)	30	Entry of Judgment (Unless Tolled)	3(c)
Cross-Appeal	10	Service and Filing of a Timely Notice of Appeal	3(c)
Taking Appeal (Administrative Tribunal)	30	Receipt of Final Administrative Tribunal Decision (Unless Statutes Provide Otherwise)	18(b)(2)
Taking Appeal (Criminal)	14	Entry of Judgment (Unless Tolled)	4(a)
Ordering Transcript (Civil, Administrative Tribunal)	14	Filing Notice of Appeal	7(a)(1) 18(b)(3)
Ordering Transcript (Criminal Indigent)	14	Order Filed by Clerk of Superior Court	7(a)(2)
Preparing and Delivering Transcript (Civil, Non-Capital Criminal) (Capital Criminal)	60 120	Service of Order for Transcript"	7(b)(1)
Serving Proposed Record on Appeal (Civil, Non-Capital Criminal) (Administrative Tribunal)	35 35	Notice of Appeal (No Transcript) or Court Reporter's Certificate of Delivery of Transcript	11(b) 18(d)
Serving Proposed Record on Appeal (Capital)	70	Court Reporter's Certificate of Delivery	11(b)

Serving Objections or Proposed Alternative Record on Appeal (Civil, Non-Capital Criminal) (Capital Criminal) (Administrative Tribunal)	 30 35 30	Service of Proposed Record Service of Proposed Record	11(c) 18(d)(2)
Requesting Judicial Settlement of Record	10	Expiration of the Last Day Within Which an Appellee Who Has Been Served Could Serve Objections, etc.	11(c) 18(d)(3)
Judicial Settlement of Record	20	Service on Judge of Request for Settlement	11(c) 18(d)(3)
Filing Record on Appeal in Appellate Court	15	Settlement of Record on Appeal	12(a)
Filing Appellant's Brief (or Mailing Brief Under Rule 26(a))	30	~~Clerk's Mailing of Printed Record~~ Filing the Record on Appeal in Appellate Court (60 Days in Death Cases)	13(a)
Filing Appellee's Brief (or Mailing Brief Under Rule 26(a))	30	Service of Appellant's Brief (60 Days in Death Cases)	13(a)
Filing Appellant's Reply Brief (or Mailing Brief Under Rule 26(a))	14	Service of Appellee's Brief	28(h)
Oral Argument	30	Filing Appellant's Brief (Usual Minimum Time)	29
Certification or Mandate	20	Issuance of Opinion	32
Petition for Rehearing (Civil Action Only)	15	Mandate	31(a)

Timetable of Appeals from Trial Division Under Article II, Rule 3.1, of the Rules of Appellate Procedure

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Taking Appeal	30	Entry of Judgment	3.1~~(a)~~(b); N.C.G.S. § 7B-1001
Notifying ~~Court-Reporting Coordinator~~ Court Reporting Manager~~(Clerk of Superior Court)~~	1 (Business)	Filing Notice of Appeal	3.1(c)~~(1)~~
Assigning Transcriptionist ~~(Court-Reporting Coordinator)~~	~~2~~5 (Business)	~~Receipt of Notification Court-Reporting Coordinator~~Completion of Expedited Juvenile Appeals Form	3.1(c)~~(1)~~
~~Preparing and Delivering a Transcript of Designated Proceedings (Indigent Appellant)~~Delivering a Transcript of the Proceedings	~~35~~40	Assignment by ~~Court-Reporting Coordinator~~Court Reporting Manager	3.1(c)~~(1)~~
~~Preparing and Delivering a Transcript of Designated Proceedings (Non-Indigent Appellant)~~	~~45~~	~~Assignment of Transcriptionist~~	~~3.1(c)(1)~~
Serving Proposed Record on Appeal	~~10~~15	~~Receipt~~ Delivery of Transcript	3.1~~(c)(2)~~ (d)
Serving Notice of Approval, ~~or Objections~~ Specific Objections or Amendments, or Proposed Alternative Record on Appeal	10	Service of Proposed Record on Appeal	3.1~~(c)(2)~~ (d)

~~Filing Record on Appeal When Parties Agree to a Settled Record Within 20 Days of Receipt of Transcript~~	~~5 (Business)~~	~~Settlement of Record~~	~~3.1(c)(2)~~
~~Filing Record on Appeal if *All* Appellees Fail Either to Serve Notices of Approval, or Objections, or Proposed Alternative Records on Appeal~~	~~5 (Business)~~	~~Last Date on Which *Any* Appellee Could so Serve~~	~~3.1(c)(2)~~
~~Appellant Files Proposed Record on Appeal and Appellee(s) Files Objections and Amendments or an Alternative Proposed Record on Appeal When Parties Cannot Agree to a Settled Record on Appeal Within 30 Days After Receipt of the Transcript~~	~~5 (Business)~~	~~Last Date on Which the Record Could be Settled by Agreement~~	~~3.1(c)(2)~~
Requesting Judicial Settlement of Record	10	Expiration of the Last Day Within Which an Appellee Who Has Been Served Could Serve Objections, etc.	3.1(d); 11(c)
Judicial Settlement of Record	20	Service on Judge of Request for Settlement	3.1(d); 11(c)
Filing Record on Appeal in Appellate Court	5 (Business)	Settlement of Record on Appeal	3.1(d)
Filing Appellant's Brief	30	Filing of Record on Appeal	~~3.1(c)(3)~~ 13(a)(1)
Filing Appellee's Brief	30	Service of Appellant's Brief	~~3.1(c)(3)~~ 13(a)(1)

Filing Appellant's Reply Brief (or Mailing Brief Under Rule 26(a))	14	Service of Appellee's Brief	~~3.1(c)(3)~~ 13(a)(1); 28(h)

Timetable of Appeals to the Supreme Court from the Court of Appeals Under Article III of the Rules of Appellate Procedure

Action	*Time (Days)*	*From date of*	*Rule Ref.*
Petition for Discretionary Review Prior to Determination	15	Docketing Appeal in Court of Appeals	15(b)
Notice of Appeal and/or Petition for Discretionary Review	15	Mandate of Court of Appeals (or From Order of Court of Appeals Denying Petition for Rehearing)	14(a) 15(b)
Cross-Notice of Appeal	10	Filing of First Notice of Appeal	14(a)
Response to Petition for Discretionary Review	10	Service of Petition	15(d)
Filing Appellant's Brief (or Mailing Brief Under Rule 26(a))	30	Filing Notice of Appeal Certification of Review	14(d) 15(g)(2)
Filing Appellee's Brief (or Mailing Brief Under Rule 26(a))	30	Service of Appellant's Brief	14(d) 15(g)
Filing Appellant's Reply Brief (or Mailing Brief Under Rule 26(a))	14	Service of Appellee's Brief	28(h)
Oral Argument	30	Filing Appellee's Brief (Usual Minimum Time)	29
Certification or Mandate	20	Issuance of Opinion	32
Petition for Rehearing (Civil Action Only)	15	Mandate	31(a)

All of the critical time intervals outlined here except those for taking an appeal, petitioning for discretionary review, responding to a petition for discretionary review, or petitioning for rehearing may be extended by order of the court in which the appeal is docketed at the time. Note that Rule 7(b)(1) authorizes the trial tribunal to grant only one extension of time for production of the transcript and that the trial tribunal lacks such authority in criminal cases in which a sentence of death has been imposed. Note also that Rule 27 authorizes the trial tribunal to grant only one extension of time for service of the proposed record. All other motions for extension of the times provided in these rules must be filed with the appellate court to which the appeal of right lies.

No time limits are prescribed for petitions for writs of certiorari other than that they be "filed without unreasonable delay." (Rule 21(c)).

* * *

Appendix B. Format and Style

All documents for filing in either appellate court are prepared on 8½ x 11", plain, white unglazed paper of 16- to 20-pound weight. Typing is done on one side only, although the document will be reproduced in two-sided format. No vertical rules, law firm marginal return addresses, or punched holes will be accepted. The papers need not be stapled; a binder clip or rubber bands are adequate to secure them in order.

Papers shall be prepared using font no smaller than 12-point and no larger than 14-point using a proportionally spaced font with serifs. Examples of proportionally spaced fonts with serifs include, but are not limited to, Constantia, Century, Century Schoolbook, and Century Old Style typeface. To allow for binding of documents, a margin of approximately one inch shall be left on all sides of the page. The formatted page should be approximately 6½ inches wide and 9 inches long. Tabs are located at the following distances from the left margin: ½", 1", 1½", 2", 4¼" (center), and 5".

CAPTIONS OF DOCUMENTS

All documents to be filed in either appellate court shall be headed by a caption. The caption contains: the number to be assigned the case by the clerk; the Judicial District from which the case arises; the appellate court to whose attention the document is addressed; the style of the case showing the names of all parties to the action, except as provided by ~~Rules 3(b)(1), 3.1(b), and 4(c)~~ Rule 42; the county from which the case comes; the indictment or docket numbers of the case below (in records on appeal and in motions and petitions in the cause filed prior to the filing of the record); and the title of the document. The caption shall

be placed beginning at the top margin of a cover page and again on the first textual page of the document.

No. _____ (Number) DISTRICT

(SUPREME COURT OF NORTH CAROLINA)
(or)
(NORTH CAROLINA COURT OF APPEALS)

****

STATE OF NORTH CAROLINA	)	
or	)	
(Name of Plaintiff)	)	From (Name) County
	)	
v	)	No. _____
	)	
(Name of Defendant)	)	

****
(TITLE OF DOCUMENT)
****

The caption should reflect the title of the action (all parties named except as provided by ~~Rules 3(b)(1), 3.1(b), and 4(e)~~ Rule 42) as it appeared in the trial division. The appellant or petitioner is not automatically given topside billing; the relative positions of the plaintiff and defendant should be retained.

The caption of a record on appeal and of a notice of appeal from the trial division should include directly below the name of the county, the indictment or docket numbers of the case in the trial division. Those numbers, however, should not be included in other documents, except a petition for writ of certiorari or other petitions and motions in which no record on appeal has yet been created in the case. In notices of appeal or petitions to the Supreme Court from decisions of the Court of Appeals, the caption should show the Court of Appeals docket number in similar fashion.

Immediately below the caption of each document, centered and underlined, in all capital letters, should be the title of the document, e.g., PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. § 7A-31, or DEFENDANT-APPELLANT'S BRIEF. A brief filed in the Supreme Court in a case previously heard and decided by the Court of Appeals is entitled NEW BRIEF.

INDEXES

A brief or petition that is ten pages or more in length and all appendixes to briefs (Rule 28) must contain an index to the contents.

The index should be indented approximately ¾" from each margin, providing a 5" line. The form of the index for a record on appeal should be as follows (indexes for briefs are addressed in Appendix E):

(Record)

INDEX

USE OF THE TRANSCRIPT OF EVIDENCE WITH RECORD ON APPEAL

Those portions of the printed record on appeal that correspond to the items asterisked (*) in the sample index above would be omitted if the transcript option were selected under Rule 9(c). In their place, counsel should insert a statement in substantially the following form:

> "Per Rule 9(c) of the Rules of Appellate Procedure, the transcript of proceedings in this case, taken by (name), court reporter, from (date) to (date) and consisting of (# of volumes) volumes and (# of pages) pages, numbered (1) through (last page #), is electronically filed pursuant to Rule 7."

Entire transcripts should not be inserted into the printed record on appeal, but rather should be electronically filed by the court reporter pursuant to Rule 7. Transcript pages inserted into the record on appeal will be treated as a narration and will be printed at the standard page charge. Counsel should note that transcripts will not be reproduced with the record on appeal, but will be treated and used as an exhibit.

TABLE OF CASES AND AUTHORITIES

Immediately following the index and before the inside caption, all briefs, petitions, and motions that are ten pages or greater in length shall contain a table of cases and authorities. Cases should be arranged alphabetically, followed by constitutional provisions, statutes, regulations, and other textbooks and authorities. The format should be similar to that of the index. Citations should be made according to the most recent edition of *The Bluebook: A Uniform System of Citation*. Citations to regional reporters shall include parallel citations to official state reporters.

FORMAT OF BODY OF DOCUMENT

Paragraphs within the body of the record on appeal should be single-spaced, with double spaces between paragraphs. The body of petitions, notices of appeal, responses, motions, and briefs should be double-spaced, with captions, headings, issues, and long quotes single-spaced.

Adherence to the margins is important because the document will be reproduced front and back and will be bound on the side. No part of the text should be obscured by that binding.

Quotations of more than three lines in length should be indented ¾" from each margin and should be single-spaced. The citation should immediately follow the quote.

References to the record on appeal should be made using a parenthetical in the text: (R pp 38-40). References to the transcript, if used, should be made in a similar manner: (T p 558, line 21).

TOPICAL HEADINGS

The various sections of the brief or petition should be separated (and indexed) by topical headings, centered and underlined, in all capital letters.

Within the argument section, the issues presented should be set out as a heading in all capital letters and in paragraph format from margin to margin. Sub-issues should be presented in similar format, but block indented ½" from the left margin.

NUMBERING PAGES

The cover page containing the caption of the document (and the index in records on appeal) is unnumbered. The index and table of cases and authorities are on pages numbered with lowercase Roman numerals, e.g., i, ii, iv.

While the page containing the inside caption and the beginning of the substance of the petition or brief bears no number, it is page 1. Subsequent pages are sequentially numbered by Arabic numbers, flanked by dashes, at the center of the top margin of the page, e.g., -4-.

An appendix to the brief should be separately numbered in the manner of a brief.

SIGNATURE AND ADDRESS

Unless filed pro se, all original papers filed in a case will bear the original signature of at least one counsel participating in the case, as in the example below. The name, address, telephone number, State Bar number, and e-mail address of the person signing, together with the capacity in which that person signs the paper, will be included. When counsel or the firm is retained, the firm name should be included above the signature; however, if counsel is appointed in an indigent criminal appeal, only the name of the appointed counsel should appear, without identification of any firm affiliation. Counsel participating in argument must have signed the brief in the case prior to that argument.

(Retained)
[LAW FIRM NAME]
By: _____
[Name]
By: _____
[Name]
Attorneys for Plaintiff-Appellants
P. O. Box 0000
Raleigh, NC 27600
(919) 999-9999
State Bar No. _____
[e-mail address]

(Appointed)
_____
[Name]
Attorney for Defendant-Appellant
P. O. Box 0000
Raleigh, NC 27600
(919) 999-9999
State Bar No. _____
[e-mail address]

* * *

Appendix D. Forms

Captions for all documents filed in the appellate division should be in the format prescribed by Appendix B, addressed to the Court whose review is sought.

NOTICES OF APPEAL

(1) To Court of Appeals from Trial Division

Appropriate in all appeals of right from district or superior court except appeals from criminal judgments imposing sentences of death.

(Caption)

****

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), hereby gives notice of appeal to the Court of Appeals of North Carolina (from the final judgment)(from the order) entered on (date) in (District)(Superior) Court, _____ County, (describing it).

Respectfully submitted this the __ day of _____, 2___.

s/_____

Attorney for (Plaintiff)(Defendant)-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

(2) To Supreme Court from a Judgment of the Superior Court Including a Sentence of Death

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Name of Defendant), Defendant, hereby gives notice of appeal to the Supreme Court of North Carolina from the final judgment entered by (name of Judge) in Superior Court, _____ County, on (date), which judgment included a conviction of murder in the first degree and a sentence of death.

Respectfully submitted this the __ day of _____, 2___.

s/_____

Attorney for Defendant-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

(3) **To Supreme Court from a Judgment of the Court of Appeals**

Appropriate in all appeals taken as of right from opinions and judgments of the Court of Appeals to the Supreme Court under N.C.G.S. § 7A-30. The appealing party shall enclose a clear copy of the opinion of the Court of Appeals with the notice. To take account of the possibility that the Supreme Court may determine that the appeal does not lie of right, an alternative petition for discretionary review may be filed with the notice of appeal.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), hereby appeals to the Supreme Court of North Carolina from the judgment of the Court of Appeals (describe it), which judgment . . . .

(Constitutional question—N.C.G.S. § 7A-30(1)) . . . directly involves a substantial question arising under the Constitution(s) (of the United States)(and)(or)(of the State of North Carolina) as follows:

(Here describe the specific issues, citing constitutional provisions under which they arise and showing how such issues were timely raised below and are set out in the record of appeal, e.g.:

Issue 1: Said judgment directly involves a substantial question arising under the Fourth and Fourteenth Amendments to the Constitution of the United States and under Article 1, Section 20 of the Constitution of the State of North Carolina, in that it deprives rights secured thereunder to the defendant by overruling defendant's challenge to the denial of (his)(her) Motion to Suppress Evidence Obtained by a Search Warrant, thereby depriving defendant of the constitutional right to be secure in his or her person, house, papers, and effects against unreasonable searches and seizures and violating constitutional prohibitions against warrants issued without probable cause and warrants not supported by evidence. This constitutional issue

was timely raised in the trial tribunal by defendant's Motion to Suppress Evidence Obtained by a Search Warrant made prior to trial of defendant (R pp 7-10). This constitutional issue was determined erroneously by the Court of Appeals.)

In the event the Court finds this constitutional question to be substantial, petitioner intends to present the following issues in its brief for review:

(Here list all issues to be presented in appellant's brief to the Supreme Court, not limited to those which are the basis of the constitutional question claim. An issue may not be briefed if it is not listed in the notice of appeal.)

(Dissent—N.C.G.S. § 7A-30(2)) . . . was entered with a dissent by Judge (name), based on the following issue(s):

(Here state the issue or issues that are the basis of the dissenting opinion in the Court of Appeals. Do not state additional issues. Any additional issues desired to be raised in the Supreme Court when the appeal of right is based solely on a dissenting opinion must be presented by a petition for discretionary review as to the additional issues.)

Respectfully submitted this the __ day of _____, 2___.

s/_____

Attorney for (Plaintiff)(Defendant)-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. § 7A-31

To seek review of the opinion and judgment of the Court of Appeals when petitioner contends the case involves issues of public interest or jurisprudential significance. May also be filed as a separate paper in conjunction with a notice of appeal to the Supreme Court when the appellant contends that such appeal lies of right due to substantial constitutional questions under N.C.G.S. § 7A-30, but desires to have the Court consider discretionary review should it determine that appeal does not lie of right in the particular case.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), respectfully petitions the Supreme Court of North Carolina to certify for discretionary review the judgment of the Court of Appeals (describing it) on the basis that (here set out the grounds from N.C.G.S. § 7A-31 that provide the basis for the petition). In support of this petition, (Plaintiff)(Defendant) shows the following:

Facts

(Here state first the procedural history of the case through the trial division and the Court of Appeals. Then set out factual background necessary for understanding the basis of the petition.)

Reasons Why Certification Should Issue

(Here set out factual and legal arguments to justify certification of the case for full review. While some substantive argument will certainly be helpful, the focus of the argument in the petition should show how the opinion of the Court of Appeals conflicts with prior decisions of the Supreme Court or how the case is significant to the jurisprudence of the State or of significant public interest. If the Court is persuaded to take the case, the appellant may deal thoroughly with the substantive issues in the new brief.)

Issues to Be Briefed

In the event the Court allows this petition for discretionary review, petitioner intends to present the following issues in its brief for review:

(Here list all issues to be presented in appellant's brief to the Supreme Court, not limited to those that are the basis of the petition. An issue may not be briefed if it is not listed in the petition.)

Respectfully submitted this the __ day of _____, 2___.

s/_____

Attorney for (Plaintiff)(Defendant)-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

Attached to the petition shall be a certificate of service upon the opposing parties and a clear copy of the opinion of the Court of Appeals in the case.

PETITION FOR WRIT OF CERTIORARI

To seek review: (1) by the appropriate appellate court of judgments or orders of trial tribunals when the right to prosecute an appeal has been lost or when no right to appeal exists; and (2) by the Supreme Court of decisions and orders of the Court of Appeals when no right to appeal or to petition for discretionary review exists or when such right has been lost by failure to take timely action.

(Caption)

****

TO THE HONORABLE (SUPREME COURT)(COURT OF APPEALS)
OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), respectfully petitions this Court to issue its writ of certiorari pursuant to Rule 21 of the Rules of Appellate Procedure to review the (judgment)(order)(decree) of the [Honorable (name), Judge Presiding, (Superior)(District) Court, _____ County][North Carolina Court of Appeals], dated (date), (here describe the judgment, order, or decree appealed from), and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding the basis of the petition: e.g., failure to perfect appeal by reason of circumstances constituting excusable neglect; non-appealability of right of an interlocutory order, etc.) (If circumstances are that transcript could not be procured from court reporter, statement should include estimate of date of availability and supporting affidavit from the court reporter.)

Reasons Why Writ Should Issue

(Here set out factual and legal arguments to justify issuance of writ: e.g., reasons why interlocutory order makes it impracticable for petitioner to proceed further in trial court; meritorious basis of petitioner's proposed issues, etc.)

Attachments

Attached to this petition for consideration by the Court are certified copies of the (judgment)(order)(decree) sought to be reviewed, and (here list any other certified items from the trial court record and any affidavits attached as pertinent to consideration of the petition).

Wherefore, petitioner respectfully prays that this Court issue its writ of certiorari to the [(Superior)(District) Court, _____ County]

[North Carolina Court of Appeals] to permit review of the (judgment)(order)(decree) above specified, upon issues stated as follows: (here list the issues, in the manner provided for in the petition for discretionary review); and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted this the __ day of _____, 2___.

s/_____

Attorney for Petitioner
(Address, Telephone Number, State Bar Number, and E-mail Address)

(Verification by petitioner or counsel)

(Certificate of service upon opposing parties)

(Attach a clear copy of the opinion, order, etc. which is the subject of the petition and other attachments as described in the petition.)

PETITION FOR WRIT OF SUPERSEDEAS UNDER RULE 23 AND MOTION FOR TEMPORARY STAY

A writ of supersedeas operates to stay the execution or enforcement of any judgment, order, or other determination of a trial court or of the Court of Appeals in civil cases under Rule 8 or to stay imprisonment or execution of a sentence of death in criminal cases (other portions of criminal sentences, e.g., fines, are stayed automatically pending an appeal of right).

A motion for temporary stay under Rule 23(e) is appropriate to seek an immediate stay of execution on an *ex parte* basis pending the Court's decision on the petition for supersedeas or the substantive petition in the case.

(Caption)

****

TO THE HONORABLE (COURT OF APPEALS)(SUPREME COURT) OF NORTH CAROLINA:

(Plaintiff)(Defendant), (Name of Party), respectfully petitions this Court to issue its writ of supersedeas to stay (execution)(enforcement) of the (judgment)(order)(decree) of the [Honorable _____, Judge Presiding, (Superior)(District) Court, _____ County][North Carolina Court of Appeals] dated _____, pending review by this Court of said (judgment)(order)(decree) which (here describe the

judgment, order, or decree and its operation if not stayed); and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding the basis of the petition and justifying its filing under Rule 23: e.g., trial judge has vacated the entry upon finding security deposited under N.C.G.S. § _____ inadequate; trial judge has refused to stay execution upon motion therefor by petitioner; circumstances make it impracticable to apply first to trial judge for stay, etc.; and showing that review of the trial court judgment is being sought by appeal or extraordinary writ.)

Reasons Why Writ Should Issue

(Here set out factual and legal arguments for justice of issuing the writ; e.g., that security deemed inadequate by trial judge is adequate under the circumstances; that irreparable harm will result to petitioner if it is required to obey decree pending its review; that petitioner has meritorious basis for seeking review, etc.)

Attachments

Attached to this petition for consideration by the court are certified copies of the (judgment)(order)(decree) sought to be stayed and (here list any other certified items from the trial court record and any affidavits deemed necessary to consideration of the petition).

Wherefore, petitioner respectfully prays that this Court issue its writ of supersedeas to the [(Superior)(District) Court, _____ County)] [North Carolina Court of Appeals] staying (execution)(enforcement) of its (judgment)(order)(decree) above specified, pending issuance of the mandate to this Court following its review and determination of the (appeal)(discretionary review)(review by extraordinary writ) (now pending)(the petition for which will be timely filed); and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted this the __ day of _____, 2___.

s/_____

Attorney for Petitioner
(Address, Telephone Number, State Bar Number, and E-mail Address)

(Verification by petitioner or counsel)

(Certificate of Service upon opposing party)

Rule 23(e) provides that in conjunction with a petition for supersedeas, either as part of it or separately, the petitioner may move for a temporary stay of execution or enforcement pending the Court's ruling on the petition for supersedeas. The following form is illustrative of such a motion for temporary stay, either included as part of the main petition or filed separately.

Motion for Temporary Stay

(Plaintiff)(Defendant) respectfully applies to the Court for an order temporarily staying (execution)(enforcement) of the (judgment)(order)(decree) that is the subject of (this)(the accompanying) petition for writ of supersedeas, such order to be in effect until determination by this Court whether it shall issue its writ. In support of this Application, movant shows that (here set out the legal and factual arguments for the issuance of such a temporary stay order; e.g., irreparable harm practically threatened if petitioner must obey decree of trial court during interval before decision by Court whether to issue writ of supersedeas).

Motion for Stay of Execution

In death cases, the Supreme Court uses an order for stay of execution of death sentence in lieu of the writ of supersedeas. Counsel should promptly apply for such a stay after the judgment of the superior court imposing the death sentence. The stay of execution order will provide that it remains in effect until dissolved. The following form illustrates the contents needed in such a motion.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Now comes the defendant, (name), who respectfully shows the Court:

1. That on (date of judgment), The Honorable _____, Judge Presiding, Superior Court, _____ County, sentenced the defendant to death, execution being set for (date of execution).

2. That pursuant to N.C.G.S. § 15A-2000(d)(1), there is an automatic appeal of this matter to the Supreme Court of North Carolina, and defendant's notice of appeal was given (describe the circumstances and date of notice).

3. That the record on appeal in this case cannot be served and settled, the matter docketed, the briefs prepared, the arguments heard, and a decision rendered before the date scheduled for execution.

WHEREFORE, the defendant prays the Court to enter an order staying the execution pending judgment and further orders of this Court.

Respectfully submitted this the __ day of _____, 2___.

s/_____

Attorney for Defendant-Appellant
(Address, Telephone Number, State Bar Number, and E-mail Address)

(Certificate of Service on Attorney General, District Attorney, and Warden of Central Prison)

~~PROTECTING THE IDENTITY OF CERTAIN JUVENILES; NOTICE~~

~~In cases governed by Rules 3(b), 3.1(b), and 4(e), the notice requirement of Rules 3.1(b) and 9(a) is as follows:~~

~~(Caption)~~

~~**********~~

~~TO THE HONORABLE (COURT OF APPEALS)(SUPREME COURT) OF NORTH CAROLINA:~~

~~FILED PURSUANT TO RULE [3(b)(1)][3.1(b)][4(e)]; SUBJECT TO PUBLIC INSPECTION ONLY BY ORDER OF A COURT OF THE APPELLATE DIVISION.~~

* * *

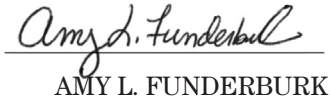
These amendments to the North Carolina Rules of Appellate Procedure become effective on 1 January 2019.

These amendments shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 19th day of December, 2018.

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 19th day of December, 2018.



AMY L. FUNDERBURK
Clerk of the Supreme Court

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

CRIMINAL LAW—Continued

Instructions—self-defense—stand your ground—The trial court erred by omitting the relevant stand-your-ground language from the jury instructions delivered at a trial in which defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury. The trial court concluded that the "no duty to retreat" instruction did not apply because defendant was not in his home or place of residence, workplace, or car. An individual who is lawfully located may stand his ground and defend himself from attack when he reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself or another. A defendant entitled to any self-defense instruction is entitled to a complete self-defense instruction, which includes the stand-your-ground provision. **State v. Bass, 535.**

Intellectual disability defense—motion to set aside verdict—The trial court did not abuse its discretion by failing to set aside the jury's verdict on intellectual disability in a prosecution for kidnapping, rape, and murder. Although defendant presented evidence to support a determination that he should be deemed exempt from the death penalty on the grounds of intellectual disability, the State presented expert testimony that supported the verdict. The relative credibility of the testimony of the various expert witnesses was a matter for the jury. **State v. Rodriguez, 295.**

Jury instructions—actual and constructive possession—one theory of possession not supported by evidence—Where defendant was on trial for possession of a firearm by a felon and the trial court instructed the jury, over defendant's objection, on both actual and constructive possession even though the evidence only supported the theory of *actual* possession, the Court of Appeals correctly determined that the trial court erred by allowing the jury to potentially convict defendant of possession of a firearm by a felon on the basis of a constructive possession theory. **State v. Malachi, 719.**

Jury instructions—unsupported instruction—no prejudice—Where defendant was on trial for possession of a firearm by a felon and the trial court instructed the jury, over defendant's objection, on both actual and constructive possession even though the evidence only supported the theory of *actual* possession, defendant failed to satisfy the Supreme Court that there was a reasonable possibility that, in the absence of the erroneous constructive possession instruction, the jury would have acquitted defendant. **State v. Malachi, 719.**

Jury instructions—unsupported instruction—subject to harmless error analysis—Where defendant was on trial for possession of a firearm by a felon and the trial court instructed the jury, over defendant's objection, on a theory of possession unsupported by the evidence, the Supreme Court held that defendant's challenge to the delivery of the trial court's unsupported instruction was subject to traditional harmless error analysis. The Court declined defendant's request to adopt a rule that such error is requires automatic reversal. **State v. Malachi, 719.**

Plea agreement—sentencing worksheet—stipulation to classification of prior second-degree murder—Where defendant, as part of a plea agreement, stipulated to a sentencing worksheet showing his prior offenses, including a second-degree murder conviction designated as a B1 offense, the Court of Appeals erred by holding that the stipulation to this type of second-degree murder was an improper legal stipulation. Defendant could properly stipulate to the facts surrounding his offense either by recounting the facts at the hearing or by stipulating to a general second-degree murder conviction that has a B1 classification. Defendant's stipulation was an acknowledgement that that the factual basis of his conviction involved