NORTH CAROLINA REPORTS

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SUPREME COURT OF NORTH CAROLINA

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THE SUPREME COURT
OF
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Alyssa M. Chen[2]
Jennifer C. Peterson
Niccolle C. Hernandez[3]

[1]Retired 29 May 2020. [2]Appointed Appellate Division Reporter 1 June 2020.
[3]Appointed Assistant Appellate Division Reporter 8 June 2020.

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DISTRICT	JUDGES	ADDRESS
	First Division	
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3B	John E. Nobles, Jr.[1]	Morehead City
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4	Charles H. Henry	Jacksonville
	Henry L. Stevens	Warsaw
5	Phyllis M. Gorham	Wilmington
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	Frank Jones	Wilmington
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8B	William W. Bland	Goldsboro
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16B	Robert F. Floyd, Jr.	Fairmont
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10	Paul C. Ridgeway	Raleigh
	G. Bryan Collins, Jr.	Raleigh
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	Gale M. Adams	Fayetteville
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	Andy Hanford	Graham
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	James P. Hill	Asheboro
19D	James M. Webb	Southern Pines
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20A	Kevin M. Bridges	Oakboro
20B	Jeffery K. Carpenter	Wadesboro
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	Susan Bray	Greensboro
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	Lora C. Cubbage	Greensboro
19A	Martin B. McGee	Concord
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	David L. Hall	Winston-Salem
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22A	Joseph Crosswhite	Statesville
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25B	Nathaniel J. Poovey	Newton
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	Donnie Hoover	Charlotte
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27B	Forrest Donald Bridges	Shelby
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	Marvin Pope	Asheville
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[1]Retired 31 March 2020. [2]Became Senior Resident Judge 1 April 2020. [3]Became Senior Resident Judge 5 May 2020. [4]Resigned 3 June 2020.
[5]Sworn in 1 April 2020.

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3A	G. Galen Braddy (Chief)	Grimesland
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	Teresa R. Freeman	Roanoke Rapids
	Vershenia B. Moody	Windsor
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	Pell C. Cooper	Rocky Mount
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	Joseph E. Brown, III	Wilson

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	Debra Ann Smith Sasser	Raleigh
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	Kristina L. Earwood	Waynesville
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J. Henry Banks	Henderson
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Ronald L. Chapman	Charlotte
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R. Dale Stubbs	Clayton
Leonard W. Thagard	Clinton
Charles M. Vincent	Greenville

[1]Sworn in 19 June 2020. [2]Retired 30 January 2020. [3]Became Chief District Court Judge 1 February 2020. [4]Sworn in 1 May 2020.
[5]Resigned 4 May 2020. [6]Resigned 31 January 2020. [7]Resigned 20 December 2019. [8]Sworn in 22 June 2020. [9]Sworn in 17 January 2020.
[10]Retired 30 April 2020. [11]Sworn in 1 June 2020. [12]Became Retired/Recalled Emergency Judge 1 May 2020.

ATTORNEY GENERAL OF NORTH CAROLINA

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CASES REPORTED

ORDERS

ORDERS

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

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

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

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

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

EMILY SUSANNA CHÁVEZ

v.

SERENA SEBRING WADLINGTON AND JOSEPH FITZGERALD WADLINGTON

No. 366A18

Filed 27 September 2019

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 821 S.E.2d 289 (N.C. Ct. App. 2018), affirming an order entered on 28 August 2017 by Judge Fred G. Battaglia, Jr., in District Court, Durham County. Heard in the Supreme Court on 28 August 2019.

Collins Family Law Group, by Rebecca K. Watts, for plaintiff-appellant.

Serena Sebring Wadlington and Joseph Fitzgerald Wadlington, pro se, defendant-appellees.

PER CURIAM.

AFFIRMED.

DAVID HAMPTON AND WIFE, MARY D. HAMPTON, PETITIONERS
v.
CUMBERLAND COUNTY, RESPONDENT

No. 60PA18

Filed 27 September 2019

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of a divided decision of the Court of Appeals, 808 S.E.2d 763 (2017), vacating an order entered on judicial review of a decision of the Cumberland County Board of Adjustment entered by Judge Robert F. Floyd, Jr. on 13 April 2016 in Superior Court, Cumberland County, and remanding for additional proceedings. Heard in the Supreme Court on 8 April 2019.

Yarborough, Winters & Neville, P.A., by Garris Neil Yarborough, for petitioner-appellants.

Cumberland County Attorney's Office, by Robert A. Hasty, Jr., for respondent-appellee.

PER CURIAM.

CERTIORARI IMPROVIDENTLY ALLOWED.

IN RE A.U.D.

[373 N.C. 3 (2019)]

IN THE MATTER OF A.U.D. AND A.X.D.

No. 133A19

Filed 27 September 2019

1. Termination of Parental Rights—findings—discrepancy between oral and written findings

An adoption agency appealing a decision by the trial court not to terminate a father's parental rights to his children failed to show existence of error in the mere fact that there were differences between the findings orally rendered at the hearing and those in the written order. A trial court's oral findings are subject to change before the final written order is entered.

2. Termination of Parental Rights—findings—best interests of the child—not written—uncontested issues

In a private termination of parental rights case initiated by an adoption agency, the trial court's failure to make written findings as to certain of N.C.G.S. § 7B-1110(a)'s statutory factors—likelihood of adoption, whether termination of parental rights would aid in the accomplishment of the permanent plan, and the bond between the juveniles and the parent—was not reversible error. These were uncontested factual issues, and remand for written findings would have served only to delay final resolution of the matter.

3. Termination of Parental Rights—evidence—guardian ad litem

In a termination of parental rights case, the mere fact that the trial court chose not to follow the recommendation of the children's guardian ad litem did not constitute error.

4. Termination of Parental Rights—best interests of child—evidence weighed

The trial court's decision in a termination of parental rights case was not arbitrary and capricious where it concluded that termination of a father's parental rights was not in the children's best interests. The trial court carefully weighed the evidence and considered the statutory factors set out in N.C.G.S. 7B-1110(a).

Justice NEWBY dissenting.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 20 December 2018 by Judge Donald Cureton Jr. in District Court,

Mecklenburg County. This matter was calendared in the Supreme Court on 11 September 2019 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Heyward Wall Law, P.A., by Heyward G. Wall, for petitioner-appellant Bethany Christian Services.

Edward Eldred for respondent-appellee father.

DAVIS, Justice.

This case involves a private termination of parental rights proceeding initiated by petitioner Bethany Christian Services (BCS) against respondent-father. In this appeal, we consider whether the trial court erred by declining to terminate respondent's parental rights to his children based on its determination that termination would not be in the best interests of the children. Because we conclude that the trial court's ruling was within its discretion, we affirm.

Factual and Procedural Background

Tanya[1] and respondent began a relationship in 2016, and Tanya became pregnant with twin girls, Amy and Ann (collectively, the children), shortly thereafter. The parties never married, and their relationship ended prior to the children's birth. In September 2016, Tanya falsely informed respondent that she had miscarried and ended contact with him. In January 2017, respondent encountered Tanya at the hospital where she worked and noticed that she appeared to be pregnant. However, respondent did not ask her about the pregnancy.

Respondent pled guilty to being a habitual felon in February 2017 after being convicted of assault with a deadly weapon with the intent to kill or inflict serious injury.[2] While incarcerated, respondent learned that Tanya was, in fact, pregnant and due to deliver in May 2017. In April 2017, respondent wrote to North Carolina Prisoner Legal Services for assistance in establishing paternity. Per its instructions, he attempted to submit a complaint and affidavit of parentage with Mecklenburg County Child Support Enforcement, but the documents were never actually filed with the clerk of court.

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

2. Respondent has a projected release date of August 2021.

After the children's birth in May 2017, Tanya initially cared for them. In June 2017, however, she placed them in the care of Sarah, the children's maternal aunt. On 3 August 2017, Tanya relinquished her parental rights to the children to BCS, an adoption agency. Later that month, Tanya visited Sarah's home with two social workers, who proceeded to take custody of the children. Shortly thereafter, Sarah obtained emergency custody of the children in District Court, Mecklenburg County. BCS filed a motion to intervene in the custody action and was awarded custody. BCS subsequently placed the children with a prospective adoptive family, where they have lived through the present date.

On 28 August 2017, BCS filed a petition to terminate respondent's parental rights in District Court, Wake County on the grounds of neglect, failure to legitimate, and dependency. *See* N.C.G.S. § 7B-1111(a)(1), (5), (6) (2017). Respondent then sought an adjudication of paternity and filed an answer to BCS's petition. The results of respondent's DNA test showed a 99.99% probability of paternity as to the children. Respondent also executed an affidavit of parentage. On 18 May 2018, the court entered an order declaring him to be the children's father. In August 2018, the court granted respondent's motion to change venue, and the termination of parental rights matter was moved to Mecklenburg County.

A hearing on the petition to terminate respondent's parental rights was held before the Honorable Donald Cureton Jr. on 7 December 2018 in District Court, Mecklenburg County. At the hearing, the trial court heard testimony from respondent, Tanya, Sarah, the children's guardian *ad litem*, and the prospective adoptive parents.

On 20 December 2018, the trial court entered an order in which it concluded that although a ground existed to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(5), termination was not in the best interests of the children. Accordingly, the trial court denied BCS's petition. BCS gave timely notice of appeal to this Court.

Analysis

In this appeal, BCS argues that the trial court failed to make sufficient findings of fact in its 20 December 2018 order and abused its discretion when it determined that termination of respondent's parental rights was not in the best interests of the children. Our Juvenile Code provides for a two-stage process for the termination of parental rights—an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2017). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under section 7B-1111(a) of the

General Statutes. N.C.G.S. § 7B-1109(f). We review a trial court's adjudication under N.C.G.S. § 7B-1109 "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984) (citation omitted).

Here, the trial court determined that there was sufficient evidence presented to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(5). Neither party has challenged this portion of the trial court's ruling, and this issue is therefore not before us.

If a trial court finds one or more grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it then proceeds to the dispositional stage. N.C.G.S. § 7B-1110(a) states, in pertinent part, as follows:

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

N.C.G.S. § 7B-1110(a).

The trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed solely for abuse of discretion. *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re L.M.T.*, 367 N.C. 165, 171, 752 S.E.2d 453, 457 (2013); *In re Montgomery*, 311 N.C. at 110, 316 S.E.2d at 252). "[A]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C.

101, 107, 772 S.E.2d 451, 455 (2015) (citing *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

Here, the trial court made the following findings of fact regarding the statutory criteria set forth in N.C.G.S. § 7B-1110(a):

> 14. The twin girls were born May 5, 2017.
>
> . . . .
>
> 43. The children were placed with the PAF [prospective adoptive family] in October 2017. The children have lived with this family continuously, without interruption since that time.
>
> 44. The PAF consists of a father, mother, and 2 biological daughters, ages 8 and 5.
>
> . . . .
>
> 46. The PA [prospective adoptive] parents have completed transracial adoption training and have tried to make the home more culturally inclusive. Some examples are they have provided all the children in their home with black dolls and have placed culturally aware artwork in the home. Additionally, the PA mom has worked to educate church members on implicit bias.
>
> 47. The twins have a strong bond with the PAF, including extended family like the grandparents, aunts, uncles, and cousins – all of which live within 60 minutes of the PAF.
>
> 48. The PAF has participated in multiple activities with the twins including dancing with them, taking them "trick-or-treating," and taking them on family trips.
>
> 49. [Respondent] has 3 other children. He received custody of the oldest two kids. The oldest is with the child's mother after she fled the state and took the child with her immediately following [respondent] being awarded emergency custody. The middle child was placed in his custody but [respondent] became incarcerated in prison for about 3 years on another unrelated offense shortly thereafter. [Respondent] has visitation rights to the youngest child.
>
> 50. [Respondent] is incarcerated at a minimum security prison. Since being incarcerated [respondent] has been

engaged in self-improvement training. [Respondent] has successfully completed all the requirements in the cognitive behavioral intervention curriculum called "Thinking for A Change." Also, [respondent] received a passing grade and 4.5 continuing Education Units for "New Beginnings: Employment Skills for Former Offenders."

51. About one month ago, [respondent] began participating in the work release program. [Respondent] has been "infraction free" while in prison thus making him eligible for the program. Before work release [respondent] worked in the kitchen and made about $7 a week.

52. Presently, [respondent] makes $10 an hour. The money he makes goes into a trust account that he only has access to upon his release, or to pay for court ordered child support or to maintain household bills while he is still incarcerated.

53. [Respondent] would like for [Amy and Ann] to be placed with [Sarah]. He does not want his parental rights terminated. He does not have any paternal relatives he could recommend for placement of [the children].

54. [Sarah] is willing and able to provide placement for [Amy and Ann] until [respondent] is released from prison. She and her son reside in a very neat and tidy, two-bedroom apartment, but she plans to move into a three-bedroom apartment if the girls are placed with her. She is employed full-time as a nurse's assistant. . . . She earns about $3361 per month. Currently, she is in a relationship with an individual who was released from prison recently.

55. When [Amy and Ann] were placed with her, [Sarah] did a good job caring for [the children]. There is no evidence that she did not or could not care for them.

. . . .

60. Although [Amy and Ann] were placed with the PAF in October 2017, it was done solely at the behest of the mother who relinquished her [parental] rights and chose the PAF specifically. [BCS] accepted the relinquishment knowing the whereabouts of [respondent] and without

> speaking with him. After speaking with [respondent] they chose not to return [Amy and Ann] to [Sarah] and there is no evidence they even spoke to her or conducted a home study of her home.
>
> 61. It is evident that [BCS] never had an intention of returning the children to [Sarah] or giving [respondent] an opportunity to parent [Amy and Ann] upon his release from prison.
>
> 62. Although it is clear [respondent] created the circumstances that led to his incarceration, it is also clear that [Tanya] and [BCS] created the circumstances that led to the girls living with the PAF for 14 months causing them to bond to the PAF substantially. They now seek to benefit from those same circumstances by arguing that it is in the best interest of [Amy and Ann] to remain with the PAF because of the substantial bond.
>
> 63. There is no doubt the PAF is taking adequate care of [Amy and Ann] but permanently severing the legal relationship between them and [respondent] and their biological relatives may not be in the best interest of [Amy and Ann] without further proof that such a relationship is truly unsafe or that [respondent] has in fact neglected [Amy and Ann]. Not only has [respondent] expressed a desire to parent [Amy and Ann] but he has proactively attempted to exercise that right through his diligent efforts to legally establish paternity and have [Sarah] gain legal custody.
>
> 64. It is not in the children's best interest to terminate the parental rights of [respondent].

[1] BCS makes several arguments concerning the dispositional findings in the trial court's order. We first address BCS's contention that the trial court's written findings did not adhere to the findings orally rendered at the conclusion of the termination hearing. BCS asserts that the trial court made certain oral findings in its favor regarding the statutory factors set forth in N.C.G.S. § 7B-1110(a) but then omitted these findings from its written order.

Pursuant to Rule 58 of the North Carolina Rules of Civil Procedure, "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C.G.S. § 1A-1, Rule 58 (2017). As our Court of Appeals has correctly held, a trial court's oral findings are

subject to change before the final written order is entered.[3] *See Morris v. Se. Orthopedics Sports Med. & Shoulder Ctr., P.A.*, 199 N.C. App. 425, 433, 681 S.E.2d 840, 846 ("The announcement of judgment in open court is the mere rendering of judgment, and is subject to change before entry of judgment." (citation and internal quotation marks omitted)), *disc. rev. denied*, 363 N.C. 745, 688 S.E.2d 456 (2009). Thus, we conclude that BCS has failed to show the existence of error based merely on the fact that there were differences between the findings orally rendered at the hearing and those set forth in the written order.

[2] We next consider BCS's contention that the trial court did not make sufficient findings regarding the factors set forth in N.C.G.S. § 7B-1110(a). Specifically, BCS argues that the trial court improperly failed to make findings of fact concerning the likelihood of adoption; whether termination of respondent's parental rights would aid in the accomplishment of the permanent plan for the juveniles; and the bond between the juveniles and respondent. *See* N.C.G.S. § 7B-1110(a)(2), (3), (4).

It is clear that a trial court must *consider* all of the factors in section 7B-1110(a). Here, the transcript of the hearing demonstrates that the trial court did, in fact, carefully consider each of the statutory criteria listed in N.C.G.S. § 7B-1110(a). The statute does not, however, explicitly require written findings as to each factor. Although the better practice would have been for the trial court to make written findings as to the statutory factors identified by BCS, we are unable to say that the trial court's failure to do so under the unique circumstances of this case constitutes reversible error.[4]

First, there was no conflict in the evidence regarding the likelihood of adoption. Indeed, the sole purpose of the petition to terminate respondent's parental rights was so that Amy and Ann could be adopted by the prospective adoptive family. Second, it was undisputed that no bond existed between respondent and the children. Third, because this was a private termination proceeding, there was no "permanent plan" for Amy and Ann within the meaning of N.C.G.S. § 7B-1110(a)(3). Accordingly,

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3. Indeed, we observe that at the conclusion of the hearing, the trial court clearly indicated that it was still "contemplating" the evidence and that it intended to "mull" over the case before reaching a decision, thus making it clear to the parties that its findings were subject to change prior to final entry of judgment.

4. We do, however, take this opportunity to encourage trial courts to make written findings on all of the statutory factors set out in N.C.G.S. § 7B-1110(a) in the dispositional portions of orders ruling on petitions to terminate parental rights, so as to obviate arguments in future cases that a written finding was not made on a "relevant" factor under the statute.

a remand by this Court to the trial court for written findings on these uncontested issues—a disposition for which our dissenting colleague appears to be advocating—would be an elevation of form over substance and would serve only to delay the final resolution of this matter for the children.

[3] BCS also argues that the trial court erred in failing to give due consideration to the report of the children's guardian *ad litem* and her recommendation that respondent's parental rights be terminated. BCS contends that the guardian *ad litem*, once appointed, is the "eyes and ears of the court" and that the trial court should have relied at least in part on the report and testimony of the guardian *ad litem* in reaching its decision.

The trial court's order clearly states that it considered the report and testimony of the guardian *ad litem*. The court, however, was not bound by that recommendation. *See In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167–68 (stating that it is the trial judge's duty to consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn therefrom). Therefore, because the trial court possesses the authority to weigh all of the evidence, the mere fact that it elected not to follow the recommendation of the guardian *ad litem* does not constitute error.[5]

[4] Finally, BCS asserts that the trial court's refusal to terminate respondent's parental rights was an arbitrary and capricious decision and constitutes an abuse of discretion. We disagree.

Our Juvenile Code provides "procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents" and aims to "develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the juvenile, and the strengths and weaknesses of the family." N.C.G.S. § 7B-100(1), (2) (2017). One of the stated policies of the Juvenile Code is to prevent "the unnecessary or inappropriate separation of juveniles from their parents." N.C.G.S. § 7B-100(4). However, although parents have a constitutionally protected interest in the care

5. BCS also asserts in its brief that the trial court's decision not to terminate respondent's parental right was due to its "personal bias against [BCS], or perhaps adoption agencies in general." We decline, however, to review this claim. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion . . . ." N.C. R. App. P. 10(a)(1). Here, BCS did not move for Judge Cureton to recuse himself from presiding over the case. Therefore, this issue was not preserved for our review.

and custody of their children and should not be unnecessarily or inappropriately separated from their children, "the best interests of the juvenile are of paramount consideration by the court and . . . 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." N.C.G.S. § 7B-100(5); *see also In re Montgomery*, 311 N.C. at 109, 316 S.E.2d at 251 ("[T]he fundamental principle underlying North Carolina's approach to controversies involving child . . . custody [is] that the best interest of the child is the polar star.").

Here, the trial court carefully weighed the competing goals of (1) preserving the ties between the children and their biological relatives; and (2) achieving permanence for the children as offered by their prospective adoptive family. In addition to the statutory factors set out in N.C.G.S. § 7B-1110(a)(1)–(5), the trial court also considered other relevant circumstances—as it was permitted to do under N.C.G.S. § 7B-1110(a)(6)—such as the fact that (1) Amy and Ann were relinquished to BCS solely at the behest of their mother; (2) respondent was never afforded the opportunity to parent Amy and Ann or provide for their care prior to their relinquishment; (3) upon learning of Amy and Ann's birth, respondent "proactively" attempted to establish paternity; (4) respondent desired that Sarah gain legal custody of the juveniles and Sarah was willing and able to provide a placement for Amy and Ann until respondent was released from incarceration; and (5) Sarah had previously cared for the juveniles and "did a good job" in doing so. The trial court further noted the strides in self-improvement that respondent had made during his incarceration.[6]

To be sure, evidence existed that would have supported a contrary decision. But this Court lacks the authority to reweigh the evidence that was before the trial court. We are satisfied that the trial court's conclusion that termination of respondent's parental rights was not in the children's best interests was neither arbitrary nor manifestly unsupported by reason.[7] Our analysis must end there.

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6. Oddly, despite acknowledging that the General Assembly has expressly authorized trial courts through N.C.G.S. § 7B-1110(a)(6) to also consider "[[a]ny relevant consideration" in addition to the factors enumerated in N.C.G.S. § 7B-1110(a)(1)–(5), the dissent then proceeds to take the trial court to task for doing just that.

7. Although the dissent asserts that the trial court erroneously focused its analysis on the best interests of *respondent*, the trial court expressly found that the termination of respondent's parental rights would not be in the best interests of the *children*.

Conclusion

For the reasons stated above, we affirm the 20 December 2018 order of the trial court denying BCS's petition to terminate respondent's parental rights.

AFFIRMED.

Justice NEWBY dissenting.

The majority muddles the analysis between the adjudicatory stage and the dispositional stage of termination of parental rights proceedings, inappropriately considering fairness to the parent at a stage in the proceedings where the statutory mandate says the best interests of the children should control. The trial court used an unnaturally broad reading of the term "relevant" in the section 7B-1110(a)(6) catchall provision while ignoring the requirement that it make written findings on all statutorily mandated factors. *See* N.C.G.S. § 7B-1110(a) (2017). Because the majority upholds the trial court's misapplication of the relevant statute, these children will be removed from the parents with whom they have bonded. I respectfully dissent.

We review a trial court's decision of whether to terminate parental rights for abuse of discretion. *In re Z.L.W.*, 831 S.E.2d 62, 64 (N.C. 2019). A trial court's misapplication of the law is an abuse of discretion. *See Koon v. United States*, 518 U.S. 81, 100, 116 S. Ct. 2035, 2047 (1996) (explaining that trial courts by definition abuse their discretion when they make errors of law). The trial court below abused its discretion because it misapplied the statutory scheme for terminating parental rights. At the dispositional stage, when the statute requires trial courts to consider only the children's interests, the trial court improperly weighed factors related to a parent's interest, which may only be considered at the adjudicatory stage. Further, the trial court did not make the required written findings on all relevant statutory criteria under section 7B-1110(a) as it determined the best interests of the children.

The trial court and the majority rewrite the carefully crafted statutory scheme, where factors weighing in the father's favor are properly considered only at the adjudicatory stage, not the dispositional stage. This Court has held that North Carolina's statutory scheme adequately safeguards parents' rights. *See In re Adoption of S.D.W.*, 367 N.C. 386, 394, 758 S.E.2d 374, 380 (2014) (explaining that "North Carolina has adopted a statutory framework designed to protect both the interests of

biological fathers in their children and the children's interest in prompt and certain adoption procedures."). In this case, respondent's interests are safeguarded by section 7B-1111(a) and the children's interests are safeguarded by section 7B-1110(a). *See* N.C.G.S. § 7B-1111(a) (2017). Section 7B-1111(a) controls the adjudicatory stage, when the court determines whether grounds exist, based on parents' behavior, to terminate parental rights. It is the only stage where a parent's interests are considered. There is no dispute that grounds existed under that provision to terminate respondent's parental rights. The adjudicatory stage is complete. The dispositional stage of the proceedings at issue here is controlled by section 7B-1110(a), which is governed by the best interests of the children.

Section 7B-1110(a) establishes criteria for courts to consider when determining whether it is in a child's best interests to terminate a party's parental rights. These criteria include: (1) the age of the juvenile; (2) the likelihood of adoption of the juvenile; (3) whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile; (4) the bond between the juvenile and the parent; (5) the quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement; and (6) any relevant consideration. *Id.* At this stage, "any relevant consideration" is constrained to those factors affecting the best interests of the children. A trial court must consider each of these six criterion and must make written findings on all that are "relevant." *Id.*

The trial court appears to have mentioned each of the criteria listed in section 7B-1110(a), and, based on its own oral findings, every one of those criteria weighed in favor of terminating the father's parental rights. The majority seems to agree. The guardian *ad litem*, who is uniquely tasked with understanding and advocating for the children's best interests, also believed respondent's parental rights should be terminated. The trial court, however, ignored all this. In considering criterion (6), the catchall, the trial court packed its analysis with a number of legally irrelevant considerations, and allowed those to outweigh all else.

The trial court, in both its oral and written findings, emphasized the following: that the father never had the chance to develop a relationship with the children; that the father's failed paternity filing was not really his fault; and that the father had no say in the development of the relationship between the children and the prospective adoptive family. These considerations speak to whether terminating respondent's parental rights would be fair to him, not the best interests of the children.

Certainly section 7B-1110(a)(6) allows the court to consider "[a]ny relevant consideration." N.C.G.S. § 7B-1110(a)(6) (2017). But these three words should not be read in a vacuum. Section 7B-1110(a) itself provides guidance. It explains that these criteria help courts determine whether terminating parental rights is in the *child's best interest*. N.C.G.S. § 7B-1110(a) (directing courts to "determine whether terminating the parent's rights is in the juvenile's best interest" by "consider[ing] the [six] criteria"). So, "[a]ny relevant consideration" includes only those criteria bearing on the children's interests, particularly when section 7B-1100(3) unambiguously elevates the children's interests above any conflicting ones of a parent in the proceedings. N.C.G.S. § 7B-1100(3) (2017) ("Action which is in the best interests of the juvenile should be taken in all cases where the interests of the juvenile and those of the juvenile's parents or other persons are in conflict.").

Some of the trial court's additional considerations do pass the relevance test under section 7B-1110(a). For example, the trial court noted that the children's aunt was willing and able to care for them. This consideration is relevant because it affects the quality of the children's lives if respondent's parental rights are not terminated.

But the aunt's willingness and capability alone fall far short of vindicating the trial court's misapplication of the statutory scheme. The trial court's ability to assess "[a]ny relevant consideration" allows some flexibility to examine the particulars of each of the many diverse cases that come before it. It does not, however, give courts unbridled discretion. Catchall provisions like this one should rarely, if ever, be powerful enough to control the outcome when every other specifically enumerated criterion would demand a different result. If it could, the General Assembly would have no need to list any criteria and could simply place the decision in the unbridled discretion of the trial court. Instead, the General Assembly has created a statutory scheme that is much more precise. The trial court and the majority fail to properly apply that scheme.

Relatedly, the trial court abused its discretion by failing to make the required written findings on all "relevant" criteria under section 7B-1110(a). The majority incorrectly assumes that "relevant" criterion are only those that are contested in the particular case. That is incorrect. "Relevant" simply describes those criterion which influence the trial court's decision, even if the nature of the criteria are undisputed. *See Relevant*, *Black's Law Dictionary* (11th ed. 2019) (defining "relevant" as "[l]ogically connected and tending to prove or disprove a matter in issue; having appreciable probative value—that is, rationally tending to persuade people of the probability or possibility of some alleged fact").

In this case, criteria (1) through (5) are all relevant. The children are young, they are likely to be adopted, adoption is part of their permanent plan, there exists no bond between the children and respondent, and the children's relationship with the prospective adoptive parents is strong. In fact, the trial court identified all of these criteria in the way just described. Every one of those criteria bear on whether it would be in the children's best interests to terminate the father's parental rights—the only issue in this case.

But it appears that the trial court omitted written findings on three out of the five criteria. It found that the children are very young and that they have a strong relationship with the adoptive parents, but failed to make findings under (2), (3), and (4). *See* N.C.G.S. § 7B-1110. The trial court thus failed to follow the controlling statute properly.

Though section 7B-1110(a) grants some discretion to trial courts, it immediately directs that discretion down a specific path. The trial court did not stay on that path. And on its detour, it diminished criteria it by statute must elevate. Whereas the dispositional phase should be guided by the children's best interests, here the majority's decision upholds the trial court's subjective consideration of the father's rights.

For these reasons, I respectfully dissent.

IN THE MATTER OF C.B.C.

No. 115A19

Filed 27 September 2019

Termination of Parental Rights—grounds—neglect and willful abandonment

The trial court properly terminated a father's parental rights on the grounds of willful abandonment where the father made no effort to pursue a relationship with his daughter during the six months preceding the filing of the petition. Although the trial court may consider conduct outside the six-month window in evaluating a parent's credibility and intentions, the determinative period for adjudicating willful abandonment is the six months preceding the petition.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered 13 December 2018 by Judge Monica M. Bousman in District Court,

Wake County. This matter was calendared in the Supreme Court on 11 September 2019 but determined on the records and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

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

J. Thomas Diepenbrock for respondent-appellant father.

HUDSON, Justice.

Respondent appeals from the trial court's order terminating his parental rights to his minor child, C.B.C. (Catherine),[1] on the grounds of neglect and willful abandonment. We affirm.

Respondent is the biological father of Catherine and petitioners are the maternal grandparents. In 2010, respondent and Catherine's biological mother, J.F., were involved in a relationship when J.F. became pregnant with Catherine. In March 2011, before Catherine's birth, respondent was convicted of felony theft charges and began serving a 15 month sentence.

J.F. gave birth to Catherine on 26 June 2011, and moved in with petitioners in July 2011. During respondent's incarceration, J.F. brought Catherine to visit him in prison "a few" times, and she sent him pictures of Catherine. Respondent finished serving his sentence in June 2012.

After his release, respondent had limited visitation with Catherine until J.F. passed away from a suspected accidental drug overdose on 7 July 2012. Following J.F's death, respondent and petitioners became involved in a custody dispute, and petitioners were granted temporary custody of Catherine, with respondent having visitation. On 19 November 2015, the trial court entered a permanent child custody order granting petitioners legal and physical custody of Catherine and ordering that respondent have no right to visitation. At the time the order was entered, respondent was incarcerated for felony breaking and entering and misdemeanor assault and had a projected release date of 16 October 2016. In the decretal section of the custody order, the trial court provided that respondent may petition the court for visitation after his release from incarceration as long as he could demonstrate to the court that his ongoing substance abuse and mental health issues

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading. *See* N.C.R. App. P. 42(b)(1).

had been appropriately addressed. The custody order also provided that respondent may continue to communicate in writing with Catherine, and that petitioners "shall deliver all appropriate communications" to Catherine.

On 4 March 2016, petitioners filed a petition to terminate respondent's parental rights alleging the grounds of dependency and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(6) and (7) (2017). Respondent participated in the hearing held 13 July 2017 and opposed the termination of his parental rights. On 21 September 2017, the trial court entered an order denying the petition. The trial court found that respondent "ha[d] consistently attempted to assert custodial rights with respect to [Catherine] and ha[d] consistently desired to maintain a relationship with her." The trial court also found that there was no evidence that respondent's substance abuse issues rendered him incapable of providing for Catherine's care, and that respondent's "periodic imprisonments [did] not constitute a 'disability' or clear, cogent and convincing evidence of incapability."

On 31 August 2017, respondent was charged with multiple felonies, including larceny of firearms and breaking and entering. Respondent spent approximately three weeks in jail before he posted bond. He remained out of jail from September 2017 through March 2018. In April 2018, respondent pled guilty to multiple felonies resulting from the August 2017 charges, and began serving his active sentence. Respondent's projected release date is in April 2022.[2]

Petitioners filed a second petition to terminate respondent's parental rights on 12 June 2018 alleging the grounds of neglect, dependency, and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(1), (6), and (7). Following a 30 October 2018 hearing, the trial court entered an order on 13 December 2018, finding that grounds existed to terminate respondent's parental rights based on neglect and willful abandonment, and that termination was in Catherine's best interests. Accordingly, the trial court terminated respondent's parental rights. Respondent gave timely notice of appeal to this Court pursuant to N.C.G.S. §§ 7A-27(a)(5) and 7B-1001(a1)(1) (2017).

Our Juvenile Code provides for a two-stage process for the termination of parental rights. N.C.G.S. §§ 7B-1109, -1110 (2017). At the

2. Respondent testified at the hearing that his projected release date is 2 April 2020, while later arguments by counsel, and the trial court's finding of fact indicate a projected release date in 2022. Respondent does not challenge this finding.

adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes. N.C.G.S. § 7B-1109(f). "If [the trial court] determines that one or more grounds listed in section 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110).

We review a trial court's adjudication under N.C.G.S. § 7B-1109 "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984) (citation omitted). The trial court's conclusions of law are reviewable de novo on appeal. *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009) (citation omitted).

Respondent first argues that the trial court erred in concluding grounds existed to terminate his parental rights based on willful abandonment. We conclude otherwise.

A trial court may terminate a parent's parental rights when "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]" N.C.G.S. § 7B-1111(a)(7). "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. at 251, 485 S.E.2d at 617 (citation omitted). "Wilful [sic] intent is an integral part of abandonment and this is a question of fact to be determined from the evidence." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962). "[I]f a parent withholds [that parent's] presence, [ ] love, [ ] care, the opportunity to display filial affection, and willfully [sic] neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Id.* at 501, 126 S.E.2d at 608.

Here, the relevant six-month period preceding the petitioners' filing of the petition is 12 December 2017 to 12 June 2018. Respondent was incarcerated for approximately three of the relevant six months. However, the Court of Appeals has held[3] that "incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision. . . . Although a parent's options for showing affection while

3. This Court has not previously addressed this issue.

incarcerated are greatly limited, a parent *will not be excused from showing interest in [the] child's welfare by whatever means available.*" *In re D.E.M.*, 810 S.E.2d 375, 378 (N.C. Ct. App. 2018) (citations and internal quotation marks omitted).

The trial court made the following findings of fact regarding abandonment:

> 9. From the time the Respondent bonded out on his felony charges in mid-September, 2017 until March 2018, the Respondent earned $600 per week performing repairs and handy man services. Despite earning regular income, the Respondent sent no support to or on behalf of [Catherine] during the same time period. The Respondent paid no support to or on behalf of [Catherine] since the time of this [c]ourt's last hearing in July, 2017 through the time of this proceeding.
>
> 10. The Respondent made no efforts to communicate with [Catherine] from the time of this [c]ourt's last hearing in July, 2017 to the time of the Petitioners' filing of their Petition on June 12, 2018. The Respondent did send one birthday card to [Catherine] from prison after he had been served with the Petitioners' termination petition. Otherwise the Respondent made no efforts to communicate with [Catherine] since the time of the July, 2017 hearing despite Judge Walczyk's 2015 Custody Order providing him the opportunity to send written communications to [Catherine]. Prior to his incarceration in March 2018 following a guilty plea, Respondent had a telephone, access to transportation, had his own vehicle, and had access to a post office. Respondent testified that he or his girlfriend mailed cards to the child prior to March 2018. His testimony was uncertain as to when and how many cards were sent. His testimony was contradictory and is not credible. After his incarceration in March 2018, he received approximately five (5) cards per month from the prison chaplain at no cost to him. He used only one of these cards to mail to [Catherine] and this card was mailed after he was served with the petition to terminate his parental rights.
>
> 11. The Respondent made no effort from the time of this [c]ourt's hearing in July, 2017 through the time of this hearing to contact either of the Petitioners to determine how

> [Catherine] was doing, how her health was, how she was doing in school, or any other inquiry regarding her well-being. The Petitioners continue to reside at the address that they resided at the time of the July, 2017 hearing and continue to have the same telephone numbers and contact information since the time of that hearing. The Petitioners did not prevent the Respondent from contacting them in order for the Respondent to obtain information about [Catherine]. Judge Walczyk's Custody Order does not contain any prohibition on the Respondent contacting the Petitioners to obtain information concerning [Catherine].
>
> 12. Since the time of this [c]ourt's hearing in July, 2017 the Respondent has taken no steps to have Judge Walczyk's 2015 Custody Order reviewed, modified or to otherwise present evidence to that [c]ourt that he has complied with the conditions of the 2015 Custody Order that would permit him once again to have visitation with [Catherine].
>
> 13. Respondent has willfully withheld his love, care, and affection from the child. He has done nothing to attempt to develop and maintain a relationship with her since his last release from prison in November 2016. He has not attempted to resume any direct contact with the child in compliance with the permanent custody order. He has not attempted to resume and [sic] parental rights or responsibility for the child. He has abandoned and neglected the child. There is a reasonable probability that he will continue to neglect the child in the future.

Respondent challenges finding of fact number 13 as not being supported by clear and convincing evidence. Specifically, respondent objects to the portion of the finding stating that he has willfully withheld his love, care, and affection and "has done nothing to attempt to develop and maintain a relationship with [Catherine]" since his release from incarceration in November 2016. Respondent argues that after his November 2016 release, he opposed the first petition to terminate his parental rights, and he sent a birthday card to Catherine in June 2018 after he had been served with the second termination petition.

However, respondent's participation in the first termination hearing in 2017 did nothing to aid in the development or continuation of his relationship with Catherine. Indeed, following the denial of the petition, respondent did not send Catherine any cards or letters, and did not take

any steps to resume visitation with her. Additionally, respondent's opposition to the original petition to terminate his parental rights does not preclude the trial court from later finding that he has willfully withheld his love, care, and affection from Catherine during the determinative six-month period. While the trial court found that respondent sent one card to Catherine after being served with the termination petition in June 2018, the court also found that the card was sent outside of the relevant six-month period, and thus not determinative in adjudicating willful abandonment under N.C.G.S. § 7B-1111(a)(7). *See also In re D.M.O.*, 794 S.E.2d 858, 861 (N.C. Ct. App. 2016) ("[T]he '*determinative*' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." (emphasis added) (citing *In re Young*, 346 N.C. at 251, 485 S.E.2d at 617)).

Nevertheless, even setting aside the portion of finding of fact number 13 stating that respondent has done nothing to attempt to develop or maintain a relationship with Catherine since his release from prison in 2016, there are ample other findings demonstrating that respondent had no contact with Catherine or petitioners for nearly one year prior to the filing of the termination petition on 12 June 2018, and that he had the ability to make at least some contact during that time but chose not to. Respondent has not challenged these findings, and they are binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.").

Respondent argues that the evidence and findings of fact do not support the court's conclusion that he willfully abandoned Catherine because his actions do not evince "a settled purpose to forego all parental duties or to relinquish all parental claims" to Catherine. Respondent further contends that it was "imperative" the trial court consider his actions over the years leading up to the termination petition in order to determine whether his actions demonstrated a settled purpose to forego all parental duties. Respondent maintains that he has consistently sought a relationship with Catherine since 2012, and argues that his "longstanding and continuing efforts and actions to pursue a relationship with his daughter negate the trial court's conclusion that he willfully abandoned her."

However, while "the trial court may consider a parent's conduct outside the six-month window *in evaluating a parent's credibility and intentions*, the 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition."

In re D.M.O., 794 S.E.2d at 861 (N.C. Ct. App. 2016) (emphasis added) (internal citations, quotation marks, and alterations omitted); N.C.G.S. § 7B-1111(a)(7). Thus, while the court may consider respondent's prior efforts in seeking a relationship with Catherine to determine his credibility and intentions, respondent's prior actions will not preclude a finding that he willfully abandoned Catherine pursuant to N.C.G.S. § 7B-1111(a)(7) if he did nothing to maintain or establish a relationship with Catherine during the determinative six-month period. *See In re B.S.O.*, 234 N.C. App. 706, 713 n.4, 760 S.E.2d 59, 65 n.4 (2014) (disregarding the respondent-father's assertion that he had "close contact" with his children and the social worker prior to his deportation in determining whether he willfully abandoned the children because it occurred outside the six-month period).

Here, the findings demonstrate that in the six months preceding the filing of the termination petition, respondent made no effort to pursue a relationship with Catherine. The trial court found that respondent did not send any cards or letters to Catherine, did not contact petitioners to inquire into Catherine's well-being, did not take any steps to modify the custody order or resume visitation after the trial court's denial of the first termination petition, and did not provide financial support for Catherine despite earning $600 per week from September 2017 until he was incarcerated in March 2018. The trial court also found that although respondent received five free cards per month while in custody, he only sent Catherine one card after being served with the termination petition.

These uncontested findings demonstrate that respondent willfully withheld his love, care, and affection from Catherine and that his conduct during the determinative six-month period constituted willful abandonment. *See In re B.S.O.*, 234 N.C. App. at 711, 760 S.E.2d at 64 (affirming termination of the respondent-father's parental rights based on willful abandonment where, in the relevant six-month period, the respondent-father "made no effort" to remain in contact with the children or their caretakers and did not provide anything toward their support). Accordingly, the trial court did not err in terminating respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(7).

The trial court's conclusion that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(7) is sufficient in and of itself to support termination of respondent's parental rights. *See In re Humphrey*, 156 N.C. App. 533, 540, 577 S.E.2d 421, 426 (2003) (citation omitted) ("A finding of any one of the enumerated grounds for termination of parental rights under N.C.G.S. 7B-1111 is sufficient to support a termination."). Respondent

did not challenge the trial court's determination that termination was in Catherine's best interests. Accordingly, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN THE MATTER OF C.M.C.

No. 109A19

Filed 27 September 2019

Termination of Parental Rights—orders—signed by judge who did not preside over hearing—nullity

Where the adjudication and disposition orders in a termination of parental rights case were signed by a judge who did not preside over the hearing and the mother subsequently noted appeal from those orders, those orders were a nullity, and the mother's notice of appeal did not divest the district court of the authority to enter further orders in the case. The judge who signed the orders did not err by vacating them, and the trial court that presided over the hearing then had the authority to enter the orders terminating the mother's parental rights.

On writ of certiorari pursuant to N.C.G.S. § 7A-31-32(b) to review orders entered on 7 December 2018 by Judge Kristina L. Earwood in District Court, Haywood County. This matter was calendared in the Supreme Court on 11 September 2019 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Jordan R. Israel for petitioner-appellee Haywood County Health and Human Services Agency.

Alston & Bird LLP, by Sarah R. Cansler, for appellee Guardian ad Litem.

David A. Perez for respondent-appellant mother.

ERVIN, Justice.

Respondent-mother Heather C. appeals from an order entered by the trial court terminating her parental rights in her daughter C.M.C.[1] After careful consideration of respondent-mother's challenge to the trial court's termination orders in light of the record and the applicable law, we conclude that the trial court's orders should be affirmed.

On 19 September 2017, the Haywood County Health and Human Services Agency filed a petition alleging that Caroline was an abused, neglected and dependent juvenile. The HHSA had received a report on 29 August 2017 that respondent-mother had given birth to Caroline in June 2017 while at home and without medical assistance; that Caroline had not received medical care since her birth; and that respondent-mother was using drugs. Respondent-mother and Rex C., Caroline's putative father, told the social workers responsible for investigating this report that Caroline had not received medical care because she did not have Medicaid and the couple could not afford a doctor. According to respondent-mother and the putative father, the couple and their family had always lived in Haywood County except for brief stints in Florida and Georgia, that their three other children lived with their maternal grandmother, and that neither respondent-mother nor the putative father had any pending criminal charges or prior history of child protective services involvement. Other information developed by the investigating social workers revealed, however, that the other children had been removed from the parents' care in North Dakota as the result of abuse-related concerns; that the North Dakota courts were about to terminate the parents' parental rights in two of their other children; and that the parents were being prosecuted in North Dakota for abusing those two children.

On 19 September 2017, Judge Monica H. Leslie entered an order granting non-secure custody of Caroline to the HHSA. Following the entry of the non-secure custody order, social workers and deputies employed by the Haywood County Sheriff's Office went to respondent-mother's home in order to search for Caroline. However, neither respondent-mother, the putative father, nor Caroline were present at the family home when the social workers and deputies arrived. On 20 September 2017, respondent-mother, the putative father, and Caroline were found in the basement of a family friend's residence. At that point, Caroline was taken into HHSA custody and admitted to the hospital and respondent-mother and the putative father were arrested on the basis of

1. C.M.C. will be referred to throughout the remainder of this opinion as "Caroline," which is a pseudonym used to protect the identity of the juvenile and for ease of reading. *See* N.C. R. App. P. 42(b)(1).

warrants that had been issued against them in connection with the pending North Dakota child abuse charges. A subsequent medical examination revealed that Caroline had several fractured ribs and tested positive for the presence of controlled substances. Following her release from the hospital, Caroline was placed in foster care.

On 9 February 2018, the trial court entered an adjudication order finding Caroline to be an abused, neglected and dependent juvenile and determining that aggravating circumstances authorizing the immediate cessation of reunification efforts consisting of "[c]hronic physical or emotional abuse," "[t]orture," "[c]hronic or toxic exposure to alcohol or controlled substances that causes impairment of or addiction in the juvenile," and "[a]ny other act, practice, or conduct that increased the enormity or added to the injurious consequences of the abuse or neglect" existed. N.C.G.S. § 7B-901(c)(1)(b), (c) (e), (f) (2017). On the same date, the trial court entered a dispositional order placing Caroline in the custody of the HHSA, establishing a permanent plan of adoption with a concurrent permanent plan of guardianship with a relative or court-appointed caretaker, and relieving the HHSA from any further responsibility for attempting to reunify Caroline with respondent-mother and the putative father.

On 5 April 2018, the HHSA filed a petition seeking the entry of an order terminating the parental rights of respondent-mother, the putative father, and any unknown father in Caroline. The issues raised by the HHSA's termination petition came on for hearing before the trial court on 10 September 2018. At the conclusion of the hearing, the trial court announced that the parental rights of respondent-mother and the putative father in Caroline should be terminated, enunciated certain findings and conclusions that it wished to have included in the trial court's adjudication and dispositional orders, and requested counsel for the HHSA to draft the required written orders. On 16 October 2018, adjudication and disposition orders signed by Judge Leslie, rather than the trial court, were filed. On 13 November 2018, respondent-mother noted an appeal from these adjudication and dispositional orders to the Court of Appeals.[2]

On 15 November 2018, the HHSA filed a motion pursuant to N.C. R. Civ. P. § 1A-1, Rule 60 (2017) seeking the entry of an order vacating the adjudication and dispositional orders that had been filed on 16 October

2. Prior to 1 January 2019, appeals noted from orders granting or denying a motion or petition to terminate parental rights lay to the Court of Appeals rather than to this Court. N.C.G.S. § 7B-1001(a)(6) (2017).

2018 given that those orders had been signed by Judge Leslie rather than by the trial court. On 30 November 2018, Judge Leslie entered an order vacating the adjudication and dispositional orders that she had signed. On 7 December 2018, the trial court entered an adjudication order determining that respondent-mother's parental rights in Caroline were subject to termination because of abuse and neglect, failure to pay support, incapability, and abandonment, N.C.G.S. § 7B-1111(a)(1), (3), (6), (7), and that the putative father's parental rights in Caroline were subject to termination because of abuse and neglect, failure to legitimate, incapability, and abandonment.[3] N.C.G.S. § 7B-1111(a)(1), (5), (6), (7). In addition, the trial court entered a separate dispositional order in which it determined that the termination of respondent-mother's and the putative father's parental rights in Caroline would be in the juvenile's best interests.[4] Respondent-mother noted an appeal from the trial court's termination orders to the Court of Appeals. On 24 April 2019, this Court granted respondent-mother's petition seeking the issuance of a writ of certiorari authorizing review of the trial court's termination orders.

In her sole challenge to the trial court's termination orders, respondent-mother argues that the trial court erred by entering the challenged termination orders on the grounds that Judge Leslie lacked the authority to vacate the earlier termination orders which she had inadvertently signed given that respondent-mother had already noted an appeal from Judge Leslie's earlier termination orders. We do not find respondent-mother's argument persuasive.

According to N.C.G.S. § 1A-1, Rule 60(b), a trial judge is entitled to grant relief from any judgment or order that, among other things, was entered by mistake or inadvertence, where the judgment is void, or where there is "[a]ny other reason justifying relief from the operation of the judgment." N.C.G.S. § 1A-1, Rule 60(b)(1), (4), (6). A trial judge does not have jurisdiction to rule upon a motion for relief from judgment made pursuant to N.C.G.S. § 1A-1, Rule 60(b) once an appeal has been noted from the relevant order. *Wiggins v. Bunch*, 280 N.C. 106, 184 S.E.2d 879 (1971). Respondent-mother contends that, since she had already given notice of appeal from the initial set of termination orders, Judge Leslie lacked the authority to vacate those orders given that her action in vacating them constituted a substantive modification of those

3. After the putative father's paternity of Caroline had been established by means of DNA testing, the HHSA dismissed its termination petition as to the unknown father.

4. The putative father has not noted an appeal from either set of termination orders and is not a party to the proceedings before this Court.

earlier orders rather than the correction of a clerical error. The HHSA argues, on the other hand, that, since Judge Leslie did not preside over the termination hearing, the first set of termination orders had never been properly entered in accordance with N.C.G.S. § 1A-1, Rule 58 (2017) and were, for that reason, a nullity. In light of that fact, the HHSA further asserts that respondent-mother's notice of appeal from the initial termination orders did not have the effect of divesting the District Court, Henderson County, of the authority to enter further orders in this case.

The Court of Appeals decided issues similar to the question before us in this case in *In re Whisnant*, 71 N.C. App. 439, 442, 322 S.E.2d 434, 435 (1984) and *In re Savage*, 163 N.C. App. 195, 198, 592 S.E.2d 610, 611 (2004), in both of which the orders terminating the parents' parental rights were vacated because they had been signed by a judge other than the individual who had presided over the termination hearing. According to the Court of Appeals, "an order terminating parental rights was a 'nullity' when signed by a judge other than the one who presided over the hearing," *In re Savage*, 163 N.C. App. at 197, 592 S.E.2d at 611 (quoting *In re Whisnant*, 71 N.C. App. at 441, 322 S.E.2d at 435), with this result stemming from the fact that N.C.G.S. § 1A-1, Rule 52 "requires a judge presiding over a non-jury trial to (1) make findings of fact, (2) state conclusions of law arising on the facts found, and (3) enter judgment accordingly." *In re Savage*, 163 N.C. App. at 197, 592 S.E.2d at 611 (citing *In re Whisnant*, 71 N.C. App. at 441, 322 S.E.2d at 435). Since we believe that the reasoning adopted by the Court of Appeals in these cases was sound, we conclude that the initial termination orders signed by Judge Leslie were, as the HHSA contends, a nullity.

In further confirmation of the appropriateness of this result, we note that N.C.G.S. § 1A-1, Rule 58 provides that "a judgment is entered when it is reduced to writing, signed by *the* judge, and filed with the clerk of court." N.C.G.S. § 1A-1, Rule 58 (emphasis added). According to well-established North Carolina law, a party may not properly appeal from a judgment until it has been entered. *See Logan v. Harris*, 90 N.C. 7, 8 (1884); *see also* N.C. R. App. P. 3(c)1) (noting that appeals must be filed "within thirty days *after entry of judgment*" (emphasis added)). Thus, we conclude that the initial termination orders signed by Judge Leslie were a nullity for this reason as well.

In view of the fact that no viable adjudication and termination orders were actually entered on 16 October 2018, the appeal that respondent-mother noted from those orders did not have the effect of divesting the District Court, Henderson County, of the authority to enter further orders in this case, including the entry of additional orders correcting

the error worked by Judge Leslie's decision to sign orders in a termination of parental rights case in which she had not presided over the adjudication and dispositional hearing. *Cf. Veazey v. City of Durham*, 231 N.C. 357, 367, 57 S.E.2d 377, 385 (1950) (stating, in discussing a statutory predecessor to the Rule of Civil Procedure, that, " 'when an appeal is taken as in this case from an interlocutory order from which no appeal is allowed by The Code [of Civil Procedure of 1868], which is not upon any matter of law and which affects no substantial right of the parties, it is the duty of the Judge to proceed as if no such appeal had been taken' " (quoting *Carleton v. Byers*, 71 N.C. 331, 335 (1874))). For this reason, Judge Leslie did not err by vacating the initial set of termination orders that she signed in this case and the trial court did not err by entering the set of termination orders which respondent-mother has sought to challenge before this Court. As a result, since the trial court had the authority to enter the challenged orders terminating respondent-mother's parental rights in Caroline and since respondent-mother has not advanced any other challenges to the validity of the trial court's termination orders, those orders are affirmed.

AFFIRMED.

IN RE INQUIRY CONCERNING A JUDGE, NO. 18-070

ANGELA C. FOSTER, RESPONDENT

No. 215A19

Filed 27 September 2019

Judges—judicial conduct—violations—censure

Where a district court judge, without a contempt hearing, ordered a party into temporary custody and threatened her teenage children in order to achieve compliance with a visitation order, the Supreme Court ordered that the judge be censured for violation of Canons 1, 2A, 3A(3), and 3A(4) of the N.C. Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brought the judicial office into disrepute in violation of N.C.G.S. § 7A-376.

This matter is before the Court pursuant to N.C.G.S. §§ 7A-376 and -377 upon a recommendation by the Judicial Standards Commission entered on 23 May 2019 that respondent Angela C. Foster, a Judge of

the General Court of Justice, District Court Division, Judicial District Eighteen, be censured for conduct in violation of Canons 1, 2A, 3A(3), and 3A(4) 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 28 August 2019, but was 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 the Court is whether District Court Judge Angela C. Foster, respondent, should be censured for violations of Canons 1, 2A, 3A(3), and 3A(4) 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 she be censured by this Court.

On 22 August 2018, Commission Counsel filed a Statement of Charges against respondent alleging that she had engaged in conduct inappropriate to her judicial office by making inappropriate comments; by failing to remain patient, dignified, and courteous with the parties appearing before her; by failing to provide every person legally interested in a proceeding, or the person's lawyer, the full right to be heard according to the law; and by abusing the contempt power. Respondent fully cooperated with the Commission's inquiry into this matter. In the Statement of Charges, Commission Counsel asserted that respondent's actions constituted willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute or otherwise constituted grounds for disciplinary proceedings under Chapter 7A, Article 30 of the North Carolina General Statutes.

Respondent filed her answer on 11 September 2018. On 26 March 2019, 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 of censure.

The Stipulation was filed with the Commission on 2 April 2019. The Commission heard this matter on 12 April 2019 and entered its recommendation that same day, which contains the following stipulated findings of fact:

> 1. On or about January 2, 2018, Respondent presided over a contempt hearing in *Morrow v. Livesay*, Guilford County File No. 15CVD5571. The matter was calendared by the defendant Jeffery Livesay against the plaintiff Kathi Morrow, to determine whether Ms. Morrow should be held in contempt after the parties' fifteen (15) year old twin sons, who reside with her, refused to visit with their father Mr. Livesay during the winter holiday.
>
> 2. At the contempt hearing on or about January 2, 2018, Ms. Morrow's counsel appeared on her behalf and objected to the court's consideration of the contempt motion on the grounds that Ms. Morrow received insufficient notice of the hearing.
>
> 3. Respondent acknowledged counsel's objection as to timely notice of the hearing, but instead of continuing the matter, ordered Ms. Morrow and the twin boys to appear in court within thirty (30) minutes. At that time, Respondent stated that "I'm not saying that we're going through with the hearing, but you need to call your client and tell her to get here because I have a few choice words that I need to say to her . . . ." Respondent further stated that "the boys need to come . . . so that they can hear that their mother can go to jail for their behavior . . . "[a]nd [sic] if a child wants their parent to go to jail, I got a problem with that as well."
>
> 4. When Ms. Morrow and the teenage twin boys arrived, Respondent convened the hearing again and asked Ms. Morrow and her sons to stand, and swore them in as if to give testimony. At that time, Respondent began to question the two boys regarding their refusal to participate in the court ordered visitation with their father and inquired of the boys whether they understood that their mother could be incarcerated for contempt if they continued to resist visitation with their father.
>
> 5. After the boys told Respondent that they would rather have their mother go to jail than visit with their

father, Respondent became deeply concerned and stated "my children would never allow me to go to jail for any reason whatsoever . . . I'm appalled because my children respect me so much they would never allow that to happen." Respondent vigorously questioned and explained the profound significance and detrimental impact their refusal to visit with their father would have on themselves and their mother.

6. After hearing from the boys that they had an understanding of the consequences of their refusal to comply with a court order, Respondent then ordered the bailiff to handcuff Ms. Morrow and place her in a holding cell. Ms. Morrow's counsel immediately objected to the decision to put her into custody because no contempt hearing had taken place and neither counsel nor his client were given an opportunity to be heard. Respondent nevertheless instructed the bailiff to take Ms. Morrow to a holding cell over her counsel's objections.

7. After Ms. Morrow was handcuffed and removed from the courtroom, Respondent again asked the twin boys to stand and then proceeded to convey to them how "appalled" she was at their behavior and how "ashamed" they should be of themselves for allowing their mother to go to jail for their behavior. During this colloquy, Respondent also lectured the twin boys about her personal experiences as a parent as well as her experiences as a certified juvenile judge. Respondent shared personal stories, as well as disturbing cases she had presided over where children had suffered unfortunate outcomes.

8. Respondent informed the boys that if their mother was found in contempt, she would go to jail for sixty (60) days and explained that meant they would be in their father's custody for that entire time. Respondent appealed to the boys' sense of reason by questioning whether it made more sense to spend six (6) days of visitation with their father as originally ordered, or sixty (60) days while their mother was incarcerated. The boys finally relented and agreed to visit their father.

9. After reaching this understanding with the boys, Respondent then asked to have Ms. Morrow brought back

into the courtroom and commented "as far as your full-blown hearing, it is going to be continued. You two need to pick a date because I do not believe that you [had] enough time to truly prepare."

10. At the conclusion of the hearing, both parties thanked Respondent for her efforts trying to resolve the boys' refusal to visit with their father.

11. Respondent believed that her actions in ordering Ms. Morrow to be handcuffed and put into custody without a hearing, opportunity to be heard, or written order were appropriate to deescalate an unfortunate situation and resolve the visitation issues without further involving the Court. Respondent has previously placed litigants in temporary custody for a short "cooling-off period" without an opportunity to be heard and found that practice to be successful in getting litigants to comply with the Court's directives. After such temporary detention, Respondent typically offers the litigant an opportunity to apologize to the Court in lieu of facing a contempt hearing and a jail sentence.

12. Respondent acknowledges that she specifically intended to have Ms. Morrow handcuffed and taken into custody without a hearing and that this decision was an improper or wrongful use of the power of her judicial office and that she knew or should have known that doing so was beyond the legitimate exercise of her authority.

(Brackets in original and citations to pages of the Stipulation omitted.)

Based on 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(3) requires a judge to be "patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in the judge's official capacity . . . . . [sic]" Canon 3A(4) requires a judge to "accord every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law . . . ."

4. Upon the Commission's independent review of the stipulated facts concerning Respondent's conduct on January 2, 2018 in presiding over the contempt hearing in *Morrow v. Livesay*, Guilford County File No. 15CVD5571, and the audio and transcript thereof included with the Stipulation, 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 herself 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 patient, dignified, and courteous to litigants, lawyers and others who she dealt with in her official capacity, in violation of Canon 3A(3) of the North Carolina Code of Judicial Conduct;

d. failed to afford every person who is legally interested in a proceeding, or the person's lawyer, a full right to be heard according to the law in violation of Canon 3A(4) of the North Carolina Code of Judicial Conduct.

13. [sic] The Commission also notes that Respondent agreed in the Stipulation that she violated the foregoing provisions of the North Carolina Code of Judicial Conduct.

14. The Commission further concludes that the facts establish that Respondent engaged in willful misconduct in office and 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.").

15. More than 40 years ago, the Supreme Court first defined "willful misconduct in office" as "improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly and, generally in bad faith. It is more than a mere error of judgment or an act of negligence." *In re Edens*, 290 N.C. 299, 305 (1976). As the Supreme Court further explained in *In re Nowell*, 293 N.C. 235 (1977), while willful misconduct in office necessarily encompasses "conduct involving moral turpitude, dishonesty, or corruption," it also can be found based upon "any knowing misuse of the office, whatever the motive." *Id.* at 248. The Supreme Court also found that "these elements are not necessary to a finding of bad faith. A specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority constitutes bad faith." *Id.*

16. In keeping with this long-standing definition, the Commission finds that Respondent engaged in willful misconduct in office. In reaching this conclusion, the Commission does not review the legal issue of whether Ms. Morrow may properly have been held in contempt based on her sons' refusal to visit with their father. Respondent admits that she purposely avoided any legal ruling on the contempt issues before her and continued the hearing to a later date. Instead, the Commission considers Respondent's conduct in ordering Ms. Morrow into custody and then threatening the boys to achieve compliance with the visitation order without a contempt hearing to be intentional and willful.

17. The facts establish that Respondent acted with the specific intent to avoid what Respondent referred to

as a "full-blown hearing," which Respondent admitted could not properly go forward because of inadequate notice. The facts also establish that this conduct was not a mere "error of judgment or mere lack of diligence" but was intentional and part of Respondent's admitted pattern of ordering litigants into temporary custody to achieve compliance with her directives without resort to the contempt power.

18. Importantly, Respondent has indicated that her decision to order Ms. Morrow into custody and her threats and harsh language directed to the boys were undertaken with benevolent motives to "deescalate an unfortunate situation and resolve the visitation issues without further involving the Court." Even so, "bad faith" includes "any knowing misuse of the office, whatever the motive." *In re Nowell*, 293 N.C. at 248. The facts establish that Respondent acted in bad faith because she had "[a] specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of [her] authority. [sic] *Id.* Respondent concedes this point as well.

19. Having concluded that Respondent engaged in willful misconduct in office, the Commission also concludes that Respondent's conduct amounts to conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The Supreme Court in *Nowell* explained that "willful misconduct in office of necessity is conduct prejudicial to the administration of justice that brings the judicial office into disrepute." *Nowell*, 293 N.C. at 248.

20. The Supreme Court also defined conduct prejudicial to the administration of justice in *In re Edens*, 290 N.C. 299 (1976) and stated as follows:

> Conduct prejudicial to the administration of justice that brings the judicial office into disrepute has been defined as "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to the public esteem for the judicial office." Whether the conduct of a judge may be so characterized "depends not

> so much upon the judge's motives but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers."

Id. at 305–306 (internal citations omitted).

21. In the present case, regardless of what Respondent perceived to be good motives for undertaking her course of conduct, Respondent's actions in directing the bailiff to handcuff Ms. Morrow and escort her out of the courtroom without an opportunity to be heard and without any indication of contemptuous behavior by Ms. Morrow in the courtroom, and then continuing to berate and threaten Ms. Morrow's children, is conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

22. As the Supreme Court recognized in *In re Nowell*, "[t]he power of the district court over the lives and everyday affairs of our citizens makes it imperative that the district court judges of the State not only be fully capable but also dedicated to carrying out their official responsibilities in accordance with the law and established standards of judicial conduct." 293 N.C. at 252. In this case, Respondent's conduct fell below the standards expected in Canon 1, Canon 2A, Canon 3A(3) and Canon 3A(4) and the facts establish that she engaged in willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

23. Respondent also acknowledges that the factual stipulations contained herein are sufficient to prove by clear and convincing evidence that her actions constitute willful misconduct in office and that she willfully engaged in misconduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C. Gen. Stat. § 7A-376.

(Brackets in original and citations to pages of the Stipulation omitted.)

Based on these findings of fact and conclusions of law, the Commission recommended that this Court censure respondent. The Commission based this recommendation on its earlier findings and conclusions, as well as the following additional dispositional determinations:

1. The Supreme Court in *In re Crutchfield*, 289 N.C. 597 (1975) first addressed sanctions under the Judicial Standards Act and stated that the purpose of judicial discipline proceedings "is not primarily to punish any individual but to maintain due and proper administration of justice in our State's courts, public confidence in its judicial system, and the honor and integrity of its judges." *Id.* at 602.

2. In cases where willful misconduct in office is found, however, the Supreme Court has found that censure is an appropriate sanction. As stated in *In re Martin*, 333 N.C. 242 (1993), "Judges especially must be vigilant to act within the bounds of their judicial power. When judges knowingly act beyond these bounds, it amounts to willful misconduct which brings the judicial office into disrepute and prejudices the administration of justice. In such cases censure at least is proper." *Id.* at 245.

3. The Commission recommends censure rather than a more severe sanction based on the following mitigating factors:

a. Respondent has been cooperative with the Commission's investigation, voluntarily providing information about the incident and accepting responsibility for her actions.

b. Respondent has been active in her community and throughout Guilford County and has served as a duly elected judge since 2008.

c. Respondent, through a written statement offered to the hearing panel expressed regret that her actions were inappropriate and offered an apology to the Livesay/Morrow family for the manner in which she handled the matter.

d. The factual stipulations as to the merits make clear that Respondent had engaged in similar conduct in the past, and therefore the Commission gives no weight to the proposed mitigating factor that the incident involving Ms. Morrow was an isolated event.

4. 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.
>
> 5. 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 **censure Respondent**.

(Emphasis in original and citations to pages of the Stipulation omitted.)

"The 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, but they may be adopted by this Court. *Id.* at 428, 722 S.E.2d at 503 (citing *In re Badgett*, 362 N.C. at 206, 657 S.E.2d at 349). 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 (citing *In re Badgett*, 362 N.C. at 207, 657 S.E.2d at 349).

The Commission found the stipulated facts to be supported by "clear, cogent and convincing evidence." In executing the Stipulation, respondent agreed that those facts and information would serve as the evidentiary and factual basis for the Commission's recommendation, and respondent does not contest the findings or conclusions made by the Commission. 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(3), and 3A(4) 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 not bound by the recommendations of the Commission. *In re Hartsfield*, 365 N.C. at 428–29, 722 S.E.2d at 503. Rather, we may exercise our 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. *Id.* at 429, 722 S.E.2d at 503. Accordingly, "[w]e

may adopt the Commission's recommendation, or we may impose a lesser or more severe sanction." *Id.* (citation omitted). The Commission recommended that respondent be censured. 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 to censure respondent.

We appreciate respondent's cooperation and candor with the Commission throughout these proceedings. Weighing the severity of respondent's misconduct against her candor and cooperation, we conclude that the Commission's recommended censure is appropriate.

Therefore, the Supreme Court of North Carolina orders that respondent Angela C. Foster be CENSURED for conduct in violation of Canons 1, 2A, 3A(3), and 3A(4) 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 27th day of September, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 27th day of September, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA
v.
BOBBY DEWAYNE HELMS

No. 397A18

Filed 27 September 2019

Sentencing—aggravating factor—taking advantage of position of trust and confidence—insufficient evidence

There was insufficient evidence to support the aggravating factor of taking advantage of a position of trust or confidence when sentencing defendant for engaging in a sex offense with a three-year-old child. Defendant was engaged in a relationship with the victim's mother; there was no relationship between defendant and the victim. Although the State relied on an acting in concert theory based on the victim's relationship of trust or confidence with her mother, the jury was not instructed on the theory.

Justice NEWBY dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, No. COA18-12, 2018 WL 4701732 (N.C. Ct. App. Oct. 2, 2018), finding no error in judgments entered on 4 May 2017 by Judge Christopher W. Bragg in Superior Court, Union County. Heard in the Supreme Court on 28 August 2019.

Joshua H. Stein, *Attorney General*, *by Alexandra Gruber*, *Assistant Attorney General*, *for the State.*

Ann B. Petersen for defendant-appellant.

HUDSON, Justice.

The case comes to us based on a dissenting opinion in the Court of Appeals. The issue before the Court is whether the Court of Appeals majority erred when it determined that the State presented sufficient evidence of the N.C.G.S. § 15A-1340.16(d)(15) aggravating factor—that defendant "took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense[s]"—to submit that aggravating factor to the jury. Because we conclude there was not sufficient evidence to submit the aggravating factor to the jury, we reverse the decision of the Court of Appeals and remand this matter

for a new sentencing hearing without the consideration of the section 15A-1340.16(d)(15) aggravating factor.

Factual and Procedural Background

On 6 July 2015, Defendant was indicted for two counts of engaging in a sex offense with a child under the age of thirteen years, in violation of section 14-27.4(a)(1) of the General Statutes. Those indictments were later joined for trial with two additional indictments for taking indecent liberties with a child.

The victim, L.F.,[1] was born on 23 April 2011. Her mother, B.F., went on her first date with defendant in 2012. Over the course of B.F.'s relationship with defendant, L.F. had very little contact with defendant and was in his presence only twice: once on B.F.'s first date with defendant, and once on the occasion of the offense.

B.F. brought L.F., who was an infant at the time, along on her first date with defendant. At the end of the date, B.F. performed oral sex on defendant in the car while L.F. was asleep in a rear-facing car seat in the backseat.

The only other time L.F. and defendant were together was on the occasion of the offense. One night in the fall of 2014, B.F. brought three-year-old L.F. to defendant's parents' house. Defendant's parents had a treehouse with a bed and a television inside. B.F., L.F., and defendant sat on the bed in the treehouse and watched a children's television show. Defendant texted B.F. and told her to take off L.F.'s clothes and her own, and she complied. Defendant then removed all of his own clothes, except his boxers. Defendant asked B.F. to touch L.F.'s clitoris, which she did. Defendant watched and began masturbating. At defendant's request, B.F. moved L.F. closer to him. Defendant placed his hand on L.F.'s head to guide her mouth onto his penis. When L.F. expressed that she wanted to leave, defendant took her and B.F. home.

In January 2015, L.F. told her stepmother about what happened in the treehouse. Her stepmother contacted law enforcement and social services.

At trial, the jury found defendant guilty of all four charges and found that the State had proven two aggravating factors: (1) that defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense, and (2) that the victim was very

1. Initials are used throughout this opinion to protect the identity of the juvenile.

young. The trial court arrested judgment on the two convictions of taking indecent liberties with a child.

At the sentencing hearing, the trial court found four mitigating factors, but determined that the aggravating factors outweighed the mitigating factors, and gave defendant an aggravated sentence. The trial court sentenced defendant to 300 to 420 months imprisonment for each charge, to run consecutively, for a total term of 600 to 840 months.

Defendant appealed to the Court of Appeals arguing there was insufficient evidence to support the submission of the second aggravating factor—that defendant "took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense[s,]"—to the jury. § 15A-1340.16(d)(15). In an unpublished opinion, *State v. Helms*, No. COA18-12, 2018 WL 4701732 (N.C. Ct. App. Oct. 2, 2018), the Court of Appeals determined that evidence did support the aggravating factor, in that defendant used his relationship with B.F. to create a relationship with L.F. and to bring L.F. to his parents' home in order to commit the offense. The Court of Appeals therefore determined that there was "a permissible inference that because of L.F.'s extreme reliance on her mother, L.F. would trust and rely on her mother's boyfriend of more than two years, even though L.F. only interacted with defendant in person on two occasions." *Id.*, slip op. at 7–8, 2018 WL 4701732, at *3. As a result, the Court of Appeals concluded that the trial court did not err when it submitted the trust or confidence aggravating factor to the jury. *Id.*, slip op. at 9, 2018 WL 4701732, at *4.

Writing separately, the dissenting judge disagreed with the majority that there was sufficient evidence to submit the aggravating factor to the jury. *Helms*, slip op. at 1, 2018 WL 4701732, at *5 (Hunter, J., dissenting). He would have held that, although the State showed evidence of a relationship of trust or confidence between L.F. and B.F., it failed to present evidence of a relationship of trust or confidence between L.F. and defendant, and that imputing the closeness of defendant's relationship with B.F. to defendant's relationship with L.F. was "tenuous[.]" *Id.*, slip op. at 1, 2018 WL 4701732, at *4 (Hunter, J., dissenting).

Defendant filed his appeal of right based on the dissenting opinion.

Analysis

"The State bears the burden of proving beyond a reasonable doubt that an aggravating factor exists . . . ." N.C.G.S. § 15A-1340.16(a). A court may impose an aggravated sentence during the sentencing phase of a trial if a jury finds that a "defendant took advantage of a position of trust

or confidence, including a domestic relationship, to commit the offense." § 15A-1340.16(d)(15). A finding of this aggravating factor depends on "the existence of a relationship between the defendant and victim generally conducive to reliance of one upon the other." *State v. Daniel*, 319 N.C. 308, 311, 354 S.E.2d 216, 218 (1987).

We have upheld a finding of the "trust or confidence" factor in very limited factual circumstances. *See State v. Mann*, 355 N.C. 294, 319, 560 S.E.2d 776, 791 (2002) (citations omitted). Specifically, we have upheld this aggravating factor where the relationship has been between the defendant and the victim. *See*, *e.g.*, *State v. Farlow*, 336 N.C. 534, 542, 444 S.E.2d 913, 918 (1994) ("The existence of this aggravating factor is premised on a relationship of trust between defendant and the victim which causes the victim to rely upon defendant."); The Court of Appeals has also applied this interpretation of the statute. *See*, *e.g.*, *State v. Stanley*, 74 N.C. App. 178, 327 S.E.2d 902 (factor properly found where *victim* trusted and obeyed *defendant* as an authority figure), *disc. rev. denied*, 314 N.C. 546, 335 S.E.2d 318 (1985); *State v. Baucom*, 66 N.C. App. 298, 311 S.E.2d 73 (1984) (factor properly found where *victim* was ten-year-old brother of *defendant*); *State v. Potts*, 65 N.C. App. 101, 308 S.E.2d 754 (1983) (factor properly found where *victim* thought of *defendant* as a brother), *disc. rev. denied*, 311 N.C. 406, 319 S.E.2d 278 (1984).

Here, we conclude that the State's evidence at trial was insufficient to establish the trust or confidence aggravating factor because it failed to show that the relationship between L.F. and defendant was conducive to her reliance on him. Rather, the State's evidence showed only that L.F. trusted defendant in the same way she might trust any adult acquaintance, a fact which our courts have found to be insufficient to support this aggravating factor. *See State v. Blakeman*, 202 N.C. App. 259, 271, 688 S.E.2d 525, 532 (2010) (finding evidence that the victim trusted the defendant in the same way she would trust any adult parent of a friend insufficient to support the aggravating factor).

L.F. was never in defendant's care, nor did she ever spend the night in the same location as defendant. Indeed, she was not alone with him even when the offense occurred. Her only contact with defendant was as an infant on her mother's first date with defendant and as a three-year-old accompanying her mother to defendant's parents' house on the occasion of the offense. The State's evidence showed nothing more that could lead to the inference that L.F. had a relationship with defendant in which she trusted or relied on him at all.

The State contends that it is not the relationship between defendant and L.F. that is relevant here; rather, it is L.F.'s relationship with B.F. Employing an "acting in concert" theory, the State argues that defendant took advantage of L.F.'s relationship of trust or confidence with her mother to carry out the offense. The State suggests the jury relied on this theory because counsel for both defendant and the State focused on defendant's relationship with B.F. in closing arguments. However, defense counsel did not specifically argue the "acting in concert" theory before closing, and the jury was not instructed on the theory. Due process requires the sufficiency of the evidence be reviewed with respect to the theory upon which the jury was instructed. *State v. Wilson*, 345 N.C. 119, 123, 478 S.E.2d 507, 510 (1996) (citing *Presnell v. Georgia*, 439 U.S. 14, 16 (1978)). We decline now to justify the jury's decision based on a theory that was never presented to it.

Without the "acting in concert" theory, the evidence here falls short of showing a relationship between defendant and L.F. whereby he took advantage of a relationship of trust or confidence to carry out the offense. Therefore, we reverse the decision of the Court of Appeals and remand to that court for further remand to the trial court to resentence defendant without consideration of the section 15A-1340.16(d)(15) aggravating factor.

REVERSED AND REMANDED.

Justice NEWBY dissenting.

The issue in this case is whether there was sufficient evidence to ask the jury to decide whether defendant abused a position of trust or confidence to commit the sexual assault. To resolve that issue, we must first answer a question of pure statutory interpretation: does the trust or confidence provision require that defendant unilaterally built a relationship with the victim toddler? It does not; I respectfully dissent.

Under section 15A-1340.16(d)(15), a jury may find that a defendant committed an aggravated offense if to commit the offense "[t]he defendant took advantage of a position of trust or confidence, including a domestic relationship." N.C.G.S. § 15A-1340.16(d)(15) (2017). The majority rewrites the statute to also require that the relationship of trust or confidence specifically exist between the defendant and the victim. The General Assembly could have easily placed that requirement in the statute if that is what it intended, but it did not. The statute should be read as written. The express language requires only that a relationship

of trust or confidence existed and that the defendant took advantage of it to commit the underlying crime. It does not say anything about necessary parties to the relationship.

Here the child victim had a relationship of trust and confidence with her mother. Defendant also had a relationship of trust or confidence with the victim's mother: for a couple years they spoke often through Facebook Messenger, made plans for the future, and even called each other "husband" and "wife."

Defendant actively leveraged both relationships to sexually assault the child. Over the span of the relationship, defendant cultivated the child's mother so she would comply with his wishes. He took advantage of her diminished mental capacity, breaching barriers a mother might otherwise put up to protect her child. Defendant encouraged the mother to sexually stimulate the child. Several times he spoke to the mother of his plans to commit sexual acts with their future offspring, and he asked for photos of the child. In time, he used the mother's trust to bring both mother and child to his parents' private treehouse where he completed his plan.

If not for the relationships of trust or confidence, the mother would not have allowed defendant access to her child. If not for the relationships, the mother and child would never have gone to the treehouse with defendant. And if not for the relationships, defendant would not have secured the mother's assistance to commit the sexual assault for which he was convicted.

The trial court's instruction to the jury was also proper. It was quite literally "by the book." The court asked the jury to answer "yes" or "no" to the following question: "Do you find the evidence beyond a reasonable doubt [that] . . . [t]he defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense[?]" This question exactly matches the statutory provision for this aggravating factor, as well as the model jury instruction. *See* N.C.P.I. Crim. 204.25(18) (June 2018). Not surprisingly, defendant did not contest this instruction.

The jury was able to simply answer "yes." It did not read in extra requirements for the aggravating factor like the majority does. A relationship of trust or confidence existed. But for that relationship, the sexual assault would not have happened. And defendant actively manipulated that relationship for that very purpose.

The majority quotes our decision in *State v. Daniel*, 319 N.C. 308, 354 S.E.2d 216 (1987), to support its holding that there can be no

relationship of trust or confidence unless the victim and the defendant have interacted substantially before the offense. In that case, we said that finding this aggravating factor "depends . . . upon the existence of a relationship between the defendant and victim generally conducive to reliance of one upon the other." *Id.* at 311, 354 S.E.2d at 218. For the majority, no such relationship was formed because the record shows only two occasions when the victim and defendant interacted.

The majority misapplies *Daniel*. The quote relied on by the majority only served to distinguish between this aggravating factor and another, the victim's youth. That same paragraph explains this purpose. The defendant in that case argued that the youth factor and the relationship of trust or confidence factor could not both be applied because they were based on the same evidence. In response, we explained:

> . . . the aggravating factor that the defendant took advantage of a position of trust or confidence was grounded not in the youth of her child but more fundamentally in the child's dependence upon her. A finding of this aggravating factor depends no more on the youth of the victim than it does on the notion that confidence or trust in the defendant must repose consciously in the victim. Such a finding depends instead on the existence of a relationship between defendant and victim generally conducive to reliance of one upon the other.

Id. So, the quote on which the majority builds its opinion does not give a complete picture of this aggravating factor. It is merely an explanation of why that factor, under the facts in that case, did not rest on the exact same evidence as the "victim's youth" factor. *Daniel* dealt with the relationship of a defendant mother and victim child, obviously one of trust or confidence. The issue was not whether there was evidence of such a relationship, but only whether that factor was truly different than the youth factor. *Daniel* simply does not speak to situations like this one, where the question is whether a relationship of trust or confidence existed between the *right* parties.

The majority cites one other case from this Court to bolster its new requirement that the relationship of trust or confidence exist between the defendant and the victim, but that case also fails to support its holding. In *State v. Farlow*, 336 N.C. 534, 542, 444 S.E.2d 913, 918 (1994), we cited *Daniel* saying "[t]he existence of this aggravating factor is premised on a relationship of trust between defendant and the victim which causes the victim to rely upon the defendant." But again, the majority

ignores the specific facts of the case. In *Farlow*, there was no other significant relationship besides the one between the defendant and the victim. The victim's father was deceased, his mother was away, and his caretaker grandfather was deceased. *Id.* The defendant built a relationship with the victim solely and directly because it could not have been any other way. This Court has not addressed a case with facts like this one, where the relationship of trust or confidence that brought about the sexual assault was not between the defendant and the victim directly.

The majority also argues this aggravating factor could be attributed to defendant only under an "acting in concert" theory, and so must have been instructed to the jury under that theory. That is incorrect. "Acting in concert" is not an abstract legal theory, but a common sense principle that places responsibility on defendants who would not otherwise directly satisfy the statutory provision, when they scheme with someone who does. It supplements aggravating factors that by their terms could only be completed directly and individually.

But an "acting in concert" theory need not be explicitly instructed when the statute providing the aggravating factor is broad enough to apply without it. *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983), provides an example. There the defendant committed second-degree murder and armed robbery. His sentence was aggravated because, among other things, the death of the robbery victim was "especially heinous, atrocious, or cruel." *See* N.C.G.S. § 15A-1340.16(d)(7) (2017) (allowing for an aggravated sentence when "[t]he offense was especially heinous, atrocious, or cruel"). The Court upheld the finding of that factor, even though the defendant himself did not directly participate in killing the victim, but instead was a lookout. *Benbow*, 309 N.C. at 544–46, 308 S.E.2d at 651–52. The Court did not discuss an acting in concert theory at all. Only two questions applied: (1) did the defendant commit the underlying offense? and (2) was the offense especially heinous, atrocious, or cruel? The answer to both was yes, so no "acting in concert" theory was necessary. *See generally id.* at 544–45, 308 S.E.2d at 651.

Because section 15A-1340.16(d)(15) does not by its terms require a specific type of relationship between the child victim and defendant, only two questions apply: (1) did defendant commit the underlying offense? and (2) did he take advantage of a relationship of trust or confidence to do so? The answer to both is yes.

I respectfully dissent.

STATE OF NORTH CAROLINA
v.
MICHAEL PATRICK RYAN

No. 366A10

Filed 27 September 2019

Appeal pursuant to an order of this Court allowing review of an order granting defendant's motion for appropriate relief entered on 7 February 2017 by Judge W. Erwin Spainhour in Superior Court, Gaston County. Heard in the Supreme Court on 27 August 2019.

Joshua H. Stein, Attorney General, by Mary Carla Babb, Assistant Attorney General, for the State.

William F. W. Massengale and Marilyn G. Ozer, for defendant-appellee.

PER CURIAM.

Justice ERVIN took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Superior Court, Gaston County. Accordingly, the decision of the Superior Court, Gaston County is left undisturbed and stands without precedential value. *See State v. Woodruff*, 307 N.C. 264, 297 S.E.2d 382 (1982).

AFFIRMED.

STATE v. CLEGG

[373 N.C. 50 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Wake County
	)	
CHRISTOPHER A. CLEGG	)	

No. 101P15-3

ORDER

Defendant's motion for leave to file a supplemental petition for discretionary review is decided as follows: Defendant's petition is allowed. The State shall have up to and including thirty days from the date of this order within which to file its response to defendant's supplemental petition for discretionary review.

By order of the Court in conference, this the 25th day of September, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 27th day of September, 2019.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
Assistant Clerk, Supreme Court of
North Carolina

STATE v. COURTNEY

[373 N.C. 51 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	WAKE COUNTY
	)	
JAMES HAROLD COURTNEY, III	)	

No. 160PA18

ORDER

The Court hereby allows a limited temporary stay of enforcement of its mandate in this case until such time as the United States Supreme Court rules on a motion for a stay, provided the State files such motion with that Court within seven days of the date of this Order. The State's application to stay enforcement of the mandate is otherwise denied.

By order of this Court in Conference, this 5th day of September, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of September, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. HARRIS

[373 N.C. 52 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Granville County
	)	
VINCENT LAMONT HARRIS	)	

No. 548A04-2

ORDER

The State's petition for discretionary review is decided as follows: The Court elects to treat the State's petition for discretionary review as a petition for certiorari and allows the State's petition for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decision in *State v. Grady* (No. 179A14-3) (16 August 2019), including determining what, if any, additional proceedings should be utilized in order to properly decide the questions that will be before it on remand.

By order of the Court in conference, this the 25th day of September, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 27th day of September, 2019.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
Assistant Clerk, Supreme Court of
North Carolina

STATE v. SHERRILL

[373 N.C. 53 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Mecklenburg County
	)	
MICHAEL WAYNE SHERRILL	)	

No. 246A09-2

ORDER

Defendant's motion for appropriate relief is decided as follows: Pursuant to N.C.G.S. § 15A-1415(b), the Court determines that it is necessary to remand this case to the Superior Court, Mecklenburg County for the holding of a hearing, the taking of evidence, and the entry of an order addressing defendant's motion for appropriate relief. The time periods for perfecting and proceeding with defendant's appeal are tolled pending the completion of the required trial court proceedings in accordance with N.C.G.S. § 15A-1418(c). The Superior Court, Mecklenburg County shall, upon the entry of its order, transmit that order to this Court as required by N.C.G.S. § 15A-1418(a) so that it may either proceed with the appeal or enter an appropriate order terminating it.

By order of the Court in conference, this the 25th day of September, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 27th day of September, 2019.

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

27 SEPTEMBER 2019

1A96-3	State v. Walter R. Goldston	Def's Pro Se Motion to Invoke Court's Jurisdiction	Dismissed
23P19	Brinkley Properties of Kings Mountain, LLC, Jerry Moore, Carolyn Moore, Don Baber, Gail Baber, Barry Rikard, Jenny Rikard, Stephanie Short, Shane Short, Alice White, Mabel Moore, Mike Whitehead, Elizabeth Whitehead, Leonard White, George Greer, and Mary Greer v. City of Kings Mountain, North Carolina, Orchard Trace of Kings Mountain, LLC	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-615)	Denied
41P17-6	Arthur O. Armstrong v. Wilson County, et al.	Plt's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wilson County	Denied
50P19-2	Jonathan E. Brunson v. Office of the District Attorney for the 12th Prosecutorial District, the North Carolina Department of Social Services, and the State of North Carolina	Plt's Pro Se Motion for Petition for Rehearing of PDR (COA18-658)	Dismissed
57P19-2	Jonathan E. Brunson v. North Carolina Department of Justice, North Carolina Department of Public Safety, and the State of North Carolina	Plt's Pro Se Motion for Petition for Rehearing of PDR (COA18-837)	Dismissed
61P19-2	Jonathan E. Brunson v. North Carolina Department of Justice and the State of North Carolina	Plt's Pro Se Motion for Petition for Rehearing of PDR (COA18-656)	Dismissed

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

27 SEPTEMBER 2019

74P19	State v. Justin Alexander Vandergriff	1. Def's Petition for Writ of Certiorari to Review Order of the COA (COAP19-123)	1. Dismissed
		2. Def's Motion to Consolidate Matters	2. Dismissed as moot
		3. Def's Petition for Writ of Certiorari to Review Order of the COA	3. Dismissed
		4. Def's Motion for Leave of Court to Consider Defendant's Reply	4. Denied
91P14-6	State v. Salim Abdu Gould	1. Def's Pro Se Notice of Appeal Based Upon A Constitutional Question (COA18-425)	1.
		2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	2.
		3. Def's Pro Se Motion for Notice of Appeal	3.
		4. Def's Pro Se Motion for Writ of Habeas Corpus Arbitration-Mediation	4. Denied **07/24/2019**
		5. Def's Pro Se Petition for Writ of Mandamus	5. Denied **09/23/2019**
		6. Def's Pro Se Motion for Jurisdictional Hearing and to Issue Transport Order	6. Denied **09/23/2019**
		7. Def's Pro Se Motion for Averment of Jurisdiction - Quo Warranto	7.
		8. Def's Pro Se Motion for Subpoena *Duces Tecum*	8. **Davis, J., recused**
97P19	State v. Justin Alexander Vandergriff	1. Def's Petition for Writ of Certiorari to Review Order of the COA (COAP19-112)	1. Dismissed
		2. Def's Petition for Writ of Certiorari to Review Orders of District and Superior Court, Wake County	2. Dismissed
		3. Def's Motion for Leave of Court to Consider Defendant's Reply	3. Denied
101P15-3	State v. Christopher Anthony Clegg	1. Def's Notice of Appeal Based Upon A Constitutional Question (COA17-76)	1. --- **08/14/2018**
		2. Def's PDR Under N.C.G.S. § 7A-31	2. Special Order **08/14/2018**
		3. State's Motion to dismiss appeal	3. Allowed **08/14/2018**
		4. Def's Motion for Leave to File Supplemental PDR	4. Special Order **09/25/2019**

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

27 SEPTEMBER 2019

123P19	State v. Raymond Carl Gilbert	Def's PDR Under N.C.G.S. § 7A-31 (COA18-614)	Denied
128P19	State v. Justin Alexander Vandergriff	Def's Petition for Writ of Certiorari to Review Order of the COA (COAP19-121)	Dismissed
130P19	State v. Terrence Andrew Thomas	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-959)	Denied **Davis, J., recused**
131P16-13	Somchai Noonsab v. Amy L. Funderburk	Def's Pro Se Motion to Vacate (COAP16-103)	Dismissed
138P19	Vincent Bordini v. Donald J. Trump for President, Inc., and Earl Phillip	Plt's Petition for Writ of Certiorari to Review Decision of the COA (COA18-409)	Denied **Ervin, J., recused**
149P19	State v. James Brandon Smith	Def's PDR Under N.C.G.S. § 7A-31 (COA18-789)	Denied **Davis, J., recused**
156A17-2	Christopher DiCesare, et al. v. the Charlotte-Mecklenburg Hospital Authority	1. Def's Motion to Admit Richard A. Feinstein, Pro Hoc Vice 2. Def's Motion to Admit Nicholas A. Widnell, Pro Hoc Vice	1. Allowed **09/03/2019** 2. Allowed **09/03/2019**
156P09-3	Waddell Bynum v. Mecklenburg County School Board	Plt's Pro Se Motion for Notice of Appeal	Dismissed
157P19	State v. Virginia Lee Loftis	Def's PDR Under N.C.G.S. § 7A-31 (COA18-709)	Denied **Davis, J., recused**
160PA18	State v. James Harold Courtney, III	State's Motion to Stay Enforcement of the Mandate (COA17-1095)	Special Order **09/05/2019**
162P18-2	State v. Ronnie Lee Ford	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Guilford County (COA17-817) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed

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

27 SEPTEMBER 2019

163P19	Marion Edward Pearson, Jr. v. Judicial Standards Commission	1. Petitioner's Pro Se Petition for Writ of Mandamus 2. Petitioner's Pro Se Motion for Revised Complaint of Misconduct	1. Denied 2. Dismissed **Ervin, J., recused** **Davis, J., recused**
168A19	Cardiorentis AG v. Iqvia Ltd. and Iqvia RDS, Inc.	Def's Motion for Leave for Charles Marshall to Withdraw as Counsel of Record	Allowed **09/17/2019**
181A93-4	State v. Rayford Lewis Burke (DEATH)	Motion of ACLU Capital Punishment Project, ACLU of North Carolina Legal Foundation, N.C. Advocates for Justice, and N.C. Conference of the NAACP for Leave to File Brief as Amici Curiae	Allowed **Ervin, J., recused**
193P18-5	State v. Joshua Bolen	1. Def's Pro Se Motion for Appropriate Relief (COAP18-238) 2. Def's Pro Se Petition for Writ of Habeas Corpus	1. 2. Dismissed without prejudice **09/25/2019**
200P19	Pender County and the Town of Atkinson v. Donald Sullivan and Marion P. Sullivan	Defs' Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-774)	Denied
202P18	Jennifer L. Haulcy, Employee v. The Goodyear Tire & Rubber Company, Employer, and Liberty Mutual Insurance Company, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-844)	Denied
204P18	Carra Jane Penegar, Widow and Executrix of the Estate of Johnny Ray Penegar, Deceased Employee v. United Parcel Service, Employer, and Liberty Mutual Insurance Co., Carrier	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA17-404) 2. Plt's Motion to Amend the PDR	1. Denied 2. Allowed

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

27 SEPTEMBER 2019

216A19	Milton Draughon, Sr., Plaintiff v. Evening Star Holiness Church of Dunn, Defendant/ Third-Party Plaintiff v. Dafford Funeral Home, Inc., Third-Party Defendant	1. Defendant/Third-Party Plt's Notice of Appeal Based Upon a Dissent (COA18-887) 2. Defendant/Third-Party Plt's PDR as to Additional Issues 3. Defendant/Third-Party Plt's Motion for John W. Graebe to Withdraw as Counsel of Record 4. Defendant/Third-Party Plt's Motion to Substitute Denaa J. Griffin as Counsel of Record	1. --- 2. Allowed 3. Allowed 4. Allowed
222P19	Department of Transportation v. Hutchinsons, LLC	1. Def's Notice of Appeal Based Upon A Constitutional Question (COA18-675) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
237P19	State v. William Brandon Mosley	1. Def's Petition for Writ of Certiorari to Review Decision of the COA (COAP18-474) 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Rutherford County	1. Dismissed 2. Dismissed **Beasley, C.J., recused** **Ervin, J., recused**
238P19	State v. Matthew Garret McMahan	1. State's Motion for Temporary Stay (COA18-672) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/24/2019** Dissolved **09/25/2019** 2. Denied 3. Denied
241PA19	Anita Kathleen Parkes v. James Howard Hermann	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA18-888) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed
245A08-3	State v. Terrence Lowell Hyman	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-398-2) 2. Def's Petition in the Alternative for Writ of Certiorari to Review Decision of the COA	1. Denied 2. Denied
245P19	Medport, Inc. v. Craig Smith	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-950)	Denied

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

27 SEPTEMBER 2019

246A09-2	State v. Michael Wayne Sherrill	1. Def's Motion for Appropriate Relief 2. State's Motion for Extension of Time to File Response to Motion for Appropriate Relief	1. Special Order 2. Allowed **04/26/2019**
246P19	Margarita Walston, Employee v. Duke University, Self-Insured Employer	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-981)	Denied
261P19	The North Carolina Reinsurance Facility v. Mike Causey, Commissioner of the North Carolina Department of Insurance, and Allstate Indemnity Company	Respondent's (Allstate Indemnity Company) PDR Under N.C.G.S. § 7A-31 (COA18-1303)	Denied
263P17-2	NNN Durham Office Portfolio 1, LLC, et al. v Highwoods Realty Limited Partnership, et al.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA17-756) 2. Plts' Motion to Withdraw PDR Under N.C.G.S. § 7A-31 as to Appellants NNN Durham Office Portfolio 12, LLC and St. Kitts Investments, LLC	1. Denied 2. Allowed
270P19	State v. Loveless Decarlos Hoskins	Def's PDR Under N.C.G.S. § 7A-31 (COA18-1181)	Denied
274P11-2	Jorge Galeas-Menchu, Jr. v. Dennis M. Daniel, Warden Pasquotank Correctional	Petitioner's Pro Se Petition for Writ of Habeas Corpus (COAP11-423)	Dismissed without prejudice **09/25/2019**
274A19	In the Matter of L.T.	Respondent's Motion for Extension of Time to File Brief	Allowed **08/15/2019**
275P19-2	Elizabeth M.T. O'Nan v. Nationwide Insurance Company, et al.	Plt's Pro Se Motion for Reconsideration (COA18-990)	Dismissed
277P18-5	State v. Gabriel Adrian Ferrari	Def's Pro Se Motion to Strike Supreme Court of North Carolina Order 14 August 2019 as Illegal and Non-Constitutional (COA98-724)	Dismissed
281P18-3	State v. Jason Robert Vickers	Def's Pro Se Motion for PDR Under N.C.G.S. § 7A-31 (COAP17-628; COA17-1216; COA18-35)	Dismissed **Davis, J., recused**

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

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283P19	State v. Nathan Elisha Tyler, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA18-1184)	Denied
285P19	Eric M. McMillian v. Tim Mullally (Wake County Director of Safety and Security) and Doug Goodwin Director, General Security Agency (GSA) of Wake County and Trepass Assessment Review Committee (TARC)	Plt's Pro Se Motion for Civil Claim (COAP19-347)	Dismissed
286P19	Jeffrey Hunt v. N.C. Department of Public Safety	Respondent's PDR Under N.C.G.S. § 7A-31 (COA18-1195)	Denied **Davis, J., recused**
287P19	State v. Henry Arnaldo Padilla-Amaya	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-856) 2. State's Motion to Deem Response Timely Filed	1. Denied 2. Dismissed as moot
293A19	State v. Adam Richard Carey	1. State's Motion for Temporary Stay (COA18-1233) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based upon a Dissent	1. Allowed **08/05/2019** 2. Allowed **08/21/2019** 3. ---
295A19	In the Matter of A.L.S.	Respondent's Motion to Amend the Record on Appeal to Include a Rule 9(d) Exhibit	Allowed **09/06/2019**
296P18	Department of Transportation v. Jay Butmataji, LLC; Byrd, Byrd, Ervin, McMahon & Denton, P.A., Trustee; Mukti, Inc., BB&T Collateral Service Corporation, Trustee, and Branch Banking and Trust Company	1. Def's (Jay Butmataji, LLC) PDR Under N.C.G.S. § 7A-31 (COA17-689) 2. Kevin G. Mahoney's Motion to Withdraw as Counsel	1. Denied 2. Allowed

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297P19	Tonya A. Spahr v. Timothy D. Spahr v. Carol Pearce, Intervenor	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP19-316) 2. Def's Pro Se Petition for Writ of Mandamus 3. Def's Pro Se Petition for Writ of Prohibition 4. Def's Pro Se Motion to Vacate Order	1. Denied 2. Denied 3. Denied 4. Denied
305P19	State v. Walter Paul Thomas	Def's Pro Se Motion for PDR (COA05-480)	Denied
306P19	Janet H. Solesbee and husband, Carl Solesbee v. Cheryl H. Brown and husband, Roger Brown; Gwenda H. Angel and husband, Wesley Angel; and Lisa H. Debruhl and husband, J. Delaine Debruhl	Respondents' (Lisa H. Debruhl and J. Delaine Debruhl) PDR Under N.C.G.S. § 7A-31 (COA18-842)	Denied
309A19	In re J.L.	1. Respondent's Motion to Stay Proceedings 2. Respondent's Amended Motion to Stay Proceedings	1. Dismissed as moot **08/29/2019** 2. Special Order **08/29/2019**
315P19	State v. Tony Maurice Gorham	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Halifax County (COAP18-578) 2. Def's Pro Se Motion for Appropriate Relief	1. Dismissed 2. Dismissed without prejudice
317P19	In the Matter of Phillip Entzminger, Assistant District Attorney, Prosecutorial District 3A	1. Respondent's Motion for Temporary Stay (COA18-1224) 2. Respondent's Petition for Writ of Supersedeas 3. Respondent's Petition for Discretionary Review Under N.C.G.S. § 7A-31	1. Allowed **08/15/2019** 2. 3.

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

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321P19	Gary Dellinger, Virginia Dellinger, and Timothy S. Dellinger v. Lincoln County, Lincoln County Board of Commissioners, and Strata Solar, LLC and Mark Morgan, Bridgette Morgan, Timothy Mooney, Nadine Mooney, Andrew Schott, Wendy Schott, Robert Bonner, Michelle Bonner, Jeffrey Deluca, Lisa Deluca, Martha Mclean, Charleen Montgomery, Robert Montgomery, David Ward, Intervenors	1. Intervenors' Motion for Temporary Stay (COA18-1080) 2. Intervenors' Petition for Writ of Supersedeas	1. Allowed **08/16/2019** 2.
324A19	State v. Jack Howard Hollars	1. State's Motion for Temporary Stay (COA18-932) 2. State's Petition for Writ of Supersedeas 3. Plt's Notice of Appeal Based upon a Dissent 4. Plt's Petition for Discretionary Review As To Additional Issues 5. Def's Motion for extension of time to file response	1. Allowed **08/21/2019** 2. 3. 4. 5. Allowed **09/19/2019** **Davis, J., recused**
326P18	Raymond A. Da Silva, Executor of the Estate of Dolores J. Pierce v. Wakemed, Wakemed d/b/a Wakemed Cary Hospital, and Wakemed Faculty Practice Plan	Defs' PDR Under N.C.G.S. § 7A-31 (COA17-820; 17-820-2)	Allowed

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328P19	Cathy Anne Carswell Reis, et al. v. Barbara Anthony Carswell, et al.	1. Plt's Pro Se Petition for Discretionary Review (COA18-1039)	1.
		2. Plt's Pro Se Motion to Withdraw Opinion	2.
		3. Plt's Pro Se Motion for Temporary Stay	3. Denied **08/29/2019**
		4. Plt's Pro Se Petition for Writ of Supersedeas	4.
		5. Plt's Pro Se Notice of Appeal Based Upon A Constitutional Question	5.
330A19	State v. Jesse James Tucker	1. State's Motion for Temporary Stay (COA18-1295)	1. Allowed **08/22/2019**
		2. State's Petition for Writ of Supersedeas	2. Allowed **09/09/2019**
		3. State's Notice of Appeal Based upon a Dissent	3. ---
332P19	State v. Dalton Dewayne Flowers	1. Def's Motion for Temporary Stay (COA18-832)	1. Allowed **08/23/2019**
		2. Def's Petition for Writ of Supersedeas	2.
333P18-3	State v. Douglas Wayne Stanaland	1. Def's Pro Se Petition for Writ of Habeas Corpus	1. Denied **09/04/2019**
		2. Def's Pro Se Motion for Judicial Review/Writ of Certiorari/Motion to Appeal	2. Dismissed **09/04/2019**
333P19-1	Sunaina S. Glaize v. Samuel G. Glaize	1. Plt's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COA19-612)	1. Denied **08/29/2019**
		2. Plt's Pro Se Petition for Writ of Mandamus	2. Denied **08/29/2019**
		3. Plt's Pro Se Petition for Writ of Supersedeas	3. Denied **08/29/2019**
		4. Plt's Pro Se Petition for Writ of Prohibition	4. Denied **08/29/2019**
		5. Plt's Pro Se Motion to Disqualify Clerk, Daniel M. Horne	5. Denied **08/29/2019**
334P19	State v. Tenedrick Strudwick	1. State's Motion for Temporary Stay (COA18-794)	1. Allowed **08/26/2019**
		2. State's Petition for Writ of Supersedeas	2.

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

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340A19	State v. Shawn Patrick Ellis	1. Def's Motion for Temporary Stay (COA18-817) 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based upon a Dissent	1. Allowed **08/29/2019** 2. Allowed **09/25/2019** 3. ---
342P19	Jabari Holmes, Fred Culp, Daniel E. Smith, Brendon Jaden Peay, Shakoya Carrie Brown, and Paul Kearney, Sr. v. Timothy K. Moore, in His Official Capacity as Speaker of the North Carolina House of Representatives; Philip E. Berger, in His Official Capacity as President Pro Tempore of the North Carolina Senate; David R. Lewis, in His Official Capacity as Chairman of the House Select Committee on Elections for the 2018 Third Extra Session; Ralph E. Hise, in His Official Capacity as Chairman of the Senate Select Committee on Elections for the 2018 Third Extra Session; the State of North Carolina; and the North Carolina State Board of Elections	Plt's Petition for Discretionary Review (Prior to Determination) (COA19-762)	Denied **09/25/2019**
343A19	In the Matter of J.D.	1. State's Motion for Temporary Stay (COA18-1036) 2. State's Petition for Writ of Supersedeas 3. Plt's Notice of Appeal Based upon a Dissent 4. Plt's Petition for Discretionary Review As To Additional Issues	1. Allowed **09/05/2019** 2. Allowed **09/25/2019** 3. --- 4.

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

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344P19	State v. Jacquel Levell Holliday	1. Def's Motion for Temporary Stay (COA18-1144) 2. Def's Petition for Writ of Supersedeas	1. Allowed **09/04/2019** 2.
351P19	State v. Danny Corey Williams	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **09/05/2019**
352P19	State v. Kenneth Russell Anthony	1. State's Motion for Temporary Stay (COA18-1118) 2. State's Petition for Writ of Supersedeas	1. Allowed **09/05/2019** 2.
355P19	State v. Kenneth Brewer	1. Def's Pro Se Petition for Discretionary Review (COA18-1246) 2. Def's Pro Se Petition for Writ of Habeas Corpus	1. 2. Denied **09/10/2019**
358P19	State v. Jason Twardzik	1. Def's Pro Se Motion for Emergency Appeal of Denial of Defendant Request to Represent Self 2. Def's Pro Se Motion for Emergency Appeal of Denial of Defendant Request of Release on Own Recognizance 3. Def's Pro Se Motion for Emergency Appeal of Denial of Defendant Request of Dismissal of Charges 4. Def's Pro Se Motion for Emergency Appeal of Denial of Defendant Request for Removal of Counsel	1. Dismissed **09/10/2019** 2. Dismissed **09/10/2019** 3. Dismissed **09/10/2019** 4. Dismissed **09/10/2019**
378P18-5	State v. Napier Sandford Fuller	1. Def's Pro Se Motion to Prescribe Rules in the General Court of Justice re: Requests for Accommodations Per Title II of the ADA (COAP18-623) 2. Def's Pro Se Petition for Writ of Mandamus 3. Def's Pro Se Motion to Seal Medical Records 4. Def's Pro Se Motion for Temporary Stay 5. Def's Pro Se Petition for Writ of Supersedeas 6. Def's Pro Se Motion to Correct a Clerical Error in Court Order	1. Dismissed 2. Denied 3. Allowed 4. Denied **09/09/2019** 5. Denied **09/09/2019** 6. Denied

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

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407P13-4	State v. Shawn Germaine Fraley	1. Def's Pro Se Motion to Extend Time to Answer and Respond to North Carolina Court of Appeals Order (COA13-69 P14-509 P17-44) 2. Def's Pro Se Motion for Appointment of Counsel	1. Dismissed **09/09/2019** 2. Denied **09/09/2019** **Davis, J., recused**
440P18-2	Waddell Bynum v. Progressive Universal Insurance	Plt's Pro Se Motion for Notice of Appeal	Dismissed
458P18	Lewis Scott Carlton and Thomas P. Wood v. Burke County Board of Education	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-62) 2. North Carolina School Boards Association's Motion for Leave to File Amicus Brief	1. Denied 2. Dismissed as moot **Ervin, J., recused** **Davis, J., recused**
548A04-2	State v. Vincent Lamont Harris	1. State's Motion for Temporary Stay (COA18-952) 2. State's Petition for Writ of Supersedeas 3. Def's Motion to Lift Temporary Stay and to Dismiss Petition for Writ of Supersedeas 4. State's PDR 5. State's Motion to Deem the Petition Timely Filed 6. Def's Motion to Dismiss State's PDR 7. Def's Motion in the Alternative to Deem State's PDR Filed on the Date this Court Decides on this Motion to Dismiss	1. Allowed **07/17/2019** Dissolved **09/25/2019** 2. Dismissed as moot 3. Denied 4. Special Order 5. Denied 6. Dismissed as moot 7. Dismissed as moot

IN RE J.B.S.

[373 N.C. 67 (2019)]

IN THE MATTER OF J.B.S., M.C.S.

No. 232A19

Filed 1 November 2019

Termination of Parental Rights—no-merit brief—abandonment and neglect

The trial court's termination of a father's parental rights for abandonment and willful neglect was affirmed where the father's counsel filed a no-merit brief. The trial court's order was based on clear, cogent, and convincing evidence supporting the statutory grounds for termination.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 22 March 2019 by Judge Clifton H. Smith in District Court, Catawba County. This matter was calendared in the Supreme Court on 4 October 2019 but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Stephen M. Schoeberle for petitioner-appellee mother.

Richard Croutharmel for respondent-appellant father.

BEASLEY, Chief Justice

Respondent, the father of the minor children J.B.S. (John)[1] and M.C.S. (Mary), appeals from the trial court's 22 March 2019 order terminating his parental rights. Respondent's counsel filed a no-merit brief pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. We conclude that the issues identified by counsel in respondent's brief lack merit and affirm the trial court's order.

Respondent and petitioner, mother of John and Mary, married in 2002, separated in 2012, and subsequently divorced. Both John and Mary were born of the marriage. In May 2012, respondent and petitioner entered into a consent order by which petitioner obtained primary custody and control of both John and Mary.

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

On 25 October 2017, petitioner filed petitions to terminate respondent's parental rights on the grounds of neglect by abandonment and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(1), (7) (2017). Petitioner alleged, *inter alia*, that although respondent was entitled to have visitation with both John and Mary, he rarely exercised those rights and that the last time respondent saw John and Mary was in June 2015. Petitioner further alleged that respondent failed to lend support and maintenance for John and Mary, withheld his presence, love, care, and affection from John and Mary for more than six consecutive months immediately preceding the petitions, and failed to send any birthday and Christmas cards or gifts for John and Mary within the last three years.

Following a hearing held before the Honorable Clifton Smith on 20 February 2019 in District Court, Catawba County, the trial court entered an order on 22 March 2019 terminating respondent's parental rights on both grounds alleged by petitioner. Respondent appeals.

Respondent's counsel has filed a no-merit brief on behalf of respondent pursuant to North Carolina Rule of Appellate Procedure 3.1(e). Counsel has advised respondent of his right to file *pro se* written arguments on his own behalf with this Court, and counsel has provided respondent with the documents necessary to do so. Respondent has not submitted any written arguments.

We independently review issues contained in a no-merit brief filed pursuant to appellate rule 3.1(e). *In re L.E.M.*, 831 S.E.2d 341, 345 (N.C. 2019). Respondent's counsel identified two issues that could arguably support an appeal but stated why he believed both of these issues lacked merit. Based upon our careful review of the issues identified in the no-merit brief and in light of our consideration of the entire record, we are satisfied that the trial court's 22 March 2019 order was based on "clear, cogent, and convincing evidence" supporting statutory grounds for termination of parental rights. *See* N.C.G.S. § 7B-1109(f). Accordingly, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN RE J.E.

[373 N.C. 69 (2019)]

IN THE MATTER OF J.E.

No. 214A19

Filed 1 November 2019

Termination of Parental Rights—no-merit brief—neglect and leaving child in placement

The termination of a mother's parental rights for neglect and for leaving her child in outside placement for twelve months without showing reasonable progress was affirmed where her counsel filed a no-merit brief and the order was based on clear, cogent, and convincing evidence supporting the statutory grounds for termination.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 25 February 2019 by Judge Jimmy Myers in District Court, Davie County. This matter was calendared in the Supreme Court on 4 October 2019 but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No brief filed for petitioner-appellee Davie County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by Stephen V. Carey, for Guardian ad Litem.

Mary McCullers Reece for respondent-appellant mother.

BEASLEY, Chief Justice.

Respondent, the mother of J.E. (Jason)[1], appeals from the trial court's 25 February 2019 order terminating her parental rights. Respondent's counsel has filed a no-merit brief pursuant to N.C. R. App. P. 3.1(e). We conclude that the issues identified by counsel in respondent's brief lack merit and affirm the trial court's order.

The Davie County Department of Social Services (DSS) has been involved with respondent and her family since November 2016. On 18 November 2016, DSS received a child protective services report that

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

Jason arrived at pre-school with a pill bottle containing twenty-four pills and labeled with respondent's name. Upon further assessment, respondent reported to a social worker that she had an addiction issue and most recently used cocaine on 17 November 2016 while supervising Jason. Respondent also reported that on 22 November 2016, she and her boyfriend were involved in a domestic altercation while Jason was present. On 28 November 2016, DSS obtained nonsecure custody of Jason and filed a petition alleging that Jason was a neglected and dependent juvenile. Following an adjudication hearing held on 6 February 2017, the trial court entered an order adjudicating Jason as a neglected and dependent juvenile.

On 10 October 2018, DSS filed a petition to terminate respondent's parental rights on the grounds of neglect and willfully leaving Jason in placement outside of the home for more than twelve months without showing reasonable progress to correct the conditions that led to his removal. *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2017). Following hearings held on 7 January and 4 February 2019, the trial court entered an order on 25 February 2019 terminating respondent's parental rights on both grounds alleged by DSS. Respondent gave timely notice of appeal to this Court pursuant to N.C.G.S. §§ 7A-27(a)(5) and 7B-1001(a1)(1).

Respondent's counsel has filed a no-merit brief on behalf of respondent pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. Counsel has advised respondent of her right to file *pro se* written arguments on her own behalf with this Court, and counsel has provided respondent with the documents necessary to do so. Respondent has not submitted any written arguments.

We independently review issues contained in a no-merit brief filed pursuant to appellate rule 3.1(e). *In re L.E.M.*, 831 S.E.2d 341, 345 (N.C. 2019). Respondent's counsel identified two issues that could arguably support an appeal but stated why she believed both of these issues lacked merit. Based upon our careful review of the issues identified in the no-merit brief in light of our consideration of the entire record, we are satisfied that the trial court's 25 February 2019 order was based on "clear, cogent, and convincing evidence" supporting statutory grounds for termination of parental rights. *See* N.C.G.S. § 7B-1109(f). Accordingly, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN RE N.D.A.

[373 N.C. 71 (2019)]

IN THE MATTER OF N.D.A.

No. 184A19

Filed 1 November 2019

1. Termination of Parental Rights—notice of appeal—designation of appellate court—brief treated as writ of certiorari

The Supreme Court treated a father's brief as a certiorari petition and issued a writ of certiorari authorizing review of his challenges to the trial court's termination of his parental rights where the father noted his appeal from the trial court's order in a timely manner but erroneously designated the Court of Appeals as the judicial body to which the appeal would lie.

2. Termination of Parental Rights—grounds for termination—willful abandonment—sufficiency of findings—willfulness

The trial court's findings of fact were insufficient to support its termination of a father's parental rights in his daughter on the grounds of willful abandonment where the trial court made no findings concerning the father's ability to visit his daughter, to contact his daughter's legal custodian, or to pay support during the relevant time period.

3. Termination of Parental Rights—grounds for termination—neglect—sufficiency of findings—willfulness

The trial court's findings of fact were insufficient to support its termination of a father's parental rights in his daughter on the grounds of neglect by abandonment where the trial court made no findings concerning the father's ability to contact his daughter's legal custodian, exercise visitation, or pay any support.

4. Termination of Parental Rights—impartiality of trial court—questioning of witnesses—clarification

The trial court's questioning of witnesses during a termination of parental rights hearing did not go beyond the need to clarify matters addressed during testimony and did not show bias against the father.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered 18 March 2019 by Judge William F. Brooks in District Court, Wilkes County. This matter was calendared in the Supreme Court on 4 October 2019 but determined on the record and briefs without

oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Vannoy, Colvard, Triplett & Vannoy, P.L.L.C., by Daniel S. Johnson, for petitioner-appellee.

Wendy C. Sotolongo, Parent Defender, by Annick Lenoir-Peek, Deputy Parent Defender, for respondent-appellant father.

ERVIN, Justice.

Respondent-father Mickey W. appeals from the trial court's order terminating his parental rights in his minor child, N.D.A.,[1] on the grounds of neglect and willful abandonment. Because we conclude that the findings in the trial court's order are insufficient to support the termination of respondent-father's parental rights on either of the grounds upon which the trial court's termination order rests, we vacate the trial court's termination order and remand this case to the District Court, Wilkes County, for further proceedings not inconsistent with this opinion.

Respondent-father is Nancy's biological father, while petitioner Heather S. is Nancy's legal custodian. In January 2014, Nancy and her biological mother, Heaven C., moved into petitioner's residence. At that time, the two adult women were involved in a romantic relationship. Nancy and her mother continued to live in petitioner's residence for the next year and a half.

In July 2015, the Wilkes County Department of Social Services began investigating a report arising from concerns about the mother's mental health, parenting skills, and failure to properly care for and supervise Nancy. At that time, Nancy was left in petitioner's care as part of a safety placement while DSS provided Nancy's mother with case management services. However, in December 2015, the mother told DSS that she was unable to properly care for Nancy. As a result, DSS filed a petition alleging that Nancy was a neglected and dependent juvenile. At the time that DSS filed this petition, respondent-father was incarcerated and had a projected release date of 4 December 2016.

After a hearing held on 1 February 2016, Judge David V. Byrd entered an order on 20 February 2016 finding Nancy to be a neglected and

1. N.D.A. will be referred to throughout the remainder of this opinion as "Nancy," which is a pseudonym used to protect the identity of the juvenile and for ease of reading. *See* N.C. R. App. P. 42(b)(1).

dependent juvenile, awarding legal and physical custody of Nancy to petitioner, and releasing DSS from any further responsibility relating to Nancy's care and supervision. In the 20 February 2016 order, Judge Byrd ordered that neither parent would be allowed to visit Nancy while incarcerated and that, in the event that either parent was not incarcerated, he or she was entitled to a minimum of one hour of supervised visitation with Nancy two times per month, with the necessary supervision to be provided by petitioner, a person or organization approved by petitioner, or personnel associated with "Our House."

Although respondent-father was released from incarceration in December 2016, he did not contact or visit Nancy following his release. In August 2018, petitioner contacted respondent-father, through social media, and the mother, by phone, for the purpose of requesting that they relinquish their parental rights in Nancy so that petitioner could adopt her. However, neither of Nancy's parents acceded to this request. Shortly thereafter, respondent-father was charged with and convicted of felonious breaking and entering. Respondent-father's current projected release date is July 2020.

On 14 August 2018, petitioner filed a petition seeking to have both parents' parental rights in Nancy terminated on the grounds of neglect and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(1) and (7) (2017). After a hearing held on 27 February 2019, the trial court entered an order on 18 March 2019 finding that grounds existed to terminate respondent-father's and the mother's parental rights in Nancy based upon both of the grounds alleged in the petition and that the termination of both parents' parental rights in Nancy would be in the child's best interests. Respondent-father noted an appeal from the trial court's termination order to the Court of Appeals.

[1] As an initial matter, we note that, even though respondent-father noted his appeal from the trial court's order in a timely manner, he erroneously designated the Court of Appeals, rather than this Court, as the judicial body to which his appeal would lie. *See* N.C.G.S. §§ 7A-27(a)(5), 7B-1001(a1)(1); N.C. R. App. P. 3(d), 3.1(a). In spite of this deficiency in respondent-father's notice of appeal, petitioner has not sought the dismissal of respondent-father's appeal and respondent-father has not filed a petition seeking the issuance of a writ of certiorari authorizing review of the trial court's termination order. In light of the seriousness of the issues involved in this termination of parental rights case, petitioner's failure to raise any issue arising from respondent-father's defective notice of appeal, and the fact that the appellate entries signed by the trial court correctly designate this Court as the body to which respondent-father's

appeal would lie, we elect to treat respondent-father's brief as a certiorari petition and issue a writ of certiorari authorizing review of respondent-father's challenges to the trial court's termination order on the merits. *See* N.C. R. App. P. 21(a)(1) (stating 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"); *see also In re Z.L.W.*, 831 S.E.2d 62, 65 (N.C. 2019) (stating that this Court granted the respondent-father's certiorari petition given that his notice of appeal improperly designated the Court of Appeals as the court to which his appeal from the trial court's order had been taken).

In seeking relief from the trial court's termination order before this Court, respondent-father contends that the trial court erred by terminating his parental rights in Nancy on the grounds that the trial court's findings of fact do not support the trial court's conclusion that respondent-father's parental rights in Nancy were subject to termination on the grounds of neglect and willful abandonment. The relevant provisions of the North Carolina General Statutes establish a two-stage process for the termination of a parent's parental rights in a juvenile. N.C.G.S. §§ 7B-1109, -1110 (2017). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" that one or more of the grounds for termination delineated in N.C.G.S. § 7B-1111 exist. N.C.G.S. § 7B-1109(e), (f). "If [the trial court] determines that one or more grounds listed in section 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110). This Court reviews a trial court's adjudication decision pursuant to N.C.G.S. § 7B-1109 "in order to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law," *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984) (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)), with the trial court's conclusions of law being subject to de novo review on appeal. *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009).

In its termination order, the trial court made the following findings of fact in support of its conclusion that respondent-father's parental rights in Nancy were subject to termination on the grounds of neglect and willful abandonment:

> 8. The Father has had no contact with the Petitioner and has not participated in any visitation. He has been incarcerated since August 2018. The Father has a significant criminal record dating back to 1999.
>
> 9. The Father has had no contact with the minor child in four years. He testified that he attempted to set up visits with the child but could not get any assistance in doing so.
>
> 10. The Father has had significant problems with substance abuse for many years.
>
> . . . .
>
> 13. Neither [parent] has ever provided financial support for the minor child.
>
> 14. Neither [parent] has ever sent any cards, gifts, or usual and customary tokens of affection to the minor child.
>
> 15. The child has been neglected by the [parents] as that term is defined in Chapter 7B of the General Statutes. The [parents] have not provided any type of support or care for the child. Their actions reflect an indifference to the welfare and well-being of the child.
>
> 16. The [parents] willfully abandoned the child as that term is defined by N.C.G.S. § 7B-1111(a)(7) for the six months immediately preceding the filing of the petition in this matter.

As an initial matter, respondent-father contends that a number of the trial court's findings of fact are legally defective. More specifically, respondent-father asserts that the second sentence contained in Finding of Fact No. 9 consists of nothing more than a mere recitation of his own testimony and is not, for that reason, a valid finding of fact. We agree with the Court of Appeals that "[r]ecitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge." *Moore v. Moore*, 160 N.C. App. 569, 571–72, 587 S.E.2d 74, 75 (2003) (citation omitted). By stating that respondent-father had testified that he had "attempted to set up visits with the child but could not get any assistance in doing so," the trial court failed to indicate whether it deemed the relevant portion of respondent-father's testimony credible. As a result, we are compelled to disregard the second sentence contained in Finding of Fact No. 9 in evaluating the validity of the trial court's termination order.

In addition, respondent-father contends that Finding of Fact No. 10 lacked sufficient evidentiary support on the grounds that "[n]o one testified that he suffered from substance abuse." However, respondent-father testified that he has "had a substance abuse problem"; that he "slip[ped] and got back on drugs" after the death of his mother in February 2018; that, when petitioner contacted him in August 2018, he "was trying to get [his] life away from that and be a part of [Nancy's] life"; and that he had last used any illegal substance around the time of his arrest in August 2018. In addition, respondent-father testified that he was incarcerated at the time of the termination hearing as the result of his drug use. As a result, the trial court did not err by finding that respondent-father had "had significant problems with substance abuse for many years."

Although respondent-father acknowledges that the record supports the trial court's statement in Finding of Fact No. 14 that "[n]either [parent] has ever sent any cards, gifts, or usual and customary tokens of affection to the minor child," he attempts to explain his failure to send such items to the child by pointing to his testimony that he did not know petitioner's address and that he did not want to get into trouble by reaching out to her directly. In view of his concession that the record supports the contents of Finding of Fact No. 14, that finding is presumed to rest upon competent evidence and is, for that reason, binding for purposes of appellate review. *See In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (stating that "[f]indings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal" (citation omitted)).

Finally, respondent-father contends that Finding of Fact Nos. 15 and 16, which consist of determinations that the parents' parental rights in the child were subject to termination on the grounds of neglect and abandonment, constitute conclusions of law rather than findings of fact given that they involve the exercise of judgment or the application of legal principles. As the Supreme Court of the United States has stated, an "ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact" and should "be distinguished from the findings of primary, evidentiary, or circumstantial facts." *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491, 57 S. Ct. 569, 574, 81 L. Ed. 755, 762 (1937); *see also In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (stating that "[u]ltimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts" (citation omitted)). Regardless of whether statements like those contained in Finding of Fact Nos. 15 and 16 are classified as findings of ultimate facts

or conclusions of law, that classification decision does not alter the fact that the trial court's determination concerning the extent to which a parent's parental rights in a child are subject to termination on the basis of a particular ground must have sufficient support in the trial court's factual findings. *See In re D.M.O.*, 250 N.C. App. 570, 573, 794 S.E.2d 858, 861 (2016) (stating that "a trial court must make adequate evidentiary findings to support its ultimate finding of willful intent" (citation omitted)). As a result, our analysis of respondent-father's challenge to the validity of Finding of Fact Nos. 15 and 16 will be addressed in the course of our analysis of the lawfulness of the trial court's determinations concerning the extent to which respondent-father's parental rights in Nancy were subject to termination on the basis of neglect and abandonment.

[2] Next, respondent-father contends that the trial court erred by determining that his parental rights in Nancy were subject to termination on the grounds of willful abandonment. A parent's parental rights in a child are subject to termination when "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion." N.C.G.S. § 7B-1111(a)(7). "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. at 251, 485 S.E.2d at 617 (citation omitted). "[I]f a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962) (citation omitted). The Court of Appeals has held that, "[w]hether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence." *In re Adoption of Searle*, 82 N.C. App. 273, 276, 346 S.E.2d 511, 514 (1986) (citation omitted). We agree with the Court of Appeals that, "[a]lthough the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re D.E.M.*, 810 S.E.2d 375, 378 (N.C. Ct. App. 2018) (citation omitted).

In attempting to persuade us that the trial court erred in determining that his parental rights in Nancy were subject to termination on the basis of willful abandonment, respondent-father argues that the trial court failed to address the willfulness of his conduct in spite of the fact that his failure to visit with Nancy and to take the other actions mentioned in the trial court's findings was not willful. In support of this contention,

respondent-father points to his testimony that he attempted to contact Our House, DSS, and the office of the Clerk of Superior Court fifteen times over a period of a year and a half for the purpose of obtaining the ability to visit Nancy without success. According to respondent-father, the trial court failed to make any findings concerning the efforts that he made to visit with his daughter and that, had the trial court made factual findings consistently with his testimony, it would have been unable to find that he willfully abandoned Nancy. On the other hand, petitioner contends that the trial court was free to disbelieve respondent-father's testimony concerning his efforts to visit with Nancy and argues that respondent-father's conduct demonstrates that he was completely indifferent to Nancy's well-being.

After careful examination of the trial court's findings of fact, the Court is persuaded that these findings are insufficient to support a determination that respondent-father willfully abandoned Nancy. *See In re D.R.B.*, 182 N.C. App. 733, 738, 643 S.E.2d 77, 80 (2007); *see also D.M.O.*, 250 N.C. App. at 573, 794 S.E.2d at 861 (stating that, "[b]ecause 'wilful intent is an integral part of abandonment' " and because willfulness " 'is a question of fact to be determined from the evidence[,]' a trial court must make adequate evidentiary findings to support its ultimate finding of willful intent." (internal citation omitted)). Although the trial court found that respondent-father had not had any contact with petitioner or Nancy, had not visited with Nancy, had not provided any financial support for Nancy, and had not sent any cards, gifts, or tokens of affection to Nancy, the trial court's findings fail to adequately address the extent to which respondent-father's acts or omissions were willful in spite of the fact that respondent-father's unchallenged testimony tended to show that he had unsuccessfully attempted to work out arrangements under which he could visit with Nancy on multiple occasions following his release from incarceration in December 2016, with these efforts including making contact with Our House, DSS, and the office of the Clerk of Superior Court on at least fifteen occasions between December 2016 and May 2018. In view of the fact that the termination petition was filed in August 2018, respondent-father's testimony suggests that his attempts to make arrangements to visit with Nancy occurred during the relevant six months immediately preceding the filing of the petition. Although petitioner is certainly correct in noting that the trial court was free to disbelieve respondent-father's testimony, *see Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994), the trial court's findings with respect to the willfulness issue consisted of nothing more than a recitation of the relevant portion of respondent-father's testimony without making any determination as to whether the relevant portion of respondent-father's testimony was credible.

In addition, respondent-father testified that he had no relationship with petitioner sufficient to persuade him that he had the ability to contact her directly, that he believed that he was not permitted do so, and that, even though he knew that petitioner lived in his community, he did not know her address and could not send Nancy any cards, letters, or gifts for that reason. As was the case with respect to the issue of visitation, the trial court's findings make no mention of the issue of whether respondent-father had the ability to contact Nancy or petitioner during the relevant six-month period. Similarly, the trial court failed to make any findings concerning the extent to which respondent-father had the ability to pay financial support for Nancy during the relevant six-month period even though it found that respondent-father had willfully failed to make such payments. *See Pratt*, 257 N.C. at 501–02, 126 S.E.2d at 608 (stating that "a mere failure of the parent of a minor child in the custody of a third person to contribute to its support does not in and of itself constitute abandonment" given that "[e]xplanations could be made which would be inconsistent with a wilful intent to abandon"). Thus, given the absence of any findings of fact concerning respondent-father's ability to visit with Nancy, to contact petitioner or his daughter, or to pay support during the relevant time period, the trial court's findings do not "demonstrate that [respondent] had a 'purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to [Nancy].' " *In re D.M.O.*, 250 N.C. App. at 573, 794 S.E.2d at 861-62 (citation omitted). As a result, while we express no opinion concerning the issue of whether the record contains sufficient evidence to support a finding that respondent-father willfully abandoned Nancy, the trial court's evidentiary findings fail to support its ultimate determination that respondent-father willfully abandoned Nancy for a period of at least six consecutive months immediately preceding the filing of the termination petition in accordance with N.C.G.S. § 7B-1111(a)(7).

[3] Additionally, respondent-father argues that the trial court erred by finding that his parental rights in Nancy were subject to termination on the grounds of neglect because it failed to make certain required findings of fact and because the findings of fact that the trial court did make do not support its determination that respondent-father's parental rights in Nancy were subject to termination on the grounds of neglect. According to N.C.G.S. § 7B-1111(a)(1), a trial court has the authority to terminate a parent's parental rights in a child in the event that the parent has neglected the child as that term is defined in N.C.G.S. § 7B-101, which provides that a neglected juvenile is, among other things, a juvenile who "does not [receive] proper care, supervision, or discipline from

the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned." N.C.G.S. § 7B-101(15). The Court of Appeals held that, "[i]n deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is the fitness of the parent to care for the child 'at the time of the termination proceeding.' " *In re L.O.K.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005) (quoting *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984) (emphasis omitted)). In the event that "a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, 'requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible.' " *Id.* (citation omitted). In such circumstances, the trial court may find that a parent's parental rights in a child are subject to termination on the grounds of neglect in the event that the petitioner makes "a showing of past neglect and a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167 (citation omitted).

In his initial challenge to the trial court's determination that respondent-father's parental rights in Nancy were subject to termination on the grounds of neglect, respondent-father argues that the trial court failed to make a finding regarding the likelihood of future neglect and that the record fails to contain sufficient evidence to support any such finding had one been made. According to respondent-father, the underlying adjudication of neglect rested upon the mother's mental health difficulties rather than upon any act or omission by respondent-father, with the record containing no evidence tending to show that respondent-father was likely to neglect Nancy in the event that she was to be placed in his care in the future. Petitioner, on the other hand, argues that the trial court was not required to make findings concerning the likelihood of future neglect in this case because the trial court did not rely on the previous neglect adjudication in determining that respondent-father had neglected Nancy. According to petitioner, the trial court's findings relate to respondent-father's treatment of Nancy after she was placed in petitioner's custody in February 2016, so that the trial court's finding of neglect rested upon current neglect rather than a combination of past neglect coupled with a likelihood of repeated neglect in the future.

A careful analysis of the trial court's termination order reveals that it contains few, if any, findings that appear to assume the applicability of the two-step method of analysis employed in cases involving past neglect and a likelihood of future neglect. For example, the trial court did not find that Nancy had previously been adjudicated to be a neglected

juvenile or that there was a likelihood that she would be neglected in the future in the event that she was to be placed in respondent-father's care. Instead, as petitioner suggests, it appears the trial court's finding of neglect was based upon a determination that respondent-father was currently neglecting Nancy, with this determination resting upon respondent-father's lack of contact with Nancy and his current lack of involvement in Nancy's life. More specifically, the trial court's determination that respondent-father's parental rights in Nancy were subject to termination on the grounds of neglect seems to have hinged upon evidentiary findings that respondent-father had failed to: (1) visit with Nancy; (2) contact petitioner or Nancy; (3) provide any financial support for Nancy; and (4) send any cards, gifts, or tokens of affection to Nancy.

A trial court is entitled to terminate a parent's parental rights in a child for neglect based upon abandonment pursuant to N.C.G.S. § 7B-1111(a)(1) in the event that the trial court finds that the parent's conduct demonstrates a "wilful neglect and refusal to perform the natural and legal obligations of parental care and support." *Pratt*, 257 N.C. at 501, 126 S.E.2d at 608. We agree with the Court of Appeals that, "in order to terminate a parent's rights on the ground of neglect by abandonment, the trial court must make findings that the parent has engaged in conduct 'which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child' as of the time of the termination hearing." *In re C.K.C.*, 822 S.E.2d 741, 745 (N.C. Ct. App. 2018) (citation omitted). As we have previously discussed in connection with our analysis of the validity of the trial court's decision that respondent-father's parental rights in Nancy were subject to termination on the grounds of willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7), the trial court's findings fail to adequately address the issue of the willfulness of respondent-father's conduct.[2] Unlike abandonment as a ground for termination under N.C.G.S. § 7B-1111(a)(7), the relevant time period for a finding of neglect by abandonment is not limited to the six consecutive months immediately preceding the filing of the termination petition. *See In re Humphrey*, 156 N.C. App. 533, 541, 577 S.E.2d 421, 427 (2003). Therefore, a trial court may consider a parent's conduct over the course of a more extended period of time in determining whether

2. Although the word "willful" does not appear in the statutory definition of neglect by abandonment, N.C.G.S. § 7B-101(15), this Court has suggested that abandonment is inherently a willful act. *See Pratt*, 257 N.C. at 501, 126 S.E.2d at 608 (stating that "abandonment imports any wilful or intentional conduct on the part of the parent" and that "[w]ilful intent is an integral part of abandonment").

the parent in question has neglected his or her child by abandonment. *See id.*

In its termination order, the trial court found that respondent-father had not had any contact with Nancy since at least 2015. On the other hand, the record reflects that respondent-father was incarcerated at the time that DSS began its investigation relating to Nancy in 2015, remained incarcerated at the time that Nancy was adjudicated to be a neglected and dependent juvenile in February 2016, and remained incarcerated through December 2016. Although "incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision[,]" *In re T.N.H.*, 372 N.C. at 412, 831 S.E.2d at 62 (citation omitted), the trial court failed to make any findings of fact regarding whether respondent-father had the ability to contact petitioner and Nancy while he was incarcerated, with such findings being necessary in order for the trial court to make a valid determination regarding the extent to which respondent-father's failure to contact Nancy and petitioner from 2014 through December 2016 was willful. *See In re D.M.O.*, 250 N.C. App. at 575, 794 S.E.2d at 862 (stating that "the circumstances attendant to a parent's incarceration are relevant when determining whether a parent willfully abandoned his or her child"). In addition, the record reflects that, even though the initial adjudication order granted the parents a minimum of one hour of supervised visitation twice per month, that order also provided that neither parent was entitled to visit with Nancy while he or she was incarcerated. Simply put, the trial court failed to make any findings of fact relating to the issue of the extent, if any, to which respondent-father's incarceration affected his ability to visit with or otherwise contact Nancy.

As a result, even though the trial court's failure to make a finding concerning the likelihood that respondent-father would neglect Nancy in the event that she was placed in his care did not constitute error in light of the legal theory upon which the trial court's finding of neglect was based, the trial court's findings of fact did not adequately support a determination that respondent-father's parental rights in Nancy were subject to termination based upon neglect by abandonment given the absence of any findings concerning respondent-father's ability to contact petitioner or Nancy, to exercise visitation, or to pay any support in order to determine that his abandonment was willful. Although we again refrain from expressing any opinion concerning the extent, if any, to which the record evidence would support a finding that respondent-father's parental rights in Nancy were subject to termination on the grounds of neglect by abandonment, we hold that the trial

court's findings of fact fail to adequately support its determination that respondent-father's parental rights in Nancy were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(1).

[4] Finally, respondent-father contends that the trial court erred by failing to act impartially during the termination hearing, with this lack of impartiality being demonstrated by trial court's decision to question various witnesses during the hearing in a manner that went beyond the need to ensure that the record was clear. According to respondent-father, the trial court's actions had the effect of relieving petitioner of her need to satisfy the applicable burden of proof "by asking questions that the petitioner failed to ask during its principal questioning of the witnesses." Petitioner, on the other hand, contends that respondent-father received a fair hearing and that the manner in which the trial court questioned various witnesses did not demonstrate the existence of bias in favor of petitioner and against respondent-father. On the contrary, petitioner argues that the questions that the trial court posed during the termination hearing simply clarified the record and that respondent-father has failed to point to any question that showed the existence of any bias on the part of the trial court.

A trial court "may interrogate witnesses, whether called by itself or by a party." N.C. R. Evid. 614(b). As this Court has previously stated, "it is proper for the judge to propound competent questions to a witness [during a trial] in order to obtain a proper understanding and clarification of his testimony, or to bring out some fact that has been overlooked." *State v. Smith*, 240 N.C. 99, 102, 81 S.E.2d 263, 265–66 (1954) (citations omitted). Respondent-father has failed to direct our attention to any specific question or questions that the trial court posed during the hearing that, in respondent-father's opinion, tended to show the existence of bias on the part of the trial court. Instead, respondent-father's argument rests upon the frequency with which the trial court posed questions to various witnesses and a contention that the questions that the trial court posed had the effect of helping petitioner to satisfy the applicable burden of proof. We do not find respondent-father's argument to be persuasive.

At the termination hearing, the trial court questioned petitioner about her work schedule, her reason for contacting respondent through social media instead of by phone, and the nature and extent of respondent-father's contacts with her. Similarly, during respondent-father's testimony, the trial court asked several questions in an attempt to clarify issues such as the number of times that respondent-father had contacted Our House, the dates upon which respondent-father had been incarcerated, the length of time during which respondent-father had

been incarcerated, and the date upon which respondent-father's mother had died. Each of these matters was relevant to a proper determination of the issues that were before the trial court in this case. As a result, we conclude that the trial court's questioning of witnesses during the termination hearing did not go beyond that needed to clarify matters addressed during the testimony of the parties and that the questions that the trial court posed during the termination hearing did not, for that reason, tend to show that the trial court was in any way biased against respondent-father.

Thus, for the reasons set forth above, we hold that the trial court's findings of fact are insufficient to support its determination that respondent-father's parental rights in Nancy were subject to termination on the grounds of neglect and abandonment and that the trial court did not fail to act impartially during the termination hearing. As a result, we vacate the trial court's termination order and remand this case to the District Court, Wilkes County, for further proceedings not inconsistent with this opinion, including, the entry of a new order containing proper findings and conclusions addressing the issue of whether grounds exist to support the termination of respondent-father's parental rights in Nancy. The trial court may, in the exercise of its discretion, receive additional evidence on remand if it elects to do so. *See In re T.M.H.*, 186 N.C. App. 451, 456, 652 S.E.2d 1, 3 (2007).

VACATED AND REMANDED.

IN RE T.H.

[373 N.C. 85 (2019)]

IN THE MATTER OF T.H.

No. 151A19

Filed 1 November 2019

Termination of Parental Rights—no-merit brief—neglect and felony assault against another child

The termination of a mother's parental rights was affirmed where her counsel filed a no-merit brief and the termination was based on substance abuse and felony assault against another child. The termination order was based on clear, cogent, and convincing evidence supporting statutory grounds for termination.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 12 February 2019 by Judge Joseph Moody Buckner in District Court, Orange County. This matter was calendared in the Supreme Court on 4 October 2019 but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Stephenson & Fleming, LLP, by Deana K. Fleming for petitioner-appellee Orange County Department of Social Services.

Schell Bray PLLC, by Christina Freeman Pearsall, for appellee Guardian ad Litem.

Wendy C. Sotolongo, Parent Defender, by Annick Lenoir-Peek, Deputy Parent Defender, for respondent-appellant mother.

HUDSON, Justice.

Respondent, the mother of the minor child T.H. (Tommy),[1] appeals from the trial court's 12 February 2019 order terminating her parental rights. Respondent's counsel has filed a no-merit brief pursuant to Rule 3.1(e)of the North Carolina Rules of Appellate Procedure. We conclude that the issues raised by counsel in respondent's brief are meritless and affirm the trial court's order.

On 8 February 2018, the Orange County Department of Social Services (DSS) filed a petition alleging that one-month-old Tommy was

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

a neglected juvenile. DSS had received a child protective services referral after Tommy tested positive for marijuana at birth. Respondent was also on probation after entering an *Alford* plea to felony negligent child abuse – for serious physical injuries sustained by her first child,[2] who was Tommy's brother. On 19 April 2018, DSS filed an amended petition alleging that Tommy was neglected and dependent. The amended petition changed the identification of Tommy's father[3] and added allegations that, shortly after the filing of the first petition, respondent entered into a consent order with DSS that was intended to ensure Tommy's safety and then violated that order.

The trial court entered an order adjudicating Tommy as a neglected and dependent juvenile on 16 July 2018. The trial court also relieved DSS of its obligation to engage in reunification efforts. On 11 October 2018, DSS filed a motion in the cause to terminate respondent's parental rights to Tommy on the grounds of neglect, dependency, and committing a felony assault that resulted in serious bodily injury to another child of the parent. *See* N.C.G.S. § 7B-1111(a)(1), (6), (8) (2017). A termination of parental rights hearing was held on 17 January 2019, and on 12 February 2019 the trial court entered an order terminating respondent's parental rights on the grounds of neglect and committing a felony assault that resulted in serious bodily injury to another child of the parent. Respondent gave timely notice of appeal to this Court pursuant to N.C.G.S. §§ 7A-27(a)(5) and 7B-1001(a1)(1).

Counsel for respondent has filed a no-merit brief on her behalf pursuant to N.C.R. App. P. 3.1(e). Counsel has advised respondent of her right to file *pro se* written arguments on her own behalf and provided her with the documents necessary to do so. Respondent has not submitted any written arguments to this Court.

We independently review issues identified by respondent's counsel in a no-merit brief filed pursuant to appellate rule 3.1(e). *In re L.E.M.*, 831 S.E.2d 341, 345 (N.C. 2019). Respondent's attorney filed a twenty-five-page brief in which she identified two issues that could arguably support an appeal but also stated why she believed both of these issues lacked merit. Having carefully considered the issues identified in the no-merit brief in light of the entire record, we conclude that the trial court's 12 February 2019 order was based on "clear, cogent, and convincing evidence" supporting statutory grounds for termination of parental rights.

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2. Respondent relinquished her rights to this child.

3. Tommy's father relinquished his parental rights and is not a party to this appeal.

See N.C.G.S. § 7B-1109(f). Accordingly, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN THE MATTER OF Z.O.M., K.A.M.

No. 152A19

Filed 1 November 2019

Termination of Parental Rights—no-merit brief—neglect and willful failure to make reasonable progress

The termination of a mother's parental rights was affirmed where the mother had a history of substance abuse and her counsel filed a no-merit brief. The termination order was based on clear, cogent, and convincing evidence and was based on proper legal grounds.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 24 January 2019 by Judge J.H. Corpening, II, in District Court, New Hanover County. This matter was calendared in the Supreme Court on 4 October 2019 but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Jennifer G. Cooke for petitioner-appellee New Hanover County Department of Social Services.

Nelson Mullins Riley & Scarborough, LLP, by Chelsea K. Barnes, for appellee Guardian ad Litem.

Rebekah W. Davis for respondent-appellant mother.

NEWBY, Justice.

Respondent, the mother of minor children Z.O.M. (Zeke) and K.A.M. (Kari),[1] appeals from the trial court's 24 January 2019 order terminating

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

her parental rights. Respondent's counsel has filed a no-merit brief pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. We conclude that the issues raised by counsel in respondent's brief are meritless and therefore affirm the trial court's order.

On 9 October 2017, New Hanover County Department of Social Services (DSS) filed a petition alleging that Zeke and Kari were neglected juveniles. In support of this allegation, DSS explained that respondent had a history of substance abuse and had overdosed on heroin a few days earlier and that the father had assaulted respondent with a baseball bat and tested positive for several illegal drugs. The trial court entered an order adjudicating Zeke and Kari as neglected juveniles on 7 December 2017.

On 24 October 2018, the trial court entered a permanency planning order that established a permanent plan of adoption with a concurrent plan of reunification. The court ordered DSS to file a termination of parental rights petition within sixty days. On 30 October 2018, DSS filed the petition, which sought to terminate respondent's parental rights to Zeke and Kari on the grounds of neglect and willful failure to make reasonable progress to correct the conditions that led to the children's removal. *See* N.C.G.S. § 7B-1111(a)(1), (2) (2017). A termination of parental rights hearing was held on 7 January 2019, and the trial court entered an order on 24 January 2019 terminating respondent's parental rights based on both grounds alleged in DSS's termination petition. Respondent appealed.[2]

Counsel has filed a no-merit brief on respondent's behalf under Rule 3.1(e) of the Rules of Appellate Procedure. In this twenty-five page brief, counsel for respondent identified two issues that could arguably support an appeal but also stated why she believed both of these issues lacked merit. Counsel has advised respondent of her right to file *pro se* written arguments on her own behalf and provided her with the documents necessary to do so. Respondent has not submitted any written arguments to this Court.

We independently review issues identified by respondent's counsel in a no-merit brief filed under Rule 3.1(e). *In re L.E.M.*, 831 S.E.2d 341, 345 (N.C. 2019). We have carefully reviewed the issues identified in the no-merit brief in light of the entire record. We are satisfied that the trial court's 24 January 2019 order was supported by clear, cogent, and

2. Zeke and Kari's father did not appeal the trial court's order and is not a party to this appeal.

convincing evidence and based on proper legal grounds. Accordingly, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

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 Nonprofit Corporation

No. 115PA18

Filed 1 November 2019

1. Contracts—novation—effect on earlier contract—plain wording

By its plain wording, a 2013 settlement agreement was a novation of a 1998 agreement regarding eighteenth-century ships uncovered off the coast of North Carolina, and plaintiff's breach of contract claims arising from the 1998 agreement were extinguished.

2. Contracts—tortious interference—elements—intentional inducement

The Supreme Court affirmed the trial court's dismissal of plaintiff marine research company's tortious interference with contract claim against defendant nonprofit under plaintiff's contracts with the N.C. Department of Natural and Cultural Resources (DNCR) concerning media rights connected to the recovery of the pirate Blackbeard's flagship. Plaintiff failed to allege that defendant nonprofit intentionally induced DNCR not to perform on its contract with plaintiff.

3. Contracts—breach—common law—subject matter jurisdiction—exhaustion of administrative remedies

Where plaintiff marine research company sued the N.C. Department of Natural and Cultural Resources (DNCR) for breach of contract by violating plaintiff's media rights connected to the recovery of the pirate Blackbeard's flagship, the trial court erred by dismissing the claim for lack of subject matter jurisdiction. Plaintiff's claim was a common law breach of contract claim, and defendants failed to demonstrate that plaintiff was required

to exhaust administrative remedies before bringing a claim in superior court.

4. Collateral Estoppel and Res Judicata—breach of contract claim—previous order—not raised in pleadings

The trial court erred by dismissing plaintiff's breach of contract claim based upon its conclusion that the claim was barred by a previous order under the doctrine of res judicata. The previous order was not a final judgment on the merits of plaintiff's breach of contract claim because that claim is a separate cause of action which plaintiff's pleadings did not raise in those proceedings.

Justice MORGAN concurring in part and dissenting in part.

Justice ERVIN joins in this separate opinion.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an opinion and order entered on 13 October 2017 dismissing plaintiff's second amended complaint and an order entered on 4 May 2018 granting defendants' motion to dismiss plaintiff's appeal, both 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 under N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 15 May 2019 in session in the New Bern City Hall in the City of New Bern pursuant to section 18B.8 of Session Law 2017-57.

Linck Harris Law Group, PLLC, by David H. Harris Jr., for plaintiff-appellant.

Joshua H. Stein, Attorney General, by Matthew W. Sawchak, Solicitor General, Ryan Y. Park, Deputy Solicitor General, Brian D. Rabinovitz, Special Deputy Attorney General, and Kenzie M. Rakes, Assistant Solicitor General, for defendant-appellees Susi H. Hamilton, North Carolina Department of Natural and Cultural Resources, and State of North Carolina.

Hedrick Gardner Kincheloe & Garofalo LLP, by Joshua D. Neighbors, for defendant-appellee Friends of Queen Anne's Revenge.

HUDSON, Justice.

This case is before us pursuant to plaintiff's petition for writ of certiorari seeking review of the trial court's 13 October 2017 opinion and order dismissing plaintiff's second amended complaint. We allowed plaintiff's petition for writ of certiorari on 5 December 2018 and we now review whether "the trial court err[ed] in dismissing any or all of Plaintiff's claims for relief and Plaintiff's Second Amended Complaint under N.C. R. Civ. P. 12(b)(1), (2), (6), or other reasons stated in the order." Accordingly, we affirm in part, reverse in part, and remand to the trial court because we conclude that it: (1) correctly granted the State Defendants'[1] motion to dismiss plaintiff's claims for breach of the 1998 Agreement; (2) correctly granted the motion filed by Friends of the Queen Anne's Revenge (FoQAR) to dismiss plaintiff's tortious interference with contract claim; (3) erred in granting the State Defendants' motion to dismiss plaintiff's claim that the State Defendants breached the 2013 Settlement Agreement by violating plaintiff's media and promotional rights; and (4) erred in granting the State Defendants' motion to dismiss plaintiff's claim that DNCR breached the 2013 Settlement Agreement by failing to renew plaintiff's *El Salvador* search permit.

Factual and Procedural Background

The facts of this case begin with, and are now woven into, the tales of two ships (1) *Queen Anne's Revenge* (*QAR*) and (2) *El Salvador*.[2] *QAR* is believed to be the flagship of pirate Blackbeard and was reported lost in 1718. *El Salvador* was a privately owned merchant vessel that was reported lost at sea, off the coast near Cape Lookout, North Carolina, during a storm in 1750.

In 1994, centuries after the disappearances of these two ships, plaintiff Intersal, Inc., a marine research and recovery corporation, received permits from the North Carolina Department of Natural and Cultural Resources (DNCR) to search for *QAR* and *El Salvador* in Beaufort Inlet

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1. This opinion will—as the trial court did below—use the name "the State Defendants" to refer collectively to defendants (1) Susi H. Hamilton, Secretary of the North Carolina Department of Natural and Cultural Resources; (2) the North Carolina Department of Natural and Cultural Resources (DNCR); and (3) the State of North Carolina.

2. This factual background is a summary of the allegations contained in plaintiff's second amended complaint. When reviewing a trial court's decision on a motion to dismiss pursuant to N.C. R. Civ. P. 12(b)(6), we treat the allegations contained in the complaint as true. *See 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)).

in Carteret County. On 21 November 1996, plaintiff discovered *QAR* just over a mile off Bogue Banks.

After discovering *QAR*, plaintiff entered into an agreement with DNCR on 1 September 1998 (1998 Agreement). As part of the agreement, plaintiff agreed to forgo its entitlement to any share in "coins and precious metals" recovered from *QAR*. The ultimate disposition of all artifacts from *QAR* was a matter left to DNCR.

In return for plaintiff forgoing its rights to the artifacts from *QAR*, DNCR recognized plaintiff as a partner in all aspects of the "*QAR* Project." The 1998 Agreement defined the *QAR* Project as "all survey, documentation, recovery, preservation, conservation, interpretation and exhibition activities related to any portion of the shipwreck of QAR or its artifacts." Accordingly, plaintiff also obtained the following rights: (1) "the exclusive right to make and market all commercial narrative (written, film, CD Rom, and/or video) accounts of project related activities undertaken by the Parties"; (2) the reasonable cooperation of "[a]ll Parties . . . in the making of a film and/or video documentary . . . with regard to project activities"; (3) "reasonable access and usage, subject to actual costs of duplication, of all video and/or film footage generated in the making" of "a non commercial educational video and/or documentary" that "[a]ll Parties agree[d] to cooperate in [ ] making"; and (4) "exclusive rights to make (or have made) molds or otherwise reproduce (or have reproduced) any QAR artifacts of its choosing for the purpose of marketing exact or miniature replicas" subject to "standard museum practices," approval by the project's "Advisory Committee," and the requirement that the replicas "be made on a limited edition basis" and authenticated by individual numbering or some other means.

In addition, the 1998 Agreement provided that:

> Subject to the provisions of Article 3 of Chapter 121 of the General Statues of North Carolina and subchapter .04R of Title 7 of the North Carolina Administrative Code, [DNCR] agrees to recognize [plaintiff's] . . . efforts and participation in the QAR project as sufficient to satisfy any performance requirements associated with annual renewal of [plaintiff's] permits for [ ] *El Salvador* . . . for the life of this Agreement, renewal of said permits cannot be denied without just cause.

Plaintiff alleges that in 2013, DNCR breached the 1998 Agreement in a number of ways. First, plaintiff alleges that DNCR failed to recognize plaintiff's renewal of the 1998 Agreement. Plaintiff alleges that it validly

executed its option to renew the 1998 Agreement via letters sent on 28 October 2012 and 4 December 2012.

Second, plaintiff alleges that certain DNCR employees, who had the responsibility of overseeing the *QAR* Project, violated the 1998 Agreement's conflict of interest provisions—and its provisions granting plaintiff exclusive commercial media rights—by serving on the board of the nonprofit corporation FoQAR. Specifically, plaintiff alleges that the DNCR employees, serving in their roles as board members of FoQAR, contracted with an independent media company to produce videos and a website covering the *QAR* Project. Allegedly, the execution of this contract included a ten thousand dollar payment from FoQAR to the spouse of FoQAR's treasurer, and that payment was not reported on FoQAR's 2013 Form 990. FoQAR's treasurer was also a DNCR employee who oversaw the *QAR* Project. Plaintiff alleges that these actions also constituted tortious interference with contract by FoQAR. FoQAR filed Articles of Dissolution on 14 March 2016. However, this action continues under N.C.G.S. § 55A-14-06(b)(5) (2017).

Third, plaintiff alleges that DNCR breached the 1998 Agreement by obstructing and delaying the renewal of plaintiff's permit, which authorized it to search for *El Salvador*. Plaintiff also alleges that this obstruction of renewal of its permit implicates the 1998 Agreement's conflict of interest provisions because the DNCR employees who obstructed and delayed the renewal of its permit were also board members of FoQAR.

On 26 July 2013, plaintiff filed a petition for a contested case hearing with the Office of Administrative Hearings (the OAH) seeking a remedy for State Defendant's alleged violations of the 1998 Agreement and of plaintiff's intellectual property rights. Following that filing, plaintiff's *El Salvador* permit was renewed on 9 August 2013. Thereafter, the OAH ordered mediation in the matter and, as a result of the mediation, plaintiff, DNCR, and plaintiff's long-time "*QAR* Video Designee," Nautilus Productions, LLC (Nautilus), entered into a settlement agreement on 15 October 2013 (2013 Settlement Agreement).

The parties expressly agreed that the 2013 Settlement Agreement would supersede the 1998 Agreement. Further, plaintiff and DNCR agreed to release each other from all claims that they could have asserted under the 1998 Agreement. Plaintiff also agreed to withdraw its petition for a contested case hearing within five business days of the execution of the agreement. Moreover, the agreement stated that, in the event of breach, the parties could "avail themselves of all remedies provided by law or equity."

Under the 2013 Settlement Agreement, the parties agreed that DNCR would "establish and maintain access to a website for the issuance of Media and Access Passes to *QAR*-project related artifacts and activities." The website would include, in pertinent part: (1) plaintiff's terms of use agreement, and (2) links to the websites of DNCR, plaintiff, and Nautilus. Further, the parties agreed that, regardless of the entity that produced the media,

> [a]ll non-commercial digital media . . . shall bear a time code stamp, and watermark (or bug) of Nautilus and/or D[N]CR, as well as a link to D[N]CR, [plaintiff], and Nautilus websites, to be clearly and visibly displayed at the bottom of any web page on which the digital media is being displayed.

Moreover, DNCR agreed "to display non-commercial digital media only on D[N]CR's website."

Further, with regard to plaintiff's *El Salvador* permit, the 2013 Settlement Agreement provided that:

> In consideration for [plaintiff's] significant contributions toward the discovery of the QAR and continued cooperation and participation in the recovery, conservation, and promotion of the QAR, D[N]CR agrees to continue to issue to [plaintiff] an exploration and recovery permit for the shipwreck *El Salvador* in the search area defined in the current permit dated 9 August 2013. D[N]CR agrees to continue to issue the permit through the year in which the QAR archaeology recovery phase is declared complete so long as the requirements contained in the permit are fulfilled. . . . D[N]CR agrees to recognize [plaintiff's] efforts and participation in the QAR project as sufficient to satisfy any performance requirements associated with annual renewal of [plaintiff's] permit for the *El Salvador*.

Plaintiff alleges that DNCR later breached the 2013 Settlement Agreement by: (1) displaying over two thousand *QAR* digital media images and over two hundred minutes of *QAR* digital media video on websites other than DNCR's website; (2) displaying those images without a watermark, time code stamp, or website links; (3) continuing to obstruct and delay the renewal of plaintiff's permit to search for *El Salvador*; (4) failing to implement certain mandates of the 2013 Settlement Agreement, such as changes to the *QAR* Project media policy; (5) failing to properly inform certain groups of opportunities under

the collaborative commercial narrative opportunity and/or media procedure language of the 2013 Settlement Agreement; (6) allowing FoQAR to film *QAR* recovery operations through an independent media company; (7) allowing FoQAR to post the footage that it filmed on the FoQAR Facebook page without a time code stamp, watermark, or website link; and (8) allowing FoQAR to bring the crew of a local radio show to dive the *QAR* shipwreck and shoot footage aboard the recovery vessel. Plaintiff also contends that FoQAR tortiously interfered with plaintiff's contract rights by filming the *QAR* recovery efforts and placing the footage on its website, while FoQAR was aware of the 2013 Settlement Agreement.

On 2 March 2015, plaintiff filed a second petition for a contested case hearing with the OAH. DNCR moved to dismiss plaintiff's petition, arguing that the OAH lacked subject matter jurisdiction to hear contractual claims that were not raised in plaintiff's earlier contested case hearing petition. Plaintiff dismissed its second petition for a contested case hearing without prejudice on 26 May 2015.

On 3 November 2015, plaintiff received a notice of termination for its permit to search for the *El Salvador* even though it already requested renewal of the permit. However, on 5 November 2015, plaintiff received another notice from the Attorney General's Office stating that DNCR had received plaintiff's request for renewal of the permit, that the notice of termination was rescinded, and that it would take thirty days to review plaintiff's renewal request. In those thirty days, State Defendants, for the first time, solicited an opinion from counsel for the Kingdom of Spain as to whether State Defendants could issue a permit to search for *El Salvador*. On 30 November 2015, counsel for the Kingdom of Spain issued an opinion that State Defendants could not grant a permit to search for *El Salvador* without the Kingdom of Spain's permission. Plaintiff received notice that its request for review of the *El Salvador* permit was denied. The notice stated that plaintiff's permit was being terminated because (1) plaintiff "failed to demonstrate operational control of laboratory activities and failed to meet certain reporting requirements"; and (2) the issuance of further permits was "not deemed to be in the best interest of the State" because "Spain's assertion of its ownership interest in *El Salvador* requires careful consideration of the State's legal authority to issue a permit in this situation." Plaintiff alleges that *El Salvador* was a private merchant vessel and, therefore, the Kingdom of Spain has no legitimate claim to it.

Plaintiff sought review of the decision to terminate its permit, and on 21 January 2016, DNCR issued a final agency decision upholding the

denial of the *El Salvador* permit. Thereafter, plaintiff filed a petition for a contested case with the OAH seeking review of DNCR's final agency decision. Plaintiff's contested case was dismissed on 27 May 2016. Plaintiff then sought review in Superior Court, Wake County.

On 27 July 2015, plaintiff separately filed a complaint in Superior Court, Wake County, asserting claims against the State Defendants for breach of contract, and requesting that the trial court enter a declaratory judgment, a temporary restraining order, a preliminary injunction, and a permanent injunction. The case was designated a mandatory complex business case on 10 September 2015. However, on 4 May 2016, this case was stayed by the trial court pending the resolution of plaintiff's administrative appeal.

With regard to plaintiff's administrative appeal, plaintiff filed its petition for judicial review of the OAH's decision to dismiss its contested case on 23 June 2016. Pursuant to judicial review, the trial court entered an order upholding the OAH decision, granting summary judgment in favor of the State Defendants, and denying and dismissing plaintiff's petition for judicial review because

> the Kingdom of Spain has a sufficient likelihood of success in its claim of ownership of the consigned cargo of the *El Salvador*, and that a reasonably cautious and prudent steward of the State's resources, in a good faith exercise of discretion, could conclude that the issuance of the [*El Salvador*] permit to the Petitioner was no longer in the best interest of the State.

Following its first order, the trial court granted plaintiff's motion for leave of court to file a second amended complaint on 20 February 2017. Plaintiff's second amended complaint was also deemed to be filed on that date. In the second amended complaint, plaintiff asserted the following pertinent claims: (1) breach of contract claims against the State Defendants for violating the terms of the 1998 Agreement, for violating plaintiff's media and promotional rights under the 2013 Settlement Agreement, and for refusing to renew plaintiff's *El Salvador* permit as required by the 2013 Settlement Agreement; and (2) tortious interference with plaintiff's contractual rights under the 1998 Agreement and the 2013 Settlement Agreement against FoQAR. Both State Defendants and FoQAR moved to dismiss plaintiff's second amended complaint.

On 13 October 2017, the trial court, in pertinent part, dismissed the following with prejudice: (1) plaintiff's breach of contract claims against the State Defendants under the 1998 Agreement; (2) plaintiff's

claim that FoQAR tortiously interfered with plaintiff's contractual rights under both the 1998 Agreement and the 2013 Settlement Agreement; and (3) plaintiff's breach of contract claim against the State Defendants under the 2013 Settlement Agreement stemming from the State Defendants' refusal to renew plaintiff's *El Salvador* permit. It also dismissed without prejudice plaintiff's breach of contract claim against the State Defendants under the 2013 Settlement Agreement stemming from DNCR's alleged violations of plaintiff's media and promotional rights.

On 9 November 2017, plaintiff filed a notice of appeal from the trial court's decision; however, that notice of appeal named the Court of Appeals, not this Court, as the judicial body to which plaintiff had a statutory right of appeal. *See* N.C.G.S. § 7A-27(a)(2) (2017). Accordingly, on 10 April 2018, the State Defendants filed a motion to dismiss the appeal. Before the State Defendants filed their motion to dismiss the appeal, plaintiff filed a petition for writ of certiorari to this Court seeking review of the trial court's 13 October 2017 opinion and order dismissing its second amended complaint. The trial court dismissed plaintiff's appeal on 4 May 2018. We, however, allowed the petition for writ of certiorari on 5 December 2018. Pursuant to plaintiff's certiorari petition, we now review whether the trial court erred in dismissing plaintiff's second amended complaint to the extent summarized above.

Analysis

We conclude that the trial court properly dismissed plaintiff's claims against the State Defendants for breach of the 1998 Agreement and its claim against FoQAR for tortious interference with contract. However, we also conclude that the trial court erred in dismissing plaintiff's claims for (1) breach of the 2013 Settlement Agreement stemming from DNCR's alleged violations of plaintiff's media and promotional rights; and (2) breach of the 2013 Agreement stemming from DNCR's non-renewal of plaintiff's *El Salvador* permit. Accordingly, we affirm in part, reverse in part, and remand to the trial court.

A. Standard of Review

This Court reviews de novo the grant of a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. *See CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51, 790 S.E.2d 657, 659 (2016) (citations omitted). "In considering a motion to dismiss under Rule 12(b)(6), the Court must decide 'whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.' " *Id.* (quoting *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013)).

Dismissal of a claim under Rule 12(b)(6) is proper when one or more of the following is satisfied: "(1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint reveals on its face the absence of fact[s] sufficient to make a [ ] claim; (3) when some fact disclosed in the complaint necessarily defeats the plaintiff's claim." *Oates v. Jag, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985) (citing *Forbis v. Honeycutt*, 301 N.C. 699, 701, 273 S.E.2d 240, 241 (1981)) (other citation omitted). However, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [a] claim which would entitle [the plaintiff] to relief." *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 165–66 (1970) (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80, 84 (1957), *abrogated by Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561–63, 127 S. Ct. 1955, 1968–69, 167 L. Ed. 2d 929, 943–44 (2007)).

This Court also reviews a dismissal for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure de novo and it may consider matters outside of the pleadings. *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007) (citations omitted).

B. Breach of Contract: The 1998 Agreement

[1] The trial court dismissed plaintiff's breach of contract claims against the State Defendants under the 1998 Agreement because it concluded that "the 2013 Settlement Agreement was a novation of the 1998 Agreement and that Plaintiff's rights under the 1998 Agreement have been extinguished." We affirm.

"A novation is the substitution of a new contract for an old one which is thereby extinguished." *Carolina Equip. & Parts Co. v. Anders*, 265 N.C. 393, 400, 144 S.E.2d 252, 257 (1965) (citing *Tomberlin v. Long*, 250 N.C. 640, 109 S.E.2d 365 (1959)). "The essential requisites of a novation are a previous valid obligation, the agreement of all the parties to the new contract, the extinguishment of the old contract, and the validity of the new contract." *Tomberlin*, 250 N.C. at 644, 109 S.E.2d at 367–68 (citation omitted). Further, in determining whether a later contract is a novation of a prior contract,

> [t]he intent of the parties governs. . . . If the parties do not say whether a new contract is being made, the courts will look to the words of the contracts, and the surrounding circumstances, if the words do not make it clear, to determine whether the second contract supersedes the first. If

> the second contract deals with the subject matter of the first so comprehensively as to be complete within itself or if the two contracts are so inconsistent that the two cannot stand together a novation occurs.

Whittaker Gen. Med. Corp. v. Daniel, 324 N.C. 523, 526, 379 S.E.2d 824, 827 (1989) (citing *Wilson v. McClenny*, 262 N.C. 121, 136 S.E.2d 569 (1964); *Tomberlin*, 250 N.C. at 644, 109 S.E.2d at 367–68; *Turner v. Turner*, 242 N.C. 533, 89 S.E.2d 245 (1955); *Bank v. Supply Co.*, 226 N.C. 416, 38 S.E.2d 503 (1946)).

Here, neither plaintiff nor the State Defendants have argued before this Court that either the 1998 Agreement or the 2013 Settlement Agreement are invalid.[3] Further, plaintiff and the State Defendants both agreed to the 2013 Settlement. Therefore, if the parties intended the 2013 Settlement Agreement to be a novation of the 1998 Agreement, it extinguished the 1998 Agreement. *See Tomberlin*, 250 N.C. at 644, 109 S.E.2d at 367–68; *Whittaker Gen. Med. Corp.*, 324 N.C. at 526, 379 S.E.2d at 827.

The words of the 2013 Settlement Agreement themselves "make it clear . . . the second contract supersedes the first." *Whittaker Gen. Med. Corp.*, 324 N.C. at 526, 379 S.E.2d at 827. Specifically, the 2013 Settlement Agreement states that it "supersedes the 1998 Agreement, *attached as* ***Attachment A***, and all prior agreements between D[N]CR, [plaintiff], and Nautilus regarding the *QAR* project." (emphases added). Because the language of the 2013 Settlement Agreement so clearly demonstrates the parties' intent that it would function as a novation of the 1998 Agreement, our analysis can end with the plain wording of the agreement. *See Whittaker Gen. Med. Corp.*, 324 N.C. at 526, 379 S.E.2d at 827 (stating that a court will look to the circumstances surrounding the second agreement to determine whether it is a novation "*if the words [of the agreement] do not make it clear*" (emphasis added))).

Because the 2013 Settlement Agreement was a novation of the 1998 Agreement, plaintiff's breach of contract claims arising from the 1998 Agreement are "extinguished." *See Carolina Equip. & Parts Co.*, 265 N.C. at 400, 144 S.E.2d at 257 (citing *Tomberlin*, 250 N.C. at 644, 109 S.E.2d at 367).

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3. In its brief, plaintiff points to the State Defendants' second affirmative defense in their answer to plaintiff's original complaint, in which the State Defendants appear to have asserted that certain paragraphs of the 1998 Agreement and the 2013 Settlement Agreement are unenforceable because they are against public policy. However, plaintiff does not actually argue that either agreement is invalid, and neither do the State Defendants.

Accordingly, we affirm the decision of the trial court to dismiss plaintiff's breach of contract claims under the 1998 Agreement.

C. Tortious Interference

[2] The trial court dismissed plaintiff's tortious interference with contract claim against FoQAR under the 1998 Agreement and the 2013 Settlement Agreement because

> [m]ere allegations that DNCR employees also served as members of F[o]QAR's board of directors, or that DNCR permitted F[o]QAR to film recovery operations and post videos to its website or to dive the *QAR* wreck do not amount to allegations of purposeful conduct on the part of F[o]QAR that was intended to induce DNCR to breach any contracts.

We affirm.

A claim for tortious interference with contract has the following elements:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair, LLC, 368 N.C. 693, 700, 784 S.E.2d 457, 462 (2016) (quoting *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988)).

The first theory by which plaintiff asserts that FoQAR tortiously interfered with the 1998 Agreement and the 2013 Settlement Agreement appears to be that the FoQAR was a mere "shadow corporation of DNCR through which certain upper level employees of DNCR sought to profit from contracts, books, tours, personal promotion, etc., connected to the *QAR* Project." Under this theory, plaintiff claims that certain DNCR employees (dual hat employees) with "specific responsibility for oversight of *QAR* Project and [plaintiff's] *El Salvador* search permit," "wore dual hats" as "officers and agents of DNCR" while also serving as "office[r]s, agents, and directors of . . . FoQAR." Therefore, plaintiff asserts that any action that the dual hat employees took in their capacities at DNCR (1) was the result of a "conflict of interest"

and an "unethical relationship[ ]"; and (2) was also imputed to FoQAR. Plaintiff's complaint appears to attempt to support the imputation theory by invoking the doctrine of respondeat superior. However, neither plaintiff's complaint, nor its briefs filed in this Court, cite any authority to support its application of that doctrine to these facts.

We conclude that the trial court correctly determined that "[m]ere allegations that DNCR employees also served as members of F[o]QAR's board of directors" do not amount to allegations that FoQAR intentionally induced DNCR to not perform its obligations under either the 1998 Agreement or the 2013 Settlement Agreement.

Specifically, plaintiff has alleged that the dual hat employees (1) had "specific responsibility for oversight of *QAR* Project and [plaintiff's] *El Salvador* search permit," (2) were serving as employees of DNCR and FoQAR under a "conflict of interest" and an "unethical relationship[ ]," and (3) were conspiring "with FoQAR to violate multiple provisions of the *QAR* Settlement Agreement." However, plaintiff has not alleged how the dual hat employees intentionally used their positions to induce DNCR to breach either the 1998 Agreement or the 2013 Settlement Agreement. *See Beverage Sys. of the Carolinas, LLC*, 368 N.C. at 700, 784 S.E.2d at 462 (citing *United Labs., Inc.*, 322 N.C. at 661, 370 S.E.2d at 387). We are persuaded that plaintiff's allegations show, at most, that the dual hat employees "induced themselves to breach the 1998 Agreement and [2013] Settlement Agreement."

In addition to its overarching shadow corporation theory, plaintiff alleged that FoQAR tortiously interfered with the 1998 Agreement when, in mid-2013, FoQAR agreed to pay third party companies to produce "various materials, including videos and a website" about the *QAR* Project. Plaintiff also alleged that some of the payment pursuant to the agreement went to the spouse of a dual hat employee. However, these allegations—involving an agreement between FoQAR and third parties, which did not include DNCR—are devoid of any conduct by FoQAR that "intentionally induce[d]" *DNCR* to not perform on its contract with plaintiff. *Beverage Sys. of the Carolinas, LLC*, 368 N.C. at 700, 784 S.E.2d at 462 (quoting *United Labs., Inc.*, 322 N.C. at 661, 370 S.E.2d at 387).

Moreover, plaintiff alleged that FoQAR tortiously interfered with the 2013 Agreement by: (1) contracting with an independent media company to film *QAR* recovery operations and posting the footage on the FoQAR Facebook page without a time code stamp, watermark, or website link; and (2) bringing the crew of a local radio show to dive the *QAR* shipwreck and shoot footage from aboard the recovery vessel. As with

the allegations addressed above, plaintiff's allegations here—involving agreements with third parties other than DNCR, and involving FoQAR's own conduct in posting footage of the recovery operation to its own Facebook page—fail to mention any conduct by FoQAR that intentionally induced *DNCR* to not perform on its contract with plaintiff.

Accordingly, we affirm the decision of the trial court to dismiss plaintiff's tortious interference with contract claim.

D. Breach of Contract: *QAR* Media Rights Under the 2013 Settlement Agreement

[3] The trial court dismissed for lack of subject matter jurisdiction plaintiff's claim that DNCR breached the 2013 Settlement Agreement by violating plaintiff's *QAR* media rights. Specifically, the trial court concluded that plaintiff (1) failed to exhaust administrative remedies; and (2) did not allege that administrative exhaustion would be futile. The trial court reached this conclusion because plaintiff dismissed its second petition for a contested case hearing under the North Carolina Administrative Procedure Act (the APA) and then filed a breach of contract claim in superior court without a final decision by the OAH. We reverse.

Our analysis of whether a plaintiff may bring a breach of contract claim against a State agency in superior court begins with our holding in *Smith v. State* "that whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract[,]" and accordingly, the State cannot invoke the doctrine of sovereign immunity as a defense. 289 N.C. 303, 320, 222 S.E.2d 412, 423–24 (1976).

We later concluded, however, that the holding in *Smith* was "superfluous" where "statutory provisions . . . permit an aggrieved party, *after exhausting certain administrative remedies*, to institute a civil contract action in Superior Court." *Middlesex Const. Corp. v. State ex rel. State Art Museum Bldg. Comm'n*, 307 N.C. 569, 573–74, 299 S.E.2d 640, 643 (1983) (emphasis added). In *Middlesex*, we ultimately held that the superior court lacked subject matter jurisdiction to adjudicate plaintiff's breach of contract claims arising from its construction contract with the State in the first instance. *Id.* at 575, 299 S.E.2d at 644. We reasoned that the plaintiff was ultimately required to pursue its claims under the provisions of N.C.G.S. § 143-135.3, which provided the requisite procedure "[w]hen a claim arises prior to the completion of any contract for construction or repair work awarded by any State board to any contractor

under the provisions of this Article." *Id.* at 571, 299 S.E.2d at 641 (quoting N.C.G.S. § 143-135.3 (Supp. 1981)). In support of this reasoning, we determined that the language of N.C.G.S. § 143-135.3

> could not be clearer: although a contractor may ultimately file an action in Superior Court, the exhaustion of administrative remedies as provided [by the statute] is a *condition precedent* to such action, and the provisions become *a part of every contract* entered into between the State and the contractor.

Id. at 573, 299 S.E.2d at 642.

The State Defendants rely on our decision in *Middlesex*, along with our decision in *Abrons Family Practice and Urgent Care, PA v. N.C. Dep't of Health and Human Servs.*, 370 N.C. 443, 810 S.E.2d 224 (2018), in arguing that the trial court was correct to dismiss plaintiff's claim because plaintiff failed to exhaust administrative remedies. The State Defendants argue that the APA provided plaintiff with an administrative remedy here under N.C.G.S. § 150B-23(a). The State Defendants' argument is unavailing.

First, we note that our decision in *Middlesex* does not support the conclusion that plaintiff was required to exhaust any administrative remedy under N.C.G.S. § 150B-23(a) before filing a common law breach of contract claim in superior court. As an initial matter—and unlike the relevant statute in *Middlesex*—N.C.G.S. § 150B-23(a) provides no administrative procedure which specifically applies to plaintiff's contract claim. *Compare* N.C.G.S. § 150B-23(a) (2017), *with* N.C.G.S. § 143-135.3 (Supp. 1981) (specifically creating an administrative procedure for "[w]hen a claim arises prior to the completion of any contract for construction or repair work awarded by any State board to any contractor under the provisions of this Article"). Accordingly—and also unlike the relevant statute in *Middlesex*—neither N.C.G.S. § 150B-23(a) nor our decision in *Smith* explicitly make any specific administrative procedure a "condition precedent" to bringing a contract claim in superior court. *Compare* N.C.G.S. § 150B-23(a) (2017), *with* N.C.G.S. § 143-135.3 (Supp. 1981) (specifically stating that following the administrative procedure set forth in the statute "shall be a condition precedent" to filing suit in superior court). Additionally—and also unlike the relevant statute in *Middlesex*—N.C.G.S. § 150B-23(a) does not explicitly make a specific administrative procedure part of every contract entered into between the State and a private citizen. *Compare* N.C.G.S. § 150B-23(a) (2017), *with* N.C.G.S. § 143-135.3 (Supp. 1981) (specifically stating that the

administrative procedure "shall . . . form a part of every contract entered into between any board of the State and any contractor"). Accordingly, N.C.G.S. § 150B-23(a) does not disturb the superior court's "*original general* jurisdiction of *all* justiciable matters of a civil nature."[4] N.C.G.S. § 7A-240 (2017) (emphasis added). We decline to read N.C.G.S. § 150B-23 as creating a specific requirement for the exhaustion of administrative remedies. Accordingly, in the absence of a specific statutory exhaustion requirement, we affirm our holding in *Smith* that, generally, where the State enters into a contract, it consents to be sued in the event of a breach of the contract.

Moreover, the text of the 2013 Settlement Agreement does not make the exhaustion of a specific administrative procedure a condition precedent to filing a breach of contract claim in superior court, nor does it provide a specific procedure for settling disputes under the contract. The only provision in the 2013 Settlement Agreement concerning breach provides that, "[i]n the event D[N]CR, [plaintiff], or Nautilus breaches this Agreement, D[N]CR, [plaintiff], or Nautilus may avail themselves of all remedies provided by law or equity."

Accordingly, here—unlike in *Middlesex*—plaintiff's ability to bring a common law breach of contract claim in superior court was not restricted by any statutory or contractual provision. As a result, the State Defendants cannot rely on *Middlesex* for the proposition that plaintiff was barred from bringing its claim in superior court in the first instance. *See Middlesex*, 307 N.C. at 570, 229 S.E.2d at 641.

The State Defendants' reliance on *Abrons* is also misplaced. In *Abrons*, plaintiffs—all of whom were health care providers—filed suit against the North Carolina Department of Health and Human Services (DHHS), and Computer Sciences Corporation (CSC). *Abrons*, 370 N.C. at 444–45, 810 S.E.2d at 226. DHHS entered into a contract with CSC to develop a new Medicaid Management Information System (later named NCTracks). *Id.* at 445, 810 S.E.2d at 226. After the system went live,

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4. Under the General Statutes, it is the General Court of Justice—not an "independent, *quasi-judicial agency*" such as the OAH, N.C.G.S. § 7A-750 (2017) (emphasis added)—which is presumed to have "general jurisdiction" over "matters of a civil nature." N.C.G.S. § 7A-240; *see also Reaves v. Earle-Chesterfield Mill Co.*, 216 N.C. 462, 465, 5 S.E.2d 305, 306 (1939) (concluding that an "administrative [body], with quasi-judicial functions," and with "special or limited jurisdiction created by statute[,]" is not a court of general jurisdiction and its jurisdiction can be "enlarged or extended only by the power creating the court." (citations omitted)).

DNCR acknowledged this state of the law in its motion to dismiss plaintiff's second petition for a contested case.

plaintiffs began submitting claims to DHHS for Medicaid reimbursements. *Id.* at 445, 810 S.E.2d at 226. However, "[i]n the first few months of being in operation, [the system] experienced over 3,200 software errors, resulting in delayed, incorrectly paid, or unpaid reimbursements to plaintiffs." *Id.* As a result, plaintiffs filed claims—including claims for monetary damages—alleging "that CSC was negligent in its design and implementation of [the system] and that DHHS breached its contracts with each of the plaintiffs by failing to pay Medicaid reimbursements." *Id.* Further, plaintiffs alleged that "they had a contractual right to receive payment for reimbursement claims and that this was 'a property right that could not be taken without just compensation.' " *Id.* Moreover, plaintiffs "sought a declaratory judgment that the methodology for payment of Medicaid reimbursement claims established by DHHS violated Medicaid reimbursement rules." *Id.*

After receiving adverse determinations on their reimbursement claims, plaintiffs failed to request a reconsideration review or file a petition for a contested case, as specifically required by DHHS procedures. *Abrons*, 370 N.C. at 448, 810 S.E.2d at 228; *see also id.* at 446–47, 810 S.E.2d at 227–28 (discussing DHHS regulations and provisions of the APA which specifically require Medicaid providers to request a reconsideration review and file a petition for a contested case hearing before obtaining judicial review). As a result, we held that the trial court correctly dismissed plaintiffs' claims because they failed to exhaust their administrative remedies and failed to demonstrate that such exhaustion would be futile. *Id.* at 453, 810 S.E.2d at 232.

Here, plaintiff has filed a claim against the State Defendants for their alleged violations of plaintiff's media rights under the 2013 Settlement Agreement. Unlike the relevant claims in *Abrons*, this claim is exclusively one for common law breach of contract and, therefore, it is not a mere "insertion of a prayer for monetary damages" into what is otherwise a claim that is primarily administrative. *See id.* at 452, 810 S.E.2d at 231.

Because plaintiffs' claim here is a common law breach of contract claim, and the State Defendants have failed to demonstrate that this case is governed by our holdings in either *Middlesex* or *Abrons*, or any other provision requiring plaintiff to exhaust administrative procedures, we conclude that plaintiff was not required to exhaust administrative remedies before bringing its breach of contract claim in superior court.

Our conclusion that the trial court had subject matter jurisdiction over plaintiff's claim is supported by the APA. Specifically, the APA

provides that "[n]othing in this Chapter shall prevent any party or person aggrieved from invoking *any judicial remedy available to the party or person aggrieved under the law* to test the validity of *any administrative action not made reviewable under this Article*." N.C.G.S. § 150B-43 (2017) (emphases added); *see also Pachas v. N.C. Dep't of Health & Human Servs.*, 822 S.E.2d 847, 855 (N.C. 2019).

Here, the relevant judicial remedy available to plaintiff is a common law breach of contract claim. As addressed above, we reject the State Defendants' argument that the APA makes such a common law claim reviewable through the administrative process under N.C.G.S. § 150B-23(a)—which provides the procedure for commencing a contested case.

As a result, the trial court erred in concluding that it lacked subject matter jurisdiction over plaintiff's claim. Because the trial court had jurisdiction to adjudicate plaintiff's claim, plaintiff need not have demonstrated that exhaustion of administrative remedies would be futile. *See Pachas*, 822 S.E.2d at 857 ("Because we conclude that the trial court had jurisdiction over petitioner's motion and petition, we need not determine whether exhaustion of administrative remedies was inadequate or futile here."). Accordingly, we reverse the trial court's conclusion that it lacked subject matter jurisdiction over plaintiff's claim.

E. Breach of Contract: *El Salvador* Permit

[4] The trial court dismissed plaintiff's breach of contract claim based on DNCR's failure to renew the *El Salvador* permit because it concluded that the claim was barred by the trial court's 7 November 2016 order under "the doctrine of res judicata"[5] because "[p]laintiff's breach of

5. Even though the trial court's order discussed "the doctrine of collateral estoppel, or issue preclusion" at some length, it ultimately concluded only that plaintiff's breach of contract claim as to the *El Salvador* permit was "barred by the doctrine of res judicata." Accordingly, of the two doctrines, we will address only whether plaintiff's claim is barred by the doctrine of res judicata. These two doctrines, although historically recognized "as species of a broader category of 'estoppel by judgment,' " are not interchangeable. *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (quoting *Bockweg v. Anderson*, 333 N.C. 486, 491–92, 428 S.E.2d 157, 161 (1993)). Specifically, res judicata, or claim preclusion, functions to bar a plaintiff's entire "*cause of action*," whereas collateral estoppel, or issue preclusion, bars only "the subsequent adjudication of *a previously determined issue*, even if the subsequent action is based on an entirely different claim." *Id.* at 15, 591 S.E.2d at 880 (emphases added) (citing *Hales v. North Carolina Ins. Guar. Ass'n*, 337 N.C. 329, 333, 445 S.E.2d 590, 594 (1994)). Therefore, although "[t]he two doctrines are complimentary," they are not the same. *Id.* at 15–16, 591 S.E.2d at 880.

contract claim was raised in the contested case proceeding" that ultimately reached the trial court on judicial review, and the order constituted "a final adjudication on the merits in the administrative matter." We reverse.

As an initial matter, "[t]he fact that the original claim arose in a quasi-judicial administrative hearing" does not preclude the applicability of res judicata. *See Batch v. Town of Chapel Hill*, 326 N.C. 1, 14–15, 387 S.E.2d 655, 664 (1990). "Under the doctrine of res judicata or 'claim preclusion,' a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (quoting *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413, 474 S.E.2d 127, 128 (1996); *Hales v. North Carolina Ins. Guar. Ass'n*, 337 N.C. 329, 333, 445 S.E.2d 590, 594 (1994)). Further, "[t]he doctrine prevents the relitigation of 'all matters . . . that were or should have been adjudicated in the prior action.' " *Id.* at 15, 591 S.E.2d at 880 (quoting *Thomas M. McInnis & Assocs. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986)). However, neither *Whitacre* nor *McInnis* provide guidance on what "matters," are considered to be barred by a prior action. *See id.* at 15, 591 S.E.2d at 880 (ultimately applying the separate doctrine of judicial estoppel); *see also McInnis*, 318 N.C. at 428, 349 S.E.2d at 556 (holding that the doctrine of res judicata was inapplicable in that action).

Our decision in *Bockweg v. Anderson*, 333 N.C. 486, 428 S.E.2d 157 (1993), provides guidance on what matters are barred by res judicata. Specifically, in *Bockweg*, we stated that "[w]hile it is true that a 'judgment is conclusive as to all issues raised by the pleadings,' . . . the judgment is not conclusive as to issues not raised by the pleadings which serve as the basis for the judgment." *Bockweg*, 333 N.C. at 492, 428 S.E.2d at 161–62 (citation omitted). In *Tyler v. Capehart*, we stated that a

> judgment is decisive of the points raised by the pleadings, or which might properly be predicated upon them . . . .[but] does not embrace any matters which might have been brought into the litigation, or any causes of action which the plaintiff might have joined, but which in fact are neither joined nor embraced by the pleadings.

125 N.C. 64, 70, 34 S.E. 108, 109 (1899).

Here, there is no dispute that the trial court's order was (1) "a final judgment"[6]; and (2) that the final judgment was "between the same parties or their privies." *Whitacre*, 358 N.C. at 15, 591 S.E.2d at 880. The issues are whether the final judgment was "on the merits" and whether that judgment concerned the "same cause of action"—namely plaintiff's breach of contract claim arising from DNCR's denial of plaintiff's permit to search for *El Salvador*. *Bockweg*, 333 N.C. at 492–93, 428 S.E.2d at 162 (citing and quoting *Tyler*, 125 N.C. at 70, 34 S.E. at 109).

We conclude that the trial court's order was not a final judgment on the merits of plaintiff's breach of contract claim because that claim is a separate cause of action which was not raised by plaintiff's pleadings before the trial court, and which cannot be "properly predicated upon [those pleadings]." *Bockweg*, 333 N.C. at 492–93, 428 S.E.2d at 162 (citing *Tyler*, 125 N.C. at 70, 34 S.E. at 109). Specifically, in its petition for judicial review, plaintiff only ever asserted that DNCR was "contractually bound," to continue renewing the *El Salvador* permit in support of plaintiff's argument that the OAH's final agency decision affirming the denial of the permit was "in violation of constitutional provisions, in excess of the statutory authority or jurisdiction of the agency or the administrative law judge, made upon unlawful procedure, affected by other error of law, unsupported by substantial evidence and is arbitrary, capricious and is an abuse of discretion." In this vein, plaintiff asserted that "[DNCR] had previously entered into an agreement with [plaintiff], known as the [2013] Settlement Agreement, in which [DNCR] bound itself to continue renewing [the *El Salvador* permit] 'through the year in which the *QAR* archaeology recovery phase is declared complete so long as the requirements contained in [the *El Salvador* permit] are fulfilled.' "

Further, nowhere in plaintiff's petition for judicial review did it make the following necessary allegations for a breach of contract claim: "[(1)] the existence of a contract between plaintiff and defendant, [(2)]

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6. Plaintiff does argue, without citing to authority, that the trial court's order was somehow a "deferral" to DNCR's decision to deny the *El Salvador* permit and, therefore, the order was not a final judgment. However, this argument is without merit because the order specifically granted summary judgment in the State Defendants' favor, while denying and dismissing plaintiff's petition. Therefore, the trial court's order constitutes a final judgment. *See Veazey v. City of Durham*, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381 (1950) ("A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." (citing *Sanders v. May*, 173 N.C. 47, 49, 91 S.E. 526, 527 (1917); *Bunker v. Bunker*, 140 N.C. 18, 22–24, 52 S.E. 237, 238–39 (1905); *McLaurin v. McLaurin*, 106 N.C. 331, 335, 10 S.E. 1056, 1057 (1890); *Flemming v. Roberts*, 84 N.C. 532, 538–39 (1881)).

the specific provisions breached, [(3)] the facts constituting the breach, and [(4)] the amount of damages resulting to plaintiff from such breach." *RGK, Inc. v. U.S. Fid. & Guar. Co.*, 292 N.C. 668, 675, 235 S.E.2d 234, 238 (1977) (quoting *Cantrell v. Woodhill Enterprises, Inc.*, 273 N.C. 490, 497, 160 S.E.2d 476, 481 (1968)). Even assuming—without deciding—that plaintiff's aforementioned assertions were allegations concerning the existence of the 2013 Settlement Agreement, as well as the specific provision of the contract at issue, plaintiff's petition for judicial review still failed to sufficiently allege that the denial of the permit constituted a breach of the 2013 Settlement Agreement, and failed to allege an amount of damages. Therefore, the pleading before the trial court did not raise plaintiff's breach of contract claim, and plaintiff could not have "properly predicate[d]" a breach of contract claim upon that pleading. *Bockweg*, 333 N.C. at 493, 428 S.E.2d at 162 (citation omitted). Accordingly, the trial court erred in dismissing plaintiff's breach of contract claim based on DNCR's failure to renew the *El Salvador* permit through the doctrine of res judicata.

The State Defendants argue to the contrary, stating that our prior decision in *Batch* is controlling here and requires the Court to conclude that plaintiff's claim was barred by res judicata. Because *Batch* is distinguishable from this case, we do not agree. In *Batch*, a property owner submitted an application to subdivide her property to the Town of Chapel Hill. *Batch*, 326 N.C. at 4, 387 S.E.2d at 657. In its ultimate resolution concerning the property owner's subdivision application, the planning board denied the application on the grounds that the subdivision application was not consistent with several aspects of the town's development ordinance. *Id.* at 7–8, 387 S.E.2d at 659–60. After the planning board denied her application, the property owner filed a "combined complaint and petition for writ of certiorari" in Superior Court, Orange County. *Id.* at 8, 387 S.E.2d at 660. The trial court determined that the claims were properly joined and issued the writ of certiorari. *Id.* at 8, 387 S.E.2d at 660. After that, the property owner moved for summary judgment and the trial court ordered the town to approve the property owner's preliminary plat with a minor exception. *See id.* at 10, 387 S.E.2d at 661.

On appeal, this Court first held that the trial court erred in joining the proceedings pursuant to the writ of certiorari and the complaint. *Batch*, 326 N.C. at 11, 387 S.E.2d at 661–62. Even though we determined that it was error to join the two proceedings, we did not remand the entire case on that basis but, instead, addressed the remaining issues. *Id.* at 11, 387 S.E.2d at 662. In reviewing the issues raised pursuant to

the property owner's petition for writ of certiorari, we held, in pertinent part, that "the Town Council properly denied [the property owner's] petition for approval of her subdivision," and, accordingly, we reversed the decision of the Court of Appeals. *Id.* at 13, 387 S.E.2d at 663. In reviewing the issues raised by the property owner's complaint, we determined that (1) "summary judgment should have been entered for the [town]"; and (2) "[the property owner's] complaint should be dismissed." *Id.* at 14, 387 S.E.2d at 663–64.

The basis for the Court's conclusions that summary judgment should have been granted in favor of the town, pursuant to the property owner's complaint, and that the property owner's complaint should be dismissed, was that "[i]t having been determined *in this opinion* that the Town Council of Chapel Hill properly denied approval of [the property owner's] subdivision plan," *Batch*, 326 N.C. at 14, 387 S.E.2d at 663 (emphasis added), under the issues raised by the petition for writ of certiorari, "[t]he foundation of [the property owner's] alleged causes of action [in her complaint] [was] determined against her," *id.* at 14, 387 S.E.2d at 663–64.

In describing how the Court's holdings on the issues raised by the petition for writ of certiorari *resolved* the issues raised by the complaint, we discussed the doctrine of res judicata. *Batch*, 326 N.C. at 14, 387 S.E.2d at 663–64 (concluding that it was unnecessary to review "any of [the property owner's] constitutional claims or other issues arising upon her complaint" because they were "based solely upon the alleged improper refusal by the Town Council to approve her subdivision plans"). Specifically, we determined that our holding under the issues raised by the property owner's petition for writ of certiorari—that "the Town Council properly denied [the property owner's] petition for approval of her subdivision"—barred, within the same opinion, any conclusion that she was entitled to summary judgment on the constitutional statutory claims raised by her complaint. *See id.* at 13–14, 387 S.E.2d at 663–64. As such, our application of res judicata in *Batch* resulted from a complex, fact-specific, procedural posture that is not applicable to the facts here.

Accordingly, we reverse the trial court's conclusion that plaintiff's breach of contract claim based upon the State Defendants' refusal to renew the *El Salvador* permit was barred by res judicata.

Conclusion

For the above reasons, we conclude that the trial court (1) properly dismissed plaintiff's breach of contract claims against the State Defendants which arose from the 1998 Agreement; (2) properly dismissed

plaintiff's tortious interference with contract claim against FoQAR; (3) erred in dismissing plaintiff's breach of contract claim against the State Defendants concerning its *QAR* media rights under the 2013 Settlement Agreement for lack of subject matter jurisdiction; and (4) erred in dismissing plaintiff's breach of contract claim against the State Defendants arising from DNCR's failure to renew plaintiff's *El Salvador* permit. Accordingly, we affirm in part, reverse in part, and remand to the trial court for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Justice MORGAN concurring in part and dissenting in part.

While I fully concur with my learned colleagues of the majority with respect to plaintiff's claims for breach of the 1998 Agreement, breach of the contractual provisions relating to media rights contained in the 2013 Settlement Agreement, and tortious interference with contract, I respectfully dissent from their determination that the Business Court erred in concluding that plaintiff's breach of contract claim arising from DNCR's refusal to renew plaintiff's permit to search for the shipwreck remains of the *El Salvador* was barred by the doctrine of res judicata. In my view, our longstanding precedent regarding claim preclusion in conjunction with the record on appeal in this matter indicates that this principle applies to plaintiff's *El Salvador* claim. Accordingly, I would affirm the Business Court on this issue.

As noted in the majority opinion, the 2013 Agreement provided that DNCR would

> continue to issue to Intersal an exploration and recovery permit for the shipwreck *El Salvador* . . . . through the year in which the *QAR* [*Queen Anne's Revenge*] archaeology recovery phase is declared complete so long as the requirements contained in the permit are fulfilled. Subject to the provisions of Article 3 of Chapter 121 of the North Carolina General Statutes . . . and the North Carolina Administrative Code, [DNCR] agrees to recognize Intersal's efforts and participation in the *QAR* [P]roject as sufficient to satisfy any performance requirements associated with annual renewal of Intersal's permit for the *El Salvador*.

In sum, to the extent that it would be consistent with our General Statutes and the North Carolina Administrative Code, plaintiff's work on the *QAR* project would be deemed to "satisfy any performance

requirements" for renewal of the *El Salvador* permit. However, when plaintiff applied for a renewal of the permit in 2015, the application was denied. DNCR gave two reasons for the denial: 1) plaintiff's failure "to fulfill material requirements set forth in" the *El Salvador* permit and 2) that renewal was "not deemed to be in the best interest of the State" due to its receipt of a letter dated 30 November 2015 from the Kingdom of Spain which "expressed [the Kingdom of Spain's] intent on maintaining control of the shipwreck and cargo of the *El Salvador* and asserted its position to defend its title," along with stressing Spain's claim that the State of North Carolina lacked the authority to issue a permit to recover the *El Salvador*. Plaintiff believed that this refusal to renew the permit violated the terms of the 2013 Settlement Agreement as quoted above.

As a result of, *inter alia*, DNCR's refusal to renew the permit to search for the *El Salvador*, plaintiff filed a petition for a contested case hearing in the Office of Administrative Hearings (OAH), seeking to compel DNCR to renew the permit.[1] The majority recognizes this development in its opinion in stating that plaintiff had "asserted that DNCR was 'contractually bound' to continue renewing the *El Salvador* permit" under terms of the 2013 Settlement Agreement and had failed to do so.

DNCR moved to dismiss the contested case. In a "Final Decision Order of Dismissal" dated 27 May 2016, the ALJ assigned to the contested case by the OAH did not address DNCR's subject matter jurisdiction argument. Instead, the ALJ resolved the contested case upon the finding, *inter alia*, that plaintiff "failed to allege that it had permission from the Kingdom of Spain to engage in the exploration and recovery of the historic shipwreck site of the *El Salvador*," citing the November 2015 letter from the Kingdom of Spain and, among other authorities, *Sea Hunt v. Unidentified Shipwrecked Vessel*, 221 F.3d 634, 640–41 (4th Cir. 2000) (stating "that a shipwreck is abandoned only where the owner has relinquished ownership rights. . . . [and w]hen an owner comes before the court to assert his rights, relinquishment would be hard, if not impossible, to show") (citing 43 U.S.C. § 2101(b)). As a result, the ALJ granted DNCR's motion to dismiss the contested case for failure to state a claim upon which relief can be granted. *See* N.C.G.S. § 1A-1, Rule 12(b)(6) (2017).

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1. The contested case filing in 15DCR09742 is not part of the record on appeal, but plaintiff's assertion in the OAH that DNCR was "contractually bound" to issue the permit renewal is referenced in decisions issued by the Administrative Law Judge (ALJ), the superior court which undertook the judicial review of the final agency decision, and the Business Court.

Pursuant to N.C.G.S. § 150B-45, plaintiff sought judicial review of the OAH final decision, asserting that "continued renewal of [the *El Salvador* permit] is required by the terms of the QAR Settlement Agreement (2013)" and that DNCR "refused to renew [the *El Salvador* permit] on November 1, 2015, giving rise to this contested case." In its petition for judicial review, plaintiff further alleged:

> The ALJ ignored several additional Petitioner's arguments raised in briefs, exhibits and oral arguments, including, without limitation, that . . . [DNCR] is contractually bound by the [2013] Settlement Agreement to continue renewing [the *El Salvador* permit] "through the year in which the QAR archaeology recovery phase is declared complete so long as the requirements contained in [the *El Salvador* permit] are fulfilled."

The matter was heard in the Superior Court, Wake County. In an order entered 7 November 2016, the superior court noted that the ALJ had determined a broader issue than that presented in plaintiff's petition for a contested case hearing, in that the ALJ purported to resolve the ownership of the *El Salvador*, while the actual issue raised by plaintiff's OAH contested case petition was whether or not DNCR's asserted reason for its denial of the permit renewal—that it would not be in the best interest of the State of North Carolina to issue such a permit given the assertion of ownership by the Kingdom of Spain—was arbitrary or capricious, as plaintiff had couched the administrative controversy in those terms in its OAH petition. However, the superior court determined that remand to the OAH was not necessary despite this error, because the North Carolina General Statutes provide that "[i]n reviewing a final decision allowing judgment on the pleadings or summary judgment, the court may enter any order allowed by G.S. 1A-1, Rule 12(c) or Rule 56." N.C.G.S. § 150B-51(d) (2017). In its order, the superior court then 1) determined that the record in the matter was fully developed and all issues were thoroughly briefed, such that it could resolve defendant's motion for summary judgment which was filed in the alternative to its motion to dismiss on the pleadings and 2) held that the denial of the *El Salvador* permit renewal was not arbitrary and capricious, but instead was in the best interest of the State in light of the ownership assertion of the Kingdom of Spain. With this analysis, the superior court affirmed OAH's dismissal of the contested case. Plaintiff did not appeal from this determination.

However, in the subsequent civil suit which was brought before the Business Court and which this Court has now been engaged to address,

plaintiff pursued a breach of contract claim, contending that defendants breached the 2013 Settlement Agreement when defendants denied the plaintiff's request for the renewal of the *El Salvador* permit in 2015. The Business Court viewed this claim as barred by the operation of the doctrine of res judicata, holding that the superior court's "[o]rder was a final adjudication on the merits in the administrative matter" and that "[p]laintiff's breach of contract claim was raised in the contested case proceeding."

As the majority decision correctly notes,

> Under the doctrine of res judicata or "claim preclusion," a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies. *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413, 474 S.E.2d 127, 128 (1996); *Hales v. North Carolina Ins. Guar. Ass'n*, 337 N.C. 329, 333, 445 S.E.2d 590, 594 (1994). The doctrine prevents the relitigation of "all matters . . . that *were or should have been adjudicated* in the prior action." [*Thomas M.*] *McInnis* [*& Assocs. v. Hall*], 318 N.C. [421,] 428, 349 S.E.2d [552,] 556 [(1986)].

Whitacre P'ship v. BioSignia, Inc., 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (emphasis added; first alteration in original); *see also Bockweg v. Anderson*, 333 N.C. 486, 492, 428 S.E.2d 157, 161 (1993) (holding that a judgment is conclusive on all issues raised by the pleadings). In *Bockweg*, we further explored the doctrine's application in observing that "subsequent actions which attempt to proceed by asserting a new legal theory or by seeking a different remedy are prohibited under the principles of res judicata." 333 N.C. at 494, 428 S.E.2d at 163 (addressing a case in which the "[p]laintiffs did not merely change their legal theory or seek a different remedy. . . . [but r]ather, [were] seeking a remedy for a separate and distinct negligent act leading to a separate and distinct injury").

The disputed question in the present case is whether the pertinent claim—breach of the *El Salvador* permit renewal provision of the 2013 Settlement Agreement—was "or should have been adjudicated in the" OAH proceeding that concluded with the superior court order dismissing plaintiff's petition; if so, then it cannot be revisited in this case. In the view of the majority, the well-established principle of res judicata or claim preclusion does not apply here to bar plaintiff from re-litigating the question of whether DNCR breached the 2013 Settlement Agreement

by failing to renew the *El Salvador* permit, based upon the majority's deductive reasoning that the breach of contract claim "was never considered" because the superior court's order did not expressly address the issue, but instead focused upon the alternative basis for plaintiff's challenge of the permit denial by defendants regarding the superior court's determination that the renewal of the permit was not in the best interest of the State. Further, although the majority acknowledges that in the OAH proceeding plaintiff "asserted that DNCR was 'contractually bound' to continue renewing the *El Salvador* permit," my colleagues with the majority view take the position that plaintiff did not make allegations to support a breach of contract claim in its petition for judicial review and therefore conclude that "the pleading before [the superior court] did not raise plaintiff's breach of contract claim." The majority also focuses on the concept that plaintiff did not plead an amount of damages—an element of a civil breach of contract claim—and therefore that the OAH could not have awarded monetary damages to plaintiff in the contested case proceeding, in an effort to fortify the rationale for this case outcome. However, the majority misapprehends both our precedent and the procedural posture of the case on this point.

As an initial matter, contrary to the majority's reasoning, plaintiff's petition for judicial review was not a "pleading" as that term is construed in the appellate case law which applies the doctrine of res judicata when discussing what issues were raised and what "matters . . . were or should have been adjudicated in the prior action." *Thomas M. McInnis & Assocs.*, 318 N.C. at 428, 349 S.E.2d at 556. Here, the petition for judicial review which afforded the superior court its jurisdiction is more properly viewed as an appeal document initiating appellate review, instead of a pleading initiating a legal controversy in the first instance. In this regard, the contested case petition filed in the OAH was the "pleading" for purposes of proper evaluation of the application of res judicata.

More importantly, in the OAH contested case proceeding, plaintiff asserted that the 2013 Settlement Agreement "contractually" bound DNCR to renew the *El Salvador* search permit and that DNCR did not renew said permit. *See Bockweg*, 333 N.C. at 492, 428 S.E.2d at 161 (holding that, generally, a judgment is conclusive on all issues that are raised or could have been raised by the pleadings). However, the fact that plaintiff sought one remedy—renewal of the permit—in the OAH proceeding and a different remedy—money damages—in the civil suit does not remove plaintiff's essential claim—that the contract as evidenced by the 2013 Settlement Agreement was breached—from the bar of res judicata. *See id.* at 494, 428 S.E.2d at 163 ("[S]ubsequent actions which attempt to

proceed by asserting a new legal theory or by seeking a different remedy are prohibited under the principles of res judicata"); *see also Cannon v. Durham Cty. Bd. of Elections*, 959 F. Supp. 289, 292 (E.D.N.C.) ("[R]es judicata operates to bar all related claims and thus plaintiffs are not entitled to a separate suit merely by shifting legal theories"), *aff'd*, 129 F.3d 116 (4th Cir. 1997).

In sum, plaintiff had the opportunity to fully argue its contract-based claim regarding DNCR's refusal to renew the permit to search for the *El Salvador* in the OAH proceeding, and the Business Court correctly held that the doctrine of res judicata dictates that plaintiff could not have a second bite at that particular apple in its civil court action. Accordingly, I dissent from the majority on this issue and would affirm the Business Court regarding it.

Justice ERVIN joins in this separate opinion.

STATE OF NORTH CAROLINA
v.
MARDI JEAN DITENHAFER

No. 126A18

Filed 1 November 2019

1. Accomplices and Accessories—accessory after the fact—sexual abuse of child—not reported

The trial court erred by not dismissing the charge of being an accessory after the fact where defendant mother did not report the sexual abuse of her daughter by her adopted father. The superseding indictment alleged only that defendant became an accessory after the fact by not reporting a specific incident on or about a specific date, and the mere failure to give information about a crime is not sufficient to establish the crime of accessory after the fact.

2. Obstruction of Justice—sufficiency of evidence—denial of access to child sexual abuse victim

There was sufficient evidence, taken in the light most favorable to the State, to support defendant mother's conviction for felonious obstruction of justice where she denied officers and social workers access to her child after the child alleged that she had been sexually assaulted by her adoptive father.

Justice ERVIN concurring in part and dissenting in part.

Justice NEWBY joins in this separate opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 812 S.E.2d 896 (2018), finding no error in part and reversing in part judgments entered on 1 June 2015 by Judge Paul G. Gessner in Superior Court, Wake County. On 20 September 2018, the Supreme Court allowed the State's petition for discretionary review of additional issues. Heard in the Supreme Court on 10 April 2019.

Joshua H. Stein, Attorney General, by Sherri Horner Lawrence, Assistant Attorney General, for the State-appellant.

Jarvis John Edgerton, IV for defendant-appellee.

HUDSON, Justice.

Here we must decide whether the Court of Appeals erroneously determined that the trial court erred by denying defendant's motion to dismiss charges of felonious obstruction of justice and accessory after the fact to sexual activity by a substitute parent. After careful consideration of the record in light of the applicable law, we affirm in part and reverse in part the Court of Appeals' decision, and remand this case to that court to determine whether there is sufficient evidence to enhance the charge of obstruction of justice for denying access to Jane from a misdemeanor to a felony under N.C.G.S. § 14-3(b).

I. Factual and Procedural Background

A. Factual Background

Defendant Mardi Jean Ditenhafer is the mother of Jane, born on 27 November 1996, and John, born in September 2004.[1] William Ditenhafer began living with defendant and Jane when Jane was five years old. When Jane was in the third grade, Mr. Ditenhafer adopted her. After Jane started middle school, defendant began working outside of the home during the week and was away from the home "almost . . . all day." As a result, Mr. Ditenhafer was left alone with Jane and John.

1. "Jane" and "John" are pseudonyms employed for ease of reading and the protection of the children's identities.

When Jane was in the eighth grade, she began e-mailing sexually suggestive pictures to a boy. After defendant and Mr. Ditenhafer learned about these images, defendant threatened to call the police if Jane engaged in similar conduct in the future.

When Jane was fifteen years old, defendant and Mr. Ditenhafer decided that Mr. Ditenhafer would give Jane weekly full-body massages for the ostensible purpose of improving her self-esteem. After one of these massages, Mr. Ditenhafer sent Jane to take a shower. As Jane walked to her room wearing only a towel following her shower, Mr. Ditenhafer called her into the living room, where he displayed additional sexually suggestive pictures that Jane had sent to the same boy as earlier, and told Jane that either he would show the new pictures to defendant or Jane could "help him with his . . . boner." Fearing he would tell her mom about the photos, Jane complied with his instructions to discard the towel and sit next to him; Mr. Ditenhafer then guided Jane's hand to his penis until he ejaculated.

After a couple of weeks of similar behavior, Mr. Ditenhafer began compelling Jane to perform oral sex upon him. Jane did not tell defendant about the abuse because she "didn't think [defendant] would believe [her] and [ ] would get angry at [her] for making up a lie." Once Jane reached the age of sixteen, Mr. Ditenhafer engaged in vaginal intercourse with her on multiple occasions.

During her ninth-grade year, Jane visited her aunt in Phoenix, Arizona. Jane told her aunt, Danielle Taber, that Mr. Ditenhafer had been sexually abusing her. When Jane and Ms. Taber called defendant to inform her about the ongoing abuse, defendant became angry at Jane. Even so, Ms. Taber called the local police, who began an investigation. On 9 April 2013, the Arizona law enforcement agency investigating Jane's allegations notified the Wake County Sheriff's Office about the sexual abuse that Jane was alleging.

Jane returned to North Carolina two days after her conversation with Ms. Taber. As they returned home from the airport, defendant told Jane that she did not believe her allegations and stated that Jane needed to "tell the truth and recant . . . because it was going to tear apart the family and it was just going to end horribly." Subsequently, defendant tried to have Jane admitted to a mental health facility and told John that "Your sister's crazy," and that the family "need[ed] to get her help."

In the aftermath of Jane's return to North Carolina, defendant continued to urge Jane to "tell the truth because [Jane] was tearing apart her family," warned that "[Mr. Ditenhafer] was going to go to jail because

of [her] lies," said that "[John] was going to turn into a drug addict and drop out of high school" because of what Jane was doing, and called Jane "a manipulative bitch." Defendant prevented Jane from talking to her Arizona relatives until Jane "called up [her] aunts and told them that [she] was lying." In addition, defendant threatened to call off a trip to Disneyland if Jane did not recant, stating that "Disney is not going to happen because we're going to lose our money" and that, "if you recant and tell the truth, . . . then we can go to Disney." In the same vein, defendant claimed that the family would "lose our stuff and the animals" if Jane did not recant. Finally, defendant told Jane that defendant might have breast cancer and that Jane "needed to stop this" because it was making the stress that she was experiencing as a result of her possible malignancy worse.

As a result of the ongoing investigation into Jane's allegations, Mr. Ditenhafer left the family home and Jane began meeting with Susan Dekarske, a social worker with the Wake County Child Protective Services Division of Wake County Human Services. Defendant was usually present or "in listening distance" during these meetings. On 21 June 2013, Detective Stan Doremus of the Wake County Sheriff's Office and Ms. Dekarske interviewed Jane at the family home. According to Detective Doremus, defendant had her hand on Jane's thigh "virtually the whole time." Detective Doremus indicated that Jane "didn't say a whole lot" because, "as soon as [she] opened her mouth to talk, Defendant would answer the questions." In the course of this interview, defendant told Detective Doremus and Ms. Dekarske that "there is some truth to everything that [Jane] is saying but not all of it is true."

On 11 July 2013, defendant allowed Jane to meet with Detective Doremus and Ms. Dekarske alone because defendant thought that Jane intended to recant her accusations against Mr. Ditenhafer. Prior to the meeting, defendant told Jane to tell Detective Doremus and Ms. Dekarske that she had "made it all up" because she "just wanted [Mr. Ditenhafer] out of the house" and "was just angry at everyone." At the meeting, however, Jane told Detective Doremus and Ms. Dekarske that "[m]y mom thinks I'm in here to recant, but I'm not because I'm telling the truth" and that she did not "know what to do because I can't take it at home anymore."

As the meeting progressed, defendant began sending text messages to Jane in which she inquired "what's going on, are you almost done[?]"As Detective Doremus and Jane discussed certain e-mails that Mr. Ditenhafer had sent Jane, defendant entered the room and interrupted the interview with a "smirk on her face." At that point, Detective

Doremus told defendant that "I'm not sure what you thought [Jane] was going to tell us, but she didn't recant" and showed defendant the e-mails that had been exchanged between Mr. Ditenhafer and Jane. In response, defendant became angry, stated that "it doesn't explain anything," and departed abruptly, taking Jane with her.

As a result of the pressure that she was receiving from various family members, including John, Jane decided to recant her accusations against Mr. Ditenhafer. In essence, Jane "didn't want to lose [John,] so [she] recanted."

On 5 August 2013, Ms. Dekarske went to the family home to conduct a regular home visit. As Ms. Dekarske was departing at the conclusion of the visit, Jane ran from the house and told Ms. Dekarske, "I just want to let you know I am recanting my story and I'm making it all up." Ms. Dekarske described Jane's recantation as "very robotic and boxed in" and stated that her comments appeared to have "been rehearsed for her to say."

On 7 August 2013, Jane called Detective Doremus while defendant listened on a separate line. According to Detective Doremus, it sounded as if two people were already talking when he answered the phone. Almost immediately, Jane stated, "I wish to recant my story." On 21 August 2013, Jane sent an e-mail to Detective Doremus that defendant had helped her to compose in which she recanted her accusations against Mr. Ditenhafer. As a result of this e-mail exchange, Detective Doremus set up a meeting with Jane.

On 29 August 2013, Mr. Doremus met with Jane at her school in an attempt to avoid any interruptions by or confrontations with defendant. At that meeting, Jane told Detective Doremus, "I can't talk to you. I need to call my mom. . . . I'm not talking to you." Jane then called defendant and told her about the meeting. Defendant later told Jane that she was proud of Jane for not saying anything to Detective Doremus.

As a result of Jane's recantation and various other factors, including defendant's desire for family reunification, Detective Doremus elected to refrain from charging Mr. Ditenhafer with committing any criminal offenses against Jane and Ms. Dekarske closed her child protective services investigation. Around Thanksgiving of 2013, Mr. Ditenhafer moved back into the family home.

Within a week after reentering the family home, Mr. Ditenhafer began sexually abusing Jane again. Jane did not tell defendant about Mr. Ditenhafer's actions because she did not think that defendant would

believe her. On 5 February 2014, Jane stayed home from school due to illness even though that meant that she would be alone in the house with Mr. Ditenhafer. On that date, Mr. Ditenhafer forced Jane to straddle him while he inserted his penis into her vagina; defendant entered the bedroom and saw what was happening. Defendant was upset and asked if this was Jane's "first time." Mr. Ditenhafer instructed Jane to tell defendant about her boyfriend. Jane told defendant that she and her boyfriend had previously had sexual intercourse. Jane thought defendant was more upset with her for having had sex with her boyfriend than she was about what she had witnessed Mr. Ditenhafer doing to Jane.

Later that day, on the way to retrieve Jane's cell phone from Detective Doremus, Jane told defendant, "What I said last year about the abuse is true . . . he has been abusing me, and that wasn't willingly. Sorry." Defendant replied, "I'm not sure if I believe you or not . . . I need to handle this first." Although defendant obtained Jane's phone from Detective Doremus, she did not inform Detective Doremus about the sexual abuse that she had just witnessed or otherwise report Mr. Ditenhafer's conduct to any law enforcement officer or child protective services worker. On the contrary, defendant told Jane to refrain from telling anyone about what Mr. Ditenhafer had done to her because "it was family business" and allowed Mr. Ditenhafer to remain in the family home for about a month after the abuse that defendant had witnessed occurred. In addition, defendant told Jane to "go into [defendant's] room, and . . . get the sheets and the pillow and the pillow case from the incident . . . and anything else that he might have used with [her]." Defendant and Jane tossed the items that Jane had retrieved from the bedroom into the backyard "because [they] had a boxer that liked to chew up and play with stuff" and threw "the rest of the stuff . . . away."

In March 2014, defendant told Mr. Ditenhafer's brother, Jay Ditenhafer, that she had walked in on Mr. Ditenhafer while he was having sexual intercourse with Jane and knew of "some pictures that had been passed between them." Although defendant claimed that she had thought about reporting Mr. Ditenhafer's conduct to the proper authorities, she told Jay Ditenhafer that she had decided not to do so because Mr. Ditenhafer and Jane had been separated "and there was no immediate danger[.]" In late April 2014, Jay Ditenhafer disclosed the information that he had received from defendant to Child Protective Services "because he did not feel that it was right for that to be happening and nothing was done about it."

On 29 April 2014, Robin Seymore, a Child Protective Services assessor with Wake County Human Services, interviewed Jane at her school.

As soon as the conversation began, Jane asked if defendant knew that Ms. Seymore was there. Upon being told that defendant did not know that their interview was taking place, Jane immediately asked, "Can I go out and talk to my mom? I want to call my mom first." Although Ms. Seymore allowed Jane to call defendant, defendant did not answer. According to Ms. Seymore, Jane seemed very anxious and kept saying "I want to call my mom. I need to talk to my mom," throughout the interview. When told of the information that Jay Ditenhafer had provided, Jane responded "that's not true, that's not true, none of that is true, none of that happened." Throughout the interview, Jane seemed "very antsy and just wanted [Ms. Seymore] to leave."

After conversing with Jane, Ms. Seymore went directly to John's school to interview him. As Ms. Seymore talked with John, defendant burst into the room, grabbed her son, and said, "Absolutely not. You're not going to talk to him. You are not going to talk to him. This is not happening."

On 30 April 2014, defendant called Ms. Seymore and made arrangements to speak with her at the family home. Even though it was raining heavily, defendant would not allow Ms. Seymore and her supervisor to enter the house and insisted that the conversation take place outside. During the interview, defendant stated that although Mr. Ditenhafer came to the house on a daily basis to transport John to and from his school, he did not want to be around Jane in order "to avoid any more lies from [her]." Defendant told Ms. Seymore and her supervisor that she did not want them to go to the children's school any longer and that any conversations that they wished to have with the children should occur immediately outside the family home. At that point, in light of the allegations that Jane had made in 2013 and more recently, Wake County Human Services decided that Jane should be removed from the home.

On 1 May 2014, Detective Doremus, accompanied by other law enforcement officers and representatives of Child Protective Services, went to the family home to take Jane into protective custody and place defendant under arrest. Shortly after their arrival, Detective Doremus and those accompanying him observed defendant approach the family home in her vehicle, slow down, turn around in a neighbor's driveway, and depart in the opposite direction. At that point, Detective Doremus got into his vehicle, activated his blue lights, and pulled defendant over.

As Detective Doremus approached the vehicle, in which Jane and John were passengers, defendant closed her vehicle's windows, locked the doors, and began talking on her cell phone. Despite the fact that

Detective Doremus asked defendant to step out of the vehicle several times, defendant remained on the phone and did not comply with Detective Doremus's request. When Detective Doremus ordered defendant to get out of the car, defendant told Jane, "Don't say anything. Don't get out of the car. . . . If they try and take you away . . . don't go. Refuse to go. . . . [L]ower your arms. Run down the street. Just don't go."

Eventually, defendant complied with Detective Doremus's instructions. In return, Detective Doremus allowed defendant to drive herself back to the family home so that Jane could gather her belongings before entering into the custody of Wake County Human Services. Although Jane wanted to take her cell phone and laptop computer with her, defendant told her not to do so.

B. Procedural History

On 20 May 2014, the Wake County grand jury returned bills of indictment charging defendant with accessory after the fact to sexual activity by a substitute parent and felonious obstruction of justice. On 9 September 2014, the Wake County grand jury returned a superseding indictment charging defendant with accessory after the fact to sexual activity by a substitute parent in which the grand jury alleged that, "on or about February 5, 2014, in Wake County, the defendant named above unlawfully, willfully and feloniously did knowingly assist William George Ditenhafer in escaping detection, arrest or punishment by not reporting the incident after he committed the felony of Sexual Activity by a Substitute Parent." On 10 March 2015, the Wake County grand jury returned a superseding indictment charging defendant with two counts of felonious obstruction of justice, the second count of which alleged that, "on or about July 11, 2013 through September 1, 2013, in Wake County, the defendant named above unlawfully, willfully and feloniously obstructed justice with deceit and intent to defraud and obstruct an investigation into the sexual abuse of a minor to wit: the defendant denied Wake County Sheriff's Department and Child Protective Services access to her daughter, [Jane] (DOB : 11/27/1996), throughout the course of the investigation."

On 1 June 2015, after a trial, a jury returned verdicts convicting defendant as charged. After accepting the jury's verdicts, the trial court entered judgments sentencing defendant to a term of six to seventeen months imprisonment based upon defendant's first conviction for felonious obstruction of justice, a consecutive term of six to seventeen months imprisonment based upon defendant's second conviction for felonious obstruction of justice, and a consecutive term of thirteen to twenty-five

months imprisonment based upon defendant's conviction for accessory after the fact to sexual activity by a substitute parent. Defendant appealed to the Court of Appeals.

In the Court of Appeals, defendant argued, among other things,[2] that the trial court had erred by denying her motions to dismiss the charges for insufficiency of the evidence. *State v. Ditenhafer*, 812 S.E.2d 896, 903 (N.C. Ct. App. 2018). First, the Court of Appeals held that the trial court properly refused to dismiss the first count of felonious obstruction of justice based on an allegation that defendant had pressured Jane to recant.[3] *Id.* at 904. Second, the Court of Appeals held that the trial court erred by denying defendant's motion to dismiss the felonious obstruction of justice charge based on the alleged denial of access to Jane. The Court of Appeals found error in that the State had "presented no evidence of a specific instance in which Defendant expressly denied a request by [the Wake County Sheriff's Department] or [Child Protective Services] to interview the daughter," that an attempt to distinguish between "access" and "full access" would "create an unworkable distinction in our jurisprudence," and that the conviction in question could not be upheld on the basis of other "acts of interference" given that such "conduct was not within the scope of the plain meaning of denying investigators 'access' to the daughter, as alleged in the indictment." *Id.* at 905. Finally, the Court of Appeals held that the trial court erred by denying defendant's motion to dismiss the accessory after the fact charge given that the indictment failed to allege any criminal conduct on the part of defendant, instead alleging "a mere omission," which is "contrary to precedent." *Id.* at 907. The Court of Appeals declined to address whether other "affirmative acts" by defendant supported the accessory after the fact conviction given that "those activities [were] plainly beyond the scope of the charge stated in the indictment." *Id.* at 907. As a result, the Court of Appeals found no error in the entry of the trial court's judgment based upon the first of defendant's felonious

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2. In addition to the issues discussed in the text of this opinion, defendant argued that the trial court had erred by failing to instruct the jury that it could only convict defendant for accessory after the fact to sexual activity by a substitute parent on the basis of her alleged failure to report the abuse that had been inflicted upon Jane. As a result of its decision to reverse defendant's accessory after the fact conviction for insufficiency of the evidence, the Court of Appeals did not reach this aspect of defendant's challenges to the trial court's judgments.

3. As a result of the fact that defendant has not brought this claim forward for our consideration, we need not discuss any further in this opinion the sufficiency of the evidence to support the first of defendant's convictions for felonious obstruction of justice.

obstruction of justice convictions, but reversed the trial court's judgments based upon the second of defendant's felonious obstruction of justice convictions and defendant's accessory after the fact conviction.

Although she agreed with the Court of Appeals majority's decision to overturn the second of defendant's felonious obstruction of justice convictions based on denying investigators access to Jane, the dissenting judge disagreed with the decision to overturn defendant's accessory after the fact conviction based on failure to report the 5 February 2014 incident she observed. According to the dissenting judge, defendant's failure to report constituted an "unlawful omission for the purpose of assisting the perpetrator" that "satisfies the elements of the accessory offense." *Id.* at 908 (Inman, J., concurring in part and dissenting in part). In reaching this result, the dissenting judge relied upon her view that this Court's decision in *State v. Potter* "carved out an exception to" the general rule that neither the withholding of information nor a decision to falsely deny knowledge of a crime "constitutes the unlawful rendering of personal assistance to a felon in and of itself." *Id.* at 908 (citing *State v. Potter*, 221 N.C. 153, 156, 19 S.E.2d 257, 259 (1942)). According to the dissenting judge, "such conduct may rise to the level of personal assistance as an accessory when done 'for the purpose of giving some advantage to the perpetrator of the crime, not on account of fear . . . .' " *Id.* at 908–09 (quoting *Potter*, 221 N.C. at 156, 19 S.E.2d at 259). Because defendant was legally obligated by N.C. Gen. Stat. § 7B-301 to disclose Mr. Ditenhafer's sexual abuse of Jane, defendant could be held criminally liable for failing to report it. *Id.* at 909.

The State appealed to this Court based on the dissenting opinion from that portion of the Court of Appeals' decision that reversed defendant's conviction for accessory after the fact. We allowed the State's petition for discretionary review of the Court of Appeals' decision reversing defendant's second conviction for felonious obstruction of justice by denying investigators access to Jane.

II. Analysis

A. Standard of Review

"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. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (quoting *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002)). Substantial evidence is the amount "necessary to persuade a rational juror to accept a conclusion." *Id.* (quoting *Mann*, 355 N.C. at 301, 560 S.E.2d at 781). In evaluating the

sufficiency of the evidence to support a criminal conviction, the evidence must 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." *Id.* (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)). In other words, if the record developed in the trial court contains "substantial evidence, whether direct or circumstantial, or a combination, '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.' " *Id.* at 575, 780 S.E.2d at 826 (quoting *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988)). "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 550 (2018) (quoting *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016)).

B. Accessory After the Fact

[1] We affirm the Court of Appeals' holding reversing defendant's conviction as an accessory after the fact because: the indictment alleged that she did not report Mr. Ditenhafer's sexual abuse of Jane, a mere failure to report is not sufficient to make someone an accessory after the fact under North Carolina law, and we decline to consider any of defendant's other acts not alleged in this indictment.

The elements necessary to prove someone is an accessory after the fact are: "(1) a felony was committed; (2) the accused knew that the person [s]he received, relieved or assisted was the person who committed the felony; and (3) the accused rendered assistance to the felon personally." *State v. Earnhardt*, 307 N.C. 62, 68, 296 S.E.2d 649, 653 (1982) (citing *State v. Squire*, 292 N.C. 494, 505, 234 S.E.2d 563, 569 (1977); *Potter*, 221 N.C. at 156, 19 S.E.2d at 259).

Regarding the rendering assistance element, our decision in *Potter* announced two rules that are pertinent here. First, this court pointed out that an individual *cannot* be held to be an accessory after the fact when she, "knowing that a crime has been committed, *merely fails to give information thereof* . . . ." *Potter*, 221 N.C. at 156, 19 S.E.2d at 259 (emphasis added) (quoting 14 Am. Jur. *Criminal Law* § 103 (1938). Second, the court in *Potter* provided that an individual *can* be held to be an accessory after the fact when she "*conceal[s]* . . . knowledge of the fact that a crime has been committed, *or [gives] false testimony as to the facts* . . . ." *Id.* (emphasis added). The key distinction is between the individual's actions and omissions. Under *Potter*, an individual can be

held to be an accessory after the fact only for her actions (such as concealment or giving false testimony), not for her omissions (like failure to report).

Here, defendant's superseding indictment only alleged that she became an accessory after the fact "by not reporting the incident . . . ." But as *Potter* made clear, the mere failure to give information of a crime she knows occurred is legally insufficient to establish the crime of accessory after the fact.

The dissent relies on *State v. Walden*, 306 N.C. 466, 293 S.E.2d 780 (1982), to find that a parent's failure to report would violate her affirmative duty to "take all steps reasonably possible to protect the child from an attack by another person . . . ." 306 N.C. at 475–76, 293 S.E.2d at 786–87. The dissent would hold that, "in the event that a parent fails to report the commission of a crime against his or her child . . . because he or she intends to provide a specific personal benefit to herself, he or she can be held criminally liable as an accessory after the fact to the commission of a criminal offense by another person." This interpretation is a significant departure from *Walden*, where the defendant was prosecuted as a principal for the substantive offense of assault—that is, for the physical harm done to her child as a direct result of her failure to comply with her duty to protect her child from physical harm. Here, defendant was prosecuted as an accessory, not for the physical or emotional harm to her child, but for "assist[ing] William George Ditenhafer in escaping detection, arrest or punishment by not reporting the incident."

Further, assuming without deciding that some of defendant's other actions in this case may have amounted to "concealment" within the meaning of *Potter* such that defendant *could* have been charged as an accessory after the fact, we are unable to uphold her conviction on that basis because the State did not allege in the indictment that defendant committed any act other than failing to report a specific offense on or about a specific date, 5 February 2014. *See State v. Brown*, 312 N.C. 237, 248, 321 S.E.2d 856, 863 (1984) ("This Court has consistently held that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon a theory not supported by the bill of indictment." (citing *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980); *State v. Dammons*, 293 N.C. 263, 272, 237 S.E.2d 834, 840–41 (1977))).

Accordingly, we affirm the decision of the Court of Appeals and hold that the trial court erred by failing to dismiss the charge that defendant was an accessory after the fact by failing to report Mr. Ditenhafer's sexual abuse of Jane.

C. Felonious Obstruction of Justice

[2] Because we conclude that the record—when taken in the light most favorable to the State—contains sufficient evidence to support defendant's conviction for felonious obstruction of justice based upon a denial of access to Jane, we reverse the Court of Appeals on this issue.

"At common law it is an offense to do any act which prevents, obstructs, impedes or hinders public or legal justice." *In re Kivett*, 309 N.C. 635, 670, 309 S.E.2d 442, 462 (1983) (quoting 67 C.J.S. *Obstructing Justice* § 2 (1978)). If common law obstruction of justice is done "with deceit and intent to defraud" it is a felony. N.C.G.S. § 14-3(b) (2017); *see also State v. Cousin*, 233 N.C. App. 523, 537, 757 S.E.2d 332, 342–43 (2014) ("The elements of common law felonious obstruction of justice are: (1) the defendant unlawfully and willfully; (2) obstructed justice; (3) with deceit and intent to defraud.")

Here, the record contains evidence tending to show that defendant talked over Jane during several interviews conducted by investigating officers and social workers in such a manner that Jane was precluded from answering the questions that were posed to her. Defendant told investigating officers and social workers that Jane had made false accusations against Mr. Ditenhafer. Defendant interrupted an interview, during which investigating officers and social workers were attempting to obtain information from Jane concerning the sexual abuse that she had experienced at the hands of Mr. Ditenhafer, by constantly sending Jane text messages and by abruptly removing Jane from the interview when she realized that Jane was not recanting her allegations. Defendant induced Jane to call Detective Doremus for the purpose of recanting her allegations against Mr. Ditenhafer and listened on the other telephone line while Jane did so. Similarly, defendant composed an e-mail that Jane sent to Detective Doremus in which she recanted her accusations. Defendant successfully induced Jane to refuse to speak with investigating officers and social workers, as evidenced by Jane's statement to Detective Doremus that "I can't talk to you. I need to call my mom," and her statement to Ms. Seymore that "I want to call my mom. I need to talk to my mom." Defendant insisted that Ms. Seymore interview Jane outside in the middle of a rainstorm by refusing to allow the interview to take place in the family home, insisted that Ms. Seymore refrain from speaking to Jane at her school, and demanded that all interviews with any family members be conducted outside the family home. On 1 May 2014, defendant fled from Detective Doremus with Jane and John, refused to unlock the doors of her automobile after Detective Doremus stopped it, and told Jane, "Don't say anything. Don't get out of the car.

. . . If they try and take you away . . . don't go. Refuse to go. . . . [L]ower your arms. Run down the street. Just don't go."

After giving "every reasonable intendment" and making "every reasonable inference" from the evidence in favor of the State, *Winkler*, 368 N.C. at 574, 780 S.E.2d at 826, we conclude that the evidence here was sufficient "to persuade a rational juror" that defendant denied officers and social workers access to Jane throughout their investigation into Jane's allegations against Mr. Ditenhafer. *Id.* As a result, we reverse the Court of Appeals' holding that the evidence did not support defendant's conviction for felonious obstruction of justice based upon defendant's actions in denying access to Jane.

III. Conclusion

For the reasons set forth above, we affirm the Court of Appeals' decision to the extent that it held that the trial court erred by denying defendant's motion to dismiss the charge of accessory after the fact to sexual activity by a substitute parent. However, we reverse the Court of Appeals' decision to the extent that it held that the trial court erred by denying defendant's motion to dismiss the second of the two felonious obstruction of justice charges (denial of access to Jane), as set out in the superseding indictment. As a result, the Court of Appeals' decision is affirmed in part, reversed in part, and this case is remanded to that court to determine whether there is sufficient evidence to enhance the charge of obstruction of justice for denying access to Jane from a misdemeanor to a felony under N.C.G.S. § 14-3(b).[4]

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Justice ERVIN concurring in part and dissenting in part.

Although I concur in the Court's determination that the record contains sufficient evidence, when taken in the light most favorable to the State, to support defendant's conviction for felonious obstruction of justice based upon a denial of access to Jane, I am unable to concur in its determination that the record fails to contain sufficient evidence to support defendant's conviction for accessory after the fact to sexual activity by a substitute parent. Instead, I believe that the trial court correctly denied defendant's motions to dismiss both of these charges for

4. This issue was raised in the Court of Appeals, but was not reached because that court found there was insufficient evidence to support defendant's conviction for obstruction of justice based on defendant's actions in denying access to Jane.

insufficiency of the evidence. As a result, I concur in the Court's opinion, in part, and dissent from its opinion, in part.

The elements of the crime of accessory after the fact are that: "(1) a felony was committed; (2) the accused knew that the person [s]he received, relieved or assisted was the person who committed the felony; and (3) the accused rendered assistance to the felon personally." *State v. Earnhardt*, 307 N.C. 62, 68, 296 S.E.2d 649, 653 (1982) (first citing *State v. Squire*, 292 N.C. 494, 505, 234 S.E.2d 563, 569 (1977); and then citing *State v. Potter*, 221 N.C. 153, 156, 19 S.E.2d 257, 259 (1942)).

> [T]o be an accessory after the fact one need only aid the criminal to escape arrest and prosecution. It is said that "this rule, however, does not render one an accessory after the fact who, knowing that a crime has been committed, merely fails to give information thereof, nor will the act of a person having knowledge of facts concerning the commission of an offense in falsifying concerning his knowledge ordinarily render him an accessory after the fact. Where, however, the concealment of knowledge of the fact that a crime has been committed, or the giving of false testimony as to the facts is made for the purpose of giving some advantage to the perpetrator of the crime, not on account of fear, and for the fact of the advantage to the accused, the person rendering such aid is an accessory after the fact."

Potter, 221 N.C. at 156, 19 S.E.2d at 259 (quoting 14 Am. Jur. *Criminal Law* § 103, at 837 (1938)). Although the Court of Appeals, consistent with the result that the Court has reached in this case, determined that *Potter* criminalizes only "active conduct" and that "[m]erely concealing knowledge regarding the commission of a crime or falsifying such knowledge does not cause a person to become an accessory after the fact," *State v. Ditenhafer*, 812 S.E.2d 896, 906 (2018) (quoting *State v. Hicks*, 22 N.C. App. 554, 557, 207 S.E.2d 318, 320 *cert. denied*, 285 N.C. 761, 209 S.E.2d 286 (1974)), this analysis overlooks our subsequent statement that, "[w]here . . . the concealment of knowledge of the fact that a crime has been committed, or the giving of false testimony as to the facts is made for the purpose of giving some advantage to the perpetrator of the crime, not on account of fear, and for the fact of the advantage to the accused, the person rendering such aid is an accessory after the fact," *Potter*, 221 N.C. at 156, 19 S.E.2d at 259. Thus, while *Potter* does state that "merely fail[ing] to give information" is not sufficient to make one an accessory after the fact to the criminal conduct of another, it

also clearly indicates that such liability can be based upon defendant's "concealment of knowledge . . . for the purpose of giving some advantage to the perpetrator of the crime, not on account of fear, and for the fact of the advantage to the accused."[1] *Id.* at 156, 19 S.E.2d at 259. As the Court of Appeals has acknowledged, the basic principle enunciated in *Potter* "is applicable to situations where a person *merely fails to give information* of the committed felony or *denies knowledge* of the committed felony," with this limitation "made clear by the sentence in the text which immediately precedes the one quoted." *State v. Martin*, 30 N.C. App. 166, 170, 226 S.E.2d 682, 684 (1976).[2]

Consistently with this interpretation of *Potter*, this Court has recognized that, in certain instances, individuals can be held criminally liable for failing to take appropriate action to prevent the commission of unlawful conduct under certain circumstances. In *State v. Walden*, 306 N.C. 466, 476, 293 S.E.2d 780, 786–87 (1982), we upheld a defendant's conviction for felonious assault on an aiding and abetting theory based upon evidence tending to show that the defendant had failed to take action to prevent another person from assaulting and seriously injuring her child given that parents have an affirmative duty to protect their children from harm. In reaching this result, we recognized that "to require a parent as a matter of law to take affirmative action to prevent harm to his or her child or be held criminally liable imposes a reasonable duty upon the parent"; that "this duty is and has always been inherent in the duty of parents to provide for the safety and welfare of their children, which duty has long been recognized by the common law and by statute"; and that "the failure of a parent who is present to take all steps reasonably possible to protect the parent's child from an attack by another person constitutes an act of omission by the parent showing the parent's consent and contribution to the crime being committed." *Id.* at

1. The Court appears to read *Potter's* reference to the "concealment of knowledge" to be limited to affirmative acts committed by a defendant for the purpose of precluding the discovery of the principal's unlawful conduct. *Potter*, 221 N.C. at 156, 19 S.E.2d at 259. However, I believe that the juxtaposition of the reference to "merely failing to give information," which seems to encompass simple silence unaccompanied by any other factor, with the reference to "concealment of knowledge," which focuses upon what one knows rather than what one does, suggests that finding a defendant guilty of accessory after the fact, based upon a failure to disclose and accompanied by the necessary mental state would be appropriate. *Id.*

2. Although the Court of Appeals suggested in *Martin*, 30 N.C App. at 170, 226 S.E.2d at 684, that the language quoted in the text is dicta, the relevant language from *Potter*, taken in its entirety, strikes me as a statement of the general principles upon which the Court relied in determining that the evidence was sufficient to support the defendant's conviction in that case.

475–76, 293 S.E.2d at 786–87 (first citing N.C.G.S. § 14-316.1; then citing *In re TenHooten*, 202 N.C. 223, 162 S.E. 619 (1932); and then citing *State v. Haywood*, 295 N.C. 709, 249 S.E.2d 429 (1978)).

I recognize the risks that are associated with criminalizing omissions, such as the failure to report the commission of a criminal offense. However, the existing decisional law in this jurisdiction clearly contemplates such a result in a limited number of instances. At an absolute minimum, I am satisfied, after reading *Potter* and *Walden* in conjunction with each other, that, in the event that a parent fails to report the commission of a crime against his or her child to the proper authorities when the making of such a report is necessary in order to prevent future harm to the child and the parent fails to do so because he or she intends to provide a specific personal benefit to the perpetrator and to herself, he or she can be held criminally liable as an accessory after the fact to the commission of a criminal offense by another person.

As the record in this case clearly reflects, defendant caught Mr. Ditenhafer in the act of committing a serious sexual assault upon Jane. As of that point in time, defendant had no reasonable basis for doubting that Mr. Ditenhafer had engaged in a lengthy pattern of sexually abusing Jane, had direct knowledge that Mr. Ditenhafer had continued to sexually abuse Jane despite the disruption and risk that had been created by Jane's earlier accusations, and had every reason to believe that Mr. Ditenhafer's misconduct would continue unless defendant took affirmative action to bring it to an end. In addition, defendant had a clear legal obligation to protect her child, Jane, from future harm. The only way that defendant could have assured that Mr. Ditenhafer did not continue to sexually assault Jane would have been to report his conduct to the proper authorities, a step that defendant simply refused to take. As a result, defendant clearly had an obligation to report Mr. Ditenhafer's conduct to the proper authorities in order to comply with her legal duty to protect Jane from further harm and failed to do so.

In addition, a careful review of the evidence contained in the record developed at trial, when taken in the light most favorable to the State, clearly permits a determination that defendant acted for the purpose of providing a specific advantage to both Mr. Ditenhafer and herself.[3] For example, the State presented evidence tending to show that

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3. I do not believe that the use of acts other than those specified in the relevant count of the indictment for the purpose of shedding light on the intent with which and the purpose for which defendant failed to act in any way runs counter to the prohibition against allowing a defendant to be convicted upon the basis of a legal theory

defendant pressured Jane to recant the allegations that she had made against Mr. Ditenhafer by telling her that "[Mr. Ditenhafer] was going to go to jail because of [her] lies." In addition, defendant told Jane to refrain from reporting the abuse to which she had been subjected at the hands of Mr. Ditenhafer because "it was family business." Defendant told Jay Ditenhafer not to involve authorities and informed investigators that Jane's allegations were not true. Finally, even after catching Mr. Ditenhafer in the act of sexually abusing Jane, defendant participated in the destruction of the bed linens that might tend to evidence the abuse to which Jane had been subjected. As the dissenting judge in the Court of Appeals correctly noted, "the evidence of additional acts committed by [d]efendant . . . support[ed] a reasonable inference that her failure to report the abuse to law enforcement was for the purpose of helping her husband escape prosecution." *Ditenhafer*, 812 S.E.2d at 909–10 (Inman, J., concurring, in part. and dissenting, in part).

Similarly, the State presented ample evidence tending to show that defendant's failure to report the abuse that Jane had suffered at the hands of Mr. Ditenhafer was intended to provide a specific and direct benefit to defendant. Among other things, defendant stated that the investigation was "tear[ing] apart the family" and that a continued investigation "would cost them more money and time." Similarly, defendant told Jane that, if she did not recant her allegations against Mr. Ditenhafer, the family would "lose [their] money" and "lose their stuff and the animals." Finally, defendant told Jane that she needed to recant the allegations that she had made against Mr. Ditenhafer in order to alleviate the stress that defendant was experiencing and that this stress was exacerbating her possible breast cancer. Thus, the record contains ample evidence tending to show that defendant refrained from reporting the sexual abuse to which Jane had been subjected for defendant's own benefit as well. Based upon this logic, I believe that the Court of Appeals erred by holding that the record did not contain sufficient evidence to support defendant's accessory after the fact conviction and dissent from the Court's conclusion to the contrary, although I join in the remainder of its

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not alleged in the underlying criminal pleading. This issue typically arises only when the criminal offense in question is statutorily defined in such a manner that the defendant can be convicted on the basis of multiple legal theories, such as is the case with the offense of first-degree kidnaping. *See State v. Brown*, 312 N.C. 237, 247–48, 321 S.E.2d 856, 862–63 (1984) (holding that the trial court erred by allowing the defendant to be convicted of first-degree kidnaping in the event that the defendant acted "for the purpose of terrorizing" the victim even though the indictment alleged that the defendant acted "for the purpose of facilitating the commission of a felony, to wit: attempted rape").

opinion. As a result, I concur in the Court's decision, in part, and dissent from its decision, in part.

Justice NEWBY joins in this separate opinion.

STATE OF NORTH CAROLINA
v.
BRANDON MALONE

No. 379A17

Filed 1 November 2019

Identification of Defendants—impermissibly suggestive identification procedures—photographs and video of defendant—likelihood of misidentification—independent origin

The State employed impermissibly suggestive identification procedures with two murder eyewitnesses by showing them photographs and a police interview video of defendant just days before defendant's murder trial. But one of those witnesses had identified defendant as the shooter long before the impermissible identification procedures, so those procedures did not create the risk of misidentification, and that witness's in-court identification of defendant was properly admitted and did not violate defendant's due process rights.

Justice ERVIN concurring in the result in part and dissenting in part.

Justices NEWBY and HUDSON join in this separate opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 256 N.C. App. 275, 807 S.E.2d 639 (2017), finding prejudicial error upon appeal from judgments entered on 7 April 2016 by Judge James K. Roberson in Superior Court, Alamance County. On 1 March 2018, the Supreme Court allowed the State's petition for discretionary review as to additional issues. Heard in the Supreme Court on 9 April 2019.

Joshua H. Stein, Attorney General, by Jess D. Mekeel, Special Deputy Attorney General, for the State-appellant.

Glenn Gerding, Appellate Defender, by James R. Grant, Assistant Appellate Defender, for defendant-appellee.

EARLS, Justice.

At approximately 6 p.m. on 23 October 2012, twenty-two year old Anthony Kevette Jones was shot and killed on the front porch of his mother's home in Burlington in a confrontation with two men. One of those men was identified soon after the shooting as Marquis Spence. The identity of the other man, who carried the gun and pulled the trigger, was the central issue in the trial of defendant Brandon Malone. Following a two-week trial, Mr. Malone was convicted of first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury. On appeal, he argued that the trial court erred in denying his motions to suppress the testimony of two eyewitnesses, Claudia Lopez and Cindy Alvarez, including their in-court identifications of defendant as the perpetrator of the crimes. In a divided opinion, the Court of Appeals majority agreed, concluding that the eyewitness testimony at issue was the result of identification procedures that were impermissibly suggestive in violation of defendant's due process rights and that the testimony was prejudicial to defendant, requiring a new trial. *State v. Malone*, 256 N.C. App. 275, 291–95, 807 S.E.2d 639, 651–53 (2017). We affirm in part and reverse in part. The Court of Appeals was correct in holding that the identification procedures at issue here were impermissibly suggestive, but we conclude that they ultimately did not violate defendant's statutory or due process rights because Cindy Alvarez's identification of defendant was of independent origin, based on what she saw at the time of the shooting.

Background

The sun was still shining on the early fall evening in Burlington when a neighbor's security camera recorded two men pulling up to the house across the street in a blue car and exiting. Less than two minutes later, the same two men are seen in the video running back to the car, getting in and driving off in haste. Although there were several people on the porch at the time Mr. Jones was fatally shot, no eyewitness to the shooting was able to identify defendant Malone within the first few days of the murder. Witnesses agreed that during the confrontation, one of the two men who had arrived in the blue car drew a handgun and fired multiple shots, killing Mr. Jones and wounding another man, Micah White. In the hours following the shooting, police focused their investigation on Marquis Spence, who was identified by eyewitnesses immediately

afterwards, and defendant, who witnesses said was with Mr. Spence within two hours before the shooting.

Upon being arrested two days after the murder, defendant submitted to a three- to four-hour police interview without counsel in which he maintained that he was not in Burlington on October 23rd. The only direct evidence that defendant was the man who shot Jones and White was the courtroom testimony of two women who did not know him but who were on the porch of the house at the time of the shooting, Claudia Lopez and her friend Cindy Alvarez. Other circumstantial evidence was submitted by the State, including the testimony of witnesses who placed defendant in the blue car with Mr. Spence earlier that day. They also testified that he was part of the drug transaction alleged to have led to the shooting.

The State's theory of the case, based on various witness' testimony, is that Spence and Malone, who lived on the same street in Durham, were virtually inseparable drug dealers. On the afternoon in question, they arranged to purchase "a pound of weed" for $1,200 from Mr. Jones and another man, Jared "Skip" Alston. Mr. Malone gave Skip the money, expecting him to return in five minutes with the drugs. However, true to his name, Skip disappeared. Three women from Durham testified to being present during some or all of these events, Calen Burnette, Arianna McCray, and Lakreisha Shoffner. After efforts to locate Skip were unsuccessful, the three women drove separately to Skip's house while Spence and Malone told the women not to worry, and that they were "going back to Raleigh to make some money."

When the blue car driven by Mr. Spence pulled up outside Mr. Jones's house in Burlington just before 6 p.m. that evening, Mr. Jones was sitting on the steps. Claudia Lopez was sitting on the arm of a chair approximately ten feet from Jones, and Cindy Alvarez was sitting in a chair approximately five to six feet from the shooter. Also on the porch were Skip's brother Jordan, and the other victim, Micah White. Tabias Sellars, Marcus Clayton and Gavin Jackson had just gone inside the house. Two men exited the car and approached the steps. A short conversation ensued between the driver and Jones concerning Skip's location. When Mr. Jones said that he did not have a phone number for Skip, four to six shots were fired, and the two men ran back to the blue car and fled the scene.

Eyewitness Identifications in 2012

Police arriving at the home shortly after the shooting spoke with witnesses. Micah White initially said he did not know which man had the

gun, the driver or the passenger. Claudia Lopez told police at the scene that "she saw one of the guys' hand in his pocket, could not remember which one, but could see a silver part of a gun." She also said, referring to the shorter man, that she "did not remember . . . any features of him." Cindy Alvarez told the officer on the scene that the shooter had dark freckles.

Two days after the shooting, Burlington Police prepared and administered two photo lineups to witnesses, one including a picture of Marquis Spence and one with a picture of Brandon Malone. Of the eyewitnesses to the shooting, Claudia Lopez identified Mr. Spence as the man who spoke with Mr. Jones with confidence of 8 out of 10. She did not identify Mr. Malone. Upon viewing the lineup a second time, Ms. Lopez "paused" at Mr. Malone's photo and said "That looks like him, but I'm not sure." The record of the photo lineup indicates no positive identification made by the witness. Cindy Alvarez identified Mr. Spence as "the one who shot Kevette" with confidence of 8 out of 10. She did not recognize Mr. Malone's photo at all and identified an entirely different photo as someone who "looks like" the man who accompanied the shooter, but she stated she was not sure because she "focused on [the] shooter because he had his hand in his pocket the whole time." Approximately a week or two after the shooting, Cindy Alvarez saw a photo of defendant on Facebook and was immediately certain "that that was the guy that shot Kevette." Ms. Lopez saw the same photo, but did not recognize defendant. Micah White, who was shot in the ankle, was unable to make a positive identification of either Mr. Spence or Mr. Malone when shown a photo lineup.

Subsequent Proceedings

On 5 November 2012, defendant was indicted for first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury.[1] For three and a half years, the eyewitnesses had no contact with law enforcement. On 29 February 2016, approximately two weeks before the trial of this case was set to begin, Iris Smith, a legal assistant at the District Attorney's office, asked Lopez and Alvarez to come to the old courthouse in Burlington where the District Attorney's office was located, to "confirm [their] identification of Malone." Alvarez testified that "They wanted to make sure that I was – I was – I mean, that I was saying who really – like, who is who. Like, if I recognized them." Smith testified that "I told them I had pictures I wanted them to look

1. Defendant was subsequently indicted for discharging a weapon into occupied property. That charge was dismissed at the close of the State's evidence.

at, updated pictures of the defendants." Smith also gave both witnesses copies of their video-recorded police interviews. Smith showed them current photos of Malone and Spence, and asked Lopez and Alvarez if they recognized them. According to Ms. Alvarez's courtroom testimony, when she saw Mr. Malone's picture that day, she pointed to him and said that "he's the one that killed Kevette."

Ms. Alvarez was upset about having to go through a trial and asked Iris Smith what Mr. Malone was saying about the incident. Ms. Smith mentioned Mr. Malone's police interview and Ms. Alvarez asked to see it. They moved to another room in the courthouse, and Ms. Lopez sat down because she was having health issues. Ms. Alvarez was standing near a window as the women waited for the video interview to load. Ms. Smith showed Lopez and Alvarez somewhere between two to five minutes of the video of Mr. Malone's police interview. At some point Ms. Alvarez looked out the window and said "that's him, that's the guy that shot Kevette." The other two women also came to the window and watched Mr. Malone, in prison clothes and handcuffs, being escorted by a police officer from a police car and into the courthouse. Mr. Malone was in court that day for a hearing in his case. After that the witnesses left and Ms. Smith went in the court for the hearing. Ms. Alvarez told defendant's investigator that she went to the door of the courtroom, looked through the glass, and "looked into the courtroom while he [Malone] was inside the courtroom."

On 12 March 2016, defendant filed motions to suppress identification evidence from two eyewitnesses to the shooting, Claudia Lopez and Cindy Alvarez, arguing that the State subjected the witnesses to impermissibly suggestive identification procedures. On 14 March 2016, the trial court held a hearing on defendant's motions to suppress. The State called several witnesses at the hearing, including Lopez and Alvarez. In denying defendant's suppression motion, the trial court made extensive oral findings of fact, including:

> That Claudia Lopez was ten feet away from Mr. Jones when he was shot. That Cindy Alvarez was four feet from the shooter when Mr. Jones was shot. [Ms. Lopez] and [Ms. Alvarez] each gave some description of the two males giving some information about clothing. [Ms. Lopez] also described that the shooter had on a white T-shirt with shoulder length hair and the speaker had [a] body piercing.
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> On [25 October] 2012, the Burlington Police Department conducted an identification procedure with [Ms. Lopez]

and with [Ms. Alvarez]. Those procedures involved photographic arrays, sometimes referred to by the officer as photo line-ups.

In one array the Burlington Police Department used a photo of Marquis Spence, who's a charged co-defendant in . . . connection with this matter. So [they] used a photo of Marquis Spence and seven fillers. Filler being seven folks who are not involved or have been excluded from involvement in the incident under investigation.

In the other array the Burlington Police Department used a photo of [Defendant] and seven fillers.

The Burlington Police Department did not use a current photo of . . . [D]efendant as reflected the current photo being introduced into evidence as State's Exhibit No. 3. In part, because the background in the photo was different from others and that there was some concern about that causing . . . [D]efendant's photo to stand out in the array.

Further, Marquis Spence's current photo showed him with an eyebrow body piercing and Burlington Police Department made the decision to attempt to locate a photo without such piercing being in the photo so as not to cause Marquis Spence's photo to stand out.

In . . . [D]efendant's current photo he had an unusual expression on his face as interpreted by the officer that the Burlington Police Department thought might make it stand out.

The Burlington Police Department instead used an older photo of . . . [D]efendant obtained from the Division of Adult Correction website. In the photo that the Burlington police used . . . [D]efendant's hairstyle, which the officer characterized as being plats, was different from the hairstyle in the current photo, which the officer characterized as dreadlocks. So the older photo had plats. Current photo dreadlocks.

[Ms. Lopez] identified [number four] Marquis Spence in the array involving that co-defendant.

At [the] hearing she referred to that identified person as the male who did the talking. She reported her level of

confidence on that identification as an eight on a scale of one to ten.

On the second array, [Ms. Lopez] indicated that [number six], which was . . . [D]efendant, looked like him but she was not sure and she initialed that she had not—did not have a positive [identification].

[Ms. Alvarez identified number six], which was Marquis Spence. She indicated she had an 80% level of confidence and 100% if he had long dreads, and added that . . . looked like the one that shot Kevette. So she identified Marquis Spence in that connection.

[Ms. Alvarez] in the second array identified [number seven]. This is the array that in which . . . [D]efendant's photo was located. [She] [i]dentified [number seven] who is an individual named Danny Lee Johnson whose photo was included as a filler. But she indicated that she was not sure. She noted she focused on the shooter because he had his hands in his pocket the whole time.

[Ms. Lopez] and [Ms. Alvarez] each saw photos of . . . [D]efendant and Marquis Spence in the online newspaper. These photos were not among those that were shown to each of them by the Burlington Police Department in the arrays. No law enforcement officer showed either [Ms. Lopez] or [Ms. Alvarez] anymore photos other than the ones shown during the course of the arrays.

. . . [W]hen [Ms. Alvarez] saw the online newspaper photos of . . . [D]efendant and Marquis Spence, she thought to herself that these photos showed how they looked on the day of the shooting.

Further, she thought that the photo of [D]efendant was of the person who shot Kevette.

[Ms. Lopez] and [Ms. Alvarez] each went several years without contact from the District Attorney's office or contacting the District Attorney's office or without any further interaction with law enforcement in connection with all these events.

Each had contact with Iris Smith, victim witness legal assistant with the Alamance County District Attorney's office in February of 2016 as trial date approached.

[Ms. Lopez] and [Ms. Alvarez] each knew that there was going to be a hearing in this case on [29 February] 2016, at the Alamance County Historic Courthouse. Neither knew . . . whether . . . [D]efendant would be present at the hearing. Iris Smith arranged to meet with each on [29 February] in the furtherance of her trial preparation duties. Because [Ms.] Smith was at the Historic Courthouse attending to grand jury matters, she advised [Ms. Lopez] and [Ms. Alvarez] . . . to meet her at the District Attorney's office in that building.

Smith gave [Ms. Lopez] and [Ms. Alvarez], a copy of her respective statement to officers and showed them photos she had obtained of . . . [D]efendant and Marquis Spence off of the Internet.

Up to the point when [Ms.] Smith downloaded the Internet photos, the only photos in the [District Attorney]'s file were the ones used in the photo arrays done by the Burlington Police Department some years earlier.

The . . . photos shown by Smith on [29 February] were the same photos that each [Ms. Lopez] and [Ms. Alvarez] had already seen in the online newspaper some time earlier.

[Ms.] Smith also began showing each a video of . . . [D]efendant's statement to law enforcement officers. [Ms. Lopez] was seated at the time. [Ms. Alvarez] was standing near the window of the room in which they were meeting.

[Ms. Alvarez] then stated, there he is, the one who shot Kevette. [Ms. Lopez] and [Ms.] Smith got up and went over to the window. At that time . . . [D]efendant was exiting alone from a patrol unit parked adjacent to the Historic Courthouse, accompanied by a law enforcement officer, dressed in an orange jumpsuit and in handcuffs.

[Ms. Lopez] testified in court that she believed that [D]efendant was the person who shot Kevette and based on the events at the scene of the shooting and not the viewing of the photos at the District Attorney's office on [29 February] or the viewing of . . . [D]efendant exiting the law enforcement unit on that day or the statement that [Ms. Alvarez] made about . . . [D]efendant as he exited the unit.

> [Ms. Alvarez] testified in court that her identification of . . . [D]efendant was based on the events surrounding the shooting and not on the [29 February] 2016, events in the [District Attorney's] office.
>
> Neither [Ms. Lopez] nor [Ms. Alvarez] knew . . . [D]efendant nor Marquis Spence prior to the date of the shooting. Assistant District Attorney Alex Dawson, the [prosecutor] in this case, was not present during the meeting on [29 February] 2016, at the Historic Courthouse.
>
> Counsel are in near agreement, . . . that the amount of time that [Ms. Alvarez] and [Ms. Lopez] were in a position to observe the two males and the shooting was from 75 to 90 seconds. So I took that matter as not being in dispute . . . .

Turning to whether the witnesses' in-court identifications of defendant were reliable and of independent origin, the trial court made additional findings:

> One of the first factors [in determining whether an identification is of independent origin] is the opportunity to view the crime. The [c]ourt finds that the time that [Ms. Lopez] and [Ms. Alvarez] had to view the two males and the shooting was a short period of time from 75 to 90 seconds.
>
> The [c]ourt does find that the event was a startling event, one that would claim your attention or cause you to pay no attention and flee from the situation.
>
> That [Ms.] Lopez was within ten feet of the shooter on the porch where Mr. Jones was shot and when he was shot and [Ms.] Alvarez was four feet from Mr. Jones when he was shot. That's the opportunity to view. They were all on the porch together.
>
> [As to] [t]he degree of attention[,] [t]he [c]ourt finds that the two indicated that they were paying attention to the two males that came up and to Mr. Jones. The event was a startling event, one that would cause the event to stand out in their minds; that they gave a general description of clothing, hair and body piercing and the car and indication of who was driving the vehicle and who was the passenger in the vehicle.

> As to the accuracy of prior description . . . [Ms.] Lopez described the shooter as having shoulder length hair. . . . [D]efendant had shoulder length hair at or around the time of the shooting. At the arrays of the Burlington Police Department [Ms. Lopez] identified Marquis Spence as the main talker. . . . also being the driver of the vehicle. And [she] was not sure about . . . [D]efendant as the shooter and did not make a positive [identification]. She did linger over . . . [D]efendant's photo during the course of the array.
>
> [Ms. Alvarez] identified Marquis Spence as the shooter and did not pick . . . [D]efendant as the other person [instead] picking a completely unassociated individual.
>
> [As to] [t]he level of certainty demonstrated at the confrontation, . . . [Ms. Alvarez] and [Ms. Lopez] had seen these photos before so they were not new photos. . . . [Ms.] Alvarez had recognized the photos as the two males as they looked at or around the time of the shooting.
>
> . . . [Ms. Lopez] and [Ms. Alvarez] each recognized . . . [D]efendant as he exited the law enforcement unit. Both appeared confident in their identifications during that event . . . .
>
> [In regard to] [t]he length of time between [the] crime and [the] confrontation[,] [t]here [were] approximately three and a half years between the shooting and the [29 February] event. . . .

Based on these and other findings of fact, the trial court denied defendant's motion to suppress, concluding that the events on 29 February 2016 during which Ms. Lopez and Ms. Alvarez saw photographs of Malone, viewed portions of his videotaped interview, and saw him being led into the courthouse by police were "not impermissibly suggestive." The court further concluded that "based on the testimony of the two witnesses, Claudia and Cindy, in the courtroom, that those identifications are of independent origin."

The jury found defendant guilty of assault with a deadly weapon inflicting serious injury and first degree murder on the basis of both premeditation and deliberation and the felony murder rule. The trial court imposed concurrent sentences of life without parole for the murder and 83 to 112 months for the assault. Defendant gave notice of appeal.

At the Court of Appeals, defendant challenged the trial court's denial of his motions to suppress, arguing that the 29 February meeting constituted an impermissibly suggestive identification procedure in violation of his due process rights and the Eyewitness Identification Reform Act (EIRA). *See* N.C.G.S. §§ 15A-284.50 to -284.53 (2017). The Court of Appeals agreed, determining first that the trial court erred in concluding that the pretrial identification procedures were not impermissibly suggestive:

> The evidence admitted at trial demonstrates after the shooting neither Lopez nor Alvarez were able to give detailed descriptions of Defendant or positively identify Defendant. Then, nearly three and a half years later and approximately two weeks prior to trial, the witnesses met with Smith, viewed a video of Defendant's interview, surveillance footage of the incident, and more recent photographs of Defendant. It is likely the witnesses would assume Smith showed them the photographs and videos because the individuals portrayed therein were suspected of being guilty.

Malone, 256 N.C. App. at 291, 807 S.E.2d at 650. Additionally, after identifying that several of the trial court's findings of fact were not supported by competent evidence, the court determined that the trial court erred in concluding that the in-court identifications of defendant were of independent origin, stating:

> The short amount of time the witnesses had to view Defendant, their inability to positively identify Defendant two days after the incident, and their inconsistent descriptions demonstrate it is improbable that three and a half years later they could positively identify Defendant with accuracy absent the intervention by the District Attorney's office.

Id. at 293, 807 S.E.2d at 651. The Court of Appeals concluded that because the 29 February meeting constituted impermissibly suggestive identification procedures and because the in-court identifications were not of independent origin, the procedures violated defendant's due process rights. *Id.* at 293, 807 S.E.2d at 651. Finally, the court determined that the impermissible identification procedures were not harmless beyond a reasonable doubt and therefore were prejudicial to defendant, requiring a new trial. *Id.* at 294–95, 807 S.E.2d at 652–53.

One member of the panel dissented, opining first that there was no error in the admission of Ms. Alvarez's in-court identification because it had an independent origin. *Id.* at 296, 807 S.E.2d at 653 (Dillon, J., dissenting). Next, the dissenting judge stated that any error in admitting the in-court identification of Ms. Lopez was harmless beyond a reasonable doubt in light of the other evidence against defendant. *Id.* at 296–97, 807 S.E.2d at 653–54. Accordingly, the dissenting judge concluded that there was "no reversible error." *Id.* at 296, 807 S.E.2d at 653.

On 11 December 2017, the State filed a notice of appeal as of right based on the dissenting opinion in the Court of Appeals pursuant to N.C.G.S. § 7A-30(2). Additionally, the State filed a petition for discretionary review of additional issues, which the Court allowed. In its petition, the State asks this Court to correct what it contends is the majority's flawed interpretation of the EIRA in dicta, namely that "all eyewitness identification procedures should comply with the requirements of the EIRA" even though here the disputed procedures were conducted by a legal assistant and by its terms, the EIRA applies to law enforcement officers.

Standard of Review

Our review of the denial of a motion to suppress is limited to determining "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)). "The trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *State v. Saldierna*, 371 N.C. 407, 421, 817 S.E.2d 174, 183 (2018) (quoting *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994), *cert. denied*, 513 U.S. 1096 (1995)), *cert. denied*, 139 S. Ct. 1279 (2019). A trial court has the benefit of being able to assess the credibility of witnesses, weigh and resolve any conflicts in the evidence, and find the facts, all of which are owed great deference by this Court. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619–20 (1982).

However, the trial court's conclusions of law are fully reviewable on appeal. *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993) (citing *State v. Mahaley*, 332 N.C. 583, 592–93, 423 S.E.2d 58, 64 (1992)), *cert. denied*, 512 U.S. 1254 (1994). Similarly, this Court reviews the decision of the Court of Appeals for any error of law. *Brooks*, 337 N.C. at 149, 446 S.E.2d at 590 (citations omitted). Furthermore, we agree with the Court of Appeals that the extent to which a witness's in-court identification has an independent origin is a question of law or legal inference

rather than a question of fact. *See State v. Pulley*, 180 N.C. App. 54, 65, 636 S.E.2d 231, 240 (2006).

Analysis

I. Due Process Claim

The governing law applicable to the issues before us in this case is well-established. As a general proposition, "the jury, not the judge, traditionally determines the reliability of evidence." *Perry v. New Hampshire*, 565 U.S. 288, 245, 132 S. Ct. 716, 728, 181 L. Ed. 2d 694, 711 (2012). However, due process considerations do place limitations upon the admission of eyewitness identification evidence obtained as the result of impermissible official conduct. *Id.* at 248, 132 S. Ct. at 730, 181 L. Ed. 2d at 713. The initial inquiry in which a reviewing court is required to engage in conducting such a due process inquiry is "whether the identification procedure was so suggestive as to create a substantial likelihood of irreparable misidentification." *State v. Fowler*, 353 N.C. 599, 617, 548 S.E.2d 684, 697–98 (2001) (citing *U.S. v. Marson*, 408 F.2d 644, 650 (4th Cir. 1968); *State v. Simpson*, 327 N.C. 178, 186, 393 S.E.2d 771, 776 (1990); *State v. Hannah*, 312 N.C. 286, 290, 322 S.E.2d 148, 151 (1984)). In order to make the relevant determination, the Court must utilize a two-step process, with the first step requiring the Court to "determine whether the identification procedures were impermissibly suggestive," *Fowler*, 353 N.C. at 617, 548 S.E.2d at 698 (citing *State v. Powell*, 321 N.C. 364, 368–69, 364 S.E.2d 332, 335 (1988); *Hannah*, 312 N.C. at 290, 322 S.E.2d at 151; *State v. Headen*, 295 N.C. 437, 439, 245 S.E.2d 706, 708 (1978)), and with the second step, which becomes relevant in the event that "the procedures were impermissibly suggestive," requiring the Court to determine "whether the procedures create a substantial likelihood of irreparable misidentification." *Fowler*, 353 N.C. at 617, 548 S.E.2d at 698 (citing *Powell*, 321 N.C. at 369, 364 S.E.2d at 335; *Hannah*, 312 N.C. at 290, 322 S.E.2d at 151; *Headen*, 295 N.C. at 493, 245 S.E.2d at 708). Even if the witness was subjected to impermissibly suggestive identification procedures, that witness's in-court identification testimony may still be admissible in the event that the trial court finds "that the in-court identification has an origin independent of the invalid pretrial procedure" because, in that case, the procedures have not created a substantial likelihood of irreparable misidentification. *State v. Bundridge*, 294 N.C. 45, 56, 239 S.E.2d 811, 819 (1978) (citing *U.S. v. Wade*, 388 U.S. 218, 242, 87 S. Ct. 1926, 1940, 18 L. Ed. 2d 1149, 1166 (1967); *State v. Henderson*, 285 N.C. 1, 12, 203 S.E.2d 10, 18 (1974)); *see also Powell*, 321 N.C. at 369, 364 S.E.2d at 336 (upholding a trial court determination that "the in-court

identification of the defendant was of independent origin and untainted by illegal pretrial procedures"); *State v. Harris*, 308 N.C. 159, 166, 201 S.E.2d 91, 96 (1983) (holding that, "[e]ven assuming arguendo that the pretrial photographic lineup procedure could be found impermissibly suggestive, we find more than adequate evidence to support the trial court's decision to hold [the witness's] in-court identification admissible as being of independent origin"); *State v. Thompson*, 303 N.C. 169, 172, 277 S.E.2d 431, 434 (1981) (finding "adequate evidence in the record to support the trial court's decision holding the in-court identification admissible as being of independent origin").

In determining whether the witness's in-court identification had the necessary independent origin, a court should consider "the opportunity of the witness to view the accused at the time of the crime, the witness' degree of attention at the time, the accuracy of his prior description of the accused, the witness' level of certainty in identifying the accused at the time of the confrontation, and the time between the crime and the confrontation." *Thompson*, 303 N.C. at 172, 277 S.E.2d at 434 (citing *Neil v. Biggers*, 409 U.S. 188, 200, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401, 411 (1971); *Headen*, 295 N.C. at 437, 245 S.E.2d at 706). It is not necessary for the Court to find that all five of the relevant factors militate in favor of a finding of independent origin in order to admit a witness's in-court identification into evidence despite the fact that impermissibly suggestive identification procedures had taken place during the investigative process. *Powell*, 321 N.C. at 370, 364 S.E.2d at 336. However, "[a]gainst these factors must be weighed the corrupting effect of the suggestive procedure itself." *State v. Pigott*, 320 N.C. 96, 100, 357 S.E.2d 631, 634 (1987) (citing *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140, 154 (1977)).

We first consider whether the procedures were impermissibly suggestive. The partial concurrence suggests that we should not address this issue. However, it is the first part of a two-part test. We have stated that "[t]his due process analysis requires a two-part inquiry. *First, the Court must determine* whether the identification procedures were impermissibly suggestive." *Fowler*, 353 N.C. at 617, 548 S.E.2d at 698 (emphasis added); *accord State v. Rogers*, 355 N.C. 420, 432, 562 S.E.2d 859, 868 (2002). We are not required to skip part of the analysis. *See State v. Knight*, 282 N.C. 220, 226–27, 192 S.E.2d 283, 287–88 (1972) (concluding first that identification procedure was impermissibly suggestive and then determining it was of independent origin); *but see Powell*, 231 N.C. at 369, 364 S.E.2d at 336 (assuming *arguendo* that procedures

were impermissibly suggestive and continuing to the second part of the inquiry). Thus, while the partial concurrence "do[es] not believe that there is any need for the Court to address the issue of whether Ms. Alvarez was subjected to impermissibly subjective identification procedures," our precedents suggest that we should. The independent origin inquiry, on which both our and the partial concurrence's conclusions are based, is merely the second part of the due process inquiry.[2]

On the first question, the Court of Appeals correctly examined the trial court's findings of fact and found that they did not support the conclusion of law that the procedures used were not impermissibly suggestive. In particular, Ms. Smith's actions in showing Lopez and Alvarez the video of Mr. Malone's interview and recent photographs of Malone and Spence are exactly the kind of highly suggestive procedures that have been widely condemned as inherently suggestive. *See Stovall v. Denno*, 388 U.S. 293, 302, 87 S. Ct. 1967, 1972–73, 18 L. Ed. 2d 1199, 1206 (1967); *State v. Oliver*, 302 N.C. 28, 45, 274 S.E.2d 183, 194 (1981). The U.S. Supreme Court has held that single-suspect identification procedures "clearly convey[ ] the suggestion to the witness that the one presented is believed guilty by the police." *Wade*, 388 U.S. at 234, 87 S. Ct. at 1936, 18 L. Ed. 2d at 1161. Here, Ms. Smith did more than simply convey a suggestion. "[I]n the furtherance of her trial preparation duties," she effectively told Lopez and Alvarez that they were viewing pictures of the men police believed were responsible for the shooting by "show[ing] them photos she had obtained of the defendant and Marquis Spence" in a meeting two weeks before trial.

The State contends that this was not an "identification procedure" because Ms. Smith was only engaging in witness preparation in anticipation of their upcoming trial testimony and that Ms. Smith only showed them the video of Mr. Malone's interview because Ms. Alvarez asked to see it. Neither Ms. Lopez nor Ms. Alvarez identified Mr. Malone when

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2. The partial concurrence is, of course, correct that we generally "avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds." *Anderson v. Assimos*, 356 N.C. 415, 416 572 S.E.2d 101, 102 (2002). However, the constitutional question here is whether due process requires the suppression of eyewitness identification evidence. Our precedents identify this as a two-part inquiry, and by addressing, rather than assuming, the first and logically necessary part of the test, we provide useful guidance on what constitutes an unnecessarily suggestive identification procedure. Moreover, given that the trial court held that the procedures were not impermissibly suggestive, we should explain why we disagree rather than simply "assume" the opposite.

shown a photo lineup two days after the shooting. Further, Ms. Alvarez identified someone other than Mr. Malone as the shooter and picked an entirely different "filler" person as the second person involved. After that, as found by the trial court, "[n]o law enforcement officer showed either Claudia or Cindy anymore photos other than the ones shown during the course of the arrays. . . . [E]ach went several years without contact from the District Attorney's office or contacting the District Attorney's office or without any further interaction with law enforcement in connection with all these events." Under these circumstances, for Lopez and Alvarez to be shown pictures and a videotaped interview, even for just a few minutes, of the person now on trial for murder goes far beyond the line where trial preparation ends and witness coaching begins. The facts as found by the trial court in this case lead inescapably to the legal conclusion that the procedures employed by the District Attorney's office on 29 February 2016 were impermissibly suggestive.

To be clear, our conclusion that impermissibly suggestive procedures were used in this case is based on the photographs and video of Mr. Malone that Ms. Lopez and Ms. Alvarez viewed a few days before trial.

Although an impermissibly suggestive identification procedure was used during the 29 February 2016 meeting between Ms. Smith, Ms. Lopez, and Ms. Alvarez, the second question is whether the procedure gave rise to a substantial likelihood of irreparable misidentification. On this second question we disagree with the majority below because the trial court's findings of fact support the legal conclusion that Ms. Alvarez's in-court identification of defendant was of independent origin and sufficiently reliable.

We examine the five factors set out in *State v. Pigott*, 320 N.C. at 99–100, 357 S.E.2d at 634, as to each witness, namely the opportunity of the witness to view the defendant at the time of the crime, the witness's degree of attention, the accuracy of any prior description of the defendant, the level of certainty demonstrated by the witness at the time of the confrontation, and the time between the crime and the confrontation. The trial court's findings with respect to independent origin begin with the witnesses' opportunity to view the crime. Here there are some differences between the two eyewitnesses. While both had the same "short period of time from 75 to 90 seconds" within which to view the two males and the shooting, Ms. Alvarez was much closer, just four feet, from Mr. Jones when he was shot while Ms. Lopez was within ten feet of

the shooter on the porch. This factor supports a finding of independent origin for Ms. Alvarez, and does so more strongly than for Ms. Lopez.[3]

Similarly, as to degree of attention, the trial court found that Ms. Alvarez and Ms. Lopez "indicated that they were paying attention." The trial court's finding was supported by the evidence, at least as to Ms. Alvarez. Ms. Alvarez stated that she was "paying attention to him the minute he got out of the car." Asked why, she said it was because "he had his hands in his pocket the whole time. One of his hands in his pocket the whole time. He wasn't really speaking. He wasn't saying nothing. And for some reason, like, I was just focused on him the whole time." In contrast, Ms. Lopez, when asked what she remembered of the person who actually fired the gun, responded that "[h]im specifically, his face, um, I was in shock, like I said, that day so the only thing I remember him about is his hair, that it was about this long." Later she testified "I never really paid much attention to his face because the whole time he was standing in front of us he just had his hand in his pocket." This factor again supports a finding of independent origin as to the in-court identification by Ms. Alvarez and does so more strongly than for Ms. Lopez.

Regarding the accuracy of the prior description, the trial court made the following findings of fact as to Ms. Lopez: (1) Ms. Lopez described the shooter as having shoulder-length hair, (2) Ms. Lopez identified Marquis Spence as one of the two suspects, particularly as the person who did not shoot Mr. Jones, and (3) although she lingered over defendant's photo during the photo lineup, she did not identify defendant or anyone else in the lineup as the second suspect who had shot Jones. The trial court made the following findings as to Ms. Alvarez: (1) Ms. Alvarez identified Marquis Spence as one of the two suspects, particularly as the person who *did* shoot Mr. Jones, (2) Ms. Alvarez did not identify defendant as the second suspect when presented with a photo lineup, and (3) Ms. Alvarez identified a "completely unassociated individual" as the second suspect when presented with a photo lineup. While Ms. Lopez accurately described defendant's shoulder-length hair, this appears to be the only accurate detail identified by the trial court. Significantly, Ms. Alvarez had a credible explanation of why she was unable to identify defendant from the photo lineup conducted by police two days after the incident, but immediately identified him upon seeing a picture on Facebook, namely because of the difference in his hair. She testified that had the officers

3. The relative strength of the reliability of the two eyewitnesses' identifications of defendant is significant because it explains why we hold that Ms. Alvarez's testimony was properly admitted and that any error in admitting Ms. Lopez's testimony was harmless.

shown her the picture she saw on Facebook, she would have been able to identify defendant as the shooter because in the Facebook picture he had his hair down similar to how it looked on the day of the murder. Accordingly, this factor somewhat undermines a finding of independent origin as to both witnesses, but with less force as to Ms. Alvarez.

Regarding the level of certainty, the trial court found and the evidence reflects that, at the time of the meeting with Iris Smith, Ms. Alvarez "recognized the photos as the two males as they looked at or around the time of the shooting." In particular and, in our view, most importantly as to this factor, the trial court found that both Lopez and Alvarez had seen the photos before and that Ms. Alvarez, upon seeing the photos on her own, independently recognized defendant as one of the two people involved in the shooting soon after the shooting had taken place. Ms. Alvarez testified that, upon seeing a photo of defendant on Facebook a week or two after the incident, which she had not been shown in the lineup, and which showed his hair in the way he was wearing it at the time of the shooting, she was sure that he was the person who shot Mr. Jones.

Ms. Lopez, however, did not recognize defendant as the shooter based either on the photos or on viewing the defendant as he exited the police car on 29 February 2016.[4] Therefore, while Alvarez identified defendant with a high degree of certainty, apparently based on her exposure to photographs between the time she spoke with police and the time she spoke to the District Attorney's office, Lopez did not identify defendant with any degree of certainty at the time of the confrontation. This factor supports a finding of independent origin as to the in-court identification by Alvarez, but undermines such a finding for the identification by Lopez.

Finally, as to the length of time between the crime and the confrontation, the trial court accurately found that approximately three and a half years passed between the shooting and the impermissibly suggestive events of 29 February 2016. However, only a week or two passed between the crime and Ms. Alvarez's identification of defendant from the Facebook picture. This factor undermines a finding of independent origin as to Ms. Lopez but not as to Ms. Alvarez, since Ms. Alvarez identified defendant shortly after the crime.

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4. While the trial court found that Ms. Lopez recognized Mr. Malone as he exited the police car, the Court of Appeals majority accurately noted that this finding was not supported by evidence.

Ultimately, weighing factors such as these is not an exercise employed with mathematical precision. Certain factors may be more important than others depending upon the nature of the impermissibly suggestive procedure as well as the particular facts of the case. "Whether there is a substantial likelihood of misidentification depends upon the totality of the circumstances." *State v. Pigott*, 320 N.C. at 99, 357 S.E.2d at 634 (citing *State v. Flowers*, 318 N.C. 208, 220, 347 S.E.2d 773, 781 (1986)). In this case, we conclude that in the totality of the circumstances, Ms. Alvarez's opportunity to view the crime, the degree of attention she paid to the suspects, the short period of time between the crime and her identifying defendant from an accurate picture, and the certainty of her identification outweigh her inaccurate initial description. Weighing against this the possible impact of the impermissibly suggestive procedures, the evidence demonstrates that for Ms. Alvarez, her identification was made long before seeing the video of defendant's interview with police or the pictures that Ms. Smith showed her, such that those procedures had no impact on her identification and did not create the risk of a misidentification.

According to the trial court's findings of fact, supported by the evidence adduced at the pretrial hearing, Ms. Alvarez's identification of defendant was based primarily upon the impression she formed after seeing a photograph of the defendant on a Facebook page, independent from any police- or prosecutor-led identification proceeding. She saw the photograph one or two weeks after the shooting and, at that time, was confident that defendant was the shooter. This fact, in conjunction with the factors discussed above, convinces us that the trial court correctly concluded that Ms. Alvarez's in-court identification had an origin that was independent of the impermissibly suggestive identification procedure conducted by the State. Assuming that the identification testimony of Ms. Lopez was improper because it lacked an independent origin, any failure to suppress it was not prejudicial because Ms. Alvarez's in-court identification was properly admitted. With one witness confidently identifying defendant as the shooter, we believe beyond any reasonable doubt that suppressing a second identification would not change the outcome here. *See* N.C.G.S. § 15A-1443(c) (providing that a violation of a defendant's federal constitutional rights is prejudicial unless harmless beyond a reasonable doubt).

II. EIRA Claim

In addition to the constitutional claim, there is also before us a statutory claim that the events of the 29 February 2016 meeting between eyewitnesses Lopez and Alvarez and Iris Smith violated the EIRA, which

defendant asserts in the alternative if we were to reverse the Court of Appeals on the due process claim and the State brings to us by way of a petition for discretionary review. The State contends that the EIRA explicitly only addresses the actions of law enforcement officers and therefore is inapplicable to this case because the allegedly impermissibly suggestive identification procedures here were carried out by an employee of the District Attorney's office. Because the Court of Appeals stated in dicta that the EIRA applies to all eyewitness identification procedures, the State argues this Court should clarify the law. Defendant urges us to take a more comprehensive view of the purpose of EIRA, and, to remand for consideration of defendant's EIRA claim if we do not affirm the majority on his constitutional claim. It is a question of first impression for this Court, but one that we do not need to address at this time because of our disposition of defendant's constitutional claim. Our holding here is that, while the identification procedures used by Ms. Smith in the days before trial were impermissibly suggestive, the relevant in-court identification was of independent origin and sufficiently reliable; thus, there is nothing further to be added by concluding that the EIRA does or does not apply.

Conclusion

Thus, for the reasons set forth above, we hold that the Court of Appeals properly found that Ms. Alvarez and Ms. Lopez were subjected to witness identification procedures that were impermissibly suggestive, but erred in failing to recognize that the evidence demonstrates that Ms. Alvarez's identification was sufficiently of independent origin to negate a substantial likelihood of a misidentification.

AFFIRMED IN PART AND REVERSED IN PART.

Justice ERVIN, concurring in the result, in part, and dissenting, in part.

Although I concur in the Court's determinations that the trial court did not err by finding that Ms. Alvarez's identification of defendant as the perpetrator of the killing of Mr. Jones and the shooting of Mr. White had an origin independent of any impermissibly suggestive identification procedures to which she might have been subjected and that any error that the trial court might have committed in admitting the identification testimony of Ms. Lopez was harmless beyond a reasonable doubt given the admission of Ms. Alvarez's identification testimony, coupled with the existence of other evidence tending to show defendant's involvement in

the commission of the crimes that he was convicted of committing, I am unable to agree with the Court's decision to address the "impermissible suggestibility" issue and with aspects of the manner in which the Court has made its "impermissible suggestibility" and "independent origin" determinations. As a result, I concur in the result reached in the Court's opinion, in part, and dissent from the Court's opinion, in part.

In its opinion, the Court affirms the Court of Appeals' decision to overturn that portion of the trial court's order denying defendant's motion to suppress the identification testimony of Ms. Alvarez and Ms. Lopez based upon a determination that the identification procedures that led to the challenged identification testimony were "impermissibly suggestive." *State v. Fowler*, 353 N.C. 599, 617, 538 S.E.2d 684, 698 (2001) (citing *State v. Powell*, 321 N.C. 364, 368-69, 364 S.E.2d 332, 335 (1988); *State v. Hannah*, 312 N.C. 286, 290, 322 S.E.2d 148, 151 (1984); *State v. Headen*, 295 N.C. 437, 439, 245 S.E.2d 706, 708 (1978)). I am unable to join this portion of the Court's opinion for at least two reasons.

As an initial matter, while I share the Court's discomfort with certain of the events that occurred during the meeting that was held between Ms. Smith, Ms. Alvarez, and Ms. Lopez in the Alamance County Historic Courthouse, I do not believe that there is any need for the Court to address the issue of whether Ms. Alvarez was subjected to impermissibly subjective identification procedures during that meeting. In light of the Court's determination, in which I concur, that Ms. Alvarez's testimony identifying defendant as the person who killed Mr. Jones and wounded Mr. White had an origin that was independent of any impermissibly suggestive identification procedures to which she might have been subjected, any decision that we might make with respect to the issue of "whether the identification procedure was so suggestive as to create a substantial likelihood of irreparable misidentification," *id.*, would be of little more than academic interest. According to well-established North Carolina law, a reviewing court should "avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds." *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002). *See also Union Carbide Corp. v. Davis*, 253 N.C. 324, 327, 116 S.E.2d 792, 794 (1960) (stating that "[c]ourts must pass on constitutional questions when, but only when, they are squarely presented and necessary to the disposition of a matter then pending and at issue"). A witness's in-court identification testimony is admissible in the event of a finding "that the in-court identification has an origin independent of the invalid pretrial procedure" regardless of the extent, if any, to which the witness in question was subject to an impermissibly suggestive

identification procedure. *State v. Bundridge*, 294 N.C. 45, 46, 239 S.E.2d 811, 819 (1978) (citing *U.S. v. Wade*, 388 U.S. 218, 242, 87 S. Ct. 1926, 1940, 18 L. Ed 2d 1149, 1166 (1967); *State v. Henderson*, 285 N.C. 1, 12, 203 S.E.2d 10, 18 (1974)); *see also State v. Harris*, 308 N.C. 159, 166, 201 S.E.2d 91, 96 (1983) (holding that, "[e]ven assuming arguendo that the pretrial photographic lineup procedure could be found impermissibly suggestive, we find more than adequate evidence to support the trial court's decision to hold [the witness's] in-court identification admissible as being of independent origin"). Thus, given that we have decided that the trial court did not err by finding Ms. Alvarez's identification of defendant as a perpetrator of the crimes charged to be of "independent origin," I see no need to address the merits of defendant's contention that Ms. Alvarez had been subjected to impermissibly suggestive identification procedures and dissent from the Court's decision to do so.

Secondly, I have concerns about certain statements that the Court has made in addressing the "impermissible suggestibility" issue. According to the applicable standard of review, an appellate court reviewing a trial court order granting or denying a suppression motion "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which case they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citing *State v. Thompson*, 303 N.C. 169, 277 S.E.2d 413 (1981); *State v. Gray*, 268 N.C. 69, 150 S.E.2d 1 (1966); 4 Strong's N.C. Index 3d § 175 (1976). In light of the applicable standard of review, I am concerned about the Court's statement that Ms. Smith "effectively told [Ms.] Lopez and [Ms.] Alvarez that they were viewing pictures of the men [that] police believed were responsible for the shooting." After carefully reviewing the trial court's findings, I am unable to find any support of this assertion. Similarly, without otherwise commenting upon the manner in which Ms. Smith conducted her meeting with Ms. Alvarez and Ms. Lopez, I am not certain that the trial court's findings fully support the Court's comment that, "for [Ms.] Lopez and [Ms.] Alvarez to be shown pictures and a videotaped interview, even for just a few minutes, of the person now on trial for murder goes far beyond the line where trial preparation ends and witness coaching begins." As a result, aside from my belief that the Court would be better advised to refrain from discussing the "impermissible suggestibility" issue at all, I am not persuaded that the analysis upon which my colleagues rely is fully consistent with the applicable standard of review.

Finally, while I agree with my colleagues that the trial court's findings support its conclusion that the identification testimony of Ms. Alvarez

had an origin independent of any impermissibly suggestive identification procedures to which she might have been subjected, I am concerned about the extent to which the Court's discussion of the "independent origin" issue relies upon an analysis of the testimony received at the suppression hearing rather than upon the findings of fact that the trial court made at the conclusion of that proceeding.[1] In addition, in light of the Court's decision to uphold the trial court's determination that the identification by Ms. Alvarez of defendant as the perpetrator of the crimes was of "independent origin" and the Court's related decision that the admission of Ms. Alvarez's identification testimony suffices to render any error that the trial court may have committed in admitting Ms. Lopez's identification testimony harmless beyond a reasonable doubt, I see no need to address the relative strength of the State's independent origin showing as between Ms. Alvarez and Ms. Lopez and do not believe that the relative strength of the identification testimony provided by the two witnesses sheds any light upon the non-prejudice analysis that we are called upon to conduct in this case.

All of that being said, however, I am fully satisfied that the trial court's findings of fact, which reflect a careful consideration of each of the factors that are relevant to the making of an "independent origin" determination, *Thompson*, 303 N.C. at 172, 277 S.E.2d at 434 (citing *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401, 411 (1971); *Headen*, 295 N.C. 437, 245 S.E.2d 706), support the trial court's determination that Ms. Alvarez's identification of defendant as the perpetrator of the crimes charged was of independent origin. Among other things, the trial court found that Ms. Alvarez was within four feet of the perpetrators at the time that the offense was committed; that the offenses were committed over a period of 75 to 90 seconds; that the shooting of Mr. Jackson and Mr. White was a "startling event" "that would claim your attention or cause you to pay no attention and flee from the situation"; that Ms. Alvarez was "paying close attention to the two males that came up and to Mr. Jones"; that Ms. Alvarez "gave a general description of clothing, hair and body piercing and the car"; that Ms. Alvarez recognized defendant as one of the perpetrators of the crimes charged when she saw an on-line photo of defendant; and that Ms. Alvarez appeared confident in the accuracy of her identification testimony. Thus, I concur in the Court's ultimate determination that the trial court did not err by

1. For example, the Court's discussion of the degree to which Ms. Alvarez and Ms. Lopez were paying attention at the time that they observed the killing of Mr. Jones and the shooting of Mr. White rests, to a considerable extent, upon an analysis of testimony admitted at the suppression hearing rather than the trial court's factual findings.

concluding that the testimony of Ms. Alvarez identifying defendant as one of the perpetrators of the killing of Mr. Jones and the shooting of Mr. White had an origin independent of any impermissibly suggestive identification procedures to which she had been subjected and that the admission of Ms. Alvarez's identification testimony, coupled with the other evidence tending to show defendant's involvement of the commission of the crimes charged, rendered any error that the trial court might have committed in admitting Ms. Lopez's identification testimony harmless beyond a reasonable doubt. As a result, for all of these reasons, I concur in the result reached in the Court's opinion in part, and dissent from the Court's opinion, in part.

Justices NEWBY and HUDSON join in this separate opinion.

STATE OF NORTH CAROLINA
v.
RONTEL VINCAE ROYSTER

No. 441A18

Filed 1 November 2019

1. Appeal and Error—preservation of issues—sufficiency of evidence—differing theories at trial and on appeal

The defendant in a cocaine trafficking prosecution preserved for appeal the issue of the sufficiency of evidence of possession where a black box that was later determined to contain cocaine was the basis of the charge. Defendant argued at trial that there was insufficient evidence both that he knew cocaine was in the box and that there was cocaine in the box at the time the box was in his possession.

2. Appeal and Error—evenly divided Supreme Court—Court of Appeals opinion stands without precedential value

A Court of Appeals decision that the State did not present sufficient evidence of possession of cocaine stood without precedential authority where the vote of the Supreme Court was evenly divided.

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

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 822 S.E.2d 489 (N.C. Ct. App. 2018), vacating a judgment entered on 4 October 2016 by Judge James E. Hardin, Jr. in Superior Court, Alamance County. Heard in the Supreme Court on 30 September 2019.

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

Jay H. Ferguson, Geeta N. Kapur, and James D. Williams, Jr., for defendant-appellee.

EARLS, Justice.

Defendant Rontel Vincae Royster was convicted by a jury on 30 September 2016 of trafficking in cocaine by possession pursuant to N.C.G.S. § 90-95(h)(3)(c). Here we consider whether defendant waived appellate review of his sufficiency of the evidence argument by failing to raise it in the trial court and whether the trial court erred in denying defendant's motion to dismiss on the basis of insufficient evidence. The Court of Appeals concluded that the State failed to present substantial evidence that defendant possessed 400 grams or more of cocaine and vacated defendant's conviction. *State v. Royster*, 822 S.E.2d 489 (N.C. Ct. App. 2018). We conclude that defendant did not waive his sufficiency of the evidence argument by failing to raise it in the trial court. As to the issue of whether the State presented sufficient evidence that defendant possessed 400 grams or more of cocaine on the date in question, the members of this Court are equally divided; accordingly, the holding of the Court of Appeals with respect to this issue is left undisturbed and stands affirmed without precedential value.

I. Background

On 28 December 2013, at around 7:00 p.m., eighteen-year-old Humberto Anzaldo was visiting friends at the Otter Creek Mobile Home Park in Green Level, North Carolina, when he saw two acquaintances, Polo and Scrappy, having an argument. According to Anzaldo, Polo was "mad" and "was screaming and arguing at Scrappy about losing $150,000." Shortly thereafter, Anzaldo observed Polo, Scrappy, and another man, Hector Lopez, leave the mobile home park in a gray two-door BMW.

At approximately 8:30 p.m. that evening, defendant's father, Ronald Royster, was at his apartment in Burlington, North Carolina, when,

hearing a knock on his door, he opened it to find several men outside, one of whom he recognized. Upon entering the apartment, one of the men asked Mr. Royster whether he had spoken with defendant. According to Mr. Royster, after he responded that he had not spoken with defendant, the man stated, "[w]ell, if you haven't talked to your son, come on with us," and proceeded to point a gun at Mr. Royster's head and bind his hands with a cord. The men then walked Mr. Royster to a grey, two-door BMW, blindfolded him, and drove him to the Otter Creek Mobile Home Park. Upon arrival, Mr. Royster heard a phone being placed by his ear and recognized defendant's voice on the other end of the call. Mr. Royster told defendant, "I don't know what's going on; you need to come and talk to them."

The following morning, 29 December 2013, Anzaldo, having left the Otter Creek Mobile Home Park the previous evening not long after Polo and Scrappy departed, returned to the mobile home park at around 8:00 or 9:00 a.m. After ten or fifteen minutes, Anzaldo was walking toward his car to leave when he heard a whistle and saw Polo standing in front of a nearby mobile home. Anzaldo spoke with Polo and, through the door of the mobile home, saw Mr. Royster inside tied up with what appeared to be rope. According to Anzaldo, he told Polo "[y]ou can't be doing this; this ain't Mexico." Anzaldo was still speaking with Polo outside of the mobile home when a white Acura arrived at the mobile home park.

When defendant and another man, Demarcus Cates, got out of the Acura, Polo, Anzaldo, and Lopez went to meet them. Meanwhile, Scrappy led Mr. Royster, now untied and with his blindfold removed, out from behind the mobile home. Defendant told Mr. Royster to "get in the car" and Mr. Royster got in the back seat of the Acura. Defendant then handed Cates a black box, which was in turn passed to Polo, Scrappy, and Anzaldo, before being passed back to Scrappy. Anzaldo described the box as "pretty heavy" and testified that no one looked inside the box during the encounter and that he did not know what was in it.

Following this exchange, Cates and Polo began arguing and then started yelling and shoving each other. Anzaldo turned around to leave, at which point he heard approximately four or five gunshots and ran behind a nearby mobile home. Anzaldo saw Scrappy, still holding the black box, run into the woods. After defendant, Cates, and Mr. Royster drove away in the Acura, Anzaldo saw Polo lying dead on the ground. Polo had been shot four times, including multiple gunshot wounds to his head.[1]

---

1. Cates was convicted of voluntary manslaughter in a separate trial in November 2013. *State v. Cates*, No. COA16-672, slip op. at 4, 2017 WL 1650090, at *1–2 (N.C. Ct. App.

At approximately 9:30 on the following morning, officers from Alamance County's K-9 unit performed a grid search for guns and drugs in the woods behind the mobile home park. Behind a tree located about fifty to seventy-five yards into the wooded area, officers discovered a black box containing a large amount of cocaine. Although there was heavy rain the previous evening, the box was completely dry. In the woods, about seventy-five yards away, officers also discovered a dry mason jar containing an additional amount of cocaine. Defendant presented evidence tending to show that the grid search was prompted by a police interview with Anzaldo on the morning of 30 December 2013, during which Anzaldo gave the "precise location[]" of the black box and stated that the box contained "two (2) kilos of cocaine."

On 6 July 2015, defendant was indicted pursuant to N.C.G.S. § 90-95(h)(3)(c) for trafficking in cocaine by possession of 400 grams or more on 29 December 2013. Defendant moved to dismiss the trafficking charge based on insufficient evidence. The trial court denied defendant's motion. At the close of all evidence, defendant renewed his motion to dismiss, which was again denied. After the jury returned a verdict of guilty, the trial court sentenced defendant to 175 to 222 months' imprisonment. Defendant appealed.

At the Court of Appeals, defendant argued that the trial court erred in denying his motion to dismiss the trafficking charge because the State failed to present sufficient evidence that he actually possessed cocaine on 29 December 2013. Specifically, he contended that the fact that the black box was found in the woods a day later with 400 grams or more of cocaine inside of it did not amount to substantial evidence that the box contained cocaine when defendant passed the box to Cates. The Court of Appeals majority agreed. The majority summarized the State's evidence regarding the exact contents of the black box on 29 December 2013 as follows:

> (1) the heated argument between Polo and Scrappy on the evening of 28 December 2013, (2) the kidnapping of defendant's father that same evening, (3) defendant's production of a closed black box in exchange for his father on the morning of 29 December 2013, and (4) the discovery of a black box containing at least 996 grams of cocaine in the woods on the morning of 30 December 2013.

May 2, 2017) (unpublished). However, a charge of trafficking in cocaine brought against Cates, based on the same black box at issue in this case, was dismissed at the close of the State's evidence on the grounds of insufficiency of the evidence. *Id.* at *1.

Royster, 822 S.E.2d at 492. The majority concluded that while "this sequence of events raises a suspicion as to the commission of the offense charged, we conclude that it is just that: a suspicion." *Id.* Accordingly, the majority held that the trial court erred in denying defendant's motion to dismiss. *Id.*

One member of the panel dissented for two separate reasons. *Id.* at 492–93 (Dillon, J., dissenting). First, the dissenting judge determined that defendant had failed to preserve his insufficiency of the evidence argument "because the ground for his argument on appeal [was] different [than] the ground he argued before the trial court." *Id.* at 493 (citation omitted). According to the dissenting judge, defendant's motion in the trial court was based solely on the element of knowledge—that is, whether "[d]efendant *knew* there was cocaine in the black box when he possessed it." *Id.* at 493 ("Felonious possession of a controlled substance has two essential elements. [1] The substance must be possessed and [2] the substance must be *knowingly* possessed." (quoting *State v. Galaviz-Torres*, 368 N.C. 44, 48, 772 S.E.2d 434, 437 (2015))). Yet, defendant's argument on appeal, the dissenting judge concluded, was "whether there was sufficient evidence that cocaine was, in fact, in the box at the time [d]efendant possessed it." *Id.* Next, the dissenting judge determined that even assuming defendant had preserved his specific argument on appeal, the evidence was sufficient, when taken in the light most favorable to the State, for a reasonable juror to infer that there was cocaine in the black box at the time it was in defendant's possession. *Id.* at 493–94.

The State filed its appeal of right based on the dissent.

II. Analysis

A. Waiver

[1] The State first argues that defendant failed to preserve the issue of whether the State presented sufficient evidence of possession—that is, whether there was actually cocaine in the black box at the time the box was in defendant's possession. We disagree.

"In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action . . . is made at trial." N.C. R. App. P. 10(a)(3); *see also State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (stating that, when ruling on a defendant's motion to dismiss for insufficient evidence, the trial court must determine "whether there is substantial evidence (1) of each essential element of the offense

charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense" (first citing *State v. Roseman*, 279 N.C. 573, 580, 184 S.E.2d 289, 294 (1971); and then citing *State v. Mason*, 279 N.C. 435, 439, 183 S.E.2d 661, 663 (1971))). Our rules provide that:

> A defendant may make a motion to dismiss . . . at the conclusion of all the evidence, irrespective of whether defendant made an earlier such motion. If the motion at the close of all the evidence is denied, the defendant may urge as ground for appeal the denial of the motion made at the conclusion of all the evidence.

N.C. R. App. P. 10(a)(3).

Here the State contends that while defendant moved to dismiss at the close of the State's evidence based on insufficiency of the evidence, and renewed his motion at the close of all evidence, he failed to preserve the specific argument he made on appeal by abandoning the sole ground he argued in the trial court—knowledge—and arguing a different, unpreserved ground on appeal—possession. In response, defendant argues that as long as a defendant makes an initial statement moving to dismiss for insufficient evidence, this constitutes a general motion to dismiss that requires the trial court to consider the sufficiency of the evidence with respect to every element of the offense charged and thereby preserves all elements as grounds for appellate review—even if the defendant proceeds to argue that the evidence is insufficient with respect only to certain elements.

We need not address here whether a defendant preserves appellate review of elements not specifically argued in the trial court because defendant, in addition to arguing that there was insufficient evidence that he knew cocaine was in the black box, also argued that there was insufficient evidence that cocaine was actually in the box at the time the box was in his possession. At the close of the State's evidence, defense counsel argued:

> The testimony has been that no one looked in that box at all and determined, at the time, the contents of that box. The evidence further is that this box was not found until the next day, some 18 or so hours or more, after the original activity.
>
> . . . .
>
> Along with that, by it not being found until 18 or so hours later, the last that we know it is in the possession of some individual by the name of Scrappy. We -- the

> State has not been able to produce any evidence of what occurred between the time that he took possession of the box and the time it was found the next morning in a totally different location.
>
> . . . . And we suggest to you, that based on the evidence before the Court at this point, that it is not substantial; there's not substantial evidence to show possession, knowing possession, by this Defendant, of any controlled substance in the box at the time of the alleged crime. So we'd ask you to allow our motion as to the cocaine.
>
> . . . .
>
> Now, the evidence from Mr. Anzaldo was that the -- at least on one occasion, that the box was not transferred until Ronald Royster came out of the [mobile home]. Ronald Royster hadn't seen a box, but, again, it could have been money. It could have been rocks; we don't know. We have no idea what was in that box at the time that it was transferred.

In the same vein, defense counsel argued at the close of all evidence:

> So we suggest to you that there is not sufficient evidence, not substantial evidence at this point, at the close of all the evidence, that our client had any knowledge of what was in that box; not only knowledge on his part, but, there is no evidence at all as to what was in the box on the 29th; none.

We conclude that defendant argued in the trial court that the State failed to present substantial evidence of actual possession and that this issue was properly preserved for appellate review.

B. Sufficiency of the Evidence

[2] Next, the State argues that the Court of Appeals erred in concluding that the State failed to present substantial evidence that defendant possessed 400 grams or more of cocaine on 29 December 2013. As to this issue, the members of this Court are equally divided; accordingly, the holding of the Court of Appeals with respect to this issue is left undisturbed and stands affirmed without precedential value. *See, e.g.*, *Piro v. McKeever*, 369 N.C. 291, 794 S.E.2d 501 (2016) (per curiam); *State v. Long*, 365 N.C. 5, 705 S.E.2d 735 (2011) (per curiam).

III. Conclusion

In sum, we conclude that defendant preserved for appellate review the issue of insufficiency of the evidence. The holding of the Court of Appeals that the State failed to present substantial evidence that defendant possessed 400 grams or more of cocaine on 29 December 2013 is affirmed without precedential value.

AFFIRMED.

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

CHRISTOPER DICESARE, JAMES LITTLE, AND DIANA STONE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED	)	
v.	)	From Mecklenburg County
THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY	)	

No. 156A17-2

ORDER

Defendant-Appellee's 1 July 2019 petition for writ of certiorari is hereby allowed.

The parties are instructed to file supplemental briefs to address the issue set forth in Defendant-Appellee's petition for writ of certiorari. Defendant-Appellee shall have up to and including 2 December 2019 to file its brief. Plaintiff-Appellants shall have thirty days from the date of service of Defendant-Appellee's brief in which to file a response brief. Any reply brief shall be filed within ten days of the date of service of Plaintiff-Appellants' response brief.

By Order of the Court in Conference, this 30th day of October, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of November, 2019.

AMY FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

GLOBAL TEXTILE ALLIANCE, INC.	)	
	)	
v.	)	From Guilford County
	)	
TDI WORLDWIDE, LLC, ET AL.	)	

No. 279A19

ORDER

The Court, acting on its own motion and for the purpose of resolving the issues raised by Plaintiff-Appellant's 22 August 2019 filings, orders as follows:

1. The Court elects to treat Plaintiff-Appellant's petition for writ of certiorari filed on 22 August 2019 as a motion to amend the record on appeal. We hereby allow this motion for the limited purpose of including two of Plaintiff-Appellant's proposed additions to the record: 1) Steven Graven's Second BCR 10.9 letter (July 18, 2018); and 2) Discovery Status Conference Hearing Transcript dated July 24, 2018 held before the Honorable Gregory P. McGuire.

2. All of the other issues presented by Plaintiff-Appellant in its 22 August 2019 petition for writ of certiorari are denied.

3. Plaintiff-Appellant's Motion to Include in the Record on Appeal the Transcript from 2 July 2019 Hearing to Settle Record on Appeal filed on 22 August 2019 is denied.

By Order of the Court in Conference, this 30th day of October, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of November, 2019.

AMY FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

GYGER v. CLEMENT

[373 N.C. 167 (2019)]

EVE GYGER	)	
	)	
v.	)	From Guilford County
	)	
QUINTIN CLEMENT	)	

No. 31PA19

ORDER

The petition for discretionary review is allowed for the purpose of addressing the following issue: "Whether N.C.G.S. § 52C-3-315(b) (2017), which allows affidavits to be admitted into 'evidence if given under penalty of perjury' requires affidavits to be notarized."

By Order of the Court in Conference, this 30th day of October, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of November, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ONSLOW COUNTY
	)	
ANTWAUN KYRAL SIMS	)	

No. 297PA18

ORDER

Defendant's motion for appropriate relief in this matter is remanded to the Superior Court in Onslow County for an evidentiary hearing pursuant to N.C.G.S. § 15A-1418(b)–(c). Accordingly, the time periods for perfecting or proceeding with the appeal are tolled, and the order of the trial division with regard to the motion must be transmitted to the appellate division so that the appeal can proceed or an appropriate order terminating it can be entered. Additionally, defendant's resentencing appeal is hereby held in abeyance, until further order of this Court.

By order of this Court in Conference, this 17th day of October, 2019.

s/Hudson, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of October, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. STRUDWICK

[373 N.C. 169 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	MECKLENBURG COUNTY
	)	
TENEDRICK STRUDWICK	)	

No. 334P19

ORDER

The State's petition for discretionary review is decided as follows: The Court allows the State's petition for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decision in *State v. Grady* (No. 179A14-3) (16 August 2019), including determining what, if any, additional proceedings should be utilized in order to properly decide the questions that will be before it on remand.

By Order of this Court in Conference, this 30th day of October, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of November, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

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

30 OCTOBER 2019

4P16-3	State v. Jamonte Dion Baker	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP15-765; COAP17-657) 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** **Davis, J., recused**
22P19-4	State v. Jennifer Jimenez/April Myers	Def's Pro Se Motion to Recall Order for Arrest; Failure to Appear; Strike Called and Failed; and to Set Aside Bond Forfeiture	Dismissed
29P19	State v. John Edward Heelan	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1245)	Denied **Davis, J., recused**
31P19	Eve Gyger v. Quintin Clement	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-244)	Special Order
34P19	Kyle Busch Motorsports, Inc. v. Justin Boston, Individually and Justin Boston Racing, LLC	Defs' Petition for Writ of Certiorari to Review Decision of the COA (COA18-426)	Denied
46P18-2	State v. Richard Thomas Mays	Def's Pro Se Motion for PDR (COAP18-45)	Dismissed
51PA19	Ted P. Chappell and Sarah S. Chappell v. North Carolina Department of Transportation	Amicus Curiae's (Owners' Counsel of America) Motion for Permission to Participate in Oral Argument (COA19-71)	Denied
62P13-2	State v. Ronnie Perry	Def's Pro Se Petition for Writ of Mandamus (COAP18-410)	Dismissed **Ervin, J., recused**
79PA18	State v. Kenneth Vernon Golder	State's Motion to File Amended New Brief for the State (Appellant) (COA16-987)	Allowed **10/17/2019**

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

30 OCTOBER 2019

87P19	North Carolina Farm Bureau Mutual Insurance Company, Inc. v. Crystal Hamner Cox, Joseph Cain Pickard, and Jessica Littlefield	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA18-225) 2. Plt's Motion for Leave to Withdraw PDR	1. --- 2. Allowed
91P14-6	State v. Salim Abdu Gould	1. Def's Pro Se Notice of Appeal Based Upon A Constitutional Question (COA18-425) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion for Notice of Appeal 4. Def's Pro Se Motion for Habeas Corpus Arbitration-Mediation 5. Def's Pro Se Petition for Writ of Mandamus 6. Def's Pro Se Motion for Jurisdictional Hearing and to Issue Transport Order 7. Def's Pro Se Motion for Averment of Jurisdiction - *Quo Warranto* 8. Def's Pro Se Motion for Subpoena *Duces Tecum*	1. Dismissed *ex mero motu* 2. Allowed 3. Denied 4. Denied **07/24/2019** 5. Denied **09/23/2019** 6. Denied **09/23/2019** 7. Denied 8. Denied **Davis, J., recused**
115A04-3	State v. Scott David Allen	1. Def's Motion for Extension of Time to File Appellant Brief 2. Def's Motion to Allow Withdrawal of Margaret C. Lumsden as Counsel 3. Def's Motion for Office of Indigent Defense Services to Appoint New Co-Counsel	1. Allowed **10/07/2019** 2. Allowed **10/09/2019** 3. Allowed **10/09/2019**
121P19	State v. Jerry Lewis Oglesby	Def's PDR Under N.C.G.S. § 7A-31 (COA18-277)	Denied
124P10-2	State v. Michael Raymond Hawkins	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Davidson County (COA09-821; COAP19-40) 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
130P18-2	State v. James Maurice Wilson	Def's Pro Se Motion for PDR (COA17-917)	Dismissed

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131P16-14	State v. Somchai Noonsab	1. Def's Pro Se Motion for Verified Complaint (COAP16-103) 2. Def's Pro Se Motion to Discharge-Vacate Conviction-Sentence and Set at Liberty	1. Denied **10/02/2019** 2. Denied **10/02/2019**
156A17-2	DiCesare, et al. v. the Charlotte-Mecklenburg Hospital Authority	1. Def's Petition for Writ of Certiorari to Review Order of N.C. Business Court 2. Plts' Motion for Kathleen Konopka to Withdraw as Counsel	1. Special Order 2. Allowed
156P19	Steven A. Eisenbrown, and Wife, Marcia Jo M. Eisenbrown, as Co-Trustees of the Steven A. Eisenbrown Trust Dated 10/05/07; Lou C. Self, Trustee of the Martha B. Cecil Generation Skipping Trust Dated 1/19/98 f/b/o Lou C. Self, a 1/4th Undivided Interest; Martha C. Jones, Trustee of the Martha B. Cecil Generation Skipping Trust Dated 1/19/98 f/b/o Martha C. Jones, a 3/4th Undivided Interest; Bruce M. Doolittle, and Wife, Cynthia A. Doolittle; David Michael Kohler and Wife, Sharlene Ann Kyser-Kohler; and Nancy Anderson (f.k.a. Nancy Finkell) v. Town of Lake Lure, and Lake Lure Lodge, LLC	Plts' PDR Under N.C.G.S. § 7A-31 (COA17-934)	Denied **Davis, J., recused**
168A19	Cardiorentis AG v. Iqvia Ltd. and Iqvia RDS, Inc.	1. Plt's Petition in the Alternative for Writ of Certiorari to Review Order of Business Court 2. Plt's Motion to Admit Catherine E. Stetson, Pro Hac Vice 3. Plt's Motion to Admit Kyle Druding, Pro Hac Vice 4. Def's Motion to Supplement Record on Appeal	1. 2. Allowed **06/25/2019** 3. Allowed **06/25/2019** 4. Allowed

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173P19	Aesthetic Facial & Ocular Plastic Surgery Center, P.A. v. Renzo A. Zaldivar and Oculofacial Plastic Surgery Consultants, P.A. Surgical, LLC	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-431)	Denied **Davis, J., recused**
174P19	In the Matter of N.T., R.T., A.T., E.T., H.T., D.T., T.T., Jr., G.T., and M.T.	1. Respondent-Parents' Pro Se PDR Under N.C.G.S. § 7A-31; (COA18-849; 18-996) 2. Guardian ad Litem's Motion to Amend Response to PDR	1. Denied 2. Allowed **05/23/2019**
175P19	Erie Insurance Exchange, Plaintiff v. Jackson R. Davies; William R. Davies; Brooke I. Davies; Donna Gardner, Administrator of the Estate of Cory R. Reese, Deceased, Defendants v. Donna Gardner, as Administrator of the Estate of Cory R. Reese, Deceased Third-Party Plaintiff v. USAA General Indemnity Company, Third-Party Defendant	Def's (Donna Gardner) Petition for Writ of Certiorari to Review Order of the COA (COA18-1092)	Denied
187P18-2	State v. Edward Smith, Jr.	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Gaston County (COA17-925) 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 **Davis, J., recused**

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188A18-2	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.) Notice of Appeal Based Upon a Dissent (COA18-378) 2. Def's (Wayne Preparatory Academy Charter School, Inc.) PDR as to Additional Issues	1. --- 2. Allowed **Davis, J., recused**
191P19	John F. Stowers and Wife, Susan Edward Stowers v. Michael J. Parker, Julie A. Parker, and Parker and Parker, a General Partnership	Plts' PDR Under N.C.G.S. 7A-31 (COA18-737)	Denied
193P18-5	State v. Joshua Bolen	1. Def's Pro Se Motion for Appropriate Relief (COAP18-238) 2. Def's Pro Se Petition for Writ of Habeas Corpus	1. Dismissed 2. Dismissed without prejudice **09/25/2019** **Davis, J., recused**
203P19-2	State v. Frederick Lynn Ingram	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Orange County (COAP19-333) 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
209P19	State v. Elbert Justin Horton	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Pasquotank County (COAP18-312) 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
211P19	State v. Harold Lee Pless, Jr.	Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA17-1270)	Denied **Davis, J., recused**

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221A19	State v. Anton Thurman McAllister	1. Def's Notice of Appeal Based Upon a Dissent (COA18-726) 2. Def's PDR as to Additional Issues	1. --- 2. Denied
236P19	State v. Julien Antonio Allen	1. Def's Notice of Appeal Based Upon A Constitutional Question (COA18-1159) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
248P19	State v. Tamora C. Williams	1. Def's Motion for Temporary Stay (COA18-994) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/25/2019** Dissolved **10/30/2019** 2. Denied 3. Denied
249P19	Ashe County, North Carolina v. Ashe County Planning Board and Appalachian Materials, LLC	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA18-253) 2. Plt's Motion to Amend Its 25 June 2019 PDR	1. Allowed 2. Denied
254P19	State v. Stacy DeWhite Brown	Def's Pro Se Petition for Writ of Habeas Corpus (COAP19-401)	Denied **10/07/2019**
263P19	State v. Harold Lee Pless, Jr.	Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA18-21)	Denied
267P19	Winston Affordable Housing, L.L.C., d/b/a Winston Summit Apartments v. Deborah Roberts	1. Def's Motion for Temporary Stay (COA18-553) 2. Def's Petition for Writ of Supersedeas 3. Plt's Motion for Clarification as to Effect of 9 July 2019 Order Allowing the Motion for Temporary Stay 4. Plt's Motion for Reconsideration, Vacation, or Modification of Order 5. Def's PDR Under N.C.G.S. § 7A-31 6. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **07/08/2019** 2. Allowed 3. Special Order **07/10/2019** 4. Special Order **07/10/2019** 5. Allowed 6. Allowed **Davis, J., recused**

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279A19	Global Textile Alliance, Inc. v. TDI Worldwide, LLC, et al.	1. Plt's Motion to Include in the Record on Appeal the Transcript from 2 July 2019 Hearing to Settle Record on Appeal 2. Plt's Petition for Writ of Certiorari to Review Order of Business Court 3. Defs' Motion for Extension of Time to Respond to Petition for Writ of Certiorari	1. Special Order 2. Special Order 3. Allowed **08/26/2019**
288P19	In the Matter of L.B., C.B.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA18-815)	Denied
290PA15-2	State v. Jeffrey Tryon Collington	Def's Pro Se Motion to Make Appearance at Oral Argument (COA14-1244)	Dismissed **10/16/2019**
297PA18	State v. Antwaun Sims	Def's Pro Se Motion to Attend Oral Argument (COA17-45)	Dismissed **10/03/2019**
297PA18	State v. Antwaun Sims	Def's Motion for Appropriate Relief	Special Order **10/17/2019**
302P19	State v. Benjamin Curtis Lankford	Def's PDR Under N.C.G.S. § 7A-31 (COA18-854)	Denied
307P19	State v. Jordan Andrew Jones	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court (COAP19-273) 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
317P16-4	State v. Ronald Thompson Corbett	Def's Pro Se Motion to Appeal (COA18-327)	Dismissed **Davis, J., recused**
320P19	State v. Mario Donye Gullette	Def's Pro Se PDR (COA19-43)	Denied **Davis, J., recused**
324A19	State v. Jack Howard Hollars	1. State's Motion for Temporary Stay (COA18-932) 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 for Extension of Time to File Response to PDR	1. Allowed **08/21/2019** 2. Allowed **10/04/2019** 3. --- 4. Denied 5. Allowed **09/19/2019**

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325P19	Paula Saunders v. Hull Property Group, LLC and Blue Ridge Mall, LLC	1. Plt's PDR Prior to a Determination of the COA (COA19-728)	1. Denied
		2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	2. Dismissed as moot
		3. North Carolina Advocates for Justice's Conditional Motion for Leave to File Amicus Brief	3. Dismissed as moot
		4. North Carolina Association of Defense Attorneys' Conditional Motion to File Amicus Brief	4. Dismissed as moot
328P19	Cathy Anne Carswell Reis, et al. v. Barbara Anthony Carswell, et al.	1. Plt's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-1039)	1. Denied
		2. Plt's Pro Se Motion to Withdraw Opinion	2. Denied
		3. Plt's Pro Se Motion for Temporary Stay	3. Denied **08/29/2019**
		4. Plt's Pro Se Petition for Writ of Supersedeas	4. Denied
		5. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question	5. Dismissed *ex mero motu*
333P19-2	Sunaina S. Glaize v. Samuel G. Glaize	1. Plt's Pro Se Motion to Vacate and Set Aside 29 August 2019 Order (COA19-612)	1. Denied
		2. Plt's Pro Se Motion for Leave to Amend Plt's 25 August 2019 Petition for Writ of Certiorari, Petition for Writ of Mandamus, Petition for Writ of Supersedeas, Petition for Writ of Prohibition	2. Denied
		3. Plt's Pro Se Motion to Disqualify Clerk, Daniel M. Horne	3. Denied
334P19	State v. Tenedrick Strudwick	1. State's Motion for Temporary Stay (COA18-794)	1. Allowed **08/26/2019** Dissolved **10/30/2019**
		2. State's Petition for Writ of Supersedeas	2. Dismissed as moot
		3. State's Motion to Correct Technical Error	3. Dismissed as moot
		4. State's PDR Under N.C.G.S. § 7A-31	4. Special Order
335A19	In the Matter of S.K.G.B.	Respondent-Mother's Motion to Dismiss Appeal	Allowed **10/01/2019**

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338P19	State v. Eldridge Edger Hodge	1. Def's Pro Se Motion for Notice of Appeal Based Upon a Constitutional Question (COAP19-323) 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
341P19	State v. Christopher O'Neal Patterson	Def's Pro Se Motion for PDR (COAP19-485)	Dismissed
342P19	Jabari Holmes, Fred Culp, Daniel E. Smith, Brendon Jaden Peay, Shakoya Carrie Brown, and Paul Kearney, Sr. v. Timothy K. Moore, in His Official Capacity as Speaker of the North Carolina House of Representatives; Philip E. Berger, in His Official Capacity as President Pro Tempore of the North Carolina Senate; David R. Lewis, in His Official Capacity as Chairman of the House Select Committee on Elections for the 2018 Third Extra Session; Ralph E. Hise, in His Official Capacity as Chairman of the Senate Select Committee on Elections for the 2018 Third Extra Session; the State of North Carolina; and the North Carolina State Board of Elections	1. Defs' Motion to Admit David H. Thompson Pro Hac Vice (COA19-762) 2. Defs' Motion to Admit Peter A. Patterson Pro Hac Vice 3. Defs' Motion to Admit Haley N. Proctor Pro Hac Vice 4. Defs' Motion to Admit Nicole Frazer Reaves Pro Hac Vice	1. Dismissed as moot **09/25/2019** 2. Dismissed as moot **09/27/2019** 3. Dismissed as moot **09/27/2019** 4. Dismissed as moot **09/27/2019**

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343A19	In the Matter of J.D.	1. State's Motion for Temporary Stay (COA18-1036) 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 **09/05/2019** 2. Allowed **09/25/2019** 3. --- **09/25/2019** 4. Allowed
345P18-2	State v. Mark Leon Conner	Def's Pro Se Petition for Writ of Habeas Corpus (COA17-1293)	Dismissed **10/08/2019**
350P19	State v. Samantha Meiaza Matthews	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-1257) 2. Def's Motion for Temporary Stay 3. Def's Petition for Writ of Supersedeas	1. 2. Allowed **10/15/2019** 3.
355P19	State v. Kenneth Brewer	1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-1246) 2. Def's Pro Se Petition for Writ of Habeas Corpus	1. Denied 2. Denied **09/10/2019**
365A19	In the Matter of K.L.M., K.A.M., and K.L.M.	Respondent-Father's Motion to Amend Record on Appeal	Allowed **10/14/2019**
367P19	State v. Maceo Lamont Gardner	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP19-145) 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
370P19	State v. Binyam T. Gebrehiwot	Def's Pro Se Motion for Jurisdiction as Resident of United States	Dismissed
373P19	State v. William Allan Miles	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-1274) 2. Def's Motion for Temporary Stay 3. Def's Petition for Writ of Supersedeas	1. 2. Denied **10/02/2019** 3.
377P19	State v. Dmarlo Levonne Faulk Johnson	1. Def's Pro Se Motion for PDR (COA19-191) 2. Def's Pro Se Petition for Writ of Supersedeas	1. Denied **10/04/2019** 2. Denied **10/04/2019**

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381P19	In the Matter of C.N., A.N.	1. Petitioner and Guardian ad Litem's Motion for Temporary Stay (COA18-1031) 2. Petitioner and Guardian ad Litem's Petition for Writ of Supersedeas 3. Petitioner and Guardian ad Litem's Petition for Writ of Certiorari to Review Decision of the COA	1. Allowed **10/02/2019**
385P19	Raleigh Housing Authority v. Patricia Winston	1. Def's Motion for Temporary Stay (COA18-1155) 2. Def's Petition for Writ of Supersedeas	1. Allowed **10/04/2019** 2. **Davis, J., recused**
388P19	Tori J. Neal v. Erik A. Hooks, et al.	1. Petitioner's Pro Se Motion for PDR (COAP18-164) 2. Petitioner's Pro Se Verified Motion for Appointment of Counsel	1. Dismissed 2. Dismissed as moot
395PA19	In the Matter of J.S., C.S., D.R.S., D.S.	1. Respondent-Mother's Petition for Writ of Certiorari to Review Order of District Court, Wilkes County 2. Respondent-Mother's Motion for Transcription of Hearing 3. Respondent-Mother's Motion for Extension of Time to Settle Final Record	1. Allowed **10/28/2019** 2. Allowed **10/28/2019** 3. Allowed **10/28/2019**
406PA18	State v. Cory Dion Bennett	1. Amicus Curiae's Motion to Admit Robert S. Chang Pro Hac Vice (COA17-1027) 2. Amicus Curiae's Motion to Admit Taki V. Flevaris Pro Hac Vice 3. Amicus Curiae's Amended Motion to Admit Robert S. Chang Pro Hac Vice 4. Amicus Curiae's Amended Motion to Admit Taki Flevaris Pro Hac Vice	1. Dismissed as moot **10/25/2019** 2. Dismissed as moot **10/25/2019** 3. Allowed **10/25/2019** 4. Allowed **10/25/2019**
407P13-5	State v. Shawn Germaine Fraley	1. Def's Pro Se Motion for PDR (COA13-69; COAP14-509; COAP17-44) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed **Ervin, J., recused** **Davis, J., recused**

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407A19	Crescent University City Venture, LLC v. Trussway Manufacturing, Inc. and Trussway Manufacturing, LLC	1. Defs' Motion to Admit Michael A. Harris Pro Hac Vice 2. Defs' Motion to Admit Martyn B. Hill Pro Hac Vice	1. Allowed **10/24/2019** 2. Allowed **10/24/2019**
411P19	State v. Joshua Wayne Clemons	Def's Petition for Writ of Mandamus (COA18-469)	Denied **10/30/2019** **Davis, J., recused**
437PA18	Chavez, et al. v. Carmichael	1. Amicus Curiae's (United States of America) Motion for Reconsideration Regarding Leave to Participate in Oral Argument 2. Amicus Curiae's (American Civil Liberties Union Foundation, The American Civil Liberties Union of North Carolina Legal Foundation, et al.) Motion for Permission to Participate in Oral Argument	1. Denied **10/30/2019** 2. Denied **10/30/2019**
441A18	State v. Rontel Vincae Royster	Def's Motion to Take Judicial Notice of Filings in this Court (COA18-2)	1. Dismissed as moot **10/30/2019** **Davis, J., recused**
441A18	State v. Rontel Vincae Royster	Def's Motion to Amend Appellee Brief (COA18-2)	Allowed **10/30/2019** **Davis, J., recused**
504P04-4	State v. Marion Beasley, Sr.	Def's Pro Se Motion for Memorandum of Error (COA00-927; COA07-1157; COAP19-167)	Dismissed
638P02-4	State v. Carl Douglas St. John	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Caldwell County (COAP06-220) 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 **Hudson, J., recused** **Ervin, J., recused**

ALBERT S. DAUGHTRIDGE, JR. AND
MARY MARGRET HOLLOMAN DAUGHTRIDGE
v.
TANAGER LAND, LLC

No. 325PA18

Filed 6 December 2019

Boundaries—demarcation—ambiguity—intent of parties—factual question for jury

Where conveyances of adjoining lots referenced only lot numbers and a recorded map and not metes and bounds descriptions, the map's ambiguity regarding where the boundary existed between the lots presented a question of fact about the grantor's intention that must be decided by a jury.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a divided, unpublished decision of the Court of Appeals, No. COA17-554, 2018 WL 3977990 (N.C. Ct. App. August 21, 2018), that affirmed an order granting summary judgment entered on 30 November 2016 by Judge Beecher R. Gray and a final judgment and assessment of costs entered on 8 February 2017 by Judge Marvin K. Blount, III, both in Superior Court, Halifax County. Heard in the Supreme Court on 13 May 2019 in session in the Halifax County Courthouse in the Town of Halifax pursuant to section 18B.8 of Chapter 57 of the 2017 Session Laws of the State of North Carolina.

Boxley, Bolton, Garber & Haywood, L.L.P., by Ronald H. Garber, for plaintiff-appellants.

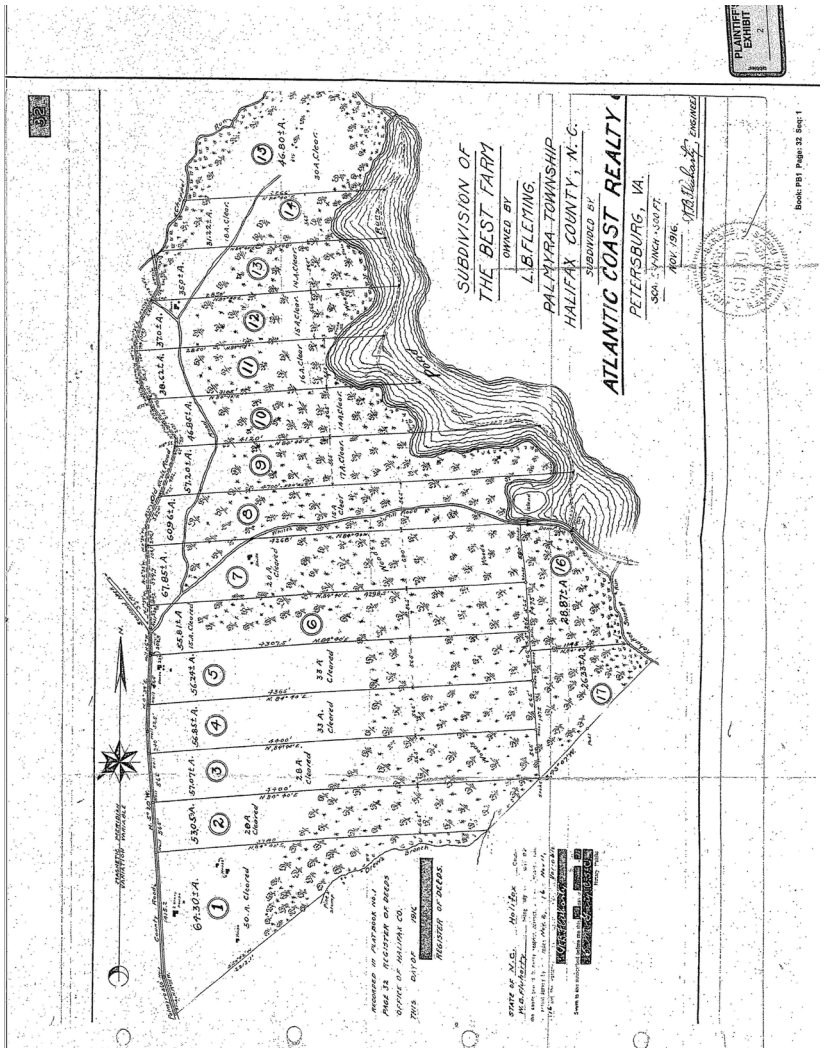
Charles S. Rountree, III for defendant-appellee.

NEWBY, Justice.

This land dispute presents the question of whether a court should decide the intent of the parties as a matter of law when the conveyances only reference lot numbers on a recorded map and where the disputed property line as shown on the map is ambiguous. Under these circumstances, the intent of the parties concerning the boundary line is a question of fact to be determined by a jury. Because we hold there is a genuine issue of material fact as to the intended boundary, we

reverse the decision of the Court of Appeals that affirmed summary judgment and other relief granted by the trial court.[1]

After acquiring a large tract of land in 1916, L.B. Fleming subdivided it into seventeen numbered lots and filed a map, the Best Farm Map ("the map"), in Plat Book 1, Page 32 in the Halifax County Registry, shown in full below.



1. The trial court granted, and the Court of Appeals affirmed, defendant's motion to dismiss plaintiffs' claim and defendant's motion for summary judgment to quiet its title.

Eight of the lots have as their eastern boundaries a hypothetical line in White's Mill Pond Run (the mill pond). Only the southern boundary of Lot 8, however, does not have a metes and bounds description to the hypothetical eastern line terminating in the mill pond. Shortly after recording the map, Fleming deeded plaintiffs' predecessor in title Lots 7 and 16 and defendant's predecessor in title Lot 8. The conveyances described the land using lot numbers as being the lots as shown on the recorded map; the respective deeds do not include metes and bounds descriptions. The map shows the dividing boundary between Lot 16 and Lot 8 to be along or near the high water line of an inlet of the mill pond. The map shows the mill pond without metes and bounds. Plaintiff alleges the high water line has always been recognized as the boundary, allowing plaintiffs to have water access and a boat ramp.

There was no dispute as to the property line until 2008 when, before acquiring Lot 8, defendant requested a survey. That survey purports to place a sliver of land along the southern shore of the pond inlet within Lot 8. The contested property is land lying between the high water line and the center of an earthen dam, extending along a portion of the shoreline ("the contested property"). Again, only by reference to a recorded map, this time the 2008 map, defendant took ownership of Lot 8,[2] claiming the contested property. After the purchase was completed, defendant installed a gate and posts on land that plaintiffs believed to be their land, eliminating plaintiffs' access to the mill pond.

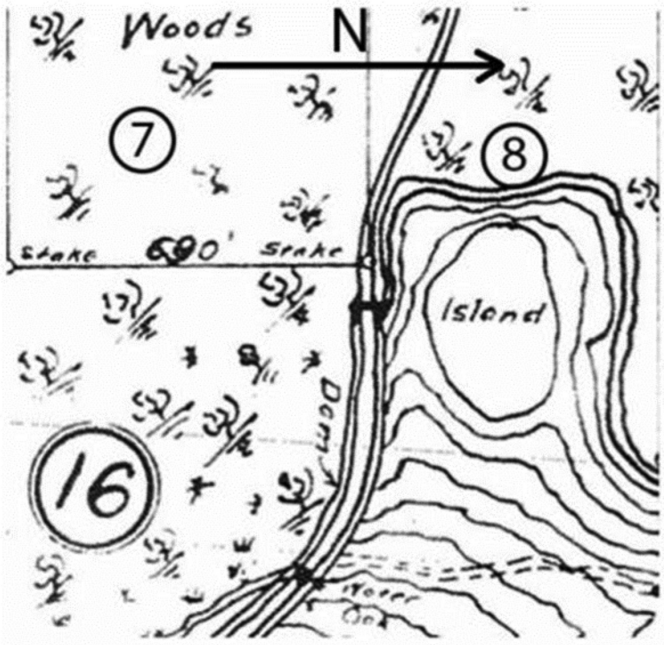
On 17 November 2015, plaintiffs filed their complaint in Superior Court, Halifax County, seeking a declaratory judgment and to quiet title, and filed a notice of *lis pendens* with the Register of Deeds on that same day. Plaintiffs filed an amended complaint on 26 February 2016. Plaintiffs' amended complaint described the portion of land at issue and defendant's alleged encroachments upon plaintiffs' land. Plaintiffs sought a declaratory judgment that the disputed land lies within the boundary of Lot 16, that the title be quieted, and that defendant's encroachments be removed. Defendants answered claiming the disputed land to be within its boundary.

The trial court declared defendant the lawful owner of the property in question, dismissed plaintiffs' notice of *lis pendens*, declared void plaintiffs' map recorded in Map Book 2016, page 96 (the Stahl survey), and awarded costs to defendant. The analysis herein that identifies a genuine issue of material fact and reverses summary judgment is equally applicable to the dismissal of plaintiffs' claim and other relief granted; thus, our holding reinstates the entire original suit. The orders of the trial court filed 30 November 2016 and 8 February 2017 are reversed.

2. A 1.19 acre tract was excluded from the conveyance of Lot 8.

On 5 October 2016, defendant moved to dismiss plaintiffs' action to quiet title and enter summary judgment for defendant, to strike the notice of *lis pendens*, and to award defendant costs and attorney fees. Plaintiffs responded to defendant's motion and attached surveys, affidavits, land leases, and depositions. Plaintiffs included an affidavit from surveyor Michael Stahl and an accompanying property line survey dated 20 July 2015. Plaintiffs' evidence tended to show that plaintiffs' boundary line extended to where the land north of the dam touches the high water line of the mill pond on the 1916 map (relevant portion of the map enlarged and shown below).

Plaintiffs point to the location of the high water line as demarcated



by "Water Oak ●" on the map, a description of the boundary line that provides Lot 16 with water access. Plaintiffs assert that the "●" as used throughout the recorded map marks a location in the water while an "○"shows locations on dry land. Plaintiffs' family has used the disputed portion of the land to fish, boat, and swim for one hundred years and installed a boat ramp for their use in the 1940s. Plaintiffs claim the contested property was first and only attributed to defendant's Lot 8 in the survey done for defendant in 2008. Similarly, defendant supported

its interpretation of the boundary line with affidavits, surveys, and other evidence.

The trial court dismissed plaintiffs' claim and granted summary judgment and other relief for defendant. It concluded "[t]he boundary between the parties' parcels of land in contention . . . is the Dam as depicted on the [1916] map . . . ." The trial court voided a map recorded by plaintiffs, the Stahl survey, because it refuted the placement of the boundary along the dam. Plaintiffs appealed.

On appeal the Court of Appeals observed that, following defendant's purchase of Lot 8, "defendant and plaintiffs both claimed title and ownership" of the contested property. *Daughtridge v. Tanager Land, LLC*, No. COA17-554, slip. op. at 2, 2018 WL 3977990 at *1 (N.C. Ct. App. August 21, 2018) (unpublished). The Court of Appeals admitted "the [1916] map is unclear as to what the boundary is and where the boundary line between their respective lots is located." *Id.* Central to the Court of Appeals' resolution of the dispute was the dam shown on the 1916 map. The Court of Appeals acknowledged the dam does not extend the full distance of the boundary. *Id.* at 4 n.1, 2018 WL 3977990 at *5 n.1 ("This result, which the trial court adopted, carries the centerline of the dam past the point where the dam ends and over a portion of land that is not subject to the same potential rules of construction."). Nevertheless, the Court of Appeals treated the dam, a monument shown on a map, the same way as a monument identified in a deed's legal description. It concluded: "Therefore, because the high water line is unlabeled and the water oak cannot be identified, we hold the dam is a monument that marks the boundary between the lots. This is consistent with the principle that the more permanent monuments control the interpretation of boundaries on plats." *Id.* at 11, 2018 WL 3977990 at *5. Thus, it upheld the trial court's grant of summary judgment for defendant and other relief. *Id.* at 12, 2018 WL 3977990 at *5.

"This Court reviews appeals from summary judgment de novo." *Ussery v. Branch Banking & Tr.*, 368 N.C. 325, 334–35, 777 S.E.2d 272, 278 (2015) (citation omitted). 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*, 368 N.C. at 334, 777 S.E.2d at 278 (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). "A genuine issue of material fact 'is one that

can be maintained by substantial evidence.' " *Ussery*, 368 N.C. 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)).

Under section 41-10 of our General Statutes, an individual can initiate an action to remove a cloud on title "against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims . . . ." N.C.G.S. § 41-10 (2017).

> The statutory action to quiet title to realty consists of two essential elements. The first is that the plaintiff must own the land in controversy, or have some estate or interest in it; and the second is that the defendant must assert some claim to such land adverse to the plaintiff's title, estate or interest.

Wells v. Clayton, 236 N.C. 102, 107, 72 S.E.2d 16, 20 (1952) (citations omitted). Plaintiff bears the burden of establishing better title. *See Day v. Godwin*, 258 N.C. 465, 469, 128 S.E.2d 814, 816–17 (1963); *Mobley v. Griffin*, 104 N.C. 112, 114, 10 S.E. 142, 142–43 (1889). "Where title to land is in dispute, claimant must show that the area claimed lies within the area described in each conveyance in his chain of title and he must fit the description contained in his deed to the land claimed." *Cutts v. Casey*, 271 N.C. 165, 167, 155 S.E.2d 519, 521 (1967)); *see also Jones v. Percy*, 237 N.C. 239, 242, 74 S.E.2d 700, 702 (1953).

Interpreting a deed is a matter of law for the court. *See Brown v. Hodges*, 232 N.C. 537, 541, 61 S.E.2d 603, 606 (1950). The intent of the parties controls. *See Cox v. McGowan*, 116 N.C. 131, 133, 21 S.E. 108, 109 (1895) (When interpreting a deed, courts discern what the parties intended to convey by placing themselves in the position of the parties at the time of the conveyance.). "*What* are the boundaries is a matter of law to be determined by the court from the description set out in the conveyance. *Where* those boundaries may be located on the ground is a factual question to be resolved by the jury." *Batson v. Bell*, 249 N.C. 718, 719, 107 S.E.2d 562, 563 (1959) (emphasis added).

Here it is undisputed that the grantor intended to grant all of Lot 16 to plaintiffs' predecessor and all of Lot 8 to defendant's predecessor. Thus the meaning of the language of the deeds is not in dispute. What is unclear from the face of the conveyances is what land each

conveyance includes. Neither conveyance includes a metes and bounds description for the court to interpret as a matter of law. The chains of title of both plaintiffs and defendant simply use lot numbers and reference a recorded map. If the map were unambiguous then the court could determine the intent of the parties; however, here with reference only to a map, and that map being ambiguous, what the grantor intended the dividing boundary to be between Lots 16 and 8 remains unclear. Under these circumstances, the intent of the parties is a question of fact to be determined by a jury.

The map uses metes and bounds with defined corners for all the landlocked conveyances depicted. For those lots abutting water, it merely indicates the existence of the waterway and the water's approximate location. The map is unclear along the northern boundary of Lot 16. The map precisely locates the common corner of Lots 7, 16, and 8 as an iron pin ("common corner") on the northern edge, not in the centerline, of an old road, White Mill Road. While the map shows the dam, the dam does not extend all the way to this common corner. Thus, defendant's view that the dam is the boundary does not answer the question of what the boundary line is between the common corner and the beginning of the dam. Interpreting the map in the light most favorable to plaintiffs as required by the summary judgment standard, the grantor could well have intended to make the northern boundary of Lot 16 the high water line, giving water access to Lot 16.

Likewise, the southeastern corner of Lot 8 is unclear. Significantly, all of the lots with a terminus point in the pond have a metes and bounds description from a known point to a point in the pond, except the southern line of Lot 8. The line's metes and bounds description ends at the common corner of Lots 7, 16, and 8. The map itself does not prove the southern boundary of Lot 8 extends eastward beyond the common corner. According to plaintiffs, the boundary of their Lot 16 is the high water line, as illustrated by "Water Oak ●" on the map, marking the northeast corner of Lot 16, where the land meets the water of the mill pond inlet. The map shows defendant's eastern boundary to be in the mill pond, but the southeastern corner is unmarked. It certainly begs the question of why would a grantor remove water access to Lot 16 and give a thin sliver of land along the shoreline to Lot 8.

Since the intent of the parties as shown on the map is ambiguous, a jury issue exists. In interpreting all the forecasted evidence in the light most favorable to the nonmoving party, plaintiffs have established a prima facie case and presented sufficient evidence to withstand a summary judgment motion. As noted by the trial court and the Court of

Appeals, defendants have likewise provided sufficient evidence to create a genuine issue of material fact. At trial the parties can present all relevant evidence to establish the intent of the parties regarding ownership of the contested property pursuant to the 1916 map. Because a genuine issue of material fact exists, the decision of the Court of Appeals affirming the trial court's dismissal of plaintiffs' claim and granting summary judgment and other relief to defendant is reversed. This matter is remanded to the Court of Appeals for further remand to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

HAMLET H.M.A., LLC D/B/A SANDHILLS REGIONAL MEDICAL CENTER
v.
PEDRO HERNANDEZ, M.D.

No. 425A18

Filed 6 December 2019

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 821 S.E.2d 600 (2018), affirming in part the judgment entered on 9 January 2017 by Judge Richard T. Brown in Superior Court, Richmond County, and reversing and remanding the granting of a directed verdict as to defendant's unfair and deceptive trade practices counterclaim. Heard in the Supreme Court on 30 September 2019 in session in the J. Newton Cohen, Sr. Rowan County Administration Building in the City of Salisbury pursuant to section 18B.8 of Session Law 2017-57.

Freeman & Freeman, LLC, by William S. F. Freeman, for plaintiff.

Law Office of Mark L. Hayes, by Mark L. Hayes, for defendant.

Linwood Jones, for N.C. Healthcare Association, amicus curiae.

Josh Stein, Attorney General, by Ryan Y. Park, Deputy Solicitor General; K. D. Sturgis and Daniel Paul Mosteller, Special Deputy Attorneys General; and Laura H. McHenry, Assistant Attorney General; for State of North Carolina, amicus curiae.

Winslow Wetsch, PLLC, by Laura J. Wetsch; and Higgins Benjamin, by Jonathan Wall; for NC Advocates for Justice, amicus curiae.

PER CURIAM.

Justice DAVIS did not participate in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Piro v. McKeever*, 369 N.C. 291, 291, 794 S.E.2d 501, 501 (2016) (per curiam) (affirming a Court of Appeals opinion without precedential value by an equally divided vote).

AFFIRMED.

IN THE MATTER OF A.R.A., P.Z.A., Z.K.A.

No. 65A19

Filed 6 December 2019

1. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—findings of fact

Where the trial court terminated a mother's parental rights to her three children for failure to make reasonable progress toward correcting the conditions that led to the removal of her children, the findings challenged by the mother on appeal were supported by competent evidence. As the trier of fact, the trial court properly passed upon the credibility of witnesses and the weight of their testimony and drew reasonable inferences from the evidence.

2. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—sufficiency of findings

In a termination of parental rights case, the trial court's findings supported its conclusion that a mother failed to make reasonable progress under the circumstances toward correcting the conditions that led to the removal of her children, pursuant to N.C.G.S. § 7B-1111(a)(2). Although the mother argued that she complied with court-ordered services and therefore made reasonable progress, her argument failed to acknowledge that the primary reason for the removal of her children was the presence of the father—who had assaulted several of the children and the mother—in the home. The

mother had voluntarily placed the children in foster care so that she could live with the father, and he remained in the home throughout the termination hearing.

3. Termination of Parental Rights—best interest of the child—statutory factors

The trial court did not abuse its discretion by concluding that it would be in a child's best interest for his mother's parental rights to be terminated. Even assuming that the findings of fact challenged by the mother were erroneous, any such error would not support a conclusion that the trial court abused its discretion where the court properly considered the appropriate factors in N.C.G.S. § 7B-1110(a) and found that the child was almost nine years old and termination of his mother's parental rights would aid in achieving the permanent plan of adoption.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to determination in the Court of Appeals, of an order entered on 12 December 2018 by Judge Ali B. Paksoy in District Court, Cleveland County. This matter was calendared for argument in the Supreme Court on 7 November 2019 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Charles E. Wilson, Jr. for petitioner-appellee Cleveland County Department of Social Services.

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

Surratt Thompson & Ceberio PLLC, by Christopher M. Watford, for respondent-appellant mother.

MORGAN, Justice.

Respondent-mother appeals from the district court's 12 December 2018 order terminating her parental rights to A.R.A. (Amy), P.Z.A. (Peter), and Z.K.A. (Zara) (collectively, the children).[1] We affirm.

1. Pseudonyms have been used to protect the identity of the juveniles and for ease of reading.

The Cleveland County Department of Social Services (DSS) has an extensive history of involvement with respondent-mother and the father[2] of the juveniles in this matter, based upon the father's substance abuse and domestic violence issues. In 2013, the father was convicted of assaulting Amy and respondent-mother. In 2015, the father assaulted Peter and threatened to kill Peter and respondent-mother. The father assaulted Amy again in 2015, resulting in a conviction of habitual misdemeanor assault. After serving time in prison for the habitual misdemeanor assault conviction, the father was released from incarceration in October 2016. In December 2016, respondent-mother allowed the father to return to the home where she lived with the children, despite his prior assaults on them and in violation of a specific condition of the father's post-release supervision conditions.

On 20 December 2016, respondent-mother voluntarily placed all three children in foster care so that the father could reside in the family home with her. On 13 January 2017, DSS obtained nonsecure custody of the children and filed a juvenile petition alleging that the children were neglected juveniles. In its petition, DSS alleged that respondent-mother and the father had repeatedly failed to comply and cooperate with DSS and the court to assist the parents in keeping the children safe and in avoiding the need for an out-of-home placement.

The district court entered a combined adjudication and disposition order on 24 March 2017. Based upon stipulations made by the parties, the children were adjudicated to be neglected juveniles, and custody of the juveniles was continued with DSS. Respondent-mother was ordered to complete a court-approved parenting education program; demonstrate appropriate parenting skills and an understanding of how substance abuse and domestic violence affects the children; complete an assessment by the Abuse Prevention Council (APC) or another court-approved domestic violence victims' program and comply with all recommendations for treatment; and demonstrate her ability to provide a safe and stable home environment consistent with county minimum standards and that is free from substance abuse and domestic violence for a minimum of six months. The father was ordered to comply with similar requirements, with the additional requirements

2. The father filed timely notice of appeal to this Court from the termination order, but subsequently filed a motion to withdraw his appeal on 10 June 2019. This Court allowed the father's motion to withdraw his appeal by order entered 1 July 2019. Although the father therefore is not a party to this appeal, his actions and presence in respondent-mother's case are highly relevant. Accordingly, we discuss the father's involvement with the matter in significant detail.

of completing a substance abuse assessment; obtaining assessment through a domestic violence batterer's program; and complying with all resulting recommendations.

At a review hearing held on 14 June 2017, pursuant to N.C.G.S. § 7B-906.1, the district court found that respondent-mother and the father had continued to reside together. Respondent-mother had started parenting classes and the APC program, but had missed two sessions of the APC program.

On 1 November 2017, the district court held a permanency planning hearing pursuant to N.C.G.S. § 7B-906.1, at which respondent-mother stated that it was Amy who had wanted the father to return to the family home upon his release from prison. In an order entered on 14 November 2017, the district court found that respondent-mother and the father continued to reside together, and that they continued to deny or minimize the impact that their substance abuse and history of domestic violence had upon the children. Respondent-mother completed a parenting program in July 2017, but, at the time of the hearing, had completed only four out of the twelve sessions required by the APC program. The district court further found that respondent-mother and the father both tested positive for marijuana in September 2017. The district court adopted a primary permanent plan of reunification with a secondary permanent plan of custody with a court-approved caretaker.

On 20 December 2017, the district court held a permanency planning review hearing. The district court entered an order on 11 January 2018 finding that, although respondent-mother and the father had made some effort to comply with the court's requirements, they had not demonstrated to the court any significant progress in correcting the conditions that led to the children's removal from their care. Respondent-mother was scheduled to complete the APC program on 22 December 2017 but had failed to comply with the court's recommendations for mental health services and substance abuse treatment. Both parents continued to deny responsibility for their situation and placed the blame on the children, particularly Amy. In its January 2018 order, the district court changed the primary permanent plan to adoption, concurrent with a secondary permanent plan of reunification.

On 22 January 2018, DSS filed a petition to terminate the parental rights of respondent-mother and the father on the grounds of neglect, willful failure to make reasonable progress, and willful failure to pay a reasonable portion of the cost of care. *See* N.C.G.S. § 7B-1111(a)(1)–(3) (2017). The district court held hearings on the 2018 dates of 18 July,

25 September, and 16 November, and on 12 December 2018, entered an order finding that the evidence in the case established facts sufficient to support the termination of respondent-mother's and father's parental rights on the grounds of neglect and willful failure to make reasonable progress. The district court further concluded that it was in the children's best interests that both parents' parental rights be terminated. Accordingly, the district court terminated the parental rights of respondent-mother and the father.

Respondent-mother gave timely notice of appeal to the North Carolina Court of Appeals. On 8 April 2019, respondent-mother filed a petition with this Court seeking discretionary review of the order terminating her parental rights, prior to a determination of the Court of Appeals. This Court allowed respondent-mother's petition for discretionary review on 1 May 2019.

The North Carolina Juvenile Code provides for a two-stage process for the termination of parental rights: adjudication and disposition. N.C.G.S. §§ 7B-1109, -1110 (2017). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under N.C.G.S. § 7B-1111(a). N.C.G.S. § 7B-1109(f). We review a district court's adjudication under N.C.G.S. § 7B-1109 "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984) (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). "If [the district court] determines that one or more grounds listed in section 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110).

Respondent-mother challenges both grounds for termination as found by the district court. Because a finding of only one ground is necessary to support a termination of parental rights, we only address respondent-mother's argument regarding the basis for termination of her willful failure to make reasonable progress. *See In re T.N.H.*, 831 S.E.2d 54, 62 (N.C. 2019). A district court may terminate a parent's parental rights pursuant to Section 7B-1111(a)(2) if the parent "has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in

correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2).

The findings in the adjudication order indicate that the father's issues with substance abuse, the commission of domestic violence in the presence of the children, and respondent-mother's failure to protect the children by allowing the father to reside in the home were the underlying reasons for the children's removal. The district court observed that upon intervention by DSS, respondent-mother elected to voluntarily place the children in foster care "so that the . . . father could reside in the home with her." In its termination order, the district court found that respondent-mother had continued to live with the father since December 2016. Instead of protecting the children, respondent-mother continued to blame the children, as well as other people such as the father's probation officer, for the father's return to the home. She continued to defend the father throughout the termination hearing. The district court further found that because respondent-mother displayed "a lack of understanding or acceptance of responsibility for the circumstances and conditions that led to the [children's] removal," she had failed to demonstrate to the satisfaction of the district court that she had made reasonable progress under the circumstances in correcting those conditions.

[1] On appeal, respondent-mother initially challenges several of the district court's findings of fact. Those findings of fact which she does not challenge are deemed to be supported by competent evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citing *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962); *Williams v. Williams*, 97 N.C. App. 118, 121, 387 S.E.2d 217, 219 (1990)). Moreover, we limit our review of challenged findings to those that are necessary to support the district court's determination that this ground of respondent-mother's willful failure to make reasonable progress existed in order to terminate her parental rights. *In re T.N.H.*, 831 S.E.2d at 58–59 (citing *In re Moore*, 306 N.C. at 404, 293 S.E.2d at 133).

Respondent-mother challenges finding of fact 47, which states:

> That the . . . parents did not give the Social Worker their address until August 21, 2018. However, the parents have continued, th[r]ough this termination hearing, to refuse the Social Worker access to their home . . . . The [parents] have therefore not established safe and stable housing.

Specifically, respondent-mother argues that her testimony directly contradicts the court's finding that the parents refused access to the home

and contends that the district court impermissibly shifted the burden of proof onto respondent-mother to prove at the termination hearing the existence of safe and stable housing. We disagree.

Other, unchallenged findings of fact indicate that respondent-mother and the father had been evicted from their residence in January 2018 and had either refused or failed to provide a new address to the DSS social worker between January and June 2018, making it difficult for the social worker to conduct the home visits necessary to assess respondent-mother's ability to provide safe and stable housing. At the termination hearing, a DSS social worker testified that respondent-mother and the father had provided a new home address to her on 21 August 2018. However, the social worker was refused access to the home and, therefore, was unable to determine whether or not it was appropriate for the children. The social worker further testified that she made four attempts to visit the home and in all four instances, the parents canceled the visits. Although respondent-mother testified that she "was not aware of the first time that [the social worker] was gonna visit" and that she was called in to work on the other days that she was scheduled to meet with the social worker, it is well-established that a district court "ha[s] the responsibility to 'pass[ ] upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom.' " *In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167–68 (quoting *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968)).

Thus, it was reasonable for the district court to infer that by repeatedly canceling home visits, respondent-mother and the father were preventing the social worker from having access to their home. Moreover, the district court did not improperly shift DSS' burden of proof onto respondent-mother. Rather, the court simply observed that respondent-mother had failed to rebut DSS' clear, cogent, and convincing evidence that she and the father had not established safe and stable housing for the children. *See*, *e.g.*, *In re Clark*, 72 N.C. App. 118, 125, 323 S.E.2d 754, 758 (1984) (holding that instead of shifting the burden of proof, the challenged finding was "nothing more than an accurate statement of the procedural stance of the case. The finding recites only that the respondents did not produce evidence that contradicted the allegations set forth in the petition.").

Next, respondent-mother challenges the portion of finding of fact 49 that provides that the parents "have failed to complete their case plan." Respondent-mother claims that she has completed the only case plan referenced in the underlying record.

Unchallenged findings of fact establish that respondent-mother was required to complete a parenting education program and demonstrate appropriate parenting skills, to complete an assessment through APC and comply with recommendations for treatment, and to provide a safe and stable home which was free from substance abuse and domestic violence. While the evidence shows that respondent-mother made some progress in her case plan by completing the APC program and a parenting education program, nonetheless clear, cogent, and convincing evidence also demonstrates that she failed to establish an ability to provide a safe and stable home environment for the children. Thus, these findings are supported by the evidence and establish that respondent-mother failed to complete her case plan.

Lastly, respondent-mother challenges the portion of finding of fact 51 that provides that she "has demonstrated that her relationship with the . . . father takes priority over the safety of her children." She argues that the district court erred by finding that she prioritized her relationship with the father over the safety of the children, where there was no evidence that the parents had engaged in domestic violence or that the father had engaged in abusive behavior during visits.

The unchallenged findings of fact reveal that respondent-mother voluntarily placed the children in DSS custody so that the father could live with her, that she consistently blamed others for the father's return to the home, and that she continued to defend the father throughout the termination hearing. Additional unchallenged findings of fact demonstrate that the father denied responsibility for assaulting the children and that he failed to acknowledge responsibility for the children's removal from the home. Although the father failed to comply with his case plan, respondent-mother continued to live with the father from the time that the children were removed from the home until the termination hearing. As the trier of fact, the district court reasonably inferred that even where there was no evidence of domestic violence occurring between the parents after the children's removal, respondent-mother's actions nevertheless indicated that she placed the importance of her relationship with the father over the safety of her children.

[2] Secondly, respondent-mother contends that the district court erred by concluding that a ground existed to terminate her parental rights under N.C.G.S. § 7B-1111(a)(2) where she complied with court-ordered services. Respondent-mother submits that she made "reasonable progress under the circumstances to correct those conditions concerning inappropriate parenting choices and exposure of the children to past domestic violence which were the grav[a]men of the concerns originally raised in December 2016." We are not persuaded by this assertion.

Respondent-mother's argument disregards the primary reason for the removal of her children—the presence of the father in the home. The district court's findings of fact demonstrate that respondent-mother failed to protect her children by allowing the father, who had assaulted Amy, Peter, and respondent-mother, to return to the family home. Instead, respondent-mother voluntarily placed the children into DSS custody so that she could live with the father. She continued to live with him through the time of the termination hearing. The district court further found that, at the time of the termination hearing, respondent-mother continued to deny the effect the father's domestic abuse had on the children and to blame others, including the children, for the father's return to the home. Throughout the termination hearing, respondent-mother displayed a lack of understanding or acceptance of responsibility for the conditions that led to the children's removal. Based on the foregoing, we conclude that the district court's findings support its conclusion that respondent-mother failed to make reasonable progress under the circumstances toward correcting the conditions that led to the removal of the children.

[3] Finally, respondent-mother argues that the district court abused its discretion by concluding that it would be in Peter's best interest that respondent-mother's parental rights be terminated. She asserts that several of the district court's dispositional findings of fact are not supported by the evidence and that the district court failed to make sufficient findings regarding the factors set forth in N.C.G.S. § 7B-1110(a).

Once the district court finds at least one ground to terminate parental rights pursuant to N.C.G.S. § 7B-1111(a), it proceeds to the dispositional stage where it must "determine whether terminating the parent's rights is in the juvenile's best interest" based on the following factors:

(1) The age of the juvenile.

(2) The likelihood of adoption of the juvenile.

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

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

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

(6) Any relevant consideration.

N.C.G.S. § 7B-1110(a). The district court's assessment of a juvenile's best interest at the dispositional stage is reviewed only for abuse of discretion. *In re D.L.W.*, 368 N.C. at 842, 788 S.E.2d at 167 (citations omitted). " '[A]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

First, respondent-mother disputes some of the findings of fact contained in the dispositional portion of the district court's order. She contends that a portion of finding of fact 69, stating that the parents had been advised of Peter's appointments with his most recent therapist, was not supported by the evidence. Respondent-mother also posits that portions of findings of fact 70, 71, and 74 are not proper findings of fact because they are not determinations made from logical reasoning or because they lack evidentiary support. However, assuming *arguendo* that the challenged findings are erroneous, any such error would not support the conclusion that the district court abused its discretion in light of the evidence presented at disposition and the court's remaining findings, as we shall now address.

Respondent-mother argues that the district court did not make sufficient findings regarding the factors set forth in N.C.G.S. § 7B-1110(a). Specifically, she contends that the district court should have made findings concerning the likelihood of Peter's adoption; the bond between Peter and respondent-mother; and the quality of the relationship between Peter and the proposed adoptive parent, guardian, custodian, or other placement. *See* N.C.G.S. § 7B-1110(a)(2), (4), (5).

"It is clear that a [district] court must *consider* all of the factors in section 7B-1110(a). . . . The statute does not, however, explicitly require written findings as to each factor." *In re A.U.D.*, 832 S.E.2d 698, 702 (N.C. 2019). We agree with the Court of Appeals that the district court is only required to make written findings regarding those factors that are relevant. *In re D.H.*, 232 N.C. App. 217, 221, 753 S.E.2d 732, 735 (2014). We also agree with the Court of Appeals that "a factor is 'relevant' if there is 'conflicting evidence concerning' the factor, such that it is 'placed in issue by virtue of the evidence presented before the [district] court[.]' " *In re H.D.*, 239 N.C. App. 318, 327, 768 S.E.2d 860, 866 (2015) (quoting *In re D.H.*, 232 N.C. App. at 222 n.3, 753 S.E.2d at 735 n.3).

In the present case, the transcript of the hearing demonstrates that the district court properly considered the appropriate factors. The

district court found that Peter was almost nine years old and that the termination of respondent-mother's parental rights would aid in achieving the permanent plan of adoption. *See* N.C.G.S. § 7B-1110(a)(1), (3). With regard to N.C.G.S. § 7B-1110(a)(2), there was no conflict in the evidence regarding the likelihood of Peter's adoption. The DSS social worker testified that, although Peter was not currently in a pre-adoptive placement, the goal was to get him to a "point of stability that we can secure a pre-adoptive placement for him." The social worker went on to testify that there would be a greater likelihood for Peter to be adopted or to be in an adoptive placement once he became available for adoption, and that there was no reason to believe that he could not eventually be adopted. We believe that the district court made the requisite finding regarding the factor addressed in N.C.G.S. § 7B-1110(a)(4) when it found that any previous bond or relationship with the respondent-mother was outweighed by Peter's need for permanence. Lastly, as to N.C.G.S. § 7B-1110(a)(5), the district court was not required to make a finding regarding the quality of the relationship between Peter and the proposed adoptive parent, guardian, custodian, or other permanent placement, since there was no potential adoptive parent at the time of the hearing. *See In re D.H.*, 232 N.C. App. at 223, 753 S.E.2d at 736 ("[T]he absence of an adoptive placement for a juvenile at the time of the termination hearing is not a bar to terminating parental rights.").

In addition to the statutory factors set out in N.C.G.S. § 7B-1110(a)(1)–(5), the district court considered other relevant factors, as it was permitted to do under N.C.G.S. § 7B-1110(a)(6), such as the facts that Peter had been in his therapeutic placement since September 2018 and was doing well in the placement; Peter had a strong bond with his current foster family and was forming a long-term attachment to the family; Peter was receiving structure and stability from the foster family; Peter needed permanence and continued therapy; and respondent-mother was no longer participating in Peter's therapy and had not called to inquire about Peter's welfare. Based on the foregoing analysis, we are satisfied that the district court's conclusion that termination of respondent-mother's parental rights was in Peter's best interest was neither arbitrary nor manifestly unsupported by reason.

For the reasons stated above, we affirm the 12 December 2018 order of the district court terminating respondent-mother's parental rights.

AFFIRMED.

IN RE I.G.C.

[373 N.C. 201 (2019)]

IN THE MATTER OF I.G.C., J.D.D.

No. 105A19

Filed 6 December 2019

1. Termination of Parental Rights—neglect and willful abandonment—case plan compliance—limited progress

The trial court's order terminating a mother's parental rights to her children on the basis of neglect and willful abandonment was affirmed where the court's findings that the mother did not maintain stable employment or housing for at least six months and that she did not complete the recommended treatment for substance abuse and domestic violence were supported by competent evidence, and where the mother admitted to not feeling comfortable being reunified with her children until a much later date for fear of suffering a relapse. The findings of fact supported the trial court's conclusion that the mother had not made reasonable progress on her case plan, which in turn supported the grounds for termination of parental rights.

2. Termination of Parental Rights—no-merit brief—neglect and willful abandonment

The trial court's termination of a father's parental rights to his children for neglect and willful abandonment was affirmed where the father's counsel filed a no-merit brief. The trial court's order was supported by competent evidence and based on proper legal grounds.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 2 January 2019 by Judge F. Warren Hughes in District Court, Madison County. This matter was calendared in the Supreme Court on 7 November 2019 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Hockaday & Hockaday, P.A., by Daniel M. Hockaday, for petitioner-appellee Madison County Department of Social Services.

Patrick, Harper & Dixon, LLP, by Amanda C. Perez, for appellee Guardian ad Litem.

Wendy C. Sotolongo, Parent Defender, by J. Lee Gilliam, Assistant Parent Defender, for respondent-appellant father.

Edward Eldred for respondent-appellant mother.

MORGAN, Justice.

Respondents, the parents of the minor children I.G.C. (Ivy) and J.D.D. (Jacob)[1] (collectively, the children), appeal from the district court's orders terminating their parental rights. We conclude that the district court made sufficient findings of fact, based on clear, cogent, and convincing evidence, to support the court's conclusions that grounds existed to terminate respondents' parental rights, and that such termination was in the children's best interests. Accordingly, we affirm the district court's orders.

Factual Background and Procedural History

On 27 September 2016, the Madison County Department of Social Services (DSS) filed petitions alleging that Ivy and Jacob were neglected and dependent juveniles. DSS had received a report on 6 September 2016, indicating that respondent-mother was drinking alcohol, using methamphetamines on a daily basis, and driving with the children while she was intoxicated. After DSS initiated a case to investigate this report, respondent-mother twice drove to the DSS office after drinking, registering a .07 reading on the breathalyzer test on one occasion and a .03 reading on the other. Ivy disclosed to DSS an incident during which respondent-mother drank "a little" and then hit a guardrail with Ivy in the vehicle. The female juvenile further disclosed that respondents had a "big fight" with each other while at a birthday party. Respondent-mother reported to DSS that respondent-father consumed alcohol, used methamphetamines, and smoked crack cocaine. DSS obtained nonsecure custody of both juveniles.

On 4 November 2016, the district court entered an order which adjudicated Ivy and Jacob as dependent juveniles. Although respondents both consented to an adjudication of neglect based upon the facts alleged in the petition and recounted above, the district court dismissed the neglect allegations. The dependency order from the district court, however, incorporated, *inter alia*, the above-stated facts as the basis for the children's removal from respondents' home and ordered respondents to enter into case plans with DSS within ten days of the trial court's adjudication order. The children remained in the custody of DSS. Respondent-mother's case plan contained eleven requirements designed to address her issues with parenting, substance abuse, mental health, domestic violence, stable housing, and employment. As part of the case

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

plan, respondent-mother was not to incur any new criminal charges and was required to attend all scheduled visitations and team meetings with DSS. Respondent-father's case plan included similar requirements.

On 23 October 2017, the district court entered a permanency planning order which found that respondents had only made minimal progress toward completing their respective case plans. The permanent plan was set as adoption, with a concurrent plan of guardianship. The district court relieved DSS of further reunification efforts and ordered DSS to file termination of parental rights petitions within sixty days.

On 18 January 2018, DSS filed motions in the cause to terminate respondents' parental rights on the grounds of neglect, willfully leaving the children in a placement outside the home for more than twelve months without making reasonable progress in correcting the removal conditions, and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(1), (2), (7) (2017). The termination hearing was conducted during the time period of 25-26 September 2018. On 2 January 2019, the district court entered orders finding that the evidence established facts sufficient to support the termination of both respondents' parental rights pursuant to N.C.G.S. § 7B-1111(a)(1)–(2). The district court also concluded that it was in the children's best interests for the parents' rights to be terminated and therefore, terminated respondents' parental rights. Each respondent appealed to this Court pursuant to N.C.G.S. §§ 7A-27(a)(5) and 7B-1001(a1)(1).

Respondent-mother's Appeal

[1] Respondent-mother argues that the district court erred by concluding that grounds existed to terminate her parental rights. She contends that the district court's ultimate findings and conclusions as to grounds for termination were unsupported in light of the evidence presented regarding the progress that respondent-mother had made in completing her case plan by the time of the termination hearing. We disagree.

A termination of parental rights proceeding consists of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2017); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under section 7B-1111(a) of our General Statutes. N.C.G.S. § 7B-1109(e), (f). We review a district court's adjudication "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. at 111, 316 S.E.2d at 253 (citing *In re Moore*,

306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). If the petitioner meets its burden during the adjudicatory stage, "the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110).

Section 7B-1111(a)(2) allows for the termination of parental rights if "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2).

Respondent-mother's limited achievements in correcting the circumstances that led to the removal of the children throughout the history of this case are well-documented in the district court's findings of fact. She appears to tacitly accept that the district court's finding that she "made minimal progress on her DSS case plan . . . until after the [c]ourt[-]ordered efforts ceased in September[ ] 2017" was supported by the evidence. Respondent-mother concedes that the court properly found that she never completed a substance abuse intensive outpatient program (SAIOP) or inpatient substance abuse treatment, as recommended, never completed a recommended eighteen-week domestic violence program, missed seventeen of thirty-nine drug screens and tested positive on two other occasions, and committed two driving while intoxicated (DWI) offenses after she entered into the case plan.

Respondent-mother does, however, challenge the content and the context of many of the district court's findings regarding her progress between the court's cessation of reunification efforts and the termination hearing. We limit our review of challenged findings to those that are necessary to support the district court's determination that the stated ground existed to terminate respondent's parental rights. *In re T.N.H.*, 831 S.E.2d 54, 58–59 (N.C. 2019) (citing *In re Moore*, 306 N.C. at 404, 293 S.E.2d at 133).

First, respondent-mother argues that the district court incorrectly found that she had not maintained stable employment for a minimum of six months. This argument is contrary to respondent-mother's own testimony at the termination hearing, in which she acknowledged that, after a five-month gap in employment, she started a job at Dollar Tree in April 2018, less than six months before the termination hearing.

Respondent-mother next asserts that the district court erred by finding that she failed to obtain stable housing for at least six months. She candidly acknowledges that the court correctly found that she had "moved at least four (4) times during the pendency of this case," yet represents that her frequent residential changes did not signal instability. Respondent-mother also claims that she had been residing at her current address for six months. The district court found that respondent-mother had been living at her current residence since April 2018. The termination hearing occurred at the end of September 2018, meaning that respondent-mother was days shy of having resided at the residence for the designated six-month minimum period of time. In light of this computation of time, respondent-mother had not yet fully achieved a full six-months of stable housing, thus verifying the correctness of the district court's finding on this matter. Moreover, the district court did not err in interpreting respondent-mother's frequent moves as further evidence of housing instability.

Respondent-mother further urges us to determine that the district court's findings were improper in that its assessment of her progress with parenting skills and substance abuse, mental health, and domestic violence treatment did not fairly credit the progress that she had made in these areas. Indeed, although the court found that respondent-mother had completed multiple parenting courses, had participated in treatment for substance abuse and domestic violence, and had achieved three recent negative drug screens, the district court also found that the substance abuse and domestic violence treatments were at a lower level of duration and intensity than recommended and were never approved by the tribunal. For instance, instead of the eighteen-week substance abuse program required by her case plan, respondent-mother only "participated in a six[-]week program with a non-licensed therapist[.]" Respondent-mother also never completed an SAIOP or inpatient substance abuse treatment. Thus, while respondent-mother was making some progress as of the time of the termination hearing, it was not the level of progress required by her case plan. By respondent-mother's own admission during the termination hearing, she would not feel comfortable having the children returned to her care for another "year, year and a half" because she feared the possibility that she would relapse. While respondent-mother was getting closer to completing various aspects of her case plan such as maintaining stable housing and employment, she still failed to complete the recommended treatment needed to fully address the core issues of substance abuse and domestic violence which had played the largest roles in the children's removal.

The district court's findings reflect that it considered all of respondent-mother's efforts up to the time of the termination hearing, weighed the evidence before it, and then made findings which showed that respondent-mother waited too long to begin working on her case plan and that, as a result, she had not made reasonable progress toward correcting the conditions that led to the children's removal by the time of the termination hearing. Therefore, the court properly concluded that respondent-mother's rights should be terminated based upon that failure.

The district court's conclusion that the ground of failure to make reasonable progress existed pursuant to N.C.G.S. § 7B-1111(a)(2) is sufficient in and of itself to support termination of respondent-mother's parental rights. *See In re T.N.H.*, 831 S.E.2d at 62. Furthermore, respondent-mother does not challenge the court's conclusion that termination of her parental rights was in her children's best interests. *See* N.C.G.S. § 7B-1110(a). Accordingly, we affirm the district court's orders terminating respondent-mother's parental rights.

Respondent-father's Appeal

[2] Counsel for respondent-father has filed a no-merit brief on behalf of this parent pursuant to N.C. R. App. P. 3.1(e). Counsel has advised respondent-father of his right to file pro se written arguments on his own behalf and has provided respondent-father with the documents necessary to do so. Respondent-father has not submitted any written arguments to this Court.

We independently review issues contained in a no-merit brief filed pursuant to Rule 3.1(e). *In re L.E.M.*, 831 S.E.2d 341, 345 (N.C. 2019). Respondent-father's attorney filed a twenty-two-page brief in which counsel identified three issues that could arguably support an appeal, but also explained why counsel believed that each of the issues lacked merit. Based upon our careful review of the issues identified in the no-merit brief in light of our consideration of the entire record, we are satisfied that the district court's 2 January 2019 orders were supported by competent evidence and based on proper legal grounds. Consequently, we affirm the district court's orders terminating respondent-father's parental rights.

AFFIRMED.

IN RE Z.V.A.

[373 N.C. 207 (2019)]

IN THE MATTER OF Z.V.A.

No. 180A19

Filed 6 December 2019

1. Termination of Parental Rights—competency of parent—intellectual disability

In a termination of parental rights case, the trial court did not abuse its discretion by not conducting an inquiry into a mother's competency where the mother had a mild intellectual disability but had been able to work and attend school.

2. Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect

The trial court's conclusion that a father's parental rights were subject to termination based on neglect was supported by the evidence where the father was willing to leave the child alone with her mother even though the mother was unfit for such responsibility, the parents exhibited marital discord during supervised visits with their child, and the parents intended to remain together.

3. Termination of Parental Rights—judicial bias—permanent plan—adoption—child's best interest

The Supreme Court rejected an argument that the trial court was unfairly biased against parents in a termination of parental rights case where the trial court made a statement regarding its previous decision to send the child to live with her out-of-state aunt. At the time of that decision, the district court had already changed the primary permanent plan to adoption, and the statement in question was merely an explanation that the court had decided those steps were in the child's best interest at the time—rather than a definitive decision to terminate the parents' rights months before the termination hearing.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 1 March 2019 by Judge J.H. Corpening II in District Court, New Hanover County. This matter was calendared in the Supreme Court on 7 November 2019 but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Jill Cairo for petitioner-appellee Social Services of New Hanover County and K&L Gates LLP, by Abigail F. Williams, for appellee Guardian ad Litem.

David A. Perez for respondent-appellant father.

Richard Croutharmel for respondent-appellant mother.

MORGAN, Justice.

Respondent-father, who is the legal father of the minor child Z.V.A. (Zoey[1]), and respondent-mother appeal from the district court's order terminating their parental rights to Zoey. We affirm.

Factual Background and Procedural History

On 15 December 2016, the New Hanover County Department of Social Services (DSS) received a Child Protective Services report regarding three-day-old Zoey. The report indicated that there was domestic violence between respondent-parents, that respondent-father had issues with alcohol and assaultive behavior, and that respondent-mother had developmental and cognitive issues. In response to the report, DSS began providing in-home services to the family. DSS had previously worked with respondent-parents from 2012 to 2015 in an attempt to address issues with an older child. However, the previous case ended with respondent-father relinquishing his parental rights to the older child and respondent-mother having her parental rights terminated by order of the court.

On 30 March 2017, a DSS social worker visiting respondent-parents' residence noticed that respondent-mother had recently been crying. When asked about her emotional state, respondent-mother reported that respondent-father had become angry and had struck respondent-mother while she was putting Zoey down for a nap. On 3 April 2017, DSS filed a petition alleging that Zoey was a neglected and dependent juvenile. Zoey was placed in the nonsecure custody of DSS.

On 12 July 2017, the district court entered an order adjudicating Zoey as a neglected juvenile based on findings of fact to which respondent-parents stipulated. Respondent-parents were both ordered to complete psychological evaluations and vocational rehabilitation

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

services, and to comply with any resulting recommendations; to engage in parenting education programs; to refrain from drug and alcohol use; and to provide an adequate living environment for Zoey. Respondent-father was additionally ordered to participate in paternity testing and to engage in domestic violence programs. Zoey remained in DSS custody.

On 22 June 2018, the district court entered a permanency planning order. The district court detailed the progress made by respondent-parents on their respective case plans. The district court also found that respondent-parents were unable to translate what they supposedly learned while working their case plans into successfully changing their behaviors, and as a result, Zoey could not be returned to the family home. The district court set the permanent plan as adoption with a concurrent plan of reunification and ordered DSS to proceed with termination of respondents' parental rights.

On 2 July 2018, DSS filed a petition to terminate respondents' parental rights pursuant to N.C.G.S. § 7B-1111(a)(1)–(2) (2017). On 10 July 2018, Zoey was placed with her maternal aunt in New Jersey.

The termination hearing was conducted from 29–31 October 2018. On 1 March 2019, the district court entered an order finding that the evidence established facts sufficient to support the termination of both respondents' parental rights pursuant to N.C.G.S. § 7B-1111(a)(1).[2] The district court also concluded that it was in Zoey's best interest for her parents' rights to be terminated and thereupon, terminated respondents' parental rights. Respondents each gave timely notice of appeal to this Court pursuant to N.C.G.S. §§ 7A-27(a)(5) and 7B-1001(a1)(1).[3]

Respondent-Mother's Competency

[1] Respondent-mother argues that the district court abused its discretion by failing to address whether she required a guardian *ad litem* under N.C.G.S. § 1A-1, Rule 17 (2017). Respondent-mother contends that the evidence presented at the termination hearing demonstrated that she was unable to manage her own affairs. In our view, the district court did not abuse its discretion here.

Section 7B-1101.1(c) of the North Carolina General Statutes permits the district court, either on the motion of a party or on its own motion,

2. The district court dismissed the other ground for termination alleged by DSS.

3. Evidence was presented that respondent-father was not Zoey's biological father, but no biological father was able to be identified. The rights of the putative biological father and any unknown fathers were also terminated by the district court, but they are not parties to this appeal.

to appoint a guardian *ad litem* for an incompetent parent. An incompetent adult is defined as one "who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition." N.C.G.S. § 35A-1101(7) (Supp. 2018).

District "court decisions concerning both the appointment of a guardian *ad litem* and the extent to which an inquiry concerning a parent's competence should be conducted are reviewed on appeal using an abuse of discretion standard." *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015). "An '[a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* (alteration in original) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)). As this Court has previously explained, the district court is afforded substantial deference with respect to its decisions involving a party's competence, because it "actually interacts with the litigant whose competence is alleged to be in question and has, for that reason, a much better basis for assessing the litigant's mental condition than that available to the members of an appellate court, who are limited to reviewing a cold, written record." *Id.* at 108, 772 S.E.2d at 456. Thus,

> when the record contains an appreciable amount of evidence tending to show that the litigant whose mental condition is at issue is not incompetent, the [district] court should not, *except in the most extreme instances*, be held on appeal to have abused its discretion by failing to inquire into that litigant's competence.

Id. at 108–09, 772 S.E.2d at 456 (emphasis added).

The instant case does not present such an extreme instance. As reflected by the record evidence underlying the district court's unchallenged findings of fact, although respondent-mother's approximate IQ of 64 indicates a mental disability, the psychologist who examined respondent-mother diagnosed her with only a "mild intellectual disability" because respondent-mother had been able to work and to attend school. Moreover, the district court found that respondent-mother demonstrated that she had developed adaptive skills to lessen the impact of her disability, and that while working on her case plan, respondent-mother completed empowerment classes to help address the issues of domestic violence in her relationship. The evidence

which supported these findings of fact does not suggest that respondent-mother's disability rose to the level of incompetence so as to require the appointment of a guardian *ad litem* to safeguard respondent-mother's interests. Accordingly, we conclude that the district court did not abuse its discretion when it did not conduct an inquiry into respondent-mother's competency.

Adjudication of Neglect as to Respondent-Father

[2] Respondent-father argues that no clear, cogent and competent evidence supports the district court's findings of fact which in turn led to its conclusion of law that his parental rights should be terminated based upon his neglect of Zoey.

Termination of parental rights proceedings consist of two stages: adjudication and disposition. N.C.G.S. §§ 7B-1109, -1110 (2017); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). At the adjudicatory stage, the petitioner must prove by "clear, cogent, and convincing evidence" that one or more grounds for termination exist under section 7B-1111(a) of our General Statutes. N.C.G.S. § 7B-1109(e), (f) (2017). Thus, we review a district court's adjudication "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. at 111, 316 S.E.2d at 253 (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). Unchallenged findings of fact made at the adjudicatory stage are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citing *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962)). If the petitioner proves at least one ground for termination during the adjudicatory stage, "the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110).

Pursuant to Section 7B-1111(a)(1), termination of parental rights is proper where a district court finds a parent has neglected his or her child to such an extent that the child is a "neglected juvenile." N.C.G.S. § 7B-1111(a)(1). For purposes of a termination proceeding, a neglected juvenile is, *inter alia*, one "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare[.]" N.C.G.S. § 7B-101(15) (Supp. 2018).

When it cannot be shown that a parent is neglecting his or her child at the time of the termination hearing because "the child has been

separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167 (citing *In re Ballard*, 311 N.C. 708, 713–15, 319 S.E.2d 227, 231–32 (1984)). Respondent-father here does not dispute that there was past neglect in this case; he challenges only the district court's determination that future neglect is likely if Zoey were to be returned to his care. When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing. *In re Ballard*, 311 N.C. at 715, 319 S.E.2d at 232. "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *Id.*

The district court's determination in the present case that neglect would likely be repeated if Zoey was returned to respondent-father was intrinsically linked to respondent-father's inability to sever his relationship with respondent-mother. The unchallenged findings of fact reflect that respondent-mother struggled with basic parenting skills and relied on respondent-father as a main support for parenting. Although respondent-mother failed to demonstrate that she could independently parent Zoey safely and appropriately, respondent-father would not commit to DSS that he would not leave Zoey alone with respondent-mother, and he declined to have visitation with Zoey separately from respondent-mother.

Respondent-father notes that he testified during the termination hearing that he did not fully understand how his unwillingness to ensure that Zoey was not left alone with respondent-mother was affecting his ability to have Zoey returned to him. He further stated that he would yield on this issue if it meant he could retain his parental rights. However, the district court was not required to credit this testimonial evidence, particularly in light of other testimony admitted during the hearing. *See In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167–68 ("[The district court] judge ha[s] the responsibility to 'pass[ ] upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom.' " (second alteration in original) (quoting *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968)).

In other portions of his testimony, respondent-father acknowledged that he had multiple conversations with the social worker about respondent-mother's parenting limitations and that respondent-father had responded to DSS's concerns by advocating for respondent-mother

to be given another chance at parenting. The DSS social worker testified that respondent-father would not promise her that he would not leave Zoey alone in respondent-mother's care, even though he was repeatedly asked to make that promise. Based on these repeated interactions and respondent-father's consistent view toward this concern of DSS, the district court could properly assume that respondent-father would allow Zoey to be left alone in respondent-mother's care in the future.

This caution exercised by DSS for Zoey's well-being was amplified when respondent-father and respondent-mother would parent Zoey together during visits and legitimized its position about respondent-mother's interactions with the child. The district court made unchallenged findings of fact that during such parental visits, respondent-father would speak to respondent-mother "in an aggressive, harsh and negative manner" and that he used his body to invade respondent-mother's personal space. In response, respondent-mother would do things intended to upset respondent-father. The social worker testified that these types of behaviors continued throughout the social worker's supervised visits of respondent-parents with Zoey. Even after respondent-parents engaged in counseling together, the social worker felt that "they weren't putting . . . into practice" what they had learned. Based on this testimony, the district court found that "when challenges arise in the relationship, [respondents] are not able to use any of the learned skills to communicate or deal with each other in a more positive and effective manner." Despite this, they both intended to remain in their relationship.

The district court's findings that respondent-father was willing to leave Zoey alone in the care of respondent-mother even though respondent-mother was unfit for such accountability, that respondent-parents continued to be in constant marital discord even while having supervised visits with Zoey, and that respondent-parents intended to remain together despite the aforementioned problems, provided an adequate basis for the court's determination that Zoey would likely be neglected again if she were returned to respondent-father's care. As such, clear, cogent, and competent evidence supported the district court's findings of fact which in turn supported the conclusion that respondent-father's parental rights were subject to termination under N.C.G.S. § 7B-1111(a)(1).

Judicial Bias

[3] Finally, both respondent-parents argue that the district court was unfairly biased against them as reflected by the following comments made by the court during the oral announcement of its ruling on the child Zoey's best interest:

> But one of the reasons that I was willing to make the commitment that I made in sending that child – this child – to Newark was what I heard from [the maternal aunt]. And sort of the rest of that story is that I would never have sent this child to live in Newark if I thought that she could be with her parents. Because that creates a distance barrier for these folks that is practically insurmountable. So that's – when I said yes to Newark then that was – that was sort of my point of saying "there's not – there's not any coming back from this." That's part of why they call them permanency planning hearings. Right? So I – I do find that it's in [Zoey]'s best interest for the parental rights of her mom, her legal father, putative father, and any unknown fathers to be terminated.

Respondent-parents contend that this statement regarding the district court's decision to send Zoey to live with her aunt in July 2018—implemented more than four months before the termination hearing—demonstrates that the district court had prejudged the termination case, and therefore should have disqualified itself *sua sponte* from the matter.

Normally, as respondent-parents both acknowledge, a court is not required to recuse itself absent a motion from a party, and when no such motion is made, the issue is not preserved for appellate review. *See*, *e.g.*, *In re D.R.F.*, 204 N.C. App. 138, 144, 693 S.E.2d 235, 240 (2010) ("When a party does not move for a judge's recusal at trial, the issue is not preserved for our review."); *see also* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]"). However, under the circumstances of this case, we elect in our discretion to invoke North Carolina Rule of Appellate Procedure 2 and address respondent-parents' arguments. *See* N.C. R. App. P. 2.

Canon 3C(1) of the North Carolina Code of Judicial Conduct states: "On motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned[.]" In arguing that the district court's impartiality could reasonably be questioned based on its statement during its ruling on the best interest phase of this termination of parental rights proceeding, respondents conveniently reconstruct the statement at issue. When Zoey was sent to live with her maternal aunt in New Jersey on 10 July 2018, the district court had already changed the primary permanent plan to adoption and ordered DSS to file a termination petition, which the agency had done a few days earlier. Viewed in this light, the district court's

statement during its ruling was merely an explanation that the court had previously taken those steps because it had determined that they were in Zoey's best interest at the time those actions were taken. If the bias alleged here were to be deemed to exist as depicted by respondent-parents and ultimately to require recusal, then the illogical consequence would follow that a district court would not ever be able to preside over a termination hearing after it had previously set the permanent plan for a juvenile as a plan that would imply or be compatible with termination, because of the inherent implication of bias which would be ascribed to a district court's decision to adopt such a plan. Therefore, considered in context, the district court's ultimate decision here to terminate the parental rights of respondent-parents was wholly consistent with the evidence presented at the termination hearing and nothing in the above-quoted statement of the district court reflects that it had definitively reached a conclusion to terminate respondent-parents' rights to their child Zoey prior to the termination hearing. Indeed, in discerning the district court's execution of fairness and impartiality in its ruling in this case as we resolve the issue of bias, it is worthy to note that the district court dismissed one of the grounds for termination alleged by DSS. In sum, respondent-parents have not shown that the district court had a duty to recuse itself from hearing the termination case.

For the reasons discussed herein, we affirm the district court's termination order.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
THOMAS CRAIG CAMPBELL

No. 252PA14-3

Filed 6 December 2019

Larceny—sufficiency of evidence—direct link between defendant and stolen property—opportunity alone

The State failed to present sufficient evidence to convict defendant of felony larceny where the evidence showed that while defendant had an opportunity to take audio equipment from a church which was left unlocked over a four-day time span, it did not establish a link between defendant and the stolen property or that defendant was in the church when the property was stolen.

Appeal pursuant to N.C.G.S. § 7A-30(2) and N.C.G.S. § 7A-31 from the decision of a divided panel of the Court of Appeals, 810 S.E.2d 803 (N.C. Ct. App. 2018), vacating and remanding a judgment entered on 12 June 2013 by Judge Linwood O. Foust in Superior Court, Cleveland County. Heard in the Supreme Court on 2 October 2019 in session in the Forsyth County Hall of Justice in the City of Winston-Salem pursuant to section 18B.8 of Chapter 57 of the 2017 Session Laws of the State of North Carolina.

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

Glenn Gerding, *Appellate Defender*, *by Hannah Hall Love*, *Assistant Appellate Defender*, *for defendant-appellee.*

DAVIS, Justice.

In this case, we consider whether the State met its burden of presenting sufficient evidence for the jury to convict defendant of felony larceny. Because we conclude that insufficient evidence existed to support the larceny charge, we modify and affirm the Court of Appeals' decision vacating his conviction.

Factual and Procedural Background

This case is before us for the third time. The relevant facts were set out in our first opinion in this case as follows:

On 8 October 2013, the Cleveland County Grand Jury indicted defendant for felony breaking or entering a place of worship and felony larceny after breaking or entering. The larceny indictment specifically alleged that, on 15 August 2012, defendant stole "a music receiver, microphones and sounds system wires, the personal property of Andy Stevens and Manna Baptist Church, ... in violation of N.C.G.S. [§] 14–54.1(a)." Defendant pled not guilty.

At trial, the State's evidence showed that at the conclusion of Sunday services on 19 August 2012, Pastor Andy Stevens of Manna Baptist Church discovered that some audio equipment was missing. Pastor Stevens lives on the Manna Baptist Church property. He testified that the church doors may have been inadvertently left unlocked on 15 August, following Wednesday evening services. When the church secretary arrived the next morning, she locked the doors, and they remained locked until Sunday morning. Although there was no sign of forced entry, Pastor Stevens found defendant's wallet in the baptistry changing area at the back of the church close to where some of the missing equipment previously had been located.

A detective testified that she spoke with defendant at the Cleveland County Detention Center, where he was being held on an unrelated charge. When defendant learned the detective wished to speak with him, he said, "[T]his can't possibly be good. What have I done now that I don't remember?" Defendant then admitted to being at Manna Baptist Church the night the doors were left unlocked. He said he was on "a spiritual journey" and "had done some things," but "did not remember what he had done" in the church.

At the close of the State's evidence, the trial court denied defendant's motion to dismiss the charges based on insufficient evidence. Defendant then testified on his own behalf. He stated that on the night in question, he was asked to leave the house in which he was living, so he packed a duffle bag with his clothes and started walking toward a friend's house. Along the way, he dumped the bag in a ditch because it was too heavy to

> carry. Defendant arrived at his friend's house around midnight. When his friend's girlfriend asked him to leave, he kept walking until he reached Manna Baptist Church. Defendant noticed that the door to the church was cracked open. He was thirsty from walking all night, so he entered the church with the intent to find water and sanctuary. Defendant stated that once inside, he prayed, slept, "tried to do a lot of soul searching," and drank a bottle of water, although he admitted he was "not really sure exactly what [he] did the whole time [he] was" in the church. He also testified that he "did not take anything away from the church" when he left at daybreak.
>
> After leaving the church, defendant felt chest pains, so he called 9-1-1. Defendant testified that he was taking a host of medications at the time, including a psychotropic drug, for his heart condition, stress disorder, bipolar condition, and diabetes. An Emergency Medical Technician ("E.M.T.") responded to the call around 6:30 a.m. on Thursday. The E.M.T. testified that defendant said he had been "wandering all night," that defendant looked "disheveled" and "worn out," and that defendant's "shoes were actually worn through the soles." The E.M.T. did not see defendant carrying anything.
>
> At the close of evidence, defendant renewed his motion to dismiss for insufficient evidence, which the trial court again denied. The jury found defendant guilty of felony larceny and felony breaking or entering a place of religious worship, and defendant appealed.

State v. Campbell, 368 N.C. 83, 84–85, 772 S.E.2d 440, 442–43 (2015) (*Campbell I*) (alterations in original).

Defendant appealed his convictions to the Court of Appeals, where he raised six issues. The Court of Appeals addressed only two of his arguments, holding that (1) his indictment for larceny was deficient because it failed to allege that Manna Baptist Church was an entity capable of owning property; and (2) the State had failed to present sufficient evidence of an essential element of felony breaking or entering—intent to commit larceny. *State v. Campbell*, 234 N.C. App. 551, 555–61, 759 S.E.2d 380, 383–87 (2014).

We allowed the State's petition for discretionary review and proceeded to reverse the Court of Appeals' decision. First, we held that

the larceny indictment was, in fact, legally adequate. *Campbell I*, 368 N.C. at 86–87, 772 S.E.2d at 443–44. Second, we ruled that sufficient evidence was presented at trial to allow the jury to convict defendant of felony breaking or entering a place of religious worship. *Id.* at 87–88, 772 S.E.2d at 444. Accordingly, we reversed the Court of Appeals' decision and remanded the case to that court for consideration of the remaining issues defendant had raised with regard to his conviction for larceny. *Id.* at 88, 772 S.E.2d at 445.

On remand, the Court of Appeals focused its analysis on defendant's argument that a fatal variance existed between the indictment for larceny and the evidence presented by the State. The Court of Appeals first determined that although defendant had not preserved his fatal variance argument at trial due to his failure to move for the dismissal of the larceny charge on that ground, consideration of defendant's fatal variance argument was nevertheless appropriate based upon the invocation of Rule 2 of the North Carolina Rules of Appellate Procedure.[1] *State v. Campbell*, 243 N.C. App. 563, 571, 777 S.E.2d 525, 530 (2015).

Having decided to invoke Rule 2, the Court of Appeals then addressed the merits of defendant's argument and determined that a fatal variance did exist because although the indictment alleged two owners of the stolen property (Andy Stevens and Manna Baptist Church), the evidence at trial established that only the church was the owner of the missing items. *Id.* at 577–78, 777 S.E.2d at 534. For this reason, the Court of Appeals vacated defendant's larceny conviction. *Id.*

The State once again petitioned this Court for discretionary review, which we allowed. We reversed the Court of Appeals' second decision and remanded the case back to that court in order for it to "independently and expressly determine whether, on the facts and under the circumstances of this specific case, to exercise its discretion to employ Rule 2 of the North Carolina Rules of Appellate Procedure . . . and consider the merits of defendant's fatal variance argument." *State v. Campbell*, 369 N.C. 599, 604, 799 S.E.2d 600, 603 (2017) (*Campbell II*).

Following our remand, the Court of Appeals issued a third opinion in which it reaffirmed its decision to invoke Rule 2 in order to review

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1. Rule 2 provides that "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions." N.C. R. App. P. 2.

the fatal variance claim and concluded once again that a fatal variance existed between the indictment and the evidence at trial. *State v. Campbell*, 810 S.E.2d 803, 818–20 (N.C. App. 2018). After so holding, the Court of Appeals proceeded—based on principles of judicial economy—to also address the additional issues of whether sufficient evidence existed to support defendant's larceny conviction and whether the trial court violated his right to a unanimous verdict in connection with the larceny charge. *Id.* at 820. The Court of Appeals determined that the State's evidence was insufficient to raise a jury question on the larceny charge. *Id.* at 820–23.[2]

Judge Berger dissented from the majority's rulings. In his dissent, he stated his belief that the majority had erred in invoking Rule 2 under the circumstances of this case. *Id.* at 823–25 (Berger, J., dissenting). He further expressed his belief that substantial evidence existed to support defendant's larceny conviction and that defendant had not been deprived of his right to a unanimous verdict. *Id.* at 826–27 (Berger, J., dissenting).

Based on Judge Berger's dissent, the State appealed as of right to this Court pursuant to N.C.G.S. § 7A-30(2). In addition, we allowed the State's petition for discretionary review as to additional issues pursuant to N.C.G.S. § 7A-31.

Analysis

The bulk of the parties' arguments in this latest appeal concern the questions of whether the Court of Appeals properly invoked Rule 2 in order to reach the fatal variance issue and, in turn, whether a fatal variance actually existed. We believe, however, that we need not resolve either of those issues based on our determination that the Court of Appeals correctly held the State failed to present sufficient evidence to support the larceny charge.

When reviewing a defendant's motion to dismiss for insufficient evidence, a court must inquire "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). Substantial evidence exists when "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Barnette*, 304 N.C. 447, 458, 284 S.E.2d 298, 305 (1981). In other

2. The Court of Appeals then provided a brief discussion regarding defendant's "unanimous verdict" argument but ultimately declined to definitively rule upon that issue given its prior determination that the larceny conviction should be vacated on other grounds. *Id.* at 823.

words, substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984).

However, if the evidence is sufficient "only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion [to dismiss] should be allowed." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980). This is true even if "the suspicion so aroused by the evidence is strong." *Id.* at 98, 261 S.E.2d at 117. When considering such a motion, a court must view the evidence in the light most favorable to the State and give the State the benefit of all reasonable inferences. *State v. Morgan*, 359 N.C. 131, 161, 604 S.E.2d 886, 904 (2004).

The essential elements of larceny are that the defendant "(1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently." *State v. Reid*, 334 N.C. 551, 558, 434 S.E.2d 193, 198 (1993) (quoting *State v. Perry*, 305 N.C. 225, 233, 287 S.E. 2d 810, 815 (1982)). In order to withstand a defendant's motion to dismiss, the State must present substantial evidence of each of these elements and "that the defendant is the perpetrator" of the larceny. *See Call*, 349 N.C. at 417, 508 S.E.2d at 518.

Based on our thorough review of the record in this case, we agree with the Court of Appeals that the State failed to present sufficient evidence that defendant took and carried away the missing items. *See State v. Campbell*, 810 S.E.2d 803, 820–23 (N.C. Ct. App. 2018). Rather, the evidence simply established that defendant had an *opportunity* to steal the equipment at issue while he was in the church. Under well-settled caselaw, evidence of a defendant's mere opportunity to commit a crime is not sufficient to send the charge to the jury.

Several of our prior decisions illustrate the principle that a conviction cannot be sustained if "[t]he most the State has shown is that defendant had been in an area where he could have committed the crimes charged." *State v. Minor*, 290 N.C. 68, 75, 224 S.E.2d 180, 185 (1976). In *Minor*, defendant Minor and his co-defendant Ingram were charged with the possession of marijuana for the purpose of distribution after marijuana plants were found growing in Ingram's corn field. *Id.* at 73, 224 S.E.2d at 184. The two had been initially pulled over and arrested while driving near the field, and a search of their vehicle revealed several wilted marijuana leaves and some fertilizer. *Id.* at 72, 224 S.E.2d at 183–84. It was further determined that the defendant had previously

used the cornfield to raise garden crops, and a bottle with the name "Minor" on it was found at an old house near the field. *Id.* We summarized the State's evidence as follows:

> About all our evidence shows is (1) that defendant Minor had been a visitor at an abandoned house leased or controlled by co-defendant Ingram; (2) that the marijuana field was 100 feet away from the house but obscured by a wooded area; (3) that the marijuana field was accessible by three different routes; (4) that on the date of Minor's arrest he was on the front seat of a Volkswagen automobile owned and operated by Ingram, where some wilted marijuana leaves were found on the left rear floorboard and one marijuana leaf was found in the trunk.

Id. at 74–75, 224 S.E.2d at 185. We concluded that this evidence was insufficient to sustain the defendant's conviction for possession for the purpose of distribution, because—at most—the State had simply shown that the "defendant had been in an area where he could have committed the crimes charged. Beyond that, we must sail in a sea of conjecture and surmise." *Id.*

We similarly applied this principle in *State v. Murphy*, 225 N.C. 115, 33 S.E.2d 588 (1945). In *Murphy*, the two defendants assaulted a victim and left him unconscious in the street. *Id.* at 117, 33 S.E.2d at 589. Two women picked up the victim and carried him to a nearby porch. *Id.* at 116, 33 S.E.2d at 588. When he regained consciousness, he discovered that his wallet was missing, and the two assailants were subsequently charged with assault and robbery. *Id.*

On appeal, this Court determined that the robbery charge could not be sustained due to insufficient evidence. *Id.* at 116, 33 S.E.2d at 589. Because there were multiple persons present and the victim was unconscious when the money was taken, we reasoned that "[u]nder such circumstances to find that any particular person took the money is to enter the realm of speculation." *Id.* at 117, 33 S.E.2d at 589. We concluded that a charge cannot be sustained "where there is merely a suspicion or conjecture" of the defendant's guilt. *Id.* at 116, 33 S.E.2d at 589.

In *State v. White*, 293 N.C. 91, 235 S.E.2d 55 (1977), the defendant was charged with second-degree murder after a woman was found stabbed to death in her mobile home outside of a motel where the defendant was staying. *Id.* at 96–97, 235 S.E.2d at 58–59. There was testimony that a motel clerk heard a woman scream and then saw a black man run out of the mobile home and head in the direction of defendant's room.

Id. at 92, 235 S.E.2d at 56. Investigators found some blood specks on the defendant's shoes and shirt but were unable to conclusively match the blood to the victim. *Id.* at 96, 235 S.E.2d at 59. The defendant admitted that he knew the victim but denied entering her mobile home that night. *Id.* at 93, 235 S.E.2d at 57.

We held that although "the evidence raises a strong suspicion as to defendant's guilt" it was "*not* sufficient to remove the case from the realm of surmise and conjecture." *Id.* at 95, 235 S.E.2d at 58. We acknowledged that the State's evidence established that the defendant was in the general vicinity of the victim's residence at the time of the murder, the defendant had given contradictory statements to law enforcement officers, and it could "even reasonably be inferred that the defendant was at the home of the deceased when the deceased came to her death, or shortly thereafter." *Id.* at 97, 235 S.E.2d at 59. Nevertheless, we were troubled by the key facts that the State had *failed* to prove, stating the following:

> (1) [The motel clerk] could not identify the man he saw leaving deceased's mobile home probably because of the distance (200-250 feet) and darkness (1 1/2 hours after sunset); (2) other black men were staying at the motel; (3) no evidence was presented that the defendant owned the murder weapon; (4) no fingerprints were found on the knife; (5) no evidence was introduced of any blood found on the defendant's pants; (6) about fifteen percent of the population has the type of blood found on the left shoe of the defendant; (7) the type of blood on the right shoe is found in thirty percent of the population; (8) the blood specks on the tee shirt, and the blood on the carpet were not identified by type or otherwise; (9) no motive was established for the crime; (10) no flight was attempted by the defendant.

Id. at 96–97, 235 S.E.2d at 59 (citation omitted).

Thus, because the State's evidence established no more than the mere opportunity for the defendant to have committed the crime, we vacated the defendant's conviction. *Id.*; *see also State v. Moore*, 312 N.C. 607, 613, 324 S.E.2d 229, 233 (1985) (reversing robbery conviction because the evidence "discloses no more than an opportunity for defendant, as well as others, to have taken the money"); *State v. Cutler*, 271 N.C. 379, 383, 156 S.E.2d 679, 682 (1967) ("It is not enough to defeat the motion for nonsuit that the evidence establishes that the defendant had an opportunity to commit the crime charged.").

* * *

With these principles in mind, we must now apply them to the facts of the present case. Here, the State offered evidence that (1) defendant entered the church without permission on the night of 15 August 2012; (2) he stayed at the church for several hours; (3) he left his wallet at the front of the church near where some of the missing sound equipment was stored; and (4) he could not remember precisely what he had done inside the church that night.

To be sure, this evidence may be fairly characterized as raising a suspicion of defendant's guilt of larceny. It is clear, however, that crucial gaps existed in the State's evidence. The State failed to actually link defendant to the stolen property or to prove that he was in the church at the time when the equipment—which was never recovered—was stolen.

The evidence at trial suggested that the church doors were left unlocked after the Wednesday night service, which ended at approximately 8:00 p.m. on 15 August 2012. Defendant testified that he arrived at the church that night sometime after midnight and left the next morning around "first light." He was found by Emergency Medical Technician Calvin Cobb in a nearby field at approximately 6:30 a.m. on Thursday morning. It was not until the following Sunday morning that the absence of the equipment was noted. Thus, the State's evidence showed a four-day time span over which the theft could have occurred. It is undisputed that a number of other persons had access to the interior of the church during this four-day period.

Furthermore, the State was unable to show how defendant could have physically been able to carry away the cumbersome equipment at issue, which consisted of an audio receiver, sound system wires, four microphones, and a pair of headphones. While the State attempted to rely upon defendant's testimony that he was carrying a duffle bag earlier in the evening, the duffle bag was not located by officers. Defendant testified that he was holding a black duffle bag filled with clothes when he initially set out towards his friend's house at approximately 10:00 p.m. on Wednesday night and that he discarded the bag shortly after he began walking—realizing it would be too heavy to carry. There was no evidence suggesting that defendant had a bag of any kind with him at the time he entered or exited the church. Moreover, Cobb testified that defendant was empty-handed when Cobb encountered him early the next morning. No evidence was offered that the duffle bag was ever actually used to transport the missing items.

In sum, the State merely proved that defendant was present inside the church for several hours during the four-day period in which the equipment was taken. Under our caselaw, this is simply not enough to sustain a conviction for larceny. We therefore conclude that defendant's larceny conviction must be vacated and that we need not decide the remaining issues raised in this case.

Conclusion

For the reasons stated above, we modify and affirm the decision of the Court of Appeals vacating defendant's larceny conviction.

MODIFIED AND AFFIRMED.

STATE OF NORTH CAROLINA
v.
KURT ALLEN COREY

No. 189PA18

Filed 6 December 2019

1. Indictment and Information—bill of indictment—identity of child victim—name required

A bill of indictment alleging that defendant committed a sex offense against "Victim #1" was fatally defective on its face for failing to state the child victim's name as required by N.C.G.S. § 15-144.2(b).

2. Sentencing—jury instruction conference—aggravating factor—position of trust or confidence

The trial court erred by failing to conduct a jury instruction conference as required by N.C.G.S. § 15A-1231(b) prior to allowing the jury to determine whether the State proved the aggravating factor that defendant took advantage of a position of trust or confidence when he committed a sex offense against a child. Any prior case law indicating that a complete failure to conduct the necessary jury instruction conference necessitates a new proceeding without a showing of material prejudice was overruled. Material prejudice was not shown here where the jury made its determination that defendant violated a position of trust or confidence after being

presented with undisputed evidence that defendant and the victim had a parent-child relationship.

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

Justice NEWBY dissenting in part and concurring in the result only in part.

Justice MORGAN dissenting in part and concurring in the result in part.

On discretionary review pursuant to N.C.G.S. § 7A-31-31 of a unanimous, unpublished decision of the Court of Appeals, No. COA17-1031, 2018 WL 2642772 (N.C. Ct. App., June 5, 2018), affirming, in part, and vacating and remanding, in part, a judgment entered on 15 December 2016 by Judge William R. Bell in the Superior Court, Burke County. Heard in the Supreme Court on 4 March 2019.

Joshua H. Stein, Attorney General, by Amy Kunstling Irene, Special Deputy Attorney General, for the State-appellant.

Franklin E. Wells, Jr., for defendant-appellee.

ERVIN, Justice.

The issue that the parties have presented for our consideration in this case is whether the Court of Appeals correctly held that defendant Kurt Allen Corey was entitled to a new hearing concerning the existence of a statutory aggravating factor on the grounds that the trial court failed to conduct a jury instruction conference prior to instructing the jury with respect to the manner in which it should determine whether the relevant aggravating factor did or did not exist. *See* N.C.G.S. § 15A-1340.16(d)(15) (2017). Although a careful review of the record reveals that the indictment underlying defendant's conviction for committing a sex offense with a child is fatally defective, we are still required to consider the issues that the parties have presented for our consideration given that the trial court consolidated defendant's conviction for committing a sex offense against a child for judgment with defendant's conviction for taking indecent liberties with a child. As a result of our conclusion that defendant's indictment for committing a sex offense against a child is

fatally defective and our determination that the trial court's erroneous failure to conduct a jury instruction conference prior to submission of the existence of the relevant statutory aggravating factor to the jury did not "materially prejudice" defendant, we arrest judgment with respect to defendant's conviction for committing a sex offense against a child, vacate the trial court's judgment, and remand this case to the Superior Court, Burke County, for resentencing based upon defendant's conviction for taking indecent liberties with a child.

Shannon[1] was born on 16 September 2002. Shannon's mother married defendant when Shannon was four years old. After her mother's marriage to defendant, Shannon lived with her mother, her two siblings, and defendant, who assumed the role of Shannon's father in the family household. When Shannon's mother and defendant briefly separated in 2009, Shannon and her two siblings resided with defendant until Shannon's mother returned to the family home once the separation had ended.

From 2009 through 2014, defendant forced Shannon to engage in oral sex, vaginal intercourse, and anal sex while Shannon's mother was at work. Dr. Terry Hobbs, a pediatrician who was qualified as an expert in the field of sexual assault forensics, examined Shannon. Based upon the results of this examination, Dr. Hobbs testified that Shannon's demeanor and attitude were consistent with those of a person who had suffered a traumatic event and that, in his opinion, Shannon had experienced "constipation encopresis," a condition consistent with the occurrence of sexual abuse.

On 16 August 2014, Shannon informed her grandmother that defendant had regularly engaged in sexual activity with her from the time that she was six years old until the date in question. Shortly thereafter, Shannon's grandmother told Shannon's mother about Shannon's accusations against defendant. On 18 August 2014, Shannon's mother reported the allegations that Shannon had made against defendant to a representative of the Caldwell County Sheriff's Office.

On 1 December 2014, the Burke County grand jury returned bills of indictment charging defendant with two counts of rape of a child, two counts of committing a sexual offense with a child, and two counts of taking indecent liberties with a child, with one of these rapes, sex offenses, and indecent liberties alleged to have taken place in 2009 and

1. The victim in this case will be referred to as "Shannon," which is a pseudonym used to protect the victim's identity and for ease of reading.

the other rape, sex offense, and indecent liberties alleged to have taken place in 2013. The count of the indictment returned against defendant for the purpose of charging him with committing a sex offense against a child in 2013 alleged that "on or about the date of offense shown [calendar year 2013] and in the county named above [Burke] the defendant named above [Kurt Allen Corey] unlawfully, willfully, and feloniously did engage in a sexual act with Victim #1, a child who was under the age of 13 years, namely 10 – 11 years of age," and that, "[a]t the time of the offense the defendant was at least 18 years of age." On 24 May 2016, the State notified defendant that the State intended to prove the existence of the statutory aggravating factor that "[t]he defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense" set out in N.C.G.S. § 15A-1340.16(d)(15) in the event that defendant was convicted of committing any felony offense.

The charges against defendant came on for trial before the trial court and a jury at the 12 December 2016 criminal session of the Superior Court, Burke County. On 15 December 2016, the jury returned verdicts acquitting defendant of committing a sex offense against a child in 2009, of both counts of rape, and of taking indecent liberties with a child in 2009 and convicting defendant of committing a sex offense against a child and taking indecent liberties with a child in 2013. After accepting the jury's verdict, the trial court convened a proceeding for the purpose of determining whether the aggravating factor of which the State had given defendant notice existed. Neither the State nor the defendant presented additional evidence at this sentencing-related proceeding. At the conclusion of this additional proceeding, the jury found as an aggravating factor that "defendant took advantage of a position of trust or confidence . . . to commit the offense." Based upon the jury's verdicts and its own determination with respect to the calculation of defendant's prior record level, the trial court consolidated defendant's convictions for judgment, determined that defendant should be sentenced in the aggravated range, and sentenced defendant to a term of life imprisonment without the possibility of parole. Defendant noted an appeal from the trial court's judgment to the Court of Appeals.

In seeking relief from the trial court's judgment before the Court of Appeals, defendant argued, among other things, in reliance upon that Court's decision in *State v. Hill*, 235 N.C. App. 166, 760 S.E.2d 85 (2014), that the trial court had committed reversible error by failing to conduct a jury instruction conference prior to submitting the issue of whether the "position of trust or confidence" aggravating factor existed in this case. On 5 June 2018, the Court of Appeals filed a unanimous, unpublished

opinion holding that the trial court had committed reversible error by failing to conduct a jury instruction conference before submitting the "position of trust or confidence" aggravating factor to the jury given that defendant had not been provided with an adequate opportunity to object to the instructions that the trial court delivered to the jury concerning the manner in which it should determine whether that aggravating factor existed. *State v. Corey*, No. COA17-1031, slip op. at 2, 2018 WL 2642772, at *1 (N.C. Ct. App., June 5, 2018). In reaching this result, the Court of Appeals focused its analysis upon N.C.G.S. § 15A-1231(b), which the Court of Appeals had determined to require that

> "Before the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury. At the conference the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. A party is also entitled to be informed, upon request, whether the judge intends to include other particular instructions in his charge to the jury. The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant."

Hill, 235 N.C. App. at 170, 760 S.E.2d at 88 (quoting N.C.G.S. § 15A-1231(b) (2013)). In the Court of Appeals' view, defendant was entitled to challenge the trial court's failure to comply with the requirements set out in N.C.G.S. § 15A-1231(b) (2017) on appeal even though he had failed to object to any non-compliance with the requirements of that statutory provision before the trial court, citing *State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000) (stating that, "[w]hen a trial court acts contrary to a statutory mandate, the defendant's right to appeal is preserved despite the defendant's failure to object during trial"). In addition, the Court of Appeals noted that the "material prejudice" necessary to support an award of appellate relief existed in the event that the trial court failed to conduct any charge conference addressing the manner in which the trial court should instruct the jury for the purpose of determining whether the relevant aggravating factor did or did not exist and did not afford the defendant's trial counsel an opportunity to object to the trial court's instructions relating to the relevant aggravating factor before they were delivered to the jury, citing *Hill*, 235 N.C. App. at 172-73, 760 S.E.2d at 90. After reviewing the record, the Court of Appeals determined

that the trial court had failed to hold the required jury instruction conference before submitting the "position of trust or confidence" aggravating factor to the jury and had not afforded defendant's trial counsel an adequate opportunity to object to the trial court's instructions concerning the "position of trust or confidence" aggravating factor. *Corey*, slip op. at 6, 2018 WL 2642772, at *2. As a result, the Court of Appeals vacated defendant's sentence and remanded this case to the trial court for a new proceeding to be conducted for the purpose of determining whether the "position of trust or confidence" aggravating factor existed in this case. *Id.* On 21 September 2018, this Court granted the State's request for discretionary review of the Court of Appeals' decision.

In seeking to persuade us to reverse the Court of Appeals' decision, the State argues that the Court of Appeals incorrectly held that the trial court's failure to conduct a jury instruction conference prior to submitting the "position of trust or confidence" aggravating factor to the jury constituted reversible error per se. The State posits that N.C.G.S. § 15A-1231(b) does not create a statutory mandate which can support an award of appellate relief in the absence of a contemporaneous objection at trial, citing *State v. Young*, 368 N.C. 188, 207, 775 S.E.2d 291, 304 (2015). In addition, while a defendant can seek relief on the basis of a trial court's failure to comply with a statutory mandate without having taken any action before the trial court in order to preserve the alleged error for purposes of appellate review, the existence of such a statutory mandate does not absolve the defendant from the necessity for establishing that the trial court's error was prejudicial, citing *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). As a result, even if it was error for the trial court to fail to hold a jury instruction conference prior to submitting the issue of whether the "position of trust or confidence" aggravating factor existed in this case to the jury, the State contends that the Court of Appeals was still required to find that the trial court's error resulted in "material prejudice" to defendant before overturning the trial court's judgment.

Moreover, the State argues that, in order to demonstrate "material prejudice," defendant was required to show the existence of a reasonable possibility that, had the error in question not occurred, a different result would have been reached at the sentencing proceeding, citing N.C.G.S. § 15A-1443(a) (providing that "[a] defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises"). According to the

State, defendant cannot show that the trial court's erroneous failure to hold a jury instruction conference prior to submitting the issue of whether the "position of trust or confidence" aggravating factor existed to the jury "materially prejudiced" him given that the trial court correctly instructed the jury concerning the circumstances under which it should and should not find the existence of the "position of trust or confidence" aggravating factor, given that the trial court's instructions with respect to that issue tracked the language of N.C.G.S. 15A-1340.16(d)(15), and given that the record contained overwhelming evidence tending to show the existence of the "position of trust or confidence" aggravating factor in this case, citing *e.g.*, *State v. Tucker*, 357 N.C. 633, 639, 588 S.E.2d 853, 857 (2003) (stating that "[a] parent-child relationship is also indicative of a position of trust and such evidence supports the aggravating factor of abusing a position of trust"). As a result, the State urges us to reverse the Court of Appeals' decision on the grounds that any error that the trial court might have committed by failing to hold a jury instruction conference prior to submitting the issue of the existence of the "position of trust or confidence" aggravating factor to the jury did not result in "material prejudice" to defendant.

In defendant's view, on the other hand, N.C. Gen. Stat. § 15A-1231(b) establishes a statutory mandate requiring trial judges to conduct a separate jury instruction conference before instructing the jury concerning the manner in which it should determine whether a particular statutory aggravating factor does or does not exist. Defendant argues that the Court of Appeals has held that no showing of prejudice is a necessary prerequisite to an award of appeal relief when the trial judge completely fails to comply with the requirements set out in N.C.G.S. § 5A-1231(b), citing *Hill*, 235 N.C. App. at 173, 760 S.E.2d at 90. The defendant argues that, in this case, as in *Hill*, the trial court failed to conduct any jury instruction conference before submitting the issue of the existence of the "position of trust or confidence" aggravating factor to the jury, entitling defendant to relief from the jury's decision to find the existence of the relevant aggravating factor regardless of whether the trial court's error resulted in "material prejudice" to defendant.

In addition, defendant contends that, even if a showing of "material prejudice" is required, he has made such a showing in this case. According to defendant, the trial court simply read the relevant language from N.C.G.S. § 15A-1340.16(d)(15) to the jury without defining either a "position of trust" or a "domestic relationship" and failed to inform the jury that the "position of trust or confidence" aggravating factor had to arise from the relationship between Shannon and defendant and only

existed in "very limited circumstances," citing *State v. Mann*, 355 N.C. 294, 319, 560 S.E.2d 776, 791 (2002). In defendant's view, the trial court's failure to conduct a jury instruction conference prior to submitting the issue of the existence of the "position of trust or confidence" aggravating factor to the jury precluded defendant from objecting to the trial court's failure to include such information in the instructions that were provided to the jury relating to the relevant aggravating factor. As a result, defendant contends that the necessary "material prejudice" existed in this case, so that the Court of Appeals did not err by determining that he was entitled to a new hearing concerning the existence of the "position of trust or confidence" aggravating factor in this case.

[1] As an initial matter, we are obligated to determine, on our own motion, the extent to which the trial court and this Court had jurisdiction over this matter. According to N.C.G.S. § 15-144.2(b) (Supp. 2018), "[i]f the victim is a person under the age of 13 years, it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a child under the age of 13 years, naming the child, and concluding as required by law," with "[a]ny bill of indictment containing the averments and allegations named in this section [being] good and sufficient in law as an indictment for a sex offense against a child under the age of 13 years." As we have already noted, the count of the indictment returned against defendant for the purpose of charging him with committing a sex offense against a child in 2013 alleged that defendant had committed the crime charged against "Victim # 1." Earlier this year, this Court held that the "use of the phrase 'Victim # 1' does not constitute 'naming the child' " as required by N.C.G.S. § 15-144.2(b), with the fact that the victim is named in other portions of the record, such as "the arrest warrant, original indictment, and proceedings at trial," being insufficient to excuse the State's failure to name the victim as required by N.C.G.S. § 15-144.2(b) given that the "facial validity [of an indictment] 'should be judged based solely upon the language of the criminal pleading in question without giving any consideration to the evidence that is ultimately offered in support of the accusation contained in that pleading,' " *State v. White*, 372 N.C. 248, 252–54, 827 S.E.2d 80, 83–84 (2019) (quoting *State v. Ellis*, 368 N.C. 342, 347, 776 S.E.2d 675, 679 (2015); *see also State v. Benton*, 275 N.C. 378. 382, 167 S.E.2d 775, 777 (1969) (stating that " '[a] charge in a bill of indictment must be complete in itself, and contain all of the material allegations that constitute the offense charged,' " with "allegations in the warrant on which defendant was originally arrested" being insufficient "to supply a deficiency in the bill of indictment" (quoting *State v. Guffey*, 265 N.C. 331, 333, 144 S.E.2d 14, 17 (1965), and citing 42 C.J.S., *Indictments and Informations* § 108,

p. 990)); *State v. Loesch*, 237 N.C. 611, 612, 75 S.E.2d 654, 655 (1953) (stating that " '[a]n indictment for an offense created by statute must be framed upon the statute, and this fact must distinctly appear upon the face of the indictment itself' ") (quoting *State v. Jackson*, 218 N.C 373, 375, 11 S.E.2d 149, 150 (1940)). Thus, an indictment purporting to charge the defendant with committing a sex offense against "Victim # 1," without otherwise naming the victim, is "facially invalid." *White*, 372 N.C. at 254, 827 S.E.2d at 84. As a result, given that "[a] valid bill of indictment is essential to the jurisdiction of the trial court to try an accused for a felony," *State v. Rankin*, 371 N.C. 885, 886, 821 S.E.2d 787, 790 (2018) (quoting *State v. Campbell*, 368 N.C. 83, 86, 772 S.E.2d 440, 443 (2015)), and given that the Court is obligated to address jurisdictional deficiencies regardless of whether they are brought to its attention by the parties or not, *State v. Fowler*, 266 N.C. 528, 530, 146 S.E.2d 418, 420 1966) (stating that "[t]he court cannot properly give judgment unless it appears in the record that an offense is sufficiently charged" and that "[i]t is the duty of this Court to look through and scrutinize the whole record, and if it sees that the judgment should have been arrested, it will *ex mero motu* direct it to be done") (citing *State v. Strickland*, 243 N.C. 100, 103, 89 S.E.2d 781, 784 (1955);[2] *State v. Thorne*, 238 N.C. 392, 396, 78 S.E.2d 140, 142 (1953); *State v. Scott*, 237 N.C. 432, 433–34, 75 S.E. 2d 154, 155 (1953)), we are required by well-established North Carolina law to arrest judgment with respect to defendant's conviction for committing a sex offense against a child in 2013 on our own motion subject to the understanding that "[t]he State, if it is so advised, may proceed against the defendant upon a sufficient bill of indictment." *Benton*, 275 N.C. at 382, 167 S.E.2d at 778.

[2] A decision to vacate the judgment that the trial court entered in this case does not, however, eliminate the necessity for the Court to determine whether the trial court committed prejudicial error by failing to conduct a jury instruction conference prior to the submission of the "position of trust or confidence" aggravating factor to the jury given that defendant's conviction for taking indecent liberties with a child in 2013

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2. Our decision in *Fowler* refers to this case as *State v. Strickland*, which is how it is titled at the top of the relevant pages in Volume No. 243 of the North Carolina Reports. The table of contents in Volume No. 243 of the North Carolina Reports indicates that both *State v. Strickland* and *State v. Nugent* appear on the page in question. The South Eastern Reporter, however, refers to the case as *State v. Nugent*. Despite these differing names, each involves the same case, with Louis Hardy Strickland being shown as the second of the four defendants involved in the case before the trial court and with Mr. Strickland being the only defendant who sought appellate review of the trial court's judgment by this Court.

remains undisturbed. In view of the fact that the trial court consolidated defendant's convictions for committing a sex offense against a child and taking indecent liberties with a child in 2013 for judgment and the fact that the sentence embodied in the judgment that the trial court entered at the conclusion of the sentencing proceeding was based upon defendant's sex offense conviction, N.C.G.S. § 15A-1340.22(b) (2017) (providing that, in the event that the trial court elects to consolidate multiple offenses for judgment, "[a]ny sentence imposed shall be consistent with the appropriate prior conviction level of the most serious offense"), the trial court will need to resentence defendant based upon his conviction for taking indecent liberties with a child on remand. The necessity for the trial court to make this resentencing decision, in turn, requires us to ascertain whether there is any legal defect in the jury's determination that the "position of trust or confidence" aggravating factor exists in this case.

According to N.C.G.S. § 15A-1231(b) (2017), prior to "the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury," at which "the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given." However, N.C.G.S. § 15A-1231(b) also provides that "[t]he failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant." As the Court of Appeals noted in *Hill*, 235 N.C. App. at 171, 760 S.E.2d at 89, the use of mandatory statutory language such as that found in N.C.G.S. § 15A-1231(b) and the importance of the purposes sought to be served by the holding of a jury instruction conference indicates that "holding a charge conference is mandatory" and that "a trial court's failure to do so is reviewable on appeal even in the absence of an objection at trial." In view of the fact that the record clearly establishes that the trial court did not conduct a jury instruction conference or otherwise discuss the manner in which the jury should be instructed concerning the issue of the existence of the "position of trust or confidence" aggravating factor with counsel for the parties before submitting that issue to the jury, we hold, despite defendant's failure to lodge a contemporaneous objection to trial court's non-compliance with N.C.G.S. § 15A-1231(b), that the trial court erred by failing to conduct a jury instruction conference concerning the manner in which the jury should determine the existence or nonexistence of the "position of trust

or confidence" aggravating factor before allowing the jury to determine whether that aggravating factor did or did not exist.[3]

The Court of Appeals appears to have concluded in *Hill* that the showing of "material prejudice" ordinarily required as a prerequisite for an award of appellate relief arising from a trial court's failure to comply with N.C.G.S. § 15A-1231(b) need not be made in the event that the trial court fails to hold any sort of jury instruction conference at all, citing *Hill*, 235 N.C. App. at 172–73, 760 S.E.2d at 90 (citing *State v. Clark*, 71 N.C. App. 55, 57–58, 322 S.E.2d 176, 177 (1984), *disapproved on other grounds in State v. Moore*, 327 N.C. 378, 395 S.E.2d 124 (1990)), with this implicit distinction between cases in which the trial judge entirely fails to comply with N.C.G.S. § 15A-1231(b) and cases in which the trial court partially complies with N.C.G.S. § 15A-1231(b) appearing to rest upon the use of "fully" in the relevant statutory language. When read literally and in context, however, the reference in N.C.G.S. § 15A-1231(b) to the necessity for the trial court to "comply fully" with the statutory requirement that a jury instruction conference be conducted, instead of distinguishing between a complete and a partial failure to comply with the applicable statutory requirement, is intended to require the making of a showing of "material prejudice" a prerequisite to an award of appellate relief regardless of the nature and extent of the trial court's non-compliance with N.C.G.S. § 15A-1231(b). As a result, to the extent that the Court of Appeals decided in this case that, under *Hill* and *Clark*, a total failure to conduct a jury instruction conference necessitates the holding of a new proceeding for the purpose of determining that a particular aggravating factor exists regardless of whether the defendant did or did not make a showing of "material prejudice," that decision was erroneous and any earlier decisions to the contrary are overruled.

As we have already noted, N.C.G.S. § 15A-1443(a) (2018) provides that a non-constitutional error is prejudicial in the event that the defendant shows that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been

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3. We do not believe that the fact that N.C.G.S. § 15A-1231(b) requires the trial court to "inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will instruct the jury" supports an inference that no jury instruction conference is necessary outside the context of the guilt-innocence portion of a criminal trial. On the contrary, we are persuaded by the Court of Appeals' reasoning in *Hill*, 235 N.C. at 172, 760 S.E.2d at 89, that the absence of any "specifics of how the trial court should conduct a separate sentencing proceeding" and the absence of any statutory language suggesting the existence of a legislative "intent to mandate a different procedure than that which governs trials of criminal offenses" in sentencing-related proceedings shows that N.C.G.S. § 15A-1231(b) "applies to sentencing proceedings" conducted pursuant to N.C.G.S. § 15A-1340.16(a1).

reached at the trial out of which the appeal arises." Although the Court of Appeals held that the trial court's error materially prejudiced defendant because the trial court failed to give defendant "the opportunity to object to the instruction on the aggravating factor" and although defendant argues that the trial court's error materially prejudiced him because "[t]he instruction given did not advise the jury that [the 'position of trust and confidence' aggravating] factor arises only from the relationship between the defendant and the victim and applies in 'very limited circumstances,' " [4] we do not find these arguments persuasive. As a practical matter, the logic underlying the Court of Appeals' prejudice determination is tantamount to an assertion that mere non-compliance with N.C.G.S. § 15A-1231(b), standing alone, automatically requires an award of appellate relief. For the reasons set forth above, an automatic reversal rule cannot be squared with the language of N.C.G.S. § 15A-1231(b). In addition, given that the undisputed, overwhelming evidence contained in the present record tends to show that the victim in this case was defendant's step-child, with the victim having been dependent upon the defendant in various ways; given that defendant has not pointed to anything in the present record that in any way suggests that there is any likelihood that the jury would have relied upon any relationship other than the one between the victim and defendant in the course of finding the existence of the relevant aggravating factor; and given the strength of the evidence tending to show the existence of the "position of trust or confidence" aggravating factor in this case, we are unable to conclude that any of the arguments that defendant has advanced in an attempt to show "material prejudice" have any merit either.[5] Simply put, as this Court has previously noted, "[a] parent-child relationship" of the

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4. In addition to the arguments discussed in the text of this opinion, defendant also contends that the trial court failed to "advise the jury what it must do if one or more jurors did have a reasonable doubt" about the existence of the relevant aggravating circumstance and that "[t]he verdict form . . . contains no instructions about what to do if the answer was '[n]o.' " However, the trial court clearly instructed the jury that, it if failed to find the existence of the "position of trust or confidence" aggravating factor, it should "leave the blank—the space blank with regard to the aggravating factor."

5. Although defendant asserted that the trial court should have included the additional information set out in the text in its sentencing proceeding instructions in his brief before the Court of Appeals, the relevant statements were made in the context of a discussion of the prejudice that resulted from the trial court's failure to conduct a jury instruction conference rather than in the context of an independent challenge to the lawfulness of the trial court's instructions to the jury concerning the existence or non-existence of the aggravating factor delineated in N.C.G.S. § 15A-1340.16(d)(15). As a result, there is no need for this Court to remand this case to the Court of Appeals for consideration of any challenge to the validity of the trial court's instructions to the jury concerning the "position of trust or confidence" aggravating factor.

type revealed by the undisputed evidence in this case "is . . . indicative of a position of trust," with evidence establishing the existence of such a relationship tending to "support[ ] the aggravating factor of abusing a position of trust." *Tucker*, 357 N.C. at 639, 588 S.E.2d at 857 (2003). Thus, for all of these reasons, we conclude that the trial court's failure to comply with N.C.G.S. § 15A-1231(b) did not "materially prejudice" defendant, so that defendant is not entitled to any relief from the jury's decision to find the existence of the "position of trust or confidence" aggravating factor in this case.

Thus, for the reasons set forth above, we hold that the indictment underlying defendant's conviction for committing a sex offense with a child in 2013 is fatally defective and that the trial court's judgment with respect to the conviction must be vacated. In addition, we hold that the Court of Appeals erred by determining that the trial court's erroneous failure to conduct a jury instruction conference prior to submitting the issue of whether "defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense" "materially prejudiced" defendant. As a result, the judgment entered by the trial court based upon defendant's consolidated convictions is vacated, judgment is arrested in connection with defendant's conviction for committing a sex offense against a child in 2013, the Court of Appeal's decision that the trial court's failure to hold a jury instruction conference before submitting the "position of trust or confidence" aggravating factor to the jury constituted prejudicial error is reversed, and this case is remanded to the Superior Court, Burke County, for resentencing based upon defendant's conviction for taking indecent liberties with a child, subject to the understanding that the State remains free to recharge defendant with committing a sex offense with a child in 2013 on the basis of a valid indictment.

VACATED IN PART, REVERSED IN PART.

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

Justice NEWBY dissenting in part and concurring in result only in part.

For the reasons stated in my dissenting opinion in *State v. White*, 827 S.E.2d 80 (N.C. 2019), I dissent from the portion of the majority opinion that holds the indictment technically flawed. Defendant was fully

aware of the identity of the victim, his wife's daughter, and the charges against him. As I stated in *White*, "Once again, a child victim must endure the emotional distress and indignities of another trial because of a purely legal technicality. It is this type of legal gamesmanship which leads to cynicism about whether justice prevails in our criminal justice system." *Id.* at 85.

I concur in result only in part because the statutory language relevant here does not specifically require a formal charge conference during the sentencing phase; thus, the absence of a separate charge conference during the sentencing phase was not error.

Section 15A-1231 governs jury instructions at trial and provides:

> (b) Before the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury. At the conference the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. A party is also entitled to be informed, upon request, whether the judge intends to include other particular instructions in his charge to the jury. The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant.

N.C.G.S. § 15A-1231(b) (2017). The text of section 15A-1231 does not mention the sentencing phase of trial or aggravating factors.

Section 15A-1340.16 governs the procedures for determining the existence of aggravating factors during a noncapital sentencing. If the defendant does not admit the existence of an aggravating factor, the State must prove its existence to the jury beyond a reasonable doubt. N.C.G.S. § 15A-1340.16(a), (a)(1) (2017). Section 15A-1340.16(a1) allows the jury to determine if one or more aggravating factors exists in the same trial or at the sentencing phase. N.C.G.S. § 15A-1340.16(a1).

> If the court determines that a separate [sentencing] proceeding is required, the proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. . . . A jury selected to determine whether one or more aggravating factors exist

> shall be selected in the same manner as juries are selected for the trial of criminal cases.

Id. Neither the plain language of section 15A-1231(b) nor the plain language of section 15A-1340.16 requires a trial judge to hold another formal charge conference before instructing the jury at a sentencing proceeding to determine the existence of an aggravating factor. It merely requires that the charge conference occur "[b]efore the arguments to the jury" and "out of the presence of the jury." N.C.G.S. § 15A-1231(b).

Here the same jury that convicted defendant during the guilt-innocence phase found the relevant aggravating factor during the sentencing phase. By holding the charge conference during the guilt-innocence phase, the trial court complied with the statutory requirements that the charge conference occur "[b]efore the arguments to the jury" and "out of the presence of the jury." Further, defendant had been properly notified that the State intended to present an aggravating factor to the jury; he knew the trial court would instruct the jury on the factor. The trial court gave defendant and the State an opportunity to be heard before and after the trial court instructed the jury on the aggravating factor. Defendant did not object. Reading the statute to require an additional charge conference adds to the statutory text. Accordingly, I respectfully dissent in part and concur in result only in part.

Justice MORGAN dissenting, in part, and concurring in the result, in part.

While I agree with my colleagues in the majority that N.C.G.S. § 15-144.2(b) (2017) expressly requires that a short-form indictment for statutory sex offense name the alleged child victim, I must disagree with them that the indictment upon which defendant was found guilty for committing a sex offense against a child in 2013 failed to comport with the statute's requirements. I would find that the indictment at issue is facially valid and, therefore, sufficient to confer jurisdiction upon our courts to adjudicate the case, because the indictment fulfills all of the legal requirements which are required for the validity of the charging instrument. The indictment that this Court determined to be fatally defective in *State v. White*, 372 N.C. 248, 256, 827 S.E.2d 80, 86 (2019), is virtually indistinguishable from the count of the indictment in the present case from which the conviction arose which the majority has vacated, while expressly informing the State that defendant may be recharged with the crime of committing a sex offense against a child. I would embrace and apply the fundamental reasoning of my dissenting

opinion in *White*, thereby affirming defendant's conviction of committing a sex offense against a child. My resolution of the jury charge conference issue which this case presents is consistent with the learned majority; however, I find it needless to overrule the Court of Appeals precedent of *State v. Hill*, 235 N.C. App. 166, 760 S.E.2d 85 (2014), *disc. rev. denied*, 367 N.C. 793, 766 S.E.2d 637 (2014) and its significant progeny to reach the same legal conclusion determined by the majority, and would likewise reverse the lower appellate court as to this sentencing matter and remand the case to the superior court for resentencing as dictated.

Section 15-144.2(b) of the North Carolina General Statutes, in delineating the essentials of a short-form indictment for a sex offense, states in pertinent part:

> (b) If the victim is a person under the age of 13 years, it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did engage in a sex offense with a child under the age of 13 years, naming the child, and concluding as aforesaid [in subsection (a)].

N.C.G.S. § 15-144.2(b) (Supp. 2018). "Any bill of indictment containing the averments and allegations named in this section is good and sufficient in law as an indictment for sex offense against a child under the age of 13 years and all lesser included offenses." N.C.G.S. § 15-144.2(b) (Supp. 2018). Pursuant to N.C.G.S. § 14-27.4A(a) (now recodified as N.C.G.S. § 14-27.28 (2017)), "[a] person is guilty of statutory sexual offense with a child by an adult if the person is at least 18 years of age and engages in a sexual act with a victim who is a child under the age of 13 years." N.C.G.S. § 14-27.28 (2017).

The majority conveniently disregards the extensive statutory, constitutional, and conceptual developments which allow a measure of practical deviation from the rigid and staid technical requirements imposed on criminal indictments at common law in concluding here that the indictment upon which defendant was found guilty for committing a sex offense against a child was fatally defective. Its taut and unpliant embrace of such archaic principles are demonstrated by the majority's heavy reliance on *State v. Jackson*, 218 N.C. 373, 11 S.E.2d 149 (1940) and its progeny of cases which were decided by this Court some decades ago. However, more recently this Court has recognized that "we are 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 *State v. Freeman*, 314 N.C. 432, 436, 333 S.E.2d 743,

746 (1985)). "Instead, contemporary criminal pleadings requirements have been 'designed to remove from our law unnecessary technicalities which tend to obstruct justice.' " *Id.* The General Assembly has provided that "[e]very criminal proceeding by indictment is sufficient in form for all intents and purposes 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." N.C.G.S. § 15-153 (2017), *quoted in Williams*, 368 N.C. at 623, 781 S.E.2d at 271 (2016) (emphasis added). Our courts have joined the General Assembly in its efforts to simplify the standard for indictments. *See e.g.*, *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953). Because "the quashing of indictments is not favored," *State v. James*, 321 N.C. 676, 681, 365 S.E.2d 579, 582 (1988), an indictment is facially valid if it uses "either literally or substantially the language found in the statute defining the offense." *Williams*, 368 N.C. at 626, 781 S.E.2d at 272. Indeed, this Court has determined that "[a]n indictment or criminal charge is constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense." *State v. Coker*, 312 N.C. 432, 434, 323 S.E.2d 343, 346 (1984).

In the case at bar, the count of the indictment returned against defendant for the purpose of charging him with committing a sex offense against a child alleged that, "on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully, and feloniously did engage in a sexual act with Victim #1, a child who was under the age of 13 years, namely 10 – 11 years of age. At the time of the offense the defendant was at least 18 years of age. This act was in violation of the above-referenced law." In finding that defendant's indictment for sex offense was facially invalid, the majority expressly relies upon its holding in *White* that the "use of the phrase 'Victim #1' does not constitute 'naming the child' " as required by N.C.G.S. § 15-144.2(b). *See White*, 372 N.C. at 248, 827 S.E.2d at 80. However, whether or not the State's use of "Victim #1" was sufficient for purposes of "naming the victim," although relevant, is not as automatically dispositive of the facial validity of the indictment at issue as the majority unfortunately believes. Rather, as earlier noted and as evidenced in our previous holdings, the validity of the indictment depends upon whether defendant was sufficiently apprised of the charge against him. "It is the duty of this Court to look through and scrutinize *the whole record*" in assessing whether "an

offense is sufficiently charged." *State v. Fowler*, 266 N.C. 528, 530, 146 S.E.2d 418, 420 (1966).

Here, although the State employed an effort to protect the alleged victim's identity by identifying her as "Victim #1" in defendant's indictment for the sex offense at issue, a review of the whole record reveals that defendant was sufficiently apprised of the charges against him. The indictment substantially tracks the critical language of N.C.G.S. § 14-27.4A, the statute under which defendant was charged. The initials of the alleged victim—which our appellate courts and federal courts have deemed sufficient for an indictment to be facially valid—appeared in the arrest warrant that was issued for defendant and which served as a preface for defendant's subsequent indictment for sex offense, as well as in the indictment charging defendant with taking indecent liberties with a child in 2013. *See e.g.*, *State v. McKoy* 196 N.C. App. 650, 657–58, 675 S.E.2d 406, 412, *appeal dismissed and disc. rev. denied*, 363 N.C. 586, 683 S.E.2d 215 (2009) (holding that "[t]he record on appeal demonstrates that [d]efendant had notice of the identity of the victim . . . [because] [t]he arrest warrants served on [d]efendant listed the victim by her initials."); *see also United States v. Wabo*, 290 F. Supp. 2d 486, 490 (D.N.J. 2003) (concluding that "the Superseding Indictment contains sufficient factual and legal information for the defense to prepare its case. Although the victims are identified by initials, it is not essential that an indictment identify victims by their given names."). The notice to defendant of the identity of "Victim #1" was so clear and effective that neither he nor his trial counsel raised an issue of any insufficiency or vagueness in the indictment as to the alleged child victim's identity. And while my distinguished colleagues of the majority are correct that this Court may act *ex mero motu* on a matter involving the properness of jurisdiction, it is inescapable to recognize that defendant considered himself to be so apprised of the elements of his alleged crime of committing a sex offense against a child that the issue was not even broached for review by this Court or by the Court of Appeals.

I would find that the effectiveness and sufficiency of the notice given to defendant as to the identity of "Victim #1" in the indictment for sex offense of a minor child, based upon the alleged victim's identity being sufficiently divulged in the documents which are contained in the present record, is readily apparent from the procedural and substantive circumstances at the trial level, and buttressed by the lack of the issue being presented for resolution at the appellate level. With the majority's citation of language excerpted from *White* that the "facial validity [of an indictment] 'should be judged based solely upon the language

of the criminal pleading in question without giving any consideration to the *evidence* that is ultimately offered in support of the accusation contained in that pleading,' " 372 N.C. at 254, 827 S.E.2d at 84, the majority erects the proverbial straw man that it easily blows down by conflating the State's *legally sufficient proof* that defendant's stepchild was the indictment's "Victim #1" with the State's *legally sufficient notice* that defendant's stepchild was the indictment's "Victim #1." However, defendant did indeed know the identity of the indictment's "Victim #1" before any evidence was presented at trial, due to the legal sufficiency of the charging instrument and supportive documentation in the record, and illustrated by defendant's familiarity with the State's contentions.

In my view, the majority does not sufficiently justify its determination that the indictment charging defendant with committing a sex offense against a child is facially invalid as to the identification of the alleged child victim as "Victim #1" in light of the achievement of required notice to defendant which protected all of his constitutional rights, while simultaneously satisfying the legal requirements for a valid short-form indictment and salvaging some protection of privacy for the minor child. I would therefore hold that the indictment was facially valid and sufficient to confer jurisdiction upon our courts to adjudicate the case, thus affirming defendant's conviction.

I now turn to the issues that the parties have presented for our consideration. North Carolina General Statutes Section 15A-1231 addresses the subject of jury instructions in criminal jury trials. Subsection (b) of the statute reads as follows:

> Before the arguments to the jury, the judge must hold a recorded conference on instructions out of the presence of the jury. At the conference the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. A party is also entitled to be informed, upon request, whether the judge intends to include other particular instructions in his charge to the jury. *The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of trial, materially prejudiced the case of the defendant.*

N.C.G.S. § 15A-1231(b) (2017) (emphasis added). Section 15A-1340.16(a) of the General Statutes provides a general foundation for the concept of

aggravated and mitigated sentences in criminal matters, stating in pertinent part that "[t]he court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate," with "[t]he State bear[ing] the burden of proving beyond a reasonable doubt that an aggravating factor exists." N.C.G.S. § 15A-1340.16(a) (2017). If the defendant does not admit to the existence of an aggravating factor, then only a jury may determine if an aggravating factor is present in an offense. N.C.G.S. § 15A-1340.16(a1). If the jury finds that any aggravating factors exist, then the court may depart from the presumptive range of sentences if the court determines that they outweigh any mitigating factors that are present, and upon such a departure may impose a sentence that is permitted by the aggravated range. N.C.G.S. § 15A-1340.16(b) (2017). A circumstance in the perpetration of a criminal offense that the defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense is statutorily established as an aggravating factor. N.C.G.S. § 15A-1340.16(d) (15) (2017).

I agree with the majority that, regardless of the nature and extent of the trial court's non-compliance with the requirements of N.C.G.S. § 15A-1231(b), defendant is required to show that he was materially prejudiced by such non-compliance in order to be afforded relief on appeal and that defendant failed to demonstrate such prejudice here. However, because the Court of Appeals firmly premised its decision on its precedent embodied in *State v. Hill*, 235 N.C. App. 166, 760 S.E.2d 85 (2014) in determining that defendant was materially prejudiced because his trial counsel was not given an opportunity to object to the instructions regarding the aggravating factor before they were given to the jury, I depart from the majority regarding the manner in which I reach the same conclusion that in the present case, defendant was not materially prejudiced by the trial court's failure to conduct a jury charge conference on the submitted aggravating factor. In doing so, my alternative determination would simultaneously distinguish the instant case from *Hill* on their respective procedural facts, thereby preventing the need to overrule *Hill* and its progeny as the majority has seen fit to do.

The Court of Appeals, in deciding *Hill*, deemed it important to accentuate that "in addition to not holding a charge conference, the trial court, contrary to the General Rules of Practice, did not, following his charge to the jury, give counsel an opportunity to object to the charge . . . As a result, defense counsel was unable to have any input into the jury instructions at all." *Hill*, 235 N.C. App. at 173, 760 S.E.2d at 90. The lower appellate court included this circumstance in its ultimate conclusion in

Hill that defendant experienced material prejudice. On the other hand, however, the trial court in the case at bar provided both defendant and the State with the opportunity to be heard both before *and* after the trial court's instructions to the jury on the aggravating factor. The trial transcript in the present case contains the following exchange among the trial court, the State's prosecutor Mr. Swanson, and defendant's counsel Mr. Bostian, immediately after the jury returned its verdicts of guilty and at the outset of the sentencing phase of the case:

> THE COURT: Okay. Ladies and gentlemen, now that you have returned a verdict - - and I didn't know this until you - - what - - I had a sense of what your verdicts were or know what your verdicts were - - the State in this matter has also filed what is called an "aggravating factor."
>
> An aggravating factor is something that the jury has to determine whether it exists or not. And if, in fact, the jury finds that it does exist, it is something the Court could consider in imposing the sentence in this case. I don't know whether - -
>
> Are you ready to proceed with that at this point?
>
> MR. SWANSON: Yes, Your Honor, I think they have - - I am ready to proceed.
>
> THE COURT: *Are you ready to proceed?*
>
> MR. BOSTIAN: *Yes*, *Your Honor*.

(emphasis added). Both the State and defendant declined the opportunity to offer further evidence on the aggravating factor before giving brief statements to the jury. After instructing the jury, the trial court excused the jury from the courtroom to deliberate the issue of the existence of the aggravating factor, and the transcript of the proceedings displays the trial court's invitation to counsel for both sides:

> THE COURT: All right, outside the presence of the jury, Defendant is present in open court with his attorney, Mr. Swanson's here on behalf of the State, the jury having returned those guilty verdicts on two of the six charges, and the State previously having asked the Court to make a determination with respect to the out-of-state Michigan conviction; *is there anything else you want to be heard* - - or do you wish to be heard any further on that?

(emphasis added). Neither defendant nor the State chose to say anything through their respective counsel about the trial court's instruction to the jury on the aggravating factor.

Consistent with the Court of Appeals' emphasis in *Hill* regarding the importance of defense counsel's opportunity at a trial's sentencing phase to be heard following the trial court's jury charge instruction on an aggravating factor in order to prevent a trial court's failure to comply fully with the provisions of N.C.G.S. § 15A-1231(b) from reaching a level of material prejudice to a defendant's case, and our recognition of this essential common trait which *Hill* shares with the instant case, this Court has likewise determined the cases of *State v. Bennett*, 308 N.C. 530, 302 S.E.2d 786 (1983) and *State v. Wiley*, 355 N.C. 592, 565 S.E.2d 22 (2002).

In *Bennett*, we considered the provisions of N.C.G.S. § 15A-1231(b), in conjunction with other statutes and pertinent rules, in assessing the defendant's argument that he was not given the opportunity by the trial court to object to instructions outside the presence of the jury. After charging the jury with its instructions, the trial court asked if there was "anything further from either the State or the defendant"; the defendant's response was, "Nothing for the defendant." *Bennett*, 308 N.C. at 535, 302 S.E.2d at 789-90. We observed:

> At this time the defendant could have objected to the instructions out of the hearing of the jury or requested that he be permitted to make his objections out of the presence of the jury. The record reveals that the defendant did neither. His failure to object to the instructions cannot, on the record before us, be said to have been caused by the lack of opportunity for the defendant to make his objections out of the hearing of the jury.

Id. *Wiley* presented another opportunity for this Court to examine the operation of N.C.G.S. § 15A-1231(b) where the issue of material prejudice was raised with regard to a jury charge conference and counsel's ability to be heard concerning a trial court's instructions. We cited our holding in *State v. Wise*, 326 N.C. 421, 390 S.E.2d 142, *cert. denied*, 498 U.S. 853, 111 S. Ct. 146, 112 L. Ed. 2d 113 (1990) as controlling the outcome in *Wiley* in determining that, where both sides indicated that they were satisfied with the jury charge, defendant cannot show material prejudice from a trial court's failure to comply fully with provisions of N.C.G.S. § 15A-1231(b) if the defendant had the opportunity to object to the charge but declined to do so. *Wiley*, 355 N.C. at 630, 565 S.E.2d at 49 (2002).

The important aspect of defense counsel's opportunity at a trial's sentencing phase to be heard following the trial court's charge to the jury is a critical trial level juncture which was not afforded to the defendant in *Hill* but was undoubtedly offered to defendant in the current matter. This distinguishing feature provides a sufficient rationale upon which to find that defendant's case was not materially prejudiced under N.C.G.S. § 15A-1231, that the statute's interpretation afforded by *Hill* from the Court of Appeals and *Hill's* predecessors of *Wiley* and *Wise* from this Court in construing the content and applicability of N.C.G.S. § 15A-1231(b) is sound, and that *Hill* and its progeny—coupled with their foundation which is consistent with this Court's precedent regarding similar issues under N.C.G.S. § 15A-1231(b)—are procedurally distinguishable in evaluating trial proceeding occurrences such that it is needless to overrule *Hill* and its guiding principles.

Based on the foregoing observations, I would reverse the Court of Appeals on all issues, while accordingly reinstating defendant's conviction for the offense of committing a sex offense against a child and the trial court's resulting judgment.

IN RE A.D.

[373 N.C. 248 (2019)]

IN THE MATTER OF A.D.	)	From Cabarrus County

No. 418A19

ORDER

Appellant-respondent's Motion to Withdraw Appeal is allowed. Because no costs have been or will be assessed by the Court in this pending appeal, appellant-respondent's request for the waiver of costs is dismissed as moot.

By Order of the Court in Conference, this 3rd day of December, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of December, 2019.

AMY FUNDERBURK

Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. ANTHONY

[373 N.C. 249 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Rowan County
	)	
KENNETH RUSSELL ANTHONY	)	

No. 352P19

ORDER

The State's petition for discretionary review is decided as follows: The Court allows the State's petition for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decision in *State v. Grady*, 831 S.E.2d 542 (N.C. 2019) (179A14-3), including what, if any, additional proceedings should be utilized in order to properly decide the questions that will be before it on remand. The temporary stay issued in this case on 5 September 2019 is hereby dissolved and the State's petition for writ of supersedeas is denied.

By Order of the Court in Conference, this 4th day of December, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of December, 2019.

AMY FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Forsyth County
	)	
RUDOLPH COLES, JR.	)	

No. 417PA18

ORDER

Defendant's motion for appropriate relief is decided as follows: Pursuant to N.C.G.S. § 15A-1415(b), the Court determines that it is necessary to remand this case to the Superior Court, Forsyth County for the holding of a hearing, the taking of evidence, and the entry of an order addressing defendant's motion for appropriate relief. The proceedings associated with defendant's appeal are stayed pending the completion of the required trial court proceedings in accordance with N.C.G.S. § 15A-1418(c). The Superior Court, Forsyth County shall, upon the entry of its order, transmit that order to this Court as required by N.C.G.S. § 15A-1418(a) so that it may either proceed with the appeal or enter an appropriate order terminating it.

By order of the Court in conference, this the 4th day of December, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of December, 2019.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
Assistant Clerk, Supreme Court of
North Carolina

STATE v. TUCKER

[373 N.C. 251 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Rowan County
	)	
JESSE JAMES TUCKER	)	

No. 330A19

ORDER

The parties' motions presently before us are decided as follows: This case is remanded to the Court of Appeals for further consideration in light of this Court's decision in *State v. Grady*, 831 S.E.2d 542 (N.C. 2019) (179A14-3). The temporary stay issued in this case on 22 August 2019 and the writ of supersedeas issued on 9 September 2019 are hereby dissolved. Defendant's remaining motions are dismissed as moot.

By Order of the Court in Conference, this 4th day of December, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of December, 2019.

AMY FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

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

4 DECEMBER 2019

25P19	John Keely Howard and wife, Cynthia Hicklin Hammond v. OrthoCarolina, P.A.; Alfred L. Rhyne, III, M.D.; Faisal A. Siddiqui, M.D.; Theodore A. Belanger, M.D.	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-71)	Denied
31PA19	Eve Gyger v. Quinten Clement	Motion to Withdraw as Counsel for Defendant-Appellee (COA18-244)	Allowed **11/25/2019**
54P19-2	State v. Rogelio Albino Diaz Tomas	1. Def's Petition for Writ of Mandamus (COAP19-490; COA19-777) 2. Def's Petition for Writ of Certiorari to Review Order of the COA 3. Def's Motion to Deem Petition Timely Filed	1. Denied **11/08/2019** 2. Denied **11/08/2019** 3. Dismissed as moot **11/08/2019**
115A04-3	State v. Scott David Allen	1. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Montgomery County 2. Def's Petition in the Alternative for Writ of Mandamus 3. State's Motion for Extension of Time to File Response to Petition for Writ of Certiorari and Writ of Mandamus 4. Def's Motion for Extension of Time to File Brief 5. Def's Motion to Allow Withdrawal of Margaret C. Lumsden as Counsel 6. Def's Motion for Office of Indigent Defense Services to Appoint New Co-Counsel 7. Def's Motion for Extension of Time to File Brief	1. Allowed **09/25/2019** 2. 3. Allowed **05/21/2019** 4. Allowed **10/07/2019** 5. Allowed **10/09/2019** 6. Allowed **10/09/2019** 7. Allowed **11/07/2019**
119A19	Lisa Dawn Crews v. James Scott Crews	1. Def's Notice of Appeal Based Upon a Dissent (COA18-42) 2. Def's Motion to Dismiss Appeal	1. --- 2. Allowed **11/19/2019**
142A97-3	State v. Terrance Dion Bowman	1. Def's Pro Se Motion for Relief 2. Def's Pro Se Motion for Appropriate Relief	1. Dismissed 2. Dismissed

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

4 DECEMBER 2019

148P19	Patricia Hager, Executrix of the Estate of Albert Hoffmaster v. Smithfield East Health Holdings, LLC d/b/a Gabriel Manor Assisted Living Center, Smithfield Operations, LLC, Saber Healthcare Holdings, LLC, Saber Healthcare Group, LLC, Sherry Tabor	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA18-651) 2. Def's Motion for Withdrawal and Substitution of Counsel	1. Denied 2. Allowed **Davis, J., recused**
153A19	N.C. Department of Revenue v. Graybar Electric Company, Inc.	Petitioner's Motion to Amend Appendix to Brief	Allowed **11/26/2019**
159A19	In the Matter of C.J.	Respondent-Mother's Motion for Leave to File Supplemental Brief	Allowed
172A19	In the Matter of J.H., Z.R., A.R., and D.R.	1. Respondent's Motion to Amend the Record on Appeal 2. Petitioner's Motion to Consider the Brief of the Forsyth County Department of Social Services Timely Filed	1. Allowed **07/08/2019** 2. Allowed **11/14/2019**
211PA16	SED Holdings, LLC v. 3 Star Properties, LLC, James Johnson, TMPS LLC, Mark Hyland, and Home Servicing, LLC	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA15-747) 2. Defs' Motion to Appear 3. Plt's Motion to Stay Proceedings Against 3 Star Properties, LLC because it is in Bankruptcy 4. Plt's Motion that Plaintiff be Permitted to Proceed Now in the Trial Court Against the Remaining Defendants 5. Plt's Motion to Lift Stay Order 6. Defs' Motion to Allow Time to Respond to Motion of Plaintiff to Dissolve the PDR Allowed by this Court 7. Defs' Motion to Dismiss Appeal	1. Allowed **09/22/2016** 2. Allowed **11/01/2016** 3. Special Order **11/01/2016** 4. Special Order **11/01/2016** 5. Dismissed as moot 6. Allowed **02/02/2017** 7. Allowed **Davis, J., recused**
212A19	In the Matter of E.B.M., Z.A.M.	Respondent-Mother's Motion to Withdraw and to Allow the Executive Director to Re-Appoint Counsel	Allowed **11/06/2019**

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

4 DECEMBER 2019

218P17-2	NNN Durham Office Portfolio 1, LLC, et al. v. Grubb & Ellis Company, et al.	1. Plts' Notice of Appeal Based Upon a Constitutional Question (COA17-607) 2. Plts' PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal 4. Defs' Conditional PDR Under N.C.G.S. § 7A-31 5. Plts' Motion to Withdraw PDR as to Appellants NNN Durham Office Portfolio 12, LLC and St. Kitts Investments, LLC	1. --- 2. Denied 3. Allowed 4. Dismissed as moot 5. Allowed
220A19	In the Matter of J.M., J.M., J.M., J.M., J.M.	Respondent-Mother's Motion to Amend Record on Appeal	Allowed **12/03/2019**
228P19	State v. Timothy Calvin Denton	1. State's Motion for Temporary Stay (COA18-742) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/14/2019** Dissolved **12/04/2019** 2. Denied 3. Denied
250P19	Todd Preston Jackson v. The Timken Company, Deborah K. Gentry, RN, a/k/a Deborah Gentry Weatherman	Def's PDR Under N.C.G.S. § 7A-31 (COA18-695)	Denied
252PA14-3	State v. Thomas Craig Campbell	Def's Motion for Judicial Notice (COA13-1404, 13-1404-2, 13-1404-3)	Dismissed as moot
256P16-3	State v. Jonathan James Newell	1. Def's Pro Se Petition for Writ of Habeas Corpus (COAP16-233) 2. Def's Pro Se Motion to Appoint Counsel	1. Denied **11/20/2019** 2. Dismissed as moot **11/20/2019**
257P19	State v. Charles Fitzgerald Harris	1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA18-910) 2. Def's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
263PA18	State v. Cedric Theodis Hobbs, Jr.	Def's Second Motion to Supplement Record on Appeal	Allowed
263PA18	State v. Cedric Theodis Hobbs, Jr.	Def's Motion to File Amended Reply Brief	Allowed

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

4 DECEMBER 2019

276A19	In the Matter of B.L.H.	Respondent-Father's Motion to Withdraw and Allow Parent Defender to Re-Appoint Counsel	Allowed **11/06/2019**
277P18-6	State v. Gabriel Adrian Ferrari	Def's Pro Se Motion to Strike the Order of the Court in Conference 25th of September 2019 (COA98-724)	Dismissed
290PA15-2	State v. Jeffrey Tryon Collington	Def's Motion for Production of a Recording (COA14-1244)	Dismissed as moot **11/07/2019**
303A19	In the Matter of N.G.	Petitioner's Motion for Extension of Time to File Appellee Brief and Response to Petition for Writ of Certiorari	Allowed **11/07/2019**
304P18-2	State v. Maurice McKinnon	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, New Hanover County (COAP18-494) 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
311A19	State v. Ricky Franklin Charles	1. Def's Notice of Appeal Based Upon a Dissent (COA18-945) 2. Def's PDR as to Additional Issues 3. Def's Motion to Amend the Record on Appeal 4. Def's Motion to Amend Certificates of Filing and Service 5. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Dismissed as moot 4. Allowed 5. Denied
323P19	Lisa Rhodes v. Justin Robertson	1. Plt's Pro Se Notice of Appeal Based Upon A Constitutional Question (COA18-1253) 2. Plt's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied

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

4 DECEMBER 2019

330A19	State v. Jesse James Tucker	1. State's Motion for Temporary Stay (COA18-1295)	1. Allowed **08/22/2019** Special Order
		2. State's Petition for Writ of Supersedeas	2. Allowed **09/09/2019** Special Order
		3. State's Notice of Appeal Based Upon a Dissent	3. ---
		4. Def's Motion to Dismiss Appeal	4. Special Order
		5. Def's Motion to Dissolve Temporary Stay	5. Special Order
		6. Def's Motion to Stay Briefing Schedule Until Resolution of the Motion to Dismiss	6. Special Order
332P19	State v. Dalton Dewayne Flowers	1. Def's Motion for Temporary Stay (COA18-832)	1. Allowed **08/23/2019** Dissolved **12/04/2019**
		2. Def's Petition for Writ of Supersedeas	2. Denied
		3. Def's Notice of Appeal Based Upon a Constitutional Question	3. ---
		4. Def's PDR Under N.C.G.S. § 7A-31	4. Denied
		5. State's Motion to Dismiss Appeal	5. Allowed
347P19	State v. James Edward Raynor, Jr.	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA18-942)	1. ---
		2. Def's PDR Under N.C.G.S. § 7A-31	2. Denied
		3. State's Motion to Dismiss Appeal	3. Allowed
348P19	State v. Morquel Deshawn Redmond	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA18-801)	1. Dismissed *ex mero motu*
		2. Def's PDR Under N.C.G.S. § 7A-31	2. Denied
350P19	State v. Samantha Meiaza Matthews	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-1257)	1. Denied
		2. Def's Motion for Temporary Stay	2. Allowed **10/15/2019** Dissolved **12/04/2019**
		3. Def's Petition for Writ of Supersedeas	3. Denied

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

4 DECEMBER 2019

352P19	State v. Kenneth Russell Anthony	1. State's Motion for Temporary Stay (COA18-1118) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/05/2019** Special Order 2. Special Order 3. Special Order
353P19	State v. Patrick Lynn Griggs	Def's PDR Under N.C.G.S. § 7A-31 (COA18-1000)	Denied
362P19	Gavin Suarez, minor child, by and through Guardian Ad Litem, Richard P. Nordan, Esq.; Eric Suarez and Jean Suarez, individually and as parents and natural guardians of Gavin Suarez, Plaintiffs v. American Ramp Company (ARC); Town of Swansboro, Defendants v. Alaina Hess, Third-Party Defendant	Def's (Town of Swansboro) PDR Under N.C.G.S. § 7A-31 (COA19-36)	Denied **Davis, J., recused**
363A14-4	Sandhill Amusements, Inc. and Gift Surplus, LLC v. State of North Carolina, ex rel. Roy Cooper, Governor, in his official capacity, Branch Head of the Alcohol Law Enforcement Branch of the State Bureau of Investigation, Mark Senter, in his official capacity, Secretary of the North Carolina Department of Public Safety, Erik Hooks, in his official capacity, and the Director of the North Carolina State Bureau of Investigation, Bob Schurmeier, in his official capacity	1. Plt's Motion for Temporary Stay (COA14-85; COAP17-693) 2. Plt's Petition for Writ of Supersedeas	1. Allowed **11/19/2019** 2. **Ervin, J., recused** **Davis, J., recused**

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

4 DECEMBER 2019

363P19	State v. Michael Eugene Bradley	Def's PDR Under N.C.G.S. § 7A-31 (COA18-1297)	Denied
369A19	In the Matter of A.H.F.S., R.S.F.S., and C.F.S.	Respondent's Petition for Writ of Certiorari to Review Decision of District Court, Henderson County	Allowed
371P19	Crystal Gail Mangum v. Marianne Bond - Officer Durham Police Department, and Durham District Attorney's Office	Plt's Pro Se PDR Under N.C.G.S. § 7A-31 (COA19-19)	Denied
396A19	In re J.M.	Respondent's Motion for Extension of Time to File Brief	Allowed **11/06/2019** **Davis, J., recused**
398P19	Gregory E. Lindberg v. Tisha L. Lindberg	Plt's PDR Under N.C.G.S. § 7A-31 (COA19-78)	Denied **Davis, J., recused**
415P19	State v. Scott Randall Reich	1. Def's Pro Se Motion for Appeal for Help in Obtaining All Files of Discovery (COAP19-666) 2. Def's Pro Se Motion for Appointment of Counsel	1. Dismissed **10/31/2019** 2. Dismissed **10/31/2019** **Davis, J., recused**
417PA18	State v. Rudolph Coles, Jr.	Def's Motion for Appropriate Relief (COA18-357)	Special Order
417P19	Common Cause, et al. v Lewis, et al.	1. Plts' PDR Prior to a Determination by the COA 2. Plts' Motion to Suspend Appellate Rules 3. Legislative-Defs' Motion to Delay Ruling on PDR Prior to a Determination by the COA 4. Legislative-Defs' Motion to Recuse Justice Earls	1. Denied **11/15/2019** 2. Dismissed as moot **11/15/2019** 3. Dismissed as moot **11/15/2019** 4. Denied **11/15/2019**
418A19	In the Matter of A.D.	Respondent-Mother's Motion to Withdraw Appeal	Special Order **12/03/2019**
427P19	State v. Maliq Anthony Marshall-Hardy	Def's Pro Se Motion for Dismissal of Pending Allegations	Dismissed **11/08/2019**

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

4 DECEMBER 2019

434PA18	PHG Asheville, LLC v. City of Asheville	Petitioner's Motion to Supplement Appellate Record	Allowed
434P19	State v. Christophe C. Exum	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wayne County (COAP19-15)	Denied **11/20/2019**
445P19	State v. Jason Travon Peterson	1. Def's Pro Se Motion for Temporary Stay (COA17-26) 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Pitt County	1. Denied **11/21/2019** 2. Denied **11/21/2019** 3. Denied **11/21/2019**
447P18	State v. Milton Denard Hauser	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-717) 2. Def's Petition for Writ of Certiorari to Review Order of the COA 3. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Forsyth County	1. Denied 2. Denied 3. Denied
447A19	State v. Ryan Kirk Fuller	1. Def's Motion for Temporary Stay (COA19-243) 2. Def's Petition for Writ of Supersedeas	1. Allowed **11/22/2019** 2.
576P07-5	State v. Moses Leon Faison	Def's Petition for Writ of Certiorari to Review Order of Superior Court, Greene County	Dismissed

IN RE C.J.

[373 N.C. 260 (2020)]

IN THE MATTER OF C.J.

No. 159A19

Filed 24 January 2020

Termination of Parental Rights—grounds for termination—willful failure to make reasonable progress—nexus between court-approved plan and conditions which led to removal

The trial court's unchallenged findings of fact were sufficient to terminate a mother's parental rights in her daughter on the grounds that she willfully left her daughter in foster care for more than twelve months without making reasonable progress to correct the conditions which led to the child's removal from her care, and were based on clear, cogent, and convincing evidence that the mother failed to maintain contact with the department of social services while her daughter was in its custody or to participate in any aspect of the court-ordered case plan. Despite the mother's argument that the conditions she failed to correct were not those which directly led to her daughter's removal, there existed a sufficient nexus between the components of the case plan and the overall conditions which led to the daughter's removal from the mother's care.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 14 January 2019 by Judge Sarah C. Seaton in District Court, Onslow County. This matter was calendared in the Supreme Court on 17 January 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Richard Penley for petitioner-appellee Onslow County Department of Social Services.

Michelle FormyDuval Lynch, GAL Appellate Counsel, for appellee Guardian ad Litem.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender J. Lee Gilliam, for respondent-appellant mother.

BEASLEY, Chief Justice.

Respondent-mother appeals from an order entered by the trial court terminating her parental rights to her daughter, Chloe.[1] After careful consideration of respondent-mother's challenges to the trial court's conclusion that grounds exist to terminate her parental rights to Chloe, we affirm the trial court's order.

On 21 October 2014, the Onslow County Department of Social Services (DSS) obtained nonsecure custody of Chloe and filed a petition alleging she was a neglected and dependent juvenile. DSS alleged respondent-mother had been arrested in Georgia and extradited to Mississippi to face charges involving drug trafficking and stolen weapons. Respondent-mother's boyfriend had taken Chloe from her school in Georgia and moved with her to Jacksonville, North Carolina. The boyfriend was subsequently arrested on charges from Georgia, and Chloe was placed with his relatives. DSS deemed the placement inappropriate and learned that a Georgia department of social services had an open case involving respondent-mother and her alleged use of Chloe to obtain prescription medication. Chloe's father was incarcerated in Mississippi on a drug-related conviction and had a projected release date of 25 January 2016.[2]

After a hearing on 14 January 2015, the trial court entered an adjudication and disposition order on 24 April 2015, which it amended by order entered 16 September 2015. The court concluded Chloe was a dependent juvenile and continued custody of Chloe with DSS. The court ordered respondent-mother to participate in therapeutic intervention, including diagnostic assessment and testing, and follow all recommendations; to complete a substance abuse assessment and follow all recommendations; to complete drug screens as requested by DSS; to obtain and maintain verifiable employment; to obtain and maintain stable housing suitable for Chloe; and to maintain communication with DSS. The court also granted respondent-mother supervised visitation with Chloe for one hour every other week.

By order entered 15 June 2015, the trial court set the primary permanent plan for Chloe as reunification and the secondary plan as custody with a court-approved caretaker. On 5 December 2016 the court changed the permanent plan to guardianship, with a secondary concurrent plan

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1. We refer to the minor child throughout this opinion as "Chloe," which is a pseudonym used to protect the identity of the child and for ease of reading.

2. Chloe's father subsequently died on 19 August 2017 and was not a party to the termination of parental rights proceeding.

of reunification, after finding that respondent-mother remained in Mississippi and had not provided DSS or the court with any evidence that she had participated in her case plan. Over the next several months, respondent-mother continued to fail to show progress toward meeting the goals of her case plan. The court ordered DSS to cease reunification efforts on 3 January 2017, and, by order entered 1 June 2018, the trial court set the primary permanent plan for Chloe as adoption and the secondary plan as guardianship.

DSS filed a petition to terminate respondent-mother's parental rights on 29 August 2018, alleging grounds of neglect, willfully leaving Chloe in foster care for more than twelve months without making reasonable progress to correct the conditions that led to her removal, willfully failing to pay a reasonable portion of the cost of care for Chloe during her placement in DHHS custody, dependency, and abandonment. *See* N.C.G.S. § 7B-1111(a)(1)–(3), (6), (7) (2017). After a hearing on 13 December 2018, the trial court entered an order terminating respondent-mother's parental rights to Chloe on 14 January 2019. The trial court found and concluded respondent-mother's parental rights were subject to termination based on the grounds of neglect, willfully leaving Chloe in foster care for more than twelve months without making reasonable progress to correct the conditions that led to her removal, and abandonment. The trial court further concluded termination of respondent-mother's parental rights was in Chloe's best interests. Respondent-mother filed timely notice of appeal to this Court from the trial court's order.

Respondent-mother first challenges four of the trial court's findings of fact as unsupported by clear, cogent, and convincing evidence. However, the challenged findings are not necessary to support the trial court's conclusion that respondent-mother willfully left Chloe in foster care for more than twelve months without making reasonable progress to correct the conditions that led to her removal, and they need not be reviewed on appeal. *See In re T.N.H.*, 831 S.E.2d 54, 58–59 (2019) ("[W]e review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982))).

Respondent-mother also argues the trial court erred in concluding she willfully left Chloe in foster care for more than twelve months without making reasonable progress to correct the conditions that led to her removal, because the conditions relied upon by the court to support this conclusion did not directly "lead" to Chloe's removal. Respondent-mother contends the only condition that directly led to Chloe's removal

was her potential lengthy incarceration in Mississippi, which she claims to have remedied. This Court has recently rejected a similar argument, holding a trial court's conclusion on this ground is supported where there exists a "nexus between the components of the court-approved case plan with which respondent-mother failed to comply and the 'conditions which led to [the juvenile's] removal' from the parental home." *In re B.O.A.*, 831 S.E.2d 305, 314 (2019).

In its initial adjudication and dispositional order, the trial court found Chloe was removed because respondent had left her in the care of her boyfriend after she was arrested and extradited to Mississippi to face criminal charges involving drug-trafficking and stolen weapons. At the time of Chloe's removal, a Georgia department of social services had an open case involving allegations that respondent-mother had used Chloe to obtain prescription medication. The court further found respondent-mother had a history with Child Protective Services in Mississippi involving allegations of inappropriate care, sexual abuse of a child by a caretaker or family friend, exposure of a child to illegal substances, and inappropriate discipline. Respondent-mother's demeanor at a hearing in this case led the court to be concerned that she may have been under the influence when she testified and may have been suffering from a mental health condition. These findings establish the required nexus between the components of respondent-mother's court-approved case plan and the overall conditions that led to Chloe's removal.

In its order terminating respondent-mother's parental rights, the trial court found respondent-mother failed to address any component of her court-ordered case plan and had not visited with Chloe since January 2015. These findings are supported by clear, cogent and convincing evidence that respondent-mother failed to maintain contact with DSS while Chloe was in the department's custody or to participate in court-ordered visitation, to verifiably participate in substance abuse assessment or drug screenings, or to maintain housing and employment stability. The trial court's findings fully support its conclusion that grounds exist to terminate respondent-mother's parental rights to Chloe under N.C.G.S. § 7B-1111(a)(2) because she willfully left Chloe in foster care for more than twelve months without making reasonable progress to correct the conditions that led to Chloe's removal from her care. *See In re B.O.A.*, 831 S.E.2d at 314–16.

The trial court's conclusion on this ground "is sufficient in and of itself to support termination of [respondent-mother's] parental rights[,]" *In re T.N.H.*, 831 S.E.2d at 62, and we need not address her arguments challenging the remaining grounds. Respondent-mother does not

challenge the trial court's conclusion that termination of her parental rights is in Chloe's best interests. Accordingly, we affirm the trial court's order terminating respondent-mother's parental rights to Chloe.

AFFIRMED.

IN THE MATTER OF J.H., Z.R., A.R., D.R.

No. 172A19

Filed 24 January 2020

1. Termination of Parental Rights—reunification efforts—cessation—adequacy of progress—best interests of child

The trial court did not abuse its discretion in determining that ceasing reunification efforts was in the best interests of respondent-mother's children where the evidence supported the trial court's findings that she made only "some progress" on her parenting skills, struggled with and was uncooperative in parent coaching sessions, and could not safely parent her children.

2. Termination of Parental Rights—best interests of child—likelihood of adoption—developmental challenges

The Supreme Court rejected respondent-mother's argument that her children were unlikely to be adopted due to their serious developmental challenges and that the trial court therefore abused its discretion by terminating her parental rights. The evidence and findings supported the trial court's conclusions that the children had a high likelihood of adoption by specific prospective adoptive parents.

Consolidated appeal pursuant to N.C.G.S. § 7B-1001(a1) and on writ of certiorari pursuant to N.C.G.S. § 7A-32(b) from orders entered on 26 February 2018 and 6 February 2019 by Judge Denise S. Hartsfield, in District Court, Forsyth County. This matter was calendared in the Supreme Court on 17 January 2020 but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Theresa A. Boucher, Assistant County Attorney, for petitioner-appellee Forsyth County Department of Social Services.

IN RE J.H.

[373 N.C. 264 (2020)]

Parker Poe Adams & Bernstein LLP, by Brandon Duckworth, for appellee Guardian ad Litem.

Sydney Batch for respondent-appellant mother.

EARLS, Justice.

Respondent appeals from the trial court's 26 February 2018 permanency planning order and from its 6 February 2019 order terminating her parental rights to Jared, Zendaya, Aaron, and Devon.[1] We affirm.

Background

Respondent is the mother of nine children. Four of her older children were adjudicated abused or neglected and she relinquished her parental rights with regard to those children in 2008. Over the last twenty years, respondent and her children have been the subjects of over forty Child Protective Services reports.

More recently, the Forsyth County Department of Social Services (DSS) received a report on or about 21 October 2016 that respondent was using inappropriate discipline by punching her sons Jared (age 9 at the time) and Devon (age 8 at the time). Two reports were made to DSS on or about 10 November 2016. The first concerned an injury to Devon's top lip that required medical attention. The second report indicated that respondent's daughter Zendaya (age 4 at the time) had been sexually abused by Zendaya's adult brother, I.H., one of respondent's older sons. The sexual abuse occurred after respondent was evicted from her home and had moved into I.H.'s home. Prior to moving in with I.H., respondent was aware of the dangers I.H. posed to her children. Specifically, DSS advised respondent multiple times that I.H. posed a risk of harm to the younger children and, earlier in 2016, I.H. had been named as a sexual offender in a report involving the sexual abuse of respondent's son, Jared. Jared, Zendaya, Aaron, and Devon were removed from the care, custody, and control of respondent on 11 November 2016.

On 3 April 2017, the trial court adjudicated Jared, Zendaya, Aaron, and Devon to be abused and neglected. In its order, the trial court required respondent to take a number of steps in order to reunify with her children, including:

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

a) Complete a mental health assessment and follow all the recommendations of her assessment.

b) Maintain employment to demonstrate her ability to provide for herself and her children for a minimum of six months.

c) Maintain appropriate and safe housing for herself and her children for a minimum of six months.

d) Participate in parent coaching to change and develop appropriate ways to parent her children and implement those skills during visits. [Respondent] is to follow the recommendations of the parent coach.

e) That [respondent] signs the necessary release forms to allow FCDSS and the Courts to monitor her progress.

The trial court held a review hearing on 31 May 2017, followed by a permanency planning hearing on 1 September 2017. Following the latter hearing, the court entered an order on 8 December 2017 finding that respondent was thus far "in compliance with her court plan and has made progress," but that "[respondent] can not safely parent her children. The Court continues to have concerns about the safety of [respondent's] new baby in her home."

The court held another permanency planning hearing on 24 January 2018. In its subsequent written order filed 26 February 2018, the court found that respondent had complied with some of the terms of her case plan while failing to comply with others. The court found that "[respondent] has made some progress but still demonstrates that she cannot safely parent her children" and that "the issues that brought the children into care are still present." After noting that DSS had filed petitions to terminate respondent's rights on 5 January 2018, the court ordered the cessation of reunification efforts and visitation between respondent and her children, ordered that the permanent plan for Zendaya, Aaron, and Devon be reunification with the father with a secondary plan of adoption, and ordered that the permanent plan for Jared be reunification with the father with a secondary plan of adoption. On 23 March 2018, respondent filed a "NOTICE TO PRESERVE RIGHT OF APPEAL" of the 26 February 2018 order ceasing reunification efforts.

The trial court held a termination of parental rights hearing on 12 September 2018. At the conclusion of the hearing, the trial court terminated respondent's parental rights as to these four children. The termination of parental rights order was filed on 6 February 2019. In

its order, the court found that respondent did not successfully complete compliance with the prior orders of the courts, including, *inter alia*, by failing to demonstrate safe parenting skills during the 22 months her children were in the custody of DSS and failing to successfully complete parenting classes. The court concluded that respondent had abused and neglected Jared, Zendaya, Aaron, and Devon and that grounds existed to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(1). Furthermore, the court concluded that respondent "failed to demonstrate . . . that she can safely maintain her children in a safe home," that return of the children to respondent "would result in a strong likelihood of repeated abuse or neglect of the children," and that it is in the best interests of the children to terminate respondent's parental rights. On 28 February 2019, respondent filed a notice of appeal.

Cessation of Reunification

[1] Respondent first contends that the trial court erred in its 26 February 2018 permanency planning order ceasing reunification efforts and excluding reunification with respondent as a permanent plan (the cessation order).[2] We hold that the trial court's findings are supported by competent evidence and that its permanency planning order was not an abuse of discretion.

"Our review of [a] cease reunification order . . . 'is limited to whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusions of law.' " *In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013) (second alteration in original) (quoting *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010)). "The trial court's findings of fact are conclusive on appeal if supported by any competent evidence." *Id.* (citing *In re P.O.*, 207 N.C. App. at 41, 698 S.E.2d at 530). Further, we agree with the Court of Appeals that we review an order ceasing reunification "to determine . . . whether the trial court abused its discretion with respect to disposition." *See In re N.G.*, 186 N.C. App. 1, 10, 650 S.E.2d 45, 51 (2007) (quoting *In re C.M.*,

2. Respondent filed her appeal of the termination of her parental rights in this Court but simultaneously filed her appeal of the cessation order in the Court of Appeals. On 17 June 2019, DSS filed a motion at the Court of Appeals to dismiss respondent's appeal of the cessation order based upon potential procedural issues with respondent's appeal. Respondent filed a response, arguing that DSS's contentions were without merit. On 14 November 2019, this Court "acting on its own motion, in order to resolve expeditiously all of the issues relating to these children, . . . issue[d] a writ of certiorari, . . . to consolidate both matters for review in this Court, as contemplated by N.C.G.S. § 7B-1001(a1)(2)." We decline to address those procedural issues here given our determination that, in any event, the trial court did not err in its cessation order.

183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007)), *aff'd per curiam*, 362 N.C. 229, 657 S.E.2d 355 (2008). "At the disposition stage, the trial court solely considers the best interests of the child. Nonetheless, facts found by the trial court are binding absent a showing of an abuse of discretion." *Id.* at 10, 650 S.E.2d at 51 (quoting *In re Pittman*, 149 N.C. App. 756, 766, 561 S.E.2d 560, 567 (2002). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 10–11, 650 S.E.2d at 51 (quoting *In re Robinson*, 151 N.C. App. 733, 737, 567 S.E.2d 227, 229 (2002)).

At a permanency planning hearing, "[r]eunification shall be a primary or secondary plan unless," *inter alia*, "the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C.G.S. § 7B-906.2(b) (2019). Additionally, the court must make findings "which shall demonstrate the degree of success or failure toward reunification," including:

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

Id. § 7B-906.2(d). This Court has stated in the context of orders ceasing reunification efforts that "[t]he trial court's written findings must address the statute's concerns, but need not quote its exact language." *In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013).

Here the trial court found that respondent completed a mental health assessment, signed the requisite release forms, and maintained, at the time of the hearing, an appropriate home. On the other hand, the trial court found that respondent was unemployed and was not in compliance with the requirement that she maintain employment and demonstrate her ability to provide for herself and her children for a period of six months. Additionally, the trial court found that while respondent participated in parent coaching, the parenting coach "reported that parenting coaching should be discontinued" due to respondent's slow progress and struggles with parenting her children. The court further found that "[respondent] has made some progress but still demonstrates that she

cannot safely parent her children" and that "the issues that brought the children into care are still present." The Court determined that return of the children "to the home of their parents would be contrary to the welfare of the juveniles at this time."

Respondent contends that, with respect to her parenting skills, the trial court's finding that she only made "some progress" was unsupported by evidence. Yet, the weekly reports from the parent coaching sessions catalogue how respondent, rather than listening to the coach and implementing suggested strategies, became argumentative, failed to follow simple instructions, and would threaten to leave the sessions. On one occasion, respondent "pin[ned] [Aaron] to the ground using her weight to restrain him," and when asked by the parenting coach not to lie on the child because doing so could cause injury, began yelling at the coach and then left the session. Respondent brought food for the children to which they were allergic, stating that she was "aware of the allergies but 'they only cause diarrhea.' " Additionally, the parenting coach reported that she "asked [respondent] weekly for the last two months to bring diapers for [Devon] and every week she has a different reason for not bringing the diapers. I ask her again if she remembered to bring a diaper. She did not." The parenting coach ultimately reported:

> I'm recommending coaching services be discontinued for [respondent]. She has been consistent with visits and appears to enjoy spending time with her children when they are compliant. However, she is not making the effort or showing improvement when parenting is difficult. She has four children with severe trauma and/or developmental disabilities. Parenting will be difficult, challenging and stressful. . . . Both [Aaron] and [Devon] can be defiant, difficult to communicate with and require consistent and constant monitoring. [Respondent] avoids engaging the children when they [ ] need the additional attention. When I try to redirect her, she is argumentative o[r] simply ignores my suggestions. This behavior/conflict is not productive and sets a poor example for the children.

Similarly, the parenting coach reported that she explained to respondent:

> I also wanted her to know it is my recommendation that coaching services be terminated because she is not making progress and some of the reasons I believe this is so, specifically she feels there is no need for services or room for growth. In addition, I believe she sees coaching as

> punitive and is therefore defensive when I offer suggestions or recommendations. I have seen the children, specifically [Jared], negatively impacted by her response to me and this does not benefit her, them or the process.

We conclude that there was ample evidentiary support for the trial court's finding that respondent only made "some progress" with respect to her parenting skills. Moreover, we conclude that, given the trial court's extensive findings about respondent's degree of progress and the underlying evidence, the trial court did not abuse its discretion in determining that ceasing reunification was in the best interests of the children.

Termination of Parental Rights

[2] A termination of parental rights proceeding involves two stages: an adjudicatory stage and a dispositional stage. *See In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). During the adjudicatory stage, the party petitioning for the termination of parental rights must show the existence of one or more of the statutory grounds for termination of parental rights by clear, cogent, and convincing evidence. N.C.G.S. § 7B-1109 (2017). In this appeal, respondent does not challenge the trial court's findings that these four children are abused or neglected and that statutory grounds exist to terminate her parental rights.

Having found grounds to terminate respondent's parental rights, the trial court then moved to the dispositional stage, where it examined whether the termination of parental rights is in the best interests of the children. *See* N.C.G.S. § 7B-1110. We review the trial court's decision to terminate parental rights at the disposition stage for abuse of discretion. *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citations omitted). "[A]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)). We find no such abuse of discretion in this case.

In determining the best interests of a child during the dispositional phase of the termination of parental rights hearing, the trial court must make relevant findings concerning: (1) the age of the juvenile, (2) the likelihood of adoption, (3) whether termination will aid in the accomplishment of the permanent plan, (4) the bond between juvenile and the parent, (5) the quality of the relationship between the juvenile and the proposed permanent placement, and (6) any relevant consideration. N.C.G.S. § 7B-1110(a). The trial court made findings related to each issue enumerated by statute, and individually determined that Jared,

Zendaya, Aaron, and Devon each had a "high probability" of adoption. Respondent argues that the trial court erred in terminating her parental rights solely because she believes it is unlikely the children would be adopted due to their numerous serious developmental challenges. However, the record shows that the trial court thoroughly considered the children's developmental challenges and their likelihood of adoption based on their current placement and potential future adoptive parents.

Jared

The trial court found that Jared has "special mental health and educational needs," has a learning disability, and has been diagnosed with Post-Traumatic Stress Disorder (PTSD) and ADHD for which he is prescribed medication. In determining Jared's probability of adoption the trial court found:

> [Jared] is 11 years old. He is placed in the home of his father and stepmother. He is receiving good and safe care in this home. There is a high likelihood that a stepparent adoption can occur for Jared so that he will have an intact two-parent home.

At the time of the termination hearing Jared was in the care of his biological father, his step-mother, and his sixteen year old sister. The evidence presented at the hearing showed that Jared is bonded with his biological father and that if he remains with his father, there is a strong likelihood of stepparent adoption. Thus, there is evidence in the record to support the trial court's finding that Jared was likely to be adopted even though he has a learning disability and other challenges.

Devon

The trial court found that Devon has "very special needs." At ten years old, he has severe intellectual disabilities, is not toilet trained, and is non-verbal. Devon is learning sign language in order to communicate his needs. Further, the trial court found that Devon has received an Innovations Waiver, which will provide him with necessary services for the rest of his life. In considering the probability that Devon would be adopted, the trial court found:

> There is a high likelihood of [a]doption and there is an identified prospective adoptive home for [Devon] but he is not living in that home at this time. The maternal grandmother has expressed interest in adopting [Devon] and all

> of his siblings. The Court is unable to determine the quality of that relationship.
>
> . . . .
>
> [Devon] is currently placed in a specialized facility . . . .. [Devon] is doing well in this facility and he has learned to swim. He is also learning to ride a bike. [Devon] is learning to have positive peer relationships and is making improvements in this area.

The trial court heard testimony that Devon was thriving in his current placement. There was evidence to support the trial court's conclusion that despite Devon's developmental challenges his probability of adoption was high because there is a prospective adoptive home for him in addition to the desire of his maternal grandmother to adopt him.

Aaron

The trial court found that Aaron has "special needs" and that he has been diagnosed with mild intellectual disabilities. Aaron has an Individual Education Plan and is diagnosed with ADHD for which he receives medication. In determining Aaron's probability of adoption the trial court found:

> [Aaron] is 6 years old. The likelihood for Adoption is very likely.
>
> . . . .
>
> [Aaron] is placed in a prospective adoptive home and he has a very good relationship with his prospective adoptive parent. [Aaron] looks to her for comfort and guidance. He is thriving in this home. His communication skills have improved greatly. In this home he has a same-age sibling and the two children have a close relationship.

At the termination hearing, Ms. Tonya Britton, a foster care social worker with DSS, summarized Aaron's progress with his prospective adoptive parent:

> Q. What is the quality of relationship between [Aaron] and his prospective adoptive parent?
>
> A. He's very bonded to her. He's called her Mom. He also has a foster brother in the home as well that he's very, very close to. They are the same age.

> Q. Does he look to her for comfort and guidance?
>
> A. Yes, he does.
>
> Q. When you have visited him in that home, does he appear to be at home there?
>
> A. Yes. . . . He has thrived in that home to the point that he has been caught up, as far as some of the educational things that he was behind in. He's communicating a whole lot better now. He could have a conversation with you, compared to when he didn't used to talk at all, or you couldn't understand what he was saying.

The testimony presented at trial supported the court's finding that even in light of his special needs, Aaron was likely to be adopted.

Zendaya

The trial court found that Zendaya has "special needs." Further, the trial court found that Zendaya was sexually molested by her brother I.H. and needs ongoing support and therapy. Zendaya has been diagnosed with PTSD but is making significant progress since her removal from her mother's home. With regard to the probability of Zendaya's adoption the trial court found:

> [Zendaya] is 5 years old. The likelihood of Adoption for [Zendaya] is very high. There are multiple families interested in adopting her.
>
> . . . .
>
> [Zendaya] is in kindergarten and is making educational progress.
>
> [Zendaya] has a safe and nurturing relationship with her current caregivers, who are prospective adoptive parents. [Zendaya] looks to them for comfort and guidance. She is involved in community and church activities with her prospective adoptive [parents]. She is thriving in this home.

The evidence at trial established that Zendaya was thriving in her current placement, even calling her prospective adoptive parents "Daddy, and Mom." Zendaya has multiple potential adoptive families and there was testimony that the prospect of her being adopted was "[v]ery, very, very, very likely." The trial court's finding that Zendaya was likely to be adopted despite her developmental challenges was supported by clear, cogent and convincing evidence in the record.

Respondent argues that children with behavioral challenges and/or developmental delays, as well as children in foster care, are difficult to place with adoptive families. Such general truths cannot overcome the particularized evidence in this case supporting the trial court's factual findings that each of these children had a high probability of being adopted. Notably, as relevant to the ultimate conclusion that termination of respondent's parental rights is in the children's best interests, there was also testimony that Jared, Devon, Aaron and Zendaya are thriving and showing great improvement developmentally in their current placements. This evidence suggests they are benefitting from not being in the custody and control of respondent. The trial court did not abuse its discretion in concluding that it was in the children's best interests to terminate respondent's parental rights.

AFFIRMED.

IN THE MATTER OF K.N.

No. 110A19

Filed 24 January 2020

1. Termination of Parental Rights—grounds for termination—neglect—findings of fact—sufficiency of evidence

In a proceeding to terminate a father's parental rights in his son based on neglect, competent evidence supported the trial court's findings of fact regarding the father's failure to voluntarily contribute to his son's care from his wages and his violation of the conditions of his probation by incurring new criminal charges, but the evidence contradicted the trial court's finding that the father did not enroll in a domestic violence intervention program.

2. Termination of Parental Rights—grounds for termination—neglect—sufficiency of findings

The trial court's findings of fact were insufficient to support its termination of a father's parental rights in his son on the ground of neglect where the trial court's only factual finding directly relating to the father's ability to care for his son concerned the father's incarceration. Incarceration, standing alone, cannot support termination on the ground of neglect without an analysis of the relevant facts and circumstances, which the trial court did not do. Other

findings regarding the adequacy of the father's participation in different aspects of his case plan were not fleshed out enough to support a conclusion that neglect was likely to recur if the minor were returned to the father's care.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 7 January 2019 by Judge H. Thomas Jarrell in District Court, Guilford County. This matter was calendared for argument in the Supreme Court on 17 January 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

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

K&L Gates, LLP, by Erica Hicks for Guardian ad Litem.

Jeffrey William Gillette for respondent-appellant father.

DAVIS, Justice.

In this case, we consider whether the trial court erred by terminating the parental rights of respondent-father (respondent) to K.N. ("Keith")[1] on the basis of neglect. Because we conclude that the findings in the trial court's order are insufficient to support a determination that respondent had neglected Keith, we vacate the termination order and remand this case to the District Court, Guilford County, for further proceedings.

Factual and Procedural Background

Respondent and "Maria"[2] are the biological parents of Keith, who was born on 17 September 2016. On or about 26 December 2016, the Guilford County Department of Health and Human Services (DHHS) received a report that Keith's parents were involved in a verbal dispute during which respondent claimed Maria was attempting to suffocate the child. Maria accused respondent of being intoxicated and holding onto Keith "too tightly" while they argued. Both Maria and Keith were taken to the hospital, but no injuries were discovered to either of them. Maria reported that respondent's relatives had "jumped" her the previous

1. Pseudonyms are used throughout this opinion to protect the identity of the juvenile.

2. Keith's mother is not a party to this appeal.

night and also disclosed several incidents of domestic violence between her and respondent.

On 10 January 2017, a safety plan with DHHS was updated and, as part of that plan, Maria agreed to keep Keith in a safe environment. However, on or about 29 January 2017, she violated the safety plan by returning to her mother's residence, which DHHS considered unsafe due to prior involvement with Child Protective Services and a history of domestic violence between Maria, her mother, and her brother. On 6 February 2017, DHHS obtained nonsecure custody of Keith and filed a juvenile petition in District Court, Guilford County, alleging that Keith was a neglected and dependent juvenile.

On 28 August 2017, the trial court entered an order adjudicating Keith to be a neglected and dependent juvenile. Pursuant to a case plan entered into with DHHS, respondent was ordered to participate in an anger management evaluation and follow all recommendations. He was allowed weekly visitations with Keith. Respondent was also ordered to comply with his case plan, which required him, among other things, to (1) secure and maintain appropriate housing suitable for Keith and to notify DHHS accordingly; (2) provide verification of his Supplemental Security Income (SSI) benefits; (3) participate in and successfully complete the Parent Assessment Training and Education (PATE) program; (4) submit to a substance abuse assessment and follow any recommendations; (5) participate in the Domestic Violence Intervention Program (DVIP); (6) notify DHHS of any incidents of domestic violence; (7) comply with the terms of his probation; and (8) refrain from incurring any new criminal charges. Keith remained in DHHS custody.

On 14 November 2017, the trial court entered a permanency planning hearing order. The court found that respondent was living in a boarding house and was on probation for thirty months, effective January 2017. He had completed a parenting evaluation but refused to engage in individual counseling—despite having received a recommendation to do so—due to the cost of the sessions. He had successfully completed the Treatment Accountability for Safer Communities (TASC) substance abuse program.

The trial court further found that respondent had indicated that he would take part in anger management classes, but then refused to participate in the DVIP program because "he had not been . . . charged as an abuser." As a result of his failure to "actively engage in his case plan," the court determined that respondent was "acting in a manner inconsistent with the health and safety of the juvenile." The trial court ordered that

the permanent plan be reunification with a concurrent secondary plan of adoption.

The trial court entered a subsequent permanency planning hearing order on 5 February 2018. The court found that respondent was living in a location unsuitable for Keith and was continuing to refuse to participate in individual parenting counseling due to cost. Although he completed anger management classes, he had attended only one DVIP class and remained uninterested in the program. The trial court changed the primary permanent plan to adoption with a concurrent secondary permanent plan of reunification. DHHS was ordered to proceed with filing a petition for termination of respondent's parental rights within sixty days.

On 15 March 2018, DHHS filed a petition to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1)–(2).[3] The termination hearing was conducted on 27 and 28 November 2018. On 7 January 2019, the trial court entered an order finding that grounds existed to terminate respondent's parental rights on the basis that respondent had neglected Keith and that such neglect was likely to recur if the juvenile was returned to respondent. *See* N.C.G.S. § 7B-1111(a)(1).[4] The trial court also determined that the termination of respondent's parental rights was in the best interests of Keith. *See* N.C.G.S. § 7B-1110(a). Respondent gave notice of appeal to this Court pursuant to N.C.G.S. § 7B-1001(a1)(1).

Analysis

On appeal, respondent contends that (1) the trial court made various findings of fact that were not supported by the evidence; and (2) the court's findings were insufficient to support its conclusion that Keith was neglected pursuant to N.C.G.S. § 7B-1111(a)(1). Our Juvenile Code provides for a two-step process for the termination of parental rights—an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2017). During the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination pursuant to subsection 7B-1111(a) of the General Statutes of North Carolina. N.C.G.S. § 7B-1109(e), (f) (2017).

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3. DHHS also sought to terminate Maria's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (9).

4. The trial court's order also terminated Maria's parental rights on the basis of neglect and additionally found that grounds existed to terminate her parental rights pursuant to N.C.G.S. § 7B-1111(a)(2) and (9).

If a trial court finds that a ground exists for termination, it then proceeds to the dispositional stage at which it must "determine whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a).

We review a trial court's adjudicatory findings under N.C.G.S. § 7B-1109 "to determine whether [they] are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 832 S.E.2d 692, 695 (N.C. 2019) (citing *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009)).

In its termination order, the trial court made the following pertinent findings of fact in support of its conclusion that grounds existed to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1):

> 12. [Respondent] entered into a case plan on April 3, 2017. The components of the plan, and his progress therewith, are as follows:
>
> A. Housing/Environment/Basic Physical Needs: The father was to secure and maintain appropriate, independent housing suitable for his child. Once the father secured housing he was to provide DHHS with a copy of his lease with his name on it within 72 hours. He was to cooperate with announced and unannounced visits to his home. [Respondent] did ultimately obtain suitable housing, after a period of residing in boarding houses. However, he is currently incarcerated at the Guilford County Department of Corrections, awaiting trial for charges of DUI, Assault with a Deadly Weapon on a Government Official, F[lee] ing to Elude Arrest, Unlawful Passing of an Emergency Vehicle, and Failure to stop at a Red Light. Although he has testified that he expects to make his $28,000.00 bond next week, the Court finds that it is uncertain when and if he will be released pending trial.
>
> B. Employment: The father was to provide DHHS with verification of his SSI benefits. [DHHS] did ultimately independently receive verification of [respondent's] benefits. At that time [DHHS] sought, and obtained, transfer of the juvenile's portion of those benefits from [Maria] (who had

been receiving them throughout the case) to [DHHS]. In addition to his SSI benefit, [respondent] works odd jobs and has just started a cleaning business. He has not provided financially for the juvenile, although the juvenile now does receive a $190.00 per month benefit from SSI.

C. Parenting Skills:

1) The father was to participate in a Parenting Psychological Evaluation and follow all recommendations. The father completed the Parenting Evaluation through Dr. Michael McColloch. Dr. McColloch recommended that [respondent] participate in individual counseling and continue to work his case plan in an effort to be reunified with his son. [Respondent] participated in individual therapy through Family Service[ ] of the Piedmont. In April of 2018 he was released from therapy with a determination that he had achieved his treatment goals.

2) The father was to participate in the PATE Parenting Classes or parenting classes through Family Service[ ] of the Piedmont until successfully completed and a certificate received. He was to visit with [Keith] once per week. [Respondent] completed the PATE Program on 10/03/17. He visited consistently with [Keith] and the visits were appropriate and went well, with no concerns to note.

3) The father was to contact Child Support Enforcement and enter into a voluntary child support agreement. [Respondent] reported that he receives SSI and cannot be pursued for Child Support.

D. Substance Abuse: The father was to submit to a substance abuse assessment and follow all recommendations. The father successfully completed the TASC Program. However, [respondent] submitted three drug screens which came back as "diluted," on June 29, 2018, July 6, 2018, and August 27, 2018. [DHHS] regards diluted samples as failed screens. He was asked thereafter to take another screen, which he delayed taking by 36 hours. That test was negative for illicit substances.

E. Domestic Violence: The father was to participate in the Domestic Violence Intervention Program through Family Service[ ] of the Piedmont and . . . follow all

> recommendations. The father was to notify DHHS of any incidents of domestic violence between himself and any intimate partner. Initially [respondent] indicated that he did not understand why he had to participate in a domestic violence class when he had not been . . . charged as an abuser. Subsequently [respondent] did complete anger management classes but did not enroll in the DVIP program. Albert Linder, his individual therapist, testified that some domestic violence issues were addressed in individual counseling.
>
> F. Probation: The father was to cooperate with the terms of his probation. The father was to resolve his pending criminal charges and not incur any new criminal charges. [Respondent] has violated his probation and his case plan by incurring new charges.
>
> 13. [DHHS] has failed to provide clear and convincing evidence that [respondent] has not made reasonable progress in his case plan.
>
> . . . .
>
> 15. The father and the mother both receive SSI income and are not required to pay child support. However, neither parent has provided any financial support for the juvenile since he came into the custody of [DHHS].
>
> 16. Grounds exist to terminate the parental rights of . . . [respondent] pursuant to N.C.G.S.[ ]§[ ]7B-1111(a)(1): The parents have neglected the juvenile within the meaning of N.C.G.S.[ ]§[ ]7B-101, and such neglect is likely to recur if the juvenile is returned to the respondent[ ].

[1] We first address respondent's argument that certain findings of fact by the trial court were not supported by competent evidence. Respondent challenges the last sentence in Finding of Fact 12(B), arguing that the trial court's finding that he "has not provided financially for the juvenile" contradicts the court's following statement that Keith receives $190.00 per month from respondent's SSI benefits. Respondent testified at the termination hearing that he received $885.00 per month in SSI benefits, a portion of which was paid directly to DHHS for the care of Keith. He also testified that in addition to receiving SSI benefits, he had started a cleaning business with his son and did "odd jobs" to earn income. Thus, while the trial court noted that Keith was receiving an allotment of SSI benefits

each month, it also found that respondent had not voluntarily contributed to the juvenile's care from the income he was earning through his business and odd jobs. Accordingly, we hold that the last sentence of Finding of Fact 12(B) is supported by the evidence.

Respondent also contends that Finding of Fact 12(E), which states that he "did not enroll in the DVIP program," was not supported by the evidence. We agree. Testimony from a social worker at the termination hearing, as well as other evidence in the record, reveals that respondent participated in and completed the DVIP program through Family Service of the Piedmont on 14 August 2018. Although the record suggests that respondent initially resisted participating in the program and did not acknowledge that he engaged in domestic violence, there is nothing in the record that contradicts the social worker's testimony that respondent participated in and completed the DVIP program. As such, we must disregard the trial court's finding that respondent did not enroll in the DVIP program.

Finally, respondent challenges the last sentence of Finding of Fact 12(F), claiming that there was no evidence that he violated the terms of his probation by incurring new criminal charges. Although respondent concedes that the initiation of new criminal charges against him constituted a breach of his DHHS case plan, we disagree that there is nothing in the record indicating that the institution of the charges actually violated the terms of his probation. At the termination hearing, the social worker testified—without objection—that respondent had violated the conditions of his probation by incurring the new criminal charges. As a result, we hold that the last sentence of Finding of Fact 12(F) is supported by evidence in the record.

[2] We next consider respondent's argument that the trial court's findings of fact are insufficient to support its conclusion that grounds exist to terminate his parental rights on the basis of neglect. Subsection 7B-1111(a) allows for the termination of parental rights if the trial court finds the parent has neglected his child to such an extent that the child fits the definition of a "neglected juvenile" under N.C.G.S. § 7B-101(15). N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is statutorily defined, in pertinent part, as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2017). Generally, "[t]ermination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing." *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15, 319 S.E.2d

227, 231–32 (1984)). However, "if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *Id.* at 843, 788 S.E.2d at 167. When determining whether future neglect is likely, the trial court must consider evidence of relevant circumstances or events that existed or occurred either before or after the prior adjudication of neglect. *In re Ballard*, 311 N.C. at 715, 319 S.E.2d at 232. "The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *Id.* at 715, 319 S.E.2d at 232.

Thus, in light of Keith's prior adjudication as a neglected juvenile and his resulting removal from the home, we must evaluate whether there are sufficient findings of fact in the termination order to support the trial court's ultimate conclusion that there is a likelihood of future neglect by respondent. Respondent asserts that absent the unsupported findings of fact in the trial court's order, the order lacks a sufficient factual basis to support the trial court's finding of neglect. We agree.

The trial court's findings reflect that DHHS had "failed to provide clear and convincing evidence that [respondent] had not made reasonable progress on his case plan" and that respondent had complied with the provisions of his case plan dealing with housing, SSI benefits, and participation in and completion of a psychological assessment, parenting education, substance abuse treatment, and anger management classes. The trial court made very few findings of fact that directly relate to respondent's ability to care for Keith or the extent to which respondent's behavior affected Keith's welfare. *See In re N.D.A.*, 833 S.E.2d 768, 775 (N.C. 2019). The only factual finding that directly addresses respondent's ability to care for Keith is Finding of Fact 12(A), in which the trial court found that although respondent had secured suitable housing, he was incarcerated at the time of the proceeding and awaiting trial on a number of criminal charges. At the termination hearing, respondent testified that he anticipated paying his bond the following week, but the trial court found that "it is uncertain when and if he will be released pending trial."

A parent's incarceration may be relevant to the determination of whether parental rights should be terminated, but "[o]ur precedents are quite clear—and remain in full force—that '[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.' " *In re M.A.W.*, 370 N.C. 149, 153, 804 S.E.2d 513, 517 (2017) (quoting *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006)). Thus,

respondent's incarceration, by itself, cannot serve as clear, cogent, and convincing evidence of neglect. Instead, the extent to which a parent's incarceration or violation of the terms and conditions of probation support a finding of neglect depends upon an analysis of the relevant facts and circumstances, including the length of the parent's incarceration. The trial court's findings do not contain any such analysis.

DHHS contends that the trial court's findings regarding respondent's failure to fully address the domestic violence component of his case plan by continuing to engage in domestic violence and by being dilatory in addressing issues related to domestic violence, his failure to make efforts to cooperate with DHHS regarding his substance abuse issues, and his failure to contribute significant earnings from his employment all support its ultimate conclusion that neglect is likely to recur if Keith is returned to respondent's care. We do not find this argument persuasive in light of an analysis of the trial court's actual findings, which do not contain a considerable amount of the information upon which DHHS relies.

Finding of Fact 12(E) addressed concerns with respondent's involvement in incidents of domestic violence. Aside from the erroneous finding that respondent did not complete DVIP, this portion of the trial court's order does not establish that respondent failed to comply with the domestic violence-related portions of his case plan or engaged in continued acts of domestic violence against Maria or anyone else.

In Finding of Fact 12(D), the trial court addressed the substance abuse component of respondent's case plan. The court found that respondent had submitted three diluted drug screens in June, July, and August 2018 and that DHHS considered diluted samples as "failed screens." However, this finding—without greater explanation—is insufficient to support a determination as to the likelihood of future neglect. The trial court's findings state that respondent delayed taking another drug screen for thirty-six hours, but do not provide any further explanation concerning the extent to which the thirty-six-hour delay enabled him to ultimately provide a "clean" sample or even when the sample was requested and provided. In addition, the trial court's findings do not address the nature and extent of respondent's earlier substance abuse issues or whether the trial court, as compared to DHHS, deemed a "diluted" sample to be tantamount to a positive test result.

Finally, in Finding of Fact 12(B) and Finding of Fact 15, the trial court found that respondent had not provided financially for Keith since he came into DHHS custody. Yet, in Finding of Fact 15, the trial court also

determined that respondent received SSI benefits and was not required to pay child support. Absent further findings by the trial court regarding respondent's finances and ability to pay additional support beyond the portion of SSI benefits going to Keith's care, we are unable to say that these portions of the trial court's order supported a finding of neglect.

As a result, for these reasons, we conclude that the trial court's findings are insufficient to support the court's ultimate determination that respondent's parental rights were subject to termination on the basis of neglect. We acknowledge, however, that the trial court *could* have made additional findings of fact, based on other evidence in the record, that might have been sufficient to support a finding of a future likelihood of neglect, including: (1) respondent's long history of drug abuse; (2) respondent's extensive criminal record which consists of drug convictions and convictions for multiple violent crimes; (3) the effect of respondent's serious criminal charges pending at the time of the termination hearing, the absence of any clear indication of when he would be released from custody or if he would be able to make bond, and the ensuing effect on his future ability to care for Keith; (4) respondent's dilatory pace in completing the objectives of his case plan; (5) respondent's hostility toward the people responsible for managing certain programs in which he had refused to participate; and (6) the additional domestic violence incident involving respondent, Maria, and another woman during which respondent was cut with a knife. Moreover, as noted above, while the trial court stated in Finding of Fact 12(D) that respondent waited thirty-six hours to take a new drug test after providing three diluted samples, it appears from the record that the delay was actually *three days*, which could suggest an attempt on his part to manipulate the results of the drug test.

In *In re N.D.A.*, we recently addressed a similar scenario in which the trial court's adjudicatory findings were insufficient to support its conclusion that termination of the parent's rights was warranted, but the record contained additional evidence that could have potentially supported a conclusion that termination was appropriate. There, we vacated the trial court's termination order and remanded the case for further proceedings, including the entry of a new order containing findings of fact and conclusions of law addressing the issue of whether a ground for termination existed. *See In re N.D.A.*, 833 S.E.2d at 777.

We believe that a similar result is appropriate here. Accordingly, we vacate the trial court's termination order and remand this case to the District Court, Guilford County, for further proceedings not inconsistent with this opinion, including the entry of a new order containing

appropriate findings of fact and conclusions of law on the issue of whether grounds exist to support the termination of respondent's parental rights. On remand, the trial court shall have the discretion to determine whether the receipt of additional evidence is appropriate.

Conclusion

For the reasons stated above, we vacate the 7 January 2019 order of the trial court and remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

IN THE MATTER OF S.D.C.

No. 229A19

Filed 24 January 2020

Termination of Parental Rights—best interests of child—placement with relative—evidence showing availability

The trial court did not abuse its discretion by concluding that termination of a father's parental rights would be in his child's best interests, and the court was not required to make findings on whether the child could be placed with a relative. Even though the paternal grandmother had been offered as a relative placement option in a previous proceeding, the county department of health and human services (DHHS) had refrained from recommending placement with her because of concerns about her finances, transportation, and criminal history, and the trial court had determined that the child's best interests would be served by remaining in DHHS custody rather than being placed with a relative.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 25 February 2019 by Judge Marcus A. Shields in District Court, Guilford County. This matter was calendared for argument in the Supreme Court on 17 January 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

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

Parker Poe Adams & Bernstein LLP, by Collier R. Marsh, for respondent-appellee Guardian ad Litem.

Surratt Thompson & Ceberio PLLC, by Christopher M. Watford, for respondent-appellant father.

ERVIN, Justice.

Respondent-father DeAngelo S. appeals from an order terminating his parental rights in his son, S.D.C.[1] After careful consideration of respondent-father's challenge to the trial court's termination order, we conclude that the trial court's order should be affirmed.

On 15 December 2016, the Guilford County Department of Health and Human Services filed a petition alleging that Sam was a neglected and dependent juvenile and, on the same day, obtained the entry of an order placing him in nonsecure custody. According to the allegations contained in the DHHS petition, Sam's mother had a history of substance abuse and used heroin on the day that she gave birth to Sam.[2] In addition, DHHS alleged that Sam's mother had an extensive child protective services history, that her parental rights in two children had previously been terminated, and that she had relinquished her parental rights in another child. DHHS also alleged that, while respondent-father had been identified as Sam's putative father, he had informed DHHS that he wanted to make sure that Sam was his biological child before making any effort to care for Sam or be involved in his life. After submitting to a paternity test on 16 December 2016, respondent-father was determined to be Sam's biological father.

On 17 April 2017, Judge Angela C. Foster entered an adjudication and dispositional order finding that Sam was a neglected and dependent juvenile. In support of this determination, Judge Foster found that Sam had been born prematurely and that he had been placed in a neonatal intensive care unit as the result of "toxic exposure" to controlled

1. S.D.C. will be referred to throughout the remainder of this opinion as "Sam," which is a pseudonym used to protect the child's identity and for ease of reading.

2. The trial court terminated the parental rights of Sam's mother in the same order in which it terminated the parental rights of respondent-father. As a result of the fact that Sam's mother has not sought appellate review of the trial court's termination order, we refrain from discussing the proceedings related to the termination of the mother's parental rights in Sam in any detail in this opinion.

substances and the existence of withdrawal symptoms. Judge Foster also noted that Sam's mother had entered into a case plan with DHHS and that respondent-father was scheduled to do so as well. In addition, Judge Foster stated that, while Sam's paternal grandmother had been identified as a potential relative placement, DHHS had declined to recommend that Sam be placed with his paternal grandmother because of concerns about her financial ability to care for Sam, her lack of an adequate means of transportation, and her criminal history. Based upon these findings and conclusions, Judge Foster ordered (1) that Sam remain in the custody of DHHS while expressly authorizing DHHS to utilize a kinship placement, (2) that further efforts to reunify Sam with his mother be ended, (3) that DHHS continue its attempts to reunify Sam with respondent-father, (4) that respondent-father enter into a case plan and comply with its provisions, and (5) that respondent-father have twice-weekly supervised visitation sessions with Sam.

On 2 May 2017, Judge Foster entered a permanency planning order in which she found that respondent-father had entered into a case plan with DHHS and was making progress toward complying with its provisions and that Sam had been placed in a foster home, in which he was doing well. After determining that the custody of and placement authority relating to Sam should be retained by DHHS, Judge Foster ordered that the primary permanent plan for Sam be reunification with respondent-father, that the secondary plan for Sam be adoption, that respondent-father continue to cooperate with DHHS and attempt to comply with his case plan if he wished to work toward reunification, and that respondent-father have twice-weekly supervised visits with Sam.

Over the course of the next several months, the level of respondent-father's efforts to comply with his case plan appeared to falter. On 13 April 2018, Judge Foster entered a permanency planning order in which she found that respondent-father had stopped visiting with Sam or attempting to comply with the provisions of his case plan. As a result, Judge Foster changed Sam's primary permanent plan to adoption with a concurrent secondary plan of reunification with respondent-father and directed DHHS to initiate proceedings to terminate the parental rights of Sam's parents. After ordering respondent-father to comply with his case plan and to cooperate with DHHS, Judge Foster suspended respondent-father's visitation with Sam until respondent-father resumed making efforts to comply with the provisions of his case plan and informed respondent-father that, in the event that he continued to fail to comply with the provisions of his case plan, the court might order the cessation of reunification efforts at a subsequent proceeding.

On 7 June 2018, DHHS filed a motion seeking to have the parental rights of Sam's parents terminated in which it alleged that respondent-father's parental rights were subject to termination on the grounds of neglect, willful failure to make reasonable progress toward correcting the conditions that led to Sam's removal from the home, willful failure to pay a reasonable portion of the cost of Sam's care, and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(1)–(3), (7) (2017). After holding a hearing on 12 February 2019 for the purpose of considering the issues raised by the termination motion, the trial court entered an order finding that all of the grounds for termination alleged by DHHS existed and concluding that the termination of respondent-father's parental rights in Sam would be in the child's best interests. Respondent-father noted an appeal to this Court from the trial court's termination order.

In his sole challenge to the trial court's termination order, respondent-father contends that the trial court abused its discretion by concluding that termination of his parental rights in Sam would be in Sam's best interests on the grounds that the trial court had failed to adequately consider whether Sam could be placed with a relative even though it was on notice that a potentially suitable relative placement existed. More specifically, respondent-father argues that the initial adjudication and dispositional order stated that Sam's paternal grandmother had been proposed as a placement option; that Sam's paternal grandmother had never been determined to be an unfit placement option by the court, even though DHHS had objected to Sam's placement with her; and that, given that the initial adjudication and dispositional order had been admitted into evidence at the termination hearing, the issue of whether Sam's paternal grandmother was a proper placement for the juvenile was a relevant dispositional factor which the trial court was required to consider and about which the trial court was required to make appropriate findings in its termination order. *See* N.C.G.S. § 7B-1110(a)(6) (2017). As a result, in light of the trial court's failure to consider or make findings concerning the possibility that Sam might be placed with his paternal grandmother, respondent-father contends that the trial court's termination order should be reversed.

In seeking to persuade us to affirm the trial court's termination order, DHHS argues that nothing in N.C.G.S. § 7B-1110 required the trial court to address the extent to which a potential relative placement existed at the dispositional stage of a termination of parental rights proceeding, *see* N.C.G.S. § 7B-1110 (2017), and that the record before the trial court at the termination proceeding contained no evidence tending to show that the placement of Sam with his paternal grandmother would

be appropriate. In addition, DHHS asserts that the trial court addressed its efforts to locate a suitable relative placement in earlier permanency planning orders.

Similarly, the guardian ad litem argues that a trial court may, but is not required, to consider the extent to which a relative placement is available during the dispositional phase of a termination of parental rights proceeding, *citing*, *e.g.*, *In re J.A.A.*, 175 N.C. App. 66, 75, 623 S.E.2d 45, 51 (2005) (stating that, "[i]f a fit relative were to come forward and declare their desire to have custody of the child, the court could consider this during the dispositional phase as grounds for why it would not be in the child's best interests to terminate the respondent's parental rights"). In view of the fact that no relative actually came forward at the termination hearing for the purpose of declaring his or her availability to assume responsibility for caring for Sam and the fact that the trial court found in the adjudication portion of its termination order that "[Sam's mother] and [respondent-father] did not offer any acceptable alternative placement options" in the underlying neglect and dependency proceeding, the guardian ad litem contends that the trial court did, in fact, consider whether a relative placement was available during the dispositional phase of the termination of parental rights proceeding and found that no viable option for such an alternative placement existed.

According to well-established North Carolina law, a termination of parental rights proceeding involves the use of a two-stage process that includes an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2017). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 832 S.E.2d 698, 700 (N.C. 2019) (quoting N.C.G.S. § 7B-1109(f)). "If a trial court finds one or more grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it then proceeds to the dispositional stage," *id.*, at which it "determines whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (2017). In making this determination,

> [t]he court may consider any evidence, including hearsay evidence as defined in [N.C.]G.S. [§] 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.

(2) The likelihood of adoption of the juvenile.

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

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

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

(6) Any relevant consideration.

Id. A trial court's determination concerning whether termination of parental rights would be in a juvenile's best interests "is reviewed solely for abuse of discretion." *In re A.U.D.*, 832 S.E.2d at 700 (citing *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016). An "[a]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 700–01 (alteration omitted) (quoting *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015)).

A trial court is required to consider whether a relative placement is available for a juvenile in deciding the issues raised in an abuse, neglect, and dependency proceeding. *See*, *e.g.*, N.C.G.S. §§ 7B-503(a), -506(h)(2), -903(a1), -906.1(e)(2) (2017). Although the trial court is not expressly directed to consider the availability of a relative placement in the course of deciding a termination of parental rights proceeding, it may treat the availability of a relative placement as a "relevant consideration" in determining whether termination of a parent's parental rights is in the child's best interests, *see* N.C.G.S. § 7B-1110(a)(6), with the extent to which it is appropriate to do so in any particular proceeding being dependent upon the extent to which the record contains evidence tending to show whether such a relative placement is, in fact, available. *See*, *e.g.*, *In re A.U.D.*, 832 S.E.2d at 702–03 (holding that a trial court is not required to make written findings concerning factors set out in section 7B-1110(a) in the absence of conflicting evidence relating to the factor in question). In the event that such conflicting evidence concerning the availability of a potential relative placement is presented to the trial court at the termination hearing, the trial court should make findings of fact addressing "the competing goals of (1) preserving the ties between the children and their biological relatives; and (2) achieving permanence for the children as offered by their prospective adoptive family." *Id.* at 703–04 (holding that the trial court's conclusion that terminating the

father's parental rights would not be in the best interests of his children did not constitute an abuse of discretion based, in part, upon the existence of findings of fact relating to the existence of a potential relative placement for the children). On the other hand, in the event that the record does not contain any evidence tending to show the availability of a potential relative placement, the trial court need not consider or make findings of fact concerning that issue. *Id.* at 702–03 (holding that, "[a]lthough the better practice would have been for the trial court to make written findings as to the statutory factors . . . , we are unable to say that the trial court's failure to do so under the unique circumstances of this case constitutes reversible error").

The record developed at the termination hearing is devoid of any evidence tending to show that a potential relative placement was available for Sam in the event that the trial court elected to refrain from terminating respondent-father's parental rights in the child. Admittedly, Judge Foster did find in the initial adjudication and dispositional order that Sam's paternal grandmother had been offered as a relative placement option for Sam and that DHHS had refrained from recommending that Sam be placed with her. However, in contending that no judicial official had ever determined that Sam's paternal grandmother was not an available relative placement option for the child, respondent-father overlooks the fact that Judge Foster determined in the initial adjudication and dispositional order and in a series of subsequent permanency planning orders that Sam's best interests would be served by remaining in DHHS custody rather than being placed with a relative. Thus, we have no hesitation in concluding that Sam's potential placement with a relative was not a factor that the trial court was required to consider or make findings about during the dispositional phase of this termination of parental rights proceeding. As a result, the order terminating respondent-father's parental rights in Sam is affirmed.

AFFIRMED.

THOMAS ACCARDI
v.
HARTFORD UNDERWRITERS INSURANCE COMPANY

No. 42A19

Filed 28 February 2020

Insurance—policy—homeowners—definitions—actual cash value—depreciation for labor costs and materials

The term "actual cash value" (ACV) in a homeowners insurance policy unambiguously included depreciation for labor costs in addition to depreciation for material costs even though the "definitions" section of the policy did not provide a definition for ACV. The roof coverage addendum did not distinguish between depreciation of labor costs and depreciation of material costs and should be read in harmony with the remainder of the policy. The Supreme Court affirmed the Business Court's dismissal of plaintiff insured's breach of contract claim.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order and opinion entered on 22 October 2018 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(a). Heard in the Supreme Court on 2 October 2019.

Whitfield Bryson & Mason, LLP, by Daniel K. Bryson, J. Hunter Bryson, Gary E. Mason, Daniel R. Johnson, and Gary M. Klinger, for plaintiff-appellant.

Wiggin and Dana LLP, by Kim E. Rinehart and David R. Roth; Ellis & Winters LLP, by Stephen D. Feldman, for defendant-appellee.

Sigmon Law, PLLC, by Mark R. Sigmon; and Amy Bach for United Policyholders, amicus curiae.

Robinson & Cole LLP, by Roger A. Peters II, for American Property Casualty Insurance Association, amicus curiae.

BEASLEY, Chief Justice.

In this case, the Court is asked to consider whether terms of an insurance policy are ambiguous when the policy fails to explicitly provide that labor depreciation will be deducted when calculating the actual cash value (ACV) of the damaged property. Because we conclude that the term "ACV" is not susceptible to more than one meaning and unambiguously includes the depreciation of labor, we affirm the ruling below.

Facts and Procedural History

Plaintiff is a resident of Wake County, North Carolina, and defendant is a Connecticut corporation licensed to sell homeowners insurance in the State of North Carolina. Plaintiff owns a home in Fuquay Varina, North Carolina that was damaged in a hailstorm on or about 1 September 2017. The storm caused damage to the roof, siding and garage of plaintiff's home and required repair and restoration. At the time of the damage, the home was insured by defendant.

Plaintiff submitted a claim to defendant requesting payment for the damage to the home. Defendant confirmed the damage was covered under plaintiff's policy and sent an adjuster to inspect the home on or about 26 September 2017. The adjuster inspected the property and prepared an estimate of the cost to repair or replace the damaged property. According to the estimate, plaintiff's home suffered $10,287.28 in loss and damages. This estimate included costs for materials and labor to repair the home, as well as sales tax on the materials.

The North Carolina Department of Insurance consumer guide to homeowner's insurance provides that when selecting homeowner's insurance, homeowners can choose to insure their home on either an ACV basis or a replacement cost value (RCV) basis. N. C. Dep't of Ins., *A Consumer's Guide to Homeowner's Insurance (2010)*, https://files.nc.gov/doi/documents/consumer/publications/consumer-guide-to-homeowners-insurance_cho1.pdf. The guide further provides that ACV is "the amount it would take to repair or replace damage to your home after depreciation," and RCV is "the amount it would take to replace or rebuild your home or repair damages with materials of similar kind and quality [at today's prices], without deducting for deprecation." *Id.* Plaintiff's insurance policy is a hybrid of the two. The terms of the policy provided that defendant would initially pay plaintiff the ACV. Once the item was repaired or replaced, defendant would settle the claim at RCV. In other words, defendant would reimburse plaintiff for any extra money paid to repair or replace the item, up to the RCV. While not defined in the base policy, the term ACV was defined in a separate endorsement limited to roof damage, which provided the following:

> You will note your policy includes Actual Cash Value (ACV) Loss Settlement for covered windstorm or hail losses to your Roof. This means if there is a covered windstorm or hail loss to your roof, [defendant] will deduct depreciation from the cost to repair or replace the damaged roof. In other words, [defendant] will reimburse for the actual cash value of the damaged roof surfacing less any applicable policy deductible.

In the current action, defendant calculated the ACV by reducing the estimated cost of repair by depreciation of property and labor, as provided in the limited endorsement. Thus, plaintiff's total estimated cost of repair for the dwelling and other structures, $10,287.28, was reduced by the $500 deductible and depreciation in the amount of $3,043.92—which included the depreciation of both labor and materials. This resulted in plaintiff being issued an ACV payment of $6,743.36. According to plaintiff, in determining the ACV, defendant was required to separately calculate the materials and labor costs of repairing or replacing his damaged property and depreciate only the material costs, not the labor costs, from the total repair estimate. Based on this argument, plaintiff sought to represent a class of all North Carolina residents to whom defendant paid ACV payments, where the cost of labor was depreciated.

Defendant moved to dismiss for failure to state a claim under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, contending that the plain meaning of ACV includes the depreciation of both labor and materials. In ruling on the motion to dismiss, the Business Court concluded that "the term ACV as used in [t]he [p]olicy is not 'reasonably susceptible to more than one interpretation,' and that the term ACV unambiguously includes depreciation for labor costs." The Business Court determined that while the "definitions" section of the insurance policy does not provide a definition of the term "ACV," the definition used in the roof coverage addendum sufficed. Thus, the definition from the roof coverage addendum should be read in harmony with the use of the term "ACV" throughout the policy. Regarding the term "depreciation," as used in calculating ACV, the court determined that the term was unambiguous because the policy did not distinguish between depreciation of labor and depreciation of material costs.

To hold otherwise, the court stated, would be to read a nonexistent provision into the policy that excludes labor costs. In the court's view, "it does not make logical sense to separate the cost of labor from that of physical materials when evaluating the depreciation of a house or its component parts," when the value of a house is more than simply the

costs of the materials used. As such, the Business Court found that the policy was unambiguous and that plaintiff's claim for breach of contract should be dismissed. We agree.

Legal Standard

When interpreting an insurance policy, courts apply general contract interpretation rules. *See, e.g.*, *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 172 S.E.2d 518 (1970). "As in other contracts, the objective of construction of terms in an insurance policy is to arrive at the insurance coverage intended by the parties when the policy was issued." *Id.* at 354, 172 S.E.2d at 522 (citing *McDowell Motor Co. v. N.Y. Underwriters Ins. Co.*, 233 N.C. 251, 63 S.E.2d 538 (1951); *Kirkley v. Merrimack Mut. Fire Ins. Co.*, 232 N.C. 292, 59 S.E.2d 629 (1950)). In North Carolina, determining the meaning of language in an insurance policy presents a question of law for the Court. *Id.*

When interpreting the relevant provisions of the insurance policy at issue, North Carolina courts have long held that any ambiguity or uncertainty as to the words used in the policy should be construed against the insurance company and in favor of the policyholder or beneficiary. *Id.* If a court finds that no ambiguity exists, however, the court must construe the document according to its terms. *Id.* (citing *Williams v. Nationwide Mut. Ins. Co.*, 269 N.C. 235, 238, 152 S.E.2d 102, 105 (1967)).

Ambiguity is not established by the mere fact that the insured asserts an understanding of the policy that differs from that of the insurance company. *Wachovia Bank & Tr. Co.*, 276 N.C. at 354, 172 S.E.2d at 522. Rather, ambiguity exists if, in the opinion of the court, the language is "fairly and reasonably susceptible to either of the constructions for which the parties contend." *Id.* The court may not remake the policy or "impose liability upon the company which it did not assume and for which the policyholder did not pay." *Id.*

If the policy contains a definition of a term, the court applies that meaning unless the context requires otherwise. *Id.* However, if the policy fails to define a term, the court must define the term in a manner that is consistent with the context in which the term is used, and the meaning accorded to it in ordinary speech. *Id.* (citing *Peirson v. Am. Hardware Mut. Ins. Co.*, 249 N.C. 580, 107 S.E.2d 137 (1959)).

Analysis

Here, plaintiff contends that the policy is ambiguous because it fails to provide a definition for "ACV" and "depreciation." In response, defendant argues that the policy is not ambiguous despite the lack of a

detailed, explicit definition, because the definition provided in the limited endorsement should be read in harmony with the remainder of the policy. Plaintiff disagrees, arguing that language in the limited endorsement should be confined to the situations addressed therein.

Courts outside of North Carolina are split on whether the term "depreciation" includes both labor and materials. *See Arnold v. State Farm Fire & Cas. Co.*, 268 F. Supp. 3d 1297, 1304 (S.D. Ala. 2017) (holding that defendant had not shown that the term "ACV," which was undefined, could only be interpreted to include depreciation of labor costs); *see also Hicks v. State Farm Fire & Cas. Co.*, 751 F. App'x 703, 708 (6th Cir. 2018) (holding that even though Kentucky law defines ACV as replacement cost minus depreciation, the policy is ambiguous because it does not specifically address what can be depreciated). *But see Papurello v. State Farm Fire & Cas. Co.*, 144 F. Supp. 3d 746, 770 (W.D. Pa. 2015) (holding that labor cost was baked into the roof and, therefore, the policy insured "the finished product in issue—the result or physical manifestation of combining knowhow, labor, physical materials (including attendant costs, e.g., the incurrence of taxes), and anything else required to produce the final finished roof itself.") (emphasis omitted); *Redcorn v. State Farm Fire and Cas. Co.*, 2002 OK 15, 55 P.3d 1017 (holding that the general principle of indemnity supports including depreciation of labor). Decisions from other jurisdictions, however, provide little guidance to this Court because the policy language in each case differs meaningfully, as do the insurance laws of each state.

Upon thorough review of the policy at issue and consideration of our state's principles of contract interpretation, we concur with the Business Court's rationale and conclusion in this case. "Actual Cash Value," as used in the policy, is not susceptible to more than one reasonable interpretation and the term unambiguously includes costs for the depreciation of labor. Although the base policy fails to define the term, the roof coverage addendum provides a definition that must be read in harmony with the remainder of the policy. *See Rouse v. Williams Realty Bldg. Co.*, 143 N.C. App. 67, 70, 544 S.E.2d 609, 612 (2001) (determining that when an insurance policy "contains a definition of a term used in it, this is the meaning which must be given to that term wherever it appears in the policy, unless the context clearly requires otherwise.").

Neither is the term "depreciation" ambiguous. The policy language provides no justification for differentiating between labor and materials when calculating depreciation, and to do so makes little sense. The value of a house is determined by considering it as a fully assembled whole, not as the simple sum of its material components. To conclude

that labor is not depreciable in this case would "impose liability upon the company which it did not assume," and provide a benefit to plaintiff for which he did not pay. *Wachovia*, 276 N.C. at 354, 172 S.E.2d at 522. We will not do so.

Because we hold that the insurance policy at issue unambiguously allows for depreciation of the costs of labor and materials, we affirm the decision of the Business Court.

AFFIRMED.

BEEM USA LIMITED-LIABILITY LIMITED PARTNERSHIP AND STEPHEN STARK
v.
GRAX CONSULTING LLC

No. 360A18

Filed 28 February 2020

Jurisdiction—personal—specific—minimum contacts—nonresident company—banking and business meetings

A nonresident company was subject to personal jurisdiction in North Carolina pursuant to the doctrine of specific jurisdiction where the nonresident company executed an agreement with a North Carolina resident to create a Limited-Liability Limited Partnership (LLLP) and the nonresident company's sole representative traveled to North Carolina multiple times to conduct the LLLP's business. The nonresident company's contacts with North Carolina related to the LLLP agreement and its implementation, and the lawsuit was concerned with the nonresident company's conduct under that agreement.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from orders entered on 13 August 2018 and 4 September 2018, by Judge Michael L. Robinson, Special Superior Court Judge for Complex Business Cases, in Superior Court, Orange County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(a). Heard in the Supreme Court on 27 August 2019.

Williams Mullen, by Camden R. Webb and Lauren E. Fussell, for plaintiffs-appellants.

No brief for defendant-appellee Grax Consulting, LLC.

DAVIS, Justice.

In this case, we consider the question of whether a nonresident company's contacts with North Carolina were sufficient to permit the exercise of personal jurisdiction over it in the courts of our state. Because we conclude that the exercise of personal jurisdiction over defendant does not trigger due process concerns, we reverse the orders of the Business Court and remand for further proceedings.

Factual and Procedural Background

The complaint in this action alleges the following facts: Grax Consulting LLC (Grax) is a limited liability company organized and existing under the laws of the State of South Carolina with its principal place of business in Fort Mill, South Carolina. Stephen Stark is a resident of Chapel Hill, North Carolina. On or about 22 February 2015, Grax and Stark signed an agreement to form Beem USA, Limited-Liability Limited Partnership (Beem), an entity created under the laws of the State of Nevada for the purpose of providing information technology services.

On 1 January 2016, Stark and Grax executed a "First Amended and Restated Limited-Liability Limited Partnership Agreement" (the partnership agreement) that set forth the rights, duties, and obligations of the parties and established that the partnership would terminate on 31 December 2016, unless terminated sooner pursuant to the provisions of the partnership agreement.

Grax, acting through its owner Mason Shane Boyd, was named the general partner and an initial limited partner of Beem, possessing a ten percent ownership interest in the partnership. Stark, individually, was named an initial limited partner with a ninety percent ownership interest in Beem. Stark and Grax were the only limited partners of Beem during its existence.

The partnership agreement provided, in part, that in the event the general partner took action, or failed to take action, so as to cause material, adverse consequences to Beem and the act or omission was fraudulent, in bad faith, or in breach of the general partner's fiduciary duty, the limited partner or partners holding a majority of the ownership interests in Beem could remove the general partner and elect a new one.

Throughout the short lifespan of Beem, Grax and Stark would frequently collaborate on matters relating to the partnership. Boyd traveled

to North Carolina on three separate occasions to meet with Stark to discuss the business of Beem and, on at least one of those occasions, to meet with Beem's banker. These meetings occurred on 28 September 2015, 26 August 2016, 27 August 2016, and 9 November 2016.

In addition, in February 2015, Boyd—acting on behalf of Grax—drove to Charlotte to open a bank account for Beem at Bank of America. Using this account, Grax would regularly deposit checks received by Beem and initiate wire transfers on behalf of the partnership. Over the course of 2016, while living in North Carolina, Stark received approximately fifteen e-mails, fifteen text messages, and seven phone calls per month from Grax relating to the partnership. Grax also mailed Stark financial records, tax documents, and other correspondence relating to Beem.

On or about 5 December 2016, Stark removed Grax as the general partner of Beem pursuant to the terms of the partnership agreement and assumed the role himself. Grax was given notice of its removal as general partner by means of both electronic communication and a letter sent to its principal place of business.

The partnership agreement expressly stated that no limited partner, unless also serving as general partner, was permitted to act on behalf of or bind Beem. Nevertheless, despite its removal as general partner, Grax—through Boyd—continued to act on Beem's behalf. Specifically, Grax (1) continued to bill and charge Beem for services that Grax purportedly provided for Beem after its removal as general partner; (2) changed the online bank account access information for Beem's Bank of America partnership account and prevented Stark, the new general partner, from accessing the account; (3) acquired a cashier's check for $3,500 from the Bank of America account without Stark's permission; and (4) filed tax documents with the Internal Revenue Service on behalf of Beem. Furthermore, Grax repeatedly failed to provide Stark with Beem's financial, accounting, banking, tax, and other records, despite requests from Stark for this information.

Following the partnership's dissolution on 31 December 2016, Stark attempted to wind up the business affairs of Beem but was unable to do so due to Grax's failure to provide Stark with the partnership's business records. Stark was also precluded from filing accurate and complete tax documents on behalf of the partnership for 2016 because Grax withheld necessary information.

On 28 December 2017, Stark, on behalf of himself and Beem (collectively, plaintiffs), filed a complaint in Superior Court, Orange County,

asserting claims against Grax for breach of contract and breach of fiduciary duty. The breach of contract claim was based on plaintiffs' allegation that Grax acted on behalf of Beem following its removal as general partner on 5 December 2016 despite lacking the authority to do so and in violation of the partnership agreement. The breach of fiduciary duty claim was premised on plaintiffs' assertion that Grax engaged in misconduct as the general partner of Beem and breached its duty of care to the partnership—namely, that Grax failed to adequately maintain financial statements of the partnership from July 2016 until the date of Grax's removal as general partner and refused to relinquish to plaintiffs those statements that existed upon its removal as general partner.

In the complaint, plaintiffs sought an injunction, in part, directing Grax to turn over the documents and information necessary for plaintiffs to wind up the affairs of Beem and file tax documents on behalf of both Beem and Stark. The case was designated a mandatory complex business case pursuant to N.C.G.S. § 7A-45.4(a) and was assigned to the Honorable Michael L. Robinson, Special Superior Court Judge for Complex Business Cases.

After repeated failed attempts to personally serve Boyd, who was the registered agent for Grax, service of process was eventually effected on 3 February 2018. Plaintiffs filed a motion for entry of default on 6 March 2018 based on Grax's failure to file a responsive pleading to plaintiffs' complaint. On 23 April 2018, a default was entered against Grax. Plaintiffs subsequently filed a motion for default judgment on 10 May 2018.

N.C.G.S. § 1-75.11 provides, in relevant part, that before a trial court can enter a judgment against a defendant who fails to appear, it "shall require proof by affidavit or other evidence . . . of the existence of any fact not shown by verified complaint which is needed to establish grounds for personal jurisdiction over the defendant." *See* N.C.G.S. § 1-75.11(1) (2017). In an effort to comply with the statute, plaintiffs filed an affidavit from Stark on 10 August 2018 that listed Grax's contacts with North Carolina.

On 13 August 2018, the Business Court issued an order denying plaintiffs' motion for default judgment based on its finding that plaintiffs had failed to satisfy their burden of proving that the court possessed personal jurisdiction over Grax. As an initial matter, the court found that Stark's affidavit was improper because it lacked "any vow of truthfulness on penalty of perjury." Moreover, the court further determined that the information contained in the affidavit was insufficient to satisfy

N.C.G.S. § 1-75.11. In support of its ruling, the Business Court stated the following:

> Plaintiffs' claims arise out of Grax's conduct after he was removed as the general partner on December 5, 2016. Thus, Grax's contacts with North Carolina prior to this date do not create a basis for exercising specific jurisdiction over Grax. . . . The record shows that the only contacts Grax had with North Carolina from which Plaintiffs' claims arise are two letters from Grax addressed to Stark at his North Carolina address. These two letters do not amount to sufficient minimum contacts with North Carolina to support the exercise of personal jurisdiction over Grax.

On 22 August 2018, plaintiffs filed a document captioned "Plaintiffs' Motion for Reconsideration and for Amended and Additional Findings of Fact" along with a properly sworn version of Stark's previously filed affidavit and a new affidavit that provided additional information about Grax's contacts with North Carolina. The Business Court entered an order on 4 September 2018 containing additional findings but once again denying plaintiffs' motion.

The court ruled that plaintiffs' breach of fiduciary duty claim did not "ar[ise] out of Grax's conduct in traveling to North Carolina to open Beem's bank account or depositing checks in or initiating wire transfers from North Carolina bank branches." Similarly, the court found that the "breach of fiduciary duty does not appear to have arisen from Grax's trips to North Carolina to discuss Beem's business with Stark or his phone calls, e-mails, and text messages to Stark in North Carolina." The Business Court concluded that "Plaintiffs' breach of fiduciary duty claim is premised on Grax's failures to maintain proper records beginning in July 2016—and nothing in the record reflects how such a breach arose out of any conduct directed at the forum state of North Carolina." Pursuant to N.C.G.S. § 7A-27(a)(2), plaintiffs gave notice of appeal from the Business Court's 13 August 2018 and 4 September 2018 orders.

Analysis

The sole question for review in this appeal is whether Grax had sufficient minimum contacts with this state such that a North Carolina court could constitutionally exercise personal jurisdiction over it. Based on our thorough review of the record, we conclude that the orders of the Business Court must be reversed.

In examining whether a nonresident defendant is subject to personal jurisdiction in our courts, we engage in a two-step analysis. *Skinner v. Preferred Credit*, 361 N.C. 114, 119, 638 S.E.2d 203, 208 (2006). First, jurisdiction over the defendant must be authorized by N.C.G.S. § 1-75.4—North Carolina's long-arm statute. *Id.* Second, "if the long-arm statute permits consideration of the action, exercise of jurisdiction must not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution." *Id.*

I. Long-Arm Statute

North Carolina's long-arm statute states, in pertinent part, that a court may exercise jurisdiction over a party if it "[i]s engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise." N.C.G.S. § 1-75.4(1)(d) (2017). This Court has held that this statute is "intended to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process." *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 676, 231 S.E.2d 629, 630 (1977) (citation omitted).

Here, it is clear that Grax's contacts with North Carolina are sufficient to satisfy the long-arm statute. Thus, we must proceed to the second step of the analysis.

II. Due Process

"The Due Process Clause of the Fourteenth Amendment operates to limit the power of a State to assert *in personam* jurisdiction over a nonresident defendant." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413–14, 80 L. Ed. 2d 404, 410 (1984) (citing *Pennoyer v. Neff*, 95 U.S. 714, 24 L. Ed. 565 (1878)). The primary concern of the Due Process Clause as it relates to a court's jurisdiction over a nonresident defendant is the protection of "an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.' " *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72, 85 L. Ed. 2d 528, 540 (1985) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319, 90 L. Ed. 95, 104 (1945)). The United States Supreme Court has made clear that the Due Process Clause permits state courts to exercise personal jurisdiction over an out-of-state defendant so long as the defendant has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Int'l Shoe*, 326 U.S. at 316, 90 L. Ed. at 102 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L. Ed. 278, 283 (1940)).

Personal jurisdiction cannot exist based upon a defendant's "random, fortuitous, or attenuated" contacts with the forum state, *Walden v. Fiore*, 571 U.S. 277, 286, 188 L. Ed. 2d 12, 21 (2014) (quoting *Burger King*, 471 U.S. at 475, 85 L. Ed. 2d at 543), but rather must be the result of "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *Skinner*, 361 N.C. at 133, 638 S.E.2d at 217 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 1298 (1958)). As such, a defendant's contacts with the forum state must be such that a defendant "should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501 (1980); *see also Skinner*, 361 N.C. at 133, 638 S.E.2d at 217 ("A crucial factor is whether the defendant had reason to expect that he might be subjected to litigation in the forum state.").

The United States Supreme Court has recognized two types of personal jurisdiction that can exist with regard to a foreign defendant: general (or "all-purpose") jurisdiction and specific (or "case-based") jurisdiction. *See Daimler AG v. Bauman*, 571 U.S. 117, 126–27, 187 L. Ed. 2d 624, 633–34 (2014) (citing *Helicopteros*, 466 U.S. at 414 nn.8–9, 80 L. Ed. 2d at 411 nn.8–9). General jurisdiction is applicable in cases where the defendant's "affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 180 L. Ed. 2d 796, 803 (2011) (quoting *Int'l Shoe*, 326 U.S. at 317, 90 L. Ed. at 102). Specific jurisdiction, conversely, encompasses cases "in which the suit 'aris[es] out of or relate[s] to the defendant's contacts with the forum.' " *Daimler*, 571 U.S. at 127, 187 L. Ed. 2d at 633–34 (2014) (alteration in original) (quoting *Helicopteros*, 466 U.S. at 414 n.8, 80 L. Ed. 2d at 411 n.8).

In the present case, plaintiffs do not assert that Grax is subject to suit in North Carolina based upon a theory of general jurisdiction. We therefore confine our analysis to whether personal jurisdiction exists in this case under the doctrine of specific jurisdiction.

Specific jurisdiction is, at its core, focused on the "relationship among the defendant, the forum, and the litigation." *Daimler*, 571 U.S. at 133, 187 L. Ed. 2d at 637 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204, 53 L. Ed. 2d 683, 698 (1977)). Some "affiliatio[n] between the forum and the underlying controversy" is required. *Walden*, 571 U.S. at 283 n.6, 188 L. Ed. 2d at 20 n.6 (alteration in original) (quoting *Goodyear*, 564 U.S. at 919, 180 L. Ed. 2d at 803). The United State Supreme Court has emphasized that "specific jurisdiction is confined to adjudication of

issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Bristol-Myers Squibb Co. v. Sup. Ct. of Cal., San Francisco Cty.*, 137 S. Ct. 1773, 1780 (U.S. 2017) (quoting *Goodyear*, 564 U.S. at 919, 180 L. Ed. 2d at 803).

This Court applied the doctrine of specific jurisdiction in *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 348 S.E.2d 782 (1986). In that case, the plaintiff, a North Carolina clothing manufacturer, sued the defendant, a clothing distributor based in New York and New Jersey, for breach of contract in Superior Court, Wake County, due to defendant's refusal to pay for repairs to shirts it had purchased and subsequently returned to plaintiff. *Id.* at 362–63, 348 S.E.2d at 784–85. The defendant moved to dismiss based on lack of personal jurisdiction. On appeal, this Court held that the trial court could exercise specific jurisdiction over the defendant based on its contacts with North Carolina. *Id.* at 368, 348 S.E.2d at 787. We observed that "[a]lthough a contractual relationship between a North Carolina resident and an out-of-state party alone does not automatically establish the necessary minimum contacts" required for personal jurisdiction, "a single contract may be a sufficient basis for the exercise of [specific] jurisdiction if it has a substantial connection with this State." *Id.* at 367, 348 S.E.2d at 786 (emphasis omitted).

In support of our holding in *Tom Togs* that personal jurisdiction existed, this Court noted that the contract was "made in North Carolina" and "substantially performed" here. *Id.* at 367, 348 S.E.2d at 786–87. We also found relevant the fact that the defendant was aware the shirts were to be cut in North Carolina and even sent its personal labels to the plaintiff in North Carolina so that they could be attached to the shirts. *Id.* at 367, 348 S.E.2d at 787. Furthermore, we observed that the shirts were manufactured in, shipped from, and eventually returned to North Carolina. Thus, we concluded that the defendant's connections with North Carolina relating to the contract satisfied the minimum contacts inquiry and established the existence of specific jurisdiction. *Id.* at 368, 348 S.E.2d at 787.

The United States Supreme Court has applied the doctrine of specific jurisdiction in two recent cases. While these cases—like *Tom Togs*—involved very different factual circumstances than the matter currently before us, they are nonetheless instructive. In *Bristol-Myers*, the defendant, a company incorporated in Delaware and headquartered in New York, contested personal jurisdiction in California for tort claims related to pharmaceuticals manufactured by the defendant that allegedly harmed plaintiffs, some of whom lived in states other than California. 137 S. Ct. at 1777–78. In analyzing whether the California court could

exercise specific jurisdiction over the defendant, the Supreme Court stated that a link was required between the forum state and the nonresident plaintiffs' underlying cause of action against the defendant—an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum." *Id.* at 1780 (alteration in original) (quoting *Goodyear*, 564 U.S. at 919, 180 L. Ed. 2d at 803). Because the Supreme Court determined that the claims of the non-California plaintiffs were not affiliated with the forum state—the "nonresidents were not prescribed [the drug] in California, did not purchase [the drug] in California, did not ingest [the drug] in California, and were not injured by [the drug] in California"—it held that California lacked the necessary connection with the cause of action to establish personal jurisdiction over the defendant in that state under a theory of specific jurisdiction. *Id.* at 1781.

In *Walden*, the plaintiffs, Nevada residents, sued the defendant, a Georgia-based Drug Enforcement Administration (DEA) agent, in a Nevada federal district court for damages arising out of a seizure that plaintiffs alleged violated their Fourth Amendment rights. *Walden*, 571 U.S. at 281, 188 L. Ed. 2d at 18. While returning to Las Vegas from a gambling trip in Puerto Rico with nearly $100,000 in cash, the plaintiffs' flight was scheduled to make a layover in Atlanta, Georgia. Puerto Rico authorities notified the defendant's DEA task force at the Hartsfield-Jackson Atlanta International Airport that the plaintiffs were traveling to Atlanta with large amounts of cash. When the plaintiffs arrived in Atlanta, they were stopped by defendant and another DEA agent, and their funds were seized by the defendant. The money was ultimately returned to the plaintiffs approximately six months later. In response to the plaintiffs' complaint, the defendant filed a motion to dismiss for lack of personal jurisdiction, which was granted by the district court. *Id.* at 280–81, 188 L. Ed. 2d at 17–18.

The Supreme Court held that the defendant lacked minimum contacts with Nevada such that the Nevada court could not exercise personal jurisdiction over him. *Id.* at 288, 188 L. Ed. 2d at 22. The Supreme Court observed that the defendant "never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada. In short, when viewed through the proper lens—whether the *defendant's* actions connect him to the *forum*—[he] formed no jurisdictionally relevant contacts with Nevada." *Id.* at 289, 188 L. Ed. 2d at 23. The Supreme Court also recognized that although the injury to the plaintiffs—the lack of access to their funds—was suffered in Nevada, this fact was irrelevant to the minimum contacts analysis because it "is not the sort of

effect that is tethered to Nevada in any meaningful way." *Id.* at 290, 188 L. Ed. 2d at 24.

* * *

Having reviewed these principles, we must now apply them to the facts presently before us. In so doing, it is clear that Grax's contacts with North Carolina—which all relate to its status as a partner in Beem—are sufficient to permit North Carolina courts to exercise specific jurisdiction over it, given that this litigation is concerned exclusively with the acts and omissions of Grax in connection with Beem's affairs.

It is undisputed that Grax purposefully availed itself of the benefits of North Carolina law for the specific purpose of carrying out the business of Beem. Grax's sole representative came to North Carolina to open a bank account on behalf of the partnership that Grax subsequently used for Beem's business activities, and he also traveled to this state on three separate occasions to discuss Beem's affairs with Stark. By virtue of its representative engaging in such conduct, Grax established an ongoing relationship with persons and entities located within this state such that it could reasonably anticipate being called into court here. *See Burger King*, 471 U.S. at 475–76, 85 L. Ed 2d at 543 ("Thus where the defendant . . . has created 'continuing obligations' between himself and residents of the forum he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." (citations omitted)).

Additionally, Grax contacted Stark—who lived in North Carolina—numerous times each month for approximately a year in order to discuss Beem's affairs and sent mail related to Beem to Stark in Chapel Hill, North Carolina. *See Walden*, 571 U.S. at 285, 188 L. Ed. 2d at 21 ("[A]lthough physical presence in the forum is not a prerequisite to jurisdiction, physical entry into the State—either by the defendant in person or through an agent, goods, mail, or some other means—is certainly a relevant contact." (citations omitted)).

The record makes abundantly clear the existence of numerous contacts by Grax with North Carolina that it made in its capacity as a partner of Beem, which goes to the heart of the present case. As a result, plaintiffs' claims alleging breach of the partnership agreement and breach of fiduciary duty "arise out of" or, at the very least, "relate to" Grax's contacts with North Carolina such that the doctrine of specific jurisdiction applies here. *Helicopteros*, 466 U.S. at 414, 80 L. Ed. 2d at 411.

Although the Business Court acknowledged Grax's contacts with North Carolina, it engaged in an exceedingly narrow analysis of the sufficiency of those contacts that finds no support in the caselaw of either the United States Supreme Court or this Court. The Business Court's inquiry required too strict a temporal connection between Grax's contacts with North Carolina and the specific claims asserted by plaintiffs in this case.[1] While the Business Court correctly recognized the need to examine Grax's contacts with North Carolina to ensure that they related to plaintiffs' claims against defendant, its orders aptly demonstrate the danger of missing the forest for the trees. Given that (1) Grax's contacts with North Carolina all related to Beem's partnership agreement and the implementation thereof, and (2) this case is wholly concerned with the conduct of Grax pursuant to that agreement, it simply cannot be said that subjecting Grax to suit in North Carolina would trigger due process concerns.

Our holding today that personal jurisdiction exists in this case pursuant to the doctrine of specific jurisdiction is faithful to the United States Supreme Court's characterization of specific jurisdiction as being based on "case-linked" contacts. *See Bristol-Myers*, 137 S. Ct. at 1785–86. As discussed above, each of Grax's contacts with North Carolina concerned its status as a partner of Beem, which is the subject of the specific claims asserted by plaintiffs in this case.

Conclusion

For the reasons set out above, we hereby reverse the 13 August 2018 and 4 September 2018 orders of the Business Court and remand this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

1. Consideration of the entirety of Grax's contacts with North Carolina relating to Beem is particularly appropriate here given the relatively brief period of time in which Beem existed as a legal entity.

BOBBY G. BOLES, ET AL.
v.
TOWN OF OAK ISLAND

No. 290A19

Filed 28 February 2020

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 830 S.E.2d 878 (N.C. Ct. App. 2019), reversing and remanding an order granting defendant's motion for summary judgment entered on 2 May 2018 by Judge James Ammons Jr. in Superior Court, Brunswick County. Heard in the Supreme Court on 4 February 2020.

Norman B. Smith, Steven B. Fox, and Mallory G. Horne for plaintiff-appellees.

Parker, Poe, Adams & Bernstein LLP, by Charles C. Meeker and Stephen V. Carey, and Crossley, McIntosh & Collier, by Brian E. Edes, for defendant-appellant.

Craige & Fox, PLLC, by Charlotte Noel Fox, for Town of Holden Beach, a North Carolina Municipality, amicus curiae.

John M. Phelps II, Gregory F. Schwitzgebel III, and Monica Langdon Jackson for North Carolina League of Municipalities, amicus curiae.

PER CURIAM.

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

REVERSED.

CARDIORENTIS AG
v.
IQVIA LTD. AND IQVIA RDS, INC.

No. 168A19

Filed 28 February 2020

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) from an order and opinion on defendants' motion to stay all proceedings on *forum non conveniens* grounds entered on 31 December 2018 by Judge Adam M. Conrad, Special Superior Court Judge for Complex Business Cases, in Superior Court, Durham County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(a). Heard in the Supreme Court on 6 January 2020.

Robinson, Bradshaw & Hinson, P.A., by J. Dickson Phillips III and Jonathan C. Krisko; and Hogan Lovells US LLP, by Catherine E. Stetson, for plaintiff.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Charles F. Marshall and Shepard D. O'Connell; Cooley LLP, by Michael J. Klisch, Joshua M. Siegel, and Robert T. Cahill for defendants.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA DURHAM COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 18 CVS 2313
CARDIORENTIS AG, Plaintiff v. IQVIA LTD. AND IQVIA RDS, INC., Defendants	**ORDER AND OPINION ON DEFENDANTS' PRE-ANSWER MOTIONS**

1. Plaintiff Cardiorentis AG is a Swiss biopharmaceutical company. Its flagship drug, Ularitide, is a treatment for heart failure. In 2012, Cardiorentis enlisted IQVIA Ltd. ("IQVIA UK"), an English contract research organization, to perform a worldwide clinical trial of Ularitide with a view toward obtaining the regulatory approvals needed to market the new drug. The trial was not successful. According to Cardiorentis, the results were invalid, compromised by the inclusion of hundreds of ineligible patients. Cardiorentis blames both IQVIA UK and its North Carolina-based parent, IQVIA RDS, Inc. ("IQVIA NC"), asserting claims for breach of contract and fraud, among others.

2. Neither IQVIA UK nor IQVIA NC has answered the complaint, instead opting to file several pre-answer motions. Defendants first ask the Court to stay all proceedings under N.C. Gen. Stat. § 1-75.12 on *forum non conveniens* grounds. (ECF No. 19.) IQVIA UK separately asks the Court to dismiss the claims against it for lack of personal jurisdiction. (ECF No. 17.) In the alternative, Defendants also seek to dismiss all claims on the merits pursuant to North Carolina Rule of Civil Procedure 12(b)(6). (ECF No. 21.)

3. For the following reasons, the Court **GRANTS** Defendants' motion to stay all proceedings under section 1-75.12. The Court **DENIES** as moot all other requested relief.

Robinson, Bradshaw & Hinson, P.A., by J. Dickson Phillips III, Jonathan C. Krisko, and Morgan P. Abbott, and Hogan Lovells US LLP, by Dennis H. Tracey III and Allison M. Wuertz, for Plaintiff Cardiorentis AG.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Charles F. Marshall, Charles E. Coble, and Shepard D. O'Connell, and Cooley LLP, by Michael J. Klisch and Robert T. Cahill, for Defendants IQVIA Ltd. and IQVIA RDS, Inc.

Conrad, Judge.

I.
BACKGROUND[1]

4. It is not clear when Cardiorentis began developing Ularitide, but by April 2010, the regulatory-approval process was underway. (*See* Compl. ¶¶ 18, 19, ECF No. 3.) Though based in Switzerland, Cardiorentis hoped to market the drug widely. It sought approvals from two of the world's key regulatory agencies, the United States Food and Drug Administration and the European Medicines Agency. (Compl. ¶ 19.) Cardiorentis completed two preliminary clinical trials before selecting IQVIA UK, an English company, to manage a Phase III trial designed to demonstrate Ularitide's safety and efficacy. (Compl. ¶¶ 1, 4, 20.)

5. In August 2012, Cardiorentis and IQVIA UK (named Quintiles Ltd. at that time) entered into a General Services Agreement ("Services Agreement") that set out the terms for a global, multi-year trial. (Compl. ¶¶ 1, 6, 21; Mem. in Supp. Mot. Stay Ex. 2, ECF No. 20.3 ["Services Agreement"].) IQVIA UK agreed to design and run the trial in its entirety. (Compl. ¶ 22.) Its duties included developing the protocol that established the essential criteria for determining a patient's eligibility to participate. (Compl. ¶¶ 22(a), 30.) IQVIA UK was also required to select all trial sites, to monitor each site to ensure compliance with the protocol, and to perform full source data verification to ensure that reported data matched the patient's original medical records. (*See* Compl. ¶¶ 22(b), 22(f), 22(f), 37, 39; Defs.' Reply Br. in Supp. Mot. Stay Ex. 3 ¶¶ 18–19, ECF No. 81.4.) Other duties included data management, statistical analysis, and medical advisory services. (*See* Mem. in Supp. Mot. Stay Ex. 5 ¶¶ 7, 9–12, ECF No. 20.6.) The Services Agreement is governed by English law and allows IQVIA UK to use the services of its corporate affiliates, including its parent IQVIA NC. (Services Agreement §§ 20.0; 28.0; Defs.' Mem. in Supp. Mot. Stay 4, ECF Nos. 20, 61 ["Mem. in Supp."].)

6. Eight months after executing the Services Agreement, Cardiorentis entered into a Clinical Quality Agreement ("Quality Agreement") with IQVIA NC (named Quintiles, Inc. at that time). (Compl. ¶ 24.) The Quality Agreement functioned as an extension of the Services Agreement, outlining processes for effective communication during the trial. (*See* Mem. in Supp. Ex. 3 § 1, ECF No. 20.4 ["Quality Agreement"].)

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1. In this section, the Court draws from the allegations in the complaint, along with the briefs and affidavits in support of and opposition to Defendants' motion to stay.

If the Services Agreement and Quality Agreement conflicted in any way, the Services Agreement would control. (Quality Agreement § 1.)

7. The trial appears to have been a mammoth undertaking, involving more than a hundred trial investigators, thousands of patients, and hospitals in 23 countries. (*See* Compl. ¶¶ 7, 8, 34; Defs.' Reply Br. in Supp. Mot. Stay 6, ECF No. 81 ["Reply Br."].) Over a three-year period, IQVIA UK trained the investigators and then collected, managed, and reviewed the trial data. (Compl. ¶¶ 22(c), 22(g).) Yet the trial was unsuccessful. (Compl. ¶¶ 8, 82, 84.)

8. Cardiorentis now seeks to hold Defendants responsible for the failed trial, claiming that both Defendants breached the Services Agreement and that IQVIA NC breached the Quality Agreement. (Compl. ¶¶ 91, 99.) Cardiorentis alleges, among other things, that Defendants provided inadequate training, failed to monitor the trial sites, allowed hundreds of ineligible patients to enroll, and then concealed deviations from the protocol. (*See* Compl. ¶¶ 46–49, 51.) These violations, Cardiorentis alleges, were intentional—a conscious choice to withhold resources and reduce trial costs for the purpose of inflating Defendants' stock price before a merger. (*See* Compl. ¶¶ 54–56.) In addition to its claims for breach of contract, Cardiorentis asserts claims for fraud, tortious misrepresentation, and violations of North Carolina's Unfair and Deceptive Trade Practices Act. (Compl. ¶¶ 106, 120, 130.)

9. In their pre-answer motions, Defendants contend that this case has little connection to North Carolina. They jointly seek a stay on *forum non conveniens* grounds, and IQVIA UK separately contends that this Court lacks personal jurisdiction over it. In the event North Carolina is a proper venue, Defendants contend that the case should be dismissed anyway because the complaint fails to state a claim for relief.

10. Before responding to the motions, Cardiorentis served discovery requests geared toward venue and personal jurisdiction. (*See* ECF No. 50.) Defendants objected to those requests. After full briefing, the Court denied Cardiorentis's motion for venue-related discovery, noting that courts typically do not permit discovery before deciding *forum non conveniens*. *See Cardiorentis AG v. IQVIA Ltd.*, 2018 NCBC LEXIS 96, at *3–4, 8 (N.C. Super. Ct. Sept. 14, 2018).

11. Defendants' pre-answer motions are now fully briefed, and the Court held a hearing on November 13, 2018. (ECF No. 71.) The motions are ripe for decision.

II.
ANALYSIS

12. Defendants argue that North Carolina is an inconvenient forum and that Cardiorentis's claims should be heard, if at all, in England.[2] On that basis, they ask the Court to stay this case under section 1-75.12. Cardiorentis responds that North Carolina is not only a convenient forum but also the forum with the most substantial connection to the case.

13. Section 1-75.12 codifies the doctrine of *forum non conveniens*. If a trial court finds "that it would work substantial injustice for [an] action to be tried in a court of this State, the judge on motion of any party may enter an order to stay further proceedings in the action in this State." N.C. Gen. Stat. § 1-75.12(a). Put another way, when it appears that this State "is an inconvenient forum and that another is available which would better serve the ends of justice and the convenience of [the] parties, a stay should be entered." *Motor Inn Mgmt., Inc. v. Irvin-Fuller Dev. Co.*, 46 N.C. App. 707, 713, 266 S.E.2d 368, 371 (1980) (citing *Silver v. Great Am. Ins. Co.*, 29 N.Y.2d 356, 361 (N.Y. 1972)).

14. In deciding whether to grant a stay, our courts usually consider a series of convenience factors and policy considerations, including

> (1) the nature of the case, (2) the convenience of the witnesses, (3) the availability of compulsory process to produce witnesses, (4) the relative ease of access to sources of proof, (5) the applicable law, (6) the burden of litigating matters not of local concern, (7) the desirability of litigating matters of local concern in local courts, (8) convenience and access to another forum, (9) choice of forum by plaintiff, and (10) all other practical considerations.

Lawyers Mut. Liab. Ins. Co. of N.C. v. Nexsen Pruet Jacobs & Pollard, 112 N.C. App. 353, 356, 435 S.E.2d 571, 573 (1993) (citing *Motor Inn*, 46 N.C. App. at 713, 266 S.E.2d at 371). These factors parallel the public and private interest factors that federal courts use to decide motions premised on *forum non conveniens*. *See*, *e.g.*, *Gulf Oil Corp. v. Gilbert*,

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2. In the alternative, Defendants argue that this case should be heard in Switzerland where Cardiorentis maintains its principal place of business. (Compl. ¶ 11; Mem. in Supp. 2.) The Court need not address this alternative position because it finds, based on the parties' briefs and affidavits, that England is "a convenient, reasonable and fair place of trial." N.C. Gen. Stat. § 1-75.12(a).

330 U.S. 501, 508–09 (1947); *DiFederico v. Marriott Int'l, Inc.*, 714 F.3d 796, 804–08 (4th Cir. 2013); *see also Motor Inn*, 46 N.C. App. at 713, 266 S.E.2d at 371.

15. It is not necessary to consider each factor or to find that every factor weighs in favor of a stay. *See Muter v. Muter*, 203 N.C. App. 129, 132–33, 689 S.E.2d 924, 927 (2010); *Wachovia Bank v. Deutsche Bank Tr. Co. Ams.*, 2006 NCBC LEXIS 10, at *12 (N.C. Super. Ct. June 2, 2006). Rather, the trial court must be able to conclude that (1) a substantial injustice would result in the absence of a stay, (2) the stay is warranted by the factors that are relevant and material, and (3) the alternative forum is convenient, reasonable, and fair. *See Bryant & Assocs., LLC v. ARC Fin. Servs., LLC*, 238 N.C. App. 1, 5, 767 S.E.2d 87, 91–92 (2014).

16. With these principles in mind, the Court turns to the relevant factors, beginning with Cardiorentis's choice of forum.

A. Plaintiff's Choice of Forum

17. Our courts generally begin with the presumption that a plaintiff's choice of forum deserves deference. *See Wachovia Bank*, 2006 NCBC LEXIS 10, at *18; *see also Wordsworth v. Warren*, 2018 NCBC LEXIS 107, at *10 (N.C. Super. Ct. Oct. 15, 2018); *La Mack v. Obeid*, 2015 NCBC LEXIS 24, at *16–17 (N.C. Super. Ct. Mar. 5, 2015). The amount of deference due, though, varies with the circumstances.

18. When a plaintiff elects to sue outside its home forum, its "choice deserves less deference." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981). This is not to disfavor foreign litigants; there is simply less reason to believe that a litigant would choose a foreign forum for reasons of convenience. As the United States Supreme Court has observed, "[w]hen the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable." *Id.* at 255–56.

19. That is the case here. Cardiorentis, a Swiss company, brought this suit thousands of miles from its home. Absent a contrary showing, it is not reasonable to assume that Cardiorentis chose North Carolina because of its convenience.

20. Cardiorentis argues that it was faced with a choice between two inconvenient forums, North Carolina and England, and that it chose North Carolina as the more convenient of the two. (*See* Opp'n 2.) The Court is not persuaded. It appears that Cardiorentis conducted its pre-suit communications through English counsel. (*See* Mem. in Supp. Ex. 7 ¶ 1.8, ECF No. 20.8.) The decision to handle pre-suit activity in

England but then to bring suit in North Carolina hints at forum shopping rather than convenience. Indeed, in other filings, Cardiorentis itself has complained about the inconvenience that results from a six-hour time difference and the associated complexity of cross-Atlantic communications. (*See* Pl.'s Resp. Defs.' Mot. Extend Time ¶ 3, ECF No. 78.)

21. The Court therefore gives reduced deference to Cardiorentis's choice of forum. This factor weighs against granting a stay, but only slightly.

B. Location of Witnesses and Evidence

22. The clinical trial for Ularitide was a global undertaking, involving doctors, patients, and hospitals around the world. As a result, this litigation is likely to involve a number of witnesses and reams of evidence from a variety of locations—an important consideration because "the touchstone of *forum non conveniens* analysis is convenience." *La Seguridad v. Transytur Line*, 707 F.2d 1304, 1307 (11th Cir. 1983).

1. Convenience of Witnesses and Convenience and Access to Another Forum

23. The location of witnesses is "always a key factor in forum non conveniens cases." *Manu Int'l, S.A. v. Avon Prods., Inc.*, 641 F.2d 62, 66 (2d Cir. 1981). The Court must consider not only the number of witnesses but also the materiality and importance of the witnesses. *See, e.g.*, *Bos. Telecomms. Grp., Inc. v. Wood*, 588 F.3d 1201, 1209 (9th Cir. 2009); *Reid-Walen v. Hansen*, 933 F.2d 1390, 1396 (8th Cir. 1991).

24. Materiality turns on the nature of Cardiorentis's allegations. In its complaint, Cardiorentis attributes the trial's failure primarily to the enrollment (and subsequent concealment) of patients who did not meet the trial protocol. (*See* Compl. ¶¶ 7, 8, 49, 51.) This protocol established the criteria by which a patient was included in or excluded from the trial. (Compl. ¶¶ 31–32.) Enrollment of ineligible patients could affect the validity of the trial data, and IQVIA employees and affiliates were required to report any protocol deviations to Cardiorentis. (*See* Compl. ¶¶ 33, 35; Reply Br. Ex. 3 ¶¶ 12, 15.) IQVIA UK also performed source data verification to ensure that the reported data matched patient records. (*See* Reply Br. Ex. 3 ¶¶ 18–19.) Defendants' alleged failure to identify and report protocol deviations and perform source data verification forms the basis of this suit.

25. These duties were largely performed by three groups of potential witnesses: the trial investigators, the Clinical Research Associates ("CRAs"), and the Clinical Project Management Team ("CPM team"). (Reply Br. 5–6.) The investigators are the doctors who treated the

patients at each study site. (Reply Br. Ex. 3 ¶ 7.) They screened potential trial participants and determined a patient's eligibility. (Compl. ¶¶ 30, 34; Reply Br. Ex. 3 ¶ 7.) The CRAs, in turn, had responsibility for training the investigators, overseeing them, and monitoring the trial sites, along with identifying protocol deviations and performing source data verification. (Reply Br. Ex. 3 ¶¶ 12, 15, 18–19.) The CPM team had overall responsibility for managing and operating the trial, including oversight responsibility for training investigators, monitoring sites, and addressing protocol deviations. (Mem. in Supp. Ex. 5 ¶ 8; Reply Br. Ex. 3 ¶¶ 7, 14.) In short, these individuals have personal knowledge of the conduct giving rise to the allegations in the complaint. Not all will be called as witnesses, but the key witnesses are likely to come from their ranks.

26. These witnesses are scattered across the globe, but with significant concentrations in Europe. Of the 179 investigators, forty-four percent were located in the European Union. Only one was located in North Carolina. (Mem. in Supp. Ex. 4 Suppl. 5–9, ECF No. 20.5.) Of the roughly 100 CRAs, seventy-two were in Europe and two were in North Carolina. (Reply Br. Ex. 1 ¶ 6, ECF No. 81.2.) Twenty-two of the twenty-nine CPM team members were located in Europe while only two members were in North Carolina. (Reply Br. Ex. 1 ¶ 5.)

27. These witnesses and the work they performed were also managed from Europe. Three of the five Global Clinical Project Managers ("Global CPMs"), who were responsible for the overall operation of the study sites, were in Europe. (Reply Br. Ex. 3 ¶¶ 8–10.) None were located in North America. (Reply Br. Ex. 3 ¶ 10.) The Global CPMs were supervised by two Line Managers, one located in England and the other in France. (Reply Br. Ex. 3 ¶ 9.)

28. Other teams that played relevant roles in the trial also appear to be concentrated in Europe. By way of example, a fifteen-member Executive Committee designed the trial protocol. (Mem. in Supp. Ex. 4 1957.) Eight of these team members were in Europe, none in North Carolina. (Mem. in Supp. Ex. 4 Suppl. 2.) When the investigators and CRAs ran into medical issues, including issues of protocol interpretation, the Medical Advisors provided guidance. (Mem. in Supp. Ex. 5 ¶ 9.) Two of the seven were in North Carolina, but four were in Europe. (Reply Br. Ex. 1 ¶ 7.) The investigators collected and processed patient data using a system developed by the Data Management team, every member of which was located in France. (Mem. in Supp. Ex. 5 ¶ 11; Reply Br. Ex. 1 ¶ 8.) The Biostatistician team was in charge of designing the trial's statistical analysis plan and had seven members located in Europe. (Mem. in Supp. Ex. 5 ¶ 12; Reply Br. Ex. 1 ¶ 9.) It seems clear that some

of these individuals will be material witnesses; Cardiorentis has sought extensive information about their roles in the trial in its discovery requests. (Mem. in Supp. Ex. 8 ¶¶ 4, 5, 20(g), 44, ECF No. 20.9.)

29. Cardiorentis says little about these potential witnesses, instead emphasizing Defendants' quality assurance operations. Cardiorentis points to the Clinical Event Validation and Adjudication ("CEVA") system, a North Carolina-based team that Cardiorentis alleges trained the investigators and assisted with reporting protocol deviations. (Opp'n Ex. A ¶ 14(c)–(d), ECF No. 75.1.) But Defendants have supplied evidence showing that the CPM team, CRAs, and investigators performed these duties, not CEVA. (Reply Br. Ex. 3 ¶¶ 7–12.) In addition, a separate Quality Assurance team conducted all of the trial's audits (thirty in Europe, two in North Carolina), and its members were located in Finland, Belgium, and Texas. (Reply Br. Ex. 2 ¶¶ 1, 3, 9–10, 12, ECF No. 81.3.)

30. CEVA appears to be an administrative data compilation tool that provided information to the Clinical Events Committee ("CEC") and Data Safety Monitoring Board ("DSMB"). These two teams played a role in ensuring patient safety. When a patient suffered a certain medical event, including death, the CEC analyzed the cause. (Reply Br. Ex. 4 ¶¶ 4–6, ECF No. 81.5.) The DSMB also evaluated patient safety data and was the body that ultimately recommended discontinuing the trial. (Reply Br. Ex. 4 ¶¶ 10–12.) The CEC team members are located entirely in Scotland, and three of the four DSMB team members were located in Europe. (Mem. in Supp. Ex. 4 Suppl. 3.)

31. Cardiorentis also alleges that ten other witnesses, all high-level IQVIA NC officers and employees, are located in North Carolina. (*See* Compl. ¶ 45(a)–(j); Opp'n 7, 12, 14.) According to Cardiorentis, these employees made or approved every medical and financial decision throughout the course of the trial. (Opp'n 7; Opp'n Ex. A ¶¶ 24, 25.) But the complaint does not clearly tie any of its allegations of wrongdoing to these IQVIA NC employees. In addition, IQVIA NC has supplied affidavits demonstrating that several of the witnesses had no day-to-day role in the trial. (*See* Mem. in Supp. Ex. 10 ¶¶ 10–13, ECF No. 20.11.)

32. The Court concludes, based on the complaint's allegations, that the more material witnesses are the trial personnel who were involved in drafting the protocol, training investigators, monitoring trial sites, identifying and reporting protocol deviations, and performing source data verification. As discussed above, most of these witnesses are located in Europe and few are located in North Carolina. It is therefore clear that England would be a far more convenient forum than North Carolina for the majority of the relevant witnesses.

33. Cardiorentis observes, correctly, that England and Europe are not synonymous and that most of these witnesses are not located in England. (Opp'n 9–10.) But the weight of authority holds that a European forum is more convenient when the preponderance of witnesses is concentrated in Europe. *See*, *e.g.*, *Schertenleib v. Traum*, 589 F.2d 1156, 1165 (2d Cir. 1978); *Vivendi S.A. v. T-Mobile USA*, *Inc.*, 2008 U.S. Dist. LEXIS 118529, at *34–35 (W.D. Wash. June 5, 2008); *Delta Brands*, *Inc. v. Danieli Corp.*, 2002 U.S. Dist. LEXIS 24532, at *25–26 (N.D. Tex. Dec. 19, 2002). Practically speaking, it is certainly easier for witnesses residing in Europe to travel to England than it is for the same witnesses to travel to North Carolina.

34. This is bolstered by the fact that many of the most material witnesses are third parties. The investigators, CEC team, and DSMB team members are not employees of IQVIA UK or IQVIA NC. (*See* Mem. in Supp. Ex. 4 Suppl. 5–9; Reply Br. 6; Reply Br. Ex. 4 ¶¶ 5, 10.) These witnesses are more likely to participate in the case if it proceeds in a European forum. *See Marnavi Splendor GmbH & Co. KG. v. Alstom Power Conversion*, *Inc.*, 706 F. Supp. 2d 749, 757 (S.D. Tex. 2010). And courts often give greater weight to the convenience of nonparty witness. *See Morris v. Chem. Bank*, 1987 U.S. Dist. LEXIS 8031, at *13–14 (S.D.N.Y. Sept. 10, 1987); *see also Banco de Seguros del Estado v. J.P. Morgan Chase & Co.*, 500 F. Supp. 2d 251, 262 (S.D.N.Y. 2007); *Mohamed v. Mazda Motor Corp.*, 90 F. Supp. 2d 757, 775 (E.D. Tex. 2000).

35. In short, the balance of witnesses with pertinent, firsthand information are in Europe, and England is a more convenient forum for those witnesses than North Carolina. The convenience of witnesses favors a stay.

2. Relative Ease of Access to Sources of Proof

36. Given the difficulty and expense associated with gathering evidence in a foreign jurisdiction, the relative ease of access to sources of proof has been considered particularly important in the *forum non conveniens* analysis. *See Ford v. Brown*, 319 F.3d 1302, 1308 (11th Cir. 2003). In analyzing this factor, a court should first consider the evidence required to prove or disprove each claim and then assess the likely location of that evidence. *See J.C. Renfroe & Sons*, *Inc. v. Renfroe Japan Co.*, *Ltd.*, 515 F. Supp. 2d 1258, 1270 (M.D. Fla. 2007).

37. Here, the Court has the benefit of reviewing Cardiorentis's discovery requests, which seek extensive discovery of evidence located largely in Europe. For example, Cardiorentis seeks information about the protocol, along with the identity of personnel involved with, and

documents and communications related to, protocol deviations and the source data verification process. (Mem. in Supp. Ex. 8 ¶¶ 4–7, 13–15, 18, 25; Mem. in Supp. Ex. 9 ¶¶ 4, 5, 8–10, ECF No. 20.10.) Other discovery requests ask for information regarding the trial sites and associated staff, site visits, and site management. (Mem. in Supp. Ex. 8 ¶¶ 8–12, 16–18, 44; Mem. in Supp. Ex. 9 ¶¶ 6, 7, 11.) And Cardiorentis seeks the meeting minutes of the CEC and the DSMB (whose members are primarily in Europe); information about a Blind Data Review Meeting (held in Scotland); and all documents related to inspections by Dutch and Swiss regulatory authorities. (Mem. in Supp. Ex. 5 ¶¶ 5, 14; Mem. in Supp. Ex. 8 ¶¶ 28, 29, 49.) The bulk of this information relates to European locations and personnel. (Reply Br. Ex. 3 ¶¶ 8–10.)

38. It will be much easier for the parties to access relevant sources of proof from England. Importantly, the Services Agreement that gives rise to all of IQVIA UK's trial responsibilities was executed in Reading, England. (Mem. in Supp. Ex. 1 ¶ 5, ECF No. 20.2; Services Agreement at 18.) England is also closer to much of the relevant evidence that will need to be collected from the study sites.

39. Conversely, North Carolina is not likely to be a significant source of evidence. Cardiorentis seeks, for example, discovery of all audits performed by Defendants. (Mem. in Supp. Ex. 8 ¶¶ 31, 32; Mem. in Supp. Ex. 9 ¶ 12.) Only two took place in North Carolina; the other thirty were in Europe. (Reply Br. Ex. 2 ¶¶ 9–10.) Documents related to CEVA may be based in North Carolina, but as discussed earlier, CEVA is likely to be less material than the Europe-centric teams it supported. (Reply Br. Ex. 4 ¶¶ 6, 8, 11.)

40. Additionally, if this case were to proceed in England, the parties may be able to take advantage of European Council Regulation No. 1206/2001. This regulation simplifies the exchange of evidence between members of the European Union. *See In re Air Crash Over the Mid-Atl. on June 1, 2009*, 760 F. Supp. 2d 832, 844 n.8 (N.D. Cal. 2010); *Vivendi S.A.*, 2008 U.S. Dist. LEXIS 118529, at *37. To the extent it is available, this method of obtaining evidence slightly favors an English forum because it is preferable to obtaining evidence through the more "time-consuming and expensive" procedures of the Hague Convention. *Crosstown Songs U.K., Ltd. v. Spirit Music Grp., Inc.*, 513 F. Supp. 2d 13, 17 (S.D.N.Y. 2007); *see also Rabbi Jacob Joseph Sch. v. Allied Irish Banks, P.L.C.*, 2012 U.S. Dist. LEXIS 121438, at *22 (E.D.N.Y. Aug. 27, 2012).[3]

3. Cardiorentis argues that the United Kingdom's anticipated exit from the European Union casts doubt on the availability of European Council Regulations, but this argument

41. Given the worldwide nature of the clinical trial, Cardiorentis and Defendants will be required to undergo extensive and burdensome evidence production from abroad whether the case proceeds in North Carolina or England. But there is little relevant evidence in North Carolina, and England is much closer to important sources of proof. This factor favors a stay.

3. Availability of Compulsory Process

42. Both North Carolina and England allow courts to compel unwilling witnesses to attend trial proceedings. Federal courts have generally found that this factor favors dismissal from an American forum when, as here, a large number of witnesses are located overseas beyond the reach of a court's compulsory process. *See MicroAire Surgical Instruments, LLC v. Arthrex, Inc.*, 2010 U.S. Dist. LEXIS 70191, at *20 (W.D. Va. July 13, 2010).

43. However, where the moving party fails to allege that nonparty witnesses would participate only if compelled to do so, the availability of compulsory process "should be given little weight in the overall balancing scheme" of the *forum non conveniens* analysis. *DiFederico*, 714 F.3d at 806; *see also Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1231 (9th Cir. 2011); *Duha v. Agrium, Inc.*, 448 F.3d 867, 877 (6th Cir. 2006); *Peregrine Myan. Ltd. v. Segal*, 89 F.3d 41, 47 (2d Cir. 1996). Neither side has identified any involuntary witnesses here. In the absence of meaningful evidence of the need for compulsory process, the factor is neutral.

C. Applicable Law

44. State and federal courts alike agree that the need to apply foreign law favors a stay in a *forum non conveniens* analysis. *See, e.g.*, *Manuel v. Gembala*, 2012 N.C. App. LEXIS 359, at *12 (N.C. Ct. App. Mar. 20, 2012) (upholding stay on appeal because, "most notably," the claims were governed by federal law and other States' laws); *see also Piper Aircraft*, 454 U.S. at 260 n.29 (citing cases); *NLA Diagnostics LLC v. Theta Techs. Ltd.*, 2012 U.S. Dist. LEXIS 108779, at *12–13 (W.D.N.C. Aug. 3, 2012).

45. Cardiorentis's claims for breach of contract will be governed by English law. The Services Agreement specifies that it must be construed

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is speculative. (Opp'n 15–16.) The timing and details of the so-called Brexit remain unsettled, and there is uncertainty as to whether the relevant procedural mechanisms (and many other EU regulations) would or would not continue to apply.

and applied "in accordance with the laws of England and Wales," (Services Agreement § 28.0), and North Carolina courts generally honor choice-of-law clauses. *See IPayment, Inc. v. Grainger*, 2017 N.C. App LEXIS 1087, at *9, 808 S.E.2d 796, 800 (2017). The Quality Agreement does not have its own choice-of-law provision but, as an outgrowth of the Services Agreement, will also be governed by the law of England and Wales. (Quality Agreement § 1.) Cardiorentis does not dispute that either agreement is governed by English law.

46. While American courts can and do apply foreign law, they regularly hold that English courts are better equipped to apply English law. *See, e.g., Rabbi Jacob Joseph Sch.*, 2012 U.S. Dist. LEXIS 121438, at *13–14; *Denmark v. Tzimas*, 871 F. Supp. 261, 271 (E.D. La. 1994). Moreover, applying and proving foreign law can impose significant costs on parties in terms of time and money and can also increase the administrative burden on the court. *See Yavuz v. 61 MM, Ltd.*, 576 F.3d 1166, 1181 (10th Cir. 2009); *In re Banco Santander Sec.-Optimal Litig.*, 732 F. Supp. 2d 1305, 1339 (S.D. Fla. 2010); *Stroitelstvo Bulg., Ltd. v. Bulgarian-Am. Enter. Fund*, 598 F. Supp. 2d 875, 889 (N.D. Ill. 2009). Therefore, that the contract claims are governed by English law favors a stay.

47. As to Cardiorentis's remaining claims, the parties vigorously dispute the applicable law. Generally, lex loci delicti "is the appropriate choice of law test to apply to tort claims," including fraud. *Harco Nat'l Ins. Co. v. Grant Thornton LLP*, 206 N.C. App. 687, 692, 698 S.E.2d 719, 722 (2010). The appropriate test for claims asserted under the Unfair and Deceptive Trade Practices Act is unsettled, however. *Compare Harco Nat'l*, 206 N.C. App. at 698, 698 S.E.2d at 726 (applying lex loci), *with Andrew Jackson Sales v. Bi-Lo Stores, Inc.*, 68 N.C. App. 222, 225, 314 S.E.2d 797, 799 (1984) (applying "most substantial relationship" test).

48. To evaluate this factor, the Court need not definitively determine which law governs, particularly when leaving the question open would avoid "unnecessarily addressing an undecided issue of [state] law." *Galustian v. Peter*, 561 F. Supp. 2d 559, 565 (E.D. Va. 2008). It suffices to note that North Carolina law is unlikely to apply to any of the tort claims.

49. Under the lex loci test, tort claims are governed by the law of the place of injury, which is sustained in the jurisdiction where the last act giving rise to the injury occurred. *See Harco Nat'l*, 206 N.C. App. at 694, 698 S.E.2d at 724; *Stetser v. TAP Pharm. Prods. Inc.*, 165 N.C. App. 1, 14, 598 S.E.2d 570, 580 (2004). The last act is often "the suffering of damages." *M-Tek Kiosk, Inc. v. Clayton*, 2016 U.S. Dist. LEXIS

67036, at *49 (M.D.N.C. May 23, 2016) (alterations and quotation marks omitted). There is no bright-line rule that a corporate plaintiff suffers injury in the forum where it maintains its principal place of business. *See Harco Nat'l*, 206 N.C. App. at 697, 698 S.E.2d at 725–26. But in this case, Cardiorentis asserts injury in the form of costs it paid to mount the trial, other costs and expenses associated with the trial, and lost profits. (Compl. ¶¶ 83–84.) Cardiorentis likely suffered these losses at its corporate home in Switzerland. (Compl. ¶ 11.) Therefore, it appears that Swiss law would govern all of Cardiorentis's tort claims if the Court applied lex loci.

50. If the Court were required to apply the most significant relationship test to the unfair trade practices claim, the question would be which forum has the strongest ties to the case. *See*, *e.g.*, *Andrew Jackson*, 68 N.C. App. at 225, 314 S.E.2d at 799. Cardiorentis's claim is primarily fraud-based, essentially alleging that Defendants improperly concealed their breaches of a contract between English and Swiss companies and governed by English law. (*See*, *e.g.*, Compl. ¶¶ 104(b)–(c), 104(e).) Under this test, it seems likely that English or Swiss law would govern, not North Carolina law.

51. At this stage, it is evident there will be substantial questions of English law. It also appears likely that a court will need to apply Swiss law to at least some of Cardiorentis's claims and unlikely that North Carolina law will govern any of the claims. Therefore, this factor favors a stay.

D. Local Concern and Nature of the Case

52. The Court must also consider the nature of the case and whether either forum has a local interest in resolving the controversy. At its root, this case concerns the performance of a global clinical trial pursuant to a contract (the Services Agreement) that is between English and Swiss companies and governed by English law. England therefore has a clear, strong interest. *See NLA Diagnostics*, 2012 U.S. Dist. LEXIS 108779, at *12–13.

53. By contrast, North Carolina has a weaker interest. Most of the conduct giving rise to the claims occurred in Europe, not North Carolina. The sole tie to North Carolina is the fact that IQVIA NC is located in this State. (Compl. ¶ 12.) Although our courts have a general interest in providing a forum to hear disputes involving injuries caused by citizens of the State, *see Reid-Walen*, 933 F.2d at 1400, this interest is diminished when the lion's share of relevant activity occurred abroad and when the controversy is unlikely to be governed by North Carolina law.

54. Thus, the Court concludes that England possesses the stronger interest in resolving this dispute. *See, e.g.*, *Gullone v. Bayer Corp.*, 484 F.3d 951, 959 (7th Cir. 2007); *Pollux Holding, Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 76 (2d Cir. 2003). These factors favor a stay. *See La Mack*, 2015 NCBC LEXIS 24, at *21.

E. Fair and Reasonable Forum

55. As a prerequisite to the entry of a stay, the moving party "must stipulate his consent to suit in another jurisdiction." N.C. Gen. Stat. § 1-75.12(a). This condition is met here. IQVIA UK and IQVIA NC have stipulated their consent to suit in either England or Switzerland. (Mem. in Supp. 23.)

56. Section 1-75.12(a) also requires that the alternative forum be reasonable and fair. This, too, is satisfied. Cardiorentis does not contend that England is an unreasonable or unfair forum. (Opp'n 3.) Indeed, England is "a forum that American courts repeatedly have recognized to be fair and impartial." *Haynsworth v. Corp.*, 121 F.3d 956, 967 (5th Cir. 1997); *see also Tarasewicz v. Royal Caribbean Cruises, Ltd.*, 2015 U.S. Dist. LEXIS 84779, at *39–40 (S.D. Fla. June 30, 2015); *Capital Mkts. Int'l v. Gelderman, Inc.*, 1998 U.S. Dist. LEXIS 12488, at *12 (N.D. Ill. Aug. 7 1998).

III.

CONCLUSION

57. After considering the relevant factors, the Court finds in its sound discretion that this case should be stayed pursuant to section 1-75.12(a). The convenience of witnesses, ease of access to sources of proof, applicable law, and local interest factors significantly favor a stay and outweigh any deference due to Cardiorentis's choice of forum. The balance of all relevant factors shows that it would be more convenient for the parties to litigate these claims in England. Defendants have shown that a substantial injustice would result if this case were to proceed in North Carolina and that England is a convenient, reasonable, and fair place of trial. For these reasons, the Court **GRANTS** Defendants' motion to stay, and this action is **STAYED** until further order of this Court.

58. As a result, the Court need not and does not decide whether it may exercise personal jurisdiction over IQVIA UK or whether Cardiorentis has failed to state its claims for relief. The Court **DENIES** as moot Defendants' motion to dismiss for failure to state a claim and IQVIA UK's motion to dismiss for lack of personal jurisdiction. *See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 425

(2007) (holding that *forum non conveniens* is a threshold issue that may be decided before ruling on personal jurisdiction or other issues).

59. During the pendency of the stay, the Court will hold this case on an inactive docket. The Court **ORDERS** that the parties shall jointly file a status report within six months of the entry of this Order and every six months thereafter. In the event the parties resolve this dispute by settlement or other means, they shall notify the Court within seven days of reaching any resolution.

SO ORDERED, this the 31st day of December, 2018.

/s/ Adam M. Conrad
Adam M. Conrad
Special Superior Court Judge
for Complex Business Cases

THE CITY OF CHARLOTTE, A NORTH CAROLINA 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

No. 183PA16-2

Filed 28 February 2020

On discretionary review under N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 818 S.E.2d 116 (N.C. Ct. App. 2018), reversing an order entered on 29 September 2016 by Judge Daniel A. Kuehnert in Superior Court, Mecklenburg County. Heard in the Supreme Court on 1 October 2019 in session in the Randolph County 1909 Historic County Courthouse in the City of Asheboro pursuant to section 18B.8 of Session Law 2017-57.

Parker Poe Adams & Bernstein LLP, by Charles C. Meeker and DeWitt F. McCarley, for plaintiff-appellant.

Johnston, Allison & Hord, P.A., by R. Susanne Todd, Martin L. White, and David V. Brennan, for defendant-appellee.

PER CURIAM.

Justice DAVIS did not participate in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Piro v. McKeever*, 369 N.C. 291, 291, 794 S.E.2d 501, 501 (2016) (per curiam) (affirming a Court of Appeals opinion without precedential value by an equally divided vote).

AFFIRMED.

CRYSTAL COGDILL AND JACKSON'S GENERAL STORE, INC.
v.
SYLVA SUPPLY COMPANY, INC. A/K/A SYLVA SUPPLY COMPANY,
DUANE JAY BALL, AND IRENE BALL

No. 219A19

Filed 28 February 2020

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 828 S.E.2d 512 (N.C. Ct. App. 2019), affirming an order of summary judgment entered on 16 April 2018 by Judge Mark E. Powell in Superior Court, Jackson County. Heard in the Supreme Court on 7 January 2020.

The Law Firm of Diane E. Sherrill, PLLC, by Diane E. Sherrill, for plaintiff-appellants.

Coward, Hicks & Siler, P.A., by J. K. Coward Jr., for defendant-appellees.

PER CURIAM.

AFFIRMED.

IN RE D.W.P.

[373 N.C. 327 (2020)]

IN THE MATTER OF D.W.P., B.A.L.P.

No. 140A19

Filed 28 February 2020

1. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—findings of fact

Where the trial court terminated a mother's parental rights to her two children for failure to make reasonable progress toward correcting the conditions that led to the removal of her children, the findings challenged by the mother on appeal were supported by competent evidence, including that she had not been honest about, or concealed the truth about, the cause of her younger child's injuries. Respondent-mother provided no medically feasible explanation for the multiple bone fractures suffered by her son while he was under her and her fiance's care, and resumed a relationship with her fiance despite domestic violence incidents.

2. Termination of Parental Rights—grounds for termination—neglect—conclusions of law

The trial court properly terminated a mother's parental rights to her two children on the ground of neglect after concluding that the mother would be likely to neglect her children in the future, based on her failure to provide an explanation for or acknowledge her responsibility for multiple bone fractures suffered by her younger child while he was under her and her fiance's care.

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

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7A-27(a)(5) from an order entered on 23 January 2019 by Judge Angela C. Foster in District Court, Guilford County. Heard in the Supreme Court on 6 November 2019.

Mercedes Chut, for petitioner-appellee Guilford County Department of Health and Human Services.

Coats & Bennett, PLLC, by Gavin Parsons, for appellee Guardian ad Litem.

Michael Spivey for respondent-appellant mother.

BEASLEY, Chief Justice.

Respondent, the mother of D.W.P. (David)[1] and B.A.L.P. (Briana), appeals from the trial court's 23 January 2019 order terminating her parental rights. The issue before the Court is whether the trial court made and relied upon findings of fact that were supported by clear, cogent, and convincing evidence in assessing respondent-mother's reasonable progress to remedy the conditions that led to the removal of her children. After careful consideration of the relevant legal authorities and in light of the record evidence, we affirm the trial court's decision.

I. Facts and Procedural History

On 1 March 2015, the Guilford County Department of Health and Human Services (GCDHHS) received a Child Protective Services (CPS) report that eleven-month old David was being treated at MedCenter Emergency Department in High Point for a broken femur. The doctor examining David had also performed a body scan and the results showed older clavicle, tibia, fibula, and rib fractures that were still in the process of healing. During the GCDHHS investigation, respondent-mother stated that she never noticed any signs that David had been harmed and attributed his fractured femur to the family's seventy-pound dog and suggested that the children's biological father had inflicted the older injures.

On 20 March 2015, based on David's young age and the multiple fractures for which respondent-mother and her fiancé, Mr. Goff, provided no plausible explanation, GCDHHS filed a petition and nonsecure custody motion relating to of David and Briana. On the same date, Judge Betty J. Brown entered an order granting nonsecure custody of both children to GCDHHS. After a hearing held on 26 January 2016, the court adjudicated David an abused and neglected juvenile and adjudicated Briana, although she had no injuries, a neglected juvenile. Legal and physical custody of both children was granted to GCDHHS and a permanency planning hearing was set for 23 March 2016. Respondent-mother appealed the trial court's order.

The COA affirmed David's adjudication as abused and neglected, but reversed Briana's adjudication as being a neglected juvenile. *See In re*

1. A pseudonym is used to protect the juveniles' identities and for ease of reading.

D.P. and B.P., 250 N.C. App. 507, 793 S.E.2d 287 (2016) (unpublished). The court remanded the case to the trial court to make appropriate findings of fact and conclusions of law to determine if Briana was, in fact, a neglected juvenile. *Id.* Respondent-mother later stipulated at the adjudication hearing on 27 October 2017 that Briana was neglected.

As a result of David's injuries, respondent-mother was charged with felony child abuse inflicting serious injury. On 9 November 2017, she entered an *Alford* plea to misdemeanor child abuse and was placed on probation for twelve months. During the allocution, respondent-mother told the court David's injuries may have occurred because he "slept funny." The trial court made a finding from this testimony that respondent-mother provided yet another explanation for the injuries that was inconsistent with previously submitted evidence involving David's injuries. Following respondent-mother's plea, there was a permanency hearing on 30 November 2017.

Following the hearing, the court entered an order ceasing reunification efforts and directing GCDHHS to file a petition for termination of parental rights. GCDHHS did so on 20 March 2018. After an 8 January 2019 termination hearing, the trial court entered its order terminating respondent-mother's parental rights on 23 January 2019. The court acknowledged that respondent-mother had completed many of the requirements set out in the permanency plan, but concluded that she had willfully failed to make reasonable progress to remedy the conditions that led to removal of her children, that her neglect continued, and that she was likely to neglect the children in the future.

Among other things, the court specifically focused on respondent-mother's refusal to honestly report how David's injuries occurred. Because respondent-mother and Mr. Goff were David's only caretakers at the time of the incident, the court identified only three possible causes of the injuries: (1) respondent-mother caused the injures, (2) respondent and Mr. Goff caused the injuries together, or (3) respondent-mother failed to protect David from Mr. Goff causing the injuries. Without knowing the cause of the injuries, the court believed GCDHHS was unable to provide a plan to ensure that injuries would not occur in the future.

Respondent-mother appealed the trial court's order terminating her parental rights, arguing that the trial court made and relied upon findings of fact that were unsupported by clear, cogent, and convincing evidence in assessing her reasonable progress to remedy the conditions that led to the removal of her children.

II. Discussion

Termination of parental rights proceedings consist of two stages: adjudication and disposition. N.C.G.S. §§ 7B-1109, -1110 (2017); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). At the adjudicatory stage, the petitioner must prove by "clear, cogent, and convincing evidence" that one or more grounds for termination exist under section 7B-1111(a) of our General Statutes. N.C.G.S. § 7B-1109(e), (f) (2017). Thus, we review a district court's adjudication "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. at 111, 316 S.E.2d at 253 (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). Unchallenged findings of fact made at the adjudicatory stage, however, are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citing *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962)). If the petitioner proves at least one ground for termination during the adjudicatory stage, "the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110)).

On appeal, respondent-mother challenges several of the trial court's findings of fact as unsupported by clear, cogent, and convincing evidence as well as its conclusions of law regarding her progress in remedying the conditions that led to the removal of her children and the likelihood of future neglect.

A. Challenged Findings of Fact

[1] Findings of fact supported by competent evidence are binding on appeal, despite evidence in the record that may support a contrary finding. *See In re Montgomery*, 311 N.C. at 112-13, 316 S.E.2d at 254. Further, it is the duty of the trial judge to ' "pass[ ] upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom." ' *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 168 (2016) (quoting *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968)). The trial judge's decisions as to the weight and credibility of the evidence, and the inferences drawn from the evidence are not subject to appellate review. *Id.*

"In all actions tried upon the facts without a jury . . . the court shall find the facts specifically and state separately its conclusions of law thereon . . . ." N.C.G.S. § 1A-1, Rule 52(a)(1). Thus, the trial court must,

through "processes of logical reasoning," based on the evidentiary facts before it, "find the ultimate facts essential to support the conclusions of law." *See In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003). The resulting findings of fact must be "sufficiently specific" to allow an appellate court to "review the decision and test the correctness of the judgment." *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982).

1. Respondent-mother has not been honest about, or has concealed the truth about, the cause of David's injuries.

The trial court made several findings of fact about respondent-mother's failure to reveal the source of David's injuries, including:

> Despite her participation and completion of some of the recommended services, [respondent-mother] has not honestly reported how [David] received his injuries. Because she and Mr. Goff were the sole caretakers of the juvenile at the time, there are only three possible scenarios: (1) [respondent-mother] caused the injuries, (2) [respondent-mother] and Mr. Goff caused the injuries together, and (3) [respondent-mother] failed to protect [David] from Mr. Goff causing the injuries. Without knowing which of these scenarios occurred, the Department was unable to put the necessary services in place in order to return the juveniles to a safe and appropriate home.
>
> . . .
>
> Given that [respondent-mother] has refused to admit how [David] received his injuries while in the exclusive care of herself and Mr. Goff, and has refused to accept responsibility for her actions, there is a likelihood of the repetition of neglect by [respondent-mother].
>
> . . .
>
> [Respondent-mother] has not put the best interest of the juveniles ahead of her decision to conceal the truth from the Department and from the Court as to the actual cause of [David's] injuries. She has provided several explanations and none are medically consistent with the injuries. Since [David] has been in the custody of the Department, he has not sustained any more injuries of the sort he presented with on March 1, 2015.

Respondent-mother argues that the trial court's findings were not supported by evidence because the court could not and did not find that she or Mr. Goff had harmed David. We disagree.

Dr. Briggs, the Pediatric Child Abuse Specialist who examined David, reported that David suffered older fractures to the femur, anterior ribs and one posterior rib, lower legs and the clavicle. While she could not provide an exact date for when each injury occurred, she reported that the fractures were in different stages of healing, there was no medical reason for all the fractures, and she did not believe any of the injuries were four or five months old. Respondent-mother reported to the GCDHHS that she and Mr. Goff were David's only caretakers at the time of the most recent injury.

Respondent-mother initially reported that the most recent injury could have been caused by the seventy-pound family dog, and she believed the older injuries occurred while David was with his biological father in November 2014. On 3 March 2015, however, Dr. Briggs observed that while it was not impossible for the dog to have caused one break in David's leg, the incident does not explain the other, older fractures. And while respondent-mother was concerned that David's biological father may have harmed him, Dr. Briggs concluded that many of the fractures were newer than the last reported contact David had with his father.

Respondent-mother fails to offer a medically feasible explanation for the injuries or to take responsibility for the role she and Mr. Goff had in causing them, despite ample evidence that the injuries could not have been caused by any other person. Accordingly, we conclude that the trial court's findings regarding respondent-mother's truthfulness about the source of David's injuries is supported by clear, cogent, and convincing evidence.

2. Respondent-mother violated her probation by failing to obtain a psychiatric evaluation as a condition of probation as required by Dr. Holm.

The trial court found that respondent-mother "ha[d] not completed a psychiatric evaluation. The completion of a psychiatric evaluation was also a condition of her probation[,] yet she has failed to participate in one." Respondent-mother argues that she was not required to have a psychiatric evaluation as a condition of probation and that she was ordered to report only for an initial evaluation by "any state licensed mental health agency specifically for child abuse." We disagree.

A special condition of respondent-mother's probation was to "[r]eport for initial evaluation by any state licensed mental health agency specifically for child abuse, participate in all further evaluation, counseling, treatment, or education programs recommended as a result of that evaluation, and comply with all other therapeutic requirements of those programs until discharged." Thus, respondent-mother was not only required to obtain an initial evaluation, but she was also required to participate in any recommended treatment as a result of the evaluation. Dr. Holms' report recommended that "an assessment by a psychiatrist would be helpful in furthering [respondent-mother's] desire to maintain a stable and loving home for her children with a minimum of disruption and conflict in [respondent-mother's] interactions with other adults."

Respondent-mother made no effort to follow Dr. Holms' recommendation, although doing so was a requirement of her probation. Thus, clear, cogent, and convincing evidence exists to support the trial court's finding as to respondent-mother's probation violation.

3. Respondent-mother resumed a relationship with Mr. Goff and they were working on reestablishing their relationship.

The trial court found that

> [Respondent-mother] resumed a relationship with [Mr. Goff] in June 2017 shortly after the death of her father, but failed to inform the Department as agreed. At that time, she provided [Mr. Goff] with a new key to her home. [Mr. Goff] was providing emotional support to [respondent-mother], and they were working on reestablishing their relationship . . .

Respondent-mother initially ended her relationship with Mr. Goff in September 2016. The record shows, and respondent-mother does not dispute, that she and Mr. Goff reconnected in June 2017. Respondent-mother informed the court that she relied on Mr. Goff for emotional support after the passing of her father. She explained that she was very isolated at the time and could not talk to many people, except Mr. Goff. Several months after the two resumed contact, respondent-mother testified that she provided Mr. Goff with access to her home to fix an electrical problem while she was at work. After the repair, she did not ask him to return the key to her home, even after a domestic violence incident ensued between the two.

Because respondent-mother admits that she did in fact resume contact with Mr. Goff and provided him with a key to her home, the

trial court's finding that respondent-mother resumed a relationship with Mr. Goff and they were working on reestablishing a relationship is supported by clear, cogent, and convincing evidence.

4. Respondent-mother continued a relationship with Mr. Goff despite domestic violence incidents.

Although there were no direct findings that respondent-mother had been abused by Mr. Goff before they separated, her testimony at the termination hearing indicates that one of the reasons they separated was because there was a possibility he could have caused the injuries to David. Despite these concerns, respondent-mother reconnected with Mr. Goff in June 2017. On 26 April 2018, after resuming her relationship with Mr. Goff, respondent-mother called the police because Mr. Goff had followed her to work, barricaded her in her car, and took her phone. Respondent-mother did not ask Mr. Goff to return the key to her home, nor did she change the locks after this incident.

Finally, after an encounter on 19 May 2018, when Mr. Goff entered her house, attempted to suffocate her with a pillow, and strangled her, respondent-mother sought a protective order. From these facts, there is clear, cogent, and convincing evidence that respondent-mother maintained a relationship with Mr. Goff despite domestic violence incidents.

5. Respondent-mother offered a new explanation for David's injuries during her Alford *plea.*

In Briana's adjudication order, the court found by clear, cogent, and convincing evidence that respondent-mother offered a new explanation for David's injuries during his plea allocution: that David may have slept on his side. Respondent-mother did not challenge this finding at the adjudicatory stage; therefore, it is binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

6. Respondent-mother intentionally withheld information concerning her marriage and lied to and evaded a social worker who came to her house.

The court found that

> [Respondent-mother] has maintained that she was not in a relationship with anyone since Mr. Goff. The evidence, however, is to the contrary. [Respondent-mother] began a relationship with Mr. Holyfield in June 2018; she married him on September 1, 2018. [Respondent-mother] was aware that she needed to notify the Department of her

> marriage. At the time of the juveniles' removal from her care, she was engaged to Mr. Goff. Mr. Goff provided the Department with his name, date of birth, and necessary information for the Department to conduct a complete background check. Mr. Holyfield has not been subjected to the same scrutiny and is therefore, not an approved person to have contact with the juveniles or to have the juveniles returned to his home.

Respondent-mother testified that she had known Mr. Holyfield since they were children. They reconnected and began dating in June 2018, Mr. Holyfield moved into respondent-mother's home between July and August 2018, and the two married in September 2018. She further testified that she believed it was relevant to the case that she had married Mr. Holyfield. However, she did not inform her social worker, or any party involved in the case about her relationship with him, either before or after their marriage. Even after being asked questions about her housing arrangement at a family team meeting in December 2018, respondent-mother failed to disclose information about Mr. Holyfield living with her. Until the date of the termination hearing, respondent-mother's case supervisor testified that she had never heard of Mr. Holyfield.

Additionally, respondent-mother had never missed a home visit prior to her husband moving in with her. However, on 20 November 2018, after Mr. Holyfield moved in, she missed her first home visit. The case supervisor testified that she knocked on the door and called out to respondent-mother, but no one answered the door. She observed respondent-mother's car in the driveway along with an unidentified car. She further testified that as she was leaving, she saw respondent-mother peer out the window, and immediately received a voicemail from respondent-mother saying that she was too sick to open the door.

The facts above support, by clear, cogent, and convincing evidence, the trial court's finding that respondent-mother hid her marriage and evaded social workers.

7. Respondent-mother failed to gain insight about David's injuries and make reasonable progress.

The trial court made the following findings of fact regarding respondent-mother's failure to determine the cause of David's injuries:

> Despite her participation in therapeutic services, [respondent-mother] has not gained sufficient insight or made sufficient progress in order to disclose how [David]

received his injuries. Throughout the time the juveniles have been in foster care, [respondent-mother] has offered several explanations for the injuries. In October 2017, [respondent-mother] appeared close to disclosing the cause of [David's] injuries. The Department has had multiple conversations with [respondent-mother] regarding [David's] injuries and how she believed they occurred. [Respondent-mother] shared with Social Worker Haik that she did not cause physical harm to the juvenile, she however, recognizes that as their mother, she was ultimately responsible for their care and supervision and accepts that role, very clearly now; and if the juveniles were returned to her, she would have to take a more cautious approach to allowing other people to care for the juveniles. According to [respondent-mother], she did not know how the injuries were inflicted/caused; so she was looking for an explanation for the injuries. The Department and [respondent-mother] have discussed various options, including, medical reasons, and most recently, on the night that [David's] leg was injured, [David] was in the care of Mr. Goff, the mother's [fiancé] at the time of the injuries, who was bathing him while she was preparing dinner. [Respondent-mother] indicated that during that time, she was primarily working outside the home, and again, she did not know how the injuries occurred, but as their mother, she was responsible, and [David] was in the care of Mr. Goff at the time. [Respondent-mother] has continually indicated that [David's biological father] caused the femur fracture, the ribs and the tibia injuries to [David]; this is contrary to the medical evidence. [Respondent-mother] had no other explanation at the time. However, on November 9, 2017, [respondent-mother] tendered a guilty plea pursuant to *Alford* with regard to [David's] injuries, in Case #15CRS74373. [Respondent-mother] was originally charged with Felony Neglect Child Abuse-Serious Physical Injury, but the charge was reduced to Misdemeanor Child Abuse. [Respondent-mother], during the allocution, offered yet another explanation for the cause of [David's] injuries, to wit that he may have slept funny. This explanation is contrary to the evidence previously submitted at the Adjudicatory Hearing involving [David], and clearly demonstrates [respondent-mother's] failure to make progress.

…

[Respondent-mother] has not made adequate progress within a reasonable period of time under the plan. Although she has addressed some of the components in her service agreement, she has not addressed concerns which led to the filing of the petition, namely how [David] received his injuries which were caused by non-accidental trauma. [Respondent-mother] has completed the Domestic Violence Intervention Program (DVIP) and the Parent Assessment Training and Education Program (PATE), she has made most, if not all her scheduled visits and she was engaging in individual therapy until April 2018. Despite the completion of those services, significant questions remain as to the cause of [David's] injuries, which included: multiple bilateral healing rib fractures - left 5, 6, 7, 8, 9, 10 and right 3, 4, 5, 6, 7 and possibly 8; mid-shaft left clavicle fracture; acute, comminuted left femoral diaphyseal fracture; possible healing fracture of the proximal left humeral metaphysis; healing right tibial fracture; possible healing fracture of the distal right fibula; possible comer fracture of the posterior aspect of the distal left tibial metaphysis; possible healing fracture of the distal right femoral metaphysis.

…

[Respondent-mother] has not put the best interest of the juveniles ahead of her decision to conceal the truth from the Department and from the Court as to the actual cause of [David's] injuries. She has provided several explanations and none are medically consistent with the injuries. Since [David] has been in the custody of the Department, he has not sustained any more injuries of the sort he presented with on March 1, 2015. [Respondent-mother] is the only person who has been criminally charged in this matter: Felony Child Abuse with Serious Injury. And, although she tendered a guilty plea to a Misdemeanor charge pursuant to Alford, she has never admitted that she or anyone else inflicted those injuries on [David]. The juveniles have been in foster care since March 2015, and the Court is still no closer to knowing exactly how [David] sustained his injuries. Because of that, [respondent-mother] has not adequately remedied the conditions that brought the juveniles into custody.

Respondent-mother has maintained that she does not know the cause of David's injuries and has offered explanations that are not medically supported. She acknowledged that she would not rule out the possibility that Mr. Goff committed the injuries to David, but she also admits to resuming contact with him after the children were taken from the home. While we recognize that respondent-mother has taken the proper steps to attend parenting classes and therapy, and has followed the majority of the court's recommendations to become a better parent, she has failed to acknowledge the harm that has resulted from her failure to identify what happened to David. Without recognizing the cause of David's injuries, respondent-mother cannot prevent them from reoccurring. Therefore, the trial court's finding that respondent-mother failed to gain insight and make reasonable progress regarding David's injuries is supported by clear, cogent and convincing evidence.

B. Challenged Conclusions of Law

[2] In termination of parental rights proceedings, this Court reviews trial court orders "by determining whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings support the trial court's conclusions of law." *In re B.O.A.*, 372 N.C. 372, 379, 831 S.E.2d 305, 310 (2019) (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). The trial court found that grounds exist to terminate respondent-mother's parental rights under N.C.G.S. § 7B-1111(a)(1), which provides that:

> (a) The court may terminate the parental rights upon a finding of one or more of the following:
>
> (1) The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101.

N.C.G.S. § 7B-1111(a)(1).

Respondent-mother disputes the trial court's conclusion that she will likely neglect her children in the future. GCDHHS argues that the trial court did not err in its conclusion that the children were neglected. A neglected juvenile is defined, in relevant part, as "[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; . . . or who lives in an environment injurious to the juvenile's welfare" N.C.G.S. § 7B-101(15).

Where, as here, the child has not been in the custody of the parent for a significant period of time, the trial court must employ a different kind of analysis to determine whether the evidence supports a finding of neglect. This is because requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible. *In re Ballard*, 311 N.C. 708, 714, 319 S.E.2d 227, 231 (1984) (overturning the termination of the respondent-mother's parental rights where the court failed to make an independent determination of whether neglect existed at the time of termination hearing). "The determinative factors must be the best interest of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*." *Id.* at 715, 319 S.E.2d 227, 565.

Thus, when a child has been separated from their parent for a long period of time, the petitioner must prove (1) prior neglect of the child by the parent and (2) a likelihood of future neglect of the child by the parent. *In re M.A.W.*, 370 N.C. 149, 152, 804 S.E.2d 513, 516 (2017) (quoting *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016)). The trial court found that respondent-mother failed to protect David. David's primary caregivers were respondent-mother and Mr. Goff; and the court's findings indicate that either of them, or both of them, caused David's injuries. *See In re Y.Y.E.T.*, 205 N.C. App. 120 (2010) (affirming termination of parental rights on ground of abuse and neglect based on finding that both parents were responsible for child's non-accidental injuries and each parent refused to identify the perpetrator). Even still, our Court has recognized that a termination of parental rights for neglect cannot be based solely on past conditions that no longer exist. *In re M.A.W.*, 370 N.C. at 152, 804 S.E.2d at 516.

In this case, the trial court's order relies upon: past abuse and neglect; failure to provide a credible explanation for David's injuries; respondent-mother's discontinuance of therapy; respondent-mother's failure to complete a psychiatric evaluation; respondent-mother's violation of the conditions of her probation; the home environment of domestic violence; respondent-mother's concealment of her marriage from GCDHHS; and respondent-mother's refusal to provide an explanation for or accept responsibility for David's injuries.

While we recognize the progress respondent-mother has made in completing her parenting plan, including completing parenting classes, attending therapy, and regularly visiting with her children, we are troubled by her continued failure to acknowledge the likely cause of David's injuries. The State of North Carolina has long recognized that the best interests of the child are always treated as the paramount consideration

in termination of parental rights cases. Termination of parental rights proceedings are not meant to be punitive against the parent, but to ensure the safety and wellbeing of the child. *See In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984) (recognizing that the determinative factor in deciding whether a child is neglected is the circumstances and conditions surrounding the child, and not the culpability of the parent).

Here, the findings of fact show that respondent-mother has been unable to recognize and break patterns of abuse that put her children at risk. Despite respondent-mother's acknowledgement that Mr. Goff could have caused David's injuries, she re-established a relationship with him that resulted in domestic violence. Subsequently, respondent-mother, after acknowledging the importance of notifying the GCDHHS that her new husband resided in her home, concealed the relationship from her case supervisors. Respondent-mother acknowledges her responsibility to keep David safe, but she refuses to make a realistic attempt to understand how he was injured or to acknowledge how her relationships affect her children's wellbeing. These facts support the trial court's conclusion that the neglect is likely to reoccur if the children are returned to respondent-mother's care.

Because there is sufficient evidence to support one ground for termination of respondent-mother's parental rights, the Court need not address the second ground for termination—that respondent-mother willfully left her children in foster care for more than twelve months without making reasonable progress. *See B.O.A.*, 372 N.C. at 380, 831 S.E.2d at 311; N.C.G.S. § 7B-1111(a)(2).

The neglect ground for termination is supported by the court's findings that respondent-mother has failed to acknowledge her responsibility for the events leading to her children's removal from the home and due to her inability to pinpoint the cause of David's injuries. As a result, we are fully satisfied that the trial court's findings support its conclusion that respondent-mother has not made reasonable progress in correcting the conditions that led to the children's removal, and the children are likely to suffer neglect in the future. Accordingly, we affirm the trial court's order terminating respondent-mother's parental rights.

AFFIRMED.

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

Justice EARLS dissenting.

In this case, the trial court's findings of fact concerning whether the mother has been honest about how her son, David, was injured are based on a fallacious logical deduction that ignores the possibility that she was either unwilling to lie in order to keep her children, or that she was unaware that her refusal to lie would result in her losing them. There is no doubt that David was seriously injured on repeated occasions by some person while he was in the custody of his mother and Mr. Goff. The evidence in the record further supports the factual finding that David's mother has, at different times, offered various possible explanations for David's injuries that are not consistent with opinions by David's treating physician about how the injuries might have been caused. The logical fallacy in the trial court's findings is the supposed fact that "[the mother] has not honestly reported how David received his injuries" because, in the trial court's view, only three scenarios are possible: (1) that his mother caused the injuries, (2) that his mother and Mr. Goff together caused the injuries, or (3) that his mother failed to protect David from Mr. Goff. The trial court concludes, and this Court endorses, the logic that therefore David's mother must be lying because she will not say which of these three possibilities is correct. However, those are not the only three possible scenarios and they do not prove she is lying. David's mother has accepted responsibility for failing to protect her son. She has also maintained that she was not aware of the nature and extent of his injuries until he was examined in the emergency room and that she does not know how they occurred. It is entirely possible that Mr. Goff injured David outside of her presence and that she honestly did not know the severity and recurring nature of his injuries until the hospital visit. To terminate her parental rights as to both of her children because she will not say that she knows how her son was injured if, in fact, she does not know that, is unjust.

Absent direct evidence that the mother ever injured David herself, or was ever present in the room when he was injured, and in light of her substantial compliance with virtually every requirement asked of her by DHHS, and further, in light of the fact that there is no evidence of any kind that the mother did anything other than protect her daughter, the termination of her parental rights as to both children was not justified by the evidence in this case.

The termination of parental rights followed determinations by the trial court that the mother had "addressed all of the conditions in her case plan" and that she had "completed the checklist that constituted

her case plan." When a parent is in substantial compliance with a mandated case plan and consistently (1) maintains innocence as to causing harm to a child, (2) maintains that she lacks knowledge as to the cause of the child's injuries, and (3) acknowledges her responsibility as the primary caregiver to protect her children from harm, the parent's inability to identify the cause of the injuries should not alone suffice to support a determination that the parent has not made "adequate progress" or that the parent is likely to neglect her children in the future, absent evidence that the parent is lying.

As noted by the majority, based on David's injuries and the lack of a plausible explanation, the Guilford County Department of Health and Human Services (DHHS) obtained nonsecure custody of David and his four-year-old sister, Brianna, on 20 March 2015. DHHS also filed a juvenile petition alleging that David was an abused and neglected juvenile and a juvenile petition alleging that Brianna was a neglected juvenile. A pre-adjudication, adjudication, and dispositional hearing was originally scheduled to take place on 20 May 2015, but was continued until 6 November 2015. At the 6 November 2015 hearing, the matter was again continued until 26 January 2016. The hearing finally took place on 26 January 2016, over ten months after the juveniles entered DHHS custody. Following the hearing, the trial court filed an order on 19 February 2016, that adjudicated David to be an abused and neglected juvenile and Brianna a neglected juvenile.

The mother appealed. On 15 November 2016, the Court of Appeals affirmed the trial court's order adjudicating David as an abused and neglected juvenile, but reversed and remanded the adjudication of neglect as to Brianna. *In re D.P. & B.P.*, 250 N.C. App. 507, 793 S.E.2d 287 (2016) (unpublished). While the adjudication orders were on appeal, the trial court conducted two permanency planning hearings pursuant to N.C.G.S. § 7B-906.1. Throughout the trial court proceedings, the mother's failure to explain David's injuries was the primary reason for not returning the children to her care. After the first hearing on 23 March 2016, the trial court entered an order, filed 21 April 2016, finding that the mother "has been compliant with her case plan," but determining that the children could not return to her home because "the mother continues to deny how the juvenile, [David], received his injuries. She has indicated that she will not admit to something she did not do, nor will she 'throw [Mr. Goff] under a bus.' " The court also noted the mother's pending criminal charges relating to David's injuries as an additional barrier to reunification. The trial court set the primary permanent plan as adoption with a concurrent secondary plan of reunification, and the mother was ordered to continue complying with her case plan.

A second hearing took place on 2 September 2016. Following the hearing, the trial court entered an order filed 21 October 2016, providing similar reasons for why the children could not be returned to their mother. The trial court also referenced the mother's limited engagement (at that time) in therapy, as well as her social media posts,[1] but focused on her failure to explain David's injuries as the principal reason for not returning the children.[2] Around the end of September 2016, the mother ended her relationship with Mr. Goff.

On 9 November 2017, the mother entered an *Alford* plea to misdemeanor child abuse for the injuries suffered by David. The mother received a suspended sentence and was placed on supervised probation for a period of twelve months. As part of her probation, the trial court ordered her to comply with "all conditions set in DSS court."

The trial court conducted hearings on remand from the Court of Appeals on 27 October 2017 and 30 November 2017. In a combined adjudication, disposition, and permanency planning order filed 18 December 2017, the trial court again adjudicated Brianna to be a neglected juvenile after the mother stipulated to several findings of fact and consented to the adjudication. The trial court's order notes that the mother had "addressed all of the conditions in her case plan." However, the court did not believe the mother had made adequate progress under the plan because she could not explain how David was injured. As barriers to achieving permanence for the juveniles, the court listed the mother's criminal conviction—resulting from her *Alford* plea—for David's injuries, and her resulting probation which would prevent her from having unsupervised contact with David for twelve months. The trial court changed the permanent plan for David and Brianna to a primary

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1. As part of her case plan, the mother was required to refrain from posting pictures of her children on any social media website. This record indicates this issue was subsequently resolved.

2. For example, the trial court stated all of the following in various orders: "Although the mother has completed [programs], DHHS does not consider any progress being made as it has been a year and a half and there are still no answers as to how [David] was injured."; "The mother and father are participating in case plans, although the mother has yet to inform [DHHS] who harmed the juvenile, [David] . . . ."; "The parents are not acting in a manner consistent [with] the health and safety of the juveniles. The mother has failed to acknowledge the severity of the injuries to her son and the need for DHHS to know who harmed him."; "The [c]ourt is concerned that we still do not know what happened to [David] . . . ."; "It is not possible for the juveniles to return to [the] home of a parent within the next six months. The mother continues to deny how the juvenile, David, received his injuries. She has indicated that she will not admit to something she did not do, nor will she 'throw [W.G.] under a bus.'

plan of adoption with a secondary concurrent plan of guardianship. DHHS was ordered to cease reunification efforts with the mother and to file termination petitions within sixty days, in accordance with N.C.G.S. § 7B-906.1(m).

In its termination order filed 23 January 2019, the trial court found that the mother had completed parenting classes and a domestic violence intervention program, that she participated in therapy from March 2016 until April 2018, that she lived in stable housing, and that she had stable employment. However, the court determined both that the children were neglected and there was a likelihood of repetition of neglect, pursuant to N.C.G.S. § 7B-1111(a)(1), and that the mother willfully left her children in foster care or a placement outside the home for more than twelve months without showing reasonable progress under the circumstances in correcting the conditions which led to her children's removal, pursuant to N.C.G.S. § 7B-1111(a)(2). In making both determinations, the trial court seems to have relied almost exclusively on the fact that the mother had been unable to provide a sufficient explanation for David's injuries.

1. The Mother's Honesty About David's Injuries

The trial court's findings that his mother concealed the truth about David's injuries are not supported by competent evidence. The trial court concluded that "[d]espite the completion of those services, significant questions remain as to the cause of [David's] injuries." The court stated that the mother had "not adequately remedied the conditions that brought the juveniles into custody" because the court did not know "exactly how [David] sustained his injuries."

However, there is no record evidence indicating that the mother knew how David was injured. The trial court placed her in the impossible position of having to provide information she claims not to have. However, while the mother says she does not know how David's injuries occurred, she accepted that she was "ultimately responsible" for his injuries as his caretaker.[3] At the termination hearing, when asked

3. The trial court provides conflicting factual findings on the issue of whether the mother accepted responsibility for David's injuries. The trial court states that the mother failed to take full responsibility for David's injuries. However, these statements are based on the mother's inability to provide an explanation for David's injuries. The trial court also states that the mother expressed to DHHS that "she was ultimately responsible for [the juveniles'] care and supervision and accepts that role," and that, while she did not know how David's injuries occurred, "she was responsible" as his mother. Therefore, to the extent that the trial court purports to find that the mother has not accepted responsibility for David's injuries, that finding is not supported by clear, cogent, and convincing evidence.

whether Mr. Goff caused David's injuries, she acknowledged the possibility that Mr. Goff could have caused the injuries, stating "I do not know. I can't rule it out. But, that's—I don't know."

Further, and most importantly, there is no record evidence to suggest that the mother is lying about her ignorance of the cause of David's injuries. This fact distinguishes the instant case from that considered by the Court of Appeals in *In re Y.Y.E.T.*, 205 N.C. App. 120, 695 S.E.2d 517 (2010), cited by the majority. There, the Court of Appeals considered facts similar to the facts in this case. Two parents brought their child to Carolinas Medical Center, where the child was diagnosed with a fractured femur. *Id.* at 121, 695 S.E.2d at 518. Subsequent examination revealed additional injuries, and the Mecklenburg County Department of Social Services took custody of the child. *Id.* The parents provided explanations for the injuries that were inconsistent with the opinions of medical professionals. *Id.* at 121–23, 695 S.E.2d at 518–19.

However, in *In re Y.Y.E.T.*, the parents claimed from the outset that they had witnessed the injury. First, the mother claimed that the child's leg was stuck between the bars of the crib and she removed the child from a crib, causing the injury. *Id.* at 121, 695 S.E.2d at 518. Later, the mother stated that the father removed the child from the crib. *Id.* When questioned, the father "provided different accounts of how he removed the juvenile from the crib," and it "sounded to the evaluator like the respondent-father was fitting the description of his motion to the twisting way that doctors indicated as the likely cause of the break to the femur." *Id.* at 124, 695 S.E.2d at 520. By contrast, the mother in this case has stated consistently that she was not present when she believes David's femur was broken, and does not know how the other injuries occurred. While the difference may be subtle, it is important. Subsection 7B-1109(f) of our General Statutes requires that the petitioner in a termination hearing prove all relevant facts "based on clear, cogent, and convincing evidence." N.C.G.S. § 7B-1109(f) (2017). Where, as here, the termination of parental rights rests so heavily on a parent's inability to explain a child's injuries, the rights cannot be terminated absent "clear, cogent, and convincing evidence" that the parent is actually concealing the cause of the injuries. While that evidence of concealment existed in *In re Y.Y.E.T.*, it does not exist here. It is of particular importance that, as the trial court notes, there is a possible explanation for David's injuries other than abuse by his mother: namely that they were caused by Mr. Goff.

2. Probation Violation for Failing to Obtain a Psychiatric Evaluation

The trial court found that the mother failed to complete a psychiatric evaluation, which the court stated was a requirement of her case plan and a condition of her probation. While the record shows that the mother did not complete a psychiatric evaluation, there is no evidence in the record that a psychiatric evaluation was a clear requirement of her case plan.

As part of her case plan, the mother was required to cooperate with a parenting assessment. She completed the parenting assessment with Dr. Thomas A. Holm on 15 June 2015. Following the assessment, Dr. Holm issued a report dated 3 September 2015 that stated the following in response to questions posed by DHHS: "I believe that an assessment by a psychiatrist would be helpful in furthering [the mother's] desire to maintain a stable and loving home for her children . . . . In addition to a consultation with a psychiatrist, I recommend that [the mother] be referred for individual therapy." The section of the report labeled "Recommendations" contains no reference to a psychiatrist or a psychiatric evaluation.

Nevertheless, the trial court's 18 December 2017 adjudication, disposition, and permanency planning hearing order states that Dr. Holm recommended a psychiatric evaluation be completed. In the same order, the trial court found that the mother "has addressed all of the conditions in her case plan." The trial court also found that "[DHHS] is willing to move forward with unsupervised visitation based on the mother's compliance with her case plan, compliance with [DHHS], addressing the risk that led to the removal of the juveniles, and her accepting responsibility as the mother." The trial court further found that the mother had "completed the checklist that constituted her case plan" and stated that questions remain, "[d]espite the completion of her case plan." It appears, then, that the recommendation that a psychiatric evaluation be completed was not part of the mother's case plan. Moreover, the transcript evidence shows that this alleged requirement was never communicated to the mother and the section of Dr. Holm's report referencing a psychiatric evaluation seems to be directed to DHHS, not the mother. To the extent that the trial court found the mother was required by her case plan to complete a psychiatric evaluation, that finding is not supported by clear, cogent, and convincing evidence.

The trial court also found that the mother violated her probation because she did not complete a psychiatric evaluation. The judgment for the mother's misdemeanor child abuse conviction specifically required

that she "cooperate and follow all conditions set in DSS court" and a box was checked on the form requiring that she "[r]eport for initial evaluation by any state licensed mental health agency specifically for child abuse[,] participate in all further evaluation, counseling, treatment, or education programs recommended as a result of that evaluation." While the language quoted by the majority appears in the thirteen-page single-spaced report from Dr. Holm, it does not appear as one of his five detailed "Recommendations" at the conclusion of the "Parenting Capacity Assessment/Psychological Evaluation." The evidence in the record shows that by the time of the termination hearing, the mother had, over the course of three years, completed twelve sessions of the Crossroads program for victims of domestic violence, completed the ten required sessions of the PATE program, and participated in the Care Coordination for Children Program. She was treated at Restoration Place Counseling between 25 August 2016 and 20 April 2018, and attended a total of 42 counseling sessions there. Put another way, over the course of 23 months she attended 42 counseling sessions. Given the mother's testimony that she was unaware that she was also supposed to complete an evaluation with a psychiatrist, the notion that the mother willfully violated her probation by failing to complete a psychiatric evaluation is not supported by clear, cogent, and convincing evidence.

3. Relationship with Mr. Goff

In its termination order, the trial court found that the mother had "resumed a relationship with [Mr. Goff] in June 2017" and that the two were "working on reestablishing their relationship." The trial court further found that the mother "put herself in the situation of domestic violence incidents with [Mr. Goff]." Respondent argues that none of these findings are supported by clear and convincing evidence, arguing that (1) no evidence supports a finding that the two were involved romantically, and (2) she "did not create a situation that posed a foreseeable or unreasonable risk that she would be the victim of criminal assaults" by Mr. Goff Petitioner argues that the evidence supports a finding that the the mother and Mr. Goff resumed some type of relationship, whether or not it was romantic, and that the mother created the situation leading to her victimization by giving a key to Mr. Goff and not changing her locks.

As to the trial court's finding that the mother "put herself in the situation of domestic violence incidents," the mother is not responsible for the criminal actions of Mr. Goff. She gave Mr. Goff a key to her home so that he could perform electrical work. Months later, the trial court found that Mr. Goff approached the mother at her workplace, "pinned her to her car and took her phone." Less than a month later, Mr.

Goff entered the mother's home while she was sleeping and violently assaulted her. As a result of that assault, the mother obtained an Ex Parte Domestic Violence Protective Order and later obtained a one-year Domestic Violence Order of Protection against Mr. Goff. While it may have been advisable for the mother to exercise better control over access to her home, the evidence does not support a finding that she caused the acts of violence perpetrated against her. Accordingly, the trial court's finding that the mother "put herself in the situation of domestic violence incidents" is not supported by clear, cogent, and convincing evidence.

The trial court's finding that the mother and Mr. Goff had resumed their relationship is also unsupported by the record. Prior to September 2016, the mother and Mr. Goff were involved in a romantic relationship. They were engaged to be married. Their relationship was certainly romantic in nature in the past. While the evidence supports the trial court's finding that Mr. Goff subsequently provided some emotional support to the mother at the time of her father's death, the evidence does not extend beyond that point. Accordingly, the trial court's finding that the mother and Mr. Goff had "resumed a relationship" and "were working on reestablishing their relationship," with the implication that the relationship was romantic, is without clear, cogent, and convincing evidence in the record.

4. New Explanation for David's Injuries during Alford Plea

On 9 November 2017, David's mother entered an *Alford* plea to the charges related to David's injuries, pleading guilty to misdemeanor child abuse without admitting that she actually committed the offense. The trial court found that, at the plea hearing, the mother "offered yet another explanation for the cause of [David's] injuries, to wit that he may have slept funny." A review of the trial transcript shows clearly that she was not offering a new explanation for the cause of David's injuries, but was instead explaining, in response to a question, what initially went through her mind when she first saw her son with a swollen leg. The trial court's finding to the contrary, that the mother was offering "yet another explanation" contrary to the medical evidence, was not supported by clear, cogent, and convincing evidence. The majority takes the position that because this fact was also a finding made at the adjudicatory stage and not appealed at that time, it is binding now. However, the adjudication order that was entered after the mother's *Alford* plea on 9 November 2017 was an adjudication only as to her daughter, Brianna. The original adjudication order as to David was entered 19 February 2016, well before the *Alford* plea. Moreover, this fact, even if it were true

and binding with regard to both children, has no real bearing on any legitimate reason to terminate the mother's parental rights.

5. Withholding Information about her Marriage

The trial court found that the mother married someone new in September 2018 but purposely hid that fact from DHHS. However, the trial court had ceased unification efforts and DHHS had stopped providing services to the mother as of 18 December 2017. There is no reason why the mother would have been aware that she had an obligation to inform DHHS nine months later of her marriage or to open her home to any social worker on demand. By this point, the trial court appears to be clutching at straws to find any possible grounds to fault the mother.

6. Lack of Insight and Failure to Determine the Cause of David's Injuries

This argument is simply the Court rehashing the first point above. At the end of the day, the trial court and this Court both can point to nothing more than that they are "troubled by [the mother's] continued failure to acknowledge the likely cause of David's injuries." However, David's mother has accepted responsibility for not keeping her son safe and, in open court, under oath, stated that she could not rule out the possibility that Mr. Goff injured her son. If she did not witness the abuse and does not know how it happened, she cannot honestly determine the cause.

The trial court's factual findings do not support the conclusion that the mother's parental rights are subject to termination. For the reasons discussed above, the failure to explain David's injuries, under the specific facts of this case, is not sufficient to find that the mother failed to make reasonable progress in correcting the conditions that led to removal of her children, nor is it sufficient to find that she is likely to neglect them in the future.

With regard to termination of the mother's parental rights for neglect under N.C.G.S. § 7B-1111(a)(1), the trial court must evaluate the likelihood of future neglect. In doing so, the trial court was required to consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing. *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984). In the time between David's admission to the hospital in March 2015 and the termination hearing, the mother completed her case plan, developed a very positive record of visits with her children, and substantially complied with all of the court-ordered requirements. While she ultimately discontinued individual therapy, she attended sessions from March 2016 until April 2018,

which was well after DHHS had ceased unification efforts in December 2017. In particular, the trial court found that there was a bond between Brianna and her mother at the time of the termination hearing. The court wrote that Brianna "loves her mother and enjoys spending time with her during visits." This finding, in conjunction with the court's other factual findings, does not support a likelihood of future neglect.

The trial court's findings of fact that (1) the mother had been charged with violating probation because she did not timely pay certain fees, (2) that she did not inform DHHS of her marriage to B.H. in the absence of any evidence that she was required to do so, and (3) that she entered an *Alford* plea to misdemeanor child abuse are not sufficient to show either that she had failed to make reasonable progress or that she was likely to neglect her children in the future.

The evidence is clear from the record that, as of 18 December 2017 at the latest, the mother had completed the requirements of her case plan. In fact, DHHS was recommending at that time, not that the mother's parental rights be terminated, but that she be allowed unsupervised visitation because of her "compliance with her case plan, compliance with [DHHS], addressing the risk that led to the removal of the juveniles, and her accepting responsibility as the mother." Instead, the trial court determined that the mother had "not made adequate progress within a reasonable period of time under the [case] plan" because "[a]lthough she [had] addressed all of the conditions in her case plan," she had not explained how David was injured. The trial court then changed the primary permanent plan to adoption and ordered DHHS to pursue the termination of the mother's parental rights. The evidence in this case shows that the mother maintained from the outset that she did not harm her child, maintained from the outset that she did not know the cause of her child's injuries, and acknowledged her responsibility, as the primary caregiver, to protect her children. No evidence presented at any hearing suggested that the mother was lying about whether she injured David. At the time of the termination hearing, the only other person who could have harmed David, Mr. Goff, was no longer in the home. Under those circumstances, the inability to identify the cause of a child's injuries should not, by itself, suffice to determine that the parent has not made "adequate progress" to correct the conditions leading to the juvenile's removal. It also should not suffice, under those circumstances, to establish a likelihood of future neglect.

While the foregoing analysis pertains equally to David and Brianna, I write further because the trial court again adjudicated Brianna neglected without making sufficient findings of fact. In the termination

order, the trial court made only two relevant findings of fact pertaining to Brianna. First, the trial court noted that Brianna "was in the same home when the injuries to her brother occurred and her sole caretakers were" the mother and Mr. Goff. The trial court repeated the same fact later, noting Brianna's "presence in the home where the abuse of her sibling occurred." Second, the trial court noted that Brianna had been adjudicated neglected by an order entered 18 December 2017. No additional facts supported the December 2017 adjudication. However, the December 2017 order contains the following statement as to Brianna: "She faced a substantial risk of physical, mental or emotional impairment because she resided in the same injurious environment as [David], who DID suffer serious injuries, caused by other than accidental means."

The trial court's vague and generalized findings were insufficient to establish that Brianna was a neglected juvenile. It is true that when determining whether a juvenile is neglected, "it is relevant whether [the] juvenile . . . lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." N.C.G.S. § 7B-101(15). However, finding only that another child in the home has suffered injury, as the trial court did in this case, is not sufficient. "A court may not adjudicate a juvenile neglected solely based upon previous Department of Social Services involvement relating to other children." *In re J.A.M.*, 372 N.C. 1, 9, 822 S.E.2d 693, 698 (2019). Instead, "clear and convincing evidence in the record must show current circumstances that present a risk to the juvenile." *Id.* "[O]ur courts have additionally required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline." *Id.* (emphasis omitted) (quoting *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003)). Here, the only basis upon which the court concluded that Brianna "faced a substantial risk of physical, mental or emotional impairment" was that Brianna lived in the home at the time of David's injuries. Piggybacking the termination of the mother's parental rights as to Brianna while merely citing the circumstances surrounding the injuries to David, without any evidence that Brianna is at a substantial risk of harm or neglect, is impermissible.

I am mindful of the fact that David and Brianna have been placed with a foster family and are, by all accounts, doing well. The evidence suggests that they have formed bonds with this new family and might very well happily stay there. By contrast, they have not lived with their mother for more than four years. Even so, these new family bonds came at the cost of those which already existed. The affidavit attached to

the initial juvenile petition filed by DHHS notes that David was "very bonded" to his mother. However, the trial court notes in its order terminating parental rights that "[t]here is no bond between [David] and [the mother]. Although [the mother] visits with [David] regularly . . . [David] does not look to [the mother] for comfort during the visits and is often playing alone. He appears relaxed in [the mother's] presence, but does not display affection." The trial court did not have sufficient factual and legal grounds to terminate the familial relationship between the mother and her children in this case. Accordingly, I would reverse the trial court's order terminating the mother's parental rights and remand for dismissal of the petition.

IN THE MATTER OF J.M, J.M., J.M., J.M., J.M.

No. 220A19

Filed 28 February 2020

1. Termination of Parental Rights—grounds for termination —findings

In a termination of parental rights case, the trial court's extensive findings of fact as to the grounds for removal—likelihood that the neglect would be repeated, failure to remedy the conditions leading to the children's removal, and inability to provide care or supervision—were supported by clear and convincing evidence and the findings as a whole supported the legal conclusions.

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

In a termination of parental rights case, the trial court's findings established that respondent-mother had the ability to pay some amount toward the cost of care for her children while they were in the custody of the Department of Social Services but did not. Those findings supported the conclusion that grounds existed to terminate respondent-mother's parental rights.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 27 February 2019 by Judge Tiffany M. Whitfield in District Court, Cumberland County. This matter was calendared for argument in the Supreme Court on 5 February 2020 but determined on the record and

briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Michael A. Simmons for petitioner-appellee Cumberland County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by Andrew F. Lopez, for respondent-appellee guardian ad litem.

Sean P. Vitrano for respondent-appellant mother.

EARLS, Justice.

Respondent-mother appeals from the trial court's order terminating her parental rights to her minor children J.M. (Edward), J.M. (David), J.M. (Carol), J.M. (Barbara), and J.M. (Alan).[1] We affirm.

On 8 January 2016, the Cumberland County Department of Social Services (DSS) filed a petition alleging Edward, David, Carol, Barbara, and Alan were neglected, seriously neglected, and dependent juveniles pursuant to N.C.G.S. § 7B-101(9), (15) and (19a), because they did not receive proper care, supervision, or discipline from their parents; had not received necessary medical care; lived in an environment injurious to their welfare; and their parents' conduct evinced a disregard of consequences of such magnitude that it constituted an unequivocal danger to their health, welfare, or safety. DSS had received multiple child protective services reports that year regarding the family and had conducted a family assessment, which led to the provision of services to the family beginning on 7 October 2015. In part, DSS alleged adequate food for the family was seldom in the home; respondent-mother was about to be evicted; and the condition of the home was poor in that it was heavily infested with roaches, the carpets were heavily soiled, and spoiled food was routinely left around the home. The children were alleged to have not been provided necessary wellness check-ups, physicals, immunizations, and other medical care. Police officers had also been called to the home on several occasions due to domestic disturbances, and respondent-mother had tested positive for marijuana on 2 October 2015. DSS also obtained non-secure custody of the children.

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1. The minor children will be referred to throughout this opinion as "Edward," "David," "Carol," "Barbara," and "Alan," which are pseudonyms used to protect the children's identities and for ease of reading. *See* N.C.R. App. P. 42(b)(1).

After a hearing on 9 June 2016, the trial court entered an adjudication and temporary disposition order on 1 July 2016. Respondent-mother stipulated to facts establishing the children did not receive proper care and supervision from their parents and lived in an environment injurious to their welfare due to unsanitary living conditions and their parents' failure to ensure they received necessary medical and "educational/remedial care." DSS dismissed the allegations of serious neglect and dependency. Based upon the stipulations, the court adjudicated the children to be neglected juveniles. The court continued the matter for disposition and left the children in DSS custody.

The trial court conducted a dispositional hearing on 14 July 2016 and entered its order from that hearing on 1 December 2016. The court continued custody of the children with DSS and directed DSS to continue to make reasonable efforts to reunite the children with their parents. Respondent-mother was ordered to complete a psychological evaluation and follow all recommendations, engage in mental health treatment, complete a substance abuse assessment and follow all recommendations, submit to random drug screens, complete an "Impact of Domestic Violence on Children" class, obtain and maintain stable housing and employment, complete a parenting assessment and follow all recommendations, and complete age-appropriate parenting classes. Respondent-mother was also granted weekly supervised visitation with the children.

On 12 April 2017, the trial court entered its initial permanency planning order. The court found respondent-mother was making some progress toward reunification with the children but had made little progress toward addressing the issues that led to the removal of the children from her home. The court further found respondent-mother's visits with the children were chaotic; she was in need of more intensive parenting classes; she had attended only 3 of 17 scheduled mental health treatment sessions; she resided in a three-bedroom apartment but was in the process of being evicted due to a domestic violence incident with the children's father; she was unemployed and had no transportation; and although she was generally cooperative with DSS, she refused to submit to random drug screens. The court set the primary permanent plan for the children as reunification with respondent-mother with a secondary plan of custody with a suitable person. Respondent-mother was ordered to comply with her case plan as set forth in the initial disposition order and directed to sign a release of information from her mental health provider.

The trial court conducted a subsequent permanency planning hearing on 18 May 2017. In its order from that hearing, the court found

respondent-mother was incarcerated with a pending charge of felony assault with a deadly weapon with intent to kill or seriously injure. The alleged victim of the assault was the children's paternal uncle. The court found respondent-mother had failed to fully engage in the services outlined in her case plan and had not demonstrated a desire to make the necessary changes to correct the conditions that led to the removal of the children from her care. The court ceased all visitation with the children and ordered there be no contact between the children and their parents. The primary permanent plan for the children was changed to adoption, while the secondary plan remained unchanged as custody with a suitable person, and DSS was ordered to pursue the termination of parental rights to the children.

DSS did not immediately pursue termination of parental rights, and the trial court conducted two additional permanency planning hearings on 2 October 2017, and 5 March 2018. In its order from the March 2018 hearing, the court found that although respondent-mother was not progressing on her case plan, she had identified a possible kinship placement for the children that required DSS to conduct a home study. The court continued the primary and secondary permanent plans for the children as adoption and custody but directed DSS to not pursue termination of parental rights. The home study was subsequently completed, and the placement was not approved.

On 10 July 2018, DSS filed a petition to terminate parental rights to the children. DSS alleged grounds existed to terminate respondent-mother's parental rights on the bases of neglect, willfully leaving the children in DSS custody for more than 12 months without making reasonable progress toward correcting the conditions that led to the children's removal from her care, willfully failing to pay a reasonable portion of the cost of the children's care while they were in DSS custody, dependency, and abandonment. *See* N.C.G.S. § 7B-1111(a)(1)–(3), (6)–(7) (2017). The trial court conducted a hearing on the petition on 15 and 16 November 2018 and entered an order terminating respondent-mother's parental rights on 27 February 2019. The court concluded grounds existed to terminate respondent-mother's parental rights based on neglect, failure to make reasonable progress toward correcting the conditions that led to the children's removal from her care, failure to pay a reasonable portion of the cost of the children's care while they were in DSS custody, and dependency. The court further concluded terminating respondent-mother's parental rights was in the best interests of the children. Respondent-mother appeals.

[1] On appeal, respondent-mother argues the trial court erred in adjudicating the existence of the grounds to terminate her parental rights. More specifically, she contends that the trial court's findings of fact do not have any bearing on the likelihood that the neglect the children experienced before they were removed from her custody will be repeated, that she made reasonable progress towards correcting the conditions that led to the children's removal, that there was no evidence concerning her ability to pay the costs of her children's support during the relevant time period, and finally, that the record did not support the trial court's conclusion that at the time of the termination hearing the children were dependent juveniles. However, the trial court's extensive findings of fact in this case as to each of the grounds for removal are supported by clear and convincing evidence, and therefore are deemed conclusive. *See In re N.G.*, 186 N.C. App. 1, 4, 650 S.E.2d 45, 47 (2007). With regard to each ground, the trial court's findings of fact taken as a whole do support the legal conclusions that the neglect of the children is likely to be repeated, that respondent-mother failed to remedy the conditions, including inadequate housing, mental health and substance abuse issues, lack of parenting skills and issues with domestic violence, that led to her children being removed from her custody, and that respondent-mother did not have the ability to provide care or supervision to the juveniles such that they were indeed dependent.

[2] Because only one ground is needed to terminate parental rights, we only address in detail below respondent-mother's arguments as to the ground of failure to pay a reasonable portion of the cost of the children's care while they were in DSS custody. *See In re E.H.P.*, 372 N.C. 388, 395, 831 S.E.2d 49, 53 (2019). However, we do not thereby imply that the evidence and supported findings were not also sufficient to establish the other three grounds for termination found by the trial court in this case. The record is clear that at the time of the termination hearing, respondent-mother had failed to maintain stable and adequate housing for the juveniles and had failed to substantially comply with the services outlined for her to complete. She had only attended three of seventeen sessions for mental health treatment that had been scheduled for her. She continued to have issues with domestic violence and had not remained employed on any consistent basis. Her inability to address these issues was a clear indication that there was a strong likelihood of neglect in the future, that there had not been reasonable progress towards correcting the conditions leading to the removal of the children, and that the children were dependent.

"We review a trial court's adjudication under N.C.G.S. § 7B-1111 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.' " *Id.* at 392, 831 S.E.2d at 52 (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)). When DSS filed its petition, a court could terminate parental rights where:

> The juvenile has been placed in the custody of a county department of social services . . . and the parent, for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C.G.S. § 7B-1111(a)(3) (2017). The "cost of care refers to the amount it costs the Department of Social Services to care for the child, namely, foster care." *In re Montgomery*, 311 N.C. 101, 113, 316 S.E.2d 246, 254 (1984) (quotation marks omitted). "A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay." *In re Clark*, 303 N.C. 592, 604, 281 S.E.2d 47, 55 (1981).

In support of this ground, the trial court found the children had been in DSS custody since 8 January 2016, including the entire relevant six-months under the statute, which was from 10 January 2018 until 10 July 2018. During this time, the cost of care for each of the children was in excess of $40,000.00. The court further found:

> 116. That during the six-month period immediately preceding the filing of the Petition herein, the Respondents paid an amount of zero toward the reasonable cost of care.
>
> 117. The Court finds that the Respondents each had the ability to pay an amount greater than zero toward the cost of care and the basis for that finding is as follows:
>
> a. Both of the Respondents are capable of working.
>
> b. There is no evidence that either of the Respondents were unable to work or became disabled during the six-month period immediately preceding the filing of the Petition. In fact, the Respondent Mother through her sworn testimony, reported that she had been employed at Hair Joy between January 2018 and June 2018; however, she

> did not pay anything towards the reasonable cost of care for the juveniles.
>
> c. That an order was rendered in Cumberland County file number 16 CVD 3061 on November 17, 2016, directing the Respondent Mother to pay $50.00 per month as child support for the juveniles beginning December 1, 2016. As part of that order, the Court found that the Respondent Mother, was physically and financially able to pay a reasonable portion of the cost of care for the juveniles as evidenced by the *Order of Paternity and Permanent Child Support* filed in Cumberland County File 16 CVD 3061 . . . . That since the entry of that, the Respondent Mother has not paid any money towards that order as evidenced by the *Order/Payment History* . . . .
>
> . . . .
>
> 118. That given the Respondents' ability to work and earn money and their failure to pay any amount toward the reasonable cost of care, the Court finds that the Respondents' failure to pay was willful.

Respondent-mother does not challenge the trial court's finding that she paid nothing toward the cost of care for her children during the relevant six-month period, and that finding is binding on appeal. *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

Respondent-mother argues the trial court's finding that she worked at Hair Joy between January 2018 and June 2018 is unsupported by the evidence. We agree and disregard this finding. The evidence established respondent-mother began working at Hair Joy during the latter part of 2016 and remained employed there for nine or ten months. In November 2017, she began working at a Popeyes restaurant but quit that job by January 2018, because a young co-worker would "always come at [her] like sideways and stuff . . . ." Respondent-mother had not been employed since quitting work at Popeyes, and she had just started looking for work at the time of the termination hearing.

Respondent-mother also argues the record does not support the trial court's finding she could work during the relevant six-month period. She contends she had not seen the person responsible for managing her medication during the three to four months prior to July 2018 due to

his military deployment, and she thus had not received her medications for anxiety and depression, which led to an increase in her depression symptoms and a two-day hospitalization at Cape Fear Valley Hospital. However, this argument is unavailing because respondent-mother was working at the beginning of the relevant six-month period and there is nothing in the record to indicate that she could not have found an alternative health-care provider to manage her medication.

In 2016, the Cumberland County Child Support Department received referrals for each of the children when they came into DSS custody. The department filed a complaint for child support from respondent-mother, which was heard on 17 November 2016. Pursuant to a court order entered in December of 2016, respondent-mother was to pay child support in the amount of $50 per month for all five children. Respondent-mother never moved to modify or set aside the order, and she was thus subject to a valid court order during the relevant six-month period that established her ability to financially support for her children. *See In re S.T.B.*, 235 N.C. App. 290, 296, 761 S.E.2d 734, 738 (2014) (" '[A] proper decree for child support will be based on the supporting parent's ability to pay as well as the child's needs, there is no requirement that petitioner independently prove or that the termination order find as fact respondent's ability to pay support during the relevant statutory time period.' " (quoting *In re Roberson*, 97 N.C. App. 277, 281, 387 S.E.2d 668, 670 (1990))).

Moreover, as discussed above, the evidence establishes respondent-mother was working at a Popeyes restaurant at the beginning of the six-month period but quit the job of her own accord. The record also establishes that any fault for the lapse in respondent-mother's medication lies with her, as she chose to not seek another provider until her symptoms worsened to the point that she needed to be hospitalized. Respondent-mother cannot assert a lack of ability to pay for her children's support, when that lack was due to her own conduct. *See In re Tate*, 67 N.C. App. 89, 96, 312 S.E.2d 535, 540 (1984) ("[W]hen a parent has forfeited the opportunity to provide some portion of the cost of the child's care by her misconduct, she 'will not be heard to assert that . . . she has no ability or means to contribute to the child's care and is therefore excused from contributing any amount.' " (quoting *In re Bradley*, 57 N.C. App. 475, 479, 291 S.E.2d 800, 802–03 (1982))).

Here, the trial court's findings establish respondent-mother had the ability to pay some amount toward the cost of care for her children while they were in DSS custody but paid nothing. These findings support its conclusion that grounds exist to terminate respondent-mother's

parental rights to the children pursuant to N.C.G.S. § 7B-1111(a)(3). Respondent-mother does not challenge the trial court's conclusion that termination of her parental rights to the children is in their best interests, and we affirm the court's order.

AFFIRMED.

IN THE MATTER OF S.E., S.A., J.A., V.W.

No. 197A19

Filed 28 February 2020

1. Termination of Parental Rights—subject matter jurisdiction —proceeding in another state

In a termination of parental rights case, the trial had subject matter jurisdiction despite respondent-mother's contentions involving a prior Oklahoma protective services and child custody determination. Respondent-mother relied on allegations and inferences to support her argument and did not meet her burden of showing that the trial court lacked jurisdiction. Furthermore, respondent-mother stipulated that the Oklahoma matter had been closed.

2. Termination of Parental Rights—grounds—failure to pay a reasonable portion of the cost of care

In a termination of parental rights case, there was no merit to respondent-mother's contention that she did not know she was required to pay for her children's care while they were in custody and therefore willful failure to pay a reasonable portion of the cost of care could not be a ground for termination. Parents have an inherent duty to support their children, and the absence of a court order, notice, or knowledge of a requirement to pay support is not a defense to the parent's obligation. Moreover, respondent-mother was on notice through repeated findings in the permanency planning orders.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 7 March 2019 by Judge Wesley W. Barkley in District Court, Burke County. This matter was calendared for argument in the Supreme Court on 5 February 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

N. Elise Putnam for petitioner-appellee Burke County Department of Social Services.

Womble Bond Dickinson (US) LLP, by John E. Pueschel and Patricia I. Heyen, for respondent-appellee guardian ad litem.

Anné C. Wright for respondent-appellant mother.

HUDSON, Justice

Respondent-mother appeals from an order entered by the trial court terminating her parental rights to her children, S.E. (Sara), S.A. (Shanna), J.A. (Jacob), and V.W. (Vera).[1] After careful consideration of respondent-mother's challenges to the trial court's jurisdiction and conclusion that grounds exist to terminate her parental rights on the basis of her willful failure to pay a reasonable portion of the cost of care for the children during their placement in DHHS custody, we affirm the trial court's order.

On 26 June 2016, the Burke County Department of Social Services ("DSS") obtained non-secure custody of Sara, Shanna, Jacob, and Vera, and filed a petition alleging they were abused, neglected, and dependent juveniles. DSS had received a report alleging Jerry A. had been physically assaulting the children.[2] At the time of the filing the children were respectively, twelve, nine, eight, and two years old. DSS interviews with the children uncovered specific and repeated instances of physical abuse of the children and regular instances of domestic violence between respondent-mother and Mr. A. Shanna also disclosed numerous instances of sexual abuse by Mr. A., of which she had informed respondent-mother and an aunt. Respondent-mother was questioned about the sexual abuse and initially denied knowing about it, but she subsequently admitted Shanna had told her about the abuse. DSS also learned respondent-mother and the children had been involved in a child protective services case in Oklahoma. Respondent-mother had temporarily left Mr. A., which led to the closure of the Oklahoma case. She then moved to North Carolina with the children, where she reconciled with Mr. A.

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1. The minor children will be referred to throughout this opinion as "Sara," "Shanna," "Jacob," and "Vera," which are pseudonyms used to protect the children's identities and for ease of reading. The children also had an older sibling who was part of the underlying abuse, neglect, and dependency case but turned eighteen years old prior to the termination of parental rights case.

2. Jerry A. is the biological father of Shanna and Jacob.

After multiple continuances due to DSS's difficulty serving the children's fathers, the trial court conducted a hearing on the petition on 23 March 2017 and entered its adjudication order on 18 April 2017. Respondent-mother and Mr. A. stipulated to the relevant facts and allegations in the petition, and the court found them to be true. The court found Mr. A. had physically abused Shanna, Jacob, and respondent-mother; and he had sexually abused Shanna on multiple occasions. Respondent-mother knew about the physical and sexual abuse of the children and failed to protect them. Respondent-mother had been convicted of intentional child abuse inflicting serious injury on 2 November 2016. She was sentenced to a suspended term of 38 to 58 months imprisonment and placed on supervised probation for 24 months. Mr. A. had been convicted of first-degree statutory rape on 13 February 2017. He was sentenced to an active term of 221 to 326 months imprisonment. The court adjudicated all the children to be abused, neglected, and dependent juveniles. Disposition was continued, but the trial court kept custody of the children with DSS and suspended visitation with their parents.

The trial court entered its dispositional order on 1 June 2017. The court found aggravated circumstances existed in that a parent sexually abused a child in the home while the other children were home and the respondent-mother allowed the abuse to occur. Reunification efforts were initially found not to be in the best interests of the children except for Vera, whose biological father had been located. DSS was in the process of completing a home-study under the Interstate Compact on the Placement of Children ("ICPC") on Vera's father's home to see if he would be an appropriate placement for her. The court continued custody of the children with DSS and directed DSS to provide respondent-mother with one two-hour visitation with the children, after which she was to have no further contact with them. DSS was also directed to identify and inform respondent-mother of programs that would assist her with the issues she was facing. The primary permanent plan for Vera was identified as reunification with her father, with a secondary plan of guardianship. The primary permanent plan for Sara, Shanna, and Jacob was identified as adoption, with a secondary plan of guardianship.

The trial court conducted four permanency planning hearings from 18 May 2017 to 9 August 2018. Respondent mother offered an out-of-state relative as a possible placement for the children, which required DSS to request and obtain a home study under the ICPC. In its orders from the first three hearings, the court consistently found the children may benefit by being adopted, but they were not free to be adopted due

to the outstanding home studies of their relatives and Vera's father. By the fourth hearing, however, the trial court found the ICPC home studies for Vera's father and respondent's relatives indicated their homes were not appropriate placements for the children. In its permanency planning order entered from the 9 August 2018 hearing, the trial court set the primary permanent plan for Vera as adoption and the secondary permanent plan as reunification with her father. The primary and secondary plans for Sara, Shanna, and Jacob remained adoption and guardianship.

DSS filed a petition to terminate parental rights to the children on 27 September 2018. As to respondent-mother, DSS alleged grounds existed to terminate her parental rights on the bases of abuse, neglect, willfully leaving the children in foster care for more than 12 months without making reasonable progress to correct the conditions that led to their removal, willfully failing to pay a reasonable portion of the cost of care for the children during their placement in DHHS custody, and for committing a felony assault resulting in serious bodily injury to a child residing in the home. *See* N.C.G.S. § 7B-1111(a)(1)–(3), (8) (2017). After a hearing on 7 February 2019, the trial court entered an order on 7 March 2019, terminating respondent-mother's parental rights to the children.[3] The court concluded grounds existed to terminate respondent-mother's parental rights on the bases of neglect, willfully leaving the children in foster care for more than 12 months without making reasonable progress to correct the conditions that led to their removal, and willfully failing to pay a reasonable portion of the cost of care for the children during their placement in DSS custody.[4] The court further concluded terminating respondent-mother's parental rights was in the children's best interests. Respondent-mother appeals.

[1] Respondent-mother first argues the trial court's order as to Sara is void for lack of subject matter jurisdiction and must be vacated.[5] Respondent-mother contends the court lacked subject matter jurisdiction over Sara's underlying juvenile case, because it failed to meet the requirements of the Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA"). *See* N.C.G.S. §§ 50A-201-204 (2017). She argues an

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3. Mr. A. relinquished his parental rights to Shanna and Jacob on 18 October 2018. The trial court's order also terminated the parental rights of the fathers of Sara and Vera. None of the fathers are parties to this appeal.

4. At the hearing, DSS elected not to proceed on N.C.G.S. § 7B-1111(a)(8).

5. Respondent-mother only challenges the trial court's subject matter jurisdiction over the juvenile case involving Sara and concedes the court had jurisdiction over the cases involving the other children.

allegation in the initial juvenile abuse, neglect, and dependency petition that one of the children reported child protective services in Oklahoma took the children out of her home put the trial court on notice there was a prior Oklahoma custody determination involving the children, which required the trial court to contact the Oklahoma court to determine if that court would cede jurisdiction to the North Carolina trial court. Respondent-mother's arguments are misplaced.

"The existence of subject matter jurisdiction is a matter of law and cannot be conferred upon a court by consent. Consequently, a court's lack of subject matter jurisdiction is not waivable and can be raised at any time." *In re K.J.L.*, 363 N.C. 343, 345–46, 677 S.E.2d 835, 837 (2009) (citations and quotation marks omitted). Nonetheless,

> "where the trial court has acted in a matter, every presumption not inconsistent with the record will be indulged in favor of jurisdiction . . . ." Nothing else appearing, we apply "the *prima facie* presumption of rightful jurisdiction which arises from the fact that a court of general jurisdiction has acted in the matter." As a result, "[t]he burden is on the party asserting want of jurisdiction to show such want."

In re N.T., 368 N.C. 705, 707, 782 S.E.2d 502, 503–04 (2016) (first quoting *Cheape v. Town of Chapel Hill*, 320 N.C. 549, 557, 359 S.E.2d 792, 797 (1987) then quoting *Williamson v. Spivey*, 224 N.C. 311, 313, 30 S.E.2d 46, 47 (1944)).

The UCCJEA applies to proceedings in which child custody is at issue, including those involving juvenile abuse, neglect, dependency and termination of parental rights; and a trial court must comply with its provisions to obtain jurisdiction in such cases. *See* N.C.G.S. §§ 50A-102(4), -201(a)–(b) (2017). Generally, North Carolina courts have jurisdiction to make a child custody determination if North Carolina is the home state of the child. N.C.G.S. § 50A-201(a)(1). " 'Home state' means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." N.C.G.S. § 50A-102(7) (2017). If a court of another state has home state jurisdiction, North Carolina courts do not have jurisdiction unless one of several statutory exceptions applies. *See* N.C.G.S. § 50A-201(a)(2)–(4).

Respondent-mother contends the allegations in the initial juvenile petition established that a prior child-custody determination had been

made as to Sara in Oklahoma[6], and the trial court failed to take the requisite action under the UCCJEA to obtain jurisdiction over her case. Respondent-mother, however, relies on allegations and inferences to support her argument and has not met her burden of showing the trial court lacked jurisdiction over Sara's case. She neglects to mention the finding of fact made by the trial court in its initial adjudication order, wherein the court found only Shanna was removed from respondent-mother's custody by child protective services in Oklahoma. Furthermore, the respondent-mother stipulated to the court that the child protective services matter in Oklahoma had been closed, a fact she had a duty to disclose pursuant to N.C.G.S. § 50A-209(a) (2017). Given these stipulations and other record facts, it was reasonable for the trial court to infer that Oklahoma did not have continuing jurisdiction under the UCCJEA.

Sara had lived with respondent-mother in North Carolina during the six months immediately preceding the filing of the juvenile petition, and North Carolina was her home state. The record before us establishes the trial court thus had "home state" jurisdiction under the UCCJEA to make an initial child-custody determination regarding Sara. *See* N.C.G.S. § 50A-201(a)(1). The trial court's orders granting DSS custody of Sara are not void for lack of subject matter jurisdiction, and DSS had standing to file the petition to terminate respondent-mother's parental rights to Sara pursuant to N.C.G.S. § 7B-1103(a)(3).

[2] We next address respondent-mother's argument that the trial court erred in concluding grounds exist to terminate her parental rights due to her willful failure to pay a reasonable portion of the cost of care for the children although physically and financially able to do so, pursuant to N.C.G.S. § 7B-1111(a)(3). Respondent-mother concedes she paid nothing toward the cost of care for her children and could have done so but argues her failure to pay was not willful. She contends she did not know she could pay towards the cost of care for her children, did not know how to pay towards the cost, and could not reasonably have been expected to do so. We disagree.

Termination of parental rights under the North Carolina Juvenile Code involves a two-stage process—an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2017). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 832

6. Oklahoma has also adopted the UCCJEA. *See* Okla. Stat. tit. 43 §§ 551-101–402 (2019).

S.E.2d 698, 700 (N.C. 2019) (quoting N.C.G.S. § 7B-1109(f) (2017)). "If a trial court finds one or more grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it then proceeds to the dispositional stage," *id.*, where it "determines whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (2017).

At the time DSS filed its petition, a court could terminate parental rights upon finding that:

> The juvenile has been placed in the custody of a county department of social services . . . and the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C. Gen. Stat. § 7B-1111(a)(3) (Supp. 2018). The cost of care "refers to the amount it costs the Department of Social Services to care for the child, namely, foster care." *In re Montgomery*, 311 N.C. 101, 113, 316 S.E.2d 246, 254 (1984). "A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay." *In re Clark*, 303 N.C. 592, 604, 281 S.E.2d 47, 55 (1981).

Respondent-mother's argument that she did not know she had to pay a reasonable portion of the cost of care for her children or how to do so is fundamentally without merit. The absence of a court order, notice, or knowledge of a requirement to pay support is not a defense to a parent's obligation to pay reasonable costs, because parents have an inherent duty to support their children. *See In re T.D.P.*, 164 N.C. App. 287, 289, 595 S.E.2d 735, 737 (2004) (citing *In re Wright*, 64 N.C. App. 135, 139, 306 S.E.2d 825, 827 (1983) ("Very early in our jurisprudence, it was recognized that there could be no law if knowledge of it was the test of its application. Too, that respondent did not know that fatherhood carries with it financial duties does not excuse his failings as a parent; it compounds them.")), *aff'd per curiam*, 359 N.C. 405, 610 S.E.2d 199 (2005); *see also In re Biggers*, 50 N.C. App. 332, 339, 274 S.E.2d 236, 241 (1981) (holding "[a]ll parents have the duty to support their children within their means . . . ."). Given her inherent duty to support her children, respondent cannot hide behind a cloak of ignorance to assert her failure to pay a reasonable portion of the cost of care for her children was not willful. Moreover, respondent-mother was on notice of her failure to pay something towards the cost of care for her children, as shown

by the trial court's repeated findings in each of its permanency planning orders that none of the respondent-parents were paying child support.

In support of this ground to terminate respondent's parental rights, the trial court found:

> 42. The respondent mother is an able bodied person capable of gainful employment and is capable of paying a sum greater than zero per month toward the support of the minor children during the six months prior to the filing of the petition to terminate her parental rights. The respondent is employed . . . and has been for over one year prior to the date of this hearing and earning at least $600 to $700 per week.
>
> 43. During the six months prior to the filing of the petition to terminate parental rights, a period of time from March 27, 2018 through September 27, 2018, the respondent mother paid zero toward the support of the minor children.
>
> 44. A reasonable portion of the cost of care for the minor children for the respondent mother to have paid during the six months prior to the filing of the petition to terminate said respondent's parental rights would have been an amount greater than zero per child per month.

Apart from her argument that she had no knowledge she was required to pay a reasonable portion of the cost of care for her children or how to do so, which we have rejected, respondent-mother does not challenge the evidentiary basis for these findings of fact. These findings are supported by clear, cogent, and convincing evidence and are binding on appeal. *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). We hold that the findings in this case fully support the trial court's conclusion that grounds exist to terminate respondent-mother's parental rights based upon her willful failure to pay a reasonable portion of the cost of care for the children during their placement in DHHS custody pursuant to N.C.G.S. § 7B-1111(a)(3). The trial court's conclusion that one ground existed to terminate parental rights "is sufficient in and of itself to support termination of [respondent-mother's] parental rights[,]" *In re T.N.H.*, 372 N.C. at 413, 831 S.E.2d at 62, and we need not address her arguments challenging the remaining grounds. Respondent-mother does not challenge the trial court's conclusion that termination of her

parental rights is in the children's best interests. Accordingly, we affirm the trial court's order terminating respondent-mother's parental rights to Sara, Shanna, Jacob, and Vera.

AFFIRMED.

IN RE INQUIRY CONCERNING A JUDGE, NO. 18-069

MICHAEL A. STONE, RESPONDENT

No. 242A19

Filed 28 February 2020

Judges—misconduct—conduct bringing judicial office into disrepute—response to State Bar

A district court judge was censured for his response to the State Bar concerning a fee dispute that arose when he was an attorney in private practice. He responded using judicial letterhead and his judicial title, incorrectly believing that using the letterhead and title in a personal matter was appropriate because the notices from the State Bar were addressed to him in his official capacity. Some of his statements to the State Bar were misleading or were made with reckless disregard for the truth. However, respondent was candid and cooperative with the Judicial Standards Commission.

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 on 3 June 2019 that respondent Michael A. Stone, a Judge of the General Court of Justice, District Court Division 16A,[1] be censured for conduct in violation of Canons 1 and 2A of the North Carolina Code of Judicial Conduct, and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b). This matter was calendared for argument in the Supreme Court on 8 January 2020 but was 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.

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1. Respondent Michael A. Stone is now a Judge of the General Court of Justice, Superior Court Division 19.

No counsel for Judicial Standards Commission or respondent.

ORDER

The issue before the Court is whether Judge Michael A. Stone, respondent, should be censured for violations of Canons 1, 2A, and 2B 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 censured by this Court.

On 24 October 2018, Commission Counsel filed a Statement of Charges against respondent alleging that he had engaged in conduct inappropriate to his judicial office by demonstrating a lack of respect for the office; by inappropriately using judicial letterhead and invoking his judicial title to strongly challenge the jurisdiction of the State Bar over his conduct while he was an attorney in private practice; and by making a number of misleading and grossly negligent assertions regarding his representation of a former client, bringing the judicial office into disrepute. 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 that brings the judicial office into disrepute or otherwise constituted grounds for disciplinary proceedings under Chapter 7A, Article 30 of the North Carolina General Statutes.

Respondent filed his answer on 11 December 2018. On 30 April 2019, 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 censure respondent. The Stipulation was filed with the Commission on 30 April 2019. The Commission heard this matter on 10 May 2019 and entered its recommendation on 3 June 2019, which contains the following stipulated findings of fact:

> 7. On or about August 21, 2014, Respondent was sworn in as a district court judge for Judicial District 16A, including Anson, Hoke, Richmond, and Scotland Counties. Prior to that time, Respondent was in private practice

primarily focused on criminal defense and Department of Social Services work.

8. On or about May 2, 2017, a "Petition for Resolution of Disputed Fee" was filed against Respondent with the State Bar's "Attorney Client Assistance Program" by Dahndra Moore based upon Respondent's representation of Mr. Moore for several months in 2014 prior to Respondent's appointment to the bench.

9. In his fee dispute petition, Mr. Moore alleged that Respondent agreed to represent him in a criminal matter for a total fee of $10,000, and that Mr. Moore paid Respondent $5,000 when Respondent withdrew from the representation to accept appointment as a judge. Mr. Moore disputed that Respondent earned the $5,000 he paid Respondent at the time of his withdrawal as counsel.

10. On or about May 8, 2017, Respondent received a "Notification of Mandatory Fee Dispute Resolution" from the State Bar's Attorney Client Assistance Program. The letter was addressed to "Judge Michael A. Stone" but also noted "Attorney at Law" and was mailed to Respondent's home address, not a courthouse or business address.

11. When Respondent received notice of the fee dispute in 2017, he did not recognize Mr. Moore's name, had no independent recollection of his representation of Mr. Moore in 2014, and had no files or other documents relating to the representation.

12. At some point thereafter, and to refresh his recollection as to his representation of Mr. Moore, Respondent contacted his former paralegal Sylvia Williams to gain more information about the representation.

13. Ms. Williams reminded Respondent about the circumstances of his representation of Mr. Moore and informed Respondent that she was still in contact with Nina McLaurin, who had made payments to Respondent on Mr. Moore's behalf during the representation. Based upon the information provided to him by Ms. Williams, Respondent asked Ms. Williams to contact Ms. McLaurin to provide a statement to the State Bar indicating that she personally paid for the legal work performed by

Respondent and that she was satisfied with the legal representation he provided.

14. On or about June 19, 2017, the State Bar received Respondent's response to the fee dispute.

15. Respondent wrote his response to the State Bar on official court letterhead despite the fact that it addressed Respondent's conduct in his private capacity prior to taking the bench. Respondent's letter also immediately invoked his judicial title to strongly challenge the jurisdiction of the State Bar over his conduct while he was an attorney in private practice. Respondent closed the letter by signing his name, and again invoking his judicial title by including "District Court Judge – District 16A" under his signature.

16. Respondent incorrectly believed it was appropriate to use judicial letterhead and invoke his judicial title in a personal matter because the fee dispute notices from the State Bar were addressed to Respondent as "Judge Michael A. Stone," and he was responding to the State Bar, a government agency.

17. In Respondent's written response to the State Bar, Respondent also made a number of assertions regarding his representation of Mr. Moore. Respondent acknowledges those assertions were either misleading or made with reckless disregard for the truth because he did not have independent recollection of the details of Mr. Moore's case or records to justify his assertions. Those assertions include the following statements from his response to the State Bar:

a. Respondent informed the State Bar that Mr. Moore was not entitled to any part of the fees paid because they were not paid by him, but by family and friends. In support of this statement, Respondent included a signed statement purportedly from Ms. Nina McLaurin, a friend of Mr. Moore's, stating that she made the majority of the payments towards the legal fees and that she was "very happy with Mr. Stone's legal services" because Respondent "really helped" Mr. Moore. In fact, because Mr. Moore was in jail and unable

to make the payments in person, Mr. Moore's family and friends paid the fees on his behalf with funds from Mr. Moore's bank account. In addition, the letter Respondent submitted to the State Bar purportedly from Ms. McLaurin was prepared by Ms. Sylvia Williams, Respondent's former legal assistant. Ms. Williams prepared the statement requested by Respondent, and then forged Ms. McLaurin's signature after being unable to secure the statement from her. Respondent was not aware of, nor responsible for, the forgery.

b. Respondent also asserted to the State Bar that he withdrew from representing Mr. Moore because he had not been paid all of the legal fees due to him. However, Respondent now acknowledges that he withdrew from Mr. Moore's case because he was appointed to the bench and could no longer serve as counsel regardless of Mr. Moore's ability to pay.

c. Respondent informed the State Bar that he was unable to produce a copy of his fee agreement with Mr. Moore because he had given it to the court-appointed attorney who took over Mr. Moore's representation after Respondent withdrew, as was his practice as he prepared to wind down his law office. Mr. Moore's new attorney stated that he never received the fee agreement.

d. As part of the justification of the fees he retained, Respondent asserted to the State Bar that he earned his fees because he "worked very hard in negotiating a plea arrangement" that would have avoided a lengthy prison sentence for Mr. Moore. While there may have been serious discussions with prosecutors about Mr. Moore's case, there was never a plea offer made by the District Attorney's office, which also has no documentation of plea negotiations or plea offers made during Respondent's brief representation of Mr. Moore.

18. Respondent's response to the State Bar also included a very detailed summary of the work and hours

Respondent claimed to have performed in Mr. Moore's case, including *inter alia*:

a. "5 separate meeting with the District Attorney's office discussing the case and negotiating his case (6½ hours + minimum 6 hours travel time)";

b. "Meeting with the District Attorney's office about discovery in the case and potential evidentiary issues related to DNA of an aborted fetus from an abortion and legal chain of custody issues as to the evidence, DNA, and legality of evidence related to the tissue of aborted fetus. (2 Hrs. + 2 Hrs travel)";

c. "Legal Research and case law research related to the unique and novel DNA evidence issues in the case (5 Hrs)"; and

d. "Meeting with my private investigator to go over his report regarding the alleged rape victim and her family as well as travel to try to interview the alleged rape victim and her mother (6 hrs + 2 hours travel)."

19. Respondent knew or should have known that the statements to the State Bar described in paragraph 18 above were misleading, or made with reckless disregard for the truth. Respondent concedes that he based his statements upon his review of the court file because he had an insufficient recollection of the work and no records. The following facts establish that the statements to the State Bar were misleading:

a. Despite Respondent's affirmative assertion to the State Bar that he spent two hours of work plus two hours of travel time to the DA's office to discuss DNA issues and evidence in the case, and despite Respondent's claims that he worked very hard to negotiate a plea deal for Mr. Moore, Respondent admits that he has no specific recollection of the time spent or travel time involved and the Assistant District Attorney who prosecuted Mr. Moore and who handled the DNA issues in Mr. Moore's case never discussed Mr. Moore's

charges, the DNA issues, or any plea offer with Respondent in person, by telephone, or via email.

b. Despite Respondent's affirmative assertion to the State Bar that he performed five hours of legal research, Respondent admits that he only recalls this research because it involved a unique DNA issue, and he does not have any specific recollection or documentation of actual time spent doing the research, and did not document any of his research about the DNA issues in Mr. Moore's case.

c. Despite Respondent's affirmative assertion to the State Bar that he spent six hours meeting with his private investigator to go over the investigator's report, the investigator in fact never produced a written investigative report for Respondent's review and does not recall even being paid to do any work in Mr. Moore's case, which Respondent says was not unusual in their working relationship.

20. On or about July 24, 2017, the Fee Dispute Resolution Program notified Mr. Moore and Respondent that the State Bar's fee dispute facilitator concluded that the parties were unable to reach a voluntary resolution of the fee dispute and therefore the dispute was closed.

21. After the fee dispute was closed, the State Bar received a letter from Ms. McLaurin, who had learned from Mr. Moore that Respondent had given the State Bar a letter allegedly provided by her. Ms. McLaurin informed the State Bar that she had no knowledge of the statement and that her signature was forged.

22. Based upon Ms. McLaurin's forgery claim, the State Bar opened a grievance against Respondent, although Respondent asserts that the State Bar did not formally notify him that he was under investigation or why he was under investigation. During the State Bar's investigation, Respondent was interviewed by a State Bar Investigator. During the interview, Respondent reiterated all of the specific assertions as to time worked on Mr. Moore's case made in his June 7, 2017 response letter, and further expressed anger and irritation at being subject to an investigation by the State Bar for his conduct as an

attorney, particularly after Respondent believed the matter to have already been concluded.

23. The State Bar Investigator did not reveal to Respondent that Ms. McLaurin's letter was forged. Respondent remained unaware of the forgery until he received notice of the Commission's formal investigation into this matter.

24. While Respondent did not intentionally attempt to deceive the State Bar, he acknowledges that his assertions to the State Bar were willful, and that those assertions were either misleading or made with reckless disregard for the truth because he did not have any independent recollection of the details of Mr. Moore's case or records to justify his assertions.

(Citations to pages of the Stipulation omitted.)

Based on 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." Canon 2B specifies that a "judge should not lend the prestige of the judge's office to advance the private interest of others . . . ."

3. Respondent concedes that he violated these provisions of the Code of Judicial Conduct.

4. Upon the Commission's independent review of the stipulated facts concerning Respondent's conduct, the

Commission concludes that Respondent 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, and 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.

5. The Commission further concludes that the facts establish that Respondent engaged in willful misconduct in office and 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, or willful misconduct in office . . .").

6. The Supreme Court defined conduct prejudicial to the administration of justice in *In re Edens*, 290 N.C. 299 (1976) and stated as follows:

> Conduct prejudicial to the administration of justice that brings the judicial office into disrepute has been defined as "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to the public esteem for the judicial office." Whether the conduct of a judge may be so characterized "depends not so much upon the judge's motives but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers."

Id. at 305-306 (internal citations omitted).

7. The Supreme Court has defined "willful misconduct in office" as "improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly and, generally in bad faith. It is more than a mere error of judgement or an act of negligence." *In re Edens*. 290 N.C. 299, 305 (1976). The Supreme Court has also made clear,

however, that "willful misconduct in office" is not limited to conduct undertaken during the discharge of official duties. As stated in *In re Martin*, 302 N.C. 299 (1981):

> We do not agree, nor have we ever held, that "willful misconduct in office" is limited to the hours of the day when a judge is actually presiding over court. A judicial official's duty to conduct himself in a manner befitting his professional office does not end at the courthouse door. Whether the conduct in question can fairly be characterized as "private" or "public" is not the inquiry; the proper focus is on, among other things, the nature and type of conduct, the frequency of occurrences, the impact which knowledge of the conduct would likely have on the prevailing attitudes of the community, and whether the judge acted knowingly or with a reckless disregard for the high standards of the judicial office.

Id. at 316 (internal citation omitted).

8. In the present case, Respondent made detailed, affirmative and specific factual assertions to the State Bar during its investigation that Respondent knew were unsupported by any personal recollection or documentation. Respondent also did so while invoking his position as a sitting judge and on letterhead bearing the imprimatur of the North Carolina Judicial Branch. Respondent has also fully admitted that his factual assertions to the State Bar were not only misleading and grossly negligent, but that he knew or should have known that such statements were made with reckless disregard for the truth.

9. The Commission concludes that this course of action amounts to willful misconduct in office and that Respondent willfully engaged in misconduct prejudicial to the administration of justice that brings the judicial office into disrepute.

10. Respondent also acknowledges that the factual stipulations contained herein are sufficient to prove by clear and convincing evidence that his actions constitute willful misconduct in office and that he willfully engaged in misconduct prejudicial to the administration of justice

> that brings the judicial office into disrepute in violation of N.C. Gen. Stat. § 7A-376.

(Brackets in original and citations to pages of the Stipulation omitted.)

Based on these findings of fact and conclusions of law, the Commission recommended that this Court censure respondent. The Commission based this recommendation on its earlier findings and conclusions, as well as the following additional dispositional determinations:

> 1. The Supreme Court in *In re Crutchfield*, 289 N.C. 597 (1975) first addressed sanctions under the Judicial Standards Act and stated that the purpose of judicial discipline proceedings "is not primarily to punish any individual but to maintain due and proper administration of justice in our State's courts, public confidence in its judicial system, and the honor and integrity of its judges." *Id.* at 602.
>
> 2. The Commission recommends censure rather than a more severe sanction based on several considerations. First, 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. Second, Respondent has been cooperative with the Commission's investigation, voluntarily providing information about the incident and reaching a resolution through this Stipulation. Third, the Commission has observed that Respondent not only fully and openly admitted his error and expressed genuine remorse, but that he fully understands the negative impact his actions have had on the integrity and impartiality of the judiciary.
>
> 3. 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.
>
> 4. 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 **censure Respondent**.

(Citations to pages of the Stipulation omitted.)

"The 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 we may adopt them. *Id.* (citing *In re Badgett*, 362 N.C. at 206, 657 S.E.2d at 349). 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 entered into the Stipulation agreeing that those facts and information would serve as the evidentiary and factual basis for the Commission's recommendation, and respondent does not contest the findings or conclusions made by the Commission. 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, and 2B 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 not bound by the recommendations of the Commission. *In re Hartsfield*, 365 N.C. at 429, 722 S.E.2d at 503. Rather, we may exercise our own judgment in arriving at a disciplinary decision in light of respondent's violations of the North Carolina Code of Judicial Conduct. *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 censured. 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 censure.

We appreciate respondent's cooperation and candor with the Commission throughout these proceedings. Furthermore, we recognize respondent's expressions of remorse and his understanding of the negative impact that his actions have had on the integrity and impartiality of the judiciary. Weighing the severity of respondent's misconduct against

his candor and cooperation, we conclude that the Commission's recommended censure is appropriate.

Therefore, the Supreme Court of North Carolina orders that respondent Michael A. Stone be CENSURED for conduct in violation of Canons 1, 2A, and 2B 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 February, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of February, 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

JONES v. JONES

[373 N.C. 381 (2020)]

JOY MANN JONES
v.
BRUCE RAY JONES

No. 78A19

Filed 28 February 2020

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 824 S.E.2d 185 (N.C. Ct. App. 2019), affirming orders entered on 10 August 2016 and 12 October 2017 by Judge Mary H. Wells in District Court, Lee County. Heard in the Supreme Court on 11 December 2019.

Elizabeth Myrick Boone for plaintiff-appellee.

Wilson, Reives and Silverman, PLLC, by Jonathan Silverman, for defendant-appellant.

PER CURIAM.

AFFIRMED.

NORTH CAROLINA DEPARTMENT OF REVENUE
v.
GRAYBAR ELECTRIC COMPANY, INC.

No. 153A19

Filed 28 February 2020

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order and opinion on petitioner's petition for judicial review entered on 9 January 2019 by Judge Louis A. Bledsoe III, Chief 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 under N.C.G.S. § 7A-45.4(a). Heard in the Supreme Court on 6 January 2020.

Parker Poe Adams & Bernstein LLP, by Kay Miller Hobart, for respondent-appellant.

Joshua H. Stein, Attorney General, Matthew W. Sawchak, Solicitor General, Ronald D. Williams II, Assistant Attorney General, James W. Doggett, Deputy Solicitor General, and Caryn Devins Strickland, Solicitor General Fellow, for petitioner-appellee.

PER CURIAM.

AFFIRMED.

N.C. DEP'T OF REVENUE v. GRAYBAR ELEC. CO.

[373 N.C. 382 (2020)]

STATE OF NORTH CAROLINA

WAKE COUNTY

N.C. DEPARTMENT OF REVENUE,
Petitioner

v.

GRAYBAR ELECTRIC COMPANY, INC.,
Respondent

IN THE GENERAL COURT
OF JUSTICE
SUPERIOR COURT DIVISION
17 CVS 13902

**ORDER AND OPINION
ON PETITION
FOR
JUDICIAL REVIEW**

1. **THIS MATTER** presents for decision whether dividends deducted on a corporation's federal corporate income tax return under the dividends-received deduction ("DRD") of section 243 of the Internal Revenue Code (the "Code") constitute "income not taxable" for purposes of calculating the corporation's net economic loss ("NEL") deduction under N.C. Gen. Stat. § 105-130.8(a) (repealed 2014)[1] for North Carolina corporate income tax purposes. Secondary to this issue is whether reducing NEL deductions by subtracting deducted dividends violates either the United States or North Carolina Constitution.

2. Petitioner North Carolina Department of Revenue (the "Department") filed its Petition for Judicial Review (the "Petition") on November 17, 2017 seeking reversal of the Office of Administrative Hearings' ("OAH") Final Decision (the "Final Decision") entering summary judgment in favor of Respondent Graybar Electric Company, Inc. ("Graybar").

3. The Court held a hearing on the Petition on April 19, 2018, at which both parties were represented by counsel. After considering the Petition, the parties' briefs in support of and in opposition to the Petition, the relevant evidence of record, and the arguments of counsel made at the April 19, 2018 hearing, the Court, for the reasons set forth below, hereby **REVERSES** the Final Decision and **REMANDS** to the OAH with instructions to enter summary judgment in favor of the Department.

North Carolina Attorney General, by Special Deputy Attorney General Tenisha S. Jacobs, for Petitioner N.C. Department of Revenue.

1. The provisions of this statute were in effect during the years at issue here. The General Assembly has since modified the statute, effective for the tax years beginning on and after January 1, 2015.

Parker Poe Adams & Bernstein LLP, by James Greene, Kay Miller Hobart, and Ray Stevens, for Respondent Graybar Electric Company, Inc.

Bledsoe, Chief Judge.

I.

FACTUAL AND PROCEDURAL BACKGROUND

4. The material facts of this matter are not in dispute.

5. Graybar is a New York corporation headquartered in St. Louis, Missouri. (R. at 8, ECF No. 20.) The company distributes electrical, communications, and data networking products throughout the United States and is authorized to do business in North Carolina. (R. at 8; *see* R. at 218–19, ECF No. 22.) Graybar files as a "C" corporation for both federal and North Carolina state income tax purposes. (R. at 8.)

6. Graybar is the parent corporation of several wholly owned subsidiaries, including Graybar Services, Inc. ("Graybar Services"), an Illinois corporation, and Commonwealth Controls Corporation ("Commonwealth"), a Missouri corporation. (R. at 8.) Both Graybar Services and Commonwealth are taxed as "C" corporations for federal income tax purposes. (R. at 8.) Graybar Services has filed North Carolina corporate income tax returns since 1998. (R. at 329, ECF No. 25.)

7. In 2007, Graybar Services paid Graybar a dividend of $400,000,000. (*See* R. at 172.) In 2008, Commonwealth paid Graybar a dividend of $1,000,000. (*See* R. at 173.) Both of these dividends (each a "Dividend," and collectively, the "Dividends") were paid from the respective subsidiary's earnings and profits. (R. at 8.)

8. In 2007 and 2008, the years it received the Dividends, Graybar filed for federal corporate income tax purposes as a consolidated group that included Graybar Services and Commonwealth. (*See* R. at 782.) North Carolina generally does not allow consolidated tax returns but instead requires a corporation to determine its State net income as if it filed a federal return as a separate entity. (R. at 782.) These "as if" federal returns are commonly referred to as pro forma federal corporate income tax returns. (R. at 782.)

9. Graybar included the Dividends on its 2007 and 2008 pro forma federal corporate income tax returns and deducted the Dividends from the amounts it reported as federal taxable income. (*See* R. at 188, 192, 203, 209.) Specifically, Graybar claimed a DRD under section 243 of the

Code for the Dividends it had received from its subsidiaries and deducted 100 percent of the Dividends on Line 29(b), "Special Deductions," in its federal corporate income tax returns. (*See* R. at 182, 192, 203, 209.)

10. Because Graybar was doing business in North Carolina in the tax years 2007 and 2008, it filed a series of North Carolina "C" corporation tax returns reporting its liability for State corporate income and franchise taxes. (R. at 603–04; *see* R. at 648–66.) North Carolina levies a corporate income tax on "State net income," which is based on a corporation's federal taxable income. (R. at 36, ECF No. 21.) Graybar's calculation of its corporate income tax for each of its North Carolina corporate income tax returns reflected the amount of federal taxable income *after* the Dividends were deducted on Line 29(b) of the federal tax returns. (R. at 603–04; *see* R. at 648–66.) Ultimately, Graybar reported its State net income as zero for 2007 and 2008 because it offset its taxable income with substantial NELs it sustained in prior years dating back to 2001. (R. at 605; *see* R. at 648–66.)

11. The Department audited Graybar in 2015. (R. at 605.) After the audit, the Department determined that Graybar underreported its corporate income tax liability for the tax years 2008, 2012, and 2013 because it improperly calculated its NEL deductions. (R. at 35.) The Department concluded that Graybar had failed to reduce the NEL it carried forward to the tax years 2007 and 2008 by the income attributable to the Dividends received. (R. at 605.) The Department reasoned that "[b]efore a [NEL] brought forward may be deducted, . . . [the NEL] must be reduced by any current-year nontaxable income[.]" (R. at 9.) Because the Dividends were deducted from Graybar's federal gross income to derive its federal taxable income, the Department concluded that the Dividends constituted "current-year nontaxable income." (R. at 9.)

12. The Department accordingly reduced the NELs that Graybar reported in 2007 and 2008 by the apportioned amount of the Dividends received,[2] and as a result, concluded that Graybar did not have a NEL for those two years. (R. at 605.) The elimination of the NEL for tax years 2007 and 2008 increased Graybar's State corporate income tax liability for 2008, 2012, and 2013. (R. at 605–06.) Based on the new NEL calculation, the Department proposed assessments against Graybar for the tax

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2. It is undisputed that the Dividends constituted North Carolina apportionable income under the then current version of N.C. Gen. Stat. § 105-130.4 during the tax years at issue. While the Dividends totaled $400,000,000 in 2007 and $1,000,000 in 2008, the amount apportioned to North Carolina for state income tax purposes was $14,194,000 and $34,465, respectively. (R. at 9.)

years 2008, 2012, and 2013, (R. at 6), in the total amount of $380,835.97, inclusive of additional State taxes, penalties, and interest, (R. at 35).

13. On September 16, 2015, Graybar timely filed with the Department a request for review concerning the proposed assessment of additional State taxes, penalties, and interest. (R. at 6.) In June 2016, the Department issued a Notice of Final Determination upholding the assessment, (R. at 35–39), citing N.C. Gen. Stat. § 105-130.8(a)(3), which provides that a NEL from a prior year can be deducted from income in a succeeding year, "only to the extent that the loss carried forward from the prior year exceeds any income not taxable" received in the succeeding year. The Department found that the Dividends received constituted "income not taxable," and thus that Graybar was required to reduce its NEL deductions by the amount of the Dividends apportioned to North Carolina. (R. at 37–38.)

14. Following receipt of the Notice of Final Determination, Graybar filed a contested case with the OAH on August 10, 2016, alleging that "the Department improperly reduced [Graybar's] net economic loss carryovers" by the amounts attributable to the Dividends. (R. at 27–34.) Graybar argued that its Dividend income was not "income not taxable" and that a reduction of its NELs was unconstitutional under both the North Carolina and United States Constitutions. (R. at 30–33.) Both parties moved for summary judgment on June 9, 2017. (R. at 4.)

15. By a Final Decision issued on October 16, 2017, the OAH entered summary judgment for Graybar, holding that the Dividends were "taxable as a matter of law" and were "not 'income not taxable.' " (R. at 4–23, 14.) The OAH further noted its agreement with Graybar's contention that "the Department's position created a double taxation on the same income" in violation of the North Carolina Constitution. (R. at 21.)

16. On November 14, 2017 the Department filed the Petition in Wake County Superior Court, seeking reversal of the OAH's Final Decision and the entry of summary judgment in favor of the Department. The matter was subsequently designated as a complex business case by the Chief Justice of the Supreme Court of North Carolina and assigned to the undersigned. The Department and Graybar each submitted briefs in support of and opposition to the Petition, each seeking the entry of summary judgment in its favor. On April 19, 2018, the Court held a hearing on the Petition, at which both parties were represented by counsel. The Petition is now ripe for resolution.

II.

LEGAL STANDARD

17. When the trial court "exercises judicial review over an agency's final decision, it acts in the capacity of an appellate court." *Meza v. Div. of Soc. Servs.*, 364 N.C. 61, 75, 692 S.E.2d 96, 105 (2010) (quoting *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 662, 599 S.E.2d 888, 896 (2004)).

18. Chapter 150B of the North Carolina General Statutes provides that "[t]he court reviewing a final [agency] decision may affirm the decision or remand the case for further proceedings." N.C. Gen. Stat. § 150B-51(b). "In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record." *Id.* § 150B-51(c).

19. The Department appeals the Final Decision of the OAH granting summary judgment in favor of Graybar. "Appeals arising from summary judgment orders are decided using a *de novo* standard of review." *Midrex Techs. v. N.C. Dep't of Revenue*, 369 N.C. 250, 257, 794 S.E.2d 785, 791 (2016). Under the *de novo* standard of review, the Court will "consider[] the matter anew and freely substitute[] its own judgment" for that of the OAH. *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895 (quoting *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002)). "In reviewing a final decision allowing . . . summary judgment, the court may enter any order allowed by . . . Rule 56" of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 150B-51(d).

20. Under Rule 56, 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 . . . judgment as a matter of law." N.C. R. Civ. P. 56(c). A genuine issue is "one that can be maintained by substantial evidence." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000). A material fact is one that "would constitute or would irrevocably establish any material element of a claim or defense." *Abner Corp. v. City Roofing & Sheetmetal Co.*, 73 N.C. App. 470, 472, 326 S.E.2d 632, 633 (1985). Summary judgment is appropriate if "the facts are not disputed and only a question of law remains." *Wal-Mart Stores E. v. Hinton*, 197 N.C. App. 30, 37, 676 S.E.2d 634, 638 (2009) (quoting *Carter v. W. Am. Ins. Co.*, 190 N.C. App. 532, 536, 661 S.E.2d 264, 268 (2008)). Thus, where, as here, the material facts are

undisputed on appeal, "a summary disposition of the claims is proper and appropriate." *Technocom Bus. Sys. v. N.C. Dep't of Revenue*, 2011 NCBC LEXIS 1, at *12 (N.C. Super. Ct. Jan. 4, 2011).

21. Graybar, as the "taxpayer claiming a deduction," must bring itself "within the statutory provisions authorizing the deduction." *Wal-Mart Stores E.*, 197 N.C. App. at 54–55, 676 S.E.2d at 651 (quoting *Ward v. Clayton*, 5 N.C. App. 53, 58, 167 S.E.2d 808, 811 (1969)).

III.

ANALYSIS

22. North Carolina imposes a tax on the "State net income of every C Corporation doing business in this State[.]" N.C. Gen. Stat. § 105-130.3. "State net income" is based on a "taxpayer's federal taxable income as determined under the Code, adjusted as provided in G.S. 105-130.5[.]" *Id.* § 105-130.2(15). Under the Code, federal taxable income "means gross income minus the deductions allowed by [the Code]." I.R.C. § 63(a). Although the Code identifies dividends as an item of gross income, *id.* § 61(a)(7), the DRD allowed under section 243 of the Code authorizes a corporation to deduct "100 percent" of the dividends it receives from "a member of the same affiliated group[,]" *id.* § 243(a)(3), (b)(1)(A). Because dividends deducted under the DRD are not included in a corporation's federal taxable income, such dividends are likewise not included in a corporation's State net income.

23. As noted, a corporation's State net income is subject to certain adjustments set forth in section 105-130.5. N.C. Gen. Stat. § 105-130.2(15). One such adjustment authorizes a deduction for "[l]osses in the nature of net economic losses sustained by the corporation in any or all of the 15 preceding years pursuant to the provisions of G.S. 105-130.8." *Id.* § 105-130.5(b)(4). In turn, the now-repealed section 105-130.8 provided that a corporation that sustained a NEL in any or all of the preceding fifteen income years was permitted to apply the NEL as a deduction from income in a succeeding taxable year. *Id.* § 105-130.8(a). Such deductions, however, were limited by section 105-130.8(a)(3), which provided in relevant part as follows:

> Any net economic loss of prior years brought forward and claimed as a deduction in any income year may be deducted from net income of the year only to the extent that the loss carried forward from the prior years exceeds any *income not taxable under this Part* received in the same year in which the deduction is claimed[.]

Id. § 105-130.8(a)(3) (emphasis added). The purpose of this NEL provision was to provide "some measure of relief to the corporation that has incurred economic misfortune." *Id.* § 105-130.8(a)(1).

24. Here, Graybar deducted from its gross income the Dividends received pursuant to the DRD and claimed those deductions to arrive at the amounts reported on Line 30 of its 2007 and 2008 federal corporate income tax returns as its federal taxable income. For purposes of its North Carolina corporate income tax returns, Graybar reported the amounts reflected on Line 30 of its federal returns as its "federal taxable income," and this figure became the starting point for the calculation of Graybar's State net income. As a result, the Dividends, deducted from gross income to determine federal taxable income, were not included in the amounts that comprised Graybar's State net income. Graybar ultimately reported its State net income as zero for 2007 and 2008 because Graybar's substantial NELs from prior years were greater than Graybar's apportioned federal taxable income as reflected on its North Carolina corporate income tax returns. In calculating its NELs, Graybar did not reduce its losses by the amount of the Dividends received (i.e., it did not treat the Dividends as "income not taxable" under section 105-130.8(a)(3)).

A. Income Not Taxable

25. In the proceeding below, the OAH concluded that the Dividends were not "income not taxable" for purposes of the NEL provision then in effect. The OAH specifically concluded, and Graybar argues here, that the Dividends were not "income not taxable" because they do not fall within either of the two categories of income specifically referenced in N.C. Gen. Stat. § 105-130.8(a)(5):

> For purposes of this section, any income item deductible in determining State net income under the provisions of G.S. 105-130.5 and any nonapportionable income not allocable to this State under the provisions of G.S. 105-130.4 *shall be considered* as income not taxable under this Part. The amount of the income item considered income not taxable under this Part is determined after subtracting related expenses for which a deduction was allowed under this Part.

Id. § 105-130.8(a)(5) (emphasis added).

26. The OAH agreed with Graybar's contention that section 105-130.8(a)(5) must be read as limiting "income not taxable" to include only the two categories of income specifically identified therein. Because

it is undisputed that the Dividends fall into neither category, Graybar contends that summary judgment was appropriately entered in its favor.

27. "In matters of statutory construction, our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished." *Elec. Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). The General Assembly's intent "is first ascertained from the plain words of the statute." *Id.*

28. Applying this standard, the Court concludes that section 105-130.8(a)(5) is exemplary—not exclusive or exhaustive. As noted by the OAH, "the language of § 105-130.8(a)(5) does not contain any indicia that the General Assembly intended that section to be an exhaustive list of all types of income that would be considered as 'income not taxable.' " (R. at 11.) Indeed, the statute's plain words do not purport to provide a complete list or otherwise limit "income not taxable" to only the types of income referenced therein. It does not use words or phrases like "means," "shall mean," "exclusively," "solely," "only," or "limited to," and instead simply declares that two types of income "shall be considered as income not taxable." N.C. Gen. Stat. § 105-130.8(a)(5); *see Pipe Line Cases*, 234 U.S. 548, 559–60 (1914) (interpreting statutory phrase "shall be considered" as not narrowing statute's reach); *Lynch v. PPG Indus.*, 105 N.C. App. 223, 225, 412 S.E.2d 163, 165 (1992) ("The statutory language, 'include but not be limited to,' clearly indicates, however, that the legislature did not intend an exclusive list."); *cf. Evans v. Diaz*, 333 N.C. 774, 779–80, 430 S.E.2d 244, 246–47 (1993) (finding "a long and specific list" that was "obviously intended to be" exhaustive to constitute a complete list).

29. Moreover, had the legislature intended the statute to be exclusive, it could have done so.[3] This is especially true in light of the North Carolina Supreme Court's decision in *Dayco Corp. v. Clayton*, 269 N.C.

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3. The language chosen in other subsections within section 105-130.8 suggests that the General Assembly did not intend for section 105-130.8(a)(5) to contain an exhaustive list. "When a legislative body includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that the legislative body acts intentionally and purposely in the disparate inclusion or exclusion." *N.C. Dep't of Revenue v. Hudson*, 196 N.C. App. 765, 768, 675 S.E.2d 709, 711 (2009) (internal quotation marks, alteration, and citation omitted). While the General Assembly provided a clearly exhaustive definition for "net economic loss," *see* N.C. Gen. Stat. § 105-130.8(a)(2) ("The net economic loss for any year *means* the amount by which allowable deductions for the year other than prior year losses exceed income from all sources in the year including any income not taxable under this Part." (emphasis added)), the same cannot be said of section 105-130.8(a)(5).

490, 153 S.E.2d 28 (1967), a decision issued four months before section 105-130.8 was enacted that addressed the meaning of "income not taxable" for purposes of the substantially similar NEL provisions in the predecessor statute. *Id.* at 497–98, 153 S.E.2d at 33; *see Kornegay Family Farms LLC v. Cross Creek Seed, Inc.*, 370 N.C. 23, 29, 803 S.E.2d 377, 381 (2017) ("[T]he legislature is always presumed to act with full knowledge of prior and existing law and . . . where it chooses not to amend a statutory provision that has been interpreted in a specific way, we may assume that it is satisfied with that interpretation." (quoting *Polaroid Corp. v. Offerman*, 349 N.C. 290, 303, 507 S.E.2d 284, 294 (1998))).

30. In *Dayco*, our Supreme Court considered whether dividend income allocable to states other than North Carolina constituted "income not taxable" for State income tax purposes under N.C. Gen. Stat. § 105-147(9)(d) (repealed 1967), the substantially similar predecessor statute to section 105-130.8.[4] *Dayco Corp.*, 269 N.C. at 497, 153 S.E.2d at 32–33. The Supreme Court concluded that because such income is not allocable to North Carolina, it is not subject to tax by North Carolina. *Id.* at 498, 153 S.E.2d at 33. The taxpayer argued that even though this income was not taxed by North Carolina, it was subject to tax in other states and thus was taxable income. *Id.* at 497, 153 S.E.2d at 33. The Supreme Court disagreed, concluding that " 'taxable income' clearly means income on which the State of North Carolina, by the Revenue Act, levies a tax" and that "[a]ll other income is 'income not taxable.' " *Id.* at 498, 153 S.E.2d at 33; *see also Aberfoyle Mfg. Co. v. Clayton*, 265 N.C. 165, 171–73, 143 S.E.2d 113, 118–19 (1965) (holding that a liquidating distribution, while not taxable income, was nonetheless "income not taxable" because it increased the corporation's assets and was not taxed by the State).

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4. N.C. Gen. Stat. § 105-147(9)(d) provided, in relevant part, as follows:

> Any net economic loss of a prior year or years brought forward and claimed as a deduction in any income year may be deducted from taxable income of the year only to the extent that such carry-over loss from the prior year or years shall exceed any income not taxable under this article received in the same year in which the deduction is claimed, except that in the case of taxpayers required to apportion to North Carolina their net apportionable income, as defined in this article, only such proportionate part of the net economic loss of a prior year shall be deductible from the income taxable in this State as would be determined by the use of the apportionment ratio computed under the provisions of G.S. 105-134 or of subsection (c) of G.S. 105-142, as the case may be, for the year of such loss.

N.C. Gen. Stat. § 105-147(9)(d)(3) (repealed 1967).

31. Applying the definition set forth in *Dayco*, the Court concludes that the Dividends Graybar received are "income not taxable" under section 105-130.8(a)(3). Graybar deducted the Dividends from its gross income pursuant to the Code's DRD, and the Dividends were thus excluded from Graybar's federal taxable income and, consequently, its State net income. As a result, the Dividends were not income upon which the State levied a tax.

32. In its Final Decision, the OAH distinguished *Dayco* on the ground that it applied to dividend income allocable to other states, not, as here, dividend income apportioned to North Carolina. The Court disagrees with the OAH's interpretation of *Dayco*. By clearly defining "income not taxable" under a substantially similar statute as income on which the State does not levy a tax, the Supreme Court has, at a minimum, offered persuasive authority and forecast its view of the proper interpretation of "income not taxable" under section 105-130.8(a)(3) and, at most, provided the rule of decision in this case.

33. When interpreting tax statutes, any "ambiguities . . . are resolved in favor of taxation." *Home Depot U.S.A., Inc. v. N.C. Dep't of Revenue*, 2015 NCBC LEXIS 103, at *19 (N.C. Super. Ct. Nov. 6, 2015) (quoting *Aronov v. Sec'y of Revenue*, 323 N.C. 132, 140, 371 S.E.2d 468, 472 (1988)). Although the Court does not find section 105-130.8 to be ambiguous, should the Supreme Court decide otherwise, this Court notes that its statutory interpretation limiting "income not taxable" to the two categories listed in subsection 105-130.8(a)(5) will permit a broader range of income to offset NEL deductions, a result in favor of taxation. *See Bodford v. N.C. Dep't of Revenue*, 2013 NCBC LEXIS 18, at *13 (N.C. Super. Ct. Apr. 10, 2013) ("The court is to construe strictly any statute providing for a deduction and resolve ambiguities in favor of taxation.").

34. The OAH also rested its conclusion on the fact that the Dividends were "deductions," rather than "exclusions," stating that because "[n]o exemption or exclusion prevented the Dividends from being included in income on either the federal or North Carolina returns[,] . . . the Dividends are not 'income not taxable.' " (R. at 19.) The OAH concluded, and Graybar argues here, that "income not taxable" under section 105-130.8 should be read to mean income items excluded from gross income altogether (i.e., items that were never within the State's authority to tax) and does not include income that the State had the authority to tax, including items first included in, and then removed from, gross income by the claiming of a deduction (like the Dividends here).

35. The OAH's focus on the Dividends' status as "deductions" and not "exclusions" is misplaced. Under *Dayco*, the determinative issue is whether the State actually levied a tax on the item of income, not whether the State had the authority to do so. The Dividends were deducted from Graybar's federal taxable income pursuant to the DRD and were not included in its State net income. Because the Dividends are income on which the State did not levy a tax, the Dividends were "income not taxable" under section 105-130.8(a)(3).

36. The Court finds further support for its conclusion in the stated policy aims motivating the passage of section 105-130.8. *See Elec. Supply Co.*, 328 N.C. at 656, 403 S.E.2d at 294 ("Courts also ascertain legislative intent from the policy objectives behind a statute's passage and the consequences which would follow from a construction one way or another." (internal quotation marks omitted)). As expressed in the statute, the NEL provisions were intended to address a corporation's "net economic situation" in order to provide relief to corporations that "incurred economic misfortune." N.C. Gen. Stat. § 105-130.8(a)(1). The Court concludes that the legislature likely did not intend for over $14,000,000 in allocable income to be disregarded in determining a corporation's "net economic situation" for purposes of providing relief based on a corporation's "economic misfortune." *See Aberfoyle Mfg. Co.*, 265 N.C. at 172, 143 S.E.2d at 119 (reducing NEL deduction where liquidating distribution increased taxpayer's assets by over $4,000,000).

37. The Court's conclusion is also buttressed by the Department's published guidance. The Department is required to administer the State's tax laws. N.C. Gen. Stat. § 143B-219. The Secretary of Revenue (the "Secretary") is authorized to publish guidance and bulletins interpreting the laws administered by the Department. N.C. Gen. Stat. § 105-264. The Supreme Court of North Carolina has explained that "[a]n interpretation by the Secretary is *prima facie* correct" and that the Secretary's interpretation of "the relevant statutory language is important and must be given 'due consideration.' " *Midrex Techs.*, 369 N.C. at 260, 794 S.E.2d at 793; *see Carolina Photography, Inc. v. Hinto*n, 196 N.C. App. 337, 339, 674 S.E.2d 724, 725 (2009) ("A rule, *bulletin*, or directive promulgated by the Secretary of Revenue which interprets [laws administered by the Department] is *prima facie* correct[.]" (emphasis added)).

38. During the years at issue here, the Secretary published a series of bulletins interpreting section 105-130.8 and, in particular, the meaning of "income not taxable" under the statute (the "Bulletins"). (*See* R. at 735–52.) In particular, the Bulletins for taxable years 2007 and 2008

define "income not taxable" as "any income that has been deducted in computing State net income under G.S. 105-130.5, any nonapportionable income that has been allocated directly to another state under G.S. 105-130.4, and *any other income* that is not taxable under State law. (*See Dayco Corporation v. Clayton*.)." (R. at 738 (emphasis added).) Thus, in addition to referencing the two categories of income identified in section 105-130.8(a)(5), the Bulletins also explicitly referenced, and adopted the holding in *Dayco*.

39. Although the OAH found that the Bulletins were "entitled to some deference," the OAH concluded, and Graybar argues here, that the Bulletins are not controlling and misinterpret section 105-130.8.[5] (R. at 11.) Graybar contends that the Court should instead rely upon a 1965 opinion of the North Carolina Attorney General. That opinion, which was issued two years before the Supreme Court's *Dayco* decision, opined that the interpretation of "income not taxable" depended on the "distinction between income excludable from gross income and income deductible from gross income." (Resp't's Br. Ex. 1 [hereinafter "AG Opinion"], ECF No. 30.) The Attorney General concluded:

> [s]ince interest and dividends are both items of gross income subject to taxation . . . , all such income would be considered TAXABLE INCOME notwithstanding the fact that a portion of such interest and dividends may qualify as deductions from gross income . . . in determining the taxpayer's net taxable income.

(AG Opinion 3.) As Graybar points out, other states have followed this same approach. *See Rosemary Props., Inc. v. McColgan*, 177 P.2d 757, 763 (Cal. 1947) ("Since the gross income and specified deductions are the factors included in arriving at the net income, the conclusion is unavoidable that it is gross income that is included in the measure of the tax."); *Yaeger v. Dubno*, 449 A.2d 144, 147 (Conn. 1982) (concluding " 'dividends taxable for federal income tax purposes' means gross dividends as defined under Code, without regard to federal adjustments").

40. Upon careful review, however, the Court concludes that the Attorney General's opinion is of limited value here, particularly when

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5. The OAH concluded that the Department's reliance on the Bulletins was misguided because (i) the Dividends were not "income not taxable" under *Dayco* (i.e., because *Dayco* involved dividend income allocable to other states), (ii) in any event, section 105-130.8(a)(5) provided a "statutory definition" of "income not taxable" that does not encompass the Dividends, and (iii) the Bulletins did not give notice that a DRD deduction "converts taxable dividends into 'income not taxable.' " (R. at 11–12.)

compared to the Department's Bulletins, because the opinion was issued before the Supreme Court's decision in *Dayco*. Indeed, the Court's research has not disclosed, and Graybar has not cited, any judicial or administrative decisions relying upon the Attorney General's opinion. Moreover, while the Department's Bulletins are presumed to be *prima facie* correct, *see Carolina Photography, Inc.*, 196 N.C. App. at 339, 674 S.E.2d at 725, the Attorney General's opinion on tax matters is merely advisory, *see In re Va.-Carolina Chem. Corp.*, 248 N.C. 531, 538, 103 S.E.2d 823, 828 (1958), and our appellate courts have admonished that "[w]hile opinions of the Attorney General are entitled to 'respectful consideration,' such opinions are not compelling authority[,]" *McLaughlin v. Bailey*, 240 N.C. App. 159, 167–68, 771 S.E.2d 570, 577 (2015) (quoting *Williams v. Alexander Cty. Bd. of Educ.*, 128 N.C. App. 599, 602, 495 S.E.2d 406, 408 (1998)). As a result, the Court concludes that, as between the two, the Department's guidance, rather than the Attorney General's opinion, is the more persuasive and further supports the Court's conclusion that the Dividends Graybar received constituted "income not taxable" for purposes of section 105-130.8.

41. Finally, the OAH found, and Graybar argues here, that the Bulletins did not provide the public with notice of the Department's interpretation that dividends deducted under the DRD are "income not taxable" for purposes of section 105-130.8(a)(3). The Court disagrees. The Department's Bulletins interpreting the NEL provision explicitly state that "income not taxable" includes "any other income that is not taxable under State law" and cite *Dayco* for support. Because *Dayco* provides that "income not taxable" includes any income on which the State does not levy a tax, the Court concludes that the Bulletins afforded the public, including Graybar, adequate notice of the Department's interpretation.[6]

42. For each of these reasons, therefore, the Court concludes that the Dividends deducted pursuant to the DRD, I.R.C. § 243(a)(3), are

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6. Graybar also points to case law holding that where the only authority for an agency's interpretations of the law is its litigation position in a particular case, "that interpretation may be viewed skeptically on judicial review." *See Cashwell v. Dep't of State Treasurer, Ret. Sys. Div.*, 196 N.C. App. 80, 89, 675 S.E.2d 73, 78 (2009) (quoting *Rainey v. N.C. Dep't of Pub. Instruction*, 361 N.C. 679, 681, 652 S.E.2d 251, 252 (2007)). The Bulletins at issue here, however, were published for the 2007 and 2008 tax years, seven years before the Department conducted its audit and seven years before Graybar formally requested a review of the Department's proposed assessments. In fact, this same interpretation appears in Bulletins dating back to at least 1999. (*See* R. at 751–52.) Graybar's argument on this point is thus unpersuasive. *See Cashwell*, 196 N.C. App. at 89, 675 S.E.2d at 78 ("[I]f the agency's interpretation of the law is not simply a 'because I said so' response to the contested case, then the agency's interpretation should be accorded . . . deference[.]" (quoting *Rainey*, 361 N.C. at 681, 652 S.E.2d at 252–53)).

"income not taxable" under section 105-130.8(a)(3), that Graybar has failed to bring itself within the statutory provisions authorizing the NEL deduction calculation it seeks, and that the OAH's contrary conclusion should be reversed.

B. Constitutionality

43. In light of the OAH's determination that the Dividends were not "income not taxable" for purposes of section 105-130.8, the OAH concluded that it was "not necessary to rule on [Graybar's] constitutional argument." (R. at 18.) Nevertheless, the OAH noted its agreement with Graybar's contention that "the Department's position creates a double taxation on the same income" in violation of the North Carolina Constitution's Just and Equitable Clause. (R. at 18.) Graybar agrees with this conclusion and argues in addition that this alleged double taxation violates the Law of the Land Clause in the North Carolina Constitution and the Due Process Clause contained in the Fourteenth Amendment of the United States Constitution. (*See* Resp't's Br. 20–22.) The Court concludes that these applied constitutional challenges are properly before the Court for determination. *See* N.C. Gen. Stat. § 150B-51(d) ("In reviewing a final decision allowing . . . summary judgment, the court may enter any order allowed by . . . Rule 56.").

44. As an initial matter, our appellate courts have held that "[a] law is presumed constitutional until the contrary is shown and the burden is on the party claiming that the law is unconstitutional to show why it is unconstitutional as applied to him." *Perry v. Perry*, 80 N.C. App. 169, 176, 341 S.E.2d 53, 58 (1986).

45. The Just and Equitable Clause of the North Carolina Constitution provides that "[t]he power of taxation shall be exercised in a just and equitable manner[.]" N.C. Const. art. V, § 2(1). The provision operates to limit the State's taxing power and protects the public against abusive tax policies. *IMT, Inc. v. City of Lumberton*, 366 N.C. 456, 461–62, 738 S.E.2d 156, 159 (2013). The tension between the State's constitutional authority to tax and the Just and Equitable Clause "must be resolved in a manner that protects the citizenry from unjust and inequitable taxes while preserving legislative authority to enact taxes without exposing the State or its subdivisions to frivolous litigation." *Id.* at 461, 738 S.E.2d at 159. In determining whether a tax is just and equitable, courts should look to factors such as, among others, whether the tax was uniformly applied, exemptions from alternative taxes, and the size of the taxing jurisdiction. *Id.* at 461–62, 738 S.E.2d at 159–60 (citing *Nesbitt v. Gill*, 227 N.C. 174, 179–80, 41 S.E.2d 646, 650–51 (1947)).

46. Challenges under the Just and Equitable Clause must be determined on a case-by-case basis, *id.* at 463, 738 S.E.2d at 160, and legislative action "will not be held invalid as violative of the Constitution unless it so appears beyond a reasonable doubt[,]" *Nesbitt*, 227 N.C. at 181, 41 S.E.2d at 651. "And when there is reasonable doubt as to the validity of a statute, such doubt will be resolved in favor of its constitutionality." *Id.* "The 'power of taxation is very largely a matter of legislative discretion' and . . . 'in respect to the method of apportionment as well as the amount, it only becomes a judicial question in cases of palpable and gross abuse.' " *Smith v. City of Fayetteville*, 220 N.C. App. 249, 256, 725 S.E.2d 405, 411 (2012) (quoting *E. B. Ficklen Tobacco Co. v. Maxwell*, 214 N.C. 367, 372, 199 S.E. 405, 409 (1938)).

47. The Law of the Land Clause provides that "[n]o person shall be denied the equal protection of the laws," and shall not be "taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. Our courts have held that the clause is "interpreted to be analogous with the [United States Constitution's] Fourteenth Amendment 'due process of law' clause." *City of Asheville v. State*, 192 N.C. App. 1, 44, 665 S.E.2d 103, 133 (2008). "These clauses have been consistently interpreted to permit the state, through the exercise of its police power, to regulate economic enterprises provided the regulation is rationally related to a proper governmental purpose." *Id.* Accordingly, the Court's analysis of the Law of the Land Clause and the Due Process Clause for present purposes diverges into a two-fold inquiry: "(1) Does the regulation have a legitimate objective? and (2) If so, are the means chosen to implement the objective reasonable?" *Id.*

48. Here, the OAH concluded, and Graybar argues now, that the substantial Dividend paid to Graybar by Graybar Services was subject to double taxation because Graybar Services paid taxes on the earnings and profits from which it paid the Dividend to Graybar and thereafter the State taxed these same monies by determining the Dividend to be "income not taxable" under the NEL provision.[7]

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7. It is worth noting that Graybar, Graybar Services, and Commonwealth are all structured as "C" corporations for federal income tax purposes and that "double taxation" is a common, widely accepted, and permissible feature of this form of business organization. As explained by one federal circuit court:

> A C corporation is a corporate entity that is required to pay taxes on the income it earns. If a C corporation decides to issue dividends to its shareholders, the shareholders must pay income tax on these dividends.

49. Notably, it has long been held that nothing in either the United States Constitution or the North Carolina Constitution prevents the State from imposing double taxation, provided the tax is imposed without arbitrary distinctions. *See*, *e.g.*, *Illinois C. R. Co. v. Minnesota*, 309 U.S. 157, 164 (1940) ("[T]he Fourteenth Amendment no more forbids double taxation than it does doubling the amount of a tax; short of confiscation or proceedings unconstitutional on other grounds." (internal quotation marks omitted)); *Jamison v. Charlotte*, 239 N.C. 682, 693–94, 80 S.E.2d 904, 913 (1954) (citing North Carolina cases to similar effect); *see also*, *e.g.*, *Swiss Oil Corp. v. Shanks*, 273 U.S. 407, 413 (1927) ("[T]he Fourteenth Amendment does not require uniformity of taxation, nor forbid double taxation." (citations omitted)); *Charlotte Coca-Cola Bottling Co. v. Shaw*, 232 N.C. 307, 309, 59 S.E.2d 819, 821 (1950) ("Double taxation, as such, is not prohibited by the Constitution, and is not invalid if the rule of uniformity is observed."); *Sabine v. Gill*, 229 N.C. 599, 603, 51 S.E. 2d 1, 3 (1948) ("[D]ouble taxation, even within the State, is not *ipso facto* necessarily obnoxious to the Constitution when the intention to impose it is clear and it is free from discriminatory features, however odious to the taxpayer.").

> This arrangement exposes shareholder dividends to double taxation—a C corporation's income is taxed at the corporate level and the portion of the C corporation's income that is passed on to shareholders is taxed again at the shareholder level.

Crumpton v. Stephens, 715 F.3d 1251, 1253 n.2 (11th Cir. 2013); *see Crowder Constr. Co. v. Kiser*, 134 N.C. App. 190, 194, 517 S.E.2d 178, 182 (1999) ("As a 'C' corporation, the Company paid corporate income tax on its earnings, and its shareholders paid income taxes on any dividends received by them.").

The DRD permits a corporation to deduct the dividends it receives from a subsidiary to avoid double taxation in this context. The policy considerations motivating the DRD deduction, however, are different from those justifying an NEL deduction. *Compare* H.R. Rep. No. 708, 72d Cong., 1st Sess., 12 (1932) (legislative history of 26 U.S.C. § 243(a)(1) reflecting a Congressional policy against double taxation of income by permitting dividends received deductions to corporations on "the theory that a corporate tax has already been paid upon the earnings out of which the dividends are distributed"), *with* N.C. Gen. Stat. § 105-130.8(a)(1) (affording relief for corporations suffering "economic misfortune" based on "net economic situation of the corporation"), *and Aberfoyle Mfg. Co.*, 265 N.C. at 171, 143 S.E.2d at 118 ("The General Assembly was under no constitutional or other legal compulsion to permit a net economic loss or losses deduction for a corporation from taxable income in a subsequent year or years. It enacted the carry-over provisions of [the predecessor statute] purely as a matter of grace, gratuitously conferring a benefit but limiting such benefit to the net economic loss of the taxpayer after deducting therefrom the allocable portion of such taxpayer's nontaxable income." (internal quotation marks omitted)).

50. Here, assuming without deciding that the State's determination concerning "income not taxable" results in double taxation,[8] the Court concludes that Graybar has failed to show that its tax burden resulting from the State's determination—i.e., the reduction of Graybar's NEL deductions by the apportioned amount of the Dividends received—is the product of discriminatory or arbitrary taxation or otherwise derives from an abusive or unreasonable taxation scheme in violation of the North Carolina or United States Constitution. The Department's interpretation of "income not taxable" is based on the Supreme Court's holding in *Dayco*, a holding the legislature elected not to overturn or modify in its 1967 statutory amendment, and a position the Department has publicly announced and implemented for at least twenty years, including during the taxable years at issue. There is no evidence that the Department's interpretation has been applied inconsistently, arbitrarily, or discriminatorily or that the Department has identified Graybar for adverse treatment relative to other similarly situated taxpayers. Moreover, the Department's interpretation is reasonable and consistent with section 105-130.8's legitimate and stated purpose "to grant some measure of relief to the corporation that has incurred economic misfortune" and to afford that relief based on the "net economic situation of the corporation." N.C. Gen. Stat. § 105-130.8(a)(1).

51. In short, the Department's interpretation does not cause section 105-130.8 to be unfair, unreasonable, arbitrary, or abusive, and Graybar's constitutional challenges must therefore be rejected. *See Aronov*, 323 N.C. at 136–39, 371 S.E.2d at 470–72 (holding that requiring a taxpayer to reduce North Carolina carryover losses by non-North Carolina income did not violate the Due Process Clause or the Law of the Land Clause, in part, because "[d]eductions are privileges, not rights"); *cf. IMT, Inc.*, 366 N.C. at 462, 738 S.E.2d at 160 (holding unconstitutional a 59,900% minimum tax increase for promotional sweepstake companies).

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8. The parties dispute whether the Department's treatment has resulted in double taxation. Graybar argues that the income from which the larger Dividend was paid was taxed twice, first when it was earned by Graybar's subsidiary, Graybar Services, and again when the Graybar could not offset its NEL deduction by that Dividend. The Department argues that the Dividend income was not initially taxed to Graybar because Graybar Services, which filed separately from Graybar, paid corporate income tax on the Dividend, not Graybar, and that the Dividend, once received by Graybar, was not taxed. The Court need not resolve this dispute to determine Graybar's constitutional challenges.

IV.

CONCLUSION

52. Based on the foregoing, the Court hereby **REVERSES** the Final Decision and **REMANDS** with instructions to the OAH to enter summary judgment in favor of the Department.

SO ORDERED, this the 9th day of January, 2019.

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge

TERESSA B. ROUSE, PETITIONER
v.
FORSYTH COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENT

No. 1PA19

Filed 28 February 2020

Public Officers and Employees—career employee—wrongful termination—back pay—attorney fees

An administrative law judge was expressly authorized by statute (N.C.G.S. § 126-34.02) to award back pay and attorney fees to a career local government employee who prevailed in a wrongful termination proceeding under the Human Resources Act. The portions of *Watlington v. Dep't of Soc. Servs. Rockingham Cty.*, 252 N.C. App. 512 (2017), to the contrary were overruled.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 822 S.E.2d 100 (N.C. Ct. App. 2018), affirming, in part, and vacating, in part, a final decision entered on 18 April 2017 by Administrative Law Judge J. Randall May in the Office of Administrative Hearings. Heard in the Supreme Court on 10 December 2019.

Elliot Morgan Parsonage, PLLC, by Benjamin P. Winikoff, Robert M. Elliot, and J. Griffin Morgan, for petitioner-appellant.

Office of Forsyth County Attorney, by Assistant County Attorney Gloria L. Woods, for respondent-appellee.

Tin Fulton Walker & Owen, PLLC, by John W. Gresham, and Edelstein & Payne, by M. Travis Payne, for North Carolina Advocates for Justice, amicus curiae.

ERVIN, Justice.

This case presents the question of whether an administrative law judge has the authority to award back pay and attorneys' fees to local government employees protected under the North Carolina Human Resources Act who prevail in a wrongful termination proceeding before the Office of Administrative Hearings. In view of the fact that N.C.G.S. § 126-34.02 explicitly provides that an administrative law judge has the authority to award back pay and attorneys' fees to any protected state and local government employee, we reverse the Court of Appeals' decision to the contrary and remand this case to the Court of Appeals for further proceedings not inconsistent with this opinion.

Petitioner Teressa B. Rouse worked for respondent Forsyth County Department of Social Services for nineteen years, with her most recent employment being as a Senior Social Worker working in the After Hours Unit, where her job duties included receiving and screening juvenile abuse, neglect, and dependency reports. On 20 June 2016, Ms. Rouse met a father, who was accompanied by his son, who claimed to be homeless, and who inquired about the possibility that his son might be placed in foster care. After Ms. Rouse explained the circumstances under which the son could be placed in foster care, the father declined to pursue that option any further.

Upon making this decision, the father contacted the son's mother using Ms. Rouse's phone and learned that the mother did not want her son to live in her home. While speaking with Ms. Rouse, the mother explained her refusal to provide a home for the son by stating that the son had previously molested her daughters. Upon receiving this information, Ms. Rouse questioned the mother concerning whether she had filed a report or contacted law enforcement officers about the son's alleged conduct and received a negative response. Subsequently, the mother recanted her allegation against the son, stating that she did not say that her son had molested her daughters and that she had only meant to say that the son had "tendencies." In addition, the father and the son each denied the mother's allegation. Ultimately, Ms. Rouse concluded that the mother's initial statement was not entitled to any credence and that there was no basis for believing that any sexual abuse had actually occurred.

After the mother promised to give the son's housing situation further thought, the father contacted the child's paternal grandmother and made arrangements for her to house the son that night. On the following day, the mother contacted Ms. Rouse and agreed to allow the son to stay at her residence. Ms. Rouse took no further action with respect to the mother's initial allegation that the son had sexually abused her daughters.

In mid-July 2016, the Forsyth County DSS received a request for assistance from the Wilkes County Department of Social Services arising from a 16 July 2016 allegation that the son had sexually molested his sisters. On 22 September 2016, the Department dismissed Ms. Rouse from its employment on the grounds that her alleged mishandling of the mother's allegation that the son had sexually abused her daughters provided just cause for the termination of Ms. Rouse's employment based upon grossly inefficient job performance and unacceptable personal conduct.

On 21 October 2016, Ms. Rouse filed a contested case petition with the Office of Administrative Hearings in which she alleged that the Department had (1) failed to follow the proper procedures prior to making the dismissal decision, (2) failed to follow the proper procedures in dismissing her from its employment, and (3) dismissed her from its employment without just cause. An evidentiary hearing was held in this case on 31 January 2017 before the administrative law judge. On 18 April 2017, the administrative law judge entered an order reversing the Department's decision to terminate Ms. Rouse's employment on the grounds that the Department had violated Ms. Rouse's procedural rights and lacked just cause to dismiss Ms. Rouse from its employment. In light of this decision, the administrative law judge ordered the Department to reinstate Ms. Rouse "to her position as Senior Social Worker, or comparable position . . . with all applicable back pay and benefits" and to pay Ms. Rouse's attorneys' fees. The Department noted an appeal to the Court of Appeals from the administrative law judge's order.

In seeking relief from the administrative law judge's order before the Court of Appeals, the Department contended that the administrative law judge had erred by concluding that it had violated Ms. Rouse's procedural rights and lacked the just cause necessary to support the decision to dismiss Ms. Rouse from its employment and by awarding Ms. Rouse back pay and attorneys' fees. On 6 November 2018, the Court of Appeals filed an opinion affirming the administrative law judge's decision, in part, and vacating that decision, in part. *Rouse v. Forsyth Cty. Dep't of Soc. Servs.*, 822 S.E.2d 100, 113 (N.C. Ct. App. 2018). As an initial

matter, the Court of Appeals upheld the administrative law judge's decision to overturn the Department's dismissal decision on the grounds that the record developed before the administrative law judge "provided substantial evidence to support [its] findings of fact and the conclusions of law" that Ms. Rouse had not engaged in grossly inefficient job performance or unacceptable personal conduct *Id.* at 102. On the other hand, acting in reliance upon its prior decision in *Watlington v. Dep't of Soc. Servs. Rockingham Cty.*, 252 N.C. App. 512, 799 S.E.2d 396 (2017), the Court of Appeals concluded that the administrative law judge lacked the authority to award back pay and attorneys' fees to Ms. Rouse on the grounds that the administrative regulations contained in Title 25, Subchapter I, of the North Carolina Administrative Code and the statutory provisions embodied in N.C.G.S. § 150B-33(b)(11) did not provide for the making of such awards for local government employees wrongfully discharged in violation of the North Carolina Human Resources Act. *Rouse*, 822 S.E.2d at 113. On 10 May 2019, this Court allowed Ms. Rouse's request for discretionary review of that portion of the Court of Appeals' decision holding that the administrative law judge lacked the authority to award her back pay and attorneys' fees.[1]

In seeking to persuade us to overturn the Court of Appeals' decision with respect to the backpay and attorneys' fees issue, Ms. Rouse points out that, in accordance with N.C.G.S. § 126-5(a), employees of local departments of social services are protected under the relevant provisions of the North Carolina Human Resources Act. According to Ms. Rouse, N.C.G.S. § 126-34.02(a)(3) authorizes an administrative law judge who determines that a protected employee has been unlawfully discharged to "[d]irect other suitable action to correct the abuse which may include the requirement of *payment for any loss of salary* which has resulted from the improper action of the appointing authority." As a result, Ms. Rouse argues that "the same statute that authorized the [administrative law judge] to reinstate [Ms.] Rouse authorized the [administrative law judge] to award backpay as payment for her two-year loss of salary," with the absence of any administrative rule authorizing an award of backpay having "no effect on the statutory mandate of N.C.[G.S.] § 126-34.02, which provided the authority to [the

1. Although this Court denied the Department's request for discretionary review of the Court of Appeals' decision to uphold the administrative law judge's decision that Ms. Rouse had been wrongfully dismissed, the Department devoted a substantial portion of its brief before this Court to an argument that the administrative law judge had reached the wrong result with respect to the wrongful discharge issue. Needless to say, the wrongful discharge issue is not before this Court, *see* N.C.R. App. P. 16(a), so we decline to address that issue any further in this opinion.

administrative law judge] to grant [Ms.] Rouse the remedies of payment for loss of salary and attorneys' fees." As a result, for this and other reasons, Ms. Rouse urges us to reinstate the administrative law judge's backpay award.

Similarly, Ms. Rouse argues that N.C.G.S. § 126-34.02(e) "permits an award of attorneys' fees to *all* employees subject to the [North Carolina Human Resources Act], including local government employees." According to Ms. Rouse, the Court of Appeals' focus upon the absence of any language in N.C.G.S. § 150B-33(b)(11) authorizing attorneys' fee awards to unlawfully discharged local government employees "ignor[es] the explicit mandate of N.C.[G.S.] § 126-34.02 and fail[s] to reconcile the two statutes [so as] to give effect to both." For that reason, Ms. Rouse contends that the Court of Appeals erred by setting aside the administrative law judge's attorneys' fee award as well.

The Department, on the other hand, argues that personnel actions involving State employees are governed by Subchapter J of Title 25 of the North Carolina Administrative Code, while personnel actions involving local government employees are subject to Subchapter I. As a result of the fact that the regulation authorizing back pay awards to local government employees expired on 1 November 2014, "[n]o remedies were set out in the amendments for local government employees at the time of the decision in this matter." According to the Department, "[t]he application of 25 [N.C. Admin. Code] Subchapter 01I exclusively to local government employees for rights and remedies was settled before the [administrative law judge] decision in this case" in *Watlington*, with there being "a host of other [ ] provisions" of the North Carolina Human Resources Act that are limited to state employees and with there being "no express statutory provision under the [North Carolina Human Resources Act] or regulatory provisions at the time of the decision in this matter which specifically authorizes an award of attorneys' fees to local government employees effective as of [Ms. Rouse's] dismissal." In view of the fact that the Court of Appeals held in *Watlington* "that it was erroneous to award backpay and attorneys' fees to a local government employee under 25 [N.C. Admin. Code] Subchapter J at the time of the decision[,]" the Department also argues that "it was [also] error for the [administrative law judge] just a few days later . . . to apply Subchapter 01J to this matter and award back pay and attorneys' fees."

The General Assembly enacted the North Carolina Human Resources Act "to establish for the government of the State a system of personnel administration under the Governor, based on accepted principles of personnel administration and applying the best methods as

evolved in government and industry." N.C.G.S. § 126-1 (2019). The North Carolina Human Resources Act applies to all State employees that are not exempted from its coverage and to the employees of certain local entities, including local departments of social services. *Id.* § 126-5(a)(1), (2)(b). According to N.C.G.S. § 126-34.02(a), once an agency whose employees are protected by the North Carolina Human Resources Act makes a final decision to terminate a protected employee[2] from its employment, the adversely affected employee "may file a contested case in the Office of Administrative Hearings under Article 3 of Chapter 150B of the General Statutes," *id.* § 126-34.02(a), and may seek relief from the agency's termination decision on the grounds "that he or she was dismissed, demoted, or suspended for disciplinary reasons without just cause." *Id.* § 126-34.02(b)(3). In the event that the administrative law judge upholds the validity of the employee's challenge to his or her dismissal, demotion, or suspension, it may:

> (1) Reinstate any employee to the position from which the employee has been removed.
>
> (2) Order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied.
>
> (3) Direct other suitable action to correct the abuse which may include the requirement of payment for any loss of salary which has resulted from the improper action of the appointing authority.

Id. § 126-34.02(a). In addition, an administrative law judge "may award attorneys' fees to an employee where reinstatement or back pay is ordered." *Id.* § 126-34.02(e). As a result, an administrative law judge who has determined that a protected employee has been discharged from his or her employment by a covered agency without just cause is statutorily authorized to award back pay and attorneys' fees to the wrongfully discharged employee.

In holding that the administrative law judge lacked the authority to award back pay to Ms. Rouse after determining that she had been wrongfully discharged from the Department's employment, the Court of Appeals began by pointing out that Ms. Rouse was a local government, rather than a state, employee and that Subchapter I of Title 25 of the

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2. The Department does not contend that Ms. Rouse is not a protected employee for purposes of the North Carolina Human Resources Act.

North Carolina Administrative Code contained no provision authorizing an award of back pay to wrongfully discharged local government employees. *Rouse*, 822 S.E.2d at 113 (noting that the Court of Appeals "has held that Title 25's Subchapter J applies to State employees, while Subchapter I applies to local government employees" (citing *Watlington*, 252 N.C. App. at 523, 799 S.E.2d at 403)).[3] In view of the fact that nothing in Subchapter I of Title 25 of the North Carolina Administrative Code mentioned the availability of backpay awards to wrongfully discharged local government employees, the Court of Appeals concluded that backpay was not one of the remedies to which such wrongfully discharged employees might be entitled. *Id.*; *see also Watlington*, 252 N.C. App. at 526, 799 S.E.2d 404. As a result, as was the case in *Watlington*, the Court of Appeals concluded that the administrative law judge lacked the authority to award back pay to Ms. Rouse despite the fact that she had been wrongfully discharged from the Department's employment. *Rouse*, 822 S.E.2d at 113.

The Court of Appeals' determination that the absence of any regulatory provision authorizing an award of back pay to an unlawfully discharged local government employee precludes the making of such an award in spite of the fact that the relevant statutory provisions clearly authorize the making of such an award rests upon a fundamental misapprehension of the relative importance of statutory provisions and administrative regulations. Simply put, the absence of an implementing

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3. Prior to 30 November 2014, Title 25, Subchapter B of the North Carolina Administrative Code provided for backpay awards in appeals by allegedly aggrieved state and protected local government employees to the State Personnel Commission, 25 N.C. Admin. Code 1B.0421 (2014), which served as the factfinding body in public employee wrongful discharge cases at that time. *See* N.C.G.S. § 126-37 (2009) (repealed 2013). This provision of Title 25, Subchapter B expired on 30 November 2014, 25 N.C. Admin. Code 1B.0421 (Supp. Jan. 2015), with no replacement regulation applicable to protected local government employees ever having been adopted. In 2011, the General Assembly amended N.C.G.S. § 126-37 to provide that the Office of Administrative Hearings, rather than the State Personnel Commission, would have factfinding authority in cases involving alleged wrongful dismissals and other prohibited adverse personnel actions directed to protected state and local employees. Act of June 18, 2011, S.L. 2011-398, § 44, 2011 N.C. Sess. Laws 1678, 1693–94. In 2013, the General Assembly repealed N.C.G.S. § 126-37 and replaced it with N.C.G.S. § 126-34.02, while continuing to assign factfinding responsibility to the Office of Administrative Hearings rather than reassigning it to the Human Resources Commission. Act of July 25, 2013, S.L. 2013–382, § 6.1, 2013 N.C. Sess. Laws 1559, 1564–70. The Human Resources Commission's failure to replace 25 N.C. Admin. Code 1B.0421 with an equivalent provision applicable to protected local government employees following its expiration resulted in the absence of any regulation specifically authorizing the making of backpay awards to unlawfully discharged local government employees upon which the Court of Appeals relied in *Watlington*. *See Watlington*, 252 N.C. App. 526, 799 S.E.2d at 404.

regulation has no bearing upon the extent to which a statutory remedy is available to a successful litigant. On the contrary, "[w]hatever force and effect a rule or regulation has is derived entirely from the statute under which it is enacted." *Swaney v. Peden Steel Co.*, 259 N.C. 531, 542, 131 S.E.2d 601, 609 (1963) (ellipsis omitted) (citation omitted). For that reason, the Court of Appeals has long recognized that "[a]n administrative agency has no power to promulgate rules and regulations which alter or add to the law it was set up to administer or which have the effect of substantive law." *State of North Carolina ex rel. Comm'r of Ins. v. Integon Life Ins. Co.*, 28 N.C. App. 7, 11, 220 S.E.2d 409, 412 (1975) (citations omitted). Similarly, in the absence of legislative language making the effectiveness of a particular statutory provision contingent upon the promulgation of related administrative regulations, the fact that the provisions of a properly enacted statute are not mirrored in the related administrative regulations has no bearing upon the extent to which the relevant statutory provision is entitled to be given full force and effect. As a result, given that Ms. Rouse was a protected employee for purposes of the North Carolina Human Resources Act,[4] the fact that an administrative law judge is explicitly authorized by N.C.G.S. § 126-34.02(a)(3) to award backpay to a wrongfully discharged state or local government employee conclusively resolves the issue of whether the administrative law judge had the authority to require that Ms. Rouse receive backpay.

Similarly, the Court of Appeals failed to rely upon the relevant statutory provision in determining that the administrative law judge lacked the authority to require the Department to pay attorneys' fees to Ms. Rouse. To be sure, N.C.G.S. § 150B-33(b)(11) provides that "[a]n administrative law judge may . . . [o]rder the assessment of reasonable attorneys' fees . . . against the *State agency* involved in contested cases decided. . . under Chapter 126 where the administrative law judge finds discrimination, harassment, or orders reinstatement or back pay." N.C.G.S. § 150B-33(b)(11) (2019) (emphasis added). Although section 150B-33(b)(11) does not, as the Court of Appeals noted, provide for an award of attorneys' fees to unlawfully discharged local employees, the absence of any reference to such an

4. On 1 July 2018, the Forsyth County Board of Commissioners approved the creation of a consolidated human services agency that combined the existing Forsyth County social services and public health departments. *See* Fran Daniel, *Forsyth County Commissioners Vote to Consolidate DSS and Public Health Departments*, Winston-Salem J., (June 21, 2018), https://perma.cc/MK52-Q97C. Although the North Carolina Human Resources Act does not provide any protections to the employees of such a consolidated human services agency, *see* N.C.G.S. § 126-5(a)(2) (2019), Ms. Rouse was never employed by the consolidated human services agency and retained her rights as an employee of a county department of social services at the time of her termination from the Department's employment.

attorneys' fee award in that statutory provision has no bearing upon the proper resolution of the issue of whether the administrative law judge had the authority to award attorneys' fees to Ms. Rouse given that, as we have already noted, N.C.G.S. § 126-34.02(e) expressly authorizes an administrative law judge to "award attorneys' fees to an employee where reinstatement or back pay is ordered." *Id.* § 126-34.02(e). In other words, the fact that N.C.G.S. § 150B-33(b)(11) makes no reference to the making of an attorneys' fee award to a wrongfully discharged local government employee has no bearing upon the issue of whether such an award is authorized for unlawfully discharged local government employees by N.C.G.S. § 126-34.02(e).

Thus, for the reasons set forth in more detail above, the administrative law judge had ample, express statutory authority to award back pay and attorneys' fees to Ms. Rouse. The fact that such remedies are not provided for in Subchapter I of Title 25 of the North Carolina Administrative Code or authorized by N.C.G.S. § 150B-33(b)(11) provides no basis for the decisions reached by the Court of Appeals in this case and in *Watlington*, the relevant portions of which we expressly overrule. As a result, the Court of Appeals' decision to invalidate the administrative law judge's decision to award back pay and attorneys' fees to Ms. Rouse is reversed and this case is remanded to the Court of Appeals for further proceedings not inconsistent with this opinion.[5]

REVERSED AND REMANDED.

5. In its brief to this Court, the Department argued that the administrative law judge had failed to make certain required findings of fact prior to awarding attorneys' fees to Ms. Rouse, citing *Hunt v. Dep't of Pub. Safety*, 817 S.E.2d 257 (N.C. Ct. App. 2018). The Department did not, however, advance this argument before the Court of Appeals or seek to present it for our consideration in its discretionary review petition. As a result, we decline to entertain this argument and will not address it further. *See Higgins v. Simmons*, 324 N.C. 100, 103, 376 S.E.2d 449, 452 (1989) (stating that "a contention not made in the court below may not be raised for the first time on appeal"); *see also* N.C.R. App. P. 10(a)(1), 16(a).

SCIGRIP, INC. v. OSAE

[373 N.C. 409 (2020)]

SCIGRIP, INC. F/K/A IPS STRUCTURAL ADHESIVES HOLDINGS, INC. AND IPS INTERMEDIATE HOLDINGS CORPORATION

v.

SAMUEL B. OSAE AND SCOTT BADER, INC.

No. 139A18

Filed 28 February 2020

1. Trade Secrets—choice of law—misappropriation of trade secrets —lex loci test

The trial court did not err by determining that the appropriate choice of law test for use in misappropriation of trade secrets cases in North Carolina was lex loci. The Supreme Court's jurisprudence favored the use of the lex loci test in cases involving tort or tort-like claims, and the weight of authority was supported by practical considerations.

2. Trade Secrets—misappropriation—choice of law—application of lex loci test

Applying the lex loci test to plaintiff's misappropriation of trade secrets claim, the trial court properly determined that North Carolina law did not apply. All of the evidence tended to show that any misappropriation of plaintiff's trade secrets by defendants occurred outside North Carolina. The fact that there was sufficient evidence to determine that defendants violated a North Carolina consent order did not render the North Carolina Trade Secrets Protection Act applicable.

3. Unfair Trade Practices—summary judgment—substantial aggravating circumstances—intentional breach of consent order—not alone sufficient

The trial court did not err by granting summary judgment in favor of defendants on plaintiff's unfair and deceptive trade practices (UDTP) claim where plaintiff merely alleged the intentional breach of a consent order, which was not sufficient by itself to establish the required substantial aggravating circumstance to support a UDTP claim.

4. Damages and Remedies—punitive damages—breach of consent order—not a separate tort

Where the trial court granted summary judgment to defendants on a misappropriation of trade secrets claim, the court did not err by also finding for defendants on plaintiff's claim for

punitive damages, because plaintiff's alternative basis for punitive damages—that defendants breached a consent order—did not constitute a separate tort.

5. Trade Secrets—summary judgment—confidentiality of information—public knowledge

The trial court did not err in a misappropriation of trade secrets action related to specialty adhesives by concluding that there was no genuine issue of material fact concerning the extent to which the relevant component was publicly known before defendants used it for their own products.

6. Evidence—expert witnesses—mootness

The trial court did not err in an action for misappropriation of trade secrets, unfair and deceptive trade practices, and breach of a consent order by denying as moot defendant's motions to exclude the testimony of two expert witnesses. The claims for trade secrets and unfair trade practices had been dismissed and the testimony was not relevant to the breach of contract claim (breach of a consent order being a breach of contract claim).

7. Contracts—consent order—breach—trade secrets—genuine issue of material fact

The trial court properly declined to grant summary judgment for plaintiff (the prior employer of a chemist) on a breach of contract claim (arising from breach of a consent order) against defendant chemist. There was a genuine issue of material fact concerning whether the component defendant used in developing a similar product for his later employer was equivalent to a proprietary component developed by defendant for use in plaintiff's products.

8. Contracts—breach of consent order—disclosure of proprietary information—summary judgment

In a dispute over trade secrets involving specialty adhesives, the trial court did not err by entering summary judgment for plaintiff on a breach of contract claim against defendant chemist (plaintiff's former employee) for violating a consent order by disclosing proprietary components in a European patent application.

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) from an interlocutory order entered on 16 January 2018 by Special Superior Court Judge for Complex Business Cases Michael L. Robinson in Superior Court, Durham County, after the case was designated a mandatory complex

business case by the Chief Justice under N.C.G.S. § 45.4(b). Heard in the Supreme Court on 28 August 2019.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, Benjamin Thompson, and J. Blakely Kiefer, for plaintiff-appellants.

Mast, Mast, Johnson, Wells & Trimyer, by George B. Mast, Charles D. Mast, Clint Mast, and Lily Van Patten, for defendant-appellee Samuel B. Osae.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Philip J. Strach and Brodie D. Erwin, for defendant-appellee Scott Bader, Inc.

ERVIN, Justice.

This case involves a dispute between plaintiff SciGrip, Inc. (formerly known as IPS Structural Adhesives Holdings, Inc.), a wholly-owned subsidiary of plaintiff IPS Intermediate Holdings Corporation (collectively, SciGrip); defendant Samuel Osae, a chemist formerly employed by SciGrip; and defendant Scott Bader, Inc., by which Mr. Osae became employed after his departure from SciGrip's employment. SciGrip and Scott Bader were competitors in the development, manufacture, and sale of structural methyl methacrylate adhesives used in the marine and other industries for the purpose of bonding metals, composites, and plastics. As will be discussed in greater detail below, the issues before us in this case involve whether the trial court correctly decided the parties' summary judgment motions relating to the claims asserted in SciGrip's amended complaint for misappropriation of trade secrets, unfair and deceptive trade practices, breach of contract, and punitive damages and Mr. Osae's motions to exclude the testimony of two expert witnesses proffered by SciGrip. After careful consideration of the parties' challenges to the trial court's order in light of the record evidence, we conclude that the challenged trial court order should be affirmed.

I. Factual Background

A. Substantive Facts

In July 2000, SciGrip, a corporation involved in the formulation, manufacture, and sale of structural adhesives, hired Mr. Osae as an Application and Development Manager responsible for formulating structural methyl methacrylate adhesives. Mr. Osae served as the sole formula chemist in SciGrip's Durham office and as the person within the

company with principal responsibility for formulating structural methyl methacrylate adhesives.

At the time that he entered into its employment, Mr. Osae signed a Proprietary Information and Inventions Agreement in which he agreed to refrain from disclosing any of SciGrip's proprietary information to any person or entity at any time during or after his employment with SciGrip.[1] In addition, Mr. Osae assigned all of the intellectual property rights and trade secrets that he learned or developed during his employment to SciGrip. On 21 December 2006 and 4 January 2008, respectively, Mr. Osae signed two Nonqualified Stock Option Agreements in which he agreed to maintain the confidentiality of all non-public information in his possession relating to SciGrip and to refrain from working for a competitor after leaving SciGrip's employment for periods of two years and one year, respectively.

Subsequently, Mr. Osae entered into discussions with Scott Bader about the possibility that Mr. Osae would work for Scott Bader in connection with its efforts to develop a structural methyl methacrylate adhesive product to be known as Crestabond. At the time that he met with Scott Bader representatives, Mr. Osae stated that he was dissatisfied with the recognition that he had received at SciGrip, that he wanted to leave SciGrip's employment, and that he could assist Scott Bader in developing structural methyl methacrylate adhesives.

On 27 August 2008, Mr. Osae resigned from his employment at SciGrip to take a position with Scott Bader as a senior applications chemist. At the time that he left SciGrip's employment, Mr. Osae executed a termination certificate in which he agreed to maintain the confidentiality of SciGrip's proprietary information. While employed with Scott Bader, Mr. Osae remained a North Carolina resident, travelling to the United Kingdom and, after 2009, to Ohio for the purpose of performing any necessary laboratory work. In October 2008, John Reeves, who served as SciGrip's president, encountered Mr. Osae at a trade show, where Mr. Osae told Mr. Reeves that he had joined Scott Bader and was involved in the development of structural methyl methacrylate adhesives.

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1. According to the Proprietary Information and Inventions Agreement, "proprietary information" is defined as "any information, technical or nontechnical, that derives independent economic value, actual or potential, from not being known to the public or other persons outside [SciGrip] who can obtain economic value from its disclosure or use, and includes information of [SciGrip], its customers, suppliers, licensors, licensees, distributors and other persons and entities with whom [SciGrip] does business," including, but not limited to, any "formulas, developmental or experimental work, methods, techniques, processes, customer lists, business plans, marketing plans, pricing information, and financial information."

On 12 November 2008, SciGrip filed a complaint in Superior Court, Durham County, against Mr. Osae and Scott Bader in which it alleged that defendants had misappropriated SciGrip's trade secrets; engaged in unfair and deceptive trade practices; and sought to enforce the provisions of the Proprietary Information and Inventions Agreement and the Nonqualified Stock Options Agreements that Mr. Osae had executed during his employment with SciGrip. *See IPS Structural Adhesives Holdings, Inc. v. Osae*, 2018 NCBC 10, 2018 WL 632950. On 15 December 2008, the parties agreed to the entry of a consent order for the purpose of resolving the issues that were in dispute between them. According to the consent order, which utilized the definition of confidential information contained in the Proprietary Information and Inventions Agreement, Mr. Osae was prohibited from disclosing, and Scott Bader was prohibited from using, any of SciGrip's protected information. On the other hand, the consent order allowed Mr. Osae to continue working for Scott Bader on the condition that he perform all of his laboratory work in the United Kingdom until 1 January 2010. Finally, the consent order prohibited Scott Bader from introducing new products that competed with those offered by SciGrip until September 2009.

After the entry of the consent order, Mr. Osae developed several Crestabond formulations for Scott Bader. In April 2009, Scott Bader began preparing a patent application relating to these newly developed formulations. In February 2010, Scott Bader filed an application for the issuance of a European patent relating to its Crestabond formulations that was published on 1 September 2011. Scott Bader's patent application disclosed the components used in the newly formulated Crestabond products.

After it became concerned about the work that Mr. Osae had been performing for Scott Bader, SciGrip hired Chemir Analytical Services to perform a deformulation analysis of a sample of a new Scott Bader product in order to identify the components utilized in that product and to determine how much of each component was present in it. On 28 April 2011, Chemir provided a report to SciGrip that identified some of the chemicals and materials that had been used in the new Scott Bader product without providing a complete identification of all of the materials that the product contained. Although the Chemir report did not indicate that any of SciGrip's propriety materials had been included in the new Scott Bader product, the report did express concerns about "what [Mr. Osae] was doing."

In June 2011, while he was still employed by Scott Bader, Mr. Osae formed a new structural methyl methacrylate adhesive company named

Engineered Bonding Solutions, LLC. On 26 August 2011, Mr. Osae resigned from his employment with Scott Bader and moved to Florida, where he became Vice President of Technology at Engineered Bonding. However, Mr. Osae continued to be a North Carolina resident through at least 15 December 2014. After becoming associated with Engineered Bonding, Mr. Osae served as the sole formulator and developer of the company's structural methyl methacrylate adhesives product, which was known as Acralock. On 24 September 2012, Engineered Bonding filed a provisional patent application with the United States Patent and Trademark Office relating to an Acralock product, with this application having been published on 21 June 2016.

At approximately the same time that Scott Bader's European patent was published in September 2012, SciGrip began discussions with an entity that was interested in acquiring SciGrip. During the course of these discussions, a representative from the potential acquiring company expressed concern about whether Mr. Osae had disclosed SciGrip's product formulations and indicated that the publication of Scott Bader's European patent application would have a material, negative effect upon SciGrip's value. SciGrip had not been aware of Scott Bader's European patent application until the date of this conversation. Ultimately, the potential acquiring entity decided to refrain from acquiring SciGrip.

B. Procedural History

On 3 May 2013, SciGrip filed a complaint in the Superior Court, Durham County, in which it asserted claims against Mr. Osae for breach of contract, misappropriation of trade secrets, and unfair and deceptive trade practices. On 1 December 2014, SciGrip filed an amended complaint that asserted claims against both Mr. Osae and Scott Bader. Ultimately, SciGrip asserted claims for (1) misappropriation of trade secrets against both defendants; (2) breach of contract against both defendants for violating the consent order during Mr. Osae's employment with Scott Bader; (3) breach of contract against Mr. Osae for violating the consent order during his employment with Engineered Bonding; (4) unfair and deceptive trade practices against both defendants; and (5) claims for punitive damages against both defendants. Mr. Osae and Scott Bader filed answers to SciGrip's amended complaint on 5 January 2015 and 12 March 2015, respectively, in which they denied the material allegations of the amended complaint and asserted various affirmative defenses.

On 31 May 2017, SciGrip filed a motion seeking summary judgment with respect to the issue of liability relating to each of the claims that it had asserted against both defendants aside from its claim for punitive

damages. On the same date, Mr. Osae filed a motion seeking summary judgment in his favor with respect to SciGrip's claims for misappropriation of trade secrets claim, unfair and deceptive trade practices, and punitive damages, and Scott Bader filed a motion seeking summary judgment in its favor with respect to each of the claims that SciGrip had asserted against it in the amended complaint. In addition, Mr. Osae filed a motion seeking to have the testimony of two of SciGrip's experts, Michael Paschall and Edward Petrie, excluded from the evidentiary record. A hearing was held before the trial court for the purpose of considering the parties' motions on 28 September 2017.

On 16 January 2018, the trial court entered a sealed order deciding the issues raised by the parties' motions.[2] With respect to SciGrip's misappropriation of trade secrets claim, the trial court noted that this Court had not yet decided which choice of law test should be applied in connection with misappropriation of trade secret claim: (1) the *lex loci delicti* test (*lex loci* test), which requires the use of the law of the state "where the injury or harm was sustained or suffered," *Harco Nat'l Ins. Co. v. Grant Thornton LLP*, 206 N.C. App. 687, 695, 698 S.E.2d 719, 724 (2010) (quoting 16 Am. Jur. 2d *Conflict of Laws* § 109 (2009)), or (2) the "most significant relationship test," a multi-factor test which requires the use of the law of the state with the most significant ties to the parties and the facts at issue in the case in question. Acting in reliance upon the Business Court's earlier decision in *Window World of Baton Rouge, LLC v. Window World, Inc.*, 2017 NCBC 58, 2017 WL 2979142, the trial court elected to apply the *lex loci* test in identifying the law applicable to SciGrip's misappropriation of trade secrets claim in this case and focused its analysis upon the place at which "the tortious act of misappropriation and use of the trade secret occurred," quoting *Domtar AI Inc. v. J.D. Irving, Ltd.*, 43 F. Supp. 3d 635, 641 (E.D.N.C. 2014). In view of the fact that SciGrip did not argue that Mr. Osae had wrongfully acquired the disputed information in North Carolina, the fact that the patent application in which SciGrip's proprietary information had allegedly been disclosed by Scott Bader had been filed in Europe, and the fact that Mr. Osae's laboratory work for Scott Bader had been performed in England or Ohio rather than North Carolina, the trial court concluded that SciGrip had failed to demonstrate that Mr. Osae and Scott Bader had misappropriated SciGrip's trade secrets in North Carolina and that summary judgment should be entered in favor of Mr. Osae and Scott Bader with respect to this claim. Similarly, the trial court noted that any

2. A redacted version of the same order was filed on 30 January 2018.

purported evidence of misappropriation that might have occurred during Mr. Osae's employment with Engineered Bonding involved actions that occurred outside of North Carolina. As a result, the trial court entered summary judgment in favor of both defendants with respect to SciGrip's misappropriation of trade secrets claim.

In addressing SciGrip's breach of contract claims, the trial court noted that the parties agreed that the claims in question were governed by North Carolina law. According to the trial court, the relevant provisions of the consent order protected legitimate business interests and were, for that reason, valid and enforceable. Similarly, the trial court held that, since the consent order prohibited any use of SciGrip's confidential information in any manner, SciGrip was not required to show that an intentional breach of contract had occurred. In addition, the trial court determined that the record reflected the existence of genuine issues of material fact concerning the date upon which SciGrip had learned that Mr. Osae and Scott Bader had breached their obligations under the consent order, with this dispute being sufficient to preclude an award of summary judgment in favor of SciGrip and against Scott Bader on statute of limitations grounds. Finally, the trial court concluded that, since the record contained undisputed evidence tending to show that certain components used in Crestabond products were unknown to the general public prior to the publication of the European patent application, SciGrip was entitled to the entry of summary judgment in its favor against Mr. Osae for breaching the provisions of the consent order in connection with the development of Crestabond products.

Similarly, in addressing SciGrip's breach of contract claim against Mr. Osae relating to events that occurred after he left Scott Bader to join Engineered Bonding, the trial court concluded that certain components upon which SciGrip's claim was based were either publicly known prior to the filing of Scott Bader's European patent application or had not been used in Engineered Bondings' Acralock product, but that the record did not permit a conclusive determination as to the extent to which another component upon which SciGrip's claim was based was equivalent to a component used in the Acralock product. As a result, the trial court refused to grant summary judgment in favor of either party with respect to the breach of contract claim that SciGrip asserted against Mr. Osae based upon his alleged conduct following his departure from Scott Bader for Engineered Bonding.

Moreover, given that it had already granted summary judgment in Mr. Osae and Scott Bader's favor with respect to SciGrip's trade secrets claim, given that SciGrip's unfair and deceptive trade practices claim

rested upon its misappropriation of trade secrets claim, and given that SciGrip had failed to assert that the breach of contract in which Scott Bader and Mr. Osae had allegedly engaged involved any substantial aggravating circumstances, the trial court granted summary judgment in favor of Scott Bader and Mr. Osae with respect to SciGrip's unfair and deceptive trade practices claim.

In addition, given that SciGrip's only surviving claims sounded in breach of contract; that punitive damages may not be awarded for breach of contract in the absence of an identifiable tort, citing *Cash v. State Farm Mut. Auto Ins. Co.*, 137 N.C. App. 192, 200, 528 S.E.2d 372, 377 (2000) (stating that, "in order to sustain a claim for punitive damages, there must be an identifiable tort which is accompanied by or partakes of some element of aggravation"); and that SciGrip had failed to forecast any evidence tending to show the occurrence of such a tort, the trial court concluded that SciGrip's punitive damages claim did not retain any viability. As a result, the trial court entered summary judgment in favor of Scott Bader and Mr. Osae with respect to SciGrip's request for punitive damages.

Finally, the trial court determined that the expert testimony proffered by Mr. Paschall and Mr. Petrie on behalf of SciGrip only related to SciGrip's misappropriation of trade secrets and unfair and deceptive trade practices claims and had no bearing upon its surviving breach of contract claims. In view of the fact that SciGrip's misappropriation of trade secrets and unfair and deceptive trade practices claims had been dismissed for other reasons, the trial court determined that Mr. Osae's motions to exclude the testimony of Mr. Paschall and Mr. Petrie on behalf of SciGrip had been rendered moot. SciGrip and Mr. Osae noted appeals to this Court from the trial court's order. In addition, SciGrip filed a conditional petition seeking the issuance of a writ of certiorari on 3 July 2018 in which it requested that this Court "treat and accept its appeal of the Order and Opinion on Motion for Summary Judgment [and] Motions to Exclude . . . entered in the above-captioned case" in the event that this Court concluded that no substantial rights of SciGrip were affected by the trial court's decision. On 26 October 2018, this Court allowed SciGrip's conditional petition for writ of certiorari.

II. Substantive Legal Analysis

A. Standard of Review

According to well-established North Carolina law, 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 judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c). An appellate court reviews a trial court's decision to grant or deny a motion for summary judgment *de novo*. *See Meinck v. City of Gastonia*, 371 N.C. 497, 502, 819 S.E.2d 353, 357 (2018). A trial court's ruling concerning the admissibility of an expert's testimony "will not be reversed on appeal absent a showing of abuse of discretion." *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004), *superseded by statute*, N.C.G.S. § 8C-1, Rule 702, 2011 N.C. Sess. Laws 283). "A trial court's rulings on relevancy are technically not discretionary, though we accord them great deference on appeal." *State v. Lane*, 365 N.C 7, 27, 707 S.E.2d 210, 223 (2011).

B. SciGrip's Claims

In seeking relief from the challenged trial court orders, SciGrip contends that the trial court erred by: (1) applying the *lex loci* test rather than the most significant relationship test in evaluating the merits of its misappropriation of trade secrets claim; (2) granting summary judgment in favor of Scott Bader and Mr. Osae with respect to its misappropriation of trade secrets claim based upon a misapplication of the *lex loci* test; (3) granting summary judgment in favor of Scott Bader and Mr. Osae with respect to its unfair and deceptive trade practices claim given the existence of evidence tending to show the existence of the necessary aggravating circumstances; (4) granting summary judgment in favor of Scott Bader and Mr. Osae with respect to its punitive damages claim given that the record contained sufficient evidence to show that those two parties engaged in sufficiently aggravated or malicious behavior; (5) concluding that one of the components upon which its breach of contract claims rested had been made public prior to the publication of Scott Bader's European patent application; (6) denying as moot Mr. Osae's motions to exclude the testimony of Mr. Paschall and Mr. Petrie given that their testimony was relevant to other claims; and (7) denying SciGrip's motion for summary judgment with respect to its breach of contract claim against Mr. Osae arising from his work for Engineered Bonding on the grounds that one of the components upon which SciGrip's claim relied had not been shown to be equivalent to one of the components used in SciGrip's proprietary products. We will examine the validity of each of SciGrip's challenges to the trial court's order in the order in which SciGrip has presented them before the Court.

1. Misappropriation of Trade Secrets

a. Choice of Law

[1] As an initial matter, SciGrip argues that the trial court erred by entering summary judgment in favor of Scott Bader and Mr. Osae with respect to its misappropriation of trade secrets claim on the grounds that the trial court should have utilized the most significant relationship test, rather than the *lex loci* test, in making this determination.[3] In support of this contention, SciGrip directs our attention to numerous decisions of the Court of Appeals and from courts in other jurisdictions which utilize the most significant relationship test rather than the *lex loci* test in deciding multistate commercial cases. According to SciGrip, these decisions tend to prefer the use of the most significant relationship test on the grounds that it avoids rigidity and makes it possible to use "a more flexible approach which would allow the court in each case to inquire which state has the most significant relationship with the events constituting the alleged tort and with the parties." *Santana, Inc. v. Levi Strauss and Co.*, 674 F.2d 269, 272 (4th Cir. 1982). In addition, SciGrip asserts that the trial court's reliance upon *Window World* was misplaced given that it relied upon a decision of this Court in a products liability case rather than a case in which the court was called upon to decide issues arising from commercial relations involving entities located in and events occurring in multiple jurisdictions.

Mr. Osae responds that, under the conflict of laws principles traditionally utilized in this jurisdiction, the *lex loci* test has been deemed applicable in dealing with claims that affect the substantial rights of the parties, citing *Harco Nat'l Ins. Co.*, 206 N.C. App. at 692, 698 S.E.2d at 722. In addition, Mr. Osae asserts that the federal courts sitting in this and other states have tended to apply the *lex loci* test in determining whether particular misappropriation of trade secrets claims are encompassed within the ambit of the North Carolina Trade Secrets Protection Act, citing *Domtar Al Inc.*, 43 F. Supp. 3d at 641, *Chattery Int'l Inc. v. JoLida, Inc.*, No. WDQ-10-2236, 2012 U.S. Dist. WL 1454158 (D. Md. Apr. 2 2012), and 3A *Composites USA, Inc. v. United Indus., Inc.*, No. 5:14-CV-5147, 2015 U.S. Dist. WL 5437119 (W.D. Ark. Sept. 15 2015). Mr. Osae argues that, when taken in their entirety, these cases demonstrate

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3. The trial court deemed the choice of law issue in this case dispositive on the grounds that, since "the undisputed evidence demonstrates that the alleged misappropriation occurred outside the State of North Carolina," "[SciGrip] cannot bring a claim under the North Carolina [Trade Secrets Protection Act]." In view of the fact that none of the parties have challenged the validity of this portion of the trial court's analysis on appeal, we assume, without deciding, that it is correct.

that, under North Carolina law, the ultimate issue for choice of law purposes is the location at which the act of misappropriation occurred rather than the location at which the defendant obtained the information that he or she misappropriated. In the same vein, Scott Bader emphasizes that misappropriation of trade secrets claims sound in tort and that North Carolina precedent unequivocally calls for the use of the *lex loci* test to decide conflict of laws issues arising in tort cases.

According to the *lex loci* test, the substantive law of the state "where the injury or harm was sustained or suffered," which is, ordinarily, "the state where the last event necessary to make the actor liable or the last event required to constitute the tort takes place," applies. *Harco Nat'l Ins. Co.*, 206 N.C. App. at 695, 698 S.E.2d at 724 (quoting 16 Am. Jur. 2d *Conflict of Laws* § 109 (2009)). The most significant relationship test, on the other hand, provides for the use of the substantive law of the state with the most significant relationship to the claim in question, with that determination to be made on the basis of an evaluation of "(a) the place where the injury occurred; (b) the place where the conduct giving rise to the injury occurred; (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; [and] (d) the place where the relationship, if any, between the parties is centered." *Henry v. Henry*, 291 N.C. 156, 163–64, 229 S.E.2d 158, 163 (1979) (quoting Restatement, Conflict of Laws 2d, § 145). We agree with the trial court that the proper choice of law rule for use in connection with our evaluation of SciGrip's misappropriation of trade secrets claim is the *lex loci* test.

As the trial court noted, this Court's jurisprudence favors the use of the *lex loci* test in cases involving tort or tort-like claims. *See*, *e.g.*, *Boudreau v. Baughman*, 322 N.C. 331, 335–36, 368 S.E.2d 849, 853–54 (1988) (noting that "[o]ur traditional conflict of laws rule is that matters affecting the substantial rights of the parties are determined by *lex loci*," with this Court having "consistent[ly] adhere[d]" to the *lex loci* test in tort actions" and with there being "no reason to abandon this well-settled rule at this time"); *Braxton v. Anco Electric*, *Inc.*, 330 N.C. 124, 126–27, 409 S.E.2d 914, 915 (1991) (stating that "[w]e do not hesitate in holding that as to the tort law controlling the rights of the litigants in the lawsuit . . . the long-established doctrine of *lex loci delicti commissi* applies"); *see also GYBE v. GYBE*, 130 N.C. App. 585, 587–88, 503 S.E.2d 434, 435 (1998) (noting that a "review of North Carolina caselaw reveals a steadfast adherence by our courts to the traditional application of the *lex loci delicti* doctrine" in matters affecting the substantive rights of the parties). Consistent with our traditional approach, a number of

federal district courts have applied the *lex loci* test when assessing North Carolina trade secrets misappropriation claims. For example, a federal district court held in *Domtar AI Inc.* that "North Carolina's choice of law rules call for the application of the *lex loci delicti* (or 'law of the place of the wrong') test to determine which law should apply to claims for misappropriation of trade secrets," with "the *lex loci* [in trade secrets cases being] where the actual misappropriation and use of the trade secret occurs" rather than the place at which the defendant obtained the relevant information. *Domtar AI Inc.*, 43 F. Supp. 3d at 641 (citing *Merck & Co. Inc. v. Lyon*, 941 F. Supp. 1443, 1456 n.3 (M.D.N.C. 1996), and *Salsbury Laboratories*, *Inc. v. Merieux Laboratories*, *Inc.*, 735 F. Supp. 1555, 1568 (M.D. Ga. 1989), *aff'd as modified*, 908 F.2d 706 (11th Cir. 1990)). Similarly, in *3A Composites USA*, 2015 U.S. Dist. WL 5437119 at *1, a federal district court concluded that a North Carolina court "would have applied the *lex loci delicti* rule to determine which state's laws govern all of [the North Carolina employer's] claims other than breach of contract," including the plaintiff's misappropriation of trade secrets claim, id. at *3–4 (citing *United Dominion Indus.*, *Inc. v. Overhead Door Corp.*, 762 F. Supp. 126, 129 (W.D.N.C. 1991) (predicting that this Court "would apply the traditional *lex loci* rule rather than the most significant relationship test" in a deceptive trade practices case); *Martinez v. Nat'l Union Fire Ins. Co.*, 911 F. Supp. 2d 331, 338 (E.D.N.C. 2012) (noting that this Court "has affirmed the continuing validity" of the *lex loci* test in deceptive trade practices cases); and *Domtar AI Inc.*, 43 F. Supp. 3d at 641 (applying *lex loci* test to a misappropriation of trade secrets claim)). As a result, the weight of this Court's decisions and those of federal courts predicting how this Court would address misappropriation of trade secrets claims tends to support the application of the *lex loci* test, rather than the most significant relationship test, in the misappropriation of trade secrets context.

The result suggested by the weight of authority is supported by more practical considerations. In rejecting the Second Restatement approach to conflict of laws issues, of which the most significant relationship test is an example, in *Boudreau*, we stated that the *lex loci* test "is an objective and convenient approach which continues to afford certainty, uniformity, and predictability of outcome in choice of law decisions." *Boudreau*, 322 N.C. at 336, 368 S.E.2d at 854. Although we cannot disagree with SciGrip's contention that use of the most significant relationship test would provide North Carolina courts with greater flexibility in identifying the state whose law should apply in any particular instance, that increased flexibility is achieved at the cost of introducing significant uncertainties into the process of identifying the state whose law

should apply, which we do not believe would be beneficial. Moreover, while the application of the *lex loci* test can be difficult in some circumstances, including cases involving events that occur in and entities associated with multiple jurisdictions, those difficulties pale in comparison with the lack of certainty inherent in the application of a totality of the circumstances test such as the most significant relationship test. As a result, we hold that the trial court did not err by determining that the appropriate choice of law test for use in misappropriation of trade secrets cases is the *lex loci* test.

b. Application of the *Lex Loci* Test

[2] Secondly, SciGrip argues that, even if the *lex loci* test, rather than the most significant relationship test, should be utilized in identifying the state whose law should be deemed controlling in this case, a proper application of the *lex loci* test compels the conclusion that North Carolina is the state in which the last act necessary to establish its claim occurred. According to SciGrip, the last act giving rise to its misappropriation of trade secrets claim was not the development work that Mr. Osae performed for Scott Bader in the United Kingdom and Ohio or the filing of Scott Bader's European patent application. Instead, SciGrip argues that the last act in this case was, for *lex loci* purposes, the "acquisition, disclosure or use" of another's trade secret without the owner's consent, citing N.C.G.S. § 66-152(1), which SciGrip contends occurred when Scott Bader and Mr. Osae violated the consent order, which had been entered by a North Carolina court.[4] In addition, SciGrip argues that, unlike the situation that existed in cases such as *Domtar AI Inc.*, *3A Composites*, and *Chattery*, in which the defendant-employees had each relocated to another state in order to work for a competitor, Mr. Osae remained a resident of North Carolina throughout the period during which the misappropriation of SciGrip's trade secrets allegedly occurred. SciGrip further argues that, since its principal place of business is located in North Carolina, the ultimate injury caused by the alleged misconduct of Scott Bader and Mr. Osae occurred in this jurisdiction, citing *Verona v. U.S. Bancorp*, No. 7:09-CV-057-BR, 2011 WL 1252935 (E.D.N.C. Mar. 29, 2011) (holding that the place of the injury in a defamation case was the state in which the defamatory statement was published); and *Harco*, 206 N.C. App. at 697, 698 S.E.2d at 725–26 (stating that the location of the plaintiff's place of business "may be useful for determining the place of

4. SciGrip does not appear to contend that Mr. Osae performed any act of misappropriation in North Carolina during the time that he was employed by Engineered Bonding and has not, for that apparent reason, argued that, under the *lex loci* test, there is any basis for finding that North Carolina law applies to that portion of its claim against Mr. Osae.

plaintiff's injury in those rare cases where, even after a rigorous analysis, the place of injury is difficult or impossible to discern"). In SciGrip's view, a decision to apply the law of another jurisdiction would frustrate the purpose of the North Carolina Trade Secrets Protection Act, which it asserts is intended to protect the trade, commerce, and residents of North Carolina. Finally, SciGrip asserts that, even if North Carolina law does not apply in this instance, the trial court should have applied the law of the applicable state rather than simply dismissing its claim, citing *Charnock v. Taylor*, 223 N.C. 360, 362, 26 S.E.2d 911, 913 (1943) (stating that, "[i]f under the *lex loci* [test] there [is] a right of action, comity permits it to be prosecuted in another jurisdiction").

Mr. Osae, on the other hand, argues that, while North Carolina law governs SciGrip's breach of contract claim, the mere fact that North Carolina law applies to that claim does not render North Carolina law applicable to any other claim, citing *Domtar AI Inc.*, 43 F. Supp. 3d at 641–42. In addition, Mr. Osae argues that the plaintiff's principal place of business is not determinative for choice of law purposes under the *lex loci* test, with the identification of the relevant state instead being dependent upon the place at which the use and disclosure of the misappropriation of the proprietary information occurred instead, citing *id.*; *Harco Nat'l Ins. Co.*, 206 N.C. App. at 697, 698 S.E.2d at 725–26 (declining to create a bright line rule for purposes of the *lex loci* test that a plaintiff's injury is suffered at its principal place of business); and *United Dominion Indus.*, 762 F. Supp. at 129–31 (rejecting an argument advanced in the context of an unfair and deceptive practices case that, for purposes of the *lex loci* test, the location of the corporation's "pocketbook" should determine the location at which the offending conduct occurred), and with any unlawful use or disclosure of SciGrip's information having occurred in the United Kingdom, Ohio, or Florida rather than in North Carolina. Mr. Osae criticizes SciGrip's reliance upon decisions in defamation cases, which he contends are not analogous to cases involving misappropriation of trade secrets claims. Finally, Mr. Osae responds to SciGrip's public policy discussion by arguing that the trial court acted reasonably by declining to extend the scope of the North Carolina Trade Secrets Protection Act to the United Kingdom, Ohio, and Florida.

In addition to echoing a number of the arguments advanced by Mr. Osae, Scott Bader asserts that the fact that Mr. Osae continued to own property and reside in North Carolina during his period of employment with Scott Bader and Engineered Bonding did not tend to show that he had impermissibly used or disclosed SciGrip's confidential information

in North Carolina. Instead, Scott Bader argues that the only work that Mr. Osae did for Scott Bader in North Carolina involved sales rather than product formulation. In Scott Bader's view, SciGrip's contention that Mr. Osae possessed and used his company-issued laptop computer and laboratory books to formulate adhesives in North Carolina lacks any support in the record evidence. Scott Bader contends that any breach of the consent order that either Scott Bader or Mr. Osae may have committed did not convert SciGrip's breach of contract claim into a misappropriation of trade secrets claim. Finally, Scott Bader argues that SciGrip's failure to request the trial court to consider a misappropriation of trade secrets claim on any theory other than as a violation of the North Carolina Trade Secrets Protection Act precludes it from asserting such a claim under the law of any other jurisdiction, citing *Leonard v. Johns-Manville Sales Corp.*, 309 N.C. 91, 95, 305 S.E.2d 528, 531 (1983) (stating that "[t]he party seeking to have the law of a foreign jurisdiction apply has the burden of bringing such law to the attention of the court").

Having determined that the *lex loci* test, rather than the most significant relationship test, should be utilized to determine whether North Carolina law applies to SciGrip's misappropriation of trade secrets claim, we have no hesitation in concluding that North Carolina law does not apply to this claim. Our conclusion to this effect rests upon the fact that all of the evidence tends to show that any misappropriation of SciGrip's trade secrets in which Mr. Osae and Scott Bader may have engaged occurred outside North Carolina and the fact that such a determination is consistent with the applicable decisions of courts applying North Carolina law. *See Domtar AI Inc.*, 43 F. Supp. 3d at 641; *Harco Nat'l Ins. Co.*, 206 N.C. App. at 692, 698 S.E.2d at 722. As a result, the North Carolina Trade Secrets Protection Act does not provide a source of liability given the facts of this case.

SciGrip's arguments fail to persuade us to reach a different conclusion. First, SciGrip urges us to conclude that the fact that Mr. Osae continued to reside in North Carolina and that he might have brought his laptop computer and laboratory notebook to North Carolina on his trips home suggests that he impermissibly used SciGrip's proprietary information in North Carolina while working for Scott Bader. However, the factual basis upon which this aspect of SciGrip's argument rests is simply insufficient to permit an inference that any misappropriation of SciGrip's trade secrets occurred in North Carolina. Secondly, the fact that Scott Bader's European patent application was published worldwide, including in North Carolina, does not suffice to render North Carolina law applicable to this law. On the contrary, acceptance of this logic would

make the law of every jurisdiction in the United States or, perhaps, the entire world applicable to SciGrip's misappropriation of trade secrets claim. Similarly, the fact that the record contains sufficient evidence to permit a determination that Scott Bader and Mr. Osae violated a North Carolina consent order does not somehow render the North Carolina Trade Secrets Protection Act applicable to its misappropriation of trade secrets claim given that different choice of law rules govern tort or tort-like actions and breach of contract claims. As a result, the trial court did not err by determining that North Carolina law did not apply to SciGrip's misappropriation of trade secrets claim.[5]

Although SciGrip argues, in the alternative, that the trial court should have applied the law of the jurisdiction in which the last act necessary to support its misappropriation of trade secrets claim occurred rather than granting summary judgment in favor of Scott Bader and Mr. Osae with respect to that claim, that argument is equally unavailing. At the time that SciGrip filed its amended complaint in this case, it had ample knowledge of the basic facts underlying its misappropriation of trade secrets claim. Instead of seeking relief under the law of another relevant jurisdiction, SciGrip asserted a claim under the North Carolina Trade Secrets Protection Act. Having pled and argued its claim in this manner before the trial court, SciGrip is not entitled to seek relief from the trial court's summary judgment order on the grounds that the trial court should have evaluated the validity of SciGrip's misappropriation of trade secrets claim on the basis of a different legal theory. As a result, for all of these reasons, the trial court did not err by granting summary judgment in favor of Scott Bader and Mr. Osae with respect to SciGrip's misappropriation of trade secrets claim.

2. Unfair and Deceptive Trade Practices Claim

[3] SciGrip contends that the trial court erred by granting summary judgment in favor of Scott Bader and Mr. Osae with respect to its unfair

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5. In addition to the arguments discussed in the text, Scott Bader has also argued that SciGrip waived any claim for misappropriation of trade secrets that it might have otherwise had when it disclosed its allegedly proprietary information in public filings and in open court during the litigation of this case, citing *Krawiec v. Manly*, 370 N.C. 602, 611, 811 S.E.2d 542, 549 (2018) and *Glaxo, Inc. v. Novopharm Ltd.*, 931 F. Supp. 1280, 1301–02 (E.D.N.C. 1996), *aff'd*, 110 F.3d 1562 (Fed. Cir. 1997); that SciGrip's misappropriation of trade secrets claim was barred by the statute of limitations and rested upon inadmissible hearsay; and that SciGrip's misappropriation of trade secrets claim was barred by the economic loss rule. In view of our decision to affirm the trial court's decision to grant summary judgment in favor of Scott Bader and Mr. Osae with respect to SciGrip's misappropriation of trade secrets claim on the grounds discussed in the text of this opinion, we need not address these additional arguments any further in this opinion.

and deceptive trade practices claim on the grounds that SciGrip had, in fact, forecast evidence tending to show the existence of the aggravating circumstances needed to support that claim.[6] We do not find this argument persuasive.

"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 v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001) (citing *Spartan Leasing Inc. v. Pollard*, 101 N.C. App. 450, 460–61, 400 S.E.2d 476, 482 (1991)). As a general proposition, unfairness or "deception either in the formation of the contract or in the circumstances of its breach" may establish the existence of substantial aggravating circumstances sufficient to support an unfair and deceptive trade practices claim. *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989) (citing *United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985, 992 (4th Cir. 1981)). Moreover, in some circumstances, a continuous transaction may constitute an unfair or deceptive act in addition to a breach of contract. *See Garlock v. Henson*, 112 N.C. App. 243, 246, 435 S.E.2d 114, 116 (1993). In the event that the same act or transaction supports a claim for both breach of contract and unfair or deceptive trade practices, "damages may be recovered either for the breach of contract, or for violation of [N.C.G.S. § 75-1.1]." *Id.* (quoting *Marshall v. Miller*, 47 N.C. App. 530, 542, 268 S.E.2d 97, 103 (1980), *modified and aff'd*, 302 N.C. 539, 276 S.E.2d 397 (1981)).

According to SciGrip, the breaches of contract committed by Scott Bader and Mr. Osae constituted such "immoral, unethical, oppressive, unscrupulous, or substantially injurious" conduct as to establish the substantial aggravating circumstances needed to support the maintenance of an unfair and deceptive trade practices claim in the present context, particularly given that the conduct in question resulted in significant damage to SciGrip and reflected a complete failure on the part of Scott Bader and Mr. Osae to comply with the consent order, quoting *Process Components, Inc v. Baltimore Aircoil Co.*, 89 N.C. App. 649, 654, 366 S.E.2d 907, 911, *aff'd per curiam*, 323 N.C. 620, 374 S.E.2d 116

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6. In addition, SciGrip argued that its unfair and deceptive trade practices claim rested upon its misappropriation of trade secrets claim and that the trial court had erred by dismissing that claim. Having held that the trial court properly dismissed SciGrip's misappropriation of trade secrets claim, we need not address this aspect of SciGrip's challenge to the dismissal of its unfair and deceptive trade practices claim any further in this opinion.

(1988). On the other hand, Mr. Osae and Scott Bader assert that SciGrip failed to argue that their alleged breaches of contract constituted substantial aggravating circumstances before the trial court and that, even if such an argument had been advanced, the trial court properly found that SciGrip's breach of contract claim, standing alone, did not suffice to support the maintenance of an unfair and deceptive trade practices claim, citing *Mitchell v. Linville*, 148 N.C. App. 71, 74–75, 557 S.E.2d 620, 623 (2001) (holding that an intentional breach of contract claim cannot, in and of itself, provide the basis for an unfair and deceptive trade practices claim), and *Griffith v. Glen Wood Co.*, 184 N.C. App. 206, 217, 646 S.E.2d 550, 558 (2007) (holding that a plaintiff had to show both a breach of contract and the presence of substantial aggravating circumstance in order to support its unfair and deceptive trade practices claim). In addition, Mr. Osae argues that, even if SciGrip had forecast sufficient evidence to show the existence of the necessary substantial aggravating circumstances, it failed to prove that it had sustained an actual injury proximately caused by the conduct of Scott Bader and Mr. Osae.

Assuming, without in any way deciding, that SciGrip has properly preserved its "substantial aggravating circumstances" argument for purposes of appellate review, we are not persuaded that the record contains sufficient evidence to show that the necessary substantial aggravating circumstances existed. In essence, the evidence that SciGrip relies upon in support of its argument for the existence of the necessary substantial aggravating circumstances amounts to nothing more than an assertion that Mr. Osae and Scott Bader intentionally breached the consent order while knowing of its existence. As the Court of Appeals correctly held in *Mitchell*, such an intentional breach of contract, standing alone, simply does not suffice to support the assertion of an unfair and deceptive trade practices claim. As a result, we conclude that the trial court did not err by granting summary judgment in favor of Scott Bader and Mr. Osae with respect to SciGrip's unfair and deceptive trade practices claim.

3. Punitive Damages

[4] SciGrip contends that the trial court erred by granting summary judgment in favor of Scott Bader and Mr. Osae with respect to its punitive damages claim. Once again, we are not persuaded by SciGrip's argument.[7]

7. In addition to the argument discussed in the text of this opinion, SciGrip argues that the trial court erred by granting summary judgment in favor of Scott Bader and Mr. Osae with respect to its misappropriation of trade secrets and unfair and deceptive trade practices claims, either of which would suffice to support a punitive damages award. In view of our decision to affirm the trial court's order with respect to these two claims, we need not address this aspect of SciGrip's argument any further.

In seeking to persuade us of the merits of its challenge to the trial court's decision with respect to this issue, SciGrip argues that the conduct of both Scott Bader and Mr. Osae at the time that they breached their obligations under the consent order was sufficiently egregious to merit an award of punitive damages, citing *Cash*, 137 N.C. App. at 200–01, 528 S.E.2d 377), and *Oakeson v. TBM Consulting Grp., Inc.*, 2009 NCBC 23, ¶52, 2009 WL 464558, *9 (stating that, "when a breach of contract claim reflects potential fraud or deceit, or other aggravated or malicious behavior, a claim for punitive damages may lie"). According to SciGrip, Mr. Osae was angry at SciGrip because he believed that he had been treated unfairly and inadequately compensated for his work, with his decision to utilize SciGrip's proprietary information in violation of the consent order while in Scott Bader's employment and to attempt to conceal the nature of his activities by backdating his laboratory notebooks reflecting his high degree of personal animosity against his former employer. Moreover, SciGrip asserts that Mr. Osae acted maliciously when he provided Scott Bader with photographs of SciGrip's equipment and its customer lists and when he formed Engineered Bonding to compete with SciGrip using SciGrip's proprietary information. Similarly, SciGrip contends that Scott Bader's conduct in soliciting, accepting, using, and disclosing SciGrip's confidential information in violation of the consent order constituted aggravating conduct sufficient to support an award of punitive damages.

Mr. Osae argues that punitive damages may not be awarded for a breach of contract in the absence of a separate, identifiable tort and an allegation that the defendant engaged in aggravated or malicious behavior, citing *Cash*, 137 N.C. App. at 200, 528 S.E.2d at 277 (stating that "[p]unitive damages are not allowed [for breaches of contract] even when the breach is wil[l]ful[l], malicious or oppressive"). Similarly, Scott Bader points out that N.C.G.S. § 1D-15(d) specifically states that "[p]unitive damages shall not be awarded against a person solely for breach of contract." N.C.G.S. § 1D-15(d).

According to well-established North Carolina law, punitive damages may not be awarded based upon the breach of a contract in the absence of the commission of an identifiable tort. *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 111, 229 S.E.2d 297, 301 (1976) (stating that, even though "North Carolina follows the general rule that punitive or exemplary damages are not allowed for breach of contract, with the exception of a contract to marry," "where there is an identifiable tort even though the tort also constitutes, or accompanies, a breach of contract, the tort itself may give rise to a claim for punitive damages") (citing

Oestreicher v. Stores, 290 N.C. 118, 134–35, 225 S.E.2d 797, 808 (1976)). SciGrip has not forecast sufficient evidence to establish that Scott Bader and Mr. Osae committed a separate tort at the time that they allegedly breached their contractual obligations under the consent order. Instead, as we noted in our discussion of SciGrip's challenge to the trial court's decision to grant summary judgment in favor of Scott Bader and Mr. Osae with respect to SciGrip's unfair and deceptive trade practices claim, the evidence upon which SciGrip relies in support of its challenge to the trial court's decision to grant summary judgment in favor of Mr. Osae and Scott Bader with respect to SciGrip's punitive damages claim consists of little more than a contention that Mr. Osae and Scott Bader intentionally breached the consent judgment. No matter how deplorable such an act may be, an intentional breach of contract does not constitute a separate tort. As a result, the trial court did not err by granting summary judgment in favor of Scott Bader and Mr. Osae with respect to SciGri's punitive damages claim.

4. Confidentiality of Information

[5] SciGrip contends that the trial court erred by finding in favor of Scott Bader and Mr. Osae with respect to the issue of whether one of the components underlying SciGrip's breach of contract claim against Scott Bader and Mr. Osae arising from Mr. Osae's employment with Scott Bader was, in fact, proprietary information. Once again, we are not persuaded that SciGrip's contention has merit.

In support of this contention, SciGrip argues that the trial court's decision rested upon an erroneous determination that the fact that the relevant component was equivalent to another, publicly known component, meant that the relevant component was publicly known as well. SciGrip asserts that it is undisputed that, prior to the publication of Scott Bader's European patent application, the fact that the relevant component was equivalent to the publicly known component was not publicly known. At the very least, SciGrip contends that a genuine issue of material fact exists with respect to this issue sufficient to preclude summary judgment.

Mr. Osae, on the other hand, contends that the fact that the record contains evidence tending to show that another entity discussed the use of the relevant component as a replacement for the publicly known component provides ample support for the trial court's decision. In addition, Mr. Osae argues that SciGrip lacks the ability to demonstrate that the relevant component possesses any independent economic value given that SciGrip has not attempted to sell the product and given that there is

no other evidence tending to show that the relevant component has any independent economic value.

A careful review of the record demonstrates that the undisputed evidence establishes that the interchangeability of the two components was publicly known in that at least one other industry participant had discussed using the relevant component for the same purpose as the publicly known component. More specifically, the record contains undisputed evidence tending to show that the prior substance, which was chemically equivalent to the substance upon which SciGrip's claim rests, had been publicly disclosed in a number of prior patents. In addition, the record reflects that a sales representative for the company selling both the earlier and discontinued substance had stated that the new substance was intended to be used as a replacement for the earlier one. As a result, we agree with the trial court's conclusion that there is no genuine issue of material fact concerning the extent to which the relevant component was publicly known prior to the time at which Scott Bader and Mr. Osae used it in Scott Bader's Crestabond products.

5. Admissibility of Expert Testimony

[6] Next, SciGrip contends that the trial court erred by denying Mr. Osae's motions to exclude the testimony of two of its expert witnesses on the grounds that the motion in question had been rendered moot. The trial court reached this conclusion on the grounds that the testimony offered by Mr. Petrie and Mr. Paschall was only relevant to SciGrip's misappropriation of trade secrets claim and had no bearing upon its claims for breach of contract. We are unable to agree with SciGrip's argument concerning the expert testimony that it sought to elicit from Mr. Paschall and Mr. Petrie.

According to SciGrip, the testimony of Mr. Petrie concerning the extent to which Mr. Osae had the ability to independently develop adhesive products and whether the composition of one of the components used in Engineered Bonding's United States patent application was readily ascertainable through reverse engineering was relevant to SciGrip's claim against Mr. Osae for breaching the consent order during his employment with Engineered Bonding. Mr. Osae, on the other hand, argues that Mr. Petrie's testimony did not express any opinion concerning the extent, if any, to which Mr. Osae violated the consent order during his period of employment with Engineered Bonding.

Similarly, SciGrip argues that the testimony of Mr. Paschall, which addressed the amount of damages that SciGrip sustained as the result of the misappropriation of its trade secrets, was also relevant to SciGrip's

claim for breach of contract relating to the period of time during which Mr. Osae worked for Engineered Bonding. More specifically, SciGrip argues that it has been unable to ascertain the full extent of the loss that it sustained as a result of Mr. Osae's breach of the consent order during his association with Engineered Bonding and that Mr. Paschall's testimony contains information directly relevant to this issue, citing *Potter v. Hileman Labs., Inc.*, 150 N.C. App. 326, 336, 564 S.E.2d 259, 266 (2002) (holding that, in a case in which one party allegedly profited from the violation of a consent order relating to the use of the other party's confidential information, a trial court could appropriately consider the profits earned by the breaching party in determining the amount of damages that the plaintiff was entitled to recover). In response, Mr. Osae asserts that any opinion that Mr. Paschall might express concerning the amount by which Engineered Bonding has been unjustly enriched as the result of Mr. Osae's breach of the consent order during the time that he was employed by Engineered Bonding has no bearing upon the amount of damages that SciGrip would be entitled to recover as the result of any breach of contract that occurred during that time, particularly given that Engineered Bonding is not a party to this case and that Mr. Paschall did not render an opinion concerning the extent to which Mr. Osae might have been personally enriched.

Although the parties have discussed this issue as if it involved issues relating to the admissibility of expert testimony, their arguments focus upon the relevance of the challenged evidence rather than upon whether the challenged evidence satisfied the requirements for the admission of expert testimony set out in our recent decision in *State v. McGrady*, 368 N.C. 880, 787 S.E.2d 1 (2016). As a result, the ultimate question for our consideration with respect to this issue is whether the proffered evidence had "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401.

The expert testimony of Mr. Petrie was proffered for the purpose of determining whether the allegedly proprietary information upon which SciGrip's misappropriation of trade secrets claim rested was commonly known to SciGrip's competitors prior to its disclosure, the potential value of the allegedly proprietary information, and the extent to which Scott Bader and Mr. Osae had misappropriated SciGrip's trade secrets. Although some of the information contained in Mr. Petrie's expert testimony touches upon information relevant to SciGrip's breach of contract claims, the opinions that Mr. Petrie expressed concerning whether the information in question constituted a trade secret has no bearing upon

the validity of SciGrip's breach of contract claim, which is governed by the provisions of the consent judgment rather than by the statutory definition of a trade secret contained in N.C.G.S § 66-152(3). As a result, the trial court did not err by determining that Mr. Petrie's testimony related to SciGrip's misappropriation of trade secrets, rather than its breach of contract, claim.

The expert testimony of Mr. Paschall was proffered for the purpose of determining the amount of damages that SciGrip was entitled to recover as the result of the misappropriation of its trade secrets. A successful plaintiff in a misappropriation of trade secrets action pursuant to N.C.G.S. § 66-154(b)—similar to a claim sounding in quasi-contract or resting upon an implied contract, in which the plaintiff's claim "is *not* based on a promise but is imposed by law to prevent an unjust enrichment," *see Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 555–56 (1988)—is entitled to a recovery that considers the amount by which the wrongdoer has been unjustly enriched. However, since "[a]n action for unjust enrichment is quasi-contractual in nature," it "may not be brought in the face of an express contract." *Acorn Structures, Inc. v. Swantz*, 846 F.2d 923, 926 (4th Cir. 1988) (citing *In re Virginia Block Co.*, 16 B.R. 771, 774 (W.D. Va. 1982)). For that reason, "[i]f there is a contract between the parties[,] the contract governs the claim and the law will not imply a contract." *Booe*, 322 N.C. at 570, 369 S.E.2d at 156 (citing *Vetco Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 124 S.E.2d 905 (1962)). In view of the fact that the consent order constituted an express contract,[8] evidence tending to show that Engineered Bonding was unjustly enriched as the result of Mr. Osae's conduct is simply not relevant to SciGrip's breach of contract claim given that the consent order here, unlike the contract at issue in *Potter*, does not contain a provision authorizing the trial court to "determine the appropriate remedy" for any violation of its provisions. *Potter*, 150 N.C. App. at 334, 564 S.E.2d at 265. As a result, the trial court did not err by determining that Mr. Osae's motions to exclude the testimony of Mr. Petrie and Mr. Paschall should be denied on mootness grounds.

6. Breach of Contract Claim Arising From Mr. Osae's Work for Engineered Bonding

[7] Finally, SciGrip argues that the trial court erred by failing to grant summary judgment in its favor with respect to its breach of contract claim

8. Although Scott Bader contested the enforceability of the consent order before the trial court, the issue of whether the consent order constitutes a valid and enforceable contract was not in dispute before this Court.

against Mr. Osae relating to the work that he performed after becoming associated with Engineered Bonding. In support of this contention, SciGrip argues that Mr. Osae violated the consent order in developing Engineered Bonding's Acralock product because he used a component that was equivalent to one in which SciGrip had proprietary rights in the course of developing that product. Mr. Osae, on the other hand, denies SciGrip's contention that the two components are equivalent, so that the use of the component incorporated in Engineered Bonding products did not constitute a misappropriation of proprietary information.

After carefully reviewing the evidence forecast by the parties, we agree with the trial court's determination that the record reflects the existence of a genuine issue of material fact concerning whether the component that Mr. Osae used in formulating Engineered Bonding's Acralock product is equivalent to the proprietary component incorporated into SciGrip's products. Among other things, the record reflects that both components are still on the market and that neither has completely replaced the other. In addition, the record contains evidence tending to show that the two components are not equivalent and that SciGrip spent considerable time and effort determining that the product that it claims to constitute protected information could be used as a substitute for the product disclosed in Engineered Bonding's United States patent application. As a result, the trial court did not err by denying SciGrip's motion for summary judgment in its favor with respect to the claim that Mr. Osae violated the consent order while associated with Engineered Bonding.

C. Mr. Osae's Claim

In his own challenge to the trial court's order, Mr. Osae argues that the trial court erred by allowing summary judgment in favor of SciGrip with respect to its breach of contract claim against Mr. Osae predicated upon Mr. Osae's actions during his employment with Scott Bader.[9] We do not find Mr. Osae's contention persuasive.

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9. Mr. Osae contends that the trial court's decision to grant summary judgment in SciGrip's favor with respect to the breach of contract claim that SciGrip asserted against him based upon the conduct in which he engaged during his employment with Scott Bader is immediately appealable because that portion of the trial court's order affects a substantial right. More specifically, Mr. Osae contends that, unless the relevant portion of the trial court's order is immediately appealable, there is a risk that there will be inconsistent verdicts concerning his liability and that of Scott Bader with respect to the same claim, citing *Hamby v. Profile Prods., L.L.C.*, 361 N.C. 630, 634, 652 S.E.2d 231, 234 (2007) (stating that "a substantial right is affected if the trial court's order granting summary judgment to some, but not all, defendants creates the possibility of separate trials involving the same issues which could lead to inconsistent verdicts"). In response, SciGrip argues that there are no

According to Mr. Osae, the record reveals the existence of a genuine issue of material fact concerning the extent, if any, to which certain components upon which SciGrip's claim rests, and upon which the trial court's decision to grant summary judgment in favor of SciGrip with respect to this claim rested, constituted economically valuable information at the time that the alleged breach of contract occurred. More specifically, Mr. Osae contends that the record contains conflicting evidence concerning the extent to which the allegedly confidential components have commercial value as a result of their secrecy. In support of this argument, Mr. Osae asserts that SciGrip and its technical experts admitted during their depositions that the relevant components lacked any standalone commercial value; that SciGrip admitted that the value of the relevant components hinged upon their combination with other substances rather than their independent worth; and that, even when the components are combined with other ingredients to create a successful product, the value of the product hinges upon their trade names rather than the inherent value of the relevant components, considered generically.

[8] Secondly, Mr. Osae contends that there is a genuine issue of material fact as to whether the relevant components were publicly known or were known by persons outside of SciGrip who could obtain economic value from their use prior to the performance of his own work for Scott Bader. More specifically, Mr. Osae asserts that the use of one of the relevant components had been disclosed in other patents prior to its use by Mr. Osae while working at Scott Bader; that the use of the specific chemicals contained in the relevant components had been disclosed in their generic form in prior patents as well; that the manufacturer of each of the specific trade name chemicals used in the relevant components had disclosed their use and benefits to at least three of SciGrip's competitors; and that, according to a chemical expert proffered by Mr. Osae,

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overlapping factual issues between SciGrip's breach of contract claim against Mr. Osae relating to the work which he performed while employed by Scott Bader and SciGrip's breach of contract claim against Scott Bader given that the only issue that remains to be decided with respect to SciGrip's breach of contract claim against Scott Bader involves the question of whether that claim is time-barred. However, even though SciGrip has correctly described the reason for the trial court's refusal to grant summary judgment in SciGrip's favor with respect to its breach of contract claim against Scott Bader, SciGrip will have to prove its entire case against Scott Bader when this case is called for trial rather than being able to limit its proof to the issue of whether the applicable statute of limitations has expired. As a result, in light of the fact that there is at least some risk of an inconsistent verdict with respect to SciGrip's breach of contract claims against Mr. Oase and Scott Bader, we hold that Mr. Osae is entitled to seek appellate review of the relevant portion of the trial court's order despite the interlocutory character of that order.

the relevant components were "obvious combinations" of chemicals that any skilled chemist in the industry would have either been aware of or been able to develop.

SciGrip, on the other hand, contends that the relevant components were subject to protection under the consent order regardless of whether they were publicly known or had independent economic value. Instead, SciGrip asserts that the mere fact that Mr. Osae developed these components while employed by SciGrip and then disclosed them while working for Scott Bader constituted a violation of the terms of the consent order. In addition, SciGrip argues that the relevant components were not known outside of SciGrip prior to the time when Mr. Osae used and disclosed them in connection with the development of the Crestabond products given that a mere reference to certain components in other patent applications does not mean that SciGrip's unique combination of the relevant components was publicly known or known by persons outside of SciGrip who could otherwise obtain economic value from their use, citing, among other decisions, *Rivendell Forest Prods., Ltd. v. Georgia-Pacific Corp.*, 28 F.3d 1042, 1045 (10th Cir. 1994) (holding that a trade secret "can consist of a combination of elements which are in the public domain").

Similarly, SciGrip argues that the existence of the same raw materials in different components does not make the components chemically equivalent or indicate that the significance of one of the components is publicly known. Moreover, SciGrip contends that the fact that a manufacturer's disclosure of the potential use and benefits of the raw materials that it supplies does not render the components that SciGrip has created using those materials non-confidential. In the same vein, SciGrip argues that the "obviousness" of the chemical combinations involved in the relevant components is a patent law concept that has no basis in trade secrets law, citing *Basic Am., Inc. v. Shatila*, 992 P.2d 175, 183 (Idaho 1993) (holding that "obviousness" is a patent law concept not relevant to the Idaho Trade Secrets Act). Finally, SciGrip contends that the components at issue in this case derived both actual and potential independent economic value from not being known prior to their disclosure in Scott Bader's European patent application given that one of the relevant components has a unique structure and the other is superior to comparable products on the market.

A careful review of the record shows that the undisputed evidence tends to demonstrate that the relevant components have both potential and actual economic value by virtue of the fact that the resulting products have superior properties and performance compared to the

comparable products available in the market, with this superiority being demonstrated by the fact that SciGrip won two new customers as a result of the development of the products in question and the fact that Scott Bader was interested in using those components in its own products. In addition, we agree with SciGrip that the proper inquiry for purposes of determining whether the relevant components are entitled to protected status is whether those components, considered in their totality rather than on the basis of a separate evaluation of each of the individual raw materials from which they are made, constitute confidential information. When viewed in that light, the blended materials upon which SciGrip's claim rests clearly constitute proprietary information as that term is used in the consent judgment. Thus, we hold that the trial court properly determined that, at the time that Mr. Osae disclosed the relevant components in the European patent application, he breached the consent order. As a result, the trial court did not err by entering summary judgment in SciGrip's favor with respect to its claim that Mr. Osae breached the consent order during the time that he was employed by Scott Bader.

III. Conclusion

Thus, for all of these reasons, we conclude that the trial court did not err by granting summary judgement in favor of Scott Bader and Mr. Osae with respect to SciGrip's claims for misappropriation of trade secrets, unfair and deceptive trade practices, and punitive damages; entering summary judgment in SciGrip's favor with respect to its claim for breach of contract against Mr. Osae for violating the consent judgment during his period of employment with Scott Bader; refusing to grant summary judgment in favor of SciGrip or Mr. Osae with respect to SciGrip's claim for breach of contract against Mr. Osae for violating the consent judgment during his period of employment with Engineered Bonding; and denying Mr. Osae's motion to preclude the admission of certain expert testimony proffered on behalf of SciGrip on mootness grounds. As a result, the challenged trial court order is affirmed.

AFFIRMED.

STATE v. ALONZO

[373 N.C. 437 (2020)]

STATE OF NORTH CAROLINA
v.
EDWARD M. ALONZO

No. 288PA18

Filed 28 February 2020

1. Sexual Offenses—child abuse by sexual act—definition of "sexual act"

The Court of Appeals erred by holding that the trial court was required to instruct the jury according to the definition of "sexual act" contained in N.C.G.S. § 14-27.1(4) in a felony child abuse by sexual act (N.C.G.S. § 14-318.4(a2)) case. The legislature intended section 14-27.1(4)'s definition of "sexual act" to apply only within its own article, of which felony child abuse by sexual act was not a part.

2. Appeal and Error—discretionary review—issues not presented in petitions

The Supreme Court declined to address defendant's argument on an issue that was not presented in either of the parties' petitions for discretionary review.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 819 S.E.2d 584 (N.C. Ct. App. 2018), affirming judgments entered on 11 January 2017 by Judge Gale M. Adams in Superior Court, Cumberland County. On 5 December 2018, the Supreme Court allowed both the State's petition for discretionary review and defendant's conditional petition for discretionary review as to an additional issue. Heard in the Supreme Court on 5 November 2019.

Joshua H. Stein, Attorney General, by Anne M. Middleton, Special Deputy Attorney General, and Ellen A. Newby, Assistant Attorney General, for the State-appellant.

G. Glenn Gerding, Appellate Defender, by Daniel Shatz, Assistant Appellate Defendant, for defendant-appellee.

HUDSON, Justice.

Here, we review the following issues: (1) whether the trial court erred in its instruction to the jury on the definition of "sexual act" under N.C.G.S. § 14-318.4(a2), which sets out the offense of felony child abuse

by sexual act; and (2) whether the trial court's instruction on felony child abuse by sexual act amounted to plain error. We affirm the Court of Appeals decision upholding defendant's convictions. However, we modify that decision because the trial court did not err by not instructing the jury on the definition of "sexual act" according to N.C.G.S. § 14-27.1(4).[1] Therefore, we need not—and do not—address the Court of Appeals' prejudice analysis under the plain error standard. Accordingly, the North Carolina Conference of Superior Court Judges Committee on Pattern Jury Instructions need not turn its attention to the definition of "sexual act" in N.C.G.S. § 14-318.4(a2) as it was instructed to do by the Court of Appeals.

Factual and Procedural Background

On 3 January 2017, the Cumberland County grand jury returned bills of indictment charging defendant with committing the following crimes against his daughter, Sandy[2]: (1) taking indecent liberties with a child in violation of N.C.G.S. § 14-202.1(a)(1)-(2); (2) felony child abuse by sexual act in violation of N.C.G.S. § 14-318.4(a2); and (3) first-degree statutory sexual offense.

At trial, the evidence showed that defendant engaged in a sustained pattern of sexually abusing Sandy while the family—which included Sandy's mother and Sandy's two siblings—lived in Fayetteville, North Carolina, during the years of 1990 to 1993.

Near the end of the trial, the trial court instructed the jury, in pertinent part, on the charge of felony child abuse by sexual act. At the time that defendant committed the underlying acts of sexual misconduct, the General Statutes provided that a defendant committed felony child abuse by sexual act when the defendant was "[a]ny parent or legal guardian of a child less than 16 years of age who commits or allows the commission of any *sexual act* upon a juvenile . . . ." N.C.G.S. § 14-318.4(a2) (1990) (emphasis added). In instructing the jury, the trial court defined "sexual act" as "an immoral, improper or indecent act by the defendant upon [Sandy] for the purpose of arousing, gratifying sexual desire."

On 11 January 2017, the jury found defendant (1) guilty of taking indecent liberties with a child; (2) guilty of felony child abuse by sexual act; but (3) not guilty of first-degree statutory sexual offense. Defendant appealed his convictions to the Court of Appeals.

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1. This statute was recodified in 2015 as N.C.G.S. § 14-27.20(4).

2. The Court of Appeals used the pseudonym "Sandy" to refer to the victim in this case. *State v. Alonzo*, 819 S.E.2d 584, 586 (N.C. Ct. App. 2018). We will do the same.

At the Court of Appeals, defendant contended, in pertinent part, that the trial court committed plain error in defining "sexual act" and did not accurately define the phrase in the context of felony child abuse under N.C.G.S. § 14-318.4(a2). Specifically, defendant argued that prior decisions of the Court of Appeals recognized that N.C.G.S. § 14-27.1(4) provided the correct definition of "sexual act" for an offense under N.C.G.S. § 14-318.4(a2). N.C.G.S. § 14-27.1(4) provided that

> "Sexual act" means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes.

N.C.G.S. § 14-27.1(4) (1990). Defendant further contended that the trial court's error in failing to instruct the jury according to the definition of "sexual act" under N.C.G.S. § 14-27.1(4) constituted plain error.

The Court of Appeals agreed with defendant that its prior case law recognized that N.C.G.S. § 14-27.1(4) provided the correct definition of "sexual act" for felony child abuse under N.C.G.S. § 14-318.4(a2). *State v. Alonzo*, 819 S.E.2d 584, 587 (N.C. Ct. App. 2018). The Court of Appeals noted that the trial court's definition of "sexual act" was one that "track[ed], almost precisely, the language of the North Carolina Pattern Jury Instruction, N.C.P.I.—Crim. 239.55B, the suggested instructions for the charge of felonious child abuse." *Id.* However, the Court of Appeals concluded that its prior decision in *State v. Lark* held that N.C.G.S. § 14-27.1(4) contained the proper definition of "sexual act" under N.C.G.S. § 14-318.4(a2). *Id.* (citing *State v. Lark*, 198 N.C. App. 82, 88, 678 S.E.2d 693, 698 (2009)). The Court of Appeals then reasoned that even though its later decision in *State v. McClamb* conflicted with *Lark* by failing to extend the definition of "sexual act" in N.C.G.S. § 14-27.1(4) to N.C.G.S. § 14-318.4(a2), *id.* (citing *State v. McClamb*, 234 N.C. App. 753, 758-59, 760 S.E.2d 337, 341 (2014)), it was bound by its decision in *Lark* because *Lark* was the earlier precedent. *Id.* (citing *State v. Meadows*, 806 S.E.2d 682, 693 (N.C. Ct. App. 2017), *aff'd in part*, 371 N.C. 742 (2018)).

Accordingly, the Court of Appeals held that the trial court erred in failing to instruct the jury according to the definition of "sexual act" contained in N.C.G.S. § 14-27.1(4). *Alonzo*, 819 S.E.2d at 587. However, it ultimately held that the trial court's error did not amount to plain error. *Id.* at 588–89. Both defendant and the State sought discretionary review of the Court of Appeals' opinion. We allowed both parties petitions for

discretionary review on 5 December 2018. However, in allowing defendant's petition for discretionary review, we limited our review to the first issue listed in his petition. Pursuant to the parties' petitions, we review (1) whether the trial court erred in instructing the jury on the charge of felony child abuse by sexual act by not defining "sexual act" according to the definition contained in N.C.G.S. § 14-27.1(4); and (2) whether the trial court's error amounted to plain error. Because we conclude that the trial court did not err by not instructing the jury on the meaning of "sexual act" according to the definition found in N.C.G.S. § 14-27.1(4), we modify and affirm the decision of the Court of Appeals. Therefore, we need not—and do not—address the Court of Appeals' prejudice analysis under the plain error standard.

Analysis

[1] "This Court reviews the decision of the Court of Appeals to determine whether it contains any errors of law." *State v. Melton*, 371 N.C. 750, 756, 821 S.E.2d 424, 428 (2018) (citing N.C. R. App. P. 16(a); *State v. Mumford*, 364 N.C. 394, 398, 699 S.E.2d 911, 914 (2010)).

Because the Court of Appeals rested its holding that N.C.G.S. § 14-27.1(4) provided the definition of "sexual act" for an offense under N.C.G.S. § 14-318.4(a2) on the reasoning of its prior decision in *Lark*, it did not engage in a statutory construction analysis to reach its determination. *See Alonzo*, 819 S.E.2d at 587 (citing *Lark*, 198 N.C. App. at 88, 678 S.E.2d at 698). We are not bound by the Court of Appeals' decision in *Lark*, and the issue of whether N.C.G.S. § 14-27.1(4) provides the definition of "sexual act" applicable to an offense under N.C.G.S. § 14-318.4(a2) is an issue of first impression for this Court. Accordingly, we now engage in a statutory construction analysis to determine whether subsection 14-27.1(4) provides the applicable definition of "sexual act."

"Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) (citing *Utils. Comm'n v. Edmisten*, 291 N.C. 451, 232 S.E.2d 184 (1977)). "But where a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *Id.* at 209, 388 S.E.2d at 136-37 (citing *Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E.2d 797 (1948)). Accordingly, in construing the meaning of ambiguous statutory language, our task is "to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Id.* at 209, 388 S.E.2d at 137 (citing *Buck v. Guar. Co.*, 265 N.C. 285, 144 S.E.2d 34 (1965)). Under a statutory construction analysis, legislative

intent "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." *Id.* at 209, 388 S.E.2d at 137 (quoting *Milk Comm'n v. Food Stores*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967)). We have further stated that "when technical terms or terms of art are used in a statute they are presumed to have been used with their technical meaning in mind, absent a legislative intent to the contrary." *Black v. Littlejohn*, 312 N.C. 626, 639, 325 S.E.2d 469, 478 (1985) (quoting *In re Appeal of Martin*, 286 N.C. 66, 77–78, 209 S.E.2d 766, 774 (1974)).

Here, defendant argues that we should affirm the Court of Appeals' holding concerning the definition of "sexual act" because "sexual act" is a technical term that takes its meaning from N.C.G.S. § 14-27.1(4). Specifically, defendant argues that when N.C.G.S. § 14-318.4(a2) was enacted, N.C.G.S. § 14-27.1 was already in effect and provided a narrow, statutory definition of "sexual act." Accordingly, defendant asserts that the legislature was aware of this technical definition of "sexual act" at the time that it enacted N.C.G.S. § 14-318.4(a2), and we should assume that the legislature intended to incorporate it into the crime of felony child abuse by sexual act.

We begin by noting that N.C.G.S. § 14-27.1(4) did provide a definition of "sexual act" at the time that the legislature enacted N.C.G.S. § 14-318.4(a2). *See* N.C.G.S. 14-27.1(4) (1983); *see also* An Act Entitled the Child Protection Act of 1983, ch. 916, § 1, 1983 N.C. Sess. Laws 1265, 1265 (adding subsection (a2) to N.C.G.S. § 14-318.4). However, assuming *arguendo* that N.C.G.S. § 14-27.1(4) provided a technical definition of "sexual act," we conclude that the legislative history of the statute provides dispositive evidence of "a legislative intent to the contrary" of defendant's argument that its definition of "sexual act" applies in the context of an offense under N.C.G.S. § 14-318.4(a2). *Black*, 312 N.C. at 639, 325 S.E.2d at 478 (quoting *In re Appeal of Martin*, 286 N.C. at 77–78, 209 S.E.2d at 774).

The legislative history of N.C.G.S. § 14-27.1(4) reveals that the legislature only intended for the statute's definition of "sexual act" to apply within its own article. Specifically, N.C.G.S. § 14-27.1 was enacted as part of a new article to Chapter 14 of the General Statutes—Article 7A. An Act to Clarify, Modernize and Consolidate the Law of Sex Offenses, ch. 682. § 1, 1979 N.C. Sess. Laws 725, 725. When it was enacted, N.C.G.S. § 14-27.1 expressly limited the applicability of all of its definitions—including the definition of "sexual act"—to Article 7A. *Id.* ("*As used in this Article*, unless the context requires otherwise . . . ." (emphasis added)); *see also* N.C.G.S. § 14-27.1 (1980). The language limiting the applicability of the

statute's definitions to Article 7A was still present when subsection (a2) of N.C.G.S. § 14-318.4 was added in 1983. *See* N.C.G.S. § 14-27.1 (1983); *see also* An Act Entitled the Child Protection Act of 1983, ch. 916, § 1, 1983 N.C. Sess. Laws 1265, 1265.

Further, the legislature amended N.C.G.S. § 14-27.1 three times after N.C.G.S. § 14-318.4(a2) was enacted, and the legislature did not remove the language limiting the applicability of the statute's definitions to Article 7A any of those times.[3] Additionally, in 2015, when the legislature recodified Article 7A as Article 7B—and recodified N.C.G.S. § 14-27.1 as N.C.G.S. § 14-27.20—the legislature did not remove the language limiting the applicability of the statute's definitions to the new article.[4] Further, the current version of the statute continues to limit the application of its definitions to Article 7B. *See* N.C.G.S. § 14-27.20 (2017) ("The following definitions apply in this Article . . . .").[5] Therefore, the legislative history demonstrates that from the time N.C.G.S. § 14-27.1 was enacted in 1980, until it took its current form in N.C.G.S. § 14-27.20, the legislature intended for the definitions in the statute to apply only within the respective article. Accordingly, it was error for the Court of Appeals to conclude that the definition of "sexual act" contained in N.C.G.S. § 14-27.1(4) was applicable to offenses under N.C.G.S. § 14-318.4(a2), which is contained in a separate article, Article 39.

Moreover, we have interpreted the definition of "sexual act" in N.C.G.S. § 14-27.1(4) as arising from the specific elements of the crimes listed in Article 7A. *See State v. Lucas*, 302 N.C. 342, 346, 275 S.E.2d 433, 436 (1981). "It is noted that all sexual acts specifically enumerated in the statute relate to sexual activity involving parts of the human

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3. *See* An Act to Make Technical Corrections and Conforming Changes to the General Statutes as Recommended by the General Statutes Commission; to Restore the Definition of Family Care Home to its Original Language as Recommended by the General Statutes Commission; and to Make Various Other Changes to the General Statutes and Session Laws, S.L. 2002-159, § 2.(a), 2002 N.C. Sess. Laws 635, 635; *see also* An Act to Create the Offense of Sexual Battery, S.L. 2003-252, § 1, 2003 N.C. Sess. Laws 426, 426; An Act to Protect North Carolina's Children/Sex Offender Law Changes, S.L. 2006-247, § 12.(a), 2006 N.C. Sess. Laws 1065, 1074.

4. *See* An Act to Reorganize, Rename, and Renumber Various Sexual Offenses to Make Them More Easily Distinguishable From One Another as Recommended by the North Carolina Court of Appeals in "State of North Carolina v. Slade Weston Hicks, Jr.," and to Make Other Technical Changes, S.L. 2015-181, §§ 1, 2, 2015 N.C. Sess. Laws 460, 460.

5. *See also* An Act to Update the General Statutes of North Carolina with People First Language by Changing the Phrase "Mental Retardation" to "Intellectual Disability" in Certain Sections and to Make Other People First Language Amendments and Technical Amendments in Those Sections, as Recommended by the General Statutes Commission, S.L. 2018-47, § 4.(a), 2018 N.C. Sess. Laws 457, 464.

body." *Id.* "The only sexual act excluded from the statutory definition relates to vaginal intercourse, a necessary omission because vaginal intercourse is an element of the crimes of first and second degree rape which are defined in [the relevant statutes]." *Id.* "The words 'sexual act' do not appear in these rape statutes. The words do appear in [N.C.]G.S. [§] 14-27.4 and [N.C.]G.S. [§] 14-27.5 which define the crimes of first and second degree 'sexual offense.' " *Id.* The fact that the definition of "sexual act" in N.C.G.S. § 14-27.1(4) arose from the specific elements of other crimes in Article 7A is a further reason to reject the proposition that N.C.G.S. § 14-27.1(4) provides a definition of "sexual act" that is applicable to offenses under N.C.G.S. § 14-318.4(a2).

[2] Accordingly, we conclude that the Court of Appeals erred when it held that the trial court erred by failing to instruct the jury on the definition of "sexual act" according to N.C.G.S. § 14-27.1(4). In so concluding, we decline to address defendant's argument that the trial court's instruction on the definition of "sexual act" was erroneous because it seemed to match the definition of indecent liberties under N.C.G.S. § 14-202.1 and, accordingly, it was overly broad. Assuming *arguendo* that defendant properly raised this issue at the Court of Appeals, defendant did not present this issue in his petition for discretionary review. N.C. R. App. P. 28(a) ("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." (emphases added)). The only issue listed in defendant's petition for discretionary review that this Court accepted for review was "[w]hether the Court of Appeals erred by holding that the erroneous instruction on the child abuse by sexual act charge was not sufficiently prejudicial to warrant relief under the plain error standard." Defendant's challenge to the Court of Appeals' holding under its prejudice analysis did not present the additional assignment of error that the trial court erred by giving a definition of "sexual act" that seemed to match the definition for indecent liberties under N.C.G.S. § 14-202.1.

Further, the only issue listed in the State's petition for discretionary review was the following: "Did the Court of Appeals err in holding the trial court erred in following the pattern jury instructions for felony child abuse by sexual act because these instructions are purportedly erroneous and require revision?" The sole basis for the Court of Appeals' holding was its determination that "sexual act" in N.C.G.S. § 14-318.4(a2) must be defined according to the definition set out in N.C.G.S. § 14-27.1(4).

Alonzo, 819 S.E.2d at 587. Therefore, the State's petition for discretionary review did not present the issue of whether the trial court's instruction was erroneous because it seemed to match the definition for indecent liberties under N.C.G.S. § 14-202.1. Because that issue was not presented in either of the parties' petitions for discretionary review, it is not properly before this Court. *See* N.C. R. App. P. 28(a). To the extent that defendant's argument on that issue is now raising a constitutional challenge to the trial court's instruction, "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. Meadows*, 371 N.C. 742, 749, 821 S.E.2d 402, 407 (2018) (quoting *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010)). Therefore, defendant's failure to object to the jury instruction and raise a constitutional issue at trial is another reason that the Court declines to review this additional issue.

Conclusion

Accordingly, we affirm the Court of Appeals' decision upholding defendant's convictions. However, we modify the decision of the Court of Appeals because we hold that the trial court did not err by not instructing the jury on the definition of "sexual act" according to N.C.G.S. § 14-27.1(4). Therefore, we need not—and do not—address the Court of Appeals' prejudice analysis under the plain error standard. Accordingly, the North Carolina Conference of Superior Court Judges Committee on Pattern Jury Instructions need not turn its attention to the definition of "sexual act" in N.C.G.S. § 14-318.4(a2), as it was instructed to do by the Court of Appeals.

MODIFIED AND AFFIRMED.

STATE v. CAREY

[373 N.C. 445 (2020)]

STATE OF NORTH CAROLINA
v.
ADAM RICHARD CAREY

No. 293A19

Filed 28 February 2020

Firearms and Other Weapons—flash bang grenade—weapon of mass destruction

The State presented substantial evidence that defendant possessed a weapon of mass death and destruction in violation of N.C.G.S. § 14-288.8 where a "flash bang" grenade was found in his car. The statute explicitly provided that any explosive or incendiary grenade was a weapon of mass death and destruction. Evidence that the grenade was explosive or incendiary included the label on the grenade and the testimony of a Highway Patrol Trooper who had been in the military.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 831 S.E.2d 597 (N.C. Ct. App. 2019), finding no error, in part, and reversing, in part, judgments entered on 18 May 2018 by Judge Leonard L. Wiggins in Superior Court, Onslow County, and remanding for resentencing. Heard in the Supreme Court on 8 January 2020.

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

Guy J. Loranger for defendant-appellee.

ERVIN, Justice.

This case presents the question of whether a "flash bang" grenade is a weapon of mass death and destruction as defined in N.C.G.S. § 14-288.8(c)(1). After carefully considering the record, transcripts, briefs, and arguments of the parties, we conclude that such a grenade is a weapon of mass death and destruction and that the Court of Appeals erred by making a contrary determination. As a result, 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 judgments.

At around 2:20 a.m. on 16 July 2016, Trooper Christopher Cross of the North Carolina State Highway Patrol noticed two vehicles traveling in close proximity to each other at a rate of speed that appeared to exceed the applicable speed limit on Highway 258 between Richlands and Jacksonville. After measuring the vehicles' speed at sixty-eight miles per hour, Trooper Cross decided to initiate a traffic stop.

As he approached the speeding vehicles, Trooper Cross observed that both of the vehicles had slowed down and moved over to the right shoulder of the highway. After activating his emergency lights, Trooper Cross saw lights on the rear deck of one of the vehicles that appeared to flash blue. Assuming that he had encountered another law enforcement officer, Trooper Cross pulled up beside the vehicle, which was a Dodge Charger, and asked the occupant, who turned out to be defendant Adam Richard Carey, what was going on. In response, defendant stated that he had pulled over the other vehicle because the driver was speeding and had been driving left of the center line.

Upon nearing defendant's vehicle, Trooper Cross noticed that, like unmarked State Highway Patrol vehicles, the Dodge Charger had a "regular North Carolina First in Flight tag on it." However, unlike unmarked State Highway Patrol vehicles, the license plate on the Dodge Charger was not stamped "SHP." At that point, Trooper Cross asked defendant which agency he was employed by and was told that defendant was a member of Duplin County Search and Rescue. After speaking to the driver of the other vehicle and allowing him to proceed on his way, Trooper Cross returned to the Dodge Charger for the purpose of having a further discussion with defendant.

In the course of the ensuing conversation, defendant denied that the lights on his vehicle were blue. As a result, Trooper Cross directed defendant to move his vehicle to a side road while he reviewed the video generated by his dashboard camera to confirm the color of the lights on the Dodge Charger. Although the dashboard camera video appeared to show that the lights were blue, Trooper Cross concluded that condensation on his windshield had caused this result. When Trooper Cross had defendant activate the lights in his vehicle, they flashed "clear and red."

After arresting defendant for impersonating a law enforcement officer, Trooper Cross, assisted by his partner, began searching defendant's vehicle incident to arrest. During the ensuing search, Trooper Cross discovered, among other items, an emergency medical technician's badge; a number of firearms, including several handguns and rifles with

suppressors; three diversionary or "flash bang" grenades; firearm magazines and ammunition; handcuffs; knives; and body armor.

On 9 May 2017, the Onslow County grand jury returned a bill of indictment charging defendant with two counts of possession of a weapon of mass death and destruction arising from defendant's possession of a silenced long rifle and a silenced pistol; one count of possession of a weapon of mass death and destruction arising from defendant's possession of three "flash bang" grenades; one count of impersonating a law enforcement officer; one count of following too closely; and one count of speeding in excess of thirty-five miles per hour while within the corporate limits of a municipality. On 15 May 2018, the State voluntarily dismissed the charges of possession of a weapon of mass death and destruction stemming from defendant's possession of a silenced long rifle and a silenced pistol, the charge of following too closely, and the charge of speeding.

The charges that had been lodged against defendant came on for trial before the trial court and a jury at the 14 May 2018 criminal session of the Superior Court, Onslow County. At the conclusion of the State's evidence, defendant unsuccessfully moved to dismiss the remaining possession of a weapon of mass death and destruction charge, which stemmed from defendant's possession of the "flash bang" grenades, and the impersonating a law enforcement officer charge for insufficiency of the evidence. In addition, defendant unsuccessfully renewed his dismissal motions at the close of all the evidence. On 18 May 2018, the jury returned a verdict convicting defendant of possessing a weapon of mass death and destruction and impersonating a law enforcement officer. After accepting the jury's verdict, the trial court entered a judgment sentencing defendant to a term of sixteen to twenty-nine months imprisonment based upon his conviction for possession of a weapon of mass death and destruction, suspending that active sentence, and placing defendant on supervised probation for a period of twenty-four months on the condition that he serve an active term of 120 days imprisonment, perform forty-eight hours of community service, obtain a mental health assessment and comply with any treatment recommendations, not possess any non-standard light systems, not possess on his person any item suggesting an association with a law enforcement agency, surrender any firearms in his possession, and comply with the usual terms and conditions of probation. In addition, the trial court entered a second judgment based upon defendant's conviction for impersonating a law enforcement officer sentencing defendant to a consecutive term of forty-five days imprisonment, suspending that sentence, and placing defendant on

supervised probation for a consecutive period of twenty-four months on the condition that defendant comply with the usual terms and conditions of probation. 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 denying his motion to dismiss the charge of possession of a weapon of mass death and destruction on the grounds that the State had failed to elicit sufficient evidence to establish that the three "flash bang" grenades that he had possessed constituted weapons of mass death and destruction as defined in N.C.G.S. § 14-288.8(c)(1); that the trial court had committed plain error by failing to instruct the jury in such a manner as to properly define a weapon of mass death and destruction; and that the trial court had committed plain error by instructing the jury that it could convict defendant of possession of a weapon of mass death and destruction on the basis of a theory that had not been alleged in the relevant count of the indictment that had been returned against defendant.

On 16 July 2019, the Court of Appeals filed an opinion finding no error, in part; reversing the trial court's judgments, in part; and remanding this case to the Superior Court, Onslow County, for resentencing. *State v. Carey*, 831 S.E.2d 597 (N.C. Ct. App. 2019). After concluding that defendant had abandoned his challenge to his conviction for impersonating a law enforcement officer, *id.* at 599 (citing N.C.R. App. P. 28(a)), the majority at the Court of Appeals held that the trial court had erred by denying defendant's motion to dismiss the possession of a weapon of mass death and destruction charge for insufficiency of the evidence because "[t]he flash bang grenades found in [d]efendant's car were not devices or weapons or 'Grenades' capable of causing mass death and destruction when construing N.C.[G.S.] § 14-288.8(c)(1)." *Id.* at 602. In reaching this conclusion, the majority reasoned that, in light of the *ejusdem generis* canon of statutory construction, which provides that, "where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated," *id.* at 601 (quoting *State v. Lee*, 277 N.C. 242, 244, 176 S.E.2d 772, 774 (1970)), the fact that "grenade" appeared in N.C.G.S. § 14-288.8(c)(1) under the general definition of a "weapon of mass death and destruction" means that any grenade subject to the relevant statutory prohibition "must be capable of causing catastrophic damage and consistent with the highly deadly and destructive nature of the other

enumerated items in the list." *Id.* In view of the fact that the "flash bang" grenades that defendant was convicted of possessing were "not consistent with the purpose, do not fit within, and do not rise" to the level of harmfulness associated with the other items included within the definition of a weapon of mass death and destruction, the possession of "flash bang" grenades was not prohibited by N.C.G.S. § 14-288.8(c)(1). *Id.* The majority at the Court of Appeals also concluded that the result that it deemed appropriate was required by the rule of lenity given that the "general and undefined term[ ] [contained in N.C.G.S. § 14-288.8(c)(1)] could include possession of items within its provisions, which are neither dangerous nor deadly weapons, and yet be included and sanctioned as a weapon of mass death and destruction." *Id.* (stating that "[t]he rule of lenity requires courts to read criminal statu[t]es narrowly and restrictively")). In light of its determination that the trial court had erred by denying defendant's dismissal motion, the majority at the Court of Appeals refrained from addressing defendant's remaining challenges to the trial court's judgments. *Id.* at 602. Judge Young dissented from the majority's determination that the trial court had erred by denying defendant's dismissal motion on the grounds that, "[p]ursuant to the plain language of the statute, a 'flash bang grenade' is, by law, a 'grenade,' and therefore a weapon of mass death and destruction." *Id.* at 603 (Young, J., dissenting).

In seeking to persuade this Court to overturn the Court of Appeals' decision, the State contends that "flash-bang grenades are weapons of mass death and destruction . . . because the General Assembly has defined them as such." The State urges us to adopt this conclusion on the grounds that N.C.G.S. § 14-288.8(c)(1) "provides that a 'weapon of mass death and destruction' includes *any* explosive or incendiary grenade." The State asserts that the statutory language contained in N.C.G.S. § 14-288.8(c)(1) is unambiguous and that the Court of Appeals erred by treating the statutory language as ambiguous and utilizing various rules of statutory construction to interpret it.

Defendant, on the other hand, contends that "N.C.[G.S.] § 14-288.8(c)(1) is ambiguous where it lists 'grenade' as a type of explosive or incendiary device that is banned as a weapon of mass death and destruction." According to defendant, the evidence elicited by the State at trial established that there are many different types of grenades, so that "the Court of Appeals made no error of law by turning to rules of statutory construction . . . in order to determine whether . . . the flash bang grenades found in [defendant's] car fell within the definition of a weapon of mass death and destruction under N.C.[G.S.] § 14-288.8(c)(1)." In defendant's

view, "the State's evidence established that a flash bang grenade is not, in and of itself, a weapon capable of causing mass death and destruction" in light of the fact that its intended purpose is "to merely stun, disable or disorient others." Defendant asserts that, in the event that a "flash bang" grenade is used for its intended purpose, it is "unlike the other deadly and destructive devices listed in N.C.[G.S.] § 14-288.8(c)(1)" and clearly falls outside the scope of the relevant statutory prohibition.

The first step that must be undertaken in construing any statutory provision is to examine the language in which that provision is couched. *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) (citing *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991)). According to well-established North Carolina law, "[w]hen the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *State v. Jackson*, 353 N.C. 495, 501, 546 S.E.2d 570, 574 (2001) (quoting *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388–89 (1978)). On the other hand, when the words of a statute are unclear or ambiguous, "courts must resort to statutory construction to determine legislative will and the evil the legislature intended the statute to suppress." *Id.* (citing *In re Banks*, 295 N.C. at 239, 244 S.E.2d at 389)).

Section 14-288.8 of the North Carolina General Statutes makes "it . . . unlawful for any person to manufacture, assemble, possess, store, transport, sell, offer to sell, purchase, offer to purchase, deliver or give to another, or acquire any weapon of mass death and destruction." N.C.G.S. § 14-288.8(a) (2019).

> The term "weapon of mass death and destruction" includes:
>
> (1) *Any explosive or incendiary*:
>
> a. Bomb; or
>
> b. *Grenade*; or
>
> c. Rocket having a propellant charge of more than four ounces; or
>
> d. Missile having an explosive or incendiary charge of more than one-quarter ounce; or
>
> e. Mine; or
>
> f. Device similar to any of the devices described above . . .

. . . .

> The term "weapon of mass death and destruction" does not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line-throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of Title 10 of the United States Code; or any other device which the Secretary of the Treasury finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting purposes, in accordance with Chapter 44 of Title 18 of the United States Code.

Id. § 14-288.8(c) (emphasis added). Although the definition of a "weapon of mass death and destruction" provided by the General Assembly consists of a list delineating a variety of weapons, only one of the weapons contained in that list is relevant to the resolution of the issue that is before us in this case.

The statutory definition contained in N.C.G.S. § 14-288.8(c)(1) explicitly provides that "[a]ny explosive or incendiary . . . [g]renade" is a weapon of mass death and destruction for purposes of the prohibition set out in N.C.G.S. § 14-288.8(a). *Id.* § 14-288.8(c)(1). As should be obvious from an examination of the plain meaning of the relevant statutory language, the General Assembly did not differentiate between different types of grenades and, instead, simply prohibited the possession of "*[a]ny* explosive or incendiary . . . [g]renade." *Id.* (emphasis added). Contrary to the reasoning employed by the majority of the Court of Appeals, nothing in the relevant statutory language suggests that the General Assembly intended to require the existence of a causal link between the use of a weapon explicitly listed in N.C.G.S. § 14-288.8(c)(1) and the ability of that weapon, as a matter of fact, to cause mass death and destruction. By focusing upon the extent to which "flash bang" grenades "are capable of and can result in widespread and catastrophic deaths and destruction of property," *Carey*, 831 S.E.2d at 600–01, the majority at the Court of Appeals injected into its analysis the kind of "judicial construction" that our precedent cautions against in cases involving clear and unambiguous statutory language. *Jackson*, 353 N.C. at 501, 546 S.E.2d at 574 (quoting *In re Banks*, 295 N.C. at 239, 244 S.E.2d at 388–89). Simply put, instead of requiring trial courts to

engage in a fact-intensive examination of the extent to which any particular weapon is capable of causing mass death and destruction, the General Assembly provided a straightforward list of weapons that it thought that the people of North Carolina should be prohibited from possessing which includes any "explosive or incendiary" grenade. As a result, we hold that any "explosive or incendiary" grenade is a weapon of mass death and destruction for purposes of the prohibition set out in N.C.G.S. § 14-288.8(a).

Having concluded that any "explosive or incendiary" grenade is a weapon of mass death and destruction as that term is defined in N.C.G.S. § 14-288.8(c)(1), we must next decide whether the State presented "substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Campbell*, 835 S.E.2d 844, 848 (N.C. 2019) (quoting *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Bradshaw*, 366 N.C. 90, 93, 728 S.E.2d 345, 347 (2012) (quoting *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990)). In view of the fact that defendant has never contested the validity of the State's contention that he actually possessed the "flash bang" grenades that are at issue in this case, the only remaining question for our consideration is whether the State's evidence establishes that the items that defendant admittedly possessed were "explosive or incendiary" grenades.

The evidence elicited by the State at trial tended to show that the items found in defendant's trunk bore a written label that stated "GRENADE, HAND, DIVERSIONARY" and "IF FOUND DO NOT HANDLE NOTIFY POLICE OR MILITARY." Trooper Cross, who had previously served in the military and taught at the School of Infantry, testified that he was familiar with "flash bang" grenades, that they were used in combat, and that such grenades, when thrown, would explode and "make a bright flash and a very loud bang, for the purpose of rendering the people—or whoever is in that room—stunned, disabled, [and] disoriented." As a result, we have no hesitation in holding that the State presented substantial evidence tending to show that defendant possessed an "explosive or incendiary" grenade in violation of N.C.G.S. § 14-288.8(a). 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 challenges to the trial court's judgments.

REVERSED AND REMANDED.

STATE v. CARVER

[373 N.C. 453 (2020)]

STATE OF NORTH CAROLINA
v.
DAVID LEROY CARVER

No. 196A19

Filed 28 February 2020

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 828 S.E.2d 195 (N.C. Ct. App. 2019), reversing and remanding an order entered on 9 February 2018 by Judge Wayland J. Sermons Jr. in Superior Court, Beaufort County. Heard in the Supreme Court on 10 December 2019.

Joshua H. Stein, Attorney General, by Douglas W. Corkhill, Special Deputy Attorney General, for the State-appellant.

The Robinson Law Firm, P.A., by Leslie S. Robinson, for defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
NEIL WAYNE HOYLE

No. 239A18

Filed 28 February 2020

1. Indecent Exposure—jury instructions—interpretation of element—"in the presence of"

In a prosecution for indecent exposure, the trial court correctly instructed the jury on the presence element where the facts showed defendant was inside his car when he called a mother to his car window and her child was about twenty feet away. In light of the plain language of N.C.G.S. § 14-190.9, as interpreted by *State v. Fly*, 348 N.C. 556 (1998), the requirement that the exposure be in the presence of the victim does not mean that the victim could have seen the exposed private parts had the victim looked. The focus is on where the defendants place themselves and on what the defendants do, not on what the victims do.

2. Indecent Exposure—sufficiency of evidence—presence

There was sufficient evidence of the presence element of indecent exposure where defendant exposed himself while sitting in his car to a mother standing at his passenger side window while her child was about twenty feet away. The proximity to the child was sufficiently close that the jury could find defendant's act was in the child's presence.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 818 S.E.2d 149 (N.C. Ct. App. 2018), vacating a judgment entered on 1 June 2017 by Judge Jeffrey P. Hunt in Superior Court, Catawba County, and remanding for a new trial. On 5 December 2018, the Supreme Court allowed the parties' petitions for discretionary review of additional issues. Heard in the Supreme Court on 5 November 2019.

Joshua H. Stein, Attorney General, by Tiffany Y. Lucas, Special Deputy Attorney General, for the State-appellant.

Anne Bleyman for defendant-appellee.

NEWBY, Justice.

In this case we decide whether a defendant charged with felony indecent exposure is entitled to an instruction requiring the jury to find that the victim could have seen the exposed private part had the victim looked. We hold that a defendant is not entitled to such an instruction. It is sufficient for the instruction to explain that the jury must find beyond a reasonable doubt that the exposure was in the presence of another person. We also conclude that the evidence at trial was sufficient for the jury to find that defendant exposed himself in the presence of the child victim. Finding no error in defendant's conviction, we therefore reverse the decision of the Court of Appeals in part.

The child victim was four years old at the time of the incident. His mother drove home from the grocery store with him in the car. After the mother parked, she began removing grocery bags from the car while the child played in the yard. As she was removing the bags, defendant came to her home in his car. Defendant parked along the street at the edge of the yard and called out to her to ask for directions. She explained to defendant that she could not help him; defendant then offered to do some work on her house. She declined, but defendant persisted. Finally, at defendant's request, the mother walked over to defendant's car to take his business card. When she arrived at the passenger side window and reached in to take the card, she saw defendant's exposed genitals. She quickly pulled her hand back, stumbled, dropped the groceries, and ran to grab her child and go inside the house. As she ran from defendant's car, she heard him laugh. During this encounter, the child was playing by a tree in the yard about twenty feet from defendant's car. Law enforcement identified defendant by the business card he had given the mother.

Defendant was tried in Superior Court, Catawba County, for one count of felony indecent exposure, the child being the victim, and one count of misdemeanor indecent exposure, the mother being the victim, both under N.C.G.S. § 14-190.9 (2017). After the State presented its evidence, and again after all evidence was presented, defendant moved to dismiss the felony indecent exposure charge for insufficient evidence. The trial court denied the motion. Defendant also asked the court to instruct the jury that, to find that defendant's exposure was in the presence of someone under the age of sixteen as required by the statute, it must find beyond a reasonable doubt that the child "could have seen [the exposure] had [he] looked." The court declined and, instead, followed the pattern jury instruction. It instructed the jury that to satisfy the "presence" element, the State must prove beyond a reasonable doubt that the exposure "was in the presence of at least one other person." It also explained that "[i]t is not necessary that [the exposure] be directed

at or even seen by another person." The jury found defendant guilty of both felony and misdemeanor indecent exposure, and the trial court arrested judgment on the misdemeanor charge. Defendant was sentenced to ten to twenty-one months in custody and was ordered to register as a sex offender and enroll in lifetime satellite-based monitoring.

[1] Defendant appealed to the Court of Appeals, arguing that the trial court committed prejudicial error by refusing to give the instruction he requested. He also argued that the Court of Appeals should vacate his conviction for felony indecent exposure because the evidence was insufficient to show that he exposed himself "in the presence of" the child. The Court of Appeals held that the trial court should have instructed the jury that to satisfy the "presence" element the State must show that the victim could have seen the exposure had he looked, and that failure to give the instruction was reversible error. The Court of Appeals, however, agreed with the trial court that the evidence was sufficient to allow the jury to consider whether the presence element was satisfied. It thus ordered a new trial requiring defendant's requested jury instruction. The dissent thought the trial court properly instructed the jury. The State appealed to this Court based on the dissent. This Court also allowed the parties' petitions for discretionary review, including defendant's request that the Court review the sufficiency of the evidence issue.

The State argues that the Court of Appeals wrongly held that the "presence" requirement under subsection 14-190.9(a1) means the child must have been able to see defendant's exposed private part had he looked. Defendant claims the Court of Appeals was correct about the jury instruction and also argues that the evidence was insufficient to satisfy the presence element of felony indecent exposure.

Subsection 14-190.9(a1) provides that

> any person at least 18 years of age who shall willfully expose the private parts of his or her person in any public place in the presence of any other person less than 16 years of age for the purpose of arousing or gratifying sexual desire shall be guilty of a Class H felony.

The elements of felony indecent exposure under this statute are that the defendant was at least eighteen years old at the time of the exposure, that he willfully exposed his private parts, that the exposure was in a public place, that the exposure was in the "presence" of someone under the age of sixteen, and that the exposure was committed to arouse or gratify sexual desire. *See State v. Fly*, 348 N.C. 556, 559, 501 S.E.2d 656,

658 (1998) (interpreting a similarly worded prior version of section 14-190.9). The presence element is the only element defendant contests before this Court, so we do not address the others.

This Court previously considered the presence element of indecent exposure in *State v. Fly*. In that case, the victim walked up the steps of her condominium building, and, upon rounding a section of stairs, looked up and saw the defendant "mooning" her. *Id.* at 557, 501 S.E.2d at 657. The defendant's pants were pulled down to his ankles and the victim could see the "crack of his [exposed] buttocks." *Id.* When the victim saw the defendant, she yelled, and the defendant quickly pulled up his pants and ran away. *Id.* One issue in *Fly* was whether the defendant could be convicted when the victim saw the "crack of his buttocks," but could not see his genitals. *Id.* at 559, 501 S.E.2d at 658. The Court first held that though the buttocks is not a "private part" under the indecent exposure statute, "the external organs of sex and excretion" are. *Id.* at 560, 501 S.E.2d at 659. It then held that a jury could reasonably find that the defendant had exposed "either his anus, his genitals, or both." *Id.* at 561, 501 S.E.2d at 659. The Court explained that the statute does not require the victim to have seen the exposure; instead, it only requires that the exposure was willfully made in a public place and in the presence of another. *Id.* The exposure need not have been to another, as long as it occurred in the *presence* of another. *Id.* Indecent exposure, the Court said, "does not go to what the victim saw but to what defendant exposed in her presence without her consent." *Id.* Therefore, the Court held that a jury could have found that the defendant exposed his genitals in the presence of the victim, even though the victim did not see them and could not have seen them without being positioned differently. *Id.*

In light of the plain language of N.C.G.S. § 14-190.9 as interpreted in *Fly*, we hold that the requirement that the exposure be "in the presence of" the victim does not require a jury to find that the victim could have seen the exposed private parts had he or she looked. The statutory requirement that the exposure be in the presence of another focuses on where a defendant places himself relative to others; it concerns what the defendant does, not what the victim does or could do. *See, e.g.*, *Fly*, 348 N.C. at 561, 501 S.E.2d at 659 ("The statute does not go to what the victim saw but to what defendant exposed in her presence without her consent."). If a defendant exposes himself in public and has positioned himself so he is sufficiently close to someone under the age of sixteen, the presence element of subsection 14-190.9(a1) is satisfied.[1]

1. To hold otherwise would lead to absurd results. If the offense of indecent exposure is not committed unless the victim could have seen the exposure had he or she

The jury instruction in this case drew directly from the statutory language and the *Fly* opinion. The trial court instructed the jury that to return a guilty verdict it must find beyond a reasonable doubt "that the exposure was in the presence of at least one other person" and that "[i]t is not necessary that [the exposure] be directed at or even seen by another person." This instruction was correct.

[2] Finally, the evidence at trial was sufficient to satisfy the presence element of the felony indecent exposure statute. When we consider a defendant's motion to dismiss, the question is "whether there is substantial evidence . . . of each essential element of the offense charged." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980) (citation omitted). The trial court must consider the evidence in the light most favorable to the State. *State v. Rose*, 339 N.C. 172, 192–93, 451 S.E.2d 211, 223 (1994). Because defendant has only contested the sufficiency of the evidence as to the "presence" element of the offense, that is the only element we consider.

At the time of the exposure, defendant was in his car along a road in front of the victim's house. He exposed himself while the child was about twenty feet away. Viewing the evidence in the light most favorable to the State, the proximity of the exposure to the victim was sufficiently close that a jury could find it was in the child's presence. The properly instructed jury, by returning a guilty verdict, apparently concluded it was. The conviction was thus appropriate. We therefore agree with the Court of Appeals that the evidence was sufficient to support defendant's felony indecent exposure conviction. That portion of the Court of Appeals' decision is affirmed.

But because the Court of Appeals erroneously held that defendant was entitled to an instruction requiring the jury to find that the child could have seen the exposure had he looked, and that the failure to give the instruction was prejudicial to defendant, we reverse that portion of

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looked, then a conviction could hinge on considerations like the quality of the victim's vision. We see nothing in the statute's language indicating that the General Assembly intended a defendant to be culpable for indecent exposure by exposing himself near a child with 20/20 vision, but not for exposing himself near a visually impaired child who left her glasses at home that day. In the same way, we do not think the General Assembly would have intended defendant's culpability to be contingent on whether the victim child happened to climb a tree or otherwise move to a position where he could more easily see the exposure.

the decision of the Court of Appeals that awarded defendant a new trial and find no error in defendant's conviction for felony indecent exposure.

AFFIRMED IN PART; REVERSED IN PART.

STATE OF NORTH CAROLINA
v.
SYDNEY SHAKUR MERCER

No. 257PA18

Filed 28 February 2020

1. Firearms and Other Weapons—possession of a firearm by a felon—affirmative defense—justification

In a case of first impression, the Supreme Court recognized the common law defense of justification as an affirmative defense for possession of a firearm by a felon (N.C.G.S. § 14-415.1) in narrow and extraordinary circumstances. The Court adopted the four-factor test outlined in *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000).

2. Criminal Law—jury instructions—possession of a firearm by a felon—requested instruction—justification defense

Defendant was entitled to his requested jury instructions on the defense of justification for possession of a firearm by a felon where each required factor was satisfied by the evidence when viewed in the light most favorable to defendant: Defendant arrived home from a job interview and found that another family had approached his family's home seeking a fight with him; defendant grabbed his cousin's gun only after he heard the other family's guns cocking and witnessed his cousin struggling with his own gun; and defendant relinquished possession of the gun when it jammed and he was able to flee. The trial court's error in failing to instruct on the justification defense was prejudicial where the jury sent a note to the trial court asking about the availability of the defense.

Justice MORGAN dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 818 S.E.2d 375 (N.C. Ct. App. 2018), vacating a judgment entered on 8 May 2017 by Judge Jesse B.

Caldwell III in Superior Court, Mecklenburg County, and remanding for a new trial. Heard in the Supreme Court on 22 November 2019 in session in the Johnston County Courthouse in the City of Smithfield pursuant to section 18B.8 of chapter 57 of the 2017 North Carolina Session Laws.

Joshua H. Stein, Attorney General, by Mary C. Babb, Assistant Attorney General, for the State-appellant.

Glenn Gerding, Appellate Defender, by Daniel K. Shatz, Assistant Appellate Defender, for defendant-appellee.

HUDSON, Justice.

Here, we must determine whether the Court of Appeals erred by concluding that the trial court committed prejudicial error when it failed to instruct the jury on justification as a defense for the charge of possession of a firearm by a felon. Because we conclude that the Court of Appeals did not err, we affirm.

I. Factual and Procedural Background

On 30 March 2016 an altercation occurred outside defendant's home. The State and defendant presented different versions of that event at trial. Due to our standard of review in this case, we present the facts primarily from defendant's version of events.

Dazoveen Mingo and a group of approximately fifteen family members (hereinafter, the Mingo group) walked to defendant's home to fight two of defendant's friends, J and Wardell. When defendant arrived at his house with J and Wardell after a job interview, the Mingo group was there urging defendant and his friends to fight them and blocking defendant from going into his house. Defendant asked the Mingo group what was going on and they accused him of jumping a member of their group. Defendant denied having anything to do with a jumping, but the Mingo group continued to approach him saying they were "done talking."

Defendant's mother heard a commotion outside her house and went outside to find the Mingo group "ambushing" defendant and preventing him from coming into the house. She tried to calm everyone down but the Mingo group continued to try to fight, walking toward defendant and his friends, who backed away. Both defendant and his mother observed that members of the Mingo group were armed.

Defendant heard the sound of guns cocking. Wardell had a gun but he did not seem to know what he was doing with it. Defendant took

the gun from Wardell, but continued to talk to the Mingo group and deny involvement in the jumping. Defendant knew he was not allowed to possess a firearm, but he saw Wardell was struggling with the gun and defendant wanted to make sure they survived. Defendant pointed Wardell's gun at the Mingo group and told them to "back up." He heard shots fired by someone else.

When defendant's mother heard the shot, she urged defendant to run away because she believed the Mingo group was trying to kill him. She heard one member of the group, Ms. Mingo, tell her son to shoot defendant and saw Ms. Mingo chasing defendant and shooting at him.

Defendant dashed to the side of the street. When he observed that someone was still shooting at him, defendant shot back once and then the gun jammed. Defendant threw the gun back to Wardell to fix it and defendant ran away. Early the next morning defendant turned himself in to the police.

The State's witnesses provided a slightly different version of events:

Dazoveen Mingo and a group of family members walked to defendant's home to fight two of defendant's friends, J and Wardell. None of the Mingo group was armed. Defendant, J, and Wardell arrived at defendant's house about the same time as the Mingo group and Dazoveen noticed that defendant had a handgun in his belt.

The Mingo group began urging defendant and his friends to fight them, walking toward defendant and his friends, who backed away. Defendant removed the gun from his pants and pointed it while telling the group to "back up." Defendant then fired a shot into the air.

After defendant fired the shot, Dazoveen's aunt arrived with a gun. Dazoveen's mother grabbed the gun from the aunt and shot it into the air. Both defendant and a member of the Mingo group fired shots into the air three to four times each. After these shots, the Mingo group went home and called the police.

Defendant was indicted on 11 April 2016 for possession of a firearm by a felon under N.C.G.S. § 14-415.1 and tried before a jury beginning in March 2017. At the conclusion of all the evidence, defendant requested a jury instruction on justification as a defense to the charge of possession of a firearm by a felon. The trial court denied the request, and defendant objected. During deliberations, the jury sent a note asking the trial court for "clarification on whether or not [defendant] could be justified in possession of a firearm even with the stipulation [that he was] a convicted

felon." In response, the trial court reread its original instruction on possession of a firearm by a felon to the jury.

The jury returned a verdict of guilty on the charge of possession of a firearm by a felon. Defendant appealed his conviction to the Court of Appeals, arguing that the trial court erred by denying his requested jury instruction on justification as a defense to possession of a firearm by a felon. The Court of Appeals concluded that defendant was entitled to a justification defense instruction. We affirm.

II. Standard of Review

We review a decision of the Court of Appeals' to determine whether it contains any error of law. N.C.R. App. P. 16(a); *State v. Malone*, 833 S.E.2d 779, 787 (N.C. 2019) (citing *State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994)). A trial court must give the substance of a requested jury instruction if it is "correct in itself and supported by the evidence . . . ." *State v. Locklear*, 363 N.C. 438, 464, 681 S.E.2d 293, 312 (2009) (citing *State v. Harvell*, 334 N.C. 356, 364, 432 S.E.2d 125, 129 (1993)); *see also*, *e.g.*, *State v. Montague*, 298 N.C. 752, 755, 259 S.E.2d 899, 902 (1979) (holding that if, there is sufficient evidence in the light most favorable to the defendant to support a self-defense instruction, "the instruction must be given even though the State's evidence is contradictory."). To resolve whether a defendant is entitled to a requested instruction, we review de novo whether each element of the defense is supported by the evidence, when taken in the light most favorable to defendant. *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988) ("When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to defendant.").

III. Analysis

A. Justification as a Defense to N.C.G.S. § 14-415.1

[1] In North Carolina, "[i]t shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm or any weapon of mass death and destruction as defined in [G.S. § 14-288.8(c)]." N.C.G.S. § 14-415.1(a) (2017). "The offense of possession of a firearm by a convicted felon has two essential elements: (1) the defendant has been convicted of a felony, and (2) the defendant subsequently possessed a firearm." *State v. Floyd*, 369 N.C. 329, 333, 794 S.E.2d 460, 463 (2016) (citation omitted).

Whether justification is a common-law defense to a charge of possession of a firearm by a felon under N.C.G.S. § 14-415.1 is a question of

first impression in our Court. Previous cases addressing this issue at the Court of Appeals have assumed arguendo that justification is available as a defense to a charge of possession of a firearm by a felon, but the defense has never been recognized by this Court because none of the previous cases presented a situation in which a defendant would have been entitled to the instruction under the analysis the defendant proposed to the Court of Appeals. *See State v. Monroe*, 233 N.C. App. 563, 568–69, 756 S.E.2d 376, 379–80 (2014), *aff'd per curiam*, 367 N.C. 771, 768 S.E.2d 292 (2015) (surveying prior Court of Appeals cases).

We now hold that in narrow and extraordinary circumstances, justification may be available as a defense to a charge under N.C.G.S. § 14-415.1.[1]

We note that justification is an affirmative defense and does not negate any element of N.C.G.S. § 14-415.1. The justification defense "serves only as a legal excuse for the criminal act and is based on additional facts and circumstances that are distinct from the conduct constituting the underlying offense." *State v. Holshouser*, 833 S.E.2d 193, 197 (N.C. Ct. App. 2019) (citing *United States v. Deleveaux*, 205 F.3d 1292, 1297–98 (11th Cir. 2000)). Thus, like other affirmative defenses, a defendant has the burden to prove his or her justification defense to the satisfaction of the jury. *See State v. Sanders*, 280 N.C. 81, 85, 185 S.E.2d 158, 161 (1971) ("When 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." (quoting *State v. Johnson*, 229 N.C. 701, 706, 51 S.E.2d 186, 190 (1949))). *See also*, *e.g.*, *State v. Caldwell*, 293 N.C. 336, 339, 237 S.E.2d 742, 744 (1977) ("[I]nsanity is an affirmative defense which must be proved to the satisfaction of the jury by every accused who pleads it."); *State v. Caddell*, 287 N.C. 266, 290, 215 S.E.2d 348, 363 (1975) ("[Unconsciousness] is an affirmative defense; . . . the burden rests upon the defendant to establish this defense, unless it arises out of the State's own evidence, to the satisfaction of the jury.").

The Court of Appeals looked to the *Deleveaux* case for guidance as to how a defendant could invoke the defense of justification. We view

1. Some form of the defense of justification has been widely recognized by other jurisdictions as a defense to possession of a firearm by a felon. *See*, *e.g.*, *United States v. Gomez*, 92 F.3d 770, 774–75 (9th Cir. 1996); *United States v. Paolello*, 951 F.2d 537, 541 (3d Cir. 1991); *United States v. Singleton*, 902 F.2d 471, 472 (6th Cir. 1990); *United States v. Gant*, 691 F.2d 1159, 1161–62 (5th Cir. 1982); *Smith v. State*, 290 Ga. 768, 770, 723 S.E.2d 915, 918 (2012); *People v. Dupree*, 486 Mich. 693, 696, 788 N.W.2d 399, 401 (2010); *Humphrey v. Commonwealth*, 37 Va. App. 36, 44–48, 553 S.E.2d 546, 550–52 (2001).

the *Deleveaux* factors as appropriate and adopt them here.[2] Accordingly, we hold that to establish justification as a defense to a charge under N.C.G.S. § 14-415.1, the defendant must show:

> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Deleveaux, 205 F.3d at 1297. Having determined that justification may be a defense to N.C.G.S. § 14-415.1 and that a justification instruction must be given when each *Deleveaux* factor is supported by evidence taken in the light most favorable to defendant, we now turn to the specific facts of the case at hand.

B. Application of the Defense

[2] "When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to defendant." *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988) (citations omitted). Thus, we examine whether evidence, considered in the light most favorable to defendant, tends to show each element of justification such that the trial court should have instructed the jury on justification as a defense.

First, defendant presented evidence that he was under unlawful and present, imminent and impending threat of death or serious bodily injury. When defendant arrived at his own house, there was a group of people ready to fight him, and those people were blocking him from going inside. The group accused defendant of jumping one of them and Ms. Mingo was shouting at her son to shoot defendant. While trying to

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2. We recognize that the court in *Deleveaux* analyzed 18 U.S.C. § 922(g)(1), the federal equivalent of N.C.G.S. §14-415.1. The two statutes share similar language and restrict similar behavior. The federal statute makes it unlawful for a convicted felon "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(g)(1). The North Carolina statute makes it unlawful for a convicted felon "to purchase, own, possess, or have in his custody, care, or control any firearm." Thus, we find the *Deleveaux* factors helpful and appropriate as a rubric for defendants to establish that they are entitled to an instruction on justification as a defense to a charge under N.C.G.S. §14-415.1.

explain that he had nothing to do with the underlying conflict and backing away from the group, defendant heard the sound of guns cocking and heard someone in the group say they were "done talking." Defendant testified that he saw his cousin struggling with his gun, and only then took the gun himself. While there is some evidence from the State that defendant was armed before the threat arose, we must view the evidence in the light most favorable to defendant, and defendant's evidence tends to show that he was under unlawful and present, imminent and impending threat of death or serious bodily injury.

Second, the evidence suggests that defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct. Defendant testified that when he arrived home after a job interview, a large group of people were there looking for a fight. Defendant's mother testified that the group was blocking defendant from going into his house and that from the moment he exited his car they were challenging him to fight. Although defendant tried to explain that he was not involved in the underlying conflict from earlier that day and physically backed away from the group, the situation escalated rapidly. Considering the evidence in the light most favorable to defendant, we conclude that a jury could find that he did not negligently or recklessly place himself in a situation where he would be forced to arm himself simply by arriving at his home and trying to explain himself to the group who were blocking him from entering his home.

Third, some evidence supports defendant's claim that he had no reasonable legal alternative to violating the law. Defendant was unable to go into his home when he arrived because the group blocked his path, and he was already out of the car and unable to drive away when the group said they were "done talking." Defendant testified that after he heard guns being cocked, he looked over to see his cousin struggling with the gun. Again, considering the evidence in the light most favorable to defendant, a reasonable jury could conclude that it was too late to call 911 and that running away would have put him at greater risk of being shot. A jury could have concluded that defendant had no reasonable legal alternative to violating the law.

Fourth and finally, there was evidence tending to show a direct causal relationship between the criminal action and the avoidance of the threatened harm. According to defendant, he only took possession of the gun when he heard other guns being cocked, and he gave the gun back to his cousin when it jammed and he was able to run away. Defendant argued that having the gun allowed him to create space enough to retreat and avoid being jumped or shot by the group. The

State presented evidence to the contrary, but when considering the evidence in the light most favorable to defendant, a jury could find that his gun possession was directly caused by his attempt to avoid a threatened harm.

Thus, viewed in the light most favorable to defendant, we conclude that he presented sufficient evidence of each *Deleveaux* factor to require the court to instruct the jury on justification as a defense to the charge of possession of a firearm by a felon. We emphasize that we are not determining whether defendant here was actually justified in his possession of the firearm, as the State did present relevant conflicting evidence on several points. We hold only that he was entitled to have the justification defense presented to the jury.

Having determined that defendant was entitled to a jury instruction on justification as a defense, we must now evaluate whether the trial court's failure to give this instruction was prejudicial to defendant. "[A] defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial. . . ." N.C. Gen. Stat. § 15A-1443(a) (2017).

The jury was not instructed on justification as a defense to the possession of a firearm by a felon and it ultimately convicted defendant on that charge. But, during deliberations, the jury sent a note to the trial court explicitly asking about the availability of a justification defense for the charge of possession of a firearm by a felon. This question indicates, at a minimum, that the jury was concerned about this legal issue. We conclude that the trial court's failure to give a justification instruction created a reasonable possibility that the jury would have reached a different result.

IV. Conclusion

We hold that the Court of Appeals did not err by recognizing the availability of a common law justification defense for a possession of a firearm by a felon charge under N.C.G.S. § 14-415.1 nor by prescribing the *Deleveaux* factors as the framework within which to determine whether the defense should have been presented to the jury. Having considered the evidence in the light most favorable to defendant, we hold that there is sufficient evidence of each *Deleveaux* factor to require a justification instruction be given to the jury. Because the failure to give that instruction was prejudicial, defendant is entitled to a new trial, and we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice MORGAN dissenting.

While I agree with my distinguished colleagues of the majority that our Court should avail itself of the opportunity that this case presents to expressly recognize and establish a defense of justification as an affirmative defense which is available to a criminal defendant who is accused of the offense of possession of a firearm by a felon, I respectfully dissent on the ground that the majority has formalized a threshold which is perilously low for the requirements of this affirmative defense to be met. In this case of first impression in this Court, while the majority states that this affirmative defense is now available "in narrow and extraordinary circumstances," in my view defendant here did not present evidence of circumstances at trial which were sufficient to qualify him for the affirmative defense at issue. Therefore, while I agree with the decision of the majority to establish a defense of justification which is available as an affirmative defense to a criminal defendant who is charged with the offense of possession of a firearm by a felon, I must dissent from the majority's decision due to my belief that defendant in the instant case did not present evidence sufficient to show each necessary element to warrant a jury instruction on justification as a defense.

In welcoming the establishment of the justification defense for a criminal defendant in the state courts of North Carolina who is charged under Section 14-415.1 of the General Statutes of North Carolina, I agree with the majority's premise that our courts should implement the four factors enunciated in *United States v. Deleveaux*, which a defendant must satisfy in order to establish justification as a defense:

> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

205 F.3d 1292, 1297 (11th Cir. 2000). I also concur with the majority's recognition of the well-established principle, as cited in its opinion, that an appellate court reviews de novo whether or not a defendant is entitled to a requested jury instruction on an affirmative defense upon examining the evidence in the light most favorable to the defendant so as to

determine whether each element of the affirmative defense is supported by the evidence.

Within the Felony Firearms Act, codified in Article 54A of the North Carolina General Statutes, is N.C.G.S. § 14-415.1. Defendant was convicted in the present case of possession of a firearm by a felon, in violation of N.C.G.S. § 14-415.1. The offense is established in § 14-415.1(a), which states in pertinent part: "It shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm." In according the word "any"—which is used twice in the excerpted passage of the statute—its plain and simple meaning, no person convicted of a felony is exempted from the statutory reach of this offense. Likewise, no firearm is excluded from the application of this criminal law. Inherent in the usage of such unequivocal and unambiguous language, and reinforced by the dearth of any terminology to compromise or to weaken its directness, is the clarity of the legislative intent undergirding N.C.G.S. § 14-415.1(a) that there are no exceptions to the operation of the statute. Therefore, while I agree with the majority's presumption that this Court has the authority to judicially carve out an affirmative defense to the criminal statutory provision,[1] nonetheless I am compelled to tailor this newly formalized affirmative defense of justification as a defense to N.C.G.S. § 14-415.1 in such a way that it is appropriately only available to criminal defendants in the type of narrow and extraordinary circumstances which most closely retain the original concept of the statute's lack of any exceptions.

In this case of first impression, as this Court adopts the standards of the federal court case *United States v. Deleveaux* to establish the affirmative defense of justification in North Carolina state court cases involving the criminal charge of possession of a firearm by a felon, it would be prudent to examine the federal courts' approach to the utilization of the defense in circumstances where, as in the instant case, the legislative enactment comprehensively bars a convicted felon from acquiring a firearm by any means. "To ensure that this strict prohibition is effectuated, we should require that the defendant meet a high level of proof to establish the defense of justification." *United States v. Paolello*, 951 F.2d 537, 541 (3rd Cir. 1991). The Seventh Circuit in *United States v. Perez* emphasized that, other than when a felon who is not engaged in criminal activity grabs a gun which is actively threatening harm, a justification defense "will rarely lie in a felon-in-possession case" and

1. "[S]tatutes rarely enumerate the defenses to the crimes they describe." *United States v. Panter*, 688 F.2d 268, 270 (5th Cir. 1982) (footnote omitted).

is available "*only in the most extraordinary circumstances*." 86 F.3d 735, 737 (7th Cir. 1996) (emphasis added). "A 'mere scintilla' of evidence supporting a defendant's theory . . . is not sufficient to warrant a [justification] defense instruction." *United States v. Morton*, 999 F.2d 435, 437 (9th Cir. 1993). Other federal courts have reached similar conclusions which require strict standards for this affirmative defense. *See, e.g.*, *United States v. Singleton*, 902 F.2d 471–72 (6th Cir. 1990) (holding "that a defense of justification may arise *in rare situations*") (citation omitted) (emphasis added); *United States v. Rice*, 214 F.3d 1295, 1297 (11th Cir. 2000) (finding that the justification defense "*is reserved for 'extraordinary circumstances*' ") (citation omitted) (emphasis added).

In examining the trial evidence when taken in the light most favorable to defendant in order to determine whether or not the evidence was sufficient to entitle him to a jury instruction on justification as a defense to the criminal offense of possession of a firearm by a felon as established by N.C.G.S. § 14-415.1(a), in my view the first factor—"the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury"—and the third factor—"the defendant had no reasonable legal alternative to violating the law"—were insufficiently shown by defendant to establish the affirmative defense and to require an instruction to the jury on it. Stated another way, because the defendant did not show sufficient evidence of all four of the *Deleveaux* factors, the circumstances presented at trial were not sufficiently narrow and extraordinary to support a defense of justification.

While the circumstances described in the testimony presented at trial concerning the two antagonistic groups of people confronting each other in an outdoor environment is a disturbing situation, they do not rise to a level which constitutes sufficient evidence to satisfy all of the required *Deleveaux* factors. Even taking the evidence in the light most favorable to defendant, such evidence falls short of the high standards articulated in the cited case law. The evidence at trial showed that defendant was engaged in discussion with the members of the "Mingo group" during the entirety of the confrontation. While there were angry responses to defendant's statements from the "Mingo group" members and gunshots fired by unknown individuals within the two groups, defendant extricated himself from the unpleasant situation simply by running away from it. As defendant put it, "I just run home. Not run home, but run away." Hence, I am not persuaded that it was necessary for defendant to possess a firearm in order to escape from the unlawful and present, imminent, and impending threat of death or serious bodily injury. Also, the trial evidence offered by defendant himself

demonstrated that there was no need for him to possess a firearm during this altercation: defendant's cousin Wardell Sherill had a firearm which he displayed, defendant "hurried up and snatched it out of his hand" after hearing "people cock their guns back" because "Wardell Sherill is my little cousin," and defendant subsequently returned the gun to its owner as he "threw it to Mr. Sherill." Through this testimony of defendant, it is apparent that he was not in a position in which he had no reasonable legal alternative to violating the law, because after he unilaterally and voluntarily took possession of the firearm from its owner, defendant unilaterally and voluntarily returned the firearm to its owner when defendant was finished with it. "Generalized fears will not support the defense of justification." *United States v. Crittendon*, 883 F.2d 326, 330 (4th Cir. 1989). As stated in *United States v. Lewis*:

> [a justification defense] does not arise from a "choice" of several sources of action; it is instead based on a *real emergency*. It may be asserted only by a defendant who was confronted with a crisis as a personal danger, a crisis that did not permit a selection *from among several solutions*, some of which would not have involved criminal acts.

628 F.2d 1276, 1279 (10th Cir. 1980) (emphasis added), *cert. denied*, 450 U.S. 924 (1981).

It is needless for me to address whether any of the other *Deleveaux* factors exist, since pursuant to my analysis regarding the sufficiency of the evidence to invoke the affirmative defense of justification, the first and third factors fail to exist, and all of them must be present for the jury instruction to be given.

I would readily join the majority in the conclusion that the defense of justification as an affirmative defense to a charge of possession of a firearm by a felon under N.C.G.S. § 14-415.1 should be deemed to be formally established by virtue of the present case. However, the "rare" and "most extraordinary" circumstances which courts routinely require to be shown through a "high level of proof to establish the defense of justification" have not been satisfied by defendant in this case in light of the clear intent of the legislature to create a pervasive denial of the possession of firearms by persons convicted of felony offenses and the resulting judicial responsibility "to ensure that this strict prohibition is effectuated." Through the majority's determination that defendant here merited a jury instruction at trial on the affirmative defense of justification on the basis of the evidence presented in this case, it has set a standard in this case of first impression which is far too low

to represent the appropriate evidentiary threshold. While the majority purports to have copiously constrained the availability of the affirmative defense of justification in cases involving N.C.G.S. § 14-415.1 to "narrow and extraordinary circumstances," I disagree. Accordingly, I would reverse the decision of the Court of Appeals on the basis that there was not sufficient evidence to entitle defendant to a jury instruction on justification as a defense to the charged offense under N.C.G.S. § 14-415.1 of possession of a firearm by a felon.

STATE OF NORTH CAROLINA
v.
GEORGE LEE NOBLES

No. 34PA14-2

Filed 28 February 2020

1. Native Americans—status as Indian—tribal or federal recognition—four-factor balancing test—factors not exhaustive

To establish whether a criminal defendant met the definition of "Indian" and therefore was subject to the federal Indian Major Crimes Act for a murder that occurred on land belonging to the Eastern Band of Cherokee Indians, the Supreme Court adopted a non-exhaustive balancing test for determining the second prong of a two-pronged test under *United States v. Rogers*, 45 U.S. 567 (1846), which is recognition as an Indian by a tribe or the federal government. The test utilized the four factors set forth in *St. Cloud v. United States*, 702 F. Supp. 1456 (D.S.D. 1988), as well as other relevant factors.

2. Native Americans—status as Indian—tribal recognition—first descendant status

In a case involving a murder on land belonging to the Eastern Band of Cherokee Indians (EBCI), the Supreme Court rejected arguments by the defendant that his status as a first descendant of the EBCI conclusively demonstrated his tribal or federal recognition as an Indian under the second prong of the two-pronged test in *United States v. Rogers*, 45 U.S. 567 (1846), precluding the need to consider factors set forth in *St. Cloud v. United States*, 702 F. Supp. (D.S.D. 1988), regarding such recognition. Classification as an Indian solely on the basis of percentage of Indian blood (the first *Rogers* prong)

and status as a first descendant would reduce the *Rogers* test to one of genetics, and ignore a person's social, societal, and spiritual ties to a tribe.

3. Native Americans—status as Indian—tribal or federal recognition—application of balancing test

In a case involving a murder on land belonging to the Eastern Band of Cherokee Indians (EBCI), defendant did not qualify as an "Indian" for purposes of the federal Indian Major Crimes Act based on multiple factors, including those found in *St. Cloud v. United States*, 702 F. Supp. 1456 (D.S.D. 1988). Defendant was not enrolled in the EBCI, received limited tribal medical benefits as a minor, did not enjoy benefits of tribal affiliation, did not participate in Indian social life, had never previously been subjected to tribal jurisdiction, and did not hold himself out as an Indian.

4. Native Americans—jurisdiction—special jury instruction—legal versus factual issue

In a case involving a murder on land belonging to the Eastern Band of Cherokee Indians, defendant was not entitled to a special jury verdict on the jurisdictional issue underlying his motion to dismiss the charges against him where the issue hinged on a legal determination of whether the Indian Major Crimes Act applied and not the resolution of a factual dispute.

Justice EARLS dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 818 S.E.2d 129 (N.C. Ct. App. 2018), determining no error in part and remanding in part a judgment entered on 15 April 2016 by Judge Bradley B. Letts in Superior Court, Jackson County. Heard in the Supreme Court on 4 November 2019.

Joshua H. Stein, *Attorney General*, *by Amy Kunstling Irene*, *Special Deputy Attorney General*, *for the State-appellee.*

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

DAVIS, Justice.

In this case, we must determine whether defendant has sufficiently demonstrated that he qualifies as an "Indian"[1] under the federal Indian Major Crimes Act (IMCA) such that he was not subject to the jurisdiction of North Carolina's courts. Because we conclude that defendant failed to demonstrate that he is an Indian for purposes of the IMCA, we affirm the decision of the Court of Appeals.

Factual and Procedural Background

On 30 September 2012, Barbara Preidt was robbed at gunpoint and fatally shot outside of a Fairfield Inn in Jackson County. The crime took place within the Qualla Boundary—land that is held in trust by the United States for the Eastern Band of Cherokee Indians (EBCI).

After an investigation by the Cherokee Indian Police Department, defendant, Dwayne Edward Swayney, and Ashlyn Carothers were arrested for the robbery and murder on 30 November 2012. Because Swayney and Carothers were enrolled members of the EBCI and of the Cherokee Nation of Oklahoma, respectively, they were brought before an EBCI tribal magistrate for indictment proceedings. Tribal, state, and federal authorities, however, agreed that defendant should be prosecuted by the State of North Carolina given that he was not present in the EBCI enrollment records. Accordingly, defendant was brought before a Jackson County magistrate and then charged in Jackson County with first-degree murder, robbery with a dangerous weapon, and two counts of possession of a firearm by a felon.

On 15 April 2013, defendant moved to dismiss the charges against him for lack of subject matter jurisdiction, arguing that because he was an Indian he could only be tried in federal court pursuant to the IMCA. The IMCA provides, in pertinent part, that "[a]ny Indian" who commits an enumerated major crime in "Indian country" is subject to "the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a) (2012).

The trial court held a pre-trial hearing on defendant's motion to dismiss on 9 August 2013. The parties stipulated that defendant was born in 1976 in Florida to Donna Lorraine Smith Crowe, an enrolled member of the EBCI. The parties also stipulated that although defendant himself is not an enrolled member of the EBCI, he "would be [classified as] a first descendant" due to his mother's status.

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1. Throughout this opinion, we use the term "Indian" to comport with the terminology contained in the Indian Major Crimes Act.

At the hearing, the trial court received testimony from Kathie McCoy, an employee at the EBCI Office of Tribal Enrollment. McCoy testified that while defendant is neither currently enrolled nor classified as a first descendant in the EBCI database, he was nevertheless "eligible to be designated as a [f]irst [d]escendant" because his mother was an enrolled member of the EBCI.

Annette Tarnawsky, the Attorney General for the EBCI, also provided testimony explaining that while first descendants are not entitled to the full range of tribal affiliation benefits that enrolled members enjoy, first descendants are eligible for some special benefits not available to persons lacking any affiliation with the tribe. These benefits include certain property rights (such as the right to inherit land from enrolled members by valid will and to rent dwellings on tribal land), health care benefits (eligibility to receive free care at the Cherokee Indian Hospital), employment benefits (a limited hiring preference for EBCI employment), and education benefits (access to financial assistance for higher education and adult education services). Tarnawsky also testified that the list of benefits available only to enrolled EBCI members includes the right to hunt and fish on tribal lands, the ability to vote in tribal elections, and the right to hold tribal office.

The State also presented evidence that defendant had been incarcerated in Florida from 1993 until 2011 and that his pre-sentence report in Florida listed his race and sex as "W/M." When defendant was released from Florida's custody in 2011, he requested that his probation be transferred to North Carolina and listed his race as "white" on his Application for Interstate Compact Transfer.

Defendant's probation officers, Christian Clemmer and Olivia Ammons, testified that in 2011, defendant began living with family members at an address near the Qualla Boundary and working at a fast food restaurant that was also located within the Boundary. For the next fourteen months, defendant lived at various addresses on or near the Qualla Boundary until his arrest on 30 November 2012. Defendant never represented to either of his probation officers that he was an Indian. On a mandatory substance abuse screening form completed by Ammons on 7 May 2012, defendant's race was listed as "white."

Defendant's mother also testified at the hearing, stating that she is an enrolled EBCI member but that defendant's father was white and not affiliated with any tribe. She testified that defendant lived on or near the Qualla Boundary for much of his childhood and that she had

enrolled defendant in both the Cherokee tribal school system and the Swain County school system. On one Bureau of Indian Affairs (BIA) student enrollment application, she listed defendant's "Degree Indian" as "none." On two other BIA student enrollment applications, however, she listed defendant's "Tribal Affiliation" as "Cherokee."

As a child, defendant received treatment at the Swain County Hospital for injuries suffered in a car accident, and the EBCI paid for the portion of his medical expenses not covered by health insurance. An employee of Cherokee Indian Hospital, Vickie Jenkins, testified that defendant received care at the hospital on five occasions between 1985 and 1990. The hospital serves only enrolled members of the EBCI and first descendants, both of whom receive medical services at no cost. Defendant's hospital records indicated that he was of EBCI descent and identified him as an "Indian nontribal member."

After hearing all the evidence, the trial court entered an order on 26 November 2013 denying defendant's motion to dismiss based on its determination that defendant was not an Indian within the meaning of the IMCA. The trial court's order contained hundreds of detailed findings of fact. On 31 January 2014, defendant filed a petition for writ of certiorari with this Court seeking review of the trial court's order. The petition was denied on 11 June 2014.

On 14 March 2016, defendant renewed his motion to dismiss the charges against him in the trial court for lack of jurisdiction, and, in the alternative, moved that the jurisdictional issue relating to his Indian status be submitted to the jury by means of a special verdict. The trial court denied both motions on 25 March 2016.

Defendant was subsequently tried in Superior Court, Jackson County, beginning on 28 March 2016, and was ultimately convicted of armed robbery, first-degree murder under the felony murder doctrine, and possession of a firearm by a felon. He was sentenced to life imprisonment without parole.

Defendant appealed his convictions to the Court of Appeals. His principal argument on appeal was that the trial court had erred in denying his motion to dismiss on jurisdictional grounds. In a unanimous opinion, the Court of Appeals rejected his argument, based on its determination that defendant did not qualify as an Indian under the IMCA and that a special verdict was not required. *State v. Nobles*, 818 S.E.2d 129

(N.C. Ct. App. 2018).[2] Defendant filed a petition for discretionary review with this Court on 7 August 2018, which we allowed.

Analysis

The two issues before us in this appeal are whether the Court of Appeals erred in affirming the trial court's order denying defendant's motion to dismiss and in ruling that the jurisdictional issue was not required to be submitted to the jury by means of a special verdict. We address each issue in turn.

I. Denial of Motion to Dismiss

[1] The IMCA provides that "[a]ny Indian who commits [an enumerated major crime] against the person or property of another . . . within the Indian country[ ] shall be subject to . . . the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a); *see United States v. Juvenile Male*, 666 F.3d 1212, 1214 (9th Cir. 2012) ("[The IMCA] provides federal criminal jurisdiction for certain crimes committed by Indians in Indian country."); *United States v. Sands*, 968 F.2d 1058, 1061 (10th Cir. 1992) ("[The IMCA] provides that federal criminal law applies to various offenses committed by Indians . . . 'within the Indian Country.' ").

Here, there is no dispute that the shooting took place in "Indian country" as it occurred within the Qualla Boundary. Nor is there any dispute that the charges against defendant constituted major crimes for purposes of the IMCA. The question before us is whether defendant qualifies as an Indian under that statute.

The IMCA does not provide a definition of the term "Indian." The Supreme Court of the United States, however, suggested a two-pronged test for analyzing this issue in *United States v. Rogers*, 45 U.S. 567, 572–73, 11 L. Ed. 1105, 1107–08 (1846). To qualify as an Indian under the *Rogers* test, a defendant must (1) have "some Indian blood," and (2) be "recognized as an Indian by a tribe or the federal government or both." *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009) (citing *Rogers*, 45 U.S. at 572–73, 11 L. Ed. at 1105); *see also United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015) (en banc) ("We hold that proof of Indian status under the IMCA requires only two things: (1) proof of some quantum of Indian blood, . . . and (2) proof of membership in, or affiliation with, a federally recognized tribe.").

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2. The Court of Appeals remanded the case to the trial court for the sole purpose of correcting a clerical error. *Nobles*, 818 S.E.2d at 144. This portion of the Court of Appeals' decision is not before us in this appeal.

In the present case, the parties agree that the first prong of the *Rogers* test has been satisfied because defendant possesses an Indian blood quantum of 11/256 (4.29%). Thus, only the second prong of *Rogers* is at issue—that is, whether defendant has received tribal or federal recognition as an Indian. This Court has not previously had an opportunity to apply the *Rogers* test. It is therefore instructive to examine how other courts have done so.

In applying the second prong of *Rogers*, both federal and state courts around the country have frequently utilized—in some fashion—the four-factor balancing test first enunciated in *St. Cloud v. United States*, 702 F. Supp. 1456 (D.S.D. 1988). Under the *St. Cloud* test, a court considers the following factors:

> 1) enrollment in a tribe; 2) government recognition formally and informally through providing the person assistance reserved only to Indians; 3) enjoying benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation and participating in Indian social life.

Id. at 1461; *see, e.g.*, *United States v. Nowlin*, 555 F. App'x 820, 823 (10th Cir. 2014) (using the *St. Cloud* factors to determine whether the defendant was an Indian); *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005) (applying the *Rogers* test as the "generally accepted test for Indian status" as well as the *St. Cloud* factors); *United States v. Lawrence*, 51 F.3d 150, 152 (8th Cir. 1995) (court's analysis of the second *Rogers* prong was "guided by consideration of four factors . . . first enunciated in *St. Cloud*"); *State v. Sebastian*, 243 Conn. 115, 132, 701 A.2d 13, 24 (1997) ("The four factors enumerated in *St. Cloud* have emerged as a widely accepted test for Indian status in the federal courts."); *State v. George*, 163 Idaho 936, 939–40, 422 P.3d 1142, 1145–46 (2018) (relying on the *St. Cloud* factors to determine the defendant's Indian status); *State v. LaPier*, 242 Mont. 335, 341, 790 P.2d 983, 986 (1990) ("We expressly adopt the foregoing [*St. Cloud*] test."); *State v. Perank*, 858 P.2d 927, 933 (Utah 1992) (relying on *St. Cloud* to determine whether the defendant met the definition of an Indian); *State v. Daniels*, 104 Wash. App. 271, 281–82, 16 P.3d 650, 654–55 (2001) (considering the *St. Cloud* factors in deciding whether the defendant qualified as an Indian).

Courts have varied, however, in their precise application of the *St. Cloud* factors. *See, e.g.*, *State v. Salazar*, No. A-1-CA-36206, 2020 WL 239879, at *3 n.4 (N.M. Ct. App. Jan. 15, 2020) ("[A] circuit split has emerged about whether certain factors carry more weight than others.").

Some courts deem the four factors set out in *St. Cloud* to be exclusive and consider them "in declining order of importance." *Bruce*, 394 F.3d at 1224; *accord Sebastian*, 243 Conn. at 132, 701 A.2d at 24 (applying the four *St. Cloud* factors "in declining order of importance"); *LaPier*, 242 Mont. at 341, 790 P.2d at 986 (analyzing the *St. Cloud* factors "[i]n declining order of importance"); *Lewis v. State*, 137 Idaho 882, 885, 55 P.3d 875, 878 (Idaho Ct. App. 2002) ("[Of the *St. Cloud*] factors tribal enrollment is the most important."); *Daniels*, 104 Wash. App. at 279, 16 P.3d at 654 (using the four factors identified in *St. Cloud* "[i]n declining order of importance").

Other courts have utilized the *St. Cloud* factors differently. The Eighth Circuit has held that the four *St. Cloud* factors "should not be considered exhaustive . . . [n]or should they be tied to an order of importance." *Stymiest*, 581 F.3d at 764. The Tenth Circuit has likewise determined that the *St. Cloud* factors "are not exclusive." *Nowlin*, 555 F. App'x at 823 ("These factors are not exclusive and only the first factor is dispositive if the defendant is an enrolled tribe member.").

After thoroughly reviewing the decisions from other jurisdictions addressing this issue, we adopt the application of the *St. Cloud* factors utilized by the Eighth Circuit and the Tenth Circuit. We do so based on our belief that this formulation of the test provides needed flexibility for courts in determining the inherently imprecise issue of whether an individual should be considered to be an Indian under the second prong of the *Rogers* test. We likewise recognize that, depending upon the circumstances in a given case, relevant factors may exist beyond the four *St. Cloud* factors that bear on this issue. *See, e.g.*, *Stymiest*, 581 F.3d at 764 (holding that the trial court "properly identified two other factors relevant on the facts of this case" in addition to the *St. Cloud* factors—namely, that the defendant's tribe had previously "exercised criminal jurisdiction over" him and that the defendant "held himself out to be an Indian").

[2] Before applying this test in the present case, however, we must first address defendant's threshold arguments. Initially, he contends that consideration of the *St. Cloud* factors is unnecessary because his status as a first descendant conclusively demonstrates—as a matter of law—his "tribal or federal recognition" under the second *Rogers* prong. We reject this argument, however, based on our concern that such an approach would reduce the *Rogers* test into a purely blood-based inquiry, thereby conflating the two prongs of the *Rogers* test into one. Were we to hold that defendant may be classified as an Indian solely on the basis of (1) his percentage of Cherokee blood; and (2) his status as the son

of an enrolled member of the Cherokee tribe, this would transform the *Rogers* test into one based wholly upon genetics. Such an approach would defeat the purpose of the test, which is to ascertain not just a defendant's blood quotient, but also his social, societal, and spiritual ties to a tribe.

Indeed, the Ninth Circuit rejected this exact argument in *United States v. Cruz*, 554 F.3d 840 (9th Cir. 2009), explaining that the four-factor test articulated in *St. Cloud* is designed to probe

> "whether the Native American has a sufficient non-racial link to a formerly sovereign people" . . . . Given that many descendants of Indians are eligible for tribal benefits based exclusively on their blood heritage, the government's argument [that the defendant's descendant status alone could satisfy this prong] would effectively render the second [*Rogers* prong] a de facto nullity, and in most, if not all, cases would transform the entire [*Rogers*] analysis into a "blood test."

Cruz, 554 F.3d at 849 (citations and emphasis omitted).

We are likewise unpersuaded by defendant's assertion that we should follow the decision of the Cherokee Court in *E. Band of Cherokee Indians v. Lambert*, 3 Cher. Rep. 62 (N.C. Cherokee Ct. 2003), on this issue. At issue in *Lambert* was whether the defendant in that case qualified as an Indian for purposes of EBCI tribal criminal jurisdiction. *Id.* at 62. The defendant filed a motion to dismiss, contending that the EBCI lacked jurisdiction over her because she was not an enrolled member of the tribe. *Id.* Both parties stipulated that the defendant was recognized by the tribe as a first descendant. *Id.*

After holding a hearing to gather additional evidence, the court ruled that the defendant was "an Indian for the purposes of [tribal criminal] jurisdiction." *Id.* at 64. The court rejected the defendant's argument that her lack of enrollment in a tribe was dispositive of her status, explaining that "membership in a Tribe is not an 'essential factor' in the test of whether the person is an 'Indian' for the purposes of this Court's exercise of criminal jurisdiction." *Id.* Instead, the court relied on *Rogers* and the *St. Cloud* factors to conclude that "the inquiry includes whether the person has some Indian blood and is recognized as an Indian." *Id.*

The Cherokee Court ruled that "[a]pplying this test in this case, the [c]ourt can only conclude that the [d]efendant meets the definition of an Indian." *Id.* at 65. The court detailed the benefits and privileges available

to EBCI first descendants, including "some privileges that only Indians have, [as well as] some privileges that members of other Tribes do not possess." *Id.* at 64. The court also took judicial notice of the fact that the defendant had "availed herself of the [c]ourt's civil jurisdiction" to file a pending lawsuit against another tribal member. *Id.* at 63. Finally, the court noted that "[f]irst [d]escend[a]nts are participating members of [the] community and treated by the [t]ribe as such." *Id.* at 64.

In the present case, we believe that defendant's reliance on *Lambert* is misplaced for several reasons. First, it is far from clear that the *Lambert* court intended to announce a categorical rule that all first descendants must be classified as Indians. There, despite the parties' stipulation that the defendant was, in fact, an EBCI first descendant, the court nevertheless determined that "additional evidence was required to decide the matter" and proceeded to hold an evidentiary hearing. *Id.* at 62. The logical inference from the court's opinion is that if first descendant status alone was sufficient to decide the issue, the court would have had no need to seek additional evidence in order to determine whether the defendant was subject to tribal jurisdiction. Indeed, we note that the court in *Lambert* expressly made a finding of fact that the defendant had previously "availed herself of the [tribal] [c]ourt's civil jurisdiction" to file a lawsuit against another tribal member. *Id.* at 63. Such a finding would have been unnecessary had the defendant's first descendant status been enough by itself to resolve the issue.

Moreover, even if the Cherokee Court in *Lambert* did intend to articulate such a categorical rule, we would not be bound by it. The court that decided *Lambert* is a trial court within the EBCI judicial system. *See* Cherokee Code § 7-1(a) ("[T]he Trial Court shall be known as the 'Cherokee Court.' "). Defendant has failed to offer any persuasive argument as to why this Court should be bound by the decision of an EBCI trial court on this issue. We note that the Supreme Court of the EBCI has made clear that it "do[es] not consider the Cherokee Court opinions as having any precedential value since the Cherokee Court is the trial court for this appellate court." *Teesateskie v. E. Band of Cherokee Indians Minors Fund*, 13 Am. Tribal Law 180, 188 (E. Cher. Sup. Ct. 2015). Thus, the decision in *Lambert* does not have binding effect even within the EBCI courts.

Furthermore, as the Idaho Supreme Court has noted, the fact that a tribal court may have exercised its jurisdiction over certain defendants is not dispositive on the issue of whether a state court possesses jurisdiction over such defendants in a particular case. *See George*, 163 Idaho at 940, 422 P.3d at 1146 ("[T]his [c]ourt either has jurisdiction or

it does not, and it is not determined by whether other agencies have or do not have jurisdiction or exercise discretion in determining whether to prosecute."). Accordingly, we hold that defendant's status as a first descendant does not—without more—satisfy the second prong of the *Rogers* test.

[3] Having rejected defendant's initial arguments, we now proceed to apply the four *St. Cloud* factors along with any additional factors relevant to the analysis. Before doing so, it is important to emphasize that defendant has not specifically challenged any of the hundreds of findings of fact contained in the trial court's order denying his motion to dismiss. Accordingly, those findings are binding upon us in this appeal. *See State v. Sparks*, 362 N.C. 181, 185, 657 S.E.2d 655, 658 (2008) ("It is well established that if a party fails to object to the [trial court's] findings of fact and bring[s] them forward on appeal, they are binding on the appellate court.").

A. Enrollment in a Tribe

We first consider whether defendant is enrolled in any "federally recognized tribe." *Zepeda*, 792 F.3d at 1114. Here, the inquiry is a simple one. It is undisputed that defendant is not enrolled in any such tribe.

B. Government Recognition Through Provision of Assistance

The second *St. Cloud* factor requires us to determine whether defendant was the recipient of "government recognition formally and informally through receipt of assistance reserved only to Indians." *Cruz*, 554 F.3d at 846. In arguing that this factor supports his argument, defendant lists the types of benefits for which first descendants are eligible. However, this factor is concerned with those tribal benefits a defendant has actually *received* as opposed to those benefits for which he is merely *eligible*. *See Cruz*, 554 F.3d at 848 (holding that defendant failed to satisfy this prong of the *St. Cloud* test because he "never 'received . . . any benefits from the Blackfeet Tribe' "); *accord United States v. LaBuff*, 658 F.3d 873, 878 (9th Cir. 2011) (rejecting the argument that this factor "could be established by demonstrating eligibility rather than actual receipt of benefits").

Here, based on the trial court's findings of fact, the only evidence of governmental assistance to defendant consisted of five incidents of free medical treatment that he received as a minor at the Cherokee Indian Hospital, a hospital that serves only enrolled EBCI members and first descendants. Defendant's hospital records indicated that he was of EBCI descent and identified him as an "Indian nontribal member." The

trial court made no findings as to any tribal assistance that defendant has received since reaching adulthood.

C. Enjoyment of Benefits of Tribal Affiliation

The third factor under *St. Cloud* addresses defendant's "enjoyment of the benefits of tribal affiliation." *Bruce*, 394 F.3d at 1224. In assessing this factor, we must examine whether defendant has received any broader benefits from his affiliation with a tribe—apart from the receipt of government assistance. *See, e.g.*, *Cruz*, 554 F.3d at 848 (holding that the defendant failed to demonstrate that he "enjoy[ed] any benefits of tribal affiliation" when there was "no evidence that he hunted or fished on the reservation, nor . . . that his employment with the BIA was related to or contingent upon his tribal heritage").

Here, defendant was born in Florida and the trial court made no finding that he was born on tribal land. He did attend a school in the Cherokee tribal school system as a child after he and his mother moved back to North Carolina in the early 1980's, but the school was open to both Indian and non-Indian students. As an adult, defendant lived and worked on or near the Qualla Boundary for approximately fourteen months prior to the murder of Preidt in 2012. The trial court made no findings, however, suggesting that his employment at the restaurant was in any way connected to his first descendant status. Nor does the trial court's order show that he enjoyed any other benefits of tribal affiliation.

D. Social Recognition as an Indian

Under the fourth *St. Cloud* factor, we consider whether defendant received "social recognition as an Indian through residence on a reservation and participation in Indian social life." *Bruce*, 394 F.3d at 1224. Courts applying this factor have deemed relevant various types of conduct showing a defendant's connection with a particular tribe. *See, e.g.*, *United States v. Reza-Ramos*, 816 F.3d 1110, 1122 (9th Cir. 2016) (defendant "spoke the tribal language" and "had lived and worked on the reservation for some time"); *LaBuff*, 658 F.3d at 878 ("[Defendant] lived, grew up, and attended school on the Blackfeet Reservation."); *Stymiest*, 581 F.3d at 765–66 (defendant "lived and worked on the Rosebud reservation," told others he was an Indian, and spent significant time "socializing with other Indians"); *Bruce*, 394 F.3d at 1226 (defendant "was born on an Indian reservation and currently lives on one," she "participated in sacred tribal rituals," and her mother and children were enrolled members of a tribe).

Conversely, courts have determined that this factor weighs against a finding of Indian status under the IMCA as to defendants who have never

been involved in Indian cultural, community, or religious events; never participated in tribal politics; and have not placed any emphasis on their Indian heritage. *See*, *e.g.*, *Cruz*, 554 F.3d at 847 (defendant "never participated in Indian religious ceremonies or dance festivals, has never voted in a Blackfeet tribal election, and does not have a tribal identification card"); *Lawrence*, 51 F.3d at 154 (victim was not "recognized socially as an Indian" when she had only lived on the reservation for seven months and "did not attend pow-wows, Indian dances or other Indian cultural events; and . . . she and her family lived without focusing on their Indian heritage").

In the present case—as noted above—defendant lived and worked on or near the Qualla Boundary for approximately fourteen months prior to the murder of Preidt. During this time, he had a girlfriend, Ashlyn Carothers, who was an enrolled tribal member. Defendant also emphasizes that his two tattoos—which depict an eagle and a headdress—demonstrate his celebration of his cultural heritage.

However, the trial court's findings are devoid of any indication that defendant ever attended any EBCI cultural, community, or religious activities; that he spoke the Cherokee language; that he possessed a tribal identification card; or that he participated in tribal politics. Indeed, we note that Myrtle Driver Johnson, an active elder and member of the EBCI community, testified that she had never seen defendant at EBCI events. Moreover, on several different official documents, defendant self-identified as being "white."

E. Other Relevant Factors

Finally, we consider whether any additional pertinent factors exist. For example, whether a defendant has been subjected to tribal jurisdiction in the past—in either a criminal or civil context—has been considered by several courts to be relevant. *See*, *e.g.*, *LaBuff*, 658 F.3d at 879 (noting "that on multiple occasions, [the defendant] was arrested, prosecuted, and convicted under the jurisdiction of the tribal courts" and that "the assumption and exercise of tribal jurisdiction over criminal charges[ ] demonstrates tribal recognition"); *Stymiest*, 581 F.3d at 766 (observing that the defendant had "repeatedly submitt[ed] [himself] to tribal arrests and prosecutions"); *Bruce*, 394 F.3d at 1226–27 (deeming instructive the fact that the defendant had been "arrested tribal all her life" because "the tribe has no jurisdiction to punish anyone but an Indian").

Here, the trial court's findings do not show that defendant was ever subjected to the jurisdiction of the EBCI tribal court or, for that matter,

any other tribal court. Nor has defendant directed us to any additional facts found by the trial court that would otherwise be relevant under the second prong of the *Rogers* test.

* * *

After carefully considering the trial court's extensive findings of fact in light of the factors relevant to the second prong of the *Rogers* test, we conclude that defendant has failed to demonstrate that the trial court erred in denying his motion to dismiss. In essence, the trial court's findings show that (1) defendant is not enrolled in any tribe; (2) he received limited government assistance from the EBCI in the form of free healthcare services on several occasions as a minor; (3) as a child, he attended a Cherokee school that accepted both Indian and non-Indian students; (4) he lived and worked on the Qualla Boundary for approximately fourteen months as an adult; (5) his participation in Indian social life was virtually nonexistent and his demonstrated celebration of his cultural heritage was at best minimal; (6) he has never previously been subjected to tribal jurisdiction; and (7) he did not hold himself out as an Indian. The trial court therefore properly concluded that defendant was not an Indian for purposes of the IMCA. Accordingly, we affirm the court's denial of his motion to dismiss.

II. Special Jury Verdict

[4] The only remaining issue before us concerns defendant's contention that he was entitled to a special jury verdict on the jurisdictional issue underlying his motion to dismiss. Defendant asserts that because this issue required resolution by a jury the trial court erred in ruling on the motion as a matter of law. In support of this contention, he cites our decisions in *State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 497 (1977) and *State v. Rick*, 342 N.C. 91, 463 S.E.2d 182 (1995).

In *Batdorf*, the defendant challenged the trial court's territorial jurisdiction, contending that there was insufficient evidence that his crime was committed in North Carolina—as opposed to Ohio—"so as to confer jurisdiction on the courts of this State." *Batdorf*, 293 N.C. at 492, 238 S.E.2d at 502. We agreed with the defendant that the State bears the "burden of proving beyond a reasonable doubt that the crime with which an accused is charged was committed in North Carolina." *Id.* at 494, 238 S.E.2d at 502. We held that the trial court should have instructed the jury to "return a special verdict indicating lack of jurisdiction" if the jury was not satisfied that the crime occurred in North Carolina. *Id.* at 494, 238 S.E.2d at 503.

Rick likewise involved a challenge to the trial court's territorial jurisdiction in which the defendant contended that the State had not sufficiently proven whether the crime occurred in North Carolina or South Carolina. *Rick*, 342 N.C. at 98, 463 S.E.2d at 186. Citing the rule established in *Batdorf*, we determined that a remand was necessary because "the record reveals that although the defendant challenged the facts of jurisdiction, the trial court did not instruct the jury as to which party bore the burden of proving jurisdiction and that if the jury was unconvinced beyond a reasonable doubt that the murder . . . occurred in North Carolina, it should return a special verdict so indicating." *Id.* at 101, 463 S.E.2d at 187.

Thus, *Batdorf* and *Rick* each involved a challenge to the court's *territorial* jurisdiction—that is, whether the crime occurred in North Carolina as opposed to another state. Here, conversely, defendant is making the entirely separate argument that he was required to be prosecuted in federal court pursuant to the IMCA. As a result, our decisions in *Batdorf* and *Rick* have no application here.

The dissent appears to be arguing that *any* challenge to the trial court's jurisdiction in a criminal case must always be resolved by a jury—regardless of the nature of the jurisdictional challenge or whether any factual disputes exist regarding the jurisdictional issue. Such an argument finds no support in our caselaw and would extend the rulings in *Batdorf* and *Rick* well beyond the limited principle of law for which those cases stand.

The dissent fails to point to any factual dispute relevant to the IMCA analysis that exists in the record.[3] Given the absence of any such factual dispute, it would make little sense to hold that a jury was required to decide the purely legal jurisdictional issue presented here.

This principle is illustrated by our decision in *State v. Darroch*, 305 N.C. 196, 287 S.E.2d 856 (1982). There, the defendant was convicted of accessory before the fact to murder. *Id.* at 197, 287 S.E.2d at 857. The evidence showed that the defendant, a Virginia resident, had—while in Virginia—hired two persons to kill her husband and that the husband was subsequently killed in North Carolina by the individuals she had hired. *Id.* On appeal, the defendant argued that the trial court lacked jurisdiction over her based on the specific crime for which she had been charged given that the murder had been committed in North Carolina

3. The dissent similarly does not acknowledge the effect of defendant's failure to challenge on appeal any of the trial court's findings of fact.

but arranged in another state. *Id.* at 200–01, 287 S.E.2d at 859–60. Relying on *Batdorf*, she contended that because she had raised a jurisdictional issue "the jury should have been allowed to return a special verdict" as to whether jurisdiction existed in the trial court. *Id.* at 212, 287 S.E.2d at 866. In rejecting her argument, we explained as follows:

> While *Batdorf* still represents the law in this state on the burden of proof on jurisdiction, it is applicable only when the facts on which the State seeks to base jurisdiction are challenged. In this case, defendant challenged not the *facts* which the State contended supported jurisdiction, but the *theory* of jurisdiction relied upon by the State. Whether the theory supports jurisdiction is a legal question; whether certain facts exist which would support jurisdiction is a jury question.

Id.

As in in *Darroch*, defendant here is not challenging the underlying "facts on which the State seeks to base jurisdiction." *Id.* Instead, defendant contests the trial court's determination that the IMCA is not applicable in this case—an inherently legal question properly decided by the trial court rather than by the jury.[4]

Finally, the dissent notes that some federal courts have concluded that a defendant's Indian status under the IMCA "is an element of the crime that must be submitted to and decided by the jury" because it is "essential to federal subject matter jurisdiction." *Stymiest*, 581 F.3d at 763. Such a requirement is not illogical given that "federal courts are courts of limited jurisdiction." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374, 57 L. Ed. 2d 274, 282 (1978). The dissent, however, has failed to cite any authority for the converse proposition that in state court proceedings the *inapplicability* of the IMCA is an element of the crime that must be submitted for resolution by the jury. Accordingly, we conclude that the trial court did not err by denying defendant's request for a special jury verdict.

Conclusion

For the reasons stated above, we affirm the decision of the Court of Appeals.

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4. Therefore, this case does not require us to decide the question of whether a defendant's challenge to a trial court's jurisdiction based on the IMCA could ever require a special jury verdict on that issue in a case where—unlike here—a factual dispute exists that is relevant to the IMCA analysis.

AFFIRMED.

Justice EARLS dissenting.

I disagree with the majority's conclusion that defendant was not entitled to a special jury verdict on the question of whether he is an "Indian" under the Indian Major Crimes Act (the IMCA).[1] Further, assuming that the majority is correct that this question was not required to be submitted to the jury, I disagree with the majority's conclusion that defendant is not an Indian under the IMCA. Accordingly, I respectfully dissent.

As the majority notes, the fatal shooting of Barbara Preidt on 30 September 2012 occurred in Jackson County within the Qualla Boundary, which is land that is held in trust by the United States for the Eastern Band of Cherokee Indians (the EBCI), a federally-recognized tribe. Following an investigation by the Cherokee Indian Police Department (the CIPD), defendant was arrested within the Qualla Boundary in connection with the shooting.

The Cherokee Rules of Criminal Procedure mandated that individuals arrested on tribal land must be brought before a tribal magistrate to "conduct the '*St. Cloud*' test" to determine whether the arrestee is an Indian, and further that if the arrestee is an enrolled member of any federally-recognized tribe or an EBCI First Descendant, jurisdiction lies with the tribal court. Despite these Rules of Criminal Procedure, CIPD Detective Sean Birchfield did not bring defendant before a tribal magistrate nor ask whether defendant was a First Descendant. Rather, after checking an EBCI enrollment book, which does not include First Descendants, and determining that defendant was not an enrolled member, and after discussing the situation with a Jackson County Assistant District Attorney and a Special Assistant United States Attorney, Detective Birchfield transported defendant to Jackson County, where he was charged in State court with first-degree murder, robbery with a dangerous weapon,. and two counts of possession of a firearm by a felon.

On 15 April 2013, defendant filed a motion to dismiss in superior court, arguing that because he was an Indian under the IMCA, jurisdiction over his case lies exclusively in federal court. After a hearing, the trial court denied defendant's motion on 26 November 2013. Defendant later renewed his motion to dismiss and requested in the alternative that

1. Like the majority, I use the term "Indian" to comport with the terminology contained in the IMCA.

the question of whether he is an Indian be submitted to the jury for a special verdict. The trial court denied these motions on 25 March 2016. On appeal, the Court of Appeals upheld the trial court's rulings, concluding that defendant received a fair trial free from error. *State v. Nobles*, 818 S.E.2d 129 (N.C. Ct. App. 2018).

Special Jury Verdict

Defendant argues that the trial court erred in denying his request for a special jury verdict because he has a constitutional right to a jury trial, with the burden on the State to prove every factual matter necessary for his conviction and sentence beyond a reasonable doubt. In support of his contention, defendant relies, in part, upon two cases from this Court, *State v. Batdorf*, 293 N.C. 486, 238 S.E.2d 496 (1977), and *State v. Rick*, 342 N.C. 91, 463 S.E.2d 182 (1995).

In *Batdorf*, the defendant argued that there was insufficient evidence that the murder at issue was committed in North Carolina "so as to confer jurisdiction on the courts of this State." 293 N.C. at 492, 238 S.E.2d at 502. The Court stated:

> A defendant's contention that this State lacks jurisdiction may be an affirmative defense in that it presents . . . a matter "beyond the essentials of the legal definition of the offense itself." Jurisdictional issues, however, relate to the authority of a tribunal to adjudicate the questions it is called upon to decide. When jurisdiction is challenged, the defendant is contesting the very power of this State to try him. We are of the view that a question as basic as jurisdiction is not an "independent, distinct, substantive matter of exemption, immunity or defense" and ought not to be regarded as an affirmative defense on which the defendant must bear the burden of proof. Rather, jurisdiction is a matter which, *when contested*, should be proven by the prosecution as a prerequisite to the authority of the court to enter judgment.

Id. at 493, 238 S.E.2d at 502 (citations omitted). Thus, the Court held that "when jurisdiction is challenged, as here, the State must carry the burden and show beyond a reasonable doubt that North Carolina has jurisdiction to try the accused." *Id.* at 494, 238 S.E.2d at 502–03.[2]

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2. The Court concluded that while the trial court there should have instructed the jury "to return a special verdict indicating lack of jurisdiction" if the jury did not find the killing occurred in North Carolina, the instruction given "afford[ed] [defendant] no just

Similarly, in *Rick*, the defendant filed a motion to dismiss for lack of jurisdiction on the basis that there was insufficient evidence that the murder with which he was charged occurred in North Carolina. 342 N.C. at 98, 463 S.E.2d at 186. The Court determined that there was sufficient evidence that the crime occurred in North Carolina, but that in light of *Batdorf* the trial court erred because it "did not instruct the jury as to which party bore the burden of proving jurisdiction and that if the jury was unconvinced beyond a reasonable doubt that the murder, or the essential elements of murder, occurred in North Carolina, it should return a special verdict so indicating." *Id.* at 99–101, 463 S.E.2d at 186–87.

In addressing defendant's argument, the majority suggests that unlike a challenge to a court's "territorial jurisdiction," "defendant is making the *entirely separate* argument that he was required to be prosecuted in federal court pursuant to the IMCA. *As a result*, our decisions in *Batdorf* and *Rick* have no application here." (Emphases added.) Yet, the majority does not explain why the characterization of *Batdorf* and *Rick* as cases involving challenges to "territorial jurisdiction" renders them "entirely separate" and inapplicable to a jurisdictional challenge in the context of the IMCA.[3] It is undisputed that defendant's Indian status has jurisdictional consequences here—that is, if defendant is an Indian under the IMCA, the trial court had no jurisdiction over the case. *See* 18 U.S.C. § 1153(a) (2012); *see also Negonsott v. Samuels*, 507 U.S. 99, 102–03 (1993) ("As the text of § 1153 and our prior cases make clear, federal jurisdiction over the offenses covered by the [IMCA] is 'exclusive' of state jurisdiction." (citations omitted)); *United States v. John*, 437 U.S. 634, 651 (1978) (stating that "the assumption that § 1153 ordinarily is pre-emptive of state jurisdiction when it applies, seems to us to be correct"). Thus, defendant, like the defendants in *Batdorf* and *Rick*, "is contesting the very power of this State to try him." *Batdorf*, 293 N.C. at 493, 238 S.E.2d at 502.

Rather than elaborate on any differences between challenges to "territorial jurisdiction" and challenges to jurisdiction under the IMCA, the majority, shifting gears, alleges that the issue of defendant's Indian

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grounds for complaint" because the instruction "properly placed the burden of proof and instructed the jury that unless the State had satisfied it beyond a reasonable doubt that the killing . . . occurred in North Carolina, a verdict of not guilty should be returned." *Batdorf*, 293 N.C. at 494, 238 S.E.2d at 503.

3. If the issue was whether the crime occurred "within the Indian country" under the IMCA, I suspect the majority would hesitate to characterize the argument that the state court lacked jurisdiction as "entirely separate," such that, "*[a]s a result*, our decisions in *Batdorf* and *Rick* have no application here." (Emphasis added.)

status here is a "purely legal" issue and therefore need not be decided by a jury.[4] According to the majority, there is no "factual dispute relevant to the IMCA analysis."[5] Yet, the majority ignores that under the federal law it purports to follow, a determination of Indian status involves fundamental questions of fact such that a defendant's Indian status itself is a "factual dispute." *See*, *e.g.*, *United States v. Bruce*, 394 F.3d 1215, 1218 (9th Cir. 2005) (stating that a determination of Indian status is "a mixed question of law and fact"); *see also United States v. Gaudin*, 515 U.S. 506, 511–12 (1995) (rejecting the government's argument that in a prosecution for making material false statements in a matter within the jurisdiction of a federal agency the question of "materiality" is a "legal" question that need not be decided by a jury and stating that the ultimate question of "whether the statement was material to the decision" is an "application-of-legal-standard-to-fact sort of question . . . commonly called a 'mixed question of law and fact,' " which "has typically been resolved by juries"). For example, the majority here expressly adopts the test used by the Eighth Circuit and Tenth Circuit to determine an individual's Indian status for the purposes of the IMCA. *See United States v. Stymiest*, 581 F.3d 759 (8th Cir. 2009); *United States v. Nowlin*, 555 F. App'x 820 (10th Cir. 2014). In these circuits, the courts submit this test—the same one the majority purports to apply here—to the jury to determine whether a defendant is an Indian. *See Stymiest*, 581 F.3d at

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4. As defendant is not contending that *Batdorf* and *Rick* require "purely legal" issues to be submitted to the jury, this determination essentially renders the majority's previous paragraph *dicta*. That is—assuming that defendant's challenge here involved only a "purely legal" issue, there would be no need to suggest that *Batdorf* and *Rick* are "entirely separate" and, "[a]s a result," have no application in the context of a challenge to state court jurisdiction on the basis of the IMCA. The majority appears to concede this, stating later in its opinion that "this case does not require us to decide the question of whether defendant's challenge to a trial court's jurisdiction based on the IMCA could ever require a special jury verdict on that issue in a case where—unlike here—a factual dispute exists that is relevant to the IMCA analysis."

5. The majority also notes "defendant's failure to challenge on appeal any of the trial court's findings of fact." This characterization is not wholly accurate, as defendant challenged on appeal numerous findings of fact in the court below. It is true that before this Court defendant has not again raised those challenges to those findings. Yet, given that defendant's argument is that with respect to the question of his Indian status he was entitled to have all facts found, and all evidence weighed, by the jury, I can see little relevance to this issue in his failure to again raise those challenges before this court. For instance, were a trial judge in a prosecution for first degree murder to make findings on the issue of premeditation and deliberation, and refuse to submit that issue to the jury, it would make little difference that the defendant requested a jury instruction on the issue but failed to challenge any of those specific findings. The real dispute here appears to be the extent to which we view a determination of Indian status under the IMCA as inherently involving questions of fact.

763 (stating that "the district court properly denied the motion to dismiss and submitted the issue of Indian status to the jury as an element of the § 1153(a) offense."); *Nowlin*, 555 F. App'x at 823 ("Under the Major Crimes Act, 18 U.S.C. § 1153, the prosecution must prove to the jury that the defendant is an Indian." (citing *Stymiest*, 581 F.3d at 763)).

Briefly addressing this concept, the majority notes that federal courts addressing this issue, where a conviction rests on a determination that the defendant *is* an Indian, have treated the question as an element of the offense, but that here the conviction depends upon a showing that defendant is *not* an Indian, and no state court has considered the inapplicability of the IMCA to be an element of an offense. The fact that in our courts a defendant's Indian status, or lack thereof, may not be an element of the offense does not necessitate a conclusion that this jurisdictional issue need not be submitted to the jury. In fact, this is precisely the import of the Court's decision in *Batdorf*, to wit—that while "[a] defendant's contention that this State lacks jurisdiction presents . . . a matter 'beyond the essentials of the legal definition of the offense itself,' " "the defendant is contesting the very power of this State to try him" and "when jurisdiction is challenged, as here, the State must carry the burden and show beyond a reasonable doubt that North Carolina has jurisdiction to try the accused." *Batdorf*, 293 N.C. at 493–94, 238 S.E.2d at 502–03.[6]

More importantly, the fact that in our state courts, unlike in federal courts, a defendant's Indian status is not an element of the crime does not transform an otherwise factual inquiry into a question purely of law. The majority is misapprehending the relevance of these federal decisions in which the jury is asked to decide whether the defendant is an Indian—specifically, the majority is explicitly adopting a test that is inherently a mixed question of fact and law appropriate for resolution by a jury,[7] but then denying defendant the right to have the question decided by a jury on the basis that it is a "purely legal" issue.

Certainly, a determination of whether an individual is an Indian for the purposes of the IMCA is a complicated inquiry. As the trial court

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6. Under *Batdorf*, the fact that a defendant's Indian status is not an element of the crime in our state courts would be relevant in prosecutions in which the defendant did not challenge jurisdiction, in which case the State would be relieved of its burden to prove jurisdiction beyond a reasonable doubt.

7. After all, federal courts are not in the habit of submitting "purely legal" issues to the jury. As the majority itself notes, "it would make little sense" to submit questions strictly of law to the jury.

stated, "deciding who is an 'Indian' has proven to be a difficult question. In fact upon closer examination when one looks to legal precedent the question quickly devolves into a multifaceted inquiry requiring examination into factual areas not normally considered in our courts." This inquiry is particularly complex in that it involves difficult questions of race, including the extent to which a defendant self-identifies as an Indian, as well as credibility determinations regarding instances of self-identification.[8] Nonetheless, in view of the fact that the test employed by federal courts, and adopted today by the majority, requires an inherently factual inquiry, as well as the fact that our precedent requires jurisdiction, when contested, to be submitted to the jury and proven beyond a reasonable doubt, I must respectfully dissent from the majority's conclusion on this issue.

Denial of Motion to Dismiss

Assuming *arguendo* that defendant is not entitled to have the issue of his Indian status submitted to the jury, I disagree with the majority that the trial court correctly found that defendant was not an Indian under the IMCA. Applying the second prong of the *Rogers* test using the application of the *St. Cloud* factors utilized by the Eighth Circuit and Tenth Circuit, I would conclude that defendant is an Indian under the IMCA.

First, I disagree with the majority's reading of *Eastern Band of Cherokee Indians v. Lambert*, 3 Cher. Rep. 62 (N.C. Cherokee Ct. 2003), in which the Cherokee tribal court addressed whether the defendant was an Indian under the *Rogers* test such that the tribal court could exercise criminal jurisdiction over the defendant.[9] The majority states that because the parties stipulated that the defendant was an EBCI First Descendant, but nevertheless determined that additional evidence was necessary and therefore conducted an evidentiary hearing, "[t]he logical inference is that if first descendant status alone was sufficient to decide the issue, the court would have had no need to seek additional evidence in order to determine whether the defendant was subject to tribal jurisdiction." Given that the tribal court had not previously addressed this question, the

8. For example, the trial court found that while defendant claimed "at certain times to be white/Caucasian and then at other times to be Indian," the "variations," including the use on two occasions of different social security numbers "necessarily call[ ] into question the veracity of Defendant."

9. The tribal court's criminal jurisdiction over the defendant depended upon whether the defendant was an "Indian" under the Indian Civil Rights Act, which defines "Indian" by reference to the meaning of an Indian under the IMCA. 25 U.S.C. § 1301(4).

logical inference in my view is that the court needed additional evidence because this was an issue of first impression for the tribal court. This is particularly apparent given that essentially all of the tribal court's findings from that evidence address first descendants generally:

1. The Defendant, Sarella C. Lambert is not an enrolled member of any federally recognized Indian Tribe.

2. The Defendant, Sarella C. Lambert is recognized by the Eastern Band of Cherokee Indians as a "First Lineal Descendent" (First Descendent).

3. To be an enrolled member of the Eastern Band of Cherokee Indians, one must have at least one ancestor on the 1924 Baker roll of tribal members and possess at least one sixteenth blood quanta of Cherokee blood.

4. A First Descendent is a child of an enrolled member, but who does not possess the minimum blood quanta to remain on the roll.

5. A First Descendent may inherit Indian Trust property by testamentary devise and may occupy, own, sell or lease it to an enrolled member during her lifetime. C.C. § 28-2. However, she may not have mineral rights or decrease the value of the holding. C.C. § 28-2(b).

6. A First Descendent has access to the Indian Health Service for health and dental care.

7. A First Descendent has priority in hiring by the Tribe over non-Indians, on a par with enrolled members of another federally recognized Tribe as part of the Tribe's Indian preference in hiring.

8. A First Descendent has access to Tribal funds for educational purposes, provided that funds have not been exhausted by enrolled members.

9. A First Descendent may use the appeal process to appeal administrative decisions of Tribal entities.

10. A First Descendent may appear before the Tribal Council to air grievances and complaints and will be received by the Tribal Council in relatively the same manner that an enrolled member from another Indian Nation would be received.

11. Other than the Trust responsibility owed to a First Descendent who owns Indian Trust property pursuant to C.C. § 28-2, the United States Department of the Interior, Bureau of Indian Affairs has no administrative or regulatory responsibilities with regard to First Descendents.

12. A First Descendent may not hold Tribal elective office.

13. A First Descendent may not vote in Tribal elections.

14. A First Descendent may not purchase Tribal Trust land.

15. The Court takes judicial notice of its own records, and specifically of the fact that the Defendant has availed herself of the Court's civil jurisdiction in that she is the Plaintiff in the case of Sarella C. Lambert v. Calvin James, CV-99-566, a case currently pending on the Court's civil docket.

16. The Defendant was charged with a proper warrant and criminal complaint for Domestic Violence Assault pursuant to C.C. §§ 14-40.1(b)(6) and 14-40.10.

17. C.C. § 14-1.5 provides "The Cherokee Court system shall have the right to hear cases, impose fines and penalties on non members as well as members."

Lambert, 3 Cher. Rep. at 62–63. The majority holds up Finding of Fact 15 as proof that the tribal court was making its determination based on more than the defendant's mere status as a first descendant. Yet, the majority ignores the relevance of this finding to the court's analysis:

> The same concept is true here. By political definition First Descendents are the children of enrolled members of the EBCI. They have some privileges that only Indians have, but also some privileges that members of other Tribes do not possess, not the least of which is that they may own possessory land holdings during their lifetimes, if they obtain them by will. During this time, the Government will honor its trust obligations with respect to First Descendents who own Tribal Trust lands. Also, First Descendents have access to Tribal educational funds, with certain limitations, and may appeal the adverse administrative decisions of Tribal agencies. Like

> members of other tribes, First Descendents may apply for jobs with the EBCI and receive an Indian preference and they may also address the Tribal Council in a similar manner as members of other Tribes. *Of course, it almost goes without saying that First Descendents may, as this Defendant has, seek recourse in the Judicial Branch of Tribal Government.* Most importantly, according to the testimony of Councilwoman McCoy, First Descendents are participating members of this community and treated by the Tribe as such.

Id. at 64 (emphasis added). In *Lambert*, the tribal court plainly ruled that first descendants are Indians.

As the tribal court stated later that same year, "this Court . . . held [in *Lambert*] that first lineal descendants, children of enrolled members who do not possess sufficient blood quanta to qualify for enrolment [sic] themselves are nevertheless subject to the criminal jurisdiction of the Court." *In re Welch*, 3 Cher. Rep. 71, 75 (N.C. Cherokee Ct. 2003) (citation omitted); *see also E. Band of Cherokee Indians v. Prater*, 3 Cher. Rep. 111, 112–13 (N.C. Cherokee Ct. 2004) (citing *Lambert* as "[h]olding that First Lineal Descendants are Indians for the purposes of the exercise of [the tribal court's] jurisdiction"). The tribal court's position that first descendants are Indians is also reflected here in the trial court's findings regarding the Cherokee Rules of Criminal Procedure, which provided that when a tribal magistrate conducts the *St. Cloud* test, if a defendant is a First Descendant, "the inquiry ends there and the Court has jurisdiction over the defendant."

While I agree with the majority that the fact that a tribal court has exercised its jurisdiction over certain defendants is not dispositive of the issue, significant weight should be attributed to these tribal determinations that First Descendants are Indians, particularly in a test that is, at bottom, designed to determine whether an individual is "recognized as an Indian by [the] tribe." *Stymiest*, 581 F.3d at 762 (citing *United States v. Rogers*, 45 U.S. at 567, 572–73 (1846)). Yet, while the majority discusses *Lambert* in rejecting the notion that it alone satisfies the second prong of the *Rogers* test, the majority omits any mention of *Lambert*, the subsequent tribal court decisions, or the Cherokee Rules of Criminal Procedure, in its balancing of the *St. Cloud* factors.

Next, the trial court and the majority both, in my view, ignore the significance of the fact that defendant was incarcerated for nearly twenty years. The trial court's findings demonstrate that defendant was born in

Florida on 17 January 1976. When defendant was an infant, his father abandoned him with his maternal uncle, Mr. Furman Smith Crowe, an enrolled member of the EBCI. Defendant's mother returned from Florida in the early 1980's and lived with defendant until at least 1990, at which time they moved back to Florida. Defendant was convicted in Florida on 28 January 1993 at the age of seventeen years old and was imprisoned there until his release on 4 November 2011, at which time he returned to North Carolina and eventually began living on or around the Qualla Boundary. Defendant was arrested on 30 November 2012 and has been imprisoned since that time. In short, defendant—now forty-four years old—has lived only about eighteen years of his life outside of prison. During the large majority of that time defendant was a minor and lived on or near the Qualla Boundary.

Here, in addressing the extent to which defendant received government assistance reserved for Indians, the trial court made findings regarding the five separate instances that defendant, on the basis of his First Descendant status, received free medical treatment from Cherokee Indian Hospital ranging from when he was nine to fourteen years old, but then found that "there are no other records of accessing any other clinics or medical facilities overseen or related to the CIH for over 23 years." Similarly, in addressing how defendant enjoyed the benefits of tribal affiliation, the trial court found that "save however for use of medical services a quarter of a century ago Defendant has not demonstrated use of any of his rights as a First Descendant of the Eastern Band of Cherokee" and that "Defendant has never 'enjoyed' these opportunities [afforded to First Descendants] which were made available for individuals similarly situated." The majority stresses these findings, stating that "[t]he trial court made no findings as to any tribal assistance that defendant has received since reaching adulthood." While I recognize that defendant's incarceration was a result of his own conduct, the fact that during the vast majority of those previous twenty-three years defendant was wholly incapable of receiving further tribal assistance or enjoying benefits of tribal affiliation is salient, particularly in a test that is, again, geared towards determining whether an individual is "recognized as an Indian by [the] tribe." *Stymiest*, 581 F.3d at 62 (citing *Rogers*, 45 U.S. at 572–73). The extent to which defendant received tribal assistance and enjoyed the benefits of affiliation when he was actually at liberty to do so should, in my view, weigh more heavily in such an analysis.

The disregard for defendant's incarceration similarly pervades other portions of the majority's analysis. For example, the majority finds it significant that the trial court's findings are devoid of any indication that he

participated in tribal politics. Given that defendant has spent the majority of his life outside of prison living on the Qualla Boundary, but that he was over the age of eighteen for less than a year of that time, I can see little significance in his lack of participation in tribal politics in terms of measuring his "social recognition as an Indian." *St. Cloud v. United States*, 702 F. Supp. 1456, 1461 (D.S.D. 1988).

In sum, I would conclude that defendant has been "recognized by a tribe" and is an Indian for the purposes of the IMCA.[10] Of particular note, in my view, are the tribal court decisions and Cherokee Rules of Criminal Procedure providing that first descendants are subject to the tribal court's criminal jurisdiction on the basis that they are Indians under *Rogers* and the IMCA, as well as the findings that defendant has lived the large majority of his non-incarcerated life on or around the Qualla Boundary and during that time received free hospital care and attended Cherokee school.

Conclusion

For the reasons stated, I respectfully dissent from the majority's decision. I would reverse and remand for a new trial, at which defendant is entitled to have the question of his Indian status submitted to the jury. In the alternative, assuming that defendant is not entitled to have the question of his Indian status submitted to the jury, I would reverse the trial court and conclude that the trial court lacks jurisdiction on the basis that defendant is an Indian under the IMCA.

10. With respect to the findings regarding defendant's tattoos, the extent to which his claims of being an Indian are potentially contradicted by other instances of identifying as "white/Caucasian," including by signing his name to probation documents that listed him as "white," and his living on or around the Qualla Boundary and dating a woman who is an enrolled tribal member—to the extent that the majority relies upon these in determining that defendant did not demonstrate any legitimate celebration of his cultural heritage and did not genuinely hold himself out as an Indian, this reliance undercuts its determination that this inquiry is a purely legal, rather than factual, determination.

STATE OF NORTH CAROLINA
v.
DAVID MICHAEL REED

No. 365A16-2

Filed 28 February 2020

Search and Seizure—traffic stop—duration—reasonableness

The trial court's findings of fact did not support its denial of defendant's motion to suppress evidence obtained during a traffic stop where the law enforcement officer who made the initial stop for a speeding violation impermissibly extended the stop without a reasonable and articulable suspicion. Although the officer issued a traffic warning ticket to defendant and stated that the stop was concluded, defendant was still seated in the passenger side of the officer's patrol car when the officer asked if he would be willing to answer more questions. The officer gave contradictory statements during the suppression hearing regarding whether defendant was free to leave at that point.

Justice NEWBY dissenting.

Justice DAVIS dissenting.

Justices NEWBY and ERVIN 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, 257 N.C. App. 524, 810 S.E.2d 245 (2018), on remand from this Court, 370 N.C. 267, 805 S.E.2d 670 (2017), reversing a judgment entered on 21 July 2015 by Judge Thomas H. Lock in Superior Court, Johnston County, following defendant's plea of guilty after the entry of an order by Judge Gale Adams on 14 July 2015 denying defendant's motion to suppress. Heard in the Supreme Court on 9 April 2019.

Joshua H. Stein, Attorney General, by Kathleen N. Bolton, Assistant Attorney General, and Derrick C. Mertz, Special Deputy Attorney General, for the State-appellant.

Paul E. Smith for defendant-appellee.

MORGAN, Justice.

On 9 September 2014, a law enforcement officer stopped a rental car which was being driven along an interstate highway by the defendant, David Michael Reed. In the seminal case of *Terry v. Ohio*, the Supreme Court of the United States recognized that law enforcement officers need discretion in conducting their investigative duties. 392 U.S. 1 (1968). Since *Terry*, this discretion has been judicially broadened, equipping law enforcement officers with wide latitude within which to effectively fulfill their duties and responsibilities. When complex considerations and exigent circumstances combine in a fluid setting, officers may be prone to exceed their authorized discretion and to intrude upon the rights of individuals to be secure against unreasonable searches and seizures under the Fourth Amendment. This case presents such a situation, as we find here that the law enforcement officer who arrested defendant disregarded the basic tenets of the Fourth Amendment by prolonging the traffic stop at issue without defendant's voluntary consent or a reasonable, articulable suspicion of criminal activity to justify doing so. As a result, we affirm the decision of the Court of Appeals.

Factual and Procedural Background

Defendant was indicted on 6 October 2014 on two counts of trafficking in cocaine for transporting and for possessing 200 grams or more, but less than 400 grams, of the controlled substance. On 27 April 2015, defendant, through his counsel, filed a motion to suppress evidence obtained during a traffic stop of a vehicle operated by defendant, which resulted in the trafficking in cocaine charges. During a suppression hearing which was conducted on 2 June 2015 and 4 June 2015 pursuant to defendant's motion to suppress, the following evidence was adduced:

At approximately 8:18 a.m. on 9 September 2014, Trooper John W. Lamm of the North Carolina State Highway Patrol was in a stationary position in the median of Interstate 95 (I-95) between the towns of Benson and Four Oaks. Trooper Lamm was a member of the Criminal Interdiction Unit of the State Highway Patrol. In that capacity, he was assigned primarily to work major interstates and highways to aggressively enforce traffic laws, as well as to be on the lookout for other criminal activity including drug interdiction and drug activity. Trooper Lamm was in the median facing north in order to clock the southbound traffic, using radar for speed detection, when he determined that a gray passenger vehicle was being operated at a speed of 78 miles per hour in

a 65 mile-per-hour zone.[1] The driver of the vehicle appeared to Trooper Lamm to be a black male. Trooper Lamm left his stationary position to pursue the vehicle. As he caught up to the vehicle, the trooper turned on his vehicle's blue lights and siren. The operator of the car pulled over to the right shoulder of the road, and Trooper Lamm positioned his law enforcement vehicle behind the driver.

Trooper Lamm testified that he stopped the driver of the vehicle for speeding. Defendant was the operator of the vehicle, which was a Nissan Altima. Upon approaching the vehicle from its passenger side, the trooper noticed that there was a black female passenger and a female pit bull dog inside the vehicle with defendant. Trooper Lamm obtained defendant's driver's license along with a rental agreement for the vehicle. Defendant had a New York driver's license. The rental agreement paperwork indicated that a black Kia Rio was the vehicle which had been originally obtained, that there was a replacement vehicle, and that the renter of the vehicle was defendant's fiancée, Ms. Usha Peart. Peart was the female passenger in the vehicle with defendant. The vehicle rental agreement paperwork indicated that defendant was an additional authorized driver. The gray Nissan had not been reported to have been stolen.

After examining the rental agreement, Trooper Lamm requested that defendant come back to the law enforcement vehicle. The trooper inspected defendant for weapons and found a pocketknife, but in the trooper's view it was "no big deal." Trooper Lamm opened the door for defendant to enter the vehicle in order for defendant to sit in the front seat. Defendant left the front right passenger door open where he was seated, leaving his right leg outside the vehicle so that he was not seated completely inside the patrol car. Trooper Lamm asked defendant to get into the vehicle and told defendant to close the door. Defendant hesitated and stated that he was "scared to do that." He explained to the trooper that he had previously been stopped in North Carolina, but that he had never been required to sit in a patrol car with the door closed during a traffic stop. Trooper Lamm ordered defendant to close the door and stated, "[s]hut the door. I'm not asking you, I'm telling you to shut the door . . . Last time I checked we were the good guys." Defendant complied with Trooper Lamm's order and closed the front passenger door of the patrol car. It was at this point in the traffic stop that Trooper Lamm did not consider defendant to be free to leave.

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1. During the traffic stop, defendant admitted that his speed was 84 miles per hour.

The trooper began to pose questions to defendant. Defendant told him that Peart and defendant were going to Fayetteville to visit family and to attend a party before school sessions officially resumed. Defendant was further questioned about his living arrangements with Peart, and whether he or Peart owned the dog in the car. When the trooper asked Peart about their destinations while she was still in the gray Nissan and defendant was in the patrol car, Peart confirmed that family members were in the area, and that she and defendant were going to Fayetteville, and also mentioned Tennessee and Georgia. Although the rental agreement paperwork only authorized the rental vehicle to be in the states of New York, New Jersey, and Connecticut and it was not supposed to be in North Carolina, the trooper determined that the vehicle was properly in the possession of Peart upon actually calling the rental vehicle company in New York.

Trooper Lamm characterized the rental vehicle as being "very dirty inside." It had a "lived-in look," according to the trooper, with "signs of like hard driving, continuous driving—coffee cups, empty energy drinks." There was a large can of dog food, a jar of dog food, and dog food scattered along the floorboard. There were also pillows, blankets, and similar items inside the vehicle.

After receiving confirmation from the rental vehicle company that all was sufficiently in order with the gray Nissan, Trooper Lamm completed the traffic stop by issuing a warning ticket to defendant. The trooper handed all of the paperwork back to defendant—including defendant's driver's license, the vehicle rental agreement, and the warning ticket—and told defendant that the traffic stop was concluded. The traffic stop had already lasted for a duration of fourteen minutes and twelve seconds through the point in time that Trooper Lamm told Peart that "I just have to write Mr. Reed a warning, he just has to slow down, his license is good and then you'll be on your way." After this, the stop was lengthened for an additional five minutes during which Trooper Lamm communicated with the rental vehicle company. While the trooper did not know the time that the traffic stop concluded, he acknowledged that "it did take a little bit longer than some stops." Trooper Lamm testified that defendant was free to leave upon the completion of these actions; nonetheless, the trooper did not inform defendant that defendant was free to leave. Instead, the trooper said to defendant, "[t]his ends the traffic stop and I'm going to ask you a few more questions if it is okay with you." Trooper Lamm construed defendant's continued presence in the front passenger seat of the law enforcement officer's vehicle to be voluntary, testifying: "[h]e complied . . . [h]e stayed there." Trooper Lamm later

said in his testimony that although he informed defendant that the traffic stop was completed, defendant would still have been detained and required to stay seated, even if defendant denied consent to search the rental vehicle and wanted to leave, based upon Trooper Lamm's observations. The trooper went on to testify that at the point that he went to get consent to search the vehicle from Peart, defendant was detained.

When defendant was asked by Trooper Lamm if there was anything illegal inside the vehicle and for permission to search it, the trooper testified that defendant responded, "you could break the car down," and did not give a response to the trooper's inquiry regarding permission to search the vehicle. Defendant instead directed Trooper Lamm to Peart on the matter of searching the vehicle, because she was the individual who had rented it. Trooper Lamm then told defendant to remain seated in the patrol car by instructing defendant to "sit tight." At this point, for safety reasons, the trooper once again would not have allowed defendant to leave the patrol car.

Trooper Kenneth Ellerbe of the North Carolina State Highway Patrol, like Trooper Lamm, was also a member of the Patrol's Criminal Interdiction Unit who was located in a stationary position elsewhere on I-95 in the median, facing northbound as he observed southbound traffic at about 8:30 a.m. Trooper Ellerbe was contacted by Trooper Lamm to meet at the traffic stop in which Trooper Lamm was involved, because the Criminal Interdiction Unit operates in such a manner that a trooper who suspects criminal activity in a traffic stop needs another trooper to provide some security in the event that the investigating trooper eventually searches the vehicle at issue if consent to search is obtained. Trooper Ellerbe proceeded to Trooper Lamm's location, parked behind Trooper Lamm's vehicle to the right off the shoulder while putting on his blue lights and siren, and waited for Trooper Lamm to exit his patrol vehicle. Trooper Lamm was inside of his vehicle, and seconds after Trooper Ellerbe's arrival, exited his vehicle and started to walk back towards Trooper Ellerbe's vehicle. Trooper Ellerbe then got out of his vehicle, with the two law enforcement officers meeting between the rear of Trooper Lamm's vehicle and the front of Trooper Ellerbe's vehicle. Trooper Lamm informed Trooper Ellerbe that Trooper Lamm was going to talk with Peart to see if she would give consent to search the vehicle. Consent to search the rental vehicle had not been given at the time of Trooper Ellerbe's arrival on the scene. The sole reason for Trooper Ellerbe's presence was to provide security. At that point, Trooper Ellerbe approached the passenger side of Trooper Lamm's vehicle and remained beside the car door

for the duration of the traffic stop. Although defendant asked Trooper Ellerbe for permission to smoke a cigarette, defendant did not leave the vehicle. Trooper Ellerbe testified that this had become an officer safety issue, and that he did not want defendant to be outside of the vehicle during the traffic stop to smoke a cigarette. Even while Trooper Ellerbe and defendant engaged in conversation, this occurred through the passenger side window of Trooper Lamm's patrol car while defendant was seated in the vehicle.

As Trooper Ellerbe stood beside the front passenger door of Trooper Lamm's patrol car to provide security while defendant remained in the front passenger seat of Trooper Lamm's vehicle, Trooper Lamm proceeded to talk with Peart. Trooper Lamm asked Peart if there were any items in the rental car that were illegal. When the trooper, in the words of his testimony, "asked her . . . to search the car, she tried to—without saying, she tried to open the door. . . . [when I was] standing right there." Immediately following that portion of Trooper Lamm's testimony, the following exchange took place between the questioning prosecutor and the answering witness, Trooper Lamm:

> Q. What was she opening the door for?
>
> A. She told me she was opening the door so I could – I think she might of said look or search. I don't remember the exact[] verbiage, but she was opening the door to get out so we could search the car.
>
> Q. She was just getting out of your way so you [could] search?
>
> A. Exactly, yes, sir.
>
> Q. So, based on – at least by her actions she was consenting to your search of the vehicle; is that right?
>
> A. Yes, sir.

Trooper Lamm then told Peart that he needed her to complete some paperwork for a search of the rental car. He gave her the State Highway Patrol form "Written Consent to Search," completed the form himself, and obtained Peart's signature on the form.

Trooper Lamm performed an initial search of the rental car and found cocaine in the backseat area of the Nissan. He notified Trooper Ellerbe to place defendant in handcuffs, and Trooper Ellerbe did so.

Upon consideration of all of the evidence presented at the suppression hearing, the trial court entered an order on 14 July 2015 which denied defendant's motion to suppress. On 20 July 2015, defendant pleaded guilty to the offenses of (1) trafficking in cocaine by transporting more than 200 grams but less than 400 grams of cocaine, and (2) trafficking in cocaine by possessing more than 200 grams but less than 400 grams of cocaine. In exchange for defendant's guilty plea, the State agreed to dismiss the charges against his codefendant, Peart; to consolidate his two trafficking offenses for one judgment; and to stipulate to an active sentence of seventy to ninety-three months of imprisonment with a $100,000.00 fine. The trial court accepted defendant's plea, sentenced defendant to seventy to ninety-three months imprisonment, and imposed a $100,000.00 fine and $3,494.50 in costs. Defendant appealed to the Court of Appeals.

In his original appeal, defendant argued that the trial court erred in denying his motion to suppress evidence which was discovered pursuant to an unlawful traffic stop. Specifically, defendant asserted that the trial court made findings of fact which were not supported by competent evidence because his "initial investigatory detention was not properly tailored to address a speeding violation." Defendant further contended that Trooper Lamm seized him without consent or reasonable suspicion of criminal activity when Trooper Lamm ordered him to "sit tight" in the patrol car. Defendant therefore maintained that Trooper Lamm unlawfully seized items from the Nissan Altima vehicle during the ensuing search of the car and that these objects were "the fruit of the poisonous tree." The Court of Appeals agreed.

In a divided opinion, the Court of Appeals determined that Trooper Lamm's authority to seize defendant for speeding had ended when Trooper Lamm informed defendant that the officer was going to issue a warning citation for speeding and provided defendant with a copy of the citation. The majority of the lower appellate court ultimately concluded that Trooper Lamm lacked reasonable suspicion to search the rental car after the traffic stop had been completed because the evidence relied upon by the trial court in support of its finding of reasonable suspicion constituted legal behavior which was consistent with innocent travel. Therefore, the Court of Appeals reversed the trial court's order denying defendant's motion to suppress.

On 5 October 2016, the State filed a petition for writ of *supersedeas* and a motion for temporary stay of this matter with this Court. On the same date, we allowed the State's motion for a temporary stay. The State filed a Notice of Appeal on 25 October 2016 pursuant to a dissenting

opinion in the Court of Appeals which supported the State's position that the traffic stop was properly executed and that the disputed evidence was therefore admissible. On 3 November 2017, this Court vacated the opinion of the Court of Appeals and remanded the matter for reconsideration in light of this Court's recent decision in *State v. Bullock*, 370 N.C. 256, 805 S.E.2d 671 (2017). Upon remand, the Court of Appeals opined:

> In *Bullock*, after the officer required the driver to exit his vehicle, he frisked the driver for weapons. The Supreme Court held this frisk was lawful, due to concerns of officer safety, and the very brief duration of the frisk. The officer then required the driver to sit in the patrol car, while he ran database checks. The [C]ourt determined this did not unlawfully extend the stop either. The [C]ourt then held the officer had reasonable suspicion to thereafter extend the stop and search defendant's vehicle. The defendant's nervous demeanor, as well as his contradictory and illogical statements provided evidence of drug activity. Additionally, he possessed a large amount of cash and multiple cell phones, and he drove a rental car registered in another person's name. The [C]ourt determined these observations provided reasonable suspicion of criminal activity, allowing the officer to lawfully extend the traffic stop and conduct a dog sniff.

State v. Reed, 257 N.C. App. 524, 529, 810 S.E.2d 245, 249 (2018) (citations omitted).

The majority of the panel below went on to conclude:

> In reconsideration of our decision, we are bound by the Supreme Court's holding in *Bullock*. Therefore, we must conclude Trooper Lamm's actions of requiring [d]efendant to exit his car, frisking him, and making him sit in the patrol car while he ran records checks and questioned [d]efendant, did not unlawfully extend the traffic stop. Yet, this case is distinguishable from *Bullock* because after Trooper Lamm returned [d]efendant's paperwork and issued the warning ticket, [d]efendant remained unlawfully seized in the patrol car . . . [T]he governing inquiry is whether under the totality of the circumstances a reasonable person in the detainee's position would have believed that he was not free to leave.

> Here, a reasonable person in [d]efendant's position would not believe he was permitted to leave. When Trooper Lamm returned [d]efendant's paperwork, [d]efendant was sitting in the patrol car. Trooper Lamm continued to question [d]efendant as he sat in the patrol car. When the trooper left the patrol car to seek Peart's consent to search the rental car, he told [d]efendant to "sit tight." At this point, a second trooper was present on the scene, and stood directly beside the passenger door of Trooper Lamm's vehicle where [d]efendant sat. Moreover, at trial Trooper Lamm admitted at this point [d]efendant was not allowed to leave the patrol car.
>
> A reasonable person in [d]efendant's position would not feel free to leave when one trooper told him to stay in the patrol car, and another trooper was positioned outside the vehicle door. Therefore, even after Trooper Lamm returned [d]efendant's paperwork, [d]efendant remained seized. To detain a driver by prolonging the traffic stop, an officer must have reasonable articulable suspicion that illegal activity is afoot.
>
> As we concluded in our first opinion, Trooper Lamm did not have reasonable suspicion of criminal activity to justify prolonging the traffic stop. The facts suggest [d]efendant appeared nervous, Peart held a dog in her lap, dog food was scattered across the floorboard of the vehicle, the car contained air fresheners, trash, and energy drinks—all of which constitute legal activity consistent with lawful travel. While Trooper Lamm initially had suspicions concerning the rental agreement, the rental company confirmed everything was fine.
>
> These facts are distinguishable from *Bullock* in which the officer observed the defendant speeding, following a truck too closely, and weaving briefly over the white line marking the edge of the road. Then the defendant's hand trembled as he handed over his license. Additionally, the defendant was not the authorized driver on his rental agreement, he had two cell phones, and a substantial amount of cash on his person. He failed to maintain eye contact, and made several contradictory, illogical statements.

Id. at 529–32, 810 S.E.2d at 249–50 (citations omitted). Accordingly, the Court of Appeals again held in a divided opinion that the trial court erred

in denying defendant's motion to suppress and reversed the trial court's judgment. The State then exercised its statutory right of appeal to this Court based upon the dissenting opinion in the court below.

In the instant appeal, the State challenges the Court of Appeals decision which reverses the trial court's denial of defendant's motion to suppress. In doing so, the State contends that Trooper Lamm's actions during the traffic stop were reasonable and, therefore, consistent with the Fourth Amendment. The constitutionality of Trooper Lamm's search-and-seizure activities following the traffic stop is the sole question before us.

Standard of Review

When considering on appeal a motion to suppress evidence, we review the trial court's factual findings for clear error and its legal conclusions de novo. *State v. Williams*, 366 N.C. 110, 112, 726 S.E.2d 161, 166 (2012). This requires us to examine "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)).

Analysis

The Fourth Amendment to the United States Constitution guards against "unreasonable searches and seizures." *See* U.S. Const. Amend. IV. The "[t]emporary detention of individuals during the stop of an automobile by police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]." *Whren v. United States*, 517 U.S. 806, 809–10 (1996); *see also Bullock*, 370 N.C. at 257, 805 S.E.2d at 673. Thus, a traffic stop is subject to the reasonableness requirement of the Fourth Amendment. In that regard, because a traffic stop is more analogous to an investigative detention than a custodial arrest, we employ the two-prong standard articulated in *Terry* in determining whether or not a traffic stop is reasonable. *United States v. Bowman*, 884 F.3d 200, 209 (4th Cir. 2018).

Under *Terry's* "dual inquiry," we must evaluate the reasonableness of a traffic stop by examining (1) whether the traffic stop was lawful at its inception, *see United States v. Rusher*, 966 F.2d 868, 875 (4th Cir. 1992), and (2) whether the continued stop was "sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Florida v. Royer*, 460 U.S. 491, 500 (1983). The United States Supreme Court has made clear that "[t]he scope of the search must be strictly

tied to and justified by the circumstances which rendered its initiation permissible." *Terry*, 392 U.S. at 19 (citation omitted). Although "[t]he scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case, . . . the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500. Relatedly, "an investigatory detention must . . . last no longer than is necessary to effectuate the purpose of the stop." *Id.*

Consistent with this approach, "*Terry's* second prong restricts the range of permissible actions that a police officer may take after initiating a traffic stop." *United States v. Palmer*, 820 F.3d 640, 649 (4th Cir. 2016). A stop may become "unlawful if it is prolonged beyond the time reasonably required to complete [its] mission." *Illinois v. Caballas*, 543 U.S. 405, 407 (2005). As the United States Supreme Court explained in *Rodriguez v. United States*,

> [a] seizure for a traffic violation justifies a police investigation of that violation . . . [T]he tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's "mission"—to address the traffic violation that warranted the stop, and attend to related safety concerns. Because addressing the infraction is the purpose of the stop, *it may last no longer than is necessary to effectuate that purpose.* Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed.

575 U.S. 348, 354 (2015) (emphasis added) (citations omitted). Our Court's decisions are obliged to heed and implement these Fourth Amendment constraints, which have been articulated by the United States Supreme Court in *Terry* and its progeny, as the law of the land governing searches and seizures in traffic stops continues in its development, interpretation, and application. To this end, we have expressly held that "the duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission of the stop." *Bullock*, 370 N.C. at 257, 805 S.E.2d at 673 (quoting *Caballas*, 543 U.S. at 407). Thus, a law enforcement officer may not detain a person "even momentarily without reasonable, objective grounds for doing so." *Royer*, 460 U.S. at 497–98. Further, "[i]t is the State's burden to demonstrate that the seizure it seeks to justify . . . was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." *Id.* at 500.

In this case, defendant initially challenged the announced basis of the traffic stop as being unreasonable. We note, however, that defendant now concedes that the traffic stop was lawful at its inception due to a speeding violation; consequently, there is no issue which arises under the first prong of the *Terry* analysis that requires this Court's attention. However, defendant continues to argue that his seizure continued after the apparent conclusion of the purpose of the traffic stop and that this continuation was unconstitutional because Trooper Lamm had neither voluntary consent for a search of the vehicle nor any reasonable, articulable suspicion that criminal activity was afoot so as to further detain defendant. In response, the State argues that the initial lawful detention resulting from the traffic stop—which all parties agree was proper—had ended, but further contends that thereafter either defendant consented to the search of the rental vehicle and in the alternative, that any ongoing detention of defendant after the completion of the traffic stop was supported by reasonable, articulable suspicion. Therefore, our analysis begins with the second prong of *Terry* and its operation in the traffic stop context: whether Trooper Lamm "diligently pursued a means of investigation that was likely to confirm or dispel [his] suspicions quickly, during which time it was necessary to detain the defendant." *United States v. Sharpe*, 470 U.S. 675, 686 (1985). Specifically, we must determine whether Trooper Lamm trenched upon defendant's Fourth Amendment rights when he extended an otherwise-completed traffic stop.

In the context of traffic stops, we recognize that police diligence "includes more than just the time needed to issue a citation." *Bullock*, 370 N.C. at 257, 805 S.E.2d at 673. Beyond determining whether to issue a traffic ticket, an "officer's mission includes ordinary inquiries incident to the traffic stop, such as checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.* In addition, "[w]hile conducting the tasks associated with a traffic stop, a police officer's 'questions or actions . . . need not be solely and exclusively focused on the purpose of that detention.' " *United States v. Digiovanni*, 650 F.3d 498, 507 (2011) (quoting *United States v. Mason*, 628 F.3d 123, 131 (4th Cir. 2010)). An officer is permitted to ask a detainee questions unrelated to the purpose of the stop "in order to obtain information confirming or dispelling the officer's suspicions." *State v. Williams*, 366 N.C. at 116, 726 S.E.2d at 167 (citation omitted). However, an investigation unrelated to the reasons for the traffic stop must not prolong the roadside detention. *See Bullock*, 370 N.C. at 258, 805 S.E.2d at 674 ("Safety precautions taken to facilitate investigations into crimes that are unrelated to the reasons for which a driver has been stopped . . . are not

permitted if they extend the duration of the stop." (citing *Rodriguez*, 575 U.S. at 356)); *see also Bowman*, 884 F.3d at 210 ("[P]olice during the course of a traffic stop may question a vehicle's occupants on topics unrelated to the traffic infraction . . . as long as the police do not extend an otherwise-completed traffic stop in order to conduct these unrelated investigations." (citation omitted)). To prolong a detention "beyond the scope of a routine traffic stop" requires that an officer "possess a justification for doing so other than the initial traffic violation that prompted the stop in the first place." *United States v. Branch*, 537 F.3d 328, 336 (4th Cir. 2008). This requires "either the driver's consent or a 'reasonable suspicion' that illegal activity is afoot." *Id.*

"Implicit in the very nature of the term 'consent' is the requirement of voluntariness. To be voluntary the consent must be 'unequivocal and specific,' and 'freely and intelligently given.' " *State v. Little*, 270 N.C. 234, 239, 154 S.E.2d 61, 65 (1967) (citation omitted). On the other hand, a determination of the existence of reasonable suspicion requires an assessment of "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Ornelas v. United States*, 517 U.S. 690, 695 (1996).

In applying these binding legal principles to the present case, we embrace the exercise of the law enforcement officer's diligence to actively engage defendant, upon the effectuation of the traffic stop, in the performance of the fundamental tasks which this Court identified in *Bullock* as being inherent in a routine, thorough traffic stop. In detaining defendant for the speeding violation, Trooper Lamm discovered that defendant had no outstanding warrants and that defendant's driver's license was valid. The trooper reviewed the registration documents of the Nissan Altima which defendant was operating and the proof of insurance materials and, while the officer found nothing illegal, nonetheless there were inconsistencies in the vehicle rental agreement paperwork which prompted Trooper Lamm to dutifully question defendant and Peart about the details underlying the inconsistencies. Even after instructing defendant to exit the rental car, to enter the patrol car, and to close the front passenger door immediately beside defendant's seated position, the law enforcement officer was still properly within his authority to detain defendant as the trooper explored varying subjects with defendant; while some of these areas of inquiry were directly related to the rental agreement details and other areas meandered into more questionable categories such as the personal relationship between defendant and Peart as well as the ownership of the dog, nonetheless the United States Supreme Court in *Rodriguez* and our Court in *Bullock* and

in *Williams* authorize such wide-ranging investigatory authority if they do not extend the duration of the traffic stop. The trooper even saw fit to contact the rental vehicle company office in New York while defendant remained seated in the law enforcement vehicle, as the officer received confirmation from the rental business that the vehicle was properly in the possession of Peart, with defendant as an authorized driver. While Trooper Lamm's exercise of his authority to seize defendant's liberty and to detain defendant's movement through this juncture was authorized by the cited case holdings of the United States Supreme Court, the Fourth Circuit Court of Appeals, and this Court, the return of the vehicle rental agreement paperwork, the issuance of the traffic warning ticket to defendant, and Trooper Lamm's unequivocal statement to defendant that the traffic stop had concluded all combine to bring an end to the law enforcement officer's entitled interaction with defendant. The mission of defendant's initial seizure—to address the traffic violation and attend to related safety concerns—was accomplished. Trooper Lamm's authority for the seizure of defendant terminated when the trooper's tasks which were tied to the speeding violation had been executed. Therefore, as dictated by the United States Supreme Court in *Cabellas* and reinforced by *Rodriguez*, the traffic stop in the instant case became unlawful after this point because the law enforcement officer prolonged it beyond the time reasonably required to complete its mission.

While this Court determined that the law enforcement officer in *Bullock* did not unlawfully prolong the traffic stop at issue under the *Rodriguez* standard, *see Bullock*, 370 N.C. at 256, 257, 805 S.E.2d at 671, 673, the Court's reasoning in this case is quite instructive regarding the mission of a traffic stop in examining its factual distinctions from the current case. We have already noted our reiteration in *Bullock* of the well-established principle that the duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission of the stop. In *Bullock*, we expressly opined that "[t]he conversation that [the law enforcement officer] had with defendant while the database checks were running enabled [the officer] to constitutionally extend the traffic stop's duration" and noted that the officer "had three database checks to run before the stop could be finished." *Id.* at 263, 805 S.E.2d at 677. Here, in contrast, the record shows that Trooper Lamm testified at the suppression hearing that after the stop was finished, he said to defendant, "[t]his ends the traffic stop and I'm going to ask you a few more questions if it is okay with you." This interaction, which was initiated by the law enforcement officer with defendant, occurred after the traffic stop was categorically recognized by the trooper to have concluded and before reasonable suspicion

existed. This significant feature of the clear conclusion of the traffic stop in the case at bar, coupled with other vital factual dissimilarities between this case and *Bullock*—as persuasively detailed by the lower appellate court in its decision— effectively establish that the mission of the traffic stop had been consummated, that the continued pursuit of involvement with defendant by Trooper Lamm wrongly prolonged the traffic stop, and that defendant was unconstitutionally detained beyond the announced end of the traffic stop because reasonable suspicion did not exist to justify defendant's further detainment.

Similarly, the State's heavy reliance on *State v. Heien*, 226 N.C. App. 280, 741 S.E.2d 1, *aff'd per curiam*, 367 N.C. 163, 749 S.E.2d 278 (2013), *aff'd sub nom. on other grounds*, *Heien v. North Carolina*, 574 U.S. 54 (2014), is also unpersuasive in light of the factual distinctions and major legal differences regarding not only the existence of reasonable suspicion, but also a defendant's expression of his or her consent to search as conveyed to a law enforcement officer. In *Heien*, two law enforcement officers initiated a traffic stop of a vehicle based upon a malfunctioning brake light. *Id.* at 281, 741 S.E.2d at 3. There were two individuals in the subject vehicle: its operator and the defendant, who was lying down in the backseat of the vehicle. *Id.* at 284, 741 S.E.2d at 4. As the interaction occurred between the officers and the vehicle's occupants, circumstances unfolded which ultimately led the lower appellate court to resolve legal issues pertaining to the concepts of reasonable suspicion and consent to search. *Id.* at 284–86, 741 S.E.2d at 4–5. In the present case, while the State extensively cites the Court of Appeals decision in *Heien* as persuasive authority, based on a number of factual similarities between the two cases, along with the Court of Appeals' interpretation and application of the law in determining that the encounter between the officers and the vehicle's occupants was consensual, nonetheless the differences between the two fact patterns and the resulting legal outcomes are consequential:

Heien case	Present case
The operator of the vehicle was standing outside between the officer's vehicle and the subject car as the officer interacted with the driver.	The operator of the vehicle—defendant—was sitting inside the officer's vehicle as the officer interacted with defendant.
The second officer was positioned outside with the subject car's operator who was also allowed to be outside.	The second officer was positioned outside of the front passenger door of the patrol car in which defendant sat, as defendant was not allowed to be outside.

The officer who had received the pertinent documents from the subject car's operator during the traffic stop returned them, gave the driver a warning citation, and then asked the driver while both were outdoors if the driver would be willing to answer some questions.	The officer who had received the pertinent documents from the subject car's operator—defendant—during the traffic stop returned them, gave defendant a warning citation, and then asked defendant while both were inside the officer's patrol car if the driver would be willing to answer some questions.
The officer asked the person in charge of the subject car—the defendant—for permission to search the vehicle, and the defendant had no objection to the search.	The officer testified at the suppression hearing that he "told" the person in charge of the subject car—defendant's fiancée—that he "wanted to search the car," and "without saying anything, she tried to open the door so I could—I *think* she *might* of said look or search. I don't remember the exact verbiage, but she was opening the door to get out so we could search the car." (emphasis added)
The interaction between one of the officers and the operator of the subject car occurred in approximately one to two minutes, and the conversation between the other officer and the vehicle's driver lasted within a period of a minute to two minutes.	The traffic stop lasted for a duration of 14 minutes and 12 seconds, followed by an additional five minutes until the officer began his communication with the rental vehicle company for an unspecified period of time.

In determining the result in *Heien*, the court below concluded:

> We believe that the trial court's conclusion that defendant consented to this search is reasonable and should be upheld, as we further believe a reasonable motorist or vehicle owner would understand that with the return of his license or other documents, the purpose of the initial stop had been accomplished and he was free to leave, was free to refuse to discuss matters further, and was free to refuse to allow a search.

Id. at 288, 741 S.E.2d at 6. The critical factual distinctions between *Heien* and the case at bar, and their collective effect upon the presence of reasonable suspicion and consent to search, render the Court of Appeals decision in *Heien* inapposite in the present case. Not only do these pertinent differences operate so as to make the State's major dependence upon *Heien* ineffective, but they also accentuate the fallacies and

frailties of the dissenters' positions regarding the acceptability of the law enforcement officer's actions after the conclusion of the traffic stop in the instant case based upon what the dissenters contend is the existence of reasonable suspicion or consent to search defendant's vehicle.

An officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). An obvious, intrinsic element of reasonable suspicion is a law enforcement officer's ability to articulate the objective justification of his or her suspicion. Both dissenting opinions conveniently presuppose a fundamental premise which is lacking here in the identification of reasonable, articulable suspicion: the suspicion must be articulable as well as reasonable. In the present case, Trooper Lamm offered contradictory statements during the suppression hearing concerning his formation of reasonable suspicion to validate his detainment of defendant. On one hand, Trooper Lamm testified that defendant was free to leave upon the completion of the traffic stop and construed defendant's act of remaining seated in the patrol car to be voluntary after its conclusion, despite having ordered defendant to close the passenger door of the patrol vehicle after defendant had entered it. However, on the other hand, Trooper Lamm later testified at the suppression hearing that although he had informed defendant that the traffic stop was completed, the officer still would have detained defendant in the patrol car, even if defendant wanted to leave, based upon Trooper Lamm's observations. These inconsistencies in the law enforcement officer's testimony illustrate the inability on the trooper's part to articulate the objective basis for his determination of reasonable suspicion and, of equal importance, the time at which he formulated such basis.

While our dissenting colleagues address the existence of reasonable suspicion and the consent to conduct a vehicle search by assuming that we have not properly considered the binding nature of the trial court's findings of fact in its order denying defendant's motion to suppress, we have indeed evaluated these findings and determined that they do not support the trial court's conclusions of law that Trooper Lamm was justified in prolonging the stop based upon a reasonable, articulable suspicion and that the trooper had received consent from defendant to extend the stop. In applying the very standard recognized by the dissenting opinion discussing reasonable suspicion that "[c]onclusions of law are reviewed de novo and are subject to full review," *Biber*, 365 N.C. at 168, 712 S.E.2d at 878 (citations omitted), coupled with our acceptance of the responsibility that "[u]nder a de novo review, the court considers

the matter anew and freely substitutes its own judgment for that of the lower tribunal," *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted), we determine that the legal conclusions drawn by the trial court that the law enforcement officer had reasonable suspicion to prolong the traffic stop, and that the officer received voluntary consent to extend the stop and to search the vehicle, are not supported by the trial court's findings of fact.

With the two dissenting opinions' joint focus on the trial court's conclusions of law, our de novo review further reveals that the dissenters' dependence upon these conclusions of law to buttress their disagreement with our decision in this case is faulty upon an examination of the combination of factors cited to constitute reasonable suspicion. Firstly, the reasonable suspicion dissent creatively conflates Peart's statement to Trooper Lamm that "they [Peart and defendant] were going to Fayetteville, and then she [Peart] also mentioned Tennessee and Georgia," coupled with defendant's failure to mention "anything about going to Tennessee or Georgia," with an inability by Peart to articulate where she and defendant were going so as to discern the presence of a factor which contributed to reasonable suspicion. Secondly, this dissent considered the trooper's view that it was "out of the ordinary" for the rental car to be a decided distance away from its designated geographic area to constitute reasonable suspicion pursuant to a cited case from the state of Arkansas. However, as noted earlier, the trooper was "able to determine the vehicle was in fact *properly* in possession of Ms. Pert [sic]" upon contacting the vehicle rental company by telephone. (Emphasis added). While the dissent regards the presence of coffee cups, energy drinks, pillows, sheets, trash, and dog food as raising Trooper Lamm's suspicions, "the presence of these items in a vehicle, without more, is utterly unremarkable." *Bowman*, 884 F.3d at 216. The dissent particularly emphasizes the presence of dog food scattered along the floor of the rental vehicle as a factor contributing to Trooper Lamm's reasonable suspicion; the importance of this element dims, however, when the existence of this dog food, along with a can of dog food and a jar of dog food, are available in the rental vehicle to feed the pit bull dog on a road trip traversing hundreds of miles. In continuing to identify the factors which constituted the existence of the trooper's reasonable suspicion in its view, the dissent frames defendant's nervousness to close the passenger door of the patrol car as a solid indicator of the potential of defendant to flee the scene. This Court has expressly determined that general nervousness is not significant to reasonable suspicion analysis because "[m]any people become nervous when stopped by a state trooper." *Pearson*, 348 N.C. at 276, 498 S.E.2d at 601; *see also United States v. Palmer*, 820

F.3d 640, 649–50 (4th Cir. 2016) (concluding that a "driver's nervousness is not a particularly good indicator of criminal activity, because most everyone is nervous when interacting with the police"). Indeed,

> [i]t is common for most people to exhibit signs of nervousness when confronted by a law enforcement officer whether or not the person is currently engaged in criminal activity. *Thus, absent signs of nervousness beyond the norm, we will discount the detaining officer's reliance on the detainee's nervousness as a basis for reasonable suspicion.*

United State v. Salzano, 158 F.3d 1107, 1113 (10th Cir. 1998) (internal quotation marks and citations omitted) (emphasis added); *see also United States v. Massenburg*, 654 F.3d 480, 490 (4th Cir. 2011).

Just as the dissenting opinion labors to elevate the payment of cash for the rental vehicle and other enumerated factors to the level of reasonable suspicion by adopting the same convenient speculative conclusions which the investigating trooper utilized to unlawfully prolong the traffic stop, the other dissenting opinion is plagued by identical shortcomings regarding the officer's attempts to justify the voluntariness of the consent to search the rental vehicle. In the first instance, this dissent repeats the flimsy premise of the reasonable suspicion dissent that the trial court's findings of fact support the order's conclusions of law. In doing so, this dissent unfortunately confuses our de novo review of the conclusions of law in light of the findings of fact with a reevaluation of the evidence and the credibility of witnesses in order to find different facts. The dissent discussing consent to search shares the convenient approach of the dissent discussing reasonable suspicion in casually choosing to ignore the inconsistent testimony rendered by Trooper Lamm in his liberal discernment that he was somehow granted consent to search the rental car.

The dissent expressly agrees with the trial court's conclusion that, as a matter of law, Trooper Lamm received consent to extend the stop. It bases this ratification of the trial court's determination on the recognized principle that officers must determine whether a reasonable person, viewing the particular police conduct as a whole and within the setting of all of the surrounding circumstances, would have concluded that the officer had in some way restrained the defendant's liberty so that such a defendant was not free to leave. However, the trial court erred in its conclusion of law that "[d]efendant had no standing to contest the search of the grey Nissan Altima that he was driving since he

was not the owner nor legal possessor of the vehicle and deferred to Ms. Peart, the legal possessor, when asked for consent to search the vehicle." The trial court made no finding of fact upon which to base this unsupported conclusion of law that defendant here had no standing to contest the search. Defendant was an authorized operator of the rental vehicle, and his referral of the trooper to Peart about searching the vehicle did not divest defendant of the authority to grant consent to search the vehicle. The dissent further compounds its wayward stance on the trial court's conclusion of law that Trooper Lamm was justified in prolonging the traffic stop through the dissent's position that defendant himself prolonged the traffic stop by voluntarily remaining in the officer's patrol car to answer the trooper's questions after the conclusion of the stop, which is inconsistent with the dissent's simultaneous embrace of the trial court's determination that Peart prolonged the traffic stop through her grant of consent to search the rental vehicle. These inconsistent articulations by the dissent, which mirror the inconsistent articulations by the trooper on the matters of reasonable suspicion and consent to search, contribute largely to the dissent's agreement with the trial court's conclusions of law regarding these issues and to the dissent's misplaced reliance on *Heien*. The dissent cannot logically, on one hand, agree with the trial court's conclusion of law that defendant had no standing to contest the search and that Peart's consent to search validly prolonged the stop, while on the other hand, determining in its own analysis that defendant validly prolonged the stop by voluntarily remaining seated in Trooper Lamm's patrol car even following the trooper's inconsistent testimony about defendant's freedom to leave and after Trooper Lamm told defendant to "sit tight" as another trooper stood directly beside defendant's front passenger door.

Finally, while the dissenters couch our decision in a manner which they view as creating uncertainty among law enforcement officers and upsetting established law regarding the concepts of reasonable suspicion and consent to search, their collective desire to extend and to expand the ample discretion afforded to law enforcement officers to utilize their established and recognized authority in the development of reasonable suspicion and the attainment of consent to search would constitute the type of legal upheaval which they ironically claim our decision in this case creates. Clarity regarding a detained individual's freedom to leave serves to preserve and to promote the safety of both the motorist and the investigating law enforcement officer; the equivocal, presumptive, and inarticulable observations of the trooper here which the dissenters would implement as legal standards would serve to detract from such clarity. In reiterating the guiding principles established in the landmark

United States Supreme Court cases of *Terry v. Ohio*, *Rodriguez v. United States*, and their progeny, applying the sturdy guidelines reiterated in our Court's opinions in *State v. Bullock* and *State v. Williams*, and explaining the distinguishing features of *State v. Heien*, we choose to sharpen the existing parameters of reasonable suspicion and consent to search rather than to blur them through an undefined and imprecise augmentation of these principles.

Conclusion

Based upon the foregoing matters as addressed, we agree with the determination of the Court of Appeals that the trial court erred in denying defendant's motion to suppress evidence which was obtained as a result of the law enforcement officer's unlawful detainment of defendant without reasonable suspicion of criminal activity after the lawful duration of the traffic stop had concluded. The officer impermissibly prolonged the traffic stop without a reasonable, articulable suspicion to justify his action to do so and without defendant's voluntary consent. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice NEWBY dissenting.

After the paperwork has been returned at the end of a traffic stop, can an officer ask an individual for consent to ask a few more questions? The majority seems to answer this question no, holding that asking for permission to ask a few more questions unlawfully prolongs the traffic stop. In so holding, the majority removes a long-standing important law enforcement tool, consent to search. A traffic stop can be lawfully extended based on reasonable suspicion or consent. I fully join Justice Davis's dissent and agree, as the trial court held, that Officer Lamm had reasonable suspicion to detain defendant and conduct the search after the initial traffic stop concluded. I write separately, however, to state that I would also uphold the search of the car based on defendant's consent to prolong the stop to answer a few more questions and the subsequent valid consent to search the car. I respectfully dissent.

Traffic stops present one of the most dangerous situations for law enforcement officers, yet policing our highways is vital for public safety. Knowing how to lawfully extend a traffic stop is important to law enforcement officers who daily encounter circumstances similar to those presented by this case. Before today's decision, the law regarding reasonable suspicion and consent was clear. Now the majority upsets

this settled law and provides little guidance to law enforcement about how to proceed under these circumstances.

The majority holds that Officer Lamm's returning paperwork, issuing a traffic warning, and stating that the traffic stop had concluded ended his ability to interact with defendant, meaning that "the traffic stop in the instant case became unlawful after this point because the law enforcement officer prolonged [the stop] beyond the time reasonably required to complete its mission." Under the majority's approach, the traffic stop could not be lawfully prolonged even when defendant expressly permitted the officer to ask a few more questions. This holding effectively removes consent as a tool for law enforcement. Further, to reach its decision the majority fails to conduct the proper analysis of the trial court's order: An appellate court must determine whether the trial court's findings of fact are supported by competent evidence and whether those findings of fact support the trial court's conclusions of law. *State v. Williams*, 366 N.C. 110, 114, 726 S.E.2d 161, 165 (2012). Instead, on a cold record the majority reweighs the evidence and makes its own credibility determinations in finding facts. It then misapplies our precedent to unduly undermine the vital role of law enforcement.

Applying the appropriate standard, an appellate court first reviews the trial court's findings of fact. Here the trial court made the following findings:

> 24. That after Trooper Lamm told the Defendant that the traffic stop was complete, he then asked Defendant if he could ask him a few questions, and the Defendant responded in the affirmative.
>
> 25. That after asking the Defendant if there was anything illegal in the vehicle, the Defendant stated that "you can break the car down[.]"
>
> 26. That after asking the Defendant if he could search his car, the defendant expressed *reluctance before directing Trooper Lamm to ask Ms. Peart since she was the lessee of the vehicle.* [(Emphasis added.)] At which time, Trooper Lamm left the patrol car, asked the defendant to sit tight, and went to ask Ms. Peart.
>
> 27. That when Trooper Lamm asked Ms. Peart for consent to search the vehicle, she verbally consented and signed a written consent form, and Trooper Lamm began the search of the grey Nissan Altima.

> 28. That during the search of the grey Nissan Altima, Trooper Lamm found suspected cocaine under the back seat of the vehicle.
>
> 29. Upon seeing the suspected cocaine that had been found under the back seat of the grey Nissan Altima, the Defendant made statements denying ownership or knowledge that the cocaine was in the car and stated he had even given his consent to search, and had also stated that "I said you can ask her (Ms. Peart)" and that "she gave consent."

These findings are supported by competent evidence in the record.[1]

Based on its findings of fact, the trial court concluded as a matter of law that Trooper Lamm "received consent to extend the stop."[2] The

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1. The trial court's findings of fact were based on the following evidence admitted at trial: After Officer Lamm issued defendant a warning ticket for speeding, Officer Lamm told defendant, "That concludes the traffic stop." At that point, defendant remained in Officer Lamm's patrol car. Officer Lamm then stated, "I'm completely done with the traffic stop, but I'd like to ask you a few more questions if it's okay with you. Is that okay?" Defendant responded in the affirmative. Officer Lamm asked defendant if he was carrying various controlled substances, firearms, or illegal cigarettes in the rental car. Defendant responded, "No, nothing, you can break the car down," which Officer Lamm interpreted as defendant giving permission to search the rental car. Nonetheless, to clarify defendant's response, Officer Lamm continued questioning defendant and subsequently said, "Look, I want to search your car, is that okay with you?" When defendant did not immediately respond, Officer Lamm stated, "It's up to you." Defendant asked why the officer wanted to search the vehicle, and Officer Lamm explained he wanted to look for any of the things previously mentioned, such as illegal drugs or firearms. Defendant then responded, "You gotta ask [Peart]. I don't see a reason why." Officer Lamm then questioned, "Okay. You want me to ask her since she is the renter on the agreement, right?" Defendant neither agreed nor disagreed but stated that he needed to go to the restroom, wanted to smoke a cigarette, and added that they were getting close to the hotel so he did not "see a reason why." At that point Officer Lamm asked, "Okay, so you're saying no?" Defendant did not answer the question but mentioned that Officer Lamm had initially frisked defendant at the beginning of the traffic stop. After further conversation, Officer Lamm said, "Alright, let me go talk to her, then. Sit tight for me, okay?"

Officer Lamm then got out of the patrol car and approached the rental car to speak to Peart. Officer Lamm asked Peart if he could search the rental car, and Peart, without verbally responding, immediately opened the door. Peart then explained that she was opening the door for Officer Lamm to search the car. Peart thereafter noted, "There's nothing in my car," but she gave verbal consent and then signed the form authorizing officers to search the rental car. During the search, officers discovered suspected cocaine under the back passenger seat. Thereafter, defendant stated that he, too, had given his consent to search.

2. Notably, the trial court further concluded as a matter of law "[t]hat the Defendant had no standing to contest the search of the grey Nissan Altima that he was driving since he was not the owner nor legal possessor of the vehicle and deferred to Ms. Peart, the legal possessor, when asked for consent to search the vehicle." The State failed to present for review the issue of defendant's standing to challenge the search. Nonetheless, the majority

trial court also concluded that Officer Lamm's search was justified based on reasonable suspicion. Therefore, the trial court denied defendant's motion to suppress.

"[T]o detain a driver beyond the scope of the traffic stop, the officer must have the [appropriate person's] consent or reasonable articulable suspicion that illegal activity is afoot." *State v. Williams*, 366 N.C. 110, 116, 726 S.E.2d 161, 166–67 (2012) (first citing *Florida v. Royer*, 460 U.S. 491, 497–98, 103 S. Ct. 1319, 1324, 75 L. Ed. 2d 229, 236 (1983); then citing *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). The State argues before this Court that the search was supported by reasonable suspicion and was also valid as consensual. The State must prove "that the consent resulted from an independent act of free will." *United States v. Thompson*, 106 F.3d 794, 797–98 (7th Cir. 1997) (citing *Royer*, 460 U.S. at 501, 103 S. Ct. at 1319, 75 L. Ed. 2d at 238). Whether a defendant was seized at the time that officers obtained her consent requires an objective determination of "whether a reasonable person, viewing the particular police conduct as a whole and within the setting of all the surrounding circumstances, would have concluded that the officer had in some way restrained her liberty so she was not free to leave." *Id.* at 798 (citing *Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S. Ct. 1975, 1979, 100 L. Ed. 2d 565, 571 (1988)) (recognizing that a defendant may still be free to leave, and interaction with police officers may still be consensual, even when the defendant is sitting in a police car). Whether an individual is free to leave is evaluated based on an objective standard, meaning it does not take into account the officer or individual's beliefs in that particular situation. *See id.*; *State v. Nicholson*, 371 N.C. 284, 292, 813 S.E.2d 840, 845 (2018) ("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." ' " (quoting *Brigham City v. Stuart*, 547 U.S. 398, 404, 126 S. Ct. 1943, 1948, 164 L. Ed. 2d 650, 658 (2006) (brackets and emphasis in original))).

While consent must be obtained voluntarily, a defendant need not be informed that he has a right to refuse. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 248–49, 93 S. Ct. 2041, 2059, 36 L. Ed. 2d 854, 875 (1973). Instead, whether a person gives consent voluntarily is evaluated based on "the totality of the circumstances surrounding the consent." *United*

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incorrectly attempts to reach this issue despite it not being before this Court. Regardless, it is undisputed that defendant told Officer Lamm to seek permission from Peart and that Peart consented to the search.

States v. Lattimore, 87 F.3d 647, 650 (4th Cir. 1996) (7–6 decision) (citing *Schneckloth*, 412 U.S. at 227, 93 S. Ct. at 2047–48, 36 L. Ed. 2d at 862–63). This determination requires an evaluation of factors like "the characteristics of the accused (such as age, maturity, education, intelligence, and experience) as well as the conditions under which the consent to search was given (such as the officer's conduct; the number of officers present; and the duration, location, and time of the encounter)." *See id.* (first citing *United States v. Watson*, 423 U.S. 411, 424, 96 S. Ct. 820, 828, 46 L. Ed. 2d 598, 609 (1976); then citing *United States v. Analla*, 975 F.2d 119, 125 (4th Cir. 1992), *cert. denied*, 507 U.S. 1033, 113 S. Ct. 1853, 123 L. Ed. 2d 476 (1993); and then citing *United States v. Morrow*, 731 F.2d 233, 236 (4th Cir.), *cert. denied*, 467 U.S. 1230, 104 S. Ct. 2689, 81 L. Ed. 2d 883 (1984)).

The majority here cites the correct standard of review. The majority then proceeds with its analysis, without even mentioning any of the trial court's findings of fact, making only a passing reference to the trial court order. The majority instead finds its own facts to reach its conclusion. In doing so, it relies on its view of the officer's subjective state of mind instead of employing the correct objective standard. Finding facts is not the job of an appellate court. This responsibility resides with the trial court, which makes credibility determinations based on face-to-face interactions with the parties before it.

When applying the correct standard of review, it is clear that the trial court's findings of fact here are supported by competent evidence in the record and that those factual findings support the trial court's conclusions of law. Officer Lamm explicitly told defendant that the traffic stop was finished before inquiring whether he could ask defendant additional questions. At this point defendant was no longer seized but was free to leave and to refuse Officer Lamm's request. *See State v. Heien*, 226 N.C. App. 280, 287, 741 S.E.2d 1, 5–6 ("Generally, the return of the driver's license or other documents to those who have been detained indicates the investigatory detention has ended."), *aff'd per curiam*, 367 N.C. 163, 749 S.E.2d 278 (2013), *aff'd sub nom. on other grounds*, *Heien v. North Carolina*, 574 U.S. 54, 135 S. Ct. 530, 190 L. Ed. 2d 475 (2014).[3] Notably, Officer Lamm asked defendant if he could proceed with additional questions, and defendant expressly consented; Officer Lamm did not just begin questioning defendant without first acquiring defendant's

3. In rejecting the State's arguments about the similarities between *Heien* and this case, the majority frequently refers to the Court of Appeals' opinion in that case. Importantly, this Court affirmed *Heien* in a per curiam opinion, placing its approval on the Court of Appeals' opinion.

consent to do so. Though defendant was still sitting in the patrol car at the time, this factor alone does not transform the consensual encounter, during which defendant was free to leave because the traffic stop had ended, into a nonconsensual interaction. *See Thompson*, 106 F.3d at 798. Thus, Officer Lamm initially prolonged the stop with defendant's consent. When asked if defendant and Peart had any illegal substances in the car, defendant responded, "No, nothing, you can break the car down." Defendant then told Officer Lamm that he would need to obtain Peart's consent to search the rental car. The officer reasonably kept defendant in the patrol car for officer safety while he talked with Peart.

Thereafter, Peart, the authorized renter of the car and the person with the authority to give consent, gave both verbal and written consent authorizing the search. Thus, at a time when defendant was not seized for Fourth Amendment purposes, Officer Lamm had, per defendant's express direction, obtained Peart's consent to search the car. *See Heien*, 226 N.C. App. at 287–88, 741 S.E.2d at 5–6 (concluding that, after officers had issued a warning ticket to the driver of a vehicle in which the defendant was the passenger and also returned the defendant passenger's driver's license, the encounter became consensual and officers could obtain valid consent to search the car from the defendant, who owned the car). Once defendant advised Officer Lamm to ask Peart for consent to search the car, Officer Lamm's request for defendant to stay in the patrol car for officer safety reasons was reasonable. *See State v. Bullock*, 370 N.C. 256, 262, 805 S.E.2d 671, 676 (2017) (recognizing that, in the context of facilitating the mission of the traffic stop itself, officers may take certain precautions justified by officer safety). Additionally, no one contests that Peart's consent was voluntarily given. Significantly, once officers discovered drugs in the car, defendant told the officers he had consented to the search.

The trial court's findings of fact are supported by competent evidence in the record, and those findings of fact support the trial court's conclusion of law that the search was lawful. Thus, because I would also uphold the trial court's order denying defendant's motion to suppress based on valid consent as well as the existence of reasonable suspicion, I respectfully dissent.

Justice DAVIS dissenting.

I respectfully dissent from the majority's opinion. Even assuming *arguendo* that defendant's consent to the search of the vehicle was not voluntary, I believe that Trooper Lamm possessed reasonable suspicion to extend the traffic stop after issuing the warning ticket.

"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, 145 L. Ed. 2d 570, 576 (2000)); *see also State v. Watkins*, 337 N.C. 437, 442, 446 S.E.2d 67, 70 (1994) ("The only requirement is a minimal level of objective justification, something more than an 'unparticularized suspicion or hunch.' " (quoting *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989))). The reviewing court must consider "the totality of the circumstances—the whole picture." *Watkins*, 337 N.C. at 441, 446 S.E.2d at 70 (quoting *United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 628 (1981)).

All of the evidence, when considered together, must yield "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *State v. Jackson*, 368 N.C. 75, 78, 772 S.E.2d 847, 849 (2015) (quoting *Navarette v. California*, 572 U.S. 393, 396, 188 L. Ed. 2d 680, 686 (2014)). This objective basis must be premised upon "specific and articulable facts" and the "rational inferences" therefrom, *Terry v. Ohio*, 392 U.S. 1, 21, 20 L. Ed. 2d 889, 906 (1968), as understood by a "an objectively reasonable police officer," *Bullock*, 370 N.C. at 258, 805 S.E.2d at 674 (citation omitted). *See Watkins*, 337 N.C. at 441, 446 S.E.2d at 70 (holding that reasonable suspicion "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").

Our standard of review on appeal from orders ruling on motions to suppress is well-settled. We review a trial court's order 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. Nicholson*, 371 N.C. 284, 288, 813 S.E.2d 840, 843 (2018) (quoting *Jackson*, 368 N.C. at 78, 772 S.E.2d at 849). When a trial court's findings of fact are not challenged on appeal, "they are deemed to be supported by competent evidence and are binding on appeal." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (citation omitted). The trial court's conclusions of law are reviewed *de novo*. *Id.*

In my view, a proper application of this standard of review in the present case requires that the trial court's order denying defendant's motion to suppress be affirmed. Here, the pertinent findings made by the court are largely unchallenged and therefore binding on us in this appeal. I believe that the majority has failed to properly consider these

findings, which are sufficient to support the trial court's conclusion that Trooper Lamm had a reasonable basis to believe that further investigation was warranted. As the trial court recognized, Trooper Lamm identified at the suppression hearing numerous factors that combined to create a reasonable suspicion that further investigation of possible criminal activity was appropriate.

First, the inconsistent statements of defendant and Peart concerning their travel plans raised Trooper Lamm's suspicions. Defendant stated that they were traveling from New York to Fayetteville to visit family, while Peart said that they were going to Fayetteville for a two-day trip but also mentioned driving to Tennessee and Georgia to visit some of her family members.[1] *See State v. Williams*, 366 N.C. 110, 117, 726 S.E.2d 161, 167 (2012) (holding that a passenger's "inability to articulate where they were going" is a factor contributing to reasonable suspicion).

Second, the rental agreement authorized the vehicle to be driven only in New York, New Jersey, and Connecticut. Trooper Lamm testified that he considered it "out of the ordinary" that the car was located approximately 500 miles away from the geographic area designated in the rental agreement. *Cf. Burks v. State*, 362 Ark. 558, 561, 210 S.W.3d 62, 65 (2005) (holding that officer had reasonable suspicion to extend traffic stop in part because defendant's rental vehicle was "half a continent away" from the permitted driving locations).

Third, the fact that the rental car had been paid for with $750 in cash was also a factor in Trooper Lamm's decision to extend the stop, as he testified that "the majority of [rental car payments] we see [are] usually on a credit card." *Cf. Sokolow*, 490 U.S. at 8–9, 104 L. Ed. 2d at 11 (1989) (holding that paying for airline tickets with large sums of cash was "out of the ordinary" and could be considered as relevant when determining whether reasonable suspicion existed to investigate suspected drug couriers).

Fourth, the presence of empty coffee cups, energy drinks, pillows and blankets, and trash in the car—which gave the vehicle a "lived-in

1. At the suppression hearing, Trooper Lamm testified at one point that "all [Peart] wanted to say was they had family down and they were going to Fayetteville, and then she also mentioned Tennessee and Georgia." Shortly thereafter, Trooper Lamm stated that "the passenger was not certain where she was going with the driver other than they were going — that she was on a trip with him and it was a trip from New York to Fayetteville for a two-day turnaround trip." The trial court's finding of fact on this issue was that Trooper Lamm "learned from [Peart] that she was unsure of her travel plans." This finding is binding upon us in this appeal.

look"—also raised Trooper Lamm's suspicions. He testified that signs of "hard" and "continuous" driving are consistent with drug trafficking. Trooper Lamm further stated that indicia of attempts to "sleep and drive at the same time" are "things we've been trained to look for beyond the normal traffic stop [as] . . . an indicator [of criminal activity]." *See United States v. Finke*, 85 F.3d 1275, 1277–1280 (7th Cir. 1996) (holding that a vehicle that looked like the defendant "had been living in [it] for the last few days" was a factor supporting a finding of reasonable suspicion because the officer making the stop "knew from his training that drug couriers frequently make straight trips because they do not want to stop anywhere with a load of drugs in their vehicle").

Fifth, Trooper Lamm testified that the presence of dog food "strung throughout the car" is a tactic used by drug traffickers to distract police canines from detecting the scent of narcotics. *See Grimm v. State*, 458 Md. 602, 618, 183 A.3d 167, 176 (2018) (noting that dog food can be used as a distraction for police canines searching for narcotics).

Sixth, the presence of air fresheners in the vehicle—which Trooper Lamm believed to be unusual given that the vehicle was a rental car—was consistent with an additional tactic utilized by drug traffickers to mask the scent of narcotics and act as a diversion for police canines. *See*, *e.g.*, *Jackson v. State*, 190 Md. App. 497, 521, 988 A.2d 1154, 1167 (2010) (stating that drug traffickers "seem to enjoy an incorrigible affinity for air fresheners" and although "[t]here is nothing criminal" about them, their presence in a vehicle may be a "tell-tale characteristic[] of a drug courier").

Finally, Trooper Lamm testified that it was unusual for a person in defendant's position to be scared to shut the door of the patrol car upon entering the vehicle, despite the officer's order to close the door and the fact that it was raining outside. This conduct suggested to Trooper Lamm that defendant may have considered fleeing, an unusual desire for a person stopped for a mere speeding violation. *See Illinois v. Wardlow*, 528 U.S. 119, 124, 145 L. Ed. 2d 570, 576 (2000) (holding that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion"); *see also United States v. Moorefield*, 111 F.3d 10, 14 (3d Cir. 1997) (holding that a defendant's "refusal to obey the officers' orders," when combined with other factors, supported a finding of reasonable suspicion).

None of the above referenced circumstances would give rise to reasonable suspicion *when viewed in isolation*. But that is not the test. To the contrary, it is the *totality* of the circumstances that must be examined. Here, the factors discussed above—when considered together—went

well beyond a mere "unparticularized suspicion or hunch" that criminal activity may have been afoot. *Sokolow*, 490 U.S. at 15, 104 L. Ed. 2d at 15; *see id.* at 9, 104 L. Ed. 2d at 11 ("Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion." (citation omitted)).

The majority fails to offer any explanation as to why these factors—when looked at together—were not enough to meet the relatively low standard necessary to establish reasonable suspicion. Instead, the majority examines each factor individually and in isolation despite the wealth of caselaw cautioning against such an approach. Not surprisingly, the majority fails to cite any case in which either this Court or the United States Supreme Court has held that reasonable suspicion was lacking in the face of anything close to the combination of circumstances presented here. Moreover, the majority incorrectly attempts to reweigh the credibility of Trooper Lamm's testimony despite the fact that the trial court expressly made findings as to his observations that are binding upon us in this appeal.

In determining that no reasonable suspicion existed, the majority also fails to view the evidence through the eyes of a law enforcement officer in light of his training and experience. This Court has recognized that the facts and inferences that can give rise to a trained law enforcement officer's suspicion of criminal activity "might well elude an untrained person." *Williams*, 366 N.C. at 116–17, 726 S.E.2d at 167 (citation omitted); *see also Cortez*, 449 U.S. at 419, 66 L. Ed. 2d at 629 ("[W]hen used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person and for action on that suspicion."). The United States Supreme Court has made clear that "the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Cortez*, 449 U.S. at 418, 66 L. Ed. 2d at 629. (1996). As we stated in *Williams*:

> 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 who is familiar with drug trafficking and illegal activity on interstate highways, the responses were sufficient to provoke a reasonable articulable suspicion that criminal activity was afoot and to justify extending the detention until a canine unit arrived.

Williams, 366 N.C. at 117, 726 S.E.2d at 167; *see Ornelas v. United States*, 517 U.S. 690, 700, 134 L. Ed. 2d 911, 921 (1996) ("To a layman the sort of loose panel below the back seat armrest in the automobile involved in this case may suggest only wear and tear, but to [the officer conducting the search], who had searched roughly 2,000 cars for narcotics, it suggested that drugs may be secreted inside the panel.").

Here, the undisputed evidence showed that Trooper Lamm is an experienced law enforcement officer who has been employed by the State Highway Patrol for over eleven years, three of which were spent in the drug interdiction unit. I believe the majority errs in failing to take into any account whatsoever his training and experience upon being confronted by these circumstances.

This Court's recent decision in *State v. Bullock* constitutes a proper application of these principles. The defendant in *Bullock* was stopped on a highway for speeding while driving a rental car that contained a large amount of drugs. 370 N.C. at 256, 805 S.E.2d at 673. The defendant moved to suppress the evidence of the drugs, claiming that they were found only after the officer at the scene had unlawfully extended the stop without reasonable suspicion. *Id.* at 256, 805 S.E.2d at 673. We disagreed and held that the officer possessed reasonable suspicion to extend the stop and search defendant's vehicle. *Id.* at 256, 805 S.E.2d at 673. In so doing, this Court identified a number of factors that gave rise to reasonable suspicion: (1) Highway I-85 is a major thoroughfare for drug trafficking, (2) defendant possessed two cell phones, (3) the rental car was rented in another person's name, (4) the defendant appeared nervous when he was asked questions about where he was going and had driven miles past his alleged destination, (5) a frisk of defendant's person revealed $372 in cash, (6) defendant gave contradictory statements about the person he claimed to be visiting, and (7) defendant lied about recently moving to North Carolina. *Id.* at 263–64, 805 S.E.2d at 677–78. None of these factors in isolation would likely have been sufficient to create reasonable suspicion. But collectively, they were enough for the officer to lawfully extend the traffic stop.

The same is true in the present case. Under the majority's analysis, Trooper Lamm somehow acted unconstitutionally simply by responding in accordance with his training upon his recognition of seven factors that were suggestive of criminal activity. Based on the majority's opinion, law enforcement officers in future cases who similarly observe a combination of circumstances that they have been taught to view as suspicious will presumably be forced to ignore their training and forego

further investigation for fear of being deemed to have acted without reasonable suspicion. Accordingly, I respectfully dissent.

Justices NEWBY and ERVIN join in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
SETHY TONY SEAM

No. 82A14-2

Filed 28 February 2020

Constitutional Law—Eighth Amendment—opportunity for parole—not ripe for review

Defendant's argument that he had no opportunity for parole was not ripe for review where he had not yet reached parole eligibility.

Justices ERVIN and DAVIS did not participate in the consideration or resolution of this decision.

Appeal pursuant to N.C.G.S. § 7A-31 from a unanimous decision of the Court of Appeals affirming the judgment entered on 11 October 2017 by Judge Jeffrey K. Carpenter in Superior Court, Davidson County. Heard in the Supreme Court on 7 January 2020.

Joshua H. Stein, *Attorney General*, *by Kimberly N. Callahan*, *Assistant Attorney General*, *for the State.*

Glenn Gerding, *Appellate Defender*, *by Kathryn L. VandenBerg*, *Assistant Appellate Defender*, *for defendant.*

PER CURIAM.

We affirm the decision of the Court of Appeals which leaves intact the sentence entered by the trial court. Defendant's arguments regarding his constitutional rights under the Eighth Amendment in which he asserts that he has no meaningful opportunity for parole are not ripe for a determination by this Court, because the time at which he is eligible to apply for parole has not yet arrived. We recognize that the potential for parole constitutionally cannot be illusory for offenders sentenced to

life with the possibility of parole. Defendant is not precluded from raising his claims at a later date, in the event that said claims become ripe for resolution.

AFFIRMED.

Justices ERVIN and DAVIS did not participate in the consideration or resolution of this decision.

STATE OF NORTH CAROLINA
v.
JEFFERY MARTAEZ SIMPKINS

No. 188A19

Filed 28 February 2020

Constitutional Law—right to counsel—forfeiture—egregious conduct by defendant

The Supreme Court recognized that a criminal defendant may forfeit the right to counsel by committing egregious acts that frustrate the legal process. In a case involving charges related to a defendant's failure to maintain a valid driver's license, defendant's conduct was not so egregiously disruptive as to forfeit his right to counsel, and the failure of the trial court to conduct the colloquy in N.C.G.S. § 15A-1242 before allowing defendant to proceed pro se violated defendant's constitutional right to counsel, entitling him to a new trial.

Justice NEWBY dissenting.

Justice MORGAN joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 826 S.E.2d 845 (N.C. Ct. App. 2019), vacating a judgment entered on 8 June 2017 by Judge Andrew Heath in Superior Court, Stanly County. Heard in the Supreme Court on 10 December 2019.

Joshua H. Stein, Attorney General, by Alexandra M. Hightower, Assistant Attorney General, for the State.

Kimberly P. Hoppin, for defendant-appellee.

EARLS, Justice.

On 4 July 2016, Jeffery Martaez Simpkins was arrested and charged with offenses related to his failure to maintain a valid driver's license. He was first tried in the district court of Stanly County, where he was convicted and sentenced to a 30-day suspended period of confinement with 18 months of supervised probation to include 24 hours of community service. He appealed to the Stanly County Superior Court, where he was tried before a jury without counsel and convicted. He was sentenced to two years of supervised probation with two consecutive active terms of 15 days to be served on weekends and holidays, and with two consecutive 60-day suspended sentences of incarceration. Simpkins appealed to the Court of Appeals. On appeal, he argued that the trial court failed to satisfy the requirements of N.C.G.S. § 15A-1242 (2019)[1] before allowing Simpkins to proceed pro se. In a divided opinion, the Court of Appeals majority agreed. The State conceded that Simpkins had not received the required colloquy before waiving counsel and the court concluded that Simpkins had not forfeited his right to counsel, which would have negated the need for the colloquy. *State v. Simpkins*, 826 S.E.2d 845, 845 (N.C. Ct. App. 2019). We affirm. The Court of Appeals was correct in holding that Simpkins did not forfeit his right to counsel and that the trial court was therefore required to ensure that Simpkins's waiver of counsel was knowing, intelligent, and voluntary.

Background

On 4 July 2016, Simpkins was arrested during a traffic stop after a local police officer ran his license plate and discovered that Simpkins had a suspended license and an arrest warrant. Simpkins appeared in

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1. The statute provides that:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

Stanly County District Court on 16 August 2016. At some point during the proceedings in district court, the court noted on an unsigned waiver of counsel form that Simpkins refused to respond to the court's inquiry. The record also contains a waiver of counsel form, signed by the trial judge, with a handwritten note indicating that Simpkins refused to sign the form.[2] He was tried without counsel and convicted of resisting a public officer, failing to carry a registration card, and driving on a revoked license.

Simpkins then appealed to the Stanly County Superior Court for a new trial. There, Simpkins was charged with (1) failure to carry a registration card, (2) resisting a public officer, (3) driving with a revoked license, and (4) failure to exhibit or surrender a driver's license. The proceedings began at 9:41 a.m. on 7 June 2017. Simpkins appeared without counsel and, following a brief exchange during which Simpkins objected to the court's jurisdiction, the trial court examined him regarding his desire to waive his right to an attorney. During the examination, Simpkins stated that he "would like counsel that's not paid for by the State of North Carolina." The trial court interpreted this as a request to hire his own counsel, and the State objected "unless he can obtain counsel in the next 15 minutes." The trial court called in standby counsel, found that Simpkins had waived his right to an attorney, and appointed standby counsel to assist Simpkins in his defense. At 10:00 a.m., the court allowed Simpkins and standby counsel to review the case together. From the beginning of the trial until the time the court determined that Simpkins had waived his right to an attorney and would proceed pro se, fewer than twenty minutes had passed.

As jury selection was beginning, standby counsel requested a bench conference and the court permitted the parties to discuss the possibility of a plea arrangement. The parties returned at 11:04 a.m., and the State reported that they were unable to reach a plea agreement. The trial court then asked Simpkins if he wished to continue with standby counsel, and Simpkins responded that he would waive his rights to standby

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2. Assuming that Mr. Simpkins waived his right to counsel in the district court, any waiver would no longer have been effective in the superior court proceedings. In addition to the long period of time between the two proceedings, Mr. Simpkins was charged with different crimes in superior court. *See State v. Anderson*, 215 N.C. App. 169, 171, 721 S.E.2d 233, 235 (2011), *aff'd per curiam* 365 N.C. 466, 722 S.E.2d 509 (2012) (defendant's district court waiver of counsel insufficient to constitute waiver for superior court trial where record does not demonstrate defendant was informed of the superior court charges at time of district court waiver). In any case, the only question before us is whether Simpkins forfeited, rather than waived, his right to counsel.

counsel. The proceedings moved forward from that point with the jury returning at 11:10 a.m. Simpkins was ultimately convicted of failure to exhibit or surrender a license and of resisting a public officer. He was found not responsible for failure to carry a registration card. The charge for driving with a revoked license was dismissed before the jury was instructed on the law.

On appeal, Simpkins argued principally that the trial court erred by not thoroughly inquiring into his decision to proceed pro se. *Simpkins*, 826 S.E.2d at 846. The inquiry is required both by statute and by the state and federal constitutions to ensure that a defendant's waiver of the right to counsel is knowing, intelligent, and voluntary. *See*, *e.g.*, *State v. Moore*, 362 N.C. 319, 322, 661 S.E.2d 722, 724 (2008) (stating requirement and quoting N.C.G.S. § 15A-1242). The State argued that the inquiry was not required because Simpkins forfeited, rather than waived, his right to counsel. *Simpkins*, 826 S.E.2d at 846. The Court of Appeals applied its own precedent, which had previously held that a defendant may lose the right to be represented by counsel through voluntary waiver or through forfeiture. *Id.* Comparing the facts below to prior cases in which the court had found forfeiture, the majority determined that Simpkins did not "engage[] in such serious misconduct as to warrant forfeiture of the right to counsel." *Id.* at 852 (quoting *State v. Blakeney*, 245 N.C. App. 452, 468, 782 S.E.2d 88, 98 (2016)) (alteration in original). The State appealed to this Court on the basis of the dissent, which concluded the opposite.

Standard of Review

The right to counsel in a criminal proceeding is protected by both the federal and state constitutions. *See* U.S. Const. amend. VI; N.C. Const. art. I, §§ 19, 23. Our review is *de novo* in cases implicating constitutional rights. *See*, *e.g.*, *State v. Diaz*, 372 N.C. 493, 498, 831 S.E.2d 532, 536 (2019). Accordingly, we review *de novo* a trial court's determination that a defendant has either waived or forfeited the right to counsel. *Cf. Moore*, 362 N.C. at 321–26, 661 S.E.2d at 724–27 (reviewing *de novo* whether defendant was appropriately allowed to proceed without counsel after trial court found waiver of right to counsel); *State v. Thomas*, 331 N.C. 671, 673–78, 417 S.E.2d 473, 475–78 (1992) (same).[3]

3. We note that the trial court below did not conclude that Simpkins forfeited his right to counsel. If it had, and had made findings of fact supporting that conclusion, then those findings would be entitled to deference. *See*, *e.g.*, *State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010). However, in this case the trial court did not make any findings of fact before concluding that Mr. Simpkins had waived his right to counsel. Finally,

Analysis

"A cardinal principle of the criminal law is that the sixth amendment to the United States Constitution requires that in a serious criminal prosecution the accused shall have the right to have the assistance of counsel for his defense." *State v. Hutchins*, 303 N.C. 321, 335, 279 S.E.2d 788, 797 (1981) (citations omitted). Even so, a criminal defendant may choose to forgo representation and "conduct his own defense." *Id.* at 337, 279 S.E.2d at 798. In such a case, the waiver "must be knowingly, intelligently, and voluntarily made." *Moore*, 362 N.C. at 326, 661 S.E.2d at 726 (quoting *Thomas*, 331 N.C. at 674, 417 S.E.2d at 476).

In the case below, the trial court determined that Simpkins had waived, rather than forfeited, counsel. When a defendant seeks to waive counsel and proceed pro se, the trial court must satisfy the requirements of N.C.G.S. § 15A-1242. *See State v. Pruitt*, 322 N.C. 600, 603, 369 S.E.2d 590, 592 (1988); *see also Moore*, 362 N.C. at 326, 661 S.E.2d at 727 (referencing "the 'thorough inquiry' mandated by N.C.G.S. § 15A-1242 to ensure the defendant's decision to represent himself was knowingly, intelligently, and voluntarily made"). Given the significant importance of an accused's right to counsel, a defendant must "clearly and unequivocally" express a desire to proceed pro se before we will deem the right to be waived. *Thomas*, 331 N.C. at 673–74, 417 S.E.2d at 475 (1992) (quoting *State v. McGuire*, 297 N.C. 69, 81, 254 S.E.2d 165, 173 (1979)). Upon receiving this clear request, the trial court is required to ensure that the waiver is knowing, intelligent, and voluntary. *Id.* at 674, 417 S.E.2d at 476. The court does so by fulfilling the mandates of N.C.G.S. § 15A-1242, which requires the court to conduct a "thorough inquiry" and to be satisfied that (1) the defendant was clearly advised of the right to counsel, including the right to assignment of counsel; (2) the defendant "[u]nderstands and appreciates the consequences" of proceeding without counsel; and (3) the defendant understands what is happening in the proceeding as well as "the range of permissible punishments." N.C.G.S. § 15A-1242. The transcript in this case demonstrates that the trial court did not fully comply with the statutory mandate and the State concedes as much. *Simpkins*, 826 S.E.2d at 846. Therefore, because an effective waiver did not occur, the Court of Appeals in this case decided a further

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acceptance of our dissenting colleague's argument concerning the degree of deference to which a trial judge's forfeiture determinations should be afforded would effectively insulate those decisions from any meaningful appellate review.

issue, namely whether Mr. Simpkins, by his behavior, forfeited his right to counsel. *Id.* at 851.[4]

The dissent briefly states and then completely ignores the fact that the trial court found Mr. Simpkins had waived his right to counsel. In fact, the dissent states that the waiver requirements are "inapplicable here." However, in order to find that Simpkins waived his right to counsel, the trial court needed to conduct the inquiry required by N.C.G.S. § 15A-1242. The only reason this case is before us is that the State argues, contrary to the finding of the trial court, that Mr. Simpkins actually forfeited, rather than waived, his right to counsel. The decision in this case does not threaten the trial court's "discretion to ensure that legal proceedings are respected by all." Nor does it prevent the trial court from "provid[ing] orderly and just proceedings for all." Instead, it does two things. First, it reinforces the longstanding principle that a waiver of the right to counsel must be knowing, intelligent, and voluntary. Second, it provides trial courts with an additional avenue to ensure the orderly administration of justice,[5] which is to find forfeiture where it is impossible to fulfill the mandate of N.C.G.S. § 15A-1242.

Forfeiture of the right to counsel

We have never previously held that a criminal defendant in North Carolina can forfeit the right to counsel. However, the Court of Appeals has recognized, in addition to waiver of counsel, that "a defendant who engages in serious misconduct may forfeit his constitutional rights to counsel." *State v. Forte*, 817 S.E.2d 764, 774 (N.C. Ct. App. 2018) (citing *Blakeney*, 245 N.C. App. at 460, 782 S.E.2d at 93). That court has noted that forfeiture is generally "restricted to situations involving egregious conduct by a defendant." *Blakeney*, 245 N.C. App. at 461, 782 S.E.2d at 94. We agree and hold that, in situations evincing egregious misconduct by a defendant, a defendant may forfeit the right to counsel.

The purpose of the right to counsel "is to assure that in any criminal prosecution, the accused shall not be left to his own devices in facing

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4. Because forfeiture is the issue presented to us by this case, we do not address (1) whether the trial court was correct that Simpkins waived his right to counsel; (2) whether "waiver by conduct" is a method by which a defendant may appropriately be required to proceed pro se, *see Blakeney*, 245 N.C. App. at 464–65, 782 S.E.2d at 96 (discussing waiver by conduct); or (3) whether a trial court, upon finding that a defendant has waived through conduct the right to counsel's assistance, must still satisfy the requirements of N.C.G.S. § 15A-1242.

5. Justice, of course, also requires honoring the right to the effective assistance of counsel.

the prosecutorial forces of organized society." *Moran v. Burbine*, 475 U.S. 412, 430, 106 S. Ct. 1135, 1146 (1986) (cleaned up). It guarantees "that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067 (1984). It "safeguard[s] the fairness of the trial and the integrity of the factfinding process." *Brewer v. Williams*, 430 U.S. 387, 426, 97 S. Ct. 1232, 1253 (1977) (Burger, C.J., dissenting). Unfortunately, in rare circumstances a defendant's actions frustrate the purpose of the right to counsel itself and prevent the trial court from moving the case forward. In such circumstances, a defendant may be deemed to have forfeited the right to counsel because, by his or her own actions, the defendant has totally frustrated that right. If one purpose of the right to counsel is to "justify reliance on the outcome of the proceeding," *Strickland*, 466 U.S. at 692, 104 S. Ct. at 2067, then totally frustrating the ability of the trial court to reach an outcome thwarts the purpose of the right to counsel.

The Court of Appeals previously found forfeiture in *State v. Montgomery*, 138 N.C. App. 521, 530 S.E.2d 66 (2000). There, the court considered whether a defendant had been denied his right to counsel where the trial court failed to conduct the Section 15A-1242 inquiry and defendant was tried with standby counsel. *Montgomery*, 138 N.C. App. at 522–23, 530 S.E.2d at 67–68. The defendant in that case received appointed counsel on 7 January 1997. *Id.* at 522, 530 S.E.2d at 67. After switching counsel three times, the defendant appeared on his initially scheduled trial date, 16 February 1998, insisting that his then-current counsel be allowed to withdraw because "defendant no longer wished to be represented by him." *Id.* Over multiple pre-trial appearances it became clear that the defendant had refused to allow witnesses to meet with defense counsel; the defendant repeatedly disrupted the proceedings with profanity, receiving multiple findings of contempt; and the defendant assaulted his attorney in court. *Id.* at 522–53, 530 S.E.2d at 67–68. The court permitted counsel to withdraw and found that the defendant had waived his right to appointed counsel. *Id.* at 523, 530 S.E.2d at 68. When the defendant finally came on for trial on 6 April 1998, a month and a half after his original trial date, the trial court permitted an appointed attorney to serve as standby counsel and defendant represented himself. *Id.* These facts demonstrate forfeiture of the right to counsel because the defendant's actions totally undermine the purposes of the right itself by making representation impossible and seeking to prevent a trial from happening at all.

In *State v. Brown*, the Court of Appeals considered whether the trial court erred in permitting the defendant to proceed pro se. *Brown*,

239 N.C. App. 510, 510, 768 S.E.2d 896, 897 (2015). There, the defendant "refus[ed] to answer whether he wanted assistance of counsel at three separate pretrial hearings" and "repeatedly and vigorously objected to the trial court's authority to proceed." *Id.* at 519, 768 S.E.2d at 901. Of particular importance to the question of forfeiture, it appears from the court's opinion that the defendant refused to participate in the proceedings and utilized the hiring and firing of counsel to delay the trial. *See id.* at 513–16, 768 S.E.2d at 898–900 (detailing defendant's refusal to give a clear answer as to desire for counsel and refusal to engage in waiver inquiry upon persistent inquiry by the court); *id.* at 516–517, 768 S.E.2d at 900 (detailing delay of nearly one month caused by defendant's attempts to dismiss counsel). By refusing to make an election as to whether to proceed with counsel and by using the appointment and firing of counsel to delay the proceedings, the defendant in *Brown* completely frustrated his own right to assistance, warranting a finding of forfeiture.

In *State v. Joiner*, the defendant instructed his counsel to withdraw and then offered "evasive and bizarre answers" when the trial court conducted a hearing to investigate the defendant's desire to represent himself. *Joiner*, 237 N.C. App. 513, 514–15, 767 S.E.2d 557, 558–59 (2014). In a subsequent hearing on the same issue, the defendant "refused to answer questions and declared that the trial court had no authority to conduct the trial." *Id.* at 515, 767 S.E.2d at 559. While the trial court attempted to conduct the inquiry required by N.C.G.S. § 15A-1242, the defendant refused to participate by refusing to acknowledge understanding, answering in contradictory ways, refusing to answer at all, yelling obscenities and being "otherwise extremely disruptive." *Id.* The trial court found that the defendant was "refus[ing] to engage appropriately simply as a means of delaying the proceedings." *Id.* While it is not relevant to the question of forfeiture, having occurred after the alleged deprivation of the right to counsel,[6] the defendant later threatened to "punch the judge in the 'f***ing face,' " he "refused to leave his cell on the second day of trial," he "threatened to stab an officer," and, for good measure, "defecated and smeared his feces on the cell walls" in addition to various other "extremely disruptive and belligerent" activity. *Id.* at 515–16, 767 S.E.2d at 559. Prior to this extremely disruptive behavior, the defendant had been evaluated to determine his competence to participate in a criminal proceeding and was found competent to stand trial. *Id.* at 514–15, 767 S.E.2d at 558.

6. *See Moore*, 362 N.C. at 326, 661 S.E.2d at 726 (holding information learned by court after waiver of right to counsel irrelevant to question of whether defendant's sixth amendment right violated).

If a defendant refuses to obtain counsel after multiple opportunities to do so, refuses to say whether he or she wishes to proceed with counsel, refuses to participate in the proceedings, or continually hires and fires counsel and significantly delays the proceedings, then a trial court may appropriately determine that the defendant is attempting to obstruct the proceedings and prevent them from coming to completion. In that circumstance, the defendant's obstructionist actions completely undermine the purposes of the right to counsel. If the defendant's actions also prevent the trial court from fulfilling the mandate of N.C.G.S. § 15A-1242, the defendant has forfeited his or her right to counsel and the trial court is not required to abide by the statute's directive to engage in a colloquy regarding a knowing waiver.

Serious obstruction[7] of the proceedings is not the only way in which a defendant may forfeit the right to counsel. Other courts have held that a defendant who assaults his or her attorney, thereby making the representation itself physically dangerous, forfeits the right to counsel. *See*, *e.g.*, *United States v. Leggett*, 162 F.3d 237, 240 (3d Cir. 1998) (finding of forfeiture where defendant "lunged at his attorney and punched him in the head" and then "straddled him and began to choke, scratch and spit on him"); *Gilchrist v. O'Keefe*, 260 F.3d 87, 90 (2d Cir. 2001) (reviewing habeas claim where New York state court found forfeiture appropriate when defendant "punched [counsel] in the ear and ruptured his eardrum");[8] *cf. State v. Holmes*, 302 S.W.3d 831, 847–48

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7. The Court of Appeals has previously stated that "[a]ny willful actions on the part of the defendant that result in the absence of defense counsel [constitute] a forfeiture of the right to counsel." *State v. Quick*, 179 N.C. App. 647, 650, 634 S.E.2d 915, 917 (2006). This statement is unsupported. *Quick* cites the Court of Appeals decision in *Montgomery*, which states nothing of the sort. *Montgomery*, 138 N.C. App. at 524, 530 S.E.2d at 69. Further, it is far too broad a statement to be consistent with the constitutional guarantee of the right to counsel and the law of this state.

8. Then-Judge Sotomayor, writing for the panel in *Gilchrist*, provided the following warning:

> Although, of course, under no circumstances do we condone a defendant's use of violence against his attorney, had this been a direct appeal from a federal conviction we might well have agreed with petitioner that the constitutional interests protected by the right to counsel prohibit a finding that a defendant forfeits that right based on a single incident, where there were no warnings that a loss of counsel could result from such misbehavior, where there was no evidence that such action was taken to manipulate the court or delay proceedings, and where it was possible that other measures short of outright denial of counsel could have been taken to protect the safety of counsel.

260 F.3d at 89 (Sotomayor, J.).

(Tenn. 2010) (after review of cases from many jurisdictions, concluding that defendant had not forfeited right to counsel where defendant pushed his finger at counsel and knocked counsel's glasses askew). In such a circumstance the trial court has permitted counsel to withdraw without appointing new counsel who would be subject to physical harm. Obviously, a defendant who intentionally seriously assaults their attorney has undermined the right to counsel.

Here, we agree with the Court of Appeals majority that Simpkins did not "engage in such serious misconduct as to warrant forfeiture of the right to counsel." *Simpkins*, 826 S.E.2d at 852. The dissent urges a holding that Simpkins forfeited his right to counsel because, in the dissent's view, "it is clear that defendant would not accept the court's authority." However, the record belies that claim. Mr. Simpkins appeared for the first time in Superior Court at 9:41 a.m. on 7 June 2017. By 10:00 a.m., the trial court had determined Simpkins had waived his right to an attorney and the court appointed standby counsel to assist Simpkins in his defense. In that twenty minutes, Simpkins made an untimely objection, stating that there was "no proof of jurisdiction," asked questions of the court out of turn, stated, in response to the court's inquiry, that he "would like counsel that's not paid for by the State of North Carolina," asked four more questions of the court out of turn, and continued to speak out of turn and argue with the court. However, the transcript of the proceedings reflects that, when the court instructed Simpkins to stop asking questions, he did so. When the court asked Simpkins whether he wished to proceed with or without an attorney, he responded, for the most part, appropriately, first requesting "counsel that's not paid for by the State of North Carolina" and later acquiescing when the court suggested he be appointed standby counsel. Throughout the proceedings, including up to the point that he was required to proceed pro se, nothing in the record suggests that Simpkins was rude or disrespectful to the trial court. Simpkins's conduct, while probably highly frustrating, was not so egregious that it frustrated the purposes of the right to counsel itself. As a result, his conduct[9] did not amount to "such serious misconduct as to

9. The dissent, urging that we should find forfeiture, points to conduct which occurred both before Mr. Simpkins came on for trial and after Mr. Simpkins was denied the right to counsel. It is the Superior Court proceedings, and what happened there, which are presented to us for review. As to conduct occurring after Mr. Simpkins proceeded without counsel, the question before us is whether Mr. Simpkins forfeited his right to counsel. It seems curiously perverse to rule, as the dissent suggests, that a defendant can be deemed to have forfeited his right to counsel based on conduct occurring after the defendant is denied counsel.

warrant forfeiture of the right to counsel." *See Blakeney*, 245 N.C. App. at 468, 782 S.E.2d at 98.

The State urges us to find that Simpkins forfeited his right to counsel largely based on the frivolous legal arguments about jurisdiction that Simpkins put forward throughout the proceeding. However, the State provides us with no reason to hold that a pro se defendant can be held to have forfeited the right to counsel because the defendant makes frivolous legal arguments. After all, a large part of the reason defendants have a right to counsel is to prevent them from making frivolous legal arguments. *See*, *e.g.*, *Burbine*, 475 U.S. at 430, 106 S. Ct. at 1146 (stating that right to counsel assures the accused is "not left to his own devices"). We reject the State's invitation to hold that a defendant, having been required to proceed without the assistance of counsel without the necessary advisories,[10] forfeits the right to counsel because he suffers the very injury the right is intended to prevent.

Further, the State argues that Simpkins forfeited his right to counsel because he failed to employ counsel before appearing for trial. However, the record evidence does not establish that Simpkins consistently refused to retain counsel in an attempt to delay the proceedings. "We are not here dealing with a situation where the record shows that a criminal defendant, capable of employing counsel, has attempted to prevent his trial by refusing to employ counsel and also refusing to waive counsel and respond to the inquiry required by N.C.G.S. § 15A-1242." *State v. Bullock*, 316 N.C. 180, 186, 340 S.E.2d 106, 109 (1986). Instead, the record reflects that Simpkins engaged with the trial court throughout, coherently responding to the court's questions and ultimately agreeing to accept standby counsel. Further, on this record we simply cannot conclude that the failure to retain counsel was an attempt to delay the proceedings, and certainly not an attempt so egregious as to justify forfeiture of the right to counsel. The record is silent on whether Simpkins made any efforts to employ counsel. Here, where it appears that any question as to counsel was disposed of on the first day Simpkins was called to trial in Superior Court, there is simply no evidence of delay rising to the level of obstruction that would support a finding of forfeiture.

The State also argues that Simpkins was generally uncooperative and "intended to frustrate the orderly workings of the court." As we noted previously, defendant's behavior was probably very frustrating, and may have been intended to be frustrating. The trial court exhibited

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10. *See* N.C.G.S. § 15A-1242.

the utmost patience and should be commended for the even-handedness with which it conducted the proceedings. However, absent egregious conduct by the defendant, a defendant must be advised of the right to counsel, the consequences of proceeding without counsel, and "the nature of the charges and proceedings and the range of permissible punishments" before the defendant can proceed without counsel. N.C.G.S. § 15A-1242. Thus, where, as here, the defendant's behavior was not so egregious as to prevent the court from proceeding, or to create a danger of any kind, forfeiture of the constitutional right to counsel has not occurred. The full inquiry required by statute should have taken place to determine if the defendant was knowingly waiving his right to counsel. The trial court should have engaged in the required colloquy prior to appointing standby counsel and permitting Simpkins to proceed pro se. *See State v. Dunlap*, 318 N.C. 384, 389, 348 S.E.2d 801, 805 (1986) (stating that standby counsel is not "a satisfactory substitute for the right to counsel in the absence of a knowing and voluntary waiver").

Conclusion

A trial court may find that a criminal defendant has forfeited the right to counsel. In such a case, the court is not required to follow the requirements of N.C.G.S. § 15A-1242, which the court would otherwise be required to do before permitting a defendant to proceed pro se. A finding that a defendant has forfeited the right to counsel requires egregious dilatory or abusive conduct on the part of the defendant which undermines the purposes of the right to counsel and prevents the trial court from complying with N.C.G.S. § 15A-1242. Such conduct is not apparent here, where the record reflects that the defendant was allowed to proceed without counsel within twenty minutes of the start of the proceeding, was generally cooperative with the court's requests, participated in the proceedings, and did not utilize the right to counsel as a means of preventing the trial from moving forward. Because of the violation of his right to counsel under the Sixth Amendment to the U.S. Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution, the defendant is entitled to a new trial.

AFFIRMED.

Justice NEWBY dissenting.

This case implicates the trial court's authority over the courtroom and its responsibility to maintain the dignity and legitimacy of trial court proceedings. A criminal defendant has a constitutional right to counsel;

however, that right may be lost. Here defendant continually refused to acknowledge the authority of the court to manage the case proceedings or the authority of the State to pursue defendant's criminal prosecution for misdemeanor crimes. By continually refusing to answer the trial court's questions and posing his own questions to the court, defendant demonstrated his unwillingness to accept the judicial process, forfeiting his right to an attorney. Nonetheless, the majority finds facts from a cold record to reverse the trial court's determination. The majority's decision undermines the trial court's fundamental authority over the courtroom. I respectfully dissent.

In July 2016, Officer Trent Middlebrook ran defendant's license plate through his database and discovered that defendant, who owned the vehicle, had a suspended driver's license and a pending warrant for his arrest. When Officer Middlebrook stopped defendant's vehicle and asked for his license and registration, defendant refused to provide the documents, continuously questioned the officer's authority, and behaved uncooperatively and belligerently. Officer Middlebrook then arrested defendant.

Defendant was initially tried in district court for, *inter alia*, resisting a public officer and failing to carry a registration card. While there is no transcript of those proceedings, the record contains an unsigned, undated "Waiver of Counsel" form with the following handwritten notation: "Refused to respond to . . . inquiry by the Court and mark as refusal at this point." The record also contains a Waiver of Counsel form dated 16 August 2016, signed by the district court, which includes a handwritten notation stating, "Defendant refused to sign waiver of counsel upon request by the Court." On that date, the district court found defendant guilty of resisting a public officer and failing to carry a registration card. The district court judgment sheet again twice notes that defendant had waived counsel.

Defendant appealed to superior court. On 6 March 2017, defendant moved to dismiss the case, asserting that the court lacked jurisdiction to conduct the proceedings. (This motion was denied at defendant's superior court trial.) Three months later, on 5 June 2017, defendant appeared before the court for a pre-trial hearing. On 7 June 2017, defendant's case came for trial in superior court. From the outset, defendant continued to object to the proceeding on jurisdictional grounds:

> [Defendant]: Objection, sir. I did not enter any pleas. Do I need to stand?

> The Court: What is the basis of your objection?
>
> [Defendant]: There is no proof of jurisdiction here. There hasn't been since last year. I've been coming here over a year, and there's no evidence of anything besides the allegation.
>
> The Court: Well, sir, evidence is put on at the trial. So there is no evidence at this point.
>
> [Defendant]: So how can you force someone here without evidence, sir?
>
> The Court: You've been charged with a crime. And this is your day in court, your opportunity to be heard.
>
> [Defendant]: Who's the injured party, sir?
>
> The Court: Sir, it is not consistent with judicial proceedings for you to ask questions of the Judge. It's the Judge that will ask questions of you.
>
> [Defendant]: Can I ask questions of the prosecution then?
>
> The Court: Not at this time. Thank you, sir.

Defendant then contended that, though he had been coming to the court since August of 2016, he had never been advised of "anything," including his right to counsel. The trial court stated:

> I see that in the Court's file there are waiver of counsel forms with notations that you refused to respond when you were notified of your right to an attorney, and so you were marked down as having waived an attorney.
>
> You are charged with violations that could subject you to periods of incarceration. And so I would like to advise you that it is your right to have an attorney and if you cannot afford an attorney, the State can provide one for you. If you would like to apply for court-appointed counsel, we'll have you fill out an affidavit. If you wish to retain your own, you certainly have that opportunity as well.

Defendant then requested counsel "not paid for by the plaintiff" and questioned the court as to why there was no plaintiff in his case. The State objected, contending that defendant had time to retain private counsel

because the matter had been pending for nearly a year and that defendant had been advised of his right to obtain an attorney on two to three occasions. Defendant then indicated that he would like to be appointed standby counsel, but thereafter three times questioned whether standby counsel would be licensed by the State of North Carolina, implying that if counsel were so licensed, counsel would be unfit to assist him. Defendant again questioned the court, inquiring to which court he should appeal if he did not "get the right judgment." When the trial court responded that it could not give legal advice from the bench, defendant asked, "How is that legal advice, sir?"

After the trial court identified a potential standby counsel, the following exchange occurred:

> [Defendant]: Do I have the right to be informed of the cause of nature of these proceedings?
>
> The Court: You are—you have been charged with some crimes. We are here for a trial in your cases. We are going through preliminary matters at this time. Specifically, we are addressing your right to an attorney. You've indicated that you would like to represent yourself but that you'd like standby.
>
> [Defendant]: No, sir. I did not say I want to represent myself. I did not. I asked for standby counsel just to assist me with what I have to ask you.
>
> The Court: So let me inform you of the difference between standby counsel and retaining an attorney. If you wish to have an attorney appointed to represent you, you can ask for that.
>
> [Defendant]: Uh-huh.
>
> The Court: If you wish to represent yourself, you can proceed without the assistance of a standby attorney or with the assistance of a standby attorney. If you proceed with the assistance of a standby attorney—if you decide that later in the proceedings you wish to have the assistance of counsel, the standby attorney can step in for you on your behalf.
>
> [Defendant]: Okay. You never answered my question.
>
> The Court: Sir, this is—this is going to be your second and final warning. You're speaking out of order. You are

> free to make motions to the Court. You are not free to challenge the Court with extraneous statements. If you wish to address the Court, you need to make a motion by standing up and making a motion. This is the final warning you're going to get.
>
> [Defendant]: What does extraneous mean?
>
> The Court: Sir, I – I can't explain vocabulary to you.

The trial court then found that, "based on the prior proceedings, the waiver of counsel form, dated August 16, which indicates that defendant refused to sign a waiver of counsel upon request by the Court, signed by Judge Tucker," defendant had waived his right to counsel. The trial court then appointed standby counsel for defendant.

As the preliminary trial matters proceeded, defendant continued to question the court about various matters. Defendant then stated that he had been trying to enter a negotiated plea but wanted "evidence of jurisdiction." After conferring with standby counsel and deciding he did not want to enter a negotiated plea, defendant waived his right to, and released, standby counsel.

Throughout his trial, defendant repeatedly questioned the law enforcement witness about the State's authority and questioned the court about its authority. At the end of the trial, the jury convicted defendant of resisting a public officer and failing to exhibit/surrender his license.

Reviewed as a whole, it is clear that defendant would not accept the court's authority or the legitimacy of the court proceedings. He continued to pose questions to, and refused to answer questions from, multiple trial courts. Only the trial courts could evaluate defendant's tone of voice, emotions, body language, and other non-verbal communication cues accompanying his words to assess his sincerity in continuously refusing to answer the courts' questions. The trial court could truly understand defendant's actions to know when to protect the court proceedings from undue disruption and delay. Defendant's refusal to acknowledge the trial court's authority here and his repeated failure to respond to the various trial courts' inquiries disrupted the trial process and resulted in the forfeiture of his right to counsel.

While a criminal defendant's right to be represented by counsel is well-established, *State v. Bullock*, 316 N.C. 180, 185, 340 S.E.2d 106, 108 (1986), a defendant may relinquish the right to counsel in certain situations, *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66,

68–69 (2000).[1] One way a defendant may relinquish his right to be represented by counsel is through forfeiture. *State v. Quick*, 179 N.C. App. 647, 649–50, 634 S.E.2d 915, 917 (2006). A defendant may forfeit his right to counsel "when [he or she] engages in . . . serious misconduct." *State v. Blakeney*, 245 N.C. App. 452, 460, 782 S.E.2d 88, 93 (2016). Courts have recognized forfeiture by misconduct when a defendant (1) engages in "flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys;" (2) employs "offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court;" or (3) "refus[es] to acknowledge the trial court's jurisdiction or participate in the judicial process, or insist[s] on nonsensical and nonexistent legal 'rights.' " *Id.* at 461–62, 782 S.E.2d at 94.

Though a defendant's right to representation is well-established, a trial court has a "legitimate interest in guarding against manipulation and delay" in its proceedings. *United States v. Goldberg*, 67 F.3d 1092, 1098 (3d Cir. 1995). "The trial court understands courtroom dynamics in ways that cannot be gleaned from the cold transcript . . . ." *See United States v. Birchette*, 908 F.3d 50, 58 (4th Cir. 2018) (discussing the trial court's discretion in the context of juror interviews), *cert. denied*, 140 S. Ct. 162, 205 L. Ed. 2d 51 (2019). Thus, as this Court has noted in numerous contexts, some decisions are best made by the trial court. *See, e.g.*, *State v. Taylor*, 362 N.C. 514, 527–28, 669 S.E.2d 239, 254 (2008) (noting that trial courts have the ability to observe a prosecutor's demeanor and questioning of prospective jurors firsthand before ruling on a *Batson* challenge); *State v. Hill*, 347 N.C. 275, 297, 493 S.E.2d 264, 276 (1997) (noting that a trial court "is in the best position to determine whether the degree of influence on the jury was irreparable" in order to determine whether a mistrial is warranted); *State v. Wilson*, 322 N.C. 117, 127, 367 S.E.2d 589, 595 (1988) (stating that the trial court is in the best position to

1. Though inapplicable here, one way a defendant may relinquish his right to counsel is by waiving this right. *State v. Thomas*, 331 N.C. 671, 673–74, 417 S.E.2d 473, 475–76 (1992). If a defendant chooses to waive his right to counsel, the trial court "must determine whether the defendant knowingly, intelligently, and voluntarily waives the right." *Id.* at 674, 417 S.E.2d at 476. If a defendant chooses to waive his right to counsel, the trial court may determine whether defendant's waiver is knowingly, intelligently, and voluntarily made by asking whether the defendant (1) "[h]as been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;" (2) "[u]nderstands and appreciates the consequences of this decision;" and (3) "[c]omprehends the nature of the charges and proceedings and the range of permissible punishments." N.C.G.S. § 15A-1242 (2019). Waiver by express oral or written consent, however, cannot be the only method of relinquishing one's right to counsel. Having only one method of relinquishing one's right to counsel would halt proceedings where a defendant refuses to answer the trial court's inquiries despite its diligent effort to obtain specific responses from the defendant.

determine whether to sequester because only the trial court can "determine the climate surrounding a trial and it is [the trial court that] is in the best position to determine if a shield is necessary to protect jurors, and thus the defendant, from extraneous influences"). Because of the institutional advantage afforded to trial courts, such as the ability to observe a defendant's behavior, evaluate his tone of voice, and assess the sincerity of his conduct, trial courts should be allowed the authority to maintain reasonable control over their courtrooms.

Though not binding on this Court, the decision of the Court of Appeals in *State v. Leyshon*, 211 N.C. App. 511, 710 S.E.2d 282, *appeal dismissed*, 365 N.C. 338, 717 S.E.2d 566 (2011), is instructive. There the defendant refused to respond to the trial court's inquiry as to whether defendant wished to waive his right to counsel. *Id.* at 512–13, 710 S.E.2d at 285. At a second hearing, the defendant again refused to answer the trial court and instead challenged the court's jurisdiction. *Id.* at 513, 710 S.E.2d at 285. The Court of Appeals determined that the defendant's refusal to answer and his contradictory statements were insufficient to waive defendant's right to counsel. *Id.* at 517, 710 S.E.2d at 287. Nonetheless, the court noted that defendant refused to "respond to the court's inquiry regarding whether he wanted an attorney," refused to respond to the trial court's inquiry at a later hearing, and "continued to challenge the court's jurisdiction." *Id.* at 518–19, 710 S.E.2d at 288. The Court of Appeals thus concluded that the defendant, through his conduct, had forfeited his right to counsel. *Id.* at 519, 710 S.E.2d at 288–89.

Similar to *Leyshon*, defendant's continuous behavior here shows that he forfeited his right to counsel. At each stage of the proceeding, defendant has shown his unwillingness to acknowledge the authority of various trial courts in conducting their respective proceedings. When Officer Middlebrook initially stopped defendant, defendant refused to comply with the officer's requests, and he continuously questioned the authority of the officer. Though there is no transcript of the district court proceedings, there are two notations in the record that defendant waived counsel because of his refusal to respond to the district court's inquiries. Once defendant's case came for trial in superior court, defendant expressed his unwillingness to participate in the proceedings by continuously questioning that court's authority. The superior court attempted to determine whether defendant was waiving his right to counsel. Instead of answering the superior court's inquiry, however, defendant questioned the court, said he would like standby counsel but then questioned standby counsel's licensure, asked the trial court how to appeal his case, and asked to be informed "of the cause of the nature

of these proceedings." Notably, defendant expressly waived his right to standby counsel shortly after standby counsel's appointment.

Moreover, despite defendant's desire to have an attorney "not paid for by the plaintiff," defendant failed to retain an attorney in the more than eight months between the district court and superior court proceedings. Defendant had attended a hearing earlier in the week and knew at a minimum that he would need to be in Court on 7 June 2017. This instance was not defendant's first interaction with the legal system; defendant had four prior distinct encounters with the legal system resulting in convictions in North Carolina between 2014 and 2016. Additionally, defendant had three prior convictions in South Carolina. Here defendant had already been tried in district court for resisting a public officer and failing to carry a registration card. Given defendant's repeated refusal to participate in the trial court proceedings below, and in light of the misdemeanor charges for which defendant was tried, the trial court could appropriately determine that defendant's conduct was intended to disrupt the court's legitimate processes.

While "[a]n appellate court reviews conclusions of law pertaining to a constitutional matter de novo," *State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010) (citing *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008)), each case presents unique facts which must be assessed by the trial court. An appellate court does not find facts; the authority to find facts resides with the trial court which has face-to-face interaction with the parties. Here the majority assumes itself to be the finder of fact, views a cold written record without having been present for any of the trial court proceedings, and finds that there is no suggestion that defendant was "rude or disrespectful" during the proceedings. Only trial courts can observe a defendant's demeanor and interpret the non-verbal communication cues accompanying his words, which might not seem rude or disrespectful from a written transcript in a cold record on appeal. In simply reading the record, appellate courts lack the necessary context accompanying a defendant's words and thus are not designated as finders of fact. Employing the proper standard of review in this case and looking at defendant's conduct as a whole, the trial court's determination that defendant should proceed without an attorney is supported by competent evidence in the record.[2] The trial court was in the best position to make such a determination given defendant's continual

2. While the trial court concluded that defendant "waived" his right to counsel, the record here shows, as the State argued, that defendant actually forfeited his right to counsel.

refusal to recognize the legitimacy of the legal process throughout multiple stages in the court proceedings.

Trial courts have a "legitimate interest in guarding against manipulation and delay." *Goldberg*, 67 F.3d at 1098. Given this legitimate interest, a trial court must be afforded discretion to ensure that legal proceedings are respected by all, which in turn enables the court to provide orderly and just proceedings for all. Because defendant forfeited his right to counsel by his own conduct, I respectfully dissent.

Justice MORGAN joins in this dissenting opinion.

VIZANT TECHNOLOGIES, LLC
v.
YRC WORLDWIDE, INC.

No. 160A19

Filed 28 February 2020

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) from an order and opinion on defendant's cross-motion for summary judgment entered on 15 November 2018 by Judge Louis A. Bledsoe III, Chief Special Superior Court Judge for Complex Business Cases, in Superior Court, Mecklenburg County, after the case was designated a complex business case by the Chief Justice pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts. Heard in the Supreme Court on 22 November 2019 in session in the Johnston County Courthouse in the City of Smithfield pursuant to section 18B.8 of Chapter 57 of the 2017 North Carolina Session Laws.

Lincoln Derr PLLC, by Sara R. Lincoln, for plaintiff-appellant.

Strauch Green & Mistretta, P.C., by Jack M. Strauch and Jessie C. Fontenot Jr., for defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA

MECKLENBURG COUNTY

IN THE GENERAL COURT
OF JUSTICE
SUPERIOR COURT DIVISION
15 CVS 20654

VIZANT TECHNOLOGIES, LLC,
Petitioner

v.

YRC WORLDWIDE INC.,
Respondent

FURTHER ORDER AND OPINION ON DEFENDANT YRC WORLDWIDE INC.'S CROSS MOTION FOR SUMMARY JUDGMENT[1]

1. **THIS MATTER** is before the Court upon Defendant YRC Worldwide Inc.'s ("YRC") Cross Motion for Summary Judgment (the "Summary Judgment Motion") in the above-captioned case.

2. Having considered the Summary Judgment Motion, the original briefs in support of and in opposition to the motion, the arguments of counsel at the May 23, 2018 hearing on the motion, the supplemental briefs submitted by the parties in support of and in opposition to the motion, and other appropriate matters of record, the Court hereby concludes that YRC's Summary Judgment Motion should be **GRANTED in part** and **DENIED in part** as set forth herein.

Lincoln Derr PLLC, by Sara R. Lincoln and Kevin L. Pratt, for Plaintiff Vizant Technologies, LLC.

Strauch Green & Mistretta, P.C., by Jack M. Strauch and Jessie Charles Fontenot, for Defendant YRC Worldwide Inc.

Bledsoe, Chief Judge.

1. Recognizing that this Order and Opinion cites and discusses the subject matter of documents that the Court has previously allowed to remain filed under seal in this case, the Court elected to file this Further Order and Opinion on Defendant YRC Worldwide Inc.'s Cross Motion for Summary Judgment under seal on November 15, 2018. The Court permitted the parties an opportunity to advise whether the Order and Opinion contained confidential information that either side contended should be redacted from a public version of this document. On November 15, 2018, both Plaintiff and Defendant advised the Court that no redactions are necessary. Accordingly, the Court removes the "filed under seal" designation and files this Order and Opinion, without redactions, as a matter of public record.

I.

BACKGROUND

3. The Court has previously discussed the factual and procedural history of this action in its June 26, 2018 Order and Opinion, as reported at *Vizant Technologies, LLC v. YRC Worldwide Inc.*, 2018 NCBC LEXIS 65 (N.C. Super. Ct. June 26, 2018). Consequently, this Order and Opinion revisits only those facts that are relevant to the Court's decision herein. The details recited are not findings of fact but a summary "of material facts which . . . are not at issue[.]" *Hyde Ins. Agency, Inc. v. Dixie Leasing Corp.*, 26 N.C. App. 138, 142, 215 S.E.2d 162, 165 (1975).

A. Factual Summary

4. This action arises out of an alleged breach of a Professional Services Agreement (the "PSA") between Plaintiff Vizant Technologies, LLC ("Vizant") and YRC. (*See* Pl.'s Mem. L. Supp. Mot. Summ. J. Ex. 2, at 5 [hereinafter "PSA"], ECF No. 84.3.)

5. YRC—the parent entity of several freight companies that operate throughout North America—has a large number of customers who pay for shipping services by credit card. (Def.'s Br. Supp. Mot. Summ. J. 3, ECF No. 88.) When one of its customers pays using a credit card, YRC pays a credit card processing fee. (Def.'s Br. Supp. Mot. Summ. J. 3.) YRC incurs substantial costs in credit card fees each year due to the number of customers that it serves and the number of orders that it fills. (Def.'s Br. Supp. Mot. Summ. J. 3.) At all times relevant to this lawsuit, YRC has sought to reduce these costs. (Whitsel Dep. 29:8–23, ECF No. 96.)

6. Vizant holds itself out as a consultant that can help clients reduce costs associated with financial payments. (*See* Br. Supp. Def.'s Mot. Summ. J. Ex. X, ECF No. 133.) Vizant approached YRC in mid-2014 to offer its services, and after a series of negotiations, the two entities executed the PSA. (PSA 5.) By the terms of the PSA, Vizant agreed to "perform an evaluation, assessment and customized analytical review" of the "Financial Payments" YRC received and "identify, indicate and quantify specific and actionable strategies and solutions" that would reduce YRC's costs associated with those payments. (PSA § 2.) In return, YRC agreed to pay Vizant a percentage of YRC's savings resulting from the strategies and solutions identified by Vizant. (PSA § 10.)

7. Under the terms of the PSA, Vizant's fee was calculated by comparing YRC's "Pre-Agreement Financial Payment Costs" with YRC's "Post-Agreement Financial Payment Costs." (PSA § 8.) If the post-agreement costs were less than the pre-agreement costs, YRC would pay

Vizant a percentage of the difference. (PSA § 8.) The PSA defined "Post-Agreement Financial Payment Costs" as the Financial Payment Costs YRC incurred "as a result of the strategies and solutions that [were] identified and recommended by Vizant in performance of its professional services[.]" (PSA § 6.)

8. On July 9, 2015, after completing an initial assessment of YRC, Vizant personnel attempted to present an in-person report on Vizant's initial recommendations to YRC management. *Vizant Techs., LLC*, 2018 NCBC LEXIS 65, at *6. Two of these recommendations included charging an account management fee for credit card transactions and convincing customers to switch from paying by credit card to paying by Automated Clearing House ("ACH") batch payments. *Id.* at *6, *23.

9. Minutes into the presentation, YRC's management stopped Vizant's employees and reminded them that YRC was already considering some of the proposed measures for lowering credit card costs. (Lopez Aff. ¶ 7, ECF No. 101.) When YRC asked if Vizant believed it was entitled to a fee for savings resulting from these measures, one of Vizant's representatives responded, "Yes." (Wilson Dep. 83:5–16, ECF No. 95; Lopez Aff. ¶ 7.) YRC then ended the meeting. (Wilson Dep. 271:11–16.) Soon thereafter, Vizant sent hard-copy and electronic versions of its Report to YRC. (Christiansen Dep. 30:1–31:25, ECF No. 122.) YRC sent Vizant a written notice of termination two months later. (Pl.'s Mem. L. Supp. Mot. Summ. J. Ex. 28, at 1, ECF No. 84.29.)

B. Procedural History

10. Vizant seeks declaratory and injunctive relief against YRC as well as damages for breach of the PSA. As part of its claimed damages, Vizant contends that it is owed outstanding fees for savings that YRC allegedly realized through successful efforts to convince customers to pay using ACH rather than credit cards (Vizant's "ACH Damages"). *Vizant Techs., LLC*, 2018 NCBC LEXIS 65, at *23.

11. On January 18, 2018, Vizant filed a motion for summary judgment. On January 19, 2018, YRC filed its cross motion for summary judgment, requesting that the Court grant summary judgment "as to [P]laintiff's claims for breach of contract." (Def.'s Mot. Summ. J. 1, ECF No. 87.) In briefing and at oral argument, each side presented the Court with its proposed interpretation of the PSA's provisions, each contending that its respective interpretation required summary judgment in its favor.

12. Vizant contended that the PSA requires YRC to pay a fee to Vizant because YRC has realized savings as a result of the strategies and

solutions identified in Vizant's report. *Vizant Techs., LLC*, 2018 NCBC LEXIS 65, at *9. Under Vizant's reading of the PSA, it does not matter whether Vizant's services actually caused YRC to implement cost-saving measures or whether YRC implemented those measures of its own accord—if Vizant identified one of the solutions that proved beneficial to YRC, Vizant argues it is owed a fee. *Id.*

13. YRC, on the other hand, asserted that the PSA only requires YRC to pay Vizant if Vizant's suggestions actually caused YRC to change business practices and realize savings. *Id.* at *10. YRC denied that it implemented any strategies based on the information in Vizant's report or presentation and thus argued that it does not owe Vizant any fee. *Id.*

14. YRC also argued that Vizant was unable to provide sufficient evidence to support its claim for ACH damages. (Def.'s Br. Supp. Mot. Summ. J. 32–33.) In particular, YRC attacked the opinions offered by one of Vizant's experts, Scott Emmanuel ("Emmanuel"), who calculated Vizant's claimed damages. *Vizant Techs., LLC*, 2018 NCBC LEXIS 65, at *23. By way of a post-discovery motion to strike, YRC asked the Court to strike Emmanuel's opinions on Vizant's claimed ACH Damages, contending that those opinions were speculative and unreliable. *Id.* In connection with its Summary Judgment Motion, YRC argued that Vizant's failure to put forward reliable evidence of ACH Damages required an entry of "judgment, as a matter of law, in YRC's favor." (Def.'s Br. Supp. Mot. Summ. J. 33.)

15. In an Opinion dated June 26, 2018, the Court made several conclusions as to the parties' summary judgment motions. First, the Court concluded that a genuine issue of material fact remained as to the interpretation of the PSA's fees provision that precluded the Court from entering summary judgment on that issue. *Vizant Techs., LLC*, 2018 NCBC LEXIS 65, at *18. Second, the Court concluded that even if YRC's interpretation of the PSA was required as a matter of law, Vizant had presented circumstantial evidence sufficient to create a question of fact as to whether YRC implemented the strategies found in Vizant's report, i.e., evidence of a sharper decline in credit card payments in the year following Vizant's report which might support Vizant's contention that YRC used the suggestions in the report. *Id.* at *19. Third, the Court concluded that questions of fact remained as to YRC's obligations to provide Vizant with certain financial data under the PSA. *Id.* at *21–22. In connection with YRC's motion to strike, the Court also concluded that Emmanuel's opinions were speculative and unreliable. *Id.* at *30. The Court then denied both sides' summary judgment motions and struck Emmanuel's opinions as to Vizant's ACH Damages. *Id.* at

*30–31. The Court did not address YRC's argument that summary judgment should be granted in its favor due to Vizant's inability to present reliable evidence of ACH Damages and made no conclusions as to the sufficiency of Vizant's evidence concerning those damages.

16. On August 6, 2018, YRC filed a motion under Rule 54(b) of the North Carolina Rules of Civil Procedure asking the Court to reconsider its June 26 Opinion. YRC asserted that the Court did not consider YRC's request for partial summary judgment as to ACH Damages and argued that the Court's decision to strike Emmanuel's opinions as to ACH Damages and Vizant's failure to offer other reliable evidence of such damages required that summary judgment be entered in YRC's favor as to that aspect of Vizant's claim.

17. Vizant argued against further consideration of its claimed ACH Damages at summary judgment. Both sides submitted briefs on YRC's motion for reconsideration, and the Court held a hearing on the matter on August 30, 2018.

18. On September 6, 2018, the Court entered an order on YRC's motion for reconsideration. The Court concluded that it was "clear that the issue of summary judgment as to Vizant's ACH Damages was properly raised and before the Court" at summary judgment and that "the Court did not address the sufficiency of Vizant's evidence as to the ACH Damages portion of Vizant's breach of contract claim or expressly consider YRC's request for summary judgment on that issue." (Order Def.'s Mot. Reconsideration ¶ 9, ECF No. 205.) Consequently, the Court concluded that YRC's motion was not a motion for reconsideration but a request that the Court decide an issue raised under Rule 56 but left unaddressed by the Court's prior decision. (Order Def.'s Mot. Reconsideration ¶ 9.)

19. Further, to the extent the Court's previous blanket denial of YRC's Summary Judgment Motion "with regard to Plaintiff's breach of contract claim," *Vizant Techs., LLC*, 2018 NCBC LEXIS 65, at *31, could be read as a ruling on YRC's request for summary judgment on the ACH Damages issue, the Court noted that North Carolina case law clearly "indicates that a trial court judge has the authority to reconsider his or her own summary judgment ruling," (Order Def.'s Mot. Reconsideration ¶ 10); *Levin v. Jacobson*, 2016 NCBC LEXIS 66, at *5 (N.C. Super. Ct. Aug. 25, 2016); *see Miller v. Miller*, 34 N.C. App. 209, 212, 237 S.E.2d 552, 555 (1977) ("An order denying summary judgment is not *res judicata* and a judge is clearly within his rights in vacating such denial."); *see also Carr v. Great Lakes Carbon Corp.*, 49 N.C. App. 631, 635, 272

S.E.2d 374, 377 (1980) ("*Miller* presented the question whether a judge who rules on a motion for summary judgment may thereafter strike the order, rehear the motion for summary judgment, and allow the motion. Such procedure does not involve one judge overruling another, and is proper under Rule 60."). The Court therefore vacated its previous denial of YRC's Summary Judgment Motion to the extent the Court's decision could be read as denying YRC's request for summary judgment as to ACH Damages. (Order Def.'s Mot. Reconsideration ¶ 10.)

20. The Court allowed Vizant a period to supplement the record before the Court and provide additional briefing as to the sufficiency of Vizant's ACH Damages at summary judgment. YRC was given an opportunity to respond to Vizant's supplemental filings. The Court reserved its right to decide whether to hold a further hearing on YRC's Summary Judgment Motion.

21. Vizant and YRC both submitted supplemental briefs and exhibits to the Court concerning Vizant's ACH Damages. The issue is ripe for resolution, and the Court elects, under the discretion afforded to it by Rule 7.4 of the General Rules of Practice and Procedure for the North Carolina Business Court, to decide this matter without a hearing.

II.

LEGAL STANDARD

22. Under Rule 56 of the North Carolina Rules of Civil Procedure, summary judgment is appropriate where there is "no genuine issue as to any material fact and . . . any party is entitled to . . . judgment as a matter of law." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 353 (2009) (quoting N.C. R. Civ. P. 56(c)). A fact is material if it "would constitute or would irrevocably establish any material element of a claim or defense." *Abner Corp. v. City Roofing & Sheetmetal Co.*, 73 N.C. App. 470, 472, 326 S.E.2d 632, 633 (1985). "[A] genuine issue is one which can be maintained by substantial evidence." *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). "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." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (internal citations omitted).

23. "The party moving for summary judgment has the burden of showing that there is no triable issue of material fact." *Nicholson v. Am. Safety Util. Corp.*, 346 N.C. 767, 774, 488 S.E.2d 240, 244 (1997). That burden may be met "by proving that an essential element of the

opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim[.]" *Collingwood v. Gen. Elec. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). If the moving party makes this required showing, "the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784–85, 534 S.E.2d 660, 664 (2000). All evidence is viewed in the light most favorable to the nonmoving party. *DeWitt*, 355 N.C. at 682, 565 S.E.2d at 146.

III.

ANALYSIS

24. In light of the Court's decision to strike Vizant's expert's opinions on ACH Damages, YRC contends that Vizant is unable to forecast evidence from which a factfinder could calculate Vizant's ACH Damages with reasonable certainty. Because Vizant cannot produce evidence to support this element of its breach of contract claim, YRC argues that the Court should grant partial summary judgment in YRC's favor on the issue of ACH Damages.

25. As a preliminary issue, the Court first addresses what choice of law applies to Vizant's claim. As a general rule, North Carolina courts will give a contractual choice of law provision "effect unless the chosen state has no substantial connection to the transaction and there is no other reasonable basis for the parties' choice, or the law of the chosen state violates a fundamental public policy of North Carolina." *Recurrent Energy Dev. Holdings, LLC v. SunEnergy1, LLC*, 2017 NCBC LEXIS 18, at *21–22 (N.C. Super. Ct. Mar. 7, 2017) (citing *Cable Tel Servs., Inc. v. Overland Contracting, Inc.*, 154 N.C. App. 639, 642–43, 574 S.E.2d 31, 33–34 (2002)). The parties here have expressly agreed—and neither has since disputed—that Kansas law shall control "any controversy, dispute, or claim arising out of or related to" the PSA. (PSA § 19.) Thus, Kansas law governs Vizant's breach of contract claim. *See Bayer CropScience LP v. Chemtura Corp.*, 2012 NCBC LEXIS 43, at *16 (N.C. Super. Ct. July 13, 2012).

26. In Kansas, the elements of a breach of contract claim are "(1) the existence of a contract between the parties; (2) sufficient consideration to support the contract; (3) the plaintiff's performance or willingness to perform in compliance with the contract; (4) the defendant's breach of the contract; and (5) damages to the plaintiff caused by the breach." *Stechschulte v. Jennings*, 298 P.3d 1083, 1098 (Kan. 2013). To satisfy the

damages element of the claim, a party "must not only show the injury sustained, but must also show with reasonable certainty the amount of damage suffered as a result of the injury or breach." *Venable v. Imp. Volkswagen, Inc.*, 519 P.2d 667, 674 (Kan. 1974). "A party is not entitled to recover damages not the proximate result of the breach of contract and those which are remote, contingent, and speculative in character." *State ex rel. Stovall v. Reliance Ins. Co.*, 107 P.3d 1219, 1228 (Kan. 2005) (internal quotation marks omitted). Consequently, the Supreme Court of Kansas has stated that "[i]n order for the evidence to be sufficient to warrant recovery of damages [for breach of contract] there must be some reasonable basis for computation which will enable the jury to arrive at an approximate estimate thereof." *Venable*, 519 P.2d at 674.

27. Vizant presents three arguments in opposition to YRC's request for partial summary judgment. First, Vizant argues that it has presented sufficient evidence to raise a genuine issue of material fact as to whether YRC implemented a strategy of switching customers from credit card to ACH and achieved savings as a result of that strategy. Second, Vizant argues that, even in the absence of expert testimony on the subject, it has provided sufficient evidence from which a jury could arrive at an approximate estimate of the claimed ACH Damages. Third, Vizant contends that, at the very least, it has provided the best evidence it could under the circumstances and that it should not be penalized for evidentiary deficiencies caused by YRC. The Court will address YRC's request for partial summary judgment by addressing each of these counterarguments in turn.

A. Vizant's Evidence that YRC Implemented Identified Strategies

28. Vizant's first argument in its supplemental opposition brief effectively revisits the Court's previous decision. There, the Court determined that Vizant's forecast evidence, "[w]hile circumstantial," created an issue of fact as to whether YRC implemented the strategies identified in Vizant's report and achieved savings as a result. *Vizant Techs., LLC*, 2018 NCBC LEXIS 65, at *19. Thus, in contending that it has presented enough evidence to raise a genuine issue of material fact as to whether YRC encouraged customers to switch to ACH, Vizant argues an already decided issue that YRC's request for partial summary judgment does not seek to revisit.

29. Instead, YRC's request for partial summary judgment challenges the adequacy of the evidence Vizant has put forward to show the amount of ACH Damages Vizant claims. The issue before the Court now is thus not whether Vizant can prove savings were achieved, or

even whether Vizant can prove how the savings were achieved, but rather whether Vizant can sufficiently show the amount of savings YRC achieved by convincing customers to switch to ACH. In short, the Court must decide whether Vizant's evidence provides a reasonable basis for a factfinder to arrive at an approximation of Vizant's ACH damages. *See Venable*, 519 P.2d at 674. The Court thus turns to address that issue.

B. Vizant's Evidence of ACH Damages

30. As to its ACH Damages evidence, Vizant argues that "an issue of material fact remains as to whether YRC's cost reductions must be causally linked to Vizant's recommendations in order for Vizant to recoup its fee under the PSA." (Pl.'s Supplemental Br. Opp'n YRC's Mot. Summ. J. 11 [hereinafter "Pl.'s Supplemental Br."], ECF No. 209.) "Thus," Vizant continues, "all Vizant has to show is that it did not get paid under . . . the still-to-be-interpreted terms of the PSA to demonstrate damages for purposes of summary judgment." (Pl.'s Supplemental Br. 11.) This assertion does not align with the Court's previous ruling or the law applicable to Vizant's claim.

1. The Required Causal Connection Between YRC's ACH Savings and Vizant's ACH Damages

31. In its June 26 Opinion, the Court held that an issue of fact remained as to whether Vizant's right to a fee under the PSA was contingent upon Vizant's report or recommendations causing YRC to implement the alleged program of encouraging customers to switch from credit card payments to ACH. *See Vizant Techs., LLC*, 2018 NCBC LEXIS 65, at *18. In essence, the Court found the evidence in dispute as to whether (i) the parties intended Vizant to recoup a fee for simply identifying and recommending strategies that led to savings, including strategies YRC decided to implement independently or had already implemented, or (ii) the parties intended Vizant to recoup a fee only in the event Vizant identified and recommended a new strategy to YRC and YRC ended up implementing that strategy because of Vizant's recommendation. *Id.* at *17–18. The Court concluded that the PSA was ambiguous on this issue and that evidence in the record pointed to both interpretations being reasonable. *Id.* at *14–15, *17–18.

32. In either event, the Court also determined that the PSA required a causal connection between a strategy of convincing customers to switch to ACH and YRC's savings that would be used to calculate Vizant's fee. *Id.* at *26. The Court noted that Vizant's fee was not meant to be based on any "broad, kitchen-sink savings realized after the execution of the PSA," but only on those savings YRC achieved as the result of a strategy

identified by Vizant. *Id.* Thus, Vizant may be entitled to a fee based on savings resulting from customers switching from credit card to ACH at YRC's prompting, but Vizant is not entitled to a fee simply because YRC had fewer credit-card-related costs after the PSA was executed. *See id.*

33. In sum, contrary to Vizant's current argument, Vizant must do more than show it was not paid under the PSA to recover ACH Damages. Vizant must also (i) prove that YRC achieved savings by convincing its customers to switch from credit card to ACH, *id.*, and (ii) show "with reasonable certainty the amount of damage[s]" caused by any outstanding fee linked to those savings, *Venable*, 519 P.2d at 674. The Court has concluded that Vizant has forecast adequate evidence to survive summary judgment on the first of these points, *see Vizant Techs., LLC*, 2018 NCBC LEXIS 65, at *19, but must now determine whether the same is true of the second.

2. The Sufficiency of Vizant's Forecast ACH Damages Evidence

34. YRC asserts that Vizant has not presented evidence showing the amount of cost savings YRC achieved as the result of any "switch-to-ACH" strategy. Because the source of Vizant's ACH Damages is the alleged unpaid fee tied to such savings, YRC argues Vizant cannot prove its claimed ACH Damages with any reasonable certainty. While YRC does not appear to contest that some evidence in the record shows YRC experienced a decline in the number of customers paying with credit cards following the PSA's execution, YRC contends that Vizant has failed to forecast any evidence that would allow a reasonable fact-finder to determine what portion of that overall decline resulted from YRC's efforts to cause customers to switch to ACH. YRC also argues that Vizant's evidence of general shifts in payment methods cannot account for any incentives YRC paid customers to encourage their switch to ACH, another factor YRC asserts is critical in determining the amount of money, if any, YRC actually saved from customers switching.

35. Before post-discovery dispositive motions practice in this case, Vizant's most succinct evidence addressing its claimed ACH Damages was Emmanuel's expert opinions. The Court struck Emmanuel's opinions related to ACH Damages after concluding that they were based on insufficient data, were not the product of a reliable method, and were not the product of a method that was reliably applied to the facts of the case. *Id.* at *30. The Court's conclusions were based, in part, on Emmanuel's own deposition testimony, wherein he admitted several ways his calculations could not accurately show the amount YRC saved by customers moving from credit card to ACH:

> Q: In order to calculate how much YRC saved by customers moving from credit card to ACH, you certainly ought to account for the amount that YRC paid its customers in incentives to make that move from credit card to ACH, right?
>
> A: Correct.
>
> Q: And you have not done that, have you?
>
> A: Correct.

(Emmanuel Dep. 123:24–124:6, ECF No. 90.10.)

> Q: And you have no idea whether or not what you say was a drop in Visa, MasterCard or Discover payments had anything to do with YRC encouraging a customer to pay by ACH instead of using one of those credit cards, right?
>
> A: Correct.
>
> Q: You have no idea whether those were the simple result of market forces where customers change their own . . . payment type or leave and go to a different trucking company, right?
>
> . . . .
>
> A: Correct.
>
> . . . .
>
> Q: And you don't know whether that reduction was caused by YRC implementing some recommendation that Vizant put in its report, right?
>
> A: Correct.
>
> Q: All you know is that your math tells you that there was some reduction, and who in the world knows why it happened, right?
>
> A: Correct.

(Emmanuel Dep. 111:14–112:1, 137:1–11.)

36. In short, Emmanuel did not attempt to discern what portion of the decrease in YRC's credit-card-related costs was due to customers switching to ACH; he simply assumed that each dollar saved should be attributed to a customer switching. The Court therefore concluded that

Emmanuel's opinions on ACH Damages were unreliable under North Carolina Rule of Evidence 702(a) and should be struck:

> Under Emmanuel's calculation, as described by his own testimony, true savings caused by YRC's customers switching to ACH payments and other factors leading to a reduction in customers paying with credit cards—for example, a reduction in credit card payments due to lost business—would all have been counted as savings for which YRC owed Vizant a fee. . . . This calculation (i) does not abide by the formula in the PSA, which requires a comparison of pre-agreement costs to post-agreement costs resulting from strategies identified by Vizant, (ii) rests on unjustifiable assumptions, and (iii) could mislead a jury into awarding Vizant damages for what was in reality a loss in YRC's business.

Vizant Techs., LLC, 2018 NCBC LEXIS 65, at *29.

37. The Court's previous analysis of Emmanuel's ACH Damages opinions is pertinent to the matter *sub judice* because Vizant's remaining evidence of ACH Damages suffers from the same flaws. All of Vizant's evidence shows nothing more than a net decrease in credit-card-related costs in the months and years following the PSA and a net trend towards increasing ACH payments. Simply put, Vizant has no evidence that can reasonably approximate what, if any, reduction in YRC's credit card costs is attributable to encouraging customers to switch to ACH.

38. For example, the previously presented chart appearing at the top of page seven of Vizant's supplemental brief (the contents of which remain under seal) shows a general shift towards a greater number of ACH payments and fewer credit card payments during the years 2014–2017, but the total number of each kind of transaction oscillates considerably over that time-span. (Pl.'s Supplemental Br. 7.) The chart provides a factfinder with nothing more than Emmanuel's previously stricken opinions and invites jurors to engage in the same speculative analysis by attempting to discern, without any identifiable framework, what percentage of the shown changes occurred due to YRC encouraging customers to switch payment methods.

39. Vizant's supplementation of the record provides no additional evidence to remedy this problem. Along with its supplemental brief, Vizant submitted twelve YRC-produced spreadsheets in pdf and Excel format ("Exhibits 1–12"). Vizant gives little explanation to assist the

Court in navigating these spreadsheets, but contends that Exhibits 1 and 5 represent "the monetary impact of YRC's 2015 ACH initiative within each of YRC's operating companies," (Pl.'s Supplemental Br. 12), and that Exhibits 4 and 5 show YRC's subsidiaries' revenues by payment type, (Pl.'s Supplemental Br. 14). Vizant asserts that it "can argue that YRC's own evidence [shows] the monetary impact of its ACH initiative . . . within the company" and that this "is a reasonable basis on which to calculate the [ACH Damages] figure." (Pl.'s Supplemental Br. 12.) The Court has reviewed each spreadsheet and disagrees.

40. Exhibits 2 and 3 showcase information on YRC's subsidiaries' top credit card accounts for May 2016 (*See* Pl.'s Supplemental Br. Exs. 2–3, ECF No. 209.1.) These exhibits do not present any information that would aid a jury in determining whether customers switched from credit card to ACH or, if so, why they switched. Exhibits 4 and 5 summarize YRC's revenue and deposits by month from 2013–2017. (*See* Pl.'s Supplemental Br. Exs. 4–5, ECF No. 209.1.) These spreadsheets track the change in deposits by payment type per month for YRC and its subsidiaries, but still provide no explanation for any changes. Exhibit 6 shows the percentage of YRC's total deposits that were attributable to credit cards from 2006–2011. (*See* Pl.'s Supplemental Br. Ex. 6, ECF No. 209.2.) This exhibit provides no explanation for changes in credit card deposits over time and is outside the time-period relevant for this case.

41. Exhibits 7 and 8 show YRC's credit card revenues broken down by major credit card company and report YRC's credit card fees for the years 2010–2014. (*See* Pl.'s Supplemental Br. Exs. 7–8, ECF No. 209.2.) Exhibit 9 reports credit card revenue per major credit card company for YRC's subsidiaries from October 2015–January 2016. (*See* Pl.'s Supplemental Br. Ex. 9, ECF No. 209.2.) Exhibits 10, 11, and 12 break down credit card revenue for YRC and its subsidiaries by month in 2014, 2016, and 2017 respectively. (*See* Pl.'s Supplemental Br. Exs. 10–12, ECF No. 209.3.) None of these spreadsheets illuminate whether customers switched from credit card payments to ACH or why they switched.

42. Vizant contends that Exhibit 1 to its supplemental brief, an Excel spreadsheet Vizant labeled "ACH Migration Program Impact Sheet," shows the monetary impact of YRC's 2015 "ACH initiative." (Pl.'s Supplemental Br. 12; Index Supp. Materials for Pl.'s Supplemental Br. 1, ECF No. 209.1; Pl.'s Supplemental Br. Ex. 1, ECF No. 209.1.) YRC, however, argues that this representation is false and based solely on Plaintiff's counsel's interpretation of Exhibit 1. According to YRC, Exhibit 1 is actually an unused template created by Abraham Bailin

("Bailin"), the finance manager of one of YRC's subsidiaries. (Bailin Aff. ¶¶ 2, 4, 6, ECF No. 213.2.)

43. In an affidavit submitted to the Court with YRC's supplemental brief, Bailin states that he never labeled Exhibit 1 "ACH Migration Program Impact Spreadsheet" and that Vizant created that title. (Bailin Aff. ¶ 4.) Bailin also states that Vizant's characterization of Exhibit 1 is incorrect. (Bailin Aff. ¶ 5.) Bailin testifies that he created Exhibit 1 in mid-2016 upon YRC's request and that Exhibit 1 "does not provide any information about any actual results of any effort to convince customers to pay by ACH instead of by credit card." (Bailin Aff. ¶ 6.) Instead, according to Bailin's understanding, Exhibit 1 was meant to forecast the financial impact of a scenario in which YRC "essentially mandate[d] that customers . . . stop paying by credit card." (Bailin Aff. ¶ 11.) Bailin states that upper management rejected that strategy and that, to the best of his knowledge, Exhibit 1 was never used to forecast the financial impact of any program that was actually implemented. (Bailin Aff. ¶ 11.)

44. According to Bailin—with the exception of the revenue and accounts receivable figures from May 2015–April 2016; the April and May 2016 top credit card account figures; credit card revenue figures from January 2015–June 2016; and the payment terms YRC had with certain third-party logistics companies—the entirety of the figures contained in Exhibit 1 are forecast numbers, placeholder variables Bailin created to build the model, or figures the model generated by processing actual figures and placeholder variables. (Bailin Aff. ¶¶ 7, 8 14.) If YRC actually used Exhibit 1, Bailin states, "it would have been up to the user" to input new figures based on known or assumed statistics. (Bailin Aff. ¶¶ 14–16.)

45. The Court has reviewed Exhibit 1's contents and concludes that they corroborate Bailin's affidavit testimony. First of all, Exhibit 1 makes the assumption that 100% of the operating revenue eligible to move from credit card payments to some other form of payment would do so, (Pl.'s Supplemental Br. Ex. 1), an assumption that would not conceivably play out in the real world. Further, while the Court must view the facts on YRC's Summary Judgment Motion in the light most favorable to Vizant, the Court cannot ignore the disparity between YRC's characterization of Exhibit 1, which is supported by an affidavit, and Vizant's description of Exhibit 1, which is supported by nothing more than counsel's argument in Vizant's supplemental brief. In light of this lack of evidentiary support for Vizant's interpretation of Exhibit 1, the Court concludes that Exhibit 1 does not provide any information from which a factfinder

could reasonably approximate Vizant's ACH Damages. *See Cone v. Cone*, 50 N.C. App. 343, 347, 274 S.E.2d 341, 343–44 (1981) ("When a party, in a motion for summary judgment, presents an argument or defense supported by facts which would entitle him to judgment as a matter of law, the party opposing the motion 'must present a forecast of the evidence which will be available for presentation at trial and which will tend to support his claim for relief.' " (quoting *Best v. Perry*, 41 N.C. App. 107, 110, 254 S.E.2d 281, 284 (1979))); *Huss v. Huss*, 31 N.C. App. 463, 466, 230 S.E.2d 159, 161–62 (1976) ("On a motion for summary judgment[,] the court may consider evidence consisting of affidavits, depositions, answers to interrogatories, admissions, documentary materials, facts which are subject to judicial notice, and any other materials which would be admissible in evidence at trial."); *see also Ronald G. Hinson Elec., Inc. v. Union Cty. Bd. of Educ.*, 125 N.C. App. 373, 379, 481 S.E.2d 326, 330 (1997) (noting that unsworn statements by a party's attorney are not considered evidence at trial).

46. The testimony of Patrick Moran ("Moran"), another of Vizant's designated experts, does nothing to remedy the problems with Vizant's evidence. Moran testified that YRC's increase in ACH payments and decrease in credit card payments went against industry trends because market data showed credit card usage increasing. (Moran Dep. 153:1–21, ECF No. 209.5.) Moran also testified that he believed a loss in business could not account for the total decrease in credit card payments YRC experienced. (Moran Dep. 153:22–154:19.) This evidence goes to whether YRC was encouraging customers to switch to ACH but provides nothing from which a reasonable factfinder could begin to approximate what part of YRC's savings resulted from any such effort.

47. Further, YRC is correct that none of the above-mentioned evidence would allow a jury to "account for the amount that YRC paid its customers in incentives to make that move from credit card to ACH," a consideration that Vizant's own expert agrees is necessary to calculate YRC's savings. (Emmanuel Dep. 123:24–124:6.) None of Vizant's evidence, with the exception of Exhibit 1's placeholder variables, addresses any financial incentives, real or forecast, associated with YRC encouraging customers to switch to ACH. While this aspect of the ACH Damages calculation may be more nuanced than those issues already discussed, it showcases yet another way Vizant's proffered evidence provides no details about what savings YRC actually realized or may have realized as a result of switching customers to ACH.

3. Vizant's Contentions of the "Best Evidence Available"

48. Vizant's third and final argument asserts that "[a]ny difficulties in calculating damages from [the submitted] data is a result of the manner [in which] YRC itself maintains the data, not Vizant's failure to bring forth sufficient evidence" and that YRC's inability to track shifts from credit card payments to ACH payments "cannot serve as a basis for granting YRC summary judgment." (Pl.'s Supplemental Br. 15.) To support this assertion that it "should not be penalized" for YRC's failure to "keep necessary records," (Pl.'s Supplemental Br. 13), Vizant cites *New Dimensions Products, Inc. v. Flambeau Corp.*, 844 P.2d 768 (Kan. Ct. App. 1993). That case, however, is inapposite.

49. In *New Dimensions*, a defendant with "exclusive control over all the records" useful in calculating damages "consistently denied" that such records existed until the first day of a bench trial. *Id.* at 771, 774. The trial court ordered the records to be produced, allowed the plaintiff to introduce the evidence, and sanctioned the defendant. *Id.* at 771. The evidence finally admitted was imperfect, and the trial court made certain inferences and assumptions in calculating parts of the plaintiff's damages for which no evidence existed. *See id.* at 771–72, 774. The trial court's award was affirmed as an exercise of its equitable power to make the plaintiff whole by resolving the question of damages "on the best evidence available." *Id.* at 771–73; *see also Gillespie v. Seymour*, 823 P.2d 782, 797 (Kan. 1991) ("In assessing damages it is within the discretion of the trial court to apply equitable standards in order that the plaintiff may be made whole.")

50. In contrast to *New Dimensions*, here there is no evidence YRC failed to keep necessary records or wrongfully refused to produce records to Vizant. YRC's inability to track figures that would easily show Vizant's ACH Damages did not emerge suddenly when the possibility of litigation seemed imminent. Indeed, Vizant's supplemental evidence reveals a conversation taking place months before the companies' relationship fell apart in which YRC personnel discuss their inability to track per-customer credit-card-to-ACH changes. (Pl.'s Supplemental Br. Ex. 24, at 1, ECF No. 209.4.) The Court will not relieve Vizant of its burden to prove its case simply because YRC did not keep records that may be convenient to proving that case. *Belot v. Unified Sch. Dist. No. 497*, 4 P.3d 626, 629 (Kan. Ct. App. 2000) ("The burden of proving the damages rests on the plaintiff.").

51. Furthermore, YRC is not the only entity with access to data that would have been useful to Vizant in making its damages case. During

discovery, YRC produced multiple documents to Vizant listing YRC's top credit card customer accounts at various points in time. (*See* Pl.'s Supplemental Br. Exs. 2, 9.) Each of these customers likely would have possessed data on their methods of paying YRC and would have been the best source for evidence tending to show *why* customers switched from credit card to ACH, i.e., whether they did so because of a YRC strategy or because of convenience, market forces, changes in credit card benefits, or other factors. Despite this, the record before the Court does not show any attempt by Vizant to obtain discovery from these nonparties. The Court does not believe Vizant is entitled to an equitable easing of its burden of proof in such circumstances. *See New Dimensions*, 884 P.2d at 774 (stating that evidence is sufficient where it "shows the extent of the damages as a matter of just and reasonable inference," but reaffirming that "damages may not be determined by mere speculation or guess" (quoting *Vanguard Ins. Co. v. Connett*, 270 F.2d 868, 870 (10th Cir. 1959))).

52. In sum, none of the evidence Vizant presents to the Court would "enable the jury to arrive at an approximate estimate" of Vizant's ACH Damages. *See Venable*, 519 P.2d at 674. At most, the forecast evidence shows that YRC's credit card revenue and credit-card-related costs decreased in the months following the execution of the PSA and that YRC's ACH revenue increased. While Vizant argues that "these records are sufficient to allow a jury to arrive at a reasonable calculation of Vizant's damages, including the ACH subcategory," (Pl.'s Supplemental Br. 15), without any evidence allowing a factfinder to even begin to discern what portion of YRC's reduced credit card costs may have been tied to YRC's efforts to switch customers to paying by ACH, presenting the current record to a jury and asking it to approximate the claimed ACH Damages would be asking jurors to engage in the same speculation that formed the basis for Emmanuel's unreliable opinions. Kansas law does not allow for Vizant to recover damages on such evidence. *See Reliance Ins. Co.*, 107 P.3d at 1228 ("A party is not entitled to recover damages not the proximate result of the breach of contract and those which are remote, contingent, and speculative in character." (internal quotation marks omitted)).[2]

---

2. The Court notes that its conclusion herein would be identical under North Carolina law, which provides that "the party seeking damages must show that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty." *Olivetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 547–48, 356 S.E.2d 578, 586 (1987).

53. In light of the above, the Court concludes that YRC has met its burden on summary judgment by showing that Vizant cannot produce evidence to support its claimed ACH Damages. Vizant has failed to respond with a forecast of evidence demonstrating specific facts to prove this element of its breach of contract claim at trial. The Court therefore concludes that summary judgment should be granted in YRC's favor as to Vizant's claimed ACH Damages. *See Gaunt*, 139 N.C. App. at 784–85, 534 S.E.2d at 664.

IV.

CONCLUSION

54. **WHEREFORE**, the Court hereby **AMENDS** its June 26, 2018 Order and Opinion on Cross Motions for Summary Judgment and Defendant's Motion to Strike and **ORDERS** as follows:

a. YRC's Cross Motion for Summary Judgment is **GRANTED in part**. Vizant shall not recover damages relating to savings YRC purportedly achieved as a result of any strategy aimed at causing customers to switch from credit card payments to ACH payments.

b. YRC's Cross Motion for Summary Judgment is otherwise **DENIED** with regard to Vizant's breach of contract claim.

c. Except as otherwise stated herein, the Court's decisions in its June 26, 2018 Order and Opinion are unaffected by this ruling.

SO ORDERED, this the 15th day of November, 2018.[3]

/s/ Louis A. Bledsoe, III
Louis A. Bledsoe, III
Chief Business Court Judge

3. This Order and Opinion was originally filed under seal on November 15, 2018. This public version of the Order and Opinion is being filed on November 19, 2018. Because this public version of the Order and Opinion does not contain any substantive changes from the version filed under seal as to constitute an amendment, and to avoid confusion in the event of an appeal, the Court has elected to state the filing date of the public version of the Order and Opinion as November 15, 2018.

IN RE C.N.

[373 N.C. 568 (2020)]

IN THE MATTER OF C.N., A.N.	)	From New Hanover County

No. 381P19

ORDER

Upon consideration, petitioners New Hanover County Department of Social Services and Guardian *ad Litem*'s "Petition for Writ of Certiorari" is allowed for the limited purpose of remanding to the Court of Appeals to reconsider its holding in light of *In re B.O.A.*, 831 S.E.2d 305, 311–12 (N.C. 2019) (stating that our termination of parental rights statutes contemplate the trial court's ability to evaluate and remediate "direct and indirect underlying causes of the juvenile's removal from the parental home"). *See also In re D.W.P. and B.A.L.P.*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (2020) (No. 140A19) (discussing the need for a court to be able to review all applicable evidence, including historical facts and evidence of changed conditions, to evaluate the probability of future neglect).

By Order of the Court in Conference, this 26th day of February, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of February 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

IN RE R.A.B.

[373 N.C. 569 (2020)]

IN THE MATTER OF R.A.B.	)	From Moore County

No. 402A19

ORDER

On 11 July 2019, the District Court, Moore County terminated respondent-father's paternal rights, and respondent gave notice of appeal on 31 July 2019. In his notice of appeal, respondent designated the Court of Appeals as the reviewing court rather than this Court. This Court allows respondent's petition for writ of certiorari that recognizes this Court is now statutorily designated to hear the appeal. This Court denies petitioners' motion to dismiss the appeal. Because counsel for respondent has filed a no-merit brief with this Court, this Court allows respondent-father to file a pro se appellant brief with this Court due on 20 January 2020. Should respondent choose to file pro se appellant brief, petitioners' appellee brief will be due on 19 February 2020. Should respondent wish to file a reply brief, the reply brief will be due on 5 March 2020.

By order of the Court in Conference, this 20th day of December, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 20th day of December, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

IN RE S.D.C.

[373 N.C. 570 (2020)]

IN THE MATTER OF S.D.C.	)	Guilford County

No. 229A19

ORDER

The Court, acting on its own motion, amends the record on appeal that was filed in this case by including page 3 of the Juvenile Petition (Abuse/Neglect/Dependency) filed on 15 December 2016, which is the first page of Exhibit A to the Juvenile Petition. This page appears to have been inadvertently omitted from the version of the record on appeal that was submitted for the Court's consideration in this case.

By order of the Court in Conference, this 10th day of January, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of January, 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

STATE v. BETTS

[373 N.C. 571 (2020)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Forsyth County
	)	
ERVAN L. BETTS	)	

No. 376A19

ORDER

Defendant's petition for discretionary review as to additional issues is decided as follows: defendant's petition is allowed with respect to Issue Nos. 1a and 1b. Except as otherwise allowed, defendant's petition is denied.

By order of the Court in conference, this the 26th day of February 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of February 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~M.C. Hackney~~

~~Assistant~~ Clerk, Supreme Court of North Carolina

STATE v. CAREY

[373 N.C. 572 (2020)]

STATE OF NORTH CAROLINA	)	1. DEFENDANT'S MOTION TO STRIKE THE ADDENDUM TO THE NEW BRIEF FOR THE STATE
v.	)	
ADAM RICHARD CAREY	)	2. STATE'S REQUEST FOR COURT TO TAKE JUDICIAL NOTICE
	)	3. STATE'S ALTERNATIVE REQUEST FOR REMAND

No. 293A19

SPECIAL ORDER

Defendant's motion to strike the addendum to the new brief for the State is granted as to all portions of the addendum except the unpublished opinion. Inclusion of that material is permitted by Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure. The State's request for the Court to take judicial notice is denied. The State's alternative request for remand is not ruled on at this time.

By order of the Court in Conference, this the 12th day of December, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 12th day of December, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. CLEGG

[373 N.C. 573 (2020)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Wake County
	)	
CHRISTOPHER ANTHONY CLEGG	)	

No. 101PA15-3

ORDER

Defendant's supplemental petition for discretionary review is decided as follows: defendant's supplemental petition is allowed for the purpose of affording plenary review of the issues raised in that petition. Defendant's request for summary reversal is denied.

By order of the Court in conference, this the 26th day of February 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of February 2020.

AMY FUNDERBURK
Clerk, Supreme Court
of North Carolina

s/Amy Funderburk
~~M.C. Hackney~~

~~Assistant~~ Clerk, Supreme Court of
North Carolina

STATE v. GROOMS

[373 N.C. 574 (2020)]

STATE OF NORTH CAROLINA	)	1. DEFENDANT'S PETITION FOR
	)	*WRIT OF CERTIORARI* TO
v.	)	REVIEW ORDER OF
	)	SUPERIOR COURT,
TIMMY EUVONNE GROOMS	)	SCOTLAND COUNTY
	)	
	)	2. DEFENDANT'S MOTION
	)	FOR LEAVE TO FILE REPLY
	)	IN SUPPORT OF PETITION
	)	FOR *WRIT OF CERTIORARI*
	)	**Allowed 2/3/2020**
	)	
	)	3. DEFENDANT'S MOTION TO
	)	ALLOW COUNSEL TO
	)	WITHDRAW AND AUTHORIZE
	)	IDS TO APPOINT
	)	SUBSTITUTE COUNSEL
	)	**Allowed 2/3/2020**

No. 39A99-2

SPECIAL ORDER

Defendant's petition for writ of certiorari to review the order of the Superior Court, Scotland County, is allowed. The 31 October 2018 order of the Superior Court denying defendant's motion for appropriate relief is hereby vacated and the case is remanded to the Superior Court for consideration of the claims in defendant's motion for appropriate relief consistent with N.C.G.S. § 15A-1420. On remand, the Superior Court is instructed to conduct an evidentiary hearing for all claims which would entitle the defendant to relief if the assertions of fact presented are assumed to be true. *See State v. McHone*, 348 N.C. 254, 258, 499 S.E.2d 761, 763 (1998).

By order of the Court in Conference, this the 26th day of February, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of February, 2020.

AMY FUNDERBURK
Clerk, Supreme Court
of North Carolina

s/Amy Funderburk
~~Assistant~~ Clerk

STATE v. WALTON

[373 N.C. 576 (2020)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Chowan County
	)	
SHAKITA NECOLE WALTON	)	

No. 311PA18

ORDER

Defendant's Motion to Dismiss State's Appeal as Moot is decided as follows:

Defendant's motion to dismiss the State's appeal is allowed, the State's appeal is dismissed as moot, and the opinion filed by the Court of Appeals in this case on 4 September 2018 reversing and remanding the trial court's order revoking defendant's probation and activating defendant's suspended sentences is vacated.

By order of the Court in conference, this the 5th day of February 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 5th day of February 2020.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
M.C. Hackney
Assistant Clerk, Supreme Court of
North Carolina

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

28 FEBRUARY 2020

1P20	State v. Lamerick Blackwell	Def's Pro Se Motion for Petition to Be Removed from the Sex Offender Registry	Dismissed
2P20	State v. James Robert Graham	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court (COAP19-829)	Dismissed
3A20	State v. Bryan Xavier Johnson	1. Def's Motion for Temporary Stay (COA19-96) 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Dissent	1. Allowed **01/07/2020** 2. 3.
4P20-1	Desmond Gayle and Georgeann Gayle v. Desmond Gayle, Jr. and Siamiramys J. Gayle	1. Plts' Pro Se Motion to Stay Order Dismissing Appeal and Denial (COA19-464) 2. Plts' Pro Se Motion to Stay Order Granting Child Custody 3. Plts' Pro Se Petition for Writ of Supersedeas	1. Denied **01/08/2020** 2. Denied **01/08/2020** 3. Dismissed **01/08/2020**
4P20-2	Desmond Gayle and Georgeann Gayle v. Desmond Gayle, Jr. and Siamiramys J. Gayle	1. Plts' Pro Se Motion to Reconsider Motion to Stay Order Dismissing Appeal and Denial 2. Plts' Pro Se Motion to Reconsider Motion to Stay Order Granting Child Custody 3. Plts' Pro Se Motion to Reconsider Petition for Writ of Supersedeas 4. Plts' Pro Se Notice of Appeal Based Upon a Constitutional Question 5. Plts' Pro Se Motion to Stay the Order Dismissing Appeal and Denial 6. Plts' Pro Se Motion to Stay the Order Granting Child Custody 7. Plts' Pro Se Petition for Writ of Certiorari to Review Order of the COA	1. Dismissed **01/17/2020** 2. Dismissed **01/17/2020** 3. Dismissed **01/17/2020** 4. Dismissed *ex mero motu* **01/17/2020** 5. Dismissed **01/17/2020** 6. Dismissed **01/17/2020** 7. Denied **01/17/2020**
6A19	State v. Patrick Mylett	Amicus Curiae's (Pennsylvania Center for the First Amendment) Motion for Leave to Participate in Oral Argument	Allowed **12/16/2019**

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8A20	State v. Harley Aaron Allen	1. State's Motion for Temporary Stay (COA18-1150) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **01/07/2020** 2. Allowed **01/24/2020** 3. ---
9P20	State v. Ronald Bruce Frazier, Jr.	Def's Pro Se Motion for Pretrial Release	Dismissed **01/13/2020**
10A20	In the Matter of S.E.T.	Respondent-Father's Petition for Writ of Certiorari to Review Order of District Court, Henderson County	Allowed **02/20/2020**
13P20	State v. James Alton Willis, Jr.	Def's Petition for Writ of Mandamus (COA18-507)	Denied **01/17/2020**
26P20	State v. Michael T. Sutton	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP19-815)	Denied **01/17/2020**
39A99-2	State v. Timmy Euvonne Grooms	1. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Scotland County 2. Def's Motion for Leave to File Reply in Support of Petition for Writ of Certiorari 3. Def's Motion to Allow Counsel to Withdraw and Authorize IDS to Appoint Substitute Counsel	1. Special Order 2. Allowed **02/03/2020** 3. Allowed **02/03/2020**
40P20	State v. Leonard Paul Schalow	1. State's Motion for Temporary Stay (COA19-215) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/27/2020** 2. 3. **Davis, J., recused**
42P20	In re Robert T. Sigler	Petitioner's Pro Se Petition for Writ of Mandamus (COAP20-37)	Denied **02/06/2020**
45P07-5	State v. Terry Gilmore	1. Def's Pro Se Motion for PDR Under N.C.G.S. § 7A-31 (COA07-600; COAP09-294; COAP19-110) 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot **Ervin, J., recused**

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46A20	In the Matter of O.K.W.	1. Respondent-Mother's Motion to Withdraw Appeal 2. Respondent-Mother's Motion to Waive Costs	1. Allowed **02/12/2020** 2. Allowed **02/12/2020**
48P20	State v. Lyneil Antonio Washington, Jr.	1. Def's Motion for Temporary Stay (COA19-547) 2. Def's Petition for Writ of Supersedeas	1. Allowed **02/06/2020** 2.
49A20	State v. Faye Larkin Meader	1. Def's Motion for Temporary Stay (COA19-554) 2. Def's Petition for Writ of Supersedeas	1. Allowed **02/07/2020** 2.
51P20	Sarah E. Riopelle (Cooper), Plaintiff v. Jason B. Riopelle, Defendant v. Lindsey and Avery Fuller, Intervenors	1. Def's Pro Se Motion for Temporary Stay (COA19-241) 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA	1. Denied **02/10/2020** 2. 3.
55P19-2	Ashley D. Carney v. Wake County Sheriff's Office	Plt's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-1299)	Denied
59P19	State v. Flora Riano Gonzalez	Def's PDR Under N.C.G.S. § 7A-31 (COA18-228)	Denied
70P17-2	Francisco Fagundes and Desiree Fagundes v. Ammons Development Group, Inc.; East Coast Drilling & Blasting, Inc.; Scott Carle; and Juan Albino	Def's (Ammons Development Group, Inc.) PDR Under N.C.G.S. § 7A-31 (COA17-1427)	Denied **Davis, J., recused**
70P20	Kanish, Inc. v. Kay F. Fox Taylor and Calvin Taylor	1. Plt's Motion for Temporary Stay (COA19-482) 2. Plt's Petition for Writ of Supersedeas 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/20/2020** 2. 3.
71A20	State v. Brandon Scott Goins	1. State's Motion for Temporary Stay (COA19-288) 2. State's Petition for Writ of Supersedeas	1. Allowed **02/20/2020** 2.

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73A20	State v. Molly Martens Corbett and Thomas Michael Martens	1. State's Motion for Temporary Stay (COA18-714) 2. State's Petition for Writ of Supersedeas	1. Allowed **02/24/2020** 2. **Davis, J., recused**
76P10-2	State v. Roderick Demain Gatling	1. Def's Pro Se Motion for Release from Unlawful Incarceration (COA09-735) 2. Def's Pro Se Motion for Avernment of Jurisdiction and Federal-Question Jurisdiction	1. Denied **12/11/2019** 2. Denied **12/11/2019**
79P19-2	William James v. Rumana Rabbani	1. Plt's Pro Se Petition for Writ of Prohibition (COAP19-156) 2. Plt's Pro Se Petition for Writ of Mandamus	1. Dismissed **01/28/2020** 2. Dismissed **01/28/2020**
91P14-7	State v. Salim Abdu Gould	Def's Pro Se Motion for Stay (COA18-425)	Dismissed **12/20/2019** **Davis, J., recused**
101PA15-3	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 4. Motion for Leave to File Supplemental PDR 5. Def's Supplemental PDR	1. --- 2. Special Order **08/14/2018** 3. Allowed **08/14/2018** 4. Special Order **09/25/2019** 5. Special Order
115A04-3	State v. Scott David Allen	Def's Motion for Extension of Time to File Brief	Allowed **01/17/2020**
115A04-3	State v. Scott David Allen	Def's Motion to File Under Seal	Allowed **01/21/2020**
120P19	Sandra J. Donnell-Smith and Husband, Langston Smith v. Russell E. McLean, Unmarried, et al.	Respondent's PDR Under N.C.G.S. § 7A-31 (COA18-613)	Denied

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163A15-2	Ivan McLaughlin and Timothy Stanley v. Daniel Bailey, in his individual and official capacity as Sheriff of Mecklenburg County, and Ohio Casualty Insurance Company	1. Plt's (Timothy Stanley) Notice of Appeal Based Upon a Constitutional Question (COA18-665) 2. Plt's (Timothy Stanley) PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal 4. North Carolina and Southern States Police Benevolent Associations' Motion for Leave to File Amicus Brief in Support of PDR	1. --- 2. Denied 3. Allowed 4. Denied **Ervin, J., recused**
168A19	Cardiorentis AG v. IQVIA Ltd. and IQVIA RDS, Inc.	Plt's Petition in the Alternative for Writ of Certiorari to Review Order of Business Court	Dismissed as moot
181PA15-2	Justin Lloyd v. Daniel Bailey, in his individual and official capacity as Sheriff of Mecklenburg County, and Ohio Casualty Insurance Company	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA18-666) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal 4. North Carolina and Southern States Police Benevolent Associations' Motion for Leave to File Amicus Brief in Support of PDR	1. --- 2. Denied 3. Allowed 4. Denied
200P07-9	Kenneth Earl Robinson v. Hon. Charlton L. Allen, James C. Gillen, Kenneth L. Goodman	Petitioner's Pro Se Petition for Writ of Mandamus	Denied **01/30/2020**
208P19	State v. Bryant Lamont Brown	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA18-1044) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
228P07-2	State v. Raymond C. Marshall	Def's Pro Se Motion to Re-Hear	Dismissed **02/05/2020**
229A19	In the Matter of S.D.C.	Motion to Amend Record on Appeal	Special Order **01/10/2020**
233P14-3	State v. Domenico Alexander Lockhart	1. Def's Pro Se Motion for PDR Under N.C.G.S. § 7A-31 (COAP19-160) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed **Ervin, J., recused** **Davis, J., recused**

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251P16-2	Kimarlo Ragland v. Nash-Rocky Mount Board of Education	Petitioner's Pro Se Motion to Revive, Reinstate, and Reconsider (COA15-862)	Dismissed
252PA14-3	State v. Thomas Craig Campbell	Def's Motion to Vacate Restitution Order and Remand for Resentencing	Dismissed without prejudice **12/20/2019**
254P18-2	State v. Jimmy A. Sevilla-Briones	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County (COAP17-645) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel 4. Def's Pro Se Motion for PDR	1. Dismissed **01/15/2020** 2. Allowed **01/15/2020** 3. Dismissed as moot **01/15/2020** 4. Denied **01/15/2020**
256P16-4	State v. Jonathan James Newell	Def's Pro Se Motion for Notice of Appeal (COAP16-233)	Dismissed **12/09/2019**
267PA19	Winston Affordable Housing, L.L.C., d/b/a Winston Summit Apartments v. Deborah Roberts	1. North Carolina Justice Center, Yale Law School Housing Clinic, and Disability Rights North Carolina's Motion for Leave to File Amicus Brief (COA18-553) 2. Amicus Curiae's Motion to Admit J.L. Pottenger, Jr. Pro Hac Vice 3. Amicus Curiae's Amended Motion to Admit J.L. Pottenger, Jr. Pro Hac Vice	1. Allowed **12/20/2019** 2. Dismissed as moot **12/20/2019** 3. Allowed **12/20/2019** **Davis, J., recused**
271A18	State ex rel. Utilities Commission v. Attorney General	Parties' Joint Motion to Extend Time for Oral Argument	Allowed **02/11/2020**
274P11-3	Jorge Galeas-Menchu, Jr. v. Dennis M. Daniels, Warden Pasquotank Correctional	1. Petitioner's Pro Se Petition for Writ of Mandamus (COAP11-423) 2. Petitioner's Pro Se Petition for Writ of Habeas Corpus	1. Denied **02/20/2020** 2. Dismissed **02/20/2020**
277P18-7	State v. Gabriel Adrian Ferrari	1. Def's Pro Se Motion to Review Appeal Order to Dismiss (COA98-724) 2. Def's Pro Se Motion of Protest	1. Dismissed 2. Dismissed

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290PA15-2	State v. Jeffrey Tryon Collington	1. Def's Pro Se Motion for Notice and Petition by Debtor Requesting and Demanding an Order for Release from Prison and Discharge from Imprisonment	1. Dismissed **12/11/2019**
291P19	State v. Harvey Lee Stevens, Jr.	1. Def's Motion for Temporary Stay (COA17-584)	1. Allowed **08/01/2019** Dissolved **02/26/2020**
		2. Def's Petition for Writ of Supersedeas	2. Denied
		3. Def's PDR Under N.C.G.S. § 7A-31	3. Denied
293A19	State v. Adam Richard Carey	1. State's Motion for Temporary Stay (COA18-1233)	1. Allowed **08/05/2019**
		2. State's Petition for Writ of Supersedeas	2. Allowed **08/21/2019**
		3. State's Notice of Appeal Based Upon a Dissent	3. --- **09/25/2019**
		4. Def's Motion to Strike the Addendum to the New Brief for the State	4. Special Order **12/12/2019**
		5. State's Motion for Court to Take Judicial Notice	5. Special Order **12/12/2019**
		6. State's Motion in the Alternative for Remand	6. Dismissed as moot
299A19	In the Matter of S.M.M.	Respondent-Attorney's Motion to Withdraw as Appellate Counsel	Denied **02/20/2020**
303A19	In the Matter of N.G.	Respondent-Father's Petition for Writ of Certiorari to Review Order of District Court, New Hanover County	Denied **01/23/2020**
304P19	State v. Randy Steven Cagle	Def's PDR Under N.C.G.S. § 7A-31 (COA18-720)	Denied
309A19	In the Matter of J.L.	The Parties' Joint Motion to Dismiss Appeal	Special Order **01/23/2020**

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311PA18	State v. Shakita Necole Walton	1. State's Motion for Temporary Stay (COA17-1359) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Allow Counsel to be Withdrawn and for Appellate Defender to Assign Additional Counsel 5. Def's Motion to Dismiss Appeal as Moot	1. Allowed **09/20/2018** 2. Allowed **01/30/2019** 3. Allowed **01/30/2019** 4. Allowed **02/04/2019** 5. Special Order **02/05/2020**
311A19	State v. Ricky Franklin Charles	1. Def's Motion to Waive Oral Argument (COA18-945) 2. Def's Motion in the Alternative for Court to Dispose of Case Pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure	1. Allowed **01/13/2020** 2. Dismissed as moot **01/13/2020**
315PA18-2	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	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA18-943) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal	1. Retained 2. Allowed 3. Denied

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322P19	Thomas Raymond Walsh, M.D. and James Dasher, M.D. v. Cornerstone Health Care, P.A.	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA18-925) 2. Def's Motion to Dismiss PDR 3. Plts' Petition for Writ of Certiorari to Review Decision of the COA	1. Denied 2. Dismissed as moot 3. Dismissed as moot
325PA18	Albert S. Daughtridge, Jr. and Mary Margret Holloman Daughtridge v. Tanager Land, LLC	1. Def's Motion to Stay the Execution of the Opinion of the Court (COA17-554) 2. Def's Petition for Rehearing	1. Allowed **12/23/2019** Dissolved **01/09/2020** 2. Denied **01/09/2020**
326P19	Cheryl Lloyd Humphrey Land Investment Company, LLC v. Resco Products, Inc. and Piedmont Minerals Company, Inc.	1. Defs' Notice of Appeal Based Upon a Constitutional Question (COA19-76) 2. Defs' PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Allowed
327P19	State of North Carolina, on Relation of City of Albemarle v. Chucky L. Nance, Jennifer R. Nance, Charlene Smith (Manager), Nancy Dry, James A. Phillips, Jr. (Trustee), First Bank (Lender), and Kirsten Foyles (Trustee)	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA18-916) 2. North Carolina League of Municipalities' Motion for Leave to File Amicus Curiae Brief in Support of Plaintiff-Appellant's PDR	1. Denied 2. Dismissed as moot
333P19-3	Sunaina S. Glaize v. Samuel G. Glaize	1. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA19-292) 2. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA19-293)	1. Dismissed *ex mero motu* 2. Dismissed *ex mero motu*
339A19	In the Matter of D.M., M.M., D.M.	Respondent-Mother's Petition for Writ of Certiorari to Review Order of District Court, Durham County	Allowed **12/27/2019**

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340A19	State v. Shawn Patrick Ellis	1. American Civil Liberties Union of North Carolina Legal Foundation's Motion to File Amicus Brief 2. Amicus Curiae's (ACLU of NC Legal Foundation) Motion to Admit Joseph Myer Sanderson Pro Hac Vice 3. Amicus Curiae's (ACLU of NC Legal Foundation) Motion to Admit Stefan Atkinson Pro Hac Vice	1. Allowed **12/05/2019** 2. Allowed **12/05/2019** 3. Allowed **12/05/2019**
340A19	State v. Shawn Patrick Ellis	1. State's Motion to Hear Appeal Without Oral Argument Pursuant to Rule 30(f)(1) 2. State's Motion to Substitute Certificates of Service	Allowed **02/04/2020** Allowed **02/04/2020**
343A19	In the Matter of J.D.	1. Def's Motion to Dismiss Appeal (COA18-1036) 2. State's Motion in the Alternative to Vacate the Court of Appeals Opinion	1. Denied 2. Dismissed as moot
343A19	In the Matter of J.D.	Def's Motion to View Exhibit	Allowed **12/31/2019**
343A19	In the Matter of J.D.	State's Motion for Leave to View Exhibit Filed Under Seal	Allowed **01/08/2020**
345P15-3	State v. Jonathon Lavon Friend	Def's Pro Se Motion for Relief from the Judgment (COAP15-693)	Dismissed
345P19	Crazie Overstock Promotions, LLC v. State of North Carolina; and Mark J. Senter, in his official capacity as Branch Head of the Alcohol Law Enforcement Division	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA18-1034) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed
355PA14-3	Terri Young v. Daniel Bailey, in his official capacity as Sheriff of Mecklenburg County, and Ohio Casualty Insurance Company	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA18-664) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal 4. North Carolina and Southern States Police Benevolent Associations' Motion for Leave to File Amicus Brief in Support of PDR	1. --- 2. Denied 3. Allowed 4. Denied
356A19	In the Matter of K.M.W. and K.L.W.	Guardian *ad Litem*'s Motion to Strike and File Amended Brief	Allowed **12/20/2019**

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357P19	State v. Dejuan Antonio Yourse	Def's PDR Under N.C.G.S. § 7A-31 (COA18-776)	Denied
362P17-4	State v. James Cornell Howard	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wayne County (COA17-77)	Dismissed **Davis, J., recused**
363A14-4	Sandhill Amusements, Inc. and Gift Surplus, LLC v. State of North Carolina, ex rel. Roy Cooper, Governor, in his official capacity, Branch Head of the Alcohol Law Enforcement Branch of the State Bureau of Investigation, Mark Senter, in his official capacity, Secretary of the North Carolina Department of Public Safety, Erik Hooks, in his official capacity, and the Director of the North Carolina State Bureau of Investigation, Bob Schurmeier, in his official capacity	1. Plts' Motion for Temporary Stay (COA18-1140) 2. Plts' Petition for Writ of Supersedeas 3. Plts' Notice of Appeal Based Upon a Constitutional Question 4. Plts' PDR Under N.C.G.S. § 7A-31 5. Defs' Motion to Dismiss Appeal 6. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **11/19/2019** 2. Allowed 3. --- 4. Allowed 5. Allowed 6. Allowed **Ervin, J., recused** **Davis, J., recused**
366A19	In the Matter of H.A.L., N.A.L., M.C.L., and N.L.	Respondent-Mother's Motion to Dismiss Appeal	Allowed **12/18/2019**
368A19	Billie Cress Sherrill Brawley, as Executrix of the Estate of Zoie S. Deaton a/k/a Zoie Lee Spears Deaton v. Bobby Vance Sherrill, Bradley Brawley, and Rebecca Brawley Thompson	1. Def's (Bobby Vance Sherill) Notice of Appeal Based Upon a Dissent (COA18-1043) 2. Def's (Rebecca Brawley Thompson) PDR Under N.C.G.S. § 7A-31 3. Def's (Bobby Vance Sherill) Conditional PDR Under N.C.G.S. § 7A-31 4. Plt and Defs' Joint Motion to Dismiss Appeal and to Dismiss PDR 5. Plt and Defs' Amended Joint Motion to Dismiss Appeal and to Dismiss PDR	1. --- 2. Dismissed **12/16/2019** 3. Dismissed as moot **12/16/2019** 4. Dismissed as moot **12/16/2019** 5. Allowed **12/16/2019**

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373P19	State v. William Allan Miles	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-1274) 2. Def's Motion for Temporary Stay 3. Def's Petition for Writ of Supersedeas 4. Def's Motion to Amend PDR	1. Denied 2. Denied **10/02/2019** 3. Denied 4. Allowed
375P19	Bethesda Road Partners, LLC, Plaintiff v. Stephen M. Strachan and Wife, Debora L. Strachan, Defendants Stephen M. Strachan and Debora L. Strachan, Third-Party Plaintiffs v. George C. McKee, Jr. and Wife, Adrianne S. McKee, Third-Party Defendants	Def and Third-Party Plts' (Stephen M. Strachan) PDR Under N.C.G.S. § 7A-31 (COA18-1170)	Denied
376A19	State v. Ervan L. Betts	1. Def's Notice of Appeal Based Upon a Dissent (COA18-963) 2. Def's PDR Under N.C.G.S. § 7A-31 as to Additional Issues	1. --- 2. Special Order
381P19	In the Matter of C.N., A.N.	1. Petitioner and Guardian *ad Litem*'s Motion for Temporary Stay (COA18-1031) 2. Petitioner and Guardian *ad Litem*'s Petition for Writ of Supersedeas 3. Petitioner and Guardian *ad Litem*'s Petition for Writ of Certiorari to Review Decision of the COA	1. Allowed **10/02/2019** Dissolved **02/26/2020** 2. Dismissed as moot 3. Special Order
388P19-2	Tori J. Neal v. Erik A. Hooks, et al.	Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP18-164)	Denied
390A19	In the Matter of L.E.W.	1. Petitioner and Guardian *ad Litem*'s Motion to Dismiss Appeal 2. Respondent-Mother's Petition for Writ of Certiorari to Review Order of District Court, Alleghany County 3. Respondent-Mother's Motion to Amend Record on Appeal	1. Allowed **01/09/2020** 2. Allowed **01/09/2020** 3. Allowed

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393P19	Veda Woodard v. NC Department of Commerce, Division of Employment Security, and Zebulon Chamber of Commerce, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA19-135)	Denied
394P19	Allison Ann Loyd (now Koch) v. Eric Carl Loyd	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-641)	Denied
397A19	In the Matter of O.W.D.A.	Respondent-Father's Motion to Amend Record on Appeal	Allowed **02/14/2020**
402A19	In the Matter of R.A.B.	1. Respondent-Father's Petition for Writ of Certiorari to Review Order of District Court, Moore County 2. Petitioners' Motion to Dismiss Appeal	1. Special Order **12/20/2019** 2. Denied **12/20/2019**
403P19	State Farm Mutual Automobile Insurance Company v. Don's Trash Company, Inc., Don's Harnett Trash Co., Inc., and DJ's Trash Company, Inc., Rachel Bull, as Administrator of the Estate of Walter L. Bull, III, Carey Dean Likens, Louis Horton, and Don L. Horton	Def's (Estate of Walter L. Bull, III) PDR Under N.C.G.S. § 7A-31 (COA18-735)	Denied
405P19	State v. George Ammons, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA18-1293)	Denied
406A19	Chisum v. Campagna, et al.	1. Defs' Motion to Deem Record Timely Filed 2. Defs' Motion to File Documents Under Seal 3. Defs' Motion for Leave to Amend Record on Appeal and Rule 9(d) Documentary Exhibits 4. Defs' Motion for Leave to Amend Record on Appeal and Rule 9(d) Documentary Exhibits (Under Seal version)	1. Allowed **12/12/2019** 2. Allowed **12/12/2019** 3. Allowed **12/12/2019** 4. Allowed
413A19	In the Matter of E.C., C.C., N.C.	Respondent-Mother's Motion to Deem Brief Timely Filed	Allowed **02/04/2020**

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416P19	State v. Rodney McDonald Williams, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA19-24)	Denied
417P14-2	State v. Melvin Lee Luckey	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court (COA14-12) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed **Ervin, J., recused**
420P19	State v. Shelton Andrea Kimble	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA18-1090) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
425A18	Hamlet H.M.A., LLC d/b/a Sandhills Regional Medical Center v. Pedro Hernandez, M.D.	Plt's Petition for Rehearing (COA17-744)	Denied **01/23/2020** **Davis, J., recused**
426P19	John McLean, Employee v. Baker Sand and Gravel, Employer, and NC Farm Bureau Mutual Insurance, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-1377)	Denied
428P19	State v. James Ray Arnold	1. Defs' Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Ashe County (COAP19-486) 2. Defs' Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
429A19	In the Matter of E.B.	1. Respondent-Father's Notice of Appeal Based Upon a Dissent (COA19-158) 2. Respondent-Father's Motion to Amend Brief	1. 2. Allowed **01/23/2020**
431A19	In the Matter of W.I.M.	1. Petitioner and Guardian *ad Litem*'s Motion to Dismiss Appeal 2. Respondent-Father's Motion to Supplement the Record 3. Respondent-Father's Petition for Writ of Certiorari to Review Order of the District Court, Haywood County 4. Petitioner's Motion to Supplement the Record on Appeal	1. Allowed 2. Allowed 3. Allowed 4. Allowed
432P19	State v. Edwin Franklin Thorne, Jr.	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA19-159)	Denied

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

28 FEBRUARY 2020

433P19	State v. Eric Lamont Graham	Def's PDR Under N.C.G.S. § 7A-31 (COA18-1186)	Denied
436P13-4	I. Beverly Lake, John B. Lewis, Jr., Everette M. Latta, Porter L. McAteer, Elizabeth S. McAteer, Robert C. Hanes, Blair J. Carpenter, Marilyn L. Futrelle, Franklin E. Davis, James D. Wilson, Benjamin E. Fountain, Jr., Faye Iris Y. Fisher, Steve Fred Blanton, Herbert W. Cooper, Robert C. Hayes, Jr., Stephen B. Jones, Marcellus Buchanan, David B. Barnes, Barbara J. Currie, Connie Savell, Robert B. Kaiser, Joan Atwell, Alice P. Nobles, Bruce B. Jarvis, Roxanna J. Evans, Jean C. Narron, and All Others Similarly Situated v. State Health Plan for Teachers and State Employees, a Corporation, Formerly Known as the North Carolina Teachers and State Employees' Comprehensive Major Medical Plan, Teachers and State Employees' Retirement System of North Carolina, a Corporation, Board of Trustees of the Teachers and State Employees' Retirement System of North Carolina, a Body Politic and Corporate, Janet Cowell, in her official capacity as Treasurer of the State of North Carolina, and the State of North Carolina	1. Plts' Notice of Appeal Based Upon a Constitutional Question (COA13-1006; 17-1280) 2. Plts' PDR Under N.C.G.S. § 7A-31 3. Plts' Petition for Writ of Certiorari to Review Decision of the COA 4. Defs' Motion to Dismiss Appeal	1. --- 2. Allowed 3. Dismissed as moot 4. Allowed **Newby, J., recused** **Ervin, J., recused**

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

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437A19	Dieter Crago v. Candice Crago	1. Def's Pro Se Notice of Appeal Based Upon a Dissent (COA18-1304) 2. Def's Pro Se PDR as to Additional Issues 3. Def's Pro Se Motion to Deem PDR Timely Filed 4. Plt's Motion to Dismiss Appeal 5. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. --- 2. Denied 3. Allowed **12/20/2019** 4. Allowed 5. Denied
439P19	State v. Marcus Locklear	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Robeson 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
440P19	State v. Harold Lee Williams, Jr.	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA19-359)	Denied
447A19	State v. Ryan Kirk Fuller	1. Def's Motion for Temporary Stay (COA19-243) 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Dissent	1. Allowed **11/22/2019** 2. Allowed **12/12/2019** 3. ---
448P19	State v. Christopher Chad Frank	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA19-373)	Denied
449P11-23	Charles Everette Hinton v. State of North Carolina, et al.	1. Plt's Pro Se Motion for Demand Judgment on the Pleadings (COAP11-256) 2. Plt's Pro Se Motion for Propound Petition for Writ of Certiorari 3. Plt's Pro Se Motion to Assign the Supreme Court as Trustee Successor to Appoint a Guardian or Guardian *ad Litem* 4. Plt's Pro Se Motion for Suit in Civil-Action Special Proceeding	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed **Ervin, J., recused**
449P19	State v. Scellarneize Glenn Holloman	Def's Pro Se Motion for Order of Relief	Dismissed
450P19	State v. Harold Clyde Griffin, Jr.	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-1164)	Denied

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

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452A19	In the Matter of A.J.P.	Respondent-Father's Motion to Amend the Record on Appeal to Include a Narrative for Untranscribed Portion of the Hearing	Allowed
453P19	State v. Robert Lee Jackson	Def's PDR Under N.C.G.S. § 7A-31 (COA19-46)	Denied
454P19	Marquis Jarvis Whitmore v. Dennis M. Daniels Administrator Pasquotank Correctional Institution	1. Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP19-656) 2. Petitioner's Pro Se Amended Petition for Writ of Certiorari to Review Order of the COA	1. Denied 2. Denied
455P19	State v. Esau Ricardo Diaz Moreno	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Guilford County (COAP19-756) 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
456P19	State v. Mareese Antwyne Lindsey	Def's Pro Se Motion for Complaint to the Supreme Court	Dismissed
459A19	In the Matter of J.H., P.H., N.H.	1. Respondent-Mother's Motion to Withdraw Appeal 2. Respondent-Mother's Motion to Waive Any Costs Associated Due to Indigent Status	1. Allowed **01/06/2020** 2. Allowed **01/06/2020**
460A19	Guy Unger v. Heather Unger	1. Plt's Motion for Extension of Time to Deem Notice of Appeal Timely (COA18-1234) 2. Def's Motion to Dismiss Appeal	1. Denied **02/24/2020** 2. Allowed **02/24/2020**
463A19	Sea Watch at Kure Beach Homeowners' Association, Inc. v. Thomas Fiorentino and Wife, Leah Fiorentino	1. Defs' Notice of Appeal Based Upon a Dissent (COA19-64) 2. Defs' PDR as to Additional Issues 3. Plt's Motion to Dismiss Appeal 4. Defs' Motion for Extension of Time to Respond to Motion to Dismiss Appeal	1. --- 2. 3. 4. Allowed up to and including 9 January 2020 **01/02/2020**

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

28 FEBRUARY 2020

466P19	Jorge Macias, Employee v. BSI Associates, Inc. d/b/a Carolina Chimney, Employer, Travelers Insurance Company, Carrier	1. Defs' Motion for Temporary Stay (COA19-299) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **12/10/2019** 2. 3. **Davis, J., recused**
467P19	State v. Roderick Reco Wyche	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA19-201) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
475A19	In the Matter of Q.P.W.	Respondent-Appellant Father's Motion to Withdraw Appeal	Allowed **01/22/2020**
478A19	In the Matter of David Eldridge, Contemnor	1. Def's Notice of Appeal Based Upon a Dissent (COA19-370) 2. Def's PDR as to Additional Issues	1. --- 2. Denied
479P19	State v. David Lee Kluttz	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Davie County (COAP19-777) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed **Davis, J., recused**
480P19	Adam L. Perry v. James Dever	1. Petitioner's Pro Se Motion for Interlocutory Appeal 2. Petitioner's Pro Se Motion for Preliminary or Permanent Injunction 3. Petitioner's Pro Se Motion for Demand for Trial 4. Petitioner's Pro Se Motion for Contempt of Court and/or Default Judgment	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed
481P19	State v. Michael Nieves	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Guilford County (COAP19-266)	Denied **Ervin, J., recused**
482P19	Kimarlo Antonio Ragland v. N.C. Department of Public Instruction	1. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA19-235) 2. Petitioner's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied

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

28 FEBRUARY 2020

484A19	State v. David William Warden II	1. State's Motion for Temporary Stay (COA19-335) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **12/20/2019** 2. Allowed **01/09/2020** 3. ---
485A19	State v. Cashaun K. Harvin	1. State's Motion for Temporary Stay (COA18-1240) 2. State's Petition for Writ of Supersedeas 3. Def's Motion to Lift the Stay 4. State's Motion to Maintain the Stay 5. State's Petition for Writ of Certiorari to Review Decision of the COA	1. Allowed **12/20/2019** 2. 3. 4. 5.
486P19	State v. Jamell Cha Melvin and Javeal Aaron Baker	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA18-843) 2. State's Motion to Amend Response to PDR	1. Allowed 2. Allowed
487P19	In the Matter of T.G.H., Y.G.L., S.N.L.	1. Respondent's Motion for Temporary Stay (COA18-1314) 2. Respondent's Petition for Writ of Supersedeas 3. Respondent's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/27/2019** 2. 3.
489P19	Nicholas A. Ochsner v. N.C. Department of Revenue	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-1126)	Denied
490P19	Morguard Lodge Apartments, LLC d/b/a The Lodge at Crossroads v. Warren Follum	1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA18-1014) 2. Def's Pro Se PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Dismiss Appeal 4. Def's Pro Se Motion for Extension of Time to File Response to Motion to Dismiss PDR and Appeal	1. 2. 3. 4. Allowed **01/24/2020** **Davis, J., recused**
491A19	In the Matter of K.S.D-F., K.N.D-F.	Guardian *ad Litem*'s Motion to Withdraw and Substitute Counsel	Allowed **01/23/2020**

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

28 FEBRUARY 2020

492P08-2	State v. Anderson Sheldon Hazelwood	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA19-121)	Denied **02/24/2020** **Davis, J., recused**
495P13-2	State v. Terry L. Long	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP17-261) 2. Def's Pro Se Motion to Amend Petition/Request for Certiorari or Review	1. Denied 2. Allowed
523P10-2	State v. Gregory Ellis Davis	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP19-96) 2. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Forsyth County	1. Dismissed 2. Dismissed

APPENDIXES

CHIEF JUSTICE'S RULES ADVISORY COMMISSION

CHIEF JUSTICE'S FAMILY COURT ADVISORY COMMISSION

ADVISORY COMMISSION ON PORTRAITS

ORDER CONCERNING CITATION FORM

RULES OF THE DISPUTE RESOLUTION COMMISSION

STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

RULES FOR MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

RULES FOR SETTLEMENT PROCEDURES IN DISTRICT COURT FAMILY FINANCIAL CASES

RULES OF MEDIATION FOR MATTERS BEFORE THE CLERK OF SUPERIOR COURT

RULES OF MEDIATION FOR MATTERS IN DISTRICT CRIMINAL COURT

RULES OF MEDIATION FOR FARM NUISANCE DISPUTES

STATE BAR OFFICERS

STATE BAR STANDING COMMITTEES AND BOARDS

MODEL BYLAWS FOR JUDICIAL DISTRICT BARS

DISCIPLINE AND DISABILITY OF ATTORNEYS

JUDICIAL DISTRICT GRIEVANCE COMMITTEES

PRACTICAL TRAINING OF LAW STUDENTS

FEE DISPUTE RESOLUTION

CONTINUING LEGAL EDUCATION

CONTINUING LEGAL EDUCATION

CONTINUING LEGAL EDUCATION

RULES OF PROFESSIONAL CONDUCT

RULES FOR COURT-ORDERED ARBITRATION

ADMINISTRATIVE ORDER ESTABLISHING THE CHIEF JUSTICE'S RULES ADVISORY COMMISSION

In recognition of the need to monitor the North Carolina Rules of Civil Procedure and the General Rules of Practice for the Superior and District Courts and to recommend amendments to those rules that will promote the administration of justice, the Court hereby creates the Chief Justice's Rules Advisory Commission.

The Commission's chairperson will be the Chief Justice or the Chief Justice's designee. The Chief Justice will appoint the Commission's other members. The membership of the Commission shall be as follows:

- one judge or justice from the Appellate Division;
- one judge from the Superior Court Division;
- one judge from the District Court Division;
- one clerk of the superior court;
- one trial court administrator;
- three practicing attorneys; and
- four at-large members.

With the exception of the chairperson, the members of the Commission shall serve for a term of three years; provided, however, that in the discretion of the Chief Justice, the initial appointments may be for a term of less than three years so as to accomplish staggered terms for the membership of the Commission.

By virtue of this order, the Court issues to the Commission the following general charge:

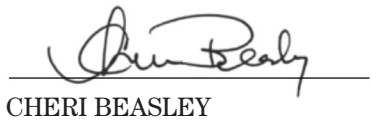
- to monitor, comprehensively and particularly, the North Carolina Rules of Civil Procedure and the General Rules of Practice for the Superior and District Courts on behalf of the judicial branch of government; and
- to recommend amendments, additions, and deletions to those rules as are considered necessary for the proper administration of justice.

By virtue of this order, the Court issues to the Commission the following special charge:

- to recommend amendments, additions, and deletions to the North Carolina Rules of Civil Procedure and the General Rules of Practice for the Superior and District Courts as are

considered necessary for the implementation of a statewide electronic-filing and case-management system.

Ordered by the Court in Conference, this the 25th day of September, 2019.



CHERI BEASLEY
Chief Justice
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 25th day of September, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

ADMINISTRATIVE ORDER ESTABLISHING THE CHIEF JUSTICE'S FAMILY COURT ADVISORY COMMISSION

In recognition of the need to monitor North Carolina's family courts and to recommend improvements in those courts that will promote the administration of justice, the Supreme Court of North Carolina hereby creates the Chief Justice's Family Court Advisory Commission.

The Commission's chairperson will be the Chief Justice or the Chief Justice's designee. The Chief Justice will appoint the Commission's other members. The membership of the Commission shall be as follows:

- one justice of the Supreme Court of North Carolina;
- one judge of the North Carolina Court of Appeals;
- two chief district court judges, each from a district with a family court;
- two chief district court judges, each from a district without a family court;
- one clerk of the superior court from a district with a family court;
- one clerk of the superior court from a district without a family court;
- two family court administrators;
- one staff member from the North Carolina Department of Juvenile Justice and Delinquency Prevention;
- one chief juvenile court counselor;
- one guardian ad litem administrator;
- one representative from a domestic violence program;
- one representative from a local custody mediation program;
- one law professor;
- one practicing attorney who regularly represents a local department of social services;
- two practicing attorneys with expertise in juvenile law; and
- two practicing attorneys with expertise in domestic law.

With the exception of the chairperson, the members of the Commission shall serve for a term of three years provided, however, that in the discretion of the Chief Justice, the initial appointments may be for a term of less than three years so as to accomplish staggered terms for the membership of the Commission.

By virtue of this order, the Court issues the following charge to the Commission:

- to advise the Chief Justice and the Director of the Administrative Office of the Courts on family court issues, including automation efforts;
- to set guidelines and standards of practice for all family court districts;
- to assure accountability for the family court program;
- to make recommendations about future legislative action, including needed statutory changes, budgetary suggestions, or recommendations for expansion of the program statewide;
- to review and make recommendations about the interrelationship between family courts and other court programs, such as guardian ad litem, child custody mediation, family drug courts, and family financial settlement; and
- to oversee the further development of the family court training curriculum.

Ordered by the Court in Conference, this the 25th day of September, 2019.

s/Cheri Beasley

CHERI BEASLEY
Chief Justice
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 25th day of September, 2019.

s/Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

IN THE MATTER OF THE ADVISORY)
COMMISSION ON PORTRAITS)

ADMINISTRATIVE ORDER

On 25 October 2018, this Court established an Advisory Commission on Portraits to consider matters related to portraits of former justices of the Supreme Court of North Carolina and directed the Commission to promulgate a report and recommendation to the Court on or before 31 December 2019. It appearing to the Court that the Commission would benefit from additional time to consider these matters, the previously established deadline is extended to 31 December 2020.

By order of the Court, this the 4th day of December, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of December, 2019.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/M.C. Hackney
Assistant Clerk, Supreme Court of
North Carolina

ADMINISTRATIVE ORDER CONCERNING THE FORMATTING OF OPINIONS AND THE ADOPTION OF A UNIVERSAL CITATION FORM

Effective 1 January 2021, an opinion number and paragraph numbers will appear in every opinion filed by the Supreme Court of North Carolina and the North Carolina Court of Appeals. Like a docket number or a party's name, these opinion and paragraph numbers will be native to the text of the opinion and may therefore appear across mediums of publication. Accordingly, opinions filed on or after 1 January 2021 will have an immediate, permanent, and medium-neutral ("universal") citation the moment they are issued.

Because a universal citation is medium-neutral, it does not point to an official publication of the opinion. The *North Carolina Reports* and the *North Carolina Court of Appeals Reports* remain the official reports of the opinions of the Supreme Court of North Carolina and of the North Carolina Court of Appeals, respectively.

Opinions of the Supreme Court of North Carolina and the North Carolina Court of Appeals that are filed on or after 1 January 2021 should be cited using this format: [Case Name], [Traditional Citation to the Bound Volume and Page Number of the Court's Official Reporter], [Universal Citation to the Year, Court, and Opinion Number], [Pinpoint Paragraph Number].

e.g., *State v. Smith*, 375 N.C. 152, 2020-NCSC-45, ¶ 16.

State v. Smith, 255 N.C. App. 43, 2020-NCCOA-118, ¶ 23.

By virtue of this administrative order, the Appellate Reporter, the Director of Appellate Division Computing, and the Supreme Court's Administrative Counsel are hereby instructed to implement this formatting and citation form and to promote its use by the stakeholders in our legal and judicial communities, subject to further orders of the Court.

Ordered by the Court in Conference, this the 4th day of December, 2019.

s/Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of December, 2019.

s/Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

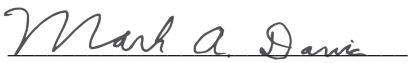
ORDER ADOPTING THE RULES OF THE DISPUTE RESOLUTION COMMISSION

Pursuant to subsection 7A-38.2(b) of the General Statutes of North Carolina, the Court hereby adopts the Rules of the Dispute Resolution Commission, which appear on the following pages. These rules supersede the Revised Rules of the North Carolina Supreme Court for the Dispute Resolution Commission, published at 367 N.C. 1063–98.

The Rules of the Dispute Resolution Commission become effective on 1 March 2020.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 23rd day of January, 2020.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of January, 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court

Rules of the Dispute Resolution Commission

Rule 1. Officers and Committees of the Commission

(a) **Officers**. The North Carolina Dispute Resolution Commission (Commission) shall establish the offices of chair and vice chair.

(b) **Appointment; Elections**.

(1) The chair shall be appointed for a two-year term and shall serve at the pleasure of the Chief Justice of the Supreme Court of North Carolina.

(2) The vice chair shall be elected by majority vote of the full Commission for a two-year term and shall serve in the absence of the chair.

(3) Both the chair and vice chair shall be members of the Commission.

(c) **Committees**.

(1) The Commission shall establish a standing Executive Committee. Members of the Executive Committee shall include the chair, vice chair, and the chairs of all standing committees. The chair may also appoint the immediate past chair of the Commission to serve on the Executive Committee, if the immediate past chair remains a member of the Commission. The Executive Committee may act for the Commission and make decisions on matters which (i) require action before the next Commission meeting, and/or (ii) have been delegated to the Executive Committee by the Commission. The Executive Committee may make recommendations to the Commission with respect to matters of policy and operations of the Commission.

(2) The chair may establish other standing and ad hoc committees as are necessary to conduct the business of the Commission and may appoint Commission members and ex officio members to serve on these committees, subject to subsection (c)(3) of this rule.

(3) The chair may appoint ex officio members. Ex officio members shall be affiliated with the courts, be involved in supporting court based dispute resolution programs, or have particular expertise in dispute resolution. Ex officio members may participate in Commission or committee discussions, but shall not vote on any matter before the Commission or a committee and shall not serve as members of the Executive Committee or any committee

routinely reviewing information that is deemed confidential under N.C.G.S. § 7A-38.2(h) or these rules. Ex officio appointments shall be for a two-year term.

(d) **Recusal Policy**. Commission and ex officio members participating in Commission or committee discussions, and Commission members casting votes, shall abide by the Commission's *Recusal of Commission Members and Ex Officio Members Policy*.

Rule 2. Commission Office; Commission Staff

(a) **Commission Office**. The chair, in consultation with the director of the North Carolina Administrative Office of the Courts (NCAOC), is authorized to establish and maintain an office for the conduct of Commission business.

(b) **Commission Staff**. The chair, in consultation with the director of the NCAOC, is authorized to appoint an executive director and to: (i) fix the executive director's terms of employment, salary, and benefits; (ii) determine the scope of the executive director's authority and duties; and (iii) employ other professional and administrative staff as necessary to conduct the Commission's business.

Rule 3. Commission Membership

(a) **Vacancies**. Upon the death, resignation, or permanent incapacitation of a member of the Commission, the chair shall notify the appointing authority and request that the vacancy, created by the death, resignation, or permanent incapacitation, be filled. The appointment of a successor shall be for the former member's unexpired term. The successor shall, thereafter, be eligible to serve two consecutive three-year terms.

(b) **Disqualifications**. If, for any reason, a Commission member becomes disqualified to serve on the Commission, the appointing authority shall be notified and requested to take appropriate action. If a member resigns or is removed, then the appointment of a successor shall be for the former member's unexpired term. The successor shall, thereafter, be eligible to serve two consecutive three-year terms.

(c) **Conflicts of Interest and Recusals**. All Commission members must abide by the Commission's *Recusal of Commission Members and Ex Officio Members Policy*.

(d) **Compensation**. Under N.C.G.S. § 138-5, members of the Commission may receive compensation for their services at the rate of fifteen dollars ($15.00) per diem for each day of service, and reimbursement of subsistence and travel at the rates allowed to State boards and commissions. Ex officio members of the Commission shall receive no

compensation for their services. In the chair's discretion, an ex officio member may be reimbursed for his or her out-of-pocket expenses necessarily incurred on behalf of the Commission and for his or her mileage, subsistence, and other travel expenses at the per diem rate established by statutes and regulations applicable to State boards and commissions.

Rule 4. Meetings of the Commission

(a) **Meeting Schedule**. The Commission shall meet at least twice each year pursuant to a schedule set by the Commission and in special sessions at the call of the chair or other officer acting for the chair.

(b) **Quorum**. A majority of Commission members shall constitute a quorum. Decisions shall be made by a majority of the members present and voting, except that decisions under Rule 9 and Rule 10 shall be made in accordance with the provisions of those rules.

(c) **Public Meetings**. All meetings of the Commission for the general conduct of business shall be open to the public and minutes of such meetings shall be available to the public, except that meetings, portions of meetings, or hearings conducted under Rule 9 and Rule 10 may be closed to the public in accordance with those rules and N.C.G.S. § 7A-38.2.

(d) **Matters Requiring Prompt Action**. In the discretion of the chair, if any matter requires a decision or other action before the next regular meeting of the Commission, but does not warrant the call of a special meeting, it may be considered by the Commission and a vote or other action may be taken by correspondence, telephone, facsimile, e-mail, or other practicable method, or it may be considered an action taken by the Executive Committee under Rule 1(c)(1); provided, however, that all formal Commission and committee decisions made and actions taken are reported to the executive director and included in the minutes of Commission proceedings.

(e) **Committee Meetings.** Committees shall meet as needed. A majority of the committee members eligible to vote shall constitute a quorum for purposes of standing and ad hoc committee meetings. Decisions shall be made by a majority of the members eligible to vote who are present and voting, except that decisions under Rule 9 and Rule 10 shall be made in accordance with those rules.

Rule 5. Commission's Budget

The Commission, in consultation with the director of the NCAOC, shall prepare an annual budget. The budget and supporting financial information shall be public records.

Rule 6. Powers and Duties of the Commission

The Commission shall have the authority to undertake activities to expand public awareness of dispute resolution procedures, to foster growth of dispute resolution services in the state, and to ensure the availability of high-quality mediator training programs and competent and ethical mediators. Specifically, the Commission is authorized and directed to do the following:

(a) Review and approve or disapprove applications of: (i) persons seeking to have mediator training programs certified, (ii) attorneys and nonattorneys seeking certification as qualified mediators to conduct mediated settlement conferences and mediations in North Carolina's court-ordered mediation programs, and (iii) persons or mediator training programs seeking reinstatement.

(b) Review applications against criteria for certification set forth in rules adopted by the Supreme Court for mediated settlement conferences or mediation programs operating under the Commission's jurisdiction, and against any other requirements of the Commission which amplify and clarify those rules. The Commission may adopt application forms and require applicants to complete the forms for certification.

(c) Compile and maintain lists of certified mediator training programs along with the names of contact persons, addresses, and telephone numbers for each mediator training program, and make those lists available online or upon request.

(d) Institute periodic review of mediator training programs and trainer qualifications, and recertify mediator training programs that continue to meet criteria for certification. Mediator training programs that are not recertified shall be removed from the lists of certified mediator training programs.

(e) Compile, keep current, and make available to the courts and the public online lists of certified mediators which specify the judicial district(s) or counties in which each mediator wishes to practice.

(f) Prepare, keep current, and make available online biographical information submitted to the Commission by certified mediators in order to make such information accessible to court staff, lawyers, and the public.

(g) Make a reasonable effort on a continuing basis to ensure that the judiciary, clerks of court, court staff, attorneys, and to the extent feasible, parties to mediation, are aware of the Commission and its office and the Commission's duty to certify and regulate the conduct of mediators and mediator training programs.

(h) Regulate the conduct of mediators and mediator training programs, including (i) receiving and investigating complaints against mediators, mediator training program personnel, and mediator training programs; and (ii) imposing sanctions, if warranted under Rule 9.

Rule 7. Mediator Conduct

The conduct of all mediators certified by the Commission or serving programs under the jurisdiction of the Commission, and personnel affiliated with any certified mediator training program, must conform to the Standards of Professional Conduct for Mediators adopted by the Supreme Court and enforceable by the Commission and to the standards of any professional organization of which such person is a member that are not in conflict nor inconsistent with the Standards of Professional Conduct for Mediators. A certified mediator shall inform the Commission of any (i) criminal conviction, disbarment, or other revocation or suspension of a professional license; (ii) complaint filed against the mediator or disciplinary action imposed upon the mediator by a professional organization; or (iii) judicial sanction, civil judgment, tax lien, or filing for bankruptcy. Failure to do so is a violation of these rules. Violations of the Standards of Professional Conduct for Mediators or other professional standards, or conduct that reflects a lack of moral character or fitness to conduct mediations or which discredits the Commission, the courts, or the mediation process, may subject a mediator to disciplinary proceedings by the Commission.

Rule 8. The Standards and Advisory Opinions Committee

(a) **Appointment of the Standards and Advisory Opinions Committee**. The Commission's chair shall appoint a standing committee on standards and advisory opinions to address the matters listed in subsection (b) of this rule.

(b) **Matters to Be Considered by the Standards and Advisory Opinions Committee**. The Standards and Advisory Opinions Committee shall review and consider the following:

(1) Proposals for amending the Standards of Professional Conduct for Mediators, the Commission's *Advisory Opinion Policy*, or the Commission's *Advertising Policy*.

(2) Requests from Commission staff for assistance in responding to inquiries from mediators and the public as to the interpretation of statutes, rules, the Standards of Professional Conduct for Mediators, advisory opinions, policies, or guidelines of the Commission.

(3) Drafts and proposals of advisory opinions for adoption by the Commission under the Commission's *Advisory Opinion Policy*.

(4) Matters that relate to mediator advertising, including review of advertisements or related materials for consistency with the Commission's *Advertising Policy*.

(5) Matters that interface with the North Carolina State Bar or other professional regulatory body regarding inconsistencies and/or conflicts between these rules and/or policies and the rules and/or policies of those entities.

(c) **Initial Commission Staff Review.**

(1) Commission staff may respond in writing to requests for assistance from mediators and the public under subsection (b)(2) of this rule, or may respond orally if time is of the essence. Staff shall consult with the chair of the Standards and Advisory Opinions Committee as necessary to ensure correct and consistent responses. Written requests for formal advisory opinions shall be referred to the chair of the committee in compliance with the procedures established by the committee. The referral procedures shall ensure that the case file number, the names of parties, and other identifying information are redacted so that any decision cannot be influenced by the information.

(2) All requests for informal advice shall be logged by Commission staff, and the requesting party's confidentiality shall be maintained unless the requesting party indicates otherwise.

(d) **Review by the Standards and Advisory Opinions Committee**.

(1) If the chair of the Standards and Advisory Opinions Committee determines that a Commission advisory opinion is warranted under subsection (c) of this rule, then the matter shall be considered by the committee. If the committee concurs, then a proposed advisory opinion shall be drafted, approved by the committee, and submitted to the Commission for its consideration.

(2) If the chair of the Standards and Advisory Opinions Committee determines that a formal Commission advisory opinion is not warranted under subsection (c) of this rule, then the requesting party shall be advised in writing and provided with informal advice, if requested.

Rule 9. The Grievance and Disciplinary Committee

(a) **Appointment of the Grievance and Disciplinary Committee**. The Commission's chair shall appoint a standing committee entitled the Grievance and Disciplinary Committee to address the matters listed in subsection (b) of this rule.

(b) **Matters to Be Considered by the Grievance and Disciplinary Committee**. The Grievance and Disciplinary Committee shall review and consider, consistent with subsection (d)(2) of this rule, the following:

(1) Matters that relate to the moral character, conduct, or fitness to practice of those seeking a provisional pre-training approval, including a request to review a Commission staff determination not to issue a provisional pre-training approval on the basis of a requesting party's moral character, conduct, or fitness to practice.

(2) Matters that relate to the moral character, conduct, or fitness to practice of an applicant for mediator certification or certification renewal, including a request for review of a Commission staff decision to deny an application for mediator certification or certification renewal on the basis of the applicant's moral character, conduct, or fitness to practice.

(3) Matters otherwise self-reported by a certified mediator or personnel affiliated with a certified mediator training program, or otherwise coming to the attention of the Commission that relate to the moral character, conduct, or fitness to practice of a mediator under the Commission's jurisdiction or a person affiliated with a certified mediator training program.

(4) Matters that relate to the moral character, conduct, or fitness to practice of a trainer or other person affiliated with a certified mediator training program or a mediator training program that is an applicant for certification or certification renewal, including a request for review of a Commission staff decision to deny an application for mediator training program certification or certification renewal on the basis of the moral character, conduct, or fitness to practice of any trainer or other person affiliated with the program.

(5) Complaints by a Commission member, Commission staff, a judge, an attorney, court staff, or any member of the public that relate to the moral character, conduct, or fitness to practice of a mediator under the Commission's

jurisdiction or a trainer or other person affiliated with a certified mediator training program.

(c) **Initial Commission Staff Review and Determination**.

(1) **Review of Requests for Provisional Pre-training Approvals**. Commission staff shall review requests for the issuance of provisional pre-training approvals regarding matters that relate to the moral character, conduct, or fitness to practice of a requesting party, and shall seek guidance from the chair of the Grievance and Disciplinary Committee, as necessary. Staff may contact the requesting party, conduct background checks, and contact third parties or entities who may possess relevant information that relates to the moral character, conduct, or fitness to practice of the requesting party. Based on its review, staff shall determine whether to issue or refrain from issuing a provisional pre-training approval. The requesting party may seek review of the staff decision from the chair of the committee. If, after review, the chair determines that the requesting party does not possess the requisite criteria for certification related to moral character, conduct, or fitness to practice established by program rules and Commission policies and guidelines, then the chair shall instruct staff not to issue a provisional pre-training approval. The staff decision, or that of the chair after review, to deny a request for a provisional pre-training approval shall be final and is not subject to appeal.

(2) **Review and Referral of Matters Relating to the Moral Character, Conduct, or Fitness to Practice of Applicants**. Commission staff shall review information relating to the moral character, conduct, or fitness to practice of an applicant seeking mediator certification or certification renewal, including matters which an applicant is required to report under program rules and information relating to the moral character, conduct, or fitness to practice of personnel affiliated with mediator training programs seeking certification or certification renewal.

Staff may contact an applicant to discuss matters reported and may conduct a background check on an applicant. Any third party with knowledge of any information relating to the moral character, conduct, or fitness to practice of an applicant may notify the Commission. Staff shall seek to verify any such third party report and

may disregard a report that cannot be verified. Staff may contact an agency where a complaint about an applicant has been filed or that has imposed discipline on an applicant and may contact a judge who has imposed discipline on an applicant.

All reported matters or other information gathered by staff that bears on the moral character, conduct, or fitness to practice of an applicant shall be forwarded directly to the Grievance and Disciplinary Committee for its review, except matters expressly exempted from review by the Commission's *Policy for Reviewing Matters Relevant to Good Moral Character, Conduct, and Fitness to Practice*. Matters that are exempted by the policy may be processed by staff, but will not act as a bar to certification or certification renewal.

The committee shall review any matter that relates to an applicant and is referred by staff under this policy, while not a complaint, in accordance with the procedures set forth in subsection (d) of this rule.

(3) **Commission Staff Review of Concerns Raised That Are Not Deemed to Constitute Complaints**. Commission staff shall review information received or concerns raised that relates to a mediator's failure to meet his or her case management duties under applicable program rules, or relates to matters that are not deemed to constitute a complaint under this subsection or subsection (c)(4) of this rule.

a. If the information received or the concern raised does not state a violation of rules or standards promulgated by the Supreme Court or local district rules, then the reporting party will be advised that the Commission will take no action in response to the report.

b. If it appears that the information received or the concern raised constitutes a violation of a rule, statute, or standard, but either is not serious enough to be treated as a complaint or the complaining party does not wish to file a complaint, Commission staff shall prepare a summary of the concern raised and submit the matter to the chair of the Grievance and Disciplinary Committee and to the chair of the Commission.

c. Commission staff shall report the concerns to the mediator by letter or other manner of communication as approved by the chair of the Grievance and Disciplinary Committee and chair of the Commission. Any written correspondence shall be copied to the chair of the committee and to the chair of the Commission.

Commission staff shall not disclose the identity of a reporting party who wishes to remain anonymous. If a reporting party wishes to remain anonymous, then staff shall not proceed under this section unless evidence of the mediator's failure to fulfill his or her case management duties has been provided or otherwise exists.

(4) **Commission Staff Review of Oral or Written Complaints**. Commission staff shall review oral and written complaints received by the Commission regarding the moral character, conduct, or fitness to practice of a mediator under the jurisdiction of the Commission or any personnel affiliated with a certified mediator training program (respondents), except that staff shall not act on anonymous complaints unless staff can independently verify the allegations made.

a. **Oral Complaints**. If, after reviewing an oral complaint, Commission staff determines it is necessary to contact a third party about the matter, including a witness identified by the complaining party or other third party identified by Commission staff during its review of the complaint, or to refer the matter to the Grievance and Disciplinary Committee, then Commission staff shall first make a summary of the complaint and forward it to the complaining party who shall be asked to sign the summary and a release and to return both to the Commission's office. A member of the Commission, a committee of the Commission, Commission staff, judges, other court officials, or court staff may initiate an oral, anonymous complaint. Commission staff shall not proceed under this subsection unless corroborative evidence of the allegation relating to the mediator's conduct has been provided to the Commission.

b. **Written Complaints**. Commission staff shall acknowledge all written complaints within thirty days from receipt. A written complaint may be

made by letter, e-mail, or filed on the Commission's approved complaint form. If a written complaint is not made on the approved form, then staff shall require the complaining party to have his or her signature on the complaint notarized and execute a release authorizing staff to contact third parties in the course of staff's review of the complaint.

c. **Pursuit of Complaint by Commission Staff or by Grievance and Disciplinary Committee Member**. If a complaining party refuses to sign a complaint summary prepared by Commission staff, refuses to sign a release, or otherwise seeks to withdraw a complaint after filing it with the Commission, staff or a Grievance and Disciplinary Committee member may pursue the complaint. In determining whether to pursue a complaint independently, staff or a committee member may consider why the complaining party is unwilling to pursue the matter further, whether the complaining party is willing to testify if a hearing becomes necessary, whether the complaining party has specifically asked to withdraw the complaint, whether the circumstances complained of may be independently verified without the complaining party's participation, whether there have been previous complaints filed regarding the respondent's conduct, and the seriousness of the allegations made in the complaint.

d. **Response to Complaint**. If Commission staff asks a respondent to respond in writing to an oral or written complaint, then the respondent shall be sent a summary or a copy of the complaint and any supporting evidence provided by the complaining party by Certified Mail, return receipt requested. The respondent shall respond no later than thirty days from the date of the actual delivery to the respondent or the date of the last attempted delivery by the U.S. Postal Service. A copy of the summary or complaint shall also be sent to respondent through the U.S. Postal Service by First-Class Mail directed to the respondent at the last mailing address provided to the Commission by the respondent. Upon written request, the respondent may be afforded ten additional days to respond to the complaint.

e. **Materials Not Forwarded to Complaining Party**. The respondent's response to the complaint and the summaries of comments of any witnesses or others contacted during the investigation shall not be forwarded to the complaining party, except as may be required by N.C.G.S. § 7A-38.2(h).

(5) **Initial Determination on Oral and Written Complaints**. In reviewing a complaint under subsection (c)(4) of this rule and any additional information gathered, including information supplied by the respondent or a witness or other third party contacted, Commission staff shall consider the conduct complained of by reference to subsection (d)(2) of this rule. Staff shall determine whether to:

a. **Recommend Dismissal**. After review and upon concluding that the complaint does not allege facts sufficient to constitute a violation of a statute, rule, standard, or policy enforceable under the jurisdiction of the Commission, Commission staff shall make a recommendation to the chair of the Grievance and Disciplinary Committee to dismiss the complaint. If the chair agrees with the recommendation, then the complaint shall be dismissed with notification to the complaining party, the respondent, and any witnesses or others contacted during the review process. The complaining party and the respondent shall be notified of the dismissal by Certified Mail, return receipt requested, and such service shall be deemed sufficient for purposes of these rules. A copy of the notice of dismissal shall also be sent to the complaining party and the respondent through the U.S. Postal Service by First-Class Mail directed to the respondent and complaining party at the last mailing address provided to the Commission.

Staff shall note for the file why a determination was made to dismiss a complaint and shall report on such dismissals to the committee. Dismissed complaints shall remain on file with the Commission. The committee may take dismissed complaints into consideration if additional complaints are later made against the same respondent.

A complaining party may file a written appeal of the dismissal of the complaint to the committee

no later than thirty days from the date of the actual delivery of the notice of dismissal to the complaining party or of the date of the last attempted delivery by the U.S. Postal Service of the notice of dismissal.

b. **Refer to the Grievance and Disciplinary Committee**. Following an initial Commission staff review of the complaint and any response submitted by the respondent, including contacting the respondent, witnesses, or other third parties as necessary, and upon a determination that the complaint (i) raises a concern about a possible violation of a statute, a program rule, the Standards of Professional Conduct for Mediators, or a Commission policy; or (ii) raises a significant question about a respondent's moral character, conduct, or fitness to practice, or if, after giving the complaint due consideration, the chair of the Grievance and Disciplinary Committee disagrees with staff's recommendation to dismiss the complaint, staff shall refer the matter to the full committee for review.

No matter shall be referred to the committee until the respondent has been forwarded a copy or summary of the complaint and a copy of these rules. The respondent shall respond no later than thirty days from the date of the actual delivery of the letter transmitting the complaint or summary to the respondent or the last attempted delivery to the respondent by the U.S. Postal Service. A copy of the complaint or summary shall also be sent to the respondent through the U.S. Postal Service by First-Class Mail directed to the respondent at the last mailing address provided to the Commission by the respondent. Upon written request, the respondent may be afforded ten additional days to respond to the complaint.

The respondent's response shall be included in the materials forwarded to the committee. If a witness or other person was contacted, any written response or summary of a response shall also be included in the materials forwarded to the committee.

(6) **Filing Deadlines for Complaints**. A complaint made under subsection (b) of this rule that relates to the conduct of a certified mediator during a mediation, from appointment or selection of the mediator through the conclusion of the mediation by settlement or impasse, shall be filed no later than one year from the conclusion of the mediation by settlement or impasse, except that a complaint that relates to the conduct of a certified district criminal court mediator during a mediation, from the beginning of the mediation through the conclusion of the last session of mediation, shall be filed no later than ninety days from the conclusion of the last mediation session. A complaint made under subsection (b) of this rule that relates to the conduct of a person affiliated with a certified mediator training program during a training program shall be filed no later than one year from the conclusion of the training program.

(7) **Confidentiality**. Commission staff will create and maintain files for all matters considered under subsection (b) of this rule. All information in the files pertaining to applicants for certification, certification of a mediator training program, or certification renewal shall remain confidential in accordance with N.C.G.S. § 7A-38.2(h). Information pertaining to complaints regarding the moral character, conduct, or fitness to practice of mediators or trainers or personnel affiliated with certified mediator training programs shall remain confidential until such time as the Grievance and Disciplinary Committee completes its preliminary investigation, finds probable cause under subsection (d)(2) of this rule and N.C.G.S. § 7A-38.2(h), and the time within which the respondent may appeal the determination of probable cause has expired, or if the respondent files a timely appeal under subsection (e) of this rule, the information shall remain confidential until a hearing is held and a decision is reached by the Commission.

Staff shall reveal the names of applicants and respondents to the committee and the committee shall keep the names of applicants and respondents and other identifying information confidential, except as provided for in N.C.G.S. § 7A-38.2(h) and subsection (d)(3) of this rule.

Notwithstanding the above, staff shall notify the executive director of the Mediation Network of North

Carolina, and the executive director of the community mediation center that is sponsoring the application of an applicant seeking certification as a district criminal court mediator, of any matter regarding the moral character, conduct, or fitness to practice of the applicant.

Staff shall notify any mediation program or agency populating a list of mediators certified by the Commission, including, but not limited to, the Mediation Network of North Carolina, community mediation centers, the North Carolina Industrial Commission, and the federal trial courts in North Carolina, of any finding of probable cause under this subsection against a mediator arising out of a mediated settlement conference conducted under the auspices of such agency or program. When practicable, staff shall notify the agency or program of any public sanction imposed by the Commission under these rules against a certified mediator who also serves as a mediator for that agency or program.

Staff and members of the Grievance and Disciplinary Committee may share information with other committee chairs or committees if needed and relevant to a review of any matter before such other committee.

The Commission may publish names, contact information, and biographical information for mediators, neutrals, and mediator training programs that have been certified or qualified.

(d) **Grievance and Disciplinary Committee Review and Determination on Matters Referred by Commission Staff**.

(1) **Grievance and Disciplinary Committee Review of Moral Character Issues and Complaints**. The Grievance and Disciplinary Committee shall review matters brought before it by Commission staff under the provisions of subsection (c) of this rule and may contact any other persons or entities with knowledge of the matter for additional information. The chair may, in his or her discretion, appoint members of the committee to serve on a subcommittee to investigate a particular matter brought to the committee by staff. The chair of the committee, or his or her designee, may issue subpoenas for the attendance of witnesses and for the production of books, papers, materials, or other documentary evidence deemed necessary to the committee's investigation and review of the matter.

(2) **Grievance and Disciplinary Committee Deliberation**. The Grievance and Disciplinary Committee shall deliberate to determine whether probable cause exists to believe that an applicant or respondent's conduct:

a. is a violation of the enabling legislation for a mediated settlement conference program under the jurisdiction of the Commission or a violation of N.C.G.S. § 7A-38.2;

b. is a violation of the Standards of Professional Conduct for Mediators or any other standards of professional conduct that are not inconsistent with the Standards of Professional Conduct for Mediators and to which the respondent is subject;

c. is a violation of Supreme Court rules or any other rules for mediated settlement conferences or mediation programs;

d. is inconsistent with good moral character (*See* Rule 8(a)(4) of the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions, Rule 8(a)(7) of the Rules for Settlement Procedures in District Court Family Financial Cases, Rule 7(a)(4) of the Rules of Mediation for Matters in District Criminal Court, and Rule 7 of these rules);

e. reflects a lack of fitness to conduct mediated settlement conferences or mediations, or to serve in affiliation with a certified mediator training program (*See* Rule 7);

f. serves to discredit the Commission, the courts, or the mediation process (*See* Rule 7); or

g. is a violation of a Commission policy.

(3) **Grievance and Disciplinary Committee Determination**. Following deliberation, the Grievance and Disciplinary Committee shall determine whether to dismiss the matter, make a referral, or impose sanctions, as follows:

a. **To Dismiss**. If a majority of the Grievance and Disciplinary Committee members review an issue of, or a complaint about, moral character, conduct, or fitness to practice and find no probable cause to believe that the applicant or respondent's conduct is a violation of subsection (d)(2) of this rule, then

the committee shall dismiss the matter and instruct Commission staff to:

1. certify or recertify the applicant, if an application is pending, or notify the respondent by Certified Mail, return receipt requested, with a copy sent by First Class Mail through the U.S. Postal Service, that no further action will be taken in the matter; or

2. notify the complaining party and the respondent by Certified Mail, return receipt requested, that no further action will be taken and that the matter is dismissed. A copy of the notice of dismissal shall also be sent to the respondent and the complaining party through the U.S. Postal Service by First-Class Mail.

b. **To Refer**. If, after reviewing an application for certification or certification renewal or a complaint, a majority of the Grievance and Disciplinary Committee members eligible to vote determine that:

1. any violation of a statute, a program rule, the Standards of Professional Conduct for Mediators, or a Commission policy was technical or relatively minor in nature, caused minimal harm to the complaining party, and did not discredit the program, courts, or Commission, then the committee may:

i. dismiss the complaint with a letter to the complaining party and respondent by Certified Mail, return receipt requested, and a copy of the letter through the U.S. Postal Service by First-Class Mail directed to the complaining party and the respondent at the last mailing address provided to the Commission by the complaining party and the respondent, notifying them of the dismissal, citing the violation, and advising the respondent to avoid such conduct in the future; or

ii. refer the respondent to one or more members of the committee to discuss the matter and explore ways that the

respondent may avoid similar complaints in the future.

2. the respondent's conduct involves no violation, but raises best practices or professionalism concerns, then the committee may:

   i. direct Commission staff to dismiss the complaint with a letter sent by Certified Mail, return receipt requested, and a copy through the U.S. Postal Service by First Class Mail to the complaining party and the respondent directed to the complaining party or respondent at the last mailing address provided to the Commission by the complaining party or the respondent advising him or her of the committee's concerns and providing guidance;

   ii. direct the respondent to meet with one or more members of the committee, who will informally discuss the committee's concerns and provide counsel; or

   iii. refer the respondent to the Chief Justice's Commission on Professionalism for counseling and guidance.

3. the applicant or respondent's conduct raises significant concerns about his or her fitness to practice, including concerns about mental instability, mental health, lack of mental acuity, possible dementia, or possible alcohol or substance abuse, then the committee may, in lieu of or in addition to imposing sanctions, refer the applicant or respondent to the North Carolina Lawyer Assistance Program for evaluation or, if the applicant or respondent is not an attorney, to a physician, other licensed mental health professional, or substance abuse counselor or organization.

In the event that an applicant or respondent is referred to one or more members of the committee for counsel, to the Lawyer Assistance Program, or to some

other professional entity, and fails to cooperate regarding the referral or refuses to sign releases or provide any resulting evaluations to the committee, or should any resulting discussion or evaluation suggest that the applicant or respondent is not currently capable of serving as a mediator, trainer, or manager, the committee may make further determinations in the matter. Pending further review, the committee may also recommend summary suspension under subsection (d)(4) of this rule until such time as the committee has authorized the applicant or respondent to return to active mediation practice. The committee may condition a certification or certification renewal on the applicant or respondent's successful completion of the referral process. Any costs associated with a referral, e.g., costs of evaluation or treatment, shall be borne entirely by the applicant or respondent.

c. **To Impose Sanctions**. Except as provided for in subsection (d)(3)(b)(1) of this rule, if a majority of the Grievance and Disciplinary Committee members find probable cause under subsection (d)(2) of this rule, then the committee shall impose sanctions on the applicant or respondent under subsection (e)(13) of this rule.

Notification of any dismissal, referral, or sanction imposed under subsection (d)(3) of this rule shall be sent to respondent by Certified Mail, return receipt requested, and a copy sent through the U.S. Postal Service by First-Class Mail directed to the last mailing address provided to the Commission by the respondent, and such service shall be deemed sufficient for the purposes of these rules. All witnesses and any others contacted by Commission staff or a committee member shall be notified, if feasible, of a dismissal of the complaint.

A complaining party shall have no right of appeal from a committee determination to dismiss a complaint under subsection (d)(3)(a) of this rule or from a committee determination to refer a mediator under subsection (d)(3)(b) of this rule.

A letter issued under subsection (d)(3)(a) or subsection (d)(3)(b) of this rule regarding conduct or referral shall not be considered sanctions under subsection (e)(13) of this rule. Rather, the letters are intended to be opportunities to address concerns and to help applicants and respondents perform more effectively as mediators. However, there may be instances that are more serious in nature where the committee may both make a referral under subsection (d)(3)(b) of this rule and impose sanctions under subsection (e)(13) of this rule.

(4) **Summary Suspension**. If, after initiation of a complaint against a respondent certified by the Commission and during review by the Grievance and Disciplinary Committee, the committee determines and the chair of the Commission concurs that the conduct of the respondent raises a serious issue regarding the health, safety, or welfare of the mediator or the public, or may adversely affect the integrity of the courts, and that there is a necessity for prompt action, then the Commission, through its chair, may petition the court to restrain or enjoin the respondent's conduct, including suspending the mediator from active service as a mediator in North Carolina. The petition for injunctive relief shall be filed in the Superior Court, Wake County.

(5) **Right to Object and Negotiate**. Within the thirty-day period set forth in subsection (d)(6) of this rule, an applicant or respondent may contact the Grievance and Disciplinary Committee and object to any referral made or sanction imposed on the applicant or respondent, including objecting to any public posting of a sanction, and seek to negotiate some other outcome with the committee. The committee shall have the authority and discretion to engage or decline to engage in negotiations with the applicant or respondent. During the negotiation period, the applicant or respondent may request an extension of the time in which to request an appeal in writing under this subsection and subsection (d)(6) of this rule. Commission staff, in consultation with the committee chair, may extend the appeal period up to an additional thirty days in order to allow more time to complete negotiations.

(6) **Right of Appeal**. If a referral is made or sanctions are imposed, then the applicant or respondent may file an

appeal with the Commission in writing no later than thirty days from the date of the actual delivery of the notice to the applicant or respondent, or within thirty days from the last attempted delivery by the U.S. Postal Service. Subject to the provisions of subsection (d)(5) of this rule, if no appeal is received within thirty days as set out herein, then the applicant or respondent shall be deemed to have accepted the Grievance and Disciplinary Committee's findings and the imposition of sanctions. The complaining party does not have a right to appeal from a decision of the committee to dismiss the complaining party's complaint against the respondent.

(7) **Notification**. At such time as the matter becomes public under subsection (c)(7) of this rule and N.C.G.S. § 7A-38.2(h), Commission staff shall, if feasible, notify the complaining party and any witnesses or others contacted during the investigation of the complaint by staff or the Grievance and Disciplinary Committee of the sanctions imposed and the fact of the respondent's appeal, if filed.

(e) **Appeal to the Commission**.

(1) **Stay Pending Appeal**. The imposition of a private or public sanction by the Grievance and Disciplinary Committee shall be stayed, pending the final disposition of an appeal properly filed by the respondent with the Commission.

(2) **The Commission Shall Meet to Consider Appeals**. In the discretion of the Commission's chair, an appeal by the respondent to the Commission of the Grievance and Disciplinary Committee's determination under subsection (d)(6) of this rule shall be heard either by (i) a five-member panel of Commission members chosen by the chair or the chair's designee, or (ii) the members of the full Commission. Any members of the committee who participated in issuing the committee's determination shall be recused and shall not participate in the hearing. Under Rule 3(c), members of the Commission shall recuse themselves from hearing the matter when they cannot act impartially. No matter shall be heard and decided by less than three Commission members.

(3) **Conduct of the Hearing**.

a. At least thirty days prior to the hearing before the Commission or panel, Commission staff shall forward to all parties, special counsel to the Commission,

and members of the Commission or panel who will hear the matter, a copy of all documents considered by the Grievance and Disciplinary Committee and the names of the members of the Commission or panel who will hear the matter. Any written challenge questioning the neutrality of a member of the Commission or panel shall be directed to and decided by the Commission's chair or the chair's designee. A written challenge shall be filed with the Commission no later than seven days from the date the person filing the challenge received notice of the members who will hear the appeal.

b. Hearings conducted by the Commission or a panel under this rule shall be de novo.

c. Applicants, complainants, respondents, and any witnesses or others identified as having relevant information about the matter may appear at the hearing with or without counsel.

d. An appeal from a denial of an initial application for certification or qualification of a mediator, neutral, or mediator training program that relates to moral character, conduct, or fitness to practice shall be held in private unless the applicant requests a public hearing. An appeal from a denial of an application for certification renewal or reinstatement that relate to ethics or conduct shall be open to the public except that, for good cause shown, the presiding officer may exclude from the hearing room all persons except the parties, counsel, and those engaged in the hearing.

e. In the event that the applicant, complaining party, or respondent fails to appear without good cause, the Commission or panel shall proceed to hear from the parties and witnesses who are present and make a determination based on the evidence presented at the proceeding.

f. Proceedings before the Commission or panel shall be conducted informally, but with decorum.

g. The Commission or panel, through its counsel, and the applicant or respondent, may present evidence in the form of sworn testimony and/or written documents and may cross-examine any witness called

to testify by the other. Commission or panel members may question any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward a full and fair development of the facts. The Commission or panel shall consider all evidence presented and give the evidence appropriate weight and effect.

h. If, in the discretion of the Commission's chair, a panel is empaneled to hear the appeal, then the Commission's chair or designee shall appoint one of the members of the panel to serve as the presiding officer at the hearing before the panel. The Commission's chair or designee shall serve as the presiding officer at a hearing before the full Commission. The presiding officer shall have such jurisdiction and powers as are necessary to conduct a proper and efficient hearing and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for the attendance of witnesses and the production of books, papers, or other documentary evidence.

i. Nothing herein shall restrict the chair of the Commission from serving on a panel or serving as its presiding officer at any hearing held under the provisions of subsection (e) of this rule.

(4) **Date of the Hearing**. An appeal of any sanction imposed by the Grievance and Disciplinary Committee shall be heard by the Commission no later than 180 days from the date the notice of appeal is filed with the Commission, unless waived in writing by the respondent.

(5) **Notice of the Hearing**. The Commission's office shall serve on all parties by Certified Mail, return receipt requested, notice of the date, time, and place of the hearing no later than sixty days prior to the hearing, and such service shall be deemed sufficient for the purposes of these rules. A copy of the hearing notice shall also be sent through the U.S. Postal Service by First-Class Mail directed to the respondent at the last mailing address provided to the Commission by the respondent.

(6) **Ex Parte Communications**. With the exception of Commission staff, no person shall have any ex parte communication with a member of the Commission concerning

the subject matter of the appeal. Communications regarding scheduling matters shall be directed to staff.

(7) **Attendance**. The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through video conference or allow witnesses to testify by telephone or through video conference, with such limitations and conditions as are just and reasonable. If an attorney or witness wishes to appear by telephone or video conference, then the requesting party shall notify Commission staff at least twenty days prior to the proceeding. At least five days prior to the proceeding, staff must be provided with the contact information of those who will participate by telephone or video conference.

(8) **Witnesses**. The presiding officer shall exercise discretion with respect to the attendance and number of witnesses who appear voluntarily or involuntarily, for the purpose of ensuring the orderly conduct of the proceeding. Each party shall forward to the Commission's office and to all other parties at least ten days prior to the hearing the names of all witnesses who will be called to testify.

(9) **Rights of the Applicant or Respondent at the Hearing**. At the hearing, the applicant or respondent may:

a. appear personally and be heard;

b. be represented by counsel;

c. call and examine witnesses;

d. offer exhibits; and

e. cross-examine witnesses.

(10) **Transcript**. The Commission shall retain a court reporter to keep a record of the proceeding. Any respondent who wishes to obtain a transcript of the record may do so at his or her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter retained by the Commission. Copies of a tape, noncertified transcript, or record made by a court reporter retained by a respondent are not part of the official record.

(11) **Commission Deliberation**. The members of the Commission or panel shall deliberate to determine

whether clear, cogent, and convincing evidence exists to believe that an applicant or respondent's conduct is a violation of any of the provisions set out in subsection (d)(2) of this rule.

(12) **Commission Decision**. After the hearing, a majority of the Commission members hearing the appeal or the panel may find that:

a. there is not clear, cogent, and convincing evidence to support a referral or the imposition of sanctions and, therefore, dismiss the complaint or direct Commission staff to certify the applicant or recertify the mediator or mediator training program; or

b. there is clear and convincing evidence that grounds exist to refer or to impose sanctions. The Commission or panel may impose the same or different sanctions than those imposed by the Grievance and Disciplinary Committee or make the same or a different referral.

The Commission or panel shall set forth its findings of fact, conclusions of law, order of referral and/or imposition of sanctions, or other action in writing and serve its decision on the respondent within sixty days from the date the hearing is concluded. A copy of the decision shall be sent by Certified Mail, return receipt requested, and such service shall be deemed sufficient for purposes of these rules. A copy of the decision shall also be sent through the U.S. Postal Service by First-Class Mail directed to the respondent at the last mailing address provided to the Commission by the respondent.

A decision of the Commission or panel shall be, subject to subsection (e)(15) of this rule, the final decision of the Commission.

(13) **Private and Public Sanctions**.

a. Private Sanctions. The Grievance and Disciplinary Committee, or the Commission members or panel who heard the respondent's appeal, may impose private sanctions against an applicant or respondent, which include the following:

1. Letter of warning (a written communication to the respondent stating that the respondent's conduct, while not a basis for public sanctions,

was an unintentional, minor, or technical violation of a statute, rule, policy, or the Standards of Professional Conduct for Mediators, or was unprofessional or not in accord with accepted professional practice, and if continued, may be a basis for public sanctions).

2. Reprimand (a written communication to the respondent stating that the respondent's conduct, although a violation of a statute, rule, policy, or the Standards of Professional Conduct for Mediators, was minor and, if continued, may result in public sanctions).

3. Denial of certification of an initial application.

4. Approval of certification or certification renewal upon enumerated condition(s).

5. Any other private sanction deemed appropriate by the Commission members who heard the appeal or the panel, including referrals as authorized by subsection (d)(3)(b) of this rule.

b. **Public Sanctions**. The Grievance and Disciplinary Committee, the Commission members who heard the appeal, or the panel may impose public sanctions against the respondent which include, but are not limited to, the following:

1. Censure (a written communication to the respondent stating that the violation of a statute, rule, Commission policy, or the Standards of Professional Conduct for Mediators is serious, has caused or could cause significant or potential harm, and if continued, may result in the imposition of more serious sanctions).

2. Reinstatement upon condition(s).

3. Suspension of certification for a specified term, with or without condition(s).

4. Denial of certification renewal.

5. Denial of reinstatement.

6. Decertification.

7. Any other sanction deemed appropriate by the Commission members who heard the appeal or the panel.

c. **Imposition of Conditions**. The Grievance and Disciplinary Committee or the panel may impose any sanction set forth in subsections (e)(13)(a) and (e)(13)(b) of this rule subject to reasonable conditions, which may include, but are not limited to, the following:

1. Completion of additional training.
2. Restriction on the types of cases to be mediated in the future.
3. Reimbursement of the fees paid to the mediator or mediator training program.
4. Prohibition on participation as a trainer or person associated with a certified mediator training program, either indefinitely or for a specific period of time.
5. Completion of additional observations.
6. Any other condition deemed appropriate by the Commission members who heard the appeal or the panel.

d. **Factors that May Be Considered in Imposing Sanctions and/or Conditions**.

1. The intent of the respondent to commit acts resulting in harm or the circumstances under which the potential of causing harm was foreseeable.
2. The circumstances reflecting the respondent's lack of honesty, trustworthiness, or integrity.
3. A dishonest or selfish motive, or the absence thereof.
4. Any negative impact of the respondent's conduct on third parties, the public's perception of the mediation process, or the administration of justice.
5. A conviction of a felony.

6. Any prior disciplinary offenses, or the absence thereof.
7. The remoteness of prior disciplinary offenses.
8. Any timely good faith efforts to rectify the consequences of misconduct.
9. A pattern of misconduct.
10. The effect of any physical or mental disability or impairment, or personal or emotional problems, on the conduct in question.
11. A full disclosure and cooperative attitude toward the disciplinary process.
12. Any bad faith obstruction of the disciplinary process by intentionally failing to comply with rules or orders of the Commission or by submitting false evidence or making false statements to the Commission.
13. The respondent's failure to acknowledge the wrongful nature of his or her conduct or to express remorse.
14. An expression of remorse and acknowledgement of the wrongful nature of the respondent's conduct.
15. The character or reputation of the respondent.
16. The respondent's mediation experience and the number of years that the respondent has been certified.
17. Any other factor found to be pertinent to the consideration of the sanctions to be imposed.

(14) **Publication of Grievance and Disciplinary Committee or Commission Decisions**.

a. The names of respondents who have been issued a private sanction as set forth in subsection (e)(13)(a) of this rule or applicants who have never been certified but have been denied certification shall not be published by the Commission.

b. The names of respondents or applicants for certification renewal who are sanctioned under any provision of subsection (e)(13)(b) of this rule or who have been denied reinstatement under this

rule shall be published by the Commission, along with a short summary of the facts involved and the discipline imposed. For good cause shown, the Grievance and Disciplinary Committee or the Commission may waive this requirement.

c. Chief district court judges, senior resident superior court judges, and clerks in judicial districts and counties in which a respondent is available to serve, the North Carolina State Bar and any other professional licensing or certification bodies to which a respondent is subject, and other trial forums or agencies having mandatory programs and using mediators certified by the Commission shall be notified of any public sanction and/or condition imposed upon a respondent.

(15) **Appeal**. The Superior Court, Wake County, shall have jurisdiction over appeals of Commission or panel decisions imposing sanctions or denying applications for mediator or mediator training program certification or certification renewal. An order imposing sanctions or denying an application for mediator or mediator training program certification or certification renewal shall be reviewable upon appeal, and the entire record, as submitted, shall be reviewed to determine whether the order is supported by substantial evidence. Notice of appeal by a respondent shall be filed in the Superior Court, Wake County, no later than thirty days from the date of the actual delivery of the order imposing sanctions or denying certification or certification renewal to the applicant or respondent, or no later than thirty days from the date of the last attempted delivery to the applicant or respondent by the U.S. Postal Service. A copy of the notice of appeal shall also be sent to the applicant or respondent through the U.S. Postal Service by First-Class Mail directed to respondent or applicant at the last mailing address provided to the Commission by the applicant or respondent.

(16) **Effective Date of Sanction Imposed**. A sanction imposed against a respondent becomes effective either upon the expiration of the period within which an applicant or respondent may appeal the determination of the Grievance and Disciplinary Committee, or upon a final decision by the Commission or a panel after hearing a timely appeal of the committee's imposition of sanctions.

(17) **Petition for Reinstatement or New Application Following a Denial of Initial or Subsequent Application**. An applicant whose application for certification has been denied under the provisions of subsection (e)(13)(a) of this rule may be certified, or a respondent who has been decertified may be reinstated, under subsection (e)(17)(h) of this rule. Except as otherwise provided by the Grievance and Disciplinary Committee, the Commission, or a panel of the Commission, no petition for reinstatement or new application for certification following a denial may be tendered within two years of the date of the order of decertification or the date of denial of the application for certification.

a. A petition for reinstatement or a new application for certification after a denial shall be made in writing, verified by the applicant or petitioner, and filed with the Commission's office.

b. The petition for reinstatement or the new application for certification following a denial shall contain:

1. the name and address of the applicant or petitioner;

2. the reasons why certification was denied or the moral character, conduct, or fitness concerns upon which the suspension, decertification, or bar to serving as a trainer or training program manager was based;

3. a concise statement of facts alleged to meet the applicant or petitioner's burden of proof as set forth in subsection (e)(17)(g) of this rule and alleged to justify certification or reinstatement as a certified mediator or certified mediator training program; and

4. a statement consenting to a criminal background check, signed by the applicant or petitioner; or, if the applicant or petitioner is a mediator training program, by the trainers or instructors affiliated with the program.

c. The petition for reinstatement or the application for certification following a previous denial may also contain a request for a hearing on the matter to consider any additional evidence which the

applicant or petitioner wishes to submit, including any third-party testimony regarding his or her moral character, competency, or fitness to practice as a mediator. A petition or application for certification from a mediator training program may contain a request for a hearing on the matter to consider any additional evidence regarding the effectiveness of the program and/or the qualifications of its trainer(s).

d. Commission staff shall refer the petition for reinstatement or the application for certification following a denial to the Commission for review. In the discretion of the Commission's chair, the chair or designee may (i) appoint a five-member panel of Commission members to review the matter, or (ii) put the matter before the Commission for review. The panel shall not include any members of the Commission who were involved in any prior determination involving the applicant or petitioner. Members of the Commission shall recuse themselves from reviewing any matter if they cannot act impartially. Any challenges questioning the neutrality of a member reviewing the matter shall be decided by the Commission's chair or designee. No matter shall be heard and decided by less than three Commission members.

e. If the applicant or petitioner does not request a hearing under subsection (e)(17)(c) of this rule, then the Commission or panel members shall review the application or petition and shall decide whether to grant or deny the applicant's application for certification or the petitioner's petition for reinstatement after denial within sixty days from the filing of the application or petition. That decision shall be final.

If the applicant or petitioner requests a hearing, it shall be held within 180 days from the filing of the application or petition, unless the time limit is waived by the applicant or petitioner in writing. In the discretion of the chair of the Commission, the hearing shall be conducted before the Commission or a panel appointed by the chair. At the hearing, the applicant or petitioner may:

1. appear personally and be heard;
2. be represented by counsel;
3. call and examine witnesses;
4. offer exhibits; and
5. cross-examine witnesses.

f. At the hearing, the Commission may call witnesses, offer exhibits, and examine the applicant or petitioner and witnesses.

g. The burden of proof shall be upon the applicant or petitioner to establish by clear, cogent, and convincing evidence that:

1. the applicant or petitioner has (i) rehabilitated his or her character; (ii) addressed and resolved any conditions that led to his or her denial of certification or decertification; (iii) completed additional training in mediation theory and practice, studied program rules, the Standards of Professional Conduct for Mediators, and ethics to ensure his or her competency as a mediator; and/or (iv) taken steps to address and resolve any other matter which led to the applicant or petitioner's denial of certification or decertification;
2. the applicant or petitioner, if a mediator training program, has corrected any deficiencies as required by enabling legislation, program rules, or Commission policies, and has addressed and resolved any issues related to the qualifications or character issues of any persons affiliated with the program;
3. the petitioner's reinstatement or applicant's certification will not be detrimental to the Mediated Settlement Conference, Family Financial Settlement, Clerk Mediation, District Criminal Court Mediation programs, or to other programs, the Commission, the courts, or the public; and
4. the applicant or petitioner has completed any paperwork required for certification or reinstatement, including, but not limited to, the

completion of a new application and execution of a release to conduct a background check, and has paid any required reinstatement and/or certification fees.

h. If the applicant or petitioner has established that the conditions set forth in subsection (e)(17)(g) of this rule have been met by clear, cogent, and convincing evidence, then the Commission shall certify or reinstate the applicant or petitioner as a certified mediator or mediator training program. Certification or reinstatement may be conditioned upon the completion of any reasonable condition set forth in subsection (e)(13)(c) of this rule.

i. The Commission or panel shall set forth its decision to certify or reinstate an applicant or petitioner or to deny certification or reinstatement in writing, making findings of fact and conclusions of law. A copy of the decision shall be sent by Certified Mail, return receipt requested, within sixty days from the date of the hearing, and such service shall be deemed sufficient for purposes of these rules. A copy of the decision shall also be sent to the applicant or petitioner through the U.S. Postal Service by First-Class Mail.

j. If a new application for certification or petition seeking reinstatement is denied, then the applicant or petitioner may not apply again under subsection (e)(17) of this rule until two years have elapsed from the date of the decision denying certification or reinstatement.

k. The Superior Court, Wake County, shall have jurisdiction over appeals of Commission decisions to deny certification or reinstatement under subsection (e)(17) of this rule. A decision denying certification or reinstatement under this section shall be reviewable upon appeal, and the entire record, as submitted, shall be reviewed to determine whether the decision is supported by substantial evidence. Notice of appeal shall be filed in the Superior Court, Wake County, no later than thirty days from the date of the actual delivery to the applicant or petitioner of the decision, or no later than thirty

days from the last attempted delivery by the U.S. Postal Service.

Rule 10. The Mediator Certification and Training Committee

(a) **Appointment of the Mediator Certification and Training Committee**. The Commission's chair shall appoint a standing committee entitled the Mediator Certification and Training Committee to review the matters set forth in subsection (b) of this rule.

(b) **Matters to Be Considered by the Mediator Certification and Training Committee**. The Mediator Certification and Training Committee shall review and consider matters arising under this subsection.

(1) Commission staff may raise with the Mediator Certification and Training Committee's chair matters relating to the issuance of provisional pre-training approvals and that pertain to an applicant's education, work experience, training, or any other requirement for mediator certification unrelated to moral character, conduct, or fitness to practice, including a request that the chair review a staff determination not to issue a provisional pre-training approval.

(2) Commission staff may raise with the Mediator Certification and Training Committee's chair or the full committee matters that relate to the education, work experience, training, or other qualifications of an applicant for mediator certification unrelated to moral character, conduct, or fitness to practice. Appeals of staff determinations to deny an application based on a deficiency in the applicant's education, work experience, and/or training, or his or her failure to meet other requirements for certification unrelated to moral character, conduct, or fitness to practice, shall be brought before the full committee.

(3) Commission staff may raise with the Mediator Certification and Training Committee's chair or the full committee matters that pertain to applications for mediator training program certification or certification renewal that are unrelated to the moral character, conduct, or fitness to practice of training program personnel. Appeals of staff decisions to deny an application for mediator training program certification or certification renewal shall be brought before the full committee.

(c) **Commission Staff Review of Qualifications**.

(1) **Review of Provisional Pre-training Approvals**. Commission staff shall review requests for the issuance

of provisional pre training approvals, seeking guidance from the Mediator Certification and Training Committee chair, as necessary, and shall issue approvals in instances where the person seeking the approval appears to meet all education, work experience, and other requirements established for mediator certification by program rules and Commission policies, except that any matters relating to the moral character, conduct, or fitness to practice of the person requesting the approval shall be put before the Grievance and Disciplinary Committee or its chair under Rule 9. Staff may contact those requesting approvals, any third party or entity with relevant information about the requesting person, and may consider any other information acquired during the review process that bears on the requesting person's qualifications. If, after review, the chair determines that the person requesting the provisional pre-training approval does not meet the requisite criteria for certification established by program rules and Commission policies, then the chair shall instruct staff not to issue the pre-training approval. That determination shall be final and is not subject to appeal by the person requesting the provisional pre-training approval.

(2) **Review of Information Obtained During the Mediator Certification Process**. Commission staff shall review all applications for mediator certification to determine whether the applicant meets the qualifications for certification unrelated to moral character, conduct, or fitness to practice set forth in program rules adopted by the Supreme Court for mediated settlement conferences or mediation programs under the jurisdiction of the Commission and any policies adopted by the Commission for the purpose of implementing those rules. Staff may contact an applicant to request additional information, may contact third parties or entities with relevant information about the applicant, and may consider any other information acquired during the review process that bears on the applicant's eligibility for certification.

(3) **Review of Mediator Training Program Certification Applications and Certification Renewal Applications**. Commission staff shall review all mediator training program applications for certification and certification renewal, including reviewing mediator training program agendas, handouts, role plays, and trainer qualifications, to ensure compliance with program rules and

Commission policies relating to mediator training programs, except that any matters relating to the moral character, conduct, or fitness to practice of training program personnel shall be put before the Grievance and Disciplinary Committee or its chair under Rule 9. Staff may seek clarification and additional information from training program personnel and training program registrants and attendees, as necessary.

(d) **Mediator Certification and Training Committee Review**.

(1) **Duty to Review**. The Mediator Certification and Training Committee shall review all matters brought before it by Commission staff under the provisions of subsections (b)(2) and (b)(3) of this rule. The chair may, in his or her discretion, appoint members of the committee to serve on a subcommittee to review a particular matter brought to the committee by staff. The chair or his or her designee may issue subpoenas for the attendance of witnesses and for the production of books, papers, materials, or other documentary evidence deemed necessary to any such review. The chair or designee may contact the following persons and entities for information concerning an applicant for mediator certification, mediator training program certification, or mediator training program certification renewal:

a. All references, employers, colleges, professional licensing or certification bodies, and other individuals or entities cited in applications and any additional persons or entities identified by Commission staff during the course of its review as having relevant information about the qualifications of an applicant for mediator certification, mediator training program certification, or mediator training program certification renewal.

b. Personnel affiliated with an applicant for mediator training program certification or mediator training program certification renewal, and those who registered for or have completed the training program.

All information in Commission files pertaining to requests for provisional pre-training approvals, initial certification applications of a mediator or mediator training program, or renewals of such certifications shall be confidential, except as provided in N.C.G.S. § 7A-38.2(h) or these rules.

(2) **Probable Cause Determination**. The members of the Mediator Certification and Training Committee who are eligible to vote shall deliberate to determine whether probable cause exists to believe that an applicant for mediator certification, mediator training program certification, or mediator training program certification renewal:

a. does not meet the qualifications for mediator certification unrelated to moral character, conduct, or fitness to practice as set forth in program rules adopted by the Supreme Court for mediated settlement conferences or mediation programs under the jurisdiction of the Commission or the policies adopted by the Commission for the purpose of implementing those rules; or

b. does not meet the requirements for mediator training program certification or mediator training program certification renewal unrelated to moral character, conduct, or fitness to practice as set forth in program rules adopted by the Supreme Court for mediated settlement conferences or mediation programs under the jurisdiction of the Commission or the policies adopted by the Commission for the purpose of implementing those rules.

If probable cause is found, then the application shall be denied.

(3) **Authority of Mediator Certification and Training Committee to Deny an Application for Certification or Mediator Training Program Certification Renewal**.

a. If a majority of the Mediator Certification and Training Committee members who are reviewing a matter and eligible to vote find no probable cause under subsection (d)(2) of this rule, then Commission staff shall be instructed to certify the applicant for mediator certification or to certify or recertify the mediator training program.

b. If a majority of the Mediator Certification and Training Committee members reviewing a matter and eligible to vote finds probable cause under subsection (d)(2) of this rule, then the committee shall deny the application for mediator certification or mediator training program certification or mediator training program certification renewal. The

committee's determination to deny the application shall be in writing, shall set forth the deficiencies the committee found in the application, and shall be forwarded to the applicant. Notification of the determination shall be by Certified Mail, return receipt requested, and such service shall be deemed sufficient for purposes of these rules. A copy of the notice shall also be sent to the applicant through the U.S. Postal Service by First-Class Mail.

c. If the Mediator Certification and Training Committee denies an application for mediator certification, mediator training program certification, or mediator training program certification renewal, then the applicant may appeal the denial to the Commission within thirty days from the date of the actual delivery of the notice of denial to the applicant or within thirty days from the date of the last attempted delivery by the U.S. Postal Service. Notification of an appeal must be in writing and directed to the Commission's office. If no appeal is filed within thirty days as set out herein, then the applicant shall be deemed to have accepted the committee's findings and determination.

(e) **Appeal of the Denial of Application for Mediator Certification, Mediator Training Program Certification, or Mediator Training Program Certification Renewal to the Commission**.

(1) **The Commission Shall Meet to Consider Appeals**. In the discretion of the Commission's chair, an appeal by an applicant to the Commission of a Mediator Certification and Training Committee determination under subsection (d)(2) of this rule shall be heard either by (i) a five-member panel of Commission members chosen by the chair or his or her designee, or (ii) the members of the full Commission. Any members of the committee who participated in issuing the committee's determination shall be recused and shall not participate in the hearing. Under Rule 3(c), members of the Commission shall recuse themselves from hearing the matter when they cannot act impartially. No matter shall be heard and decided by less than three Commission members.

(2) **Conduct of the Hearing**.

a. At least thirty days prior to the hearing before the Commission or panel, Commission staff shall

forward to the appealing party, special counsel to the Commission, if appointed, and members of the Commission or panel who will hear the matter, a copy of all documents considered by the Mediator Certification and Training Committee and the names of the members of the Commission or panel who will hear the matter. Any written challenge questioning the neutrality of a member of the Commission or panel shall be directed to and decided by the Commission's chair or designee. A written challenge shall be filed with the Commission no later than seven days from the date the person filing the challenge received notice of the members who will hear the appeal.

b. Hearings conducted by the Commission or a panel under this rule shall be de novo.

c. If, in the discretion of the Commission's chair, a panel is empaneled to hear the appeal, then the Commission's chair or designee shall appoint one of the members of the panel to serve as the presiding officer at the hearing before the panel. The Commission's chair or designee shall serve as the presiding officer at a hearing before the full Commission. The presiding officer shall have such jurisdiction and powers as are necessary to conduct a proper and efficient hearing and disposition of the matter on appeal. The presiding officer may administer oaths and may issue subpoenas for the attendance of witnesses and the production of books, papers, or other documentary evidence.

d. Nothing herein shall restrict the chair of the Commission from serving on a panel or serving as its presiding officer at any hearing held under the provisions of subsection (e) of this rule.

e. Special counsel supplied by the North Carolina Attorney General, at the request of the Commission or otherwise employed by the Commission, may present evidence in support of the denial of certification or recertification.

f. The Commission or panel, through its counsel, and the applicant or the applicant's representative may present evidence in the form of sworn testimony

and/or written documents. The Commission or panel, through its counsel, and the applicant may cross-examine any witness called to testify at the hearing. The Rules of Evidence shall not apply, except as to privilege, but shall be considered as a guide toward a full and fair development of the facts. Commission or panel members may question any witness called to testify at the hearing. The Commission or panel shall consider all evidence presented and give the evidence appropriate weight and effect.

g. Hearings shall be conducted in private unless the applicant requests a public hearing.

h. An applicant and any witnesses or others identified as having relevant information about the matter may appear at the hearing with or without counsel.

i. In the event that the applicant fails to appear without good cause, the Commission or panel shall proceed to hear from the witnesses who are present and make a determination based on the evidence presented at the proceeding.

j. Proceedings before the Commission or panel shall be conducted informally, but with decorum.

(3) **Date of the Hearing**. An appeal of any determination by the Mediator Certification and Training Committee to deny an application for mediator certification, mediator training program certification, or mediator training program certification renewal shall be heard by the Commission no later than 180 days from the date the notice of appeal is filed with the Commission, unless waived in writing by the applicant.

(4) **Notice of the Hearing**. The Commission's office shall serve on all parties by Certified Mail, return receipt requested, notice of the date, time, and place of the hearing no later than sixty days prior to the hearing, and such service shall be deemed sufficient for the purposes of these rules. A copy of the hearing notice shall also be sent through the U.S. Postal Service by First-Class Mail.

(5) **Ex Parte Communications**. With the exception of Commission staff, no person shall have any ex parte communication with a member of the Commission concerning

the subject matter of the appeal. Communications regarding scheduling matters shall be directed to staff.

(6) **Attendance**. The presiding officer may, in his or her discretion, permit an attorney to represent a party by telephone or through video conference or allow witnesses to testify by telephone or through video conference, with such limitations and conditions as are just and reasonable. If an attorney or witness wishes to appear by telephone or video conference, then he or she shall notify Commission staff at least twenty days prior to the proceeding. At least five days prior to the proceeding, staff must be provided with the contact information of those who will participate by telephone or video conference.

(7) **Witnesses**. The presiding officer shall exercise his or her discretion with respect to the attendance and number of witnesses who appear, voluntarily or involuntarily, for the purpose of ensuring the orderly conduct of the proceeding. At least ten days prior to the hearing, each party shall forward to the Commission's office and to all other parties the names of all witnesses who each intends to call to testify.

(8) **Rights of the Applicant at the Hearing**. At the hearing, the applicant may:

a. appear personally and be heard;

b. be represented by counsel;

c. call and examine witnesses;

d. offer exhibits; and

e. cross-examine witnesses.

(9) **Transcript**. The Commission shall retain a court reporter to keep a record of the proceeding. Any applicant who wishes to obtain a transcript of the record may do so at his or her own expense by contacting the court reporter directly. The only official record of the proceeding shall be the one made by the court reporter retained by the Commission. Copies of a tape, noncertified transcript, or record made by a court reporter retained by a party are not part of the official record.

(10) **Commission Deliberation**. The members of the Commission or panel shall deliberate to determine whether clear, cogent, and convincing evidence exists to believe that the education, work experience, training, or

other qualifications of an applicant for mediator certification unrelated to moral character, conduct, or fitness to practice, fail to meet the requirements for certification set forth in program rules and/or Commission policies, or whether the qualifications of a mediator training program seeking certification or certification renewal fail to meet any of the requirements for certification or certification renewal unrelated to the moral character, conduct, or fitness to practice of mediator training program personnel set forth in program rules and/or Commission policies.

(11) **Commission Decision**. After the hearing, a majority of the Commission members hearing the appeal or the panel may find that:

a. there is not clear, cogent, and convincing evidence to support a denial of certification, and instruct Commission staff to certify the applicant for mediator certification or to certify or recertify the applicant for mediator training program certification; or

b. there is clear, cogent, and convincing evidence that grounds exist to deny the application for mediator certification or mediator training program certification or mediator training program certification renewal.

The Commission or panel shall set forth its findings of fact, conclusions of law, and decision to deny certification or certification renewal in writing and serve its decision on the applicant within sixty days from the date the hearing is concluded. A copy of the decision shall be sent by Certified Mail, return receipt requested, and such service shall be deemed sufficient for purposes of these rules. A copy of the decision shall also be sent through the U.S. Postal Service by First-Class Mail.

(12) **Appeals**. The Superior Court, Wake County, shall have jurisdiction over appeals of Commission or panel decisions denying an application for certification of a mediator or mediator training program or mediator training program renewal. The decision denying certification or renewal of mediator training program certification under this rule shall be reviewable upon appeal if the entire record, as submitted, is reviewed to determine whether the decision is supported by substantial evidence. A notice of appeal shall be filed in the Superior

Court, Wake County, no later than thirty days from the date of the actual delivery to the applicant of the decision denying certification or mediator training program certification renewal, or within thirty days from the last attempted delivery by the U.S. Postal Service.

(13) **New Application Following Denial of Initial Application for Certification or Mediator Training Program Certification Renewal**. An applicant whose application for mediator or mediator training program certification has been denied, or a mediator training program whose application for certification renewal has been denied, may reapply for certification under this rule.

Except as otherwise provided by the Mediator Certification and Training Committee, Commission, or a panel of the Commission, no new application for mediator certification following a denial may be tendered within two years of the date of the denial of the application for mediator certification. A new application for mediator training program certification may be tendered at any time the applicant believes that the program has met the qualifications for mediator training program certification.

a. A new application following a denial shall be made in writing, verified by the applicant, and filed with the Commission's office.

b. The new application following a denial shall contain:

1. the name and address of the applicant;

2. a concise statement of the reasons upon which the denial was based;

3. a concise statement of facts alleged to meet respondent's burden of proof as set forth in subsection (e)(13)(g) of this rule; and

4. a statement consenting to a criminal background check, signed by the applicant or petitioner; or, if the applicant or petitioner is a mediator training program, by the trainers or instructors affiliated with the program.

c. The new application for certification may also contain a request for a hearing on the matter to consider any additional evidence that the applicant wishes to submit. An application from a mediator training program for certification or certification

renewal may contain a request for a hearing on the matter to consider any additional evidence regarding the effectiveness of the program and/or the qualifications of its personnel.

d. Commission staff shall refer the new application to the Commission for review. In the discretion of the Commission's chair, the chair or designee may (i) appoint a five-member panel of Commission members to review the matter, or (ii) put the matter before the Commission for review. The panel shall not include any members of the Commission who were involved in a prior determination involving the applicant or petitioner. Members of the Commission shall recuse themselves from reviewing any matter if they cannot act impartially. Any challenges questioning the neutrality of a member reviewing the matter shall be decided by the Commission's chair or designee. No matter shall be heard and decided by less than three Commission members.

e. If the applicant does not request a hearing under subsection (e)(13)(c) of this rule, then the Commission or panel shall review the application and shall decide whether to grant or deny the new application for mediator certification or mediator training program certification or certification renewal after denial within ninety days from the filing of the new application. That decision shall be final.

If the applicant requests a hearing, then it shall be held within 180 days from the filing of the new application, unless the time limit is waived by the applicant in writing. The Commission shall conduct the hearing consistent with subsection (e)(2) of this rule. In the discretion of the chair of the Commission, the hearing shall be conducted before the Commission or a panel appointed by the chair. At the hearing, the applicant may:

1. appear personally and be heard;
2. be represented by counsel;
3. call and examine witnesses;
4. offer exhibits; and
5. cross-examine witnesses.

f. At the hearing, the Commission may call witnesses, offer exhibits, and examine the applicant and witnesses.

g. The burden of proof shall be upon the applicant to establish by clear, cogent, and convincing evidence that:

1. the applicant has satisfied the qualifications that led to the denial;

2. the applicant has completed any paperwork required for certification, including, but not limited to, the completion of an approved application form and execution of a release to conduct a background check, and paid any required certification fees; and

3. the applicant, if a mediator training program, has corrected any deficiencies as required by enabling legislation, program rules, or Commission policies, and has addressed and resolved any issues related to the qualifications of any persons affiliated with the program unrelated to moral character, conduct, or fitness to practice.

h. If the applicant has established that the conditions set forth in subsection (e)(13)(g) of this rule have been met by clear, cogent, and convincing evidence, and is entitled to have the application approved, then the Commission shall certify the applicant.

i. The Commission or panel shall set forth its decision to certify the applicant or to deny certification in writing, making findings of fact and conclusions of law. The decision shall be sent by Certified Mail, return receipt requested, within sixty days from the date of the hearing. Such service shall be deemed sufficient for purposes of these rules. A copy of the decision shall also be sent through the U.S. Postal Service by First-Class Mail.

j. The Superior Court, Wake County, shall have jurisdiction over appeals of Commission decisions to deny certification or certification renewal under subsection (e)(13) of this rule. A decision denying certification or certification renewal under

this section shall be reviewable upon appeal, and the entire record, as submitted, shall be reviewed to determine whether the decision is supported by substantial evidence. Notice of appeal shall be filed in the Superior Court, Wake County, no later than thirty days from the date of the actual delivery of the decision to the applicant, or thirty days from the date of the last attempted delivery by the U.S. Postal Service. A copy of the decision shall also be sent to applicant through the U.S. Postal Service by First-Class Mail.

Rule 11. Internal Operating Procedures

(a) The Commission may adopt and publish internal operating procedures and policies for the conduct of Commission business.

(b) The Commission's procedures and policies may be changed as needed.

* * *

ORDER ADOPTING THE STANDARDS OF PROFESSIONAL CONDUCT FOR MEDIATORS

Pursuant to subsection 7A-38.2(a) of the General Statutes of North Carolina, the Court hereby adopts the Standards of Professional Conduct for Mediators, which appear on the following pages. These standards supersede the Revised Standards of Professional Conduct for Mediators, published at 367 N.C. 1053–62.

The Standards of Professional Conduct for Mediators become effective on 1 March 2020.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 23rd day of January, 2020.

Mark A. Davis

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of January, 2020.

Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

Standards of Professional Conduct for Mediators

Preamble

The Standards of Professional Conduct for Mediators apply to (i) all mediators who are certified by the North Carolina Dispute Resolution Commission (Commission); and (ii) all mediators who are not certified by the Commission, but are conducting court-ordered mediations in the context of a program or process governed by statutes that provide for the Commission to regulate the conduct of mediators participating in the program or process.

These standards are intended to instill and promote public confidence in the mediation process and to provide minimum standards for the conduct of mediators. As with other forms of dispute resolution, mediation must be built upon public understanding and confidence. Persons serving as mediators are responsible to the parties, the public, and the courts to conduct themselves in a manner that will merit that confidence. (*See* Rule 7 of the Rules of the Dispute Resolution Commission.)

It is the mediator's role to facilitate communication and understanding among the parties and to assist the parties in reaching an agreement. The mediator should aid the parties in identifying and discussing issues and in exploring options for settlement. The mediator should not, however, render a decision on the issue in dispute. In mediation, the ultimate decision whether, and on what terms, to resolve the dispute belongs to the parties alone.

Standard 1. Competency

A mediator shall maintain professional competency in mediation skills and, where a mediator lacks the skills necessary for a particular case, the mediator shall decline to serve or withdraw from serving.

(a) A mediator's most important qualification is the mediator's competence in the procedural aspects of facilitating the resolution of a dispute, rather than the mediator's technical knowledge relating to the subject of the dispute. Therefore, a mediator shall obtain necessary skills and substantive training appropriate to the mediator's areas of practice and advance those skills on an ongoing basis.

(b) If a mediator determines that a lack of technical knowledge impairs or is likely to impair the mediator's effectiveness, then the mediator shall notify the parties and shall withdraw from mediating the dispute if requested by any party.

(c) Beyond disclosure under subsection (b) of this standard, a mediator is obligated to exercise judgment as to whether the mediator's skills or expertise are sufficient given the demands of the case and, if they are not, to decline from serving or withdraw.

Standard 2. Impartiality

A mediator shall, in word and action, maintain impartiality toward the parties and on the issue in dispute.

(a) Impartiality means an absence of prejudice or bias, in word and action, and a commitment to aid all parties, as opposed to a single party, in exploring the possibilities for resolution.

(b) As early as practical, and no later than the beginning of the first mediation session, the mediator shall fully disclose of any known relationship with a party or a party's counsel that may affect, or give the appearance of affecting, the mediator's impartiality.

(c) The mediator shall decline to serve, or shall withdraw from serving, if:

(1) a party objects to the mediator serving on grounds of lack of impartiality and, after discussion, the party continues to object; or

(2) the mediator determines that he or she cannot serve impartially.

Standard 3. Confidentiality

A mediator shall, subject to exceptions set forth below, maintain the confidentiality of all information obtained within the mediation process.

(a) A mediator shall not disclose to any nonparticipant, directly or indirectly, any information communicated to the mediator by a participant within the mediation process, whether the information is obtained before, during, or after the mediated settlement conference. A mediator's filing of a copy of an agreement reached in mediation with the appropriate court, under a statute that mandates such filing, shall not be considered to be a violation of this subsection.

(b) A mediator shall not disclose to any participant, directly or indirectly, any information communicated to the mediator in confidence by any other participant in the mediation process, whether the information is obtained before, during, or after the mediated settlement conference, unless the other participant gives the mediator permission to do so. A mediator may encourage a participant to permit disclosure but, absent permission, the mediator shall not disclose the information.

(c) A mediator shall not disclose to court officials or staff any information communicated to the mediator by a participant within the mediation process, whether before, during, or after the mediated settlement conference, including correspondence or communications regarding scheduling or attendance, except as required to complete a report of mediator form; provided, however, that when seeking to collect a fee for services, the mediator may share correspondence or communications from a participant relating to the fees of the mediator. Report of mediator forms are available on the North Carolina Administrative Office of the Court's website at https://www.nccourts.gov.

(d) Notwithstanding the confidentiality provisions set forth in subsections (a), (b), and (c) of this standard, a mediator may report otherwise confidential conduct or statements made before, during, or after mediation in the following circumstances:

(1) If a mediator believes that communicating certain procedural matters to court officials or staff will aid the mediation, then, with the consent of the parties to the mediation, the mediator may do so. In making a permitted disclosure, a mediator shall refrain from expressing his or her personal opinion about a participant or any aspect of the case to court officials or staff.

(2) If a statute requires or permits a mediator to testify, give an affidavit, or tender a copy of an agreement reached in mediation to the official designated by the statute, then the mediator may do so.

If, under the Rules for Settlement Procedures in District Court Family Financial Cases or the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions, a hearing is held on a motion for sanctions for failure to attend a mediated settlement conference, or for failure to pay the mediator's fee, and the mediator who mediated the dispute testifies, either as the movant or under a subpoena, then the mediator shall limit his or her testimony to facts relevant to a decision about the sanction sought and shall not testify about statements made by a participant that are not relevant to that decision.

(3) If a mediator is subpoenaed and ordered to testify or produce evidence in a criminal action or proceeding as provided in N.C.G.S. § 7A-38.1(1), N.C.G.S. § 7A-38.4A(j), and N.C.G.S. § 7A-38.3B(g), then the mediator may do so.

(4) If public safety is at issue, then a mediator may disclose otherwise confidential information to participants, nonparticipants, law enforcement personnel, or other persons potentially affected by the harm, if:

a. a party to, or a participant in, the mediation has communicated to the mediator a threat of serious bodily harm or death to any person, and the mediator has reason to believe the party has the intent and ability to act on the threat;

b. a party to, or a participant in, the mediation has communicated to the mediator a threat of significant damage to real or personal property, and the mediator has reason to believe the party has the intent and ability to act on the threat; or

c. a party or other participant's conduct during the mediation results in direct bodily injury or death to a person.

(5) If a party to, or a participant in, a mediation has filed a complaint with either the Commission or the North Carolina State Bar regarding a mediator's professional conduct, moral character, or fitness to practice as a mediator, then the mediator may reveal otherwise confidential information for the purpose of defending himself or herself against the complaint.

(6) If a party to, or a participant in, a mediation has filed a lawsuit against a mediator for damages or other relief regarding the mediator's professional conduct, moral character, or fitness to practice as a mediator, then the mediator may reveal otherwise confidential information for the purpose of defending himself or herself in the action.

(7) With the permission of all parties, a mediator may disclose otherwise confidential information to an attorney who now represents a party in a case previously mediated by the mediator and in which no settlement was reached. The disclosure shall be intended to help the newly involved attorney understand any offers extended during the mediation process and any impediments to settlement. A mediator who discloses otherwise confidential information under this subsection shall take great care, especially if some time has passed, to ensure that their recall of the discussion is clear, that the information

is presented in an unbiased manner, and that no confidential information is revealed.

(8) If a mediator is an attorney licensed by the North Carolina State Bar and another attorney makes statements or engages in conduct that is reportable under subsection (d)(3) of this standard, then the mediator shall report the statements or conduct to either the North Carolina State Bar or the court having jurisdiction over the matter, in accordance with Rule 8.3(e) of the North Carolina Rules of Professional Conduct.

(9) If a mediator concludes that, as a matter of safety, the mediated settlement conference should be held in a secure location, such as the courthouse, then the mediator may seek the assistance of court officials or staff in securing a location, so long as the specific circumstances of the parties' dispute are not identifiable.

(10) If a mediator or mediator-observer witnesses concerning behavior of an attorney during a mediation, then that behavior may be reported to the North Carolina Lawyer Assistance Program for the purpose of providing assistance to the attorney for alcohol or substance abuse.

In making a permitted disclosure under this standard, a mediator should make every effort to protect the confidentiality of noncomplaining parties or participants in the mediation, refrain from expressing his or her personal opinion about a participant, and avoid disclosing the identities of the participants or the specific circumstances of the parties' dispute.

(e) "Court officials or staff," as used in this standard, includes court officials or staff of North Carolina state and federal courts, state and federal administrative agencies, and community mediation centers.

(f) Nothing in this standard prohibits the use of information obtained in a mediation for instructional purposes or for the purpose of evaluating or monitoring the performance of a mediator, mediation organization, or dispute resolution program, so long as the parties or the specific circumstances of the parties' controversy are not identifiable.

Standard 4. Consent

A mediator shall make reasonable efforts to ensure that each party understands the mediation process, the role of the mediator, and the party's options within the mediation process.

(a) A mediator shall discuss with the participants the rules and procedures pertaining to the mediation process and shall inform the parties of such matters as applicable rules require.

(b) A mediator shall not exert undue pressure on a participant, whether to participate in mediation or to accept a settlement; nevertheless, a mediator shall encourage the parties to consider both the benefits of participation and settlement and the costs of withdrawal and impasse.

(c) If a party appears to have difficulty comprehending the mediation process, issue, or settlement options, or appears to have difficulty participating in a mediation, then a mediator shall explore the circumstances and potential accommodations, modifications, or adjustments that would facilitate the party's ability to comprehend, participate, and exercise self-determination. If the mediator determines that the party cannot meaningfully participate in the mediation, then the mediator shall recess or discontinue the mediation. Before discontinuing the mediation, the mediator shall consider the context and circumstances of the mediation, including the subject matter of the dispute, availability of support persons for the party, and whether the party is represented by counsel.

(d) In appropriate circumstances, a mediator shall inform the parties about the importance of seeking legal, financial, tax, or other professional advice before, during, or after the mediation process.

Standard 5. Self-Determination

A mediator shall respect and encourage self-determination by the parties in their decision whether, and on what terms, to resolve their dispute, and shall refrain from being directive or judgmental regarding the issue in dispute and the options for settlement.

(a) A mediator is obligated to leave to the parties the full responsibility for deciding whether, and on what terms, to resolve their dispute. The mediator may assist a party in making an informed and thoughtful decision, but shall not impose his or her judgment or opinion concerning any aspect of the mediation on the party.

(b) A mediator may raise questions for the participants to consider regarding their perception of the dispute, as well as the acceptability of proposed options for settlement and their impact on third parties. Furthermore, a mediator may suggest options for settlement in addition to those conceived of by the parties.

(c) A mediator shall not impose his or her opinion about the merits of the dispute or about the acceptability of any proposed option for

settlement. A mediator should refrain from giving his or her opinion about the dispute and options for settlement, even when the mediator is requested to do so by a party or attorney. Instead, a mediator should help that party utilize the party's own resources to evaluate the dispute and the options for settlement.

This subsection prohibits a mediator from imposing his or her opinion, advice, or counsel upon a party or attorney. This subsection does not prohibit a mediator from expressing his or her opinion as a last resort to a party or attorney who requests it, as long as the mediator has already helped that party utilize the party's own resources to evaluate the dispute and the options for settlement.

(d) Subject to Standard 4(d), if a party to a mediation declines to consult with independent counsel or an expert after a mediator has raised the consultation as an option, then the mediator shall permit the mediation to go forward according to the parties' wishes.

(e) If, in a mediator's judgment, the integrity of the mediation process has been compromised by, for example, the inability or unwillingness of a party to participate meaningfully, the inequality of bargaining power or ability, the unfairness resulting from nondisclosure or fraud by a participant, or other circumstances likely to lead to a grossly unjust result, then the mediator shall inform the parties of his or her concern. Consistent with the confidentiality provisions in Standard 3, the mediator may discuss with the parties the source of his or her concern. The mediator may choose to discontinue the mediation in such circumstances but shall not violate his or her obligation of confidentiality.

Standard 6. Legal and Other Professional Advice Prohibited

A mediator shall limit himself or herself solely to the role of mediator and shall not give legal or other professional advice during the mediation.

A mediator may provide information that the mediator is qualified by training or experience to provide, but only if the mediator can do so consistent with these standards. A mediator may respond to a party's request for the mediator's opinion on the merits of the case, or on the suitability of settlement proposals, in accordance with Standard 5(c).

Standard 7. Conflicts of Interest

A mediator shall not allow the mediator's personal interest to interfere with his or her primary obligation to impartially serve the parties to the dispute.

(a) A mediator shall place the interests of the parties above the interests of any court or agency which has referred the case, if such interests are in conflict.

(b) If a party is represented or advised by a professional advocate or counselor, then a mediator shall place the interest of the party over the mediator's own interest in maintaining cordial relations with the professional advocate or counselor, if such interests are in conflict.

(c) A mediator who is an attorney, therapist, or other professional, and the mediator's professional partners or co-shareholders, shall not advise, counsel, or represent any of the parties in future matters concerning the subject of the dispute, an action closely related to the dispute, or an outgrowth of the dispute when the mediator or his or her staff has engaged in a substantive conversation with a party to the dispute. A substantive conversation is one that goes beyond a discussion of the general issue in dispute, the identity of parties or participants, and scheduling or administrative issues. Any disclosure that a party might expect the mediator to hold confidential under Standard 3 is a substantive conversation.

A mediator who is an attorney, therapist, or other professional may not mediate the dispute when the mediator, the mediator's professional partners, or the mediator's co-shareholders have advised, counseled, or represented any of the parties in any matter concerning the subject of the dispute, in any action closely related to the dispute, in any preceding issue in the dispute, or in any outgrowth of the dispute.

(d) A mediator shall not charge a contingent fee, or a fee based on the outcome of the mediation.

(e) A mediator shall not use information obtained, or relationships formed, during a mediation for personal gain or advantage.

(f) A mediator shall not knowingly contract for mediation services that cannot be delivered or completed in a timely manner or as directed by the court.

(g) A mediator shall not prolong a mediation for the purpose of charging a higher fee.

(h) A mediator shall not give any commission, rebate, or other monetary or non-monetary form of consideration to a party, or representative of a party, in return for a referral or due to an expectation of a referral of clients for mediation services.

A mediator should neither give nor accept any gift, favor, loan, or other item of value that raises a question as to the mediator's impartiality.

However, a mediator may give or receive de minimis offerings such as sodas, cookies, snacks, or lunches served to those attending a mediation conducted by the mediator, that are intended to further the mediation or show respect for cultural norms.

Standard 8. Protecting the Integrity of the Mediation Process

A mediator shall encourage mutual respect between the parties and shall take reasonable steps, subject to the principle of self-determination, to limit abuses of the mediation process.

(a) A mediator shall make reasonable efforts to (i) ensure that a balanced discussion takes place during the mediation, (ii) prevent manipulation or intimidation by either party, and (iii) ensure that each party understands and respects the concerns and the position of the other party—even if they cannot agree.

(b) If a mediator believes that the statements or actions of a participant—including those of an attorney who the mediator believes is engaging in, or has engaged in, professional misconduct—jeopardize or will jeopardize the integrity of the mediation process, then the mediator shall attempt to persuade the participant to cease the participant's behavior and take remedial action. If the mediator is unsuccessful in this effort, then the mediator shall take appropriate steps including, but not limited to, postponing, withdrawing from, or terminating the mediation. If an attorney's statements or conduct are reportable under Standard 3(d)(8), then the mediator shall report the attorney to either the North Carolina State Bar or the court having jurisdiction over the matter, in accordance with Rule 8.3(e) of the North Carolina Rules of Professional Conduct.

* * *

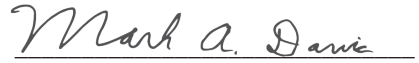
ORDER ADOPTING THE RULES FOR MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

Pursuant to subsection 7A-38.1(c) of the General Statutes of North Carolina, the Court hereby adopts the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions, which appear on the following pages. These rules supersede the Revised Rules Implementing Statewide Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions, published at 367 N.C. 1010–52.

The Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions become effective on 1 March 2020.

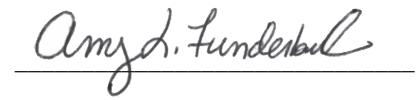
This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 23rd day of January, 2020.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of January, 2020.



AMY L. FUNDERBURK
Clerk of the Supreme Court

Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions

Rule 1. Initiating Settlement Events

(a) **Purposes of Mandatory Settlement Procedures**. These rules are promulgated under N.C.G.S. § 7A-38.1 to implement a system of settlement events, which are designed to focus the parties' attention on settlement, rather than on trial preparation, and to provide a structured opportunity for settlement negotiations to take place. Nothing in these rules is intended to limit or prevent the parties from engaging in settlement procedures voluntarily, either prior to, or after, those ordered by the court under these rules.

(b) **Duty of Counsel to Consult with Clients and Opposing Counsel Concerning Settlement Procedures**. In furtherance of the purposes set out in subsection (a) of this rule, upon being retained to represent any party to a superior court civil action, counsel shall advise his or her client regarding the settlement procedures approved by these rules, and shall attempt to reach an agreement with opposing counsel on an appropriate settlement procedure for the action.

(c) **Initiating the Mediated Settlement Conference by Court Order**.

(1) **Order of the Senior Resident Superior Court Judge**. In all civil actions, except those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license, the senior resident superior court judge of any judicial district shall, by written order, require all persons and entities identified in Rule 4 to attend a pretrial mediated settlement conference. The judge may withdraw his or her order upon motion of a party under subsection (c)(6) of this rule only for good cause shown.

(2) **Motion to Authorize the Use of Other Settlement Procedures**. The parties may move the senior resident superior court judge to authorize the use of another settlement procedure allowed by these rules, or by local rule, in lieu of a mediated settlement conference, as provided in N.C.G.S. § 7A-38.1(i). The party requesting the authorization shall file a Motion for an Order to Use Settlement Procedure Other Than Mediated Settlement Conference in Superior Court Civil Action, Form AOC-CV-829, within twenty-one days of the senior resident superior

court judge's order requiring a conference. The motion shall include:

a. the type of settlement procedure requested;

b. the name, address, and telephone number of the neutral evaluator (neutral) selected by the parties;

c. the rate of compensation of the neutral;

d. that the neutral and opposing counsel have agreed upon the selection and compensation of the neutral; and

e. that all parties consent to the motion.

If the parties are unable to agree to each of the above, then the senior resident superior court judge shall deny the motion and the parties shall attend the conference as originally ordered by the court. If the motion is granted, then the court may order the use of any agreed upon settlement procedure authorized by Rule 10, Rule 11, Rule 12, or Rule 13, or by local rule of the superior court in the county or judicial district where the action is pending.

(3) **Timing of the Order**. The senior resident superior court judge shall issue the order requiring a mediated settlement conference as soon as practicable after the time for the filing of answers has expired. Both Rule 3(b) and subsection (c)(4) of this rule shall govern the content of the order and the date for completion of the conference.

(4) **Content of the Order**. The court's order shall be on an Order for Mediated Settlement Conference in Superior Court and Trial Calendar Notice, Form AOC-CV-811, and shall:

a. require that a mediated settlement conference be held in the case;

b. establish a deadline for the completion of the mediated settlement conference;

c. state clearly that the parties have the right to select their own mediator as provided by Rule 2;

d. state the rate of compensation of the court-appointed mediator, if the parties do not exercise their right to select a mediator under Rule 2; and

e. state that the parties shall be required to pay the mediator's fee at the conclusion of the mediated settlement conference, unless otherwise ordered by the court.

(5) **Motion for Court-Ordered Mediated Settlement Conference**. In cases not ordered to participate in a mediated settlement conference, any party may file a written motion with the senior resident superior court judge requesting that the conference be ordered. The motion shall state the reasons why the order should be allowed and shall be served on the nonmovant. Any objections to the motion may be filed in writing with the senior resident superior court judge within ten days of the date of the service of the motion. The judge shall rule on the motion without a hearing and shall notify the parties or their attorneys of the ruling.

(6) **Motion to Dispense with the Mediated Settlement Conference**. A party may move the senior resident superior court judge to dispense with a mediated settlement conference ordered by the judge. The motion shall state the reasons the relief is sought. For good cause shown, the senior resident superior court judge may grant the motion.

Good cause may include, but is not limited to, the fact that the parties (i) have participated in a settlement procedure, such as nonbinding arbitration or early neutral evaluation, prior to the court's order to participate in a conference; or (ii) have elected to resolve their case through arbitration.

(d) **Initiating the Mediated Settlement Conference by Local Rule**.

(1) **Order by Local Rule**. In judicial districts in which a system of scheduling orders or scheduling conferences is utilized to aid in the administration of civil cases, the senior resident superior court judge of the district shall, by local rule, require all persons and entities identified in Rule 4 to attend a pretrial mediated settlement conference in all civil actions, except those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license. The judge may withdraw his or her order

upon motion of a party under subsection (c)(6) of this rule only for good cause shown.

(2) **Scheduling Orders or Notices**. In judicial districts in which scheduling orders or notices are utilized to manage civil cases and for all cases ordered to participate in a mediated settlement conference by local rule, the order or notice shall: (i) require that a conference be held in the case; (ii) establish a deadline for the completion of the conference; (iii) state clearly that the parties have the right to designate their own mediator and state the deadline by which that designation should be made; (iv) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to designate a mediator; and (v) state that the parties shall be required to pay the mediator's fee at the conclusion of the conference, unless otherwise ordered by the court.

(3) **Scheduling Conferences**. In judicial districts in which scheduling conferences are utilized to manage civil cases and for cases ordered to participate in a mediated settlement conference by local rule, the notice for the scheduling conference shall: (i) require that a mediated settlement conference be held in the case; (ii) establish a deadline for the completion of the mediated settlement conference; (iii) state clearly that the parties have the right to designate their own mediator and state the deadline by which that designation should be made; (iv) state the rate of compensation of the court appointed mediator, in the event that the parties do not exercise their right to designate a mediator; and (v) state that the parties shall be required to pay the mediator's fee at the conclusion of the mediated settlement conference, unless otherwise ordered by the court.

(4) **Application of Rule 1(c)**. The provisions in subsections (c)(2), (c)(5), and (c)(6) of this rule shall apply to mediated settlement conferences initiated by local rule under subsection (d) of this rule, except for the time limitations set out in those subsections.

(5) **Deadline for Completion**. The provisions of Rule 3(b), which state the deadline for completion of the mediated settlement conference, shall not apply to mediated settlement conferences conducted under subsection (d) of this rule. The deadline for completion of the mediated

settlement conference shall be set by the senior resident superior court judge or the judge's designee at the scheduling conference or in the scheduling order or notice, whichever is applicable. However, the completion deadline set by the court shall be well in advance of the trial date.

(6) **Selection of the Mediator**. The parties may designate, or the senior resident superior court judge may appoint, a mediator under Rule 2, except that the time limits for designation and appointment shall be set by local rule. All other provisions of Rule 2 shall apply to mediated settlement conferences that are conducted under subsection (d) of this rule.

(7) **Use of Other Settlement Procedures**. The parties may utilize other settlement procedures under the provisions of subsection (c)(2) of this rule and Rule 10. However, the time limits and the method of moving the court for approval to utilize another settlement procedure set out in these rules shall not apply and shall be governed by local rules.

Comment

Comment to Rule 1(c)(6). If a party is unable to pay the costs of the mediated settlement conference or lives a significant distance from the conference site, then the court should consider Rule 4 or Rule 7 prior to dispensing with mediation for good cause. Rule 4 permits a party to attend the conference electronically, and Rule 7 permits parties to attend the conference and obtain relief from the obligation to pay the mediator's fee.

Rule 2. Designation of the Mediator

(a) **Designation of a Mediator by Agreement of Parties**. Within twenty-one days of the court's order, the parties may, by agreement, designate a mediator who is certified under these rules. A Designation of Mediator in Superior Court Civil Action, Form AOC-CV-812 (Designation Form), must be filed with the court within twenty-one days of the court's order. The plaintiff's attorney should file the Designation Form; however, any party may file the Designation Form. The party filing the Designation Form shall serve a copy on all parties and the mediator designated to conduct the mediated settlement conference. The Designation Form shall state: (i) the name, address, and telephone number of the mediator; (ii) the rate of compensation of the mediator; (iii) that the mediator and opposing counsel have agreed upon the designation and rate of compensation; and (iv) that the mediator is certified under these rules.

(b) **Appointment of a Mediator by the Court**. If the parties cannot agree on the designation of a mediator, then the plaintiff or the plaintiff's attorney shall notify the court by filing a Designation Form, requesting, on behalf of the parties, that the senior resident superior court judge appoint a mediator. The Designation Form must be filed within twenty-one days of the court's order and shall state that the attorneys for the parties have discussed the designation of a mediator and have been unable to agree.

Upon receipt of a Designation Form requesting the appointment of a mediator, or in the event that the parties fail to file a Designation Form with the court within twenty-one days of the court's order, the senior resident superior court judge shall appoint a mediator certified under these rules who has expressed a willingness to mediate actions within the senior resident superior court judge's district.

In appointing a mediator, the senior resident superior court judge shall rotate through a list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation, or whether the mediator is a licensed attorney. The senior resident superior court judge shall retain discretion to depart from a strict rotation of mediators when, in the judge's discretion, there is good cause in a case to do so.

As part of the application or annual certification renewal process, all mediators shall designate the judicial districts in which they are willing to accept court appointments. Each designation is a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated district and will not charge for travel time and expenses incurred in carrying out his or her duties associated with those appointments. A mediator's refusal to accept an appointment in a judicial district designated by the mediator may be grounds for removal from the district's appointment list by the Dispute Resolution Commission (Commission) or the senior resident superior court judge.

The Commission shall provide the senior resident superior court judge of each judicial district a list of certified superior court mediators requesting appointments in that district. The list shall contain each mediator's name, address, and telephone number. The list shall be available on the Commission's website at https://www.ncdrc.gov.

The Commission shall promptly notify the senior resident superior court judge of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

(c) **Mediator Information Directory**. To assist the parties in designating a mediator, the Commission shall post a list of certified superior court mediators on its website at https://www.ncdrc.gov, accompanied by each mediator's contact information and the judicial districts in which each mediator is available to serve. If a mediator has supplied it to the Commission, the list shall also provide the mediator's biographical information, including information about the mediator's education, professional experience, and mediation training and experience.

(d) **Withdrawal or Disqualification of the Mediator**.

(1) Any party may move the senior resident superior court judge of the judicial district where the action is pending for an order disqualifying the mediator using a Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, Form AOC-DRC-20. For good cause, an order disqualifying the mediator shall be entered.

(2) A mediator who wishes to withdraw from a case may file a Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, Form AOC-DRC-20, with the senior resident superior court judge of the judicial district where the action is pending.

(3) If a mediator withdraws or is disqualified, then a substitute mediator shall be designated or appointed under this rule. A mediator who has withdrawn or been disqualified shall not be entitled to receive an administrative fee, unless the mediation has been commenced.

Rule 3. The Mediated Settlement Conference

(a) **Where the Mediated Settlement Conference Is to Be Held**. The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree on a location, then the mediator shall be responsible for reserving a neutral place in the county where the action is pending, for making arrangements for the conference, and for giving timely notice of the time and location of the conference to all attorneys, pro se parties, and other parties required to attend.

(b) **When the Mediated Settlement Conference Is to Be Held**. As a guiding principle, the mediated settlement conference should be held after the parties have had a reasonable time to conduct discovery, but well in advance of the trial date.

The court's order issued under Rule 1(c)(1) shall state a deadline for completion for the conference, which shall be not less than 120 days, nor more than 180 days, after issuance of the court's order. The mediator shall set a date and time for the conference under Rule 6(b)(5).

(c) **Extending Deadline for Completion**. The senior resident superior court judge may extend the deadline for completion of the mediated settlement conference upon the judge's own motion, upon stipulation of the parties, or upon the suggestion of the mediator.

(d) **Recesses**. The mediator may recess the mediated settlement conference at any time and may set times for reconvening. If the time for reconvening is set before the conference is recessed, then no further notification is required for persons present at the conference.

(e) **The Mediated Settlement Conference Is Not to Delay Other Proceedings**. The mediated settlement conference shall not be the cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the senior resident superior court judge.

Rule 4. Duties of Parties, Attorneys, and Other Participants in Mediated Settlement Conferences

(a) **Attendance**.

(1) **Persons Required to Attend**. The following persons shall attend a mediated settlement conference:

a. Parties to the action, to include the following:

1. All individual parties.

2. Any party that is a nongovernmental entity shall be represented at the mediated settlement conference by an officer, employee, or agent who is not the entity's outside counsel and who has been authorized to decide whether, and on what terms, to settle the action on behalf of the entity, or who has been authorized to negotiate on behalf of the entity and can promptly communicate during the conference with persons who have decision-making authority to settle the action; provided, however, that if a specific procedure is required by law (e.g., a statutory pre-audit certificate) or the entity's governing documents (e.g., articles of incorporation, bylaws,

partnership agreement, articles of organization, or operating agreement) to approve the terms of the settlement, then the representative shall have the authority to negotiate and make recommendations to the applicable approval authority in accordance with that procedure.

3. Any party that is a governmental entity shall be represented at the mediated settlement conference by an employee or agent who is not the entity's outside counsel and who: (i) has authority to decide on behalf of the entity whether and on what terms to settle the action; (ii) has been authorized to negotiate on behalf of the entity and can promptly communicate during the conference with persons who have decision-making authority to settle the action; or (iii) has authority to negotiate on behalf of the entity and to make a recommendation to the entity's governing board, if under applicable law the proposed settlement terms can be approved only by the entity's governing board.

Notwithstanding anything in these rules to the contrary, any agreement reached which involves a governmental entity may be subject to the provisions of N.C.G.S. § 159-28(a).

b. A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier, which may be obligated to pay all or part of any claim presented in the action. Each carrier shall be represented at the mediated settlement conference by an officer, employee, or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of the carrier, or who has been authorized to negotiate on behalf of the carrier, and can promptly communicate during the conference with persons who have decision-making authority.

c. At least one counsel of record for each party or other participant whose counsel has appeared in the action.

(2) **Physical Attendance Required**. Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed, as provided in subsection (c) of this rule, or an impasse has been declared. Any party or person may have the attendance requirement excused or modified, including the allowance of the party or person's participation without physical attendance by:

a. agreement of all parties, persons required to attend, and the mediator; or

b. order of the senior resident superior court judge, upon motion of a party and notice to the mediator and to all parties and persons required to attend.

(3) **Scheduling**. Participants required to attend the mediated settlement conference shall promptly notify the mediator after designation or appointment of any significant problems that they may have with the dates for conference sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated mediated settlement conference session is scheduled by the mediator. If a scheduling conflict in another court proceeding arises after a conference session has been scheduled by the mediator, then the participants shall promptly attempt to resolve the conflict under Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina on 20 June 1985.

(b) **Notifying Lienholders**. Any party or attorney who has received notice of a lien, or other claim upon proceeds recovered in the action, shall notify the lienholder or claimant of the date, time, and location of the mediated settlement conference, and shall request that the lienholder or claimant attend the conference or make a representative available with whom to communicate during the conference.

(c) **Finalizing Agreement**.

(1) If an agreement is reached at the mediated settlement conference, then the parties shall reduce the terms of the agreement to writing and sign the writing, along with their counsel. By stipulation of the parties and at the parties' expense, the agreement may be electronically

recorded. If the agreement resolves all issues in the dispute, then a consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

(2) If the agreement resolves all issues at the mediated settlement conference, then the parties shall give a copy of the signed agreement, consent judgment, or voluntary dismissal to the mediator and to all parties at the conference, and shall file the consent judgment or voluntary dismissal with the court within thirty days of the conference, or within ninety days if the State or a political subdivision of the State is a party to the action, or before expiration of the mediation deadline, whichever is later. In all cases, a consent judgment or voluntary dismissal shall be filed prior to the scheduled trial.

(3) If an agreement that resolves all issues in the dispute is reached prior to the mediated settlement conference, or is finalized while the conference is in recess, then the parties shall reduce the terms of the agreement to writing and sign the writing, along with their counsel, and shall file a consent judgment or voluntary dismissal disposing of all issues with the court within thirty days of the conference, or within ninety days if the State or a political subdivision of the State is a party to the action, or before expiration of the mediation deadline, whichever is later.

(4) When an agreement is reached upon all issues, all attorneys of record must notify the senior resident superior court judge within four business days of the settlement and advise who will file the consent judgment or voluntary dismissal.

(d) **Payment of the Mediator's Fee**. The parties shall pay the mediator's fee as provided by Rule 7.

(e) **Related Cases**. Upon application of any party or person, the senior resident superior court judge may order that an attorney of record or a party in a pending superior court civil action, or a representative of an insurance carrier that may be liable for all or any part of a claim pending in superior court, shall, upon reasonable notice, attend a mediation conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance ordered under this rule. Any attorney, party, or representative of an insurance carrier

that properly attends a mediation conference under this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Any disputed issue concerning an order entered under this rule shall be determined by the senior resident superior court judge who entered the order.

(f) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

Comment

Comment to Rule 4(a). Parties subject to Chapter 159 of the General Statutes of North Carolina—which provides, among other things, that if an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, then the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been pre-audited to assure compliance with N.C.G.S. § 159-28(a) and that an obligation incurred in violation of N.C.G.S. § 159-28(a) or (a1) is invalid and may not be enforced—should, as appropriate, inform all participants at the beginning of the mediation of the preaudit requirement and the consequences for failing to preaudit under N.C.G.S. § 159-28.

Comment to Rule 4(c). Consistent with N.C.G.S. § 7A-38.1(*l*), if a settlement is reached during a mediated settlement conference, then the mediator shall ensure that the terms of the settlement are reduced to writing and signed by the parties and their attorneys before ending the conference. No settlement shall be enforceable unless it has been reduced to writing and signed by the parties.

Cases in which an agreement upon all issues has been reached should be disposed of as expeditiously as possible. This assures that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep the terms of the settlement confidential, then they may timely file with the court closing documents that do not contain confidential terms (e.g., voluntary dismissal or a consent judgment resolving all claims). Mediators will not be required by local rules to submit agreements to the court.

Comment to Rule 4(e). Rule 4(e) clarifies a senior resident superior court judge's authority to order a party, attorney of record, or representative of an insurance carrier to attend proceedings in another forum that are related to the superior court civil action. For example, when there are workers' compensation claims being asserted in a case before North Carolina Industrial Commission, there are typically additional claims asserted in superior court against a third-party tortfeasor. Because of the related nature of the claims, it may be beneficial for a party, attorney of record, or representative of an insurance carrier in the superior court civil action to attend the North Carolina Industrial Commission mediation conference in order to resolve the pending claims.

Rule 4(e) specifically authorizes a senior resident superior court judge to order a party, attorney of record, or representative of an insurance carrier to attend a proceeding in another forum, provided that all parties in the related matter consent and the persons ordered to attend receive reasonable notice of the proceeding. The *North Carolina Industrial Commission Rules for Mediated Settlement and Neutral Evaluation Conferences* contain a similar provision, which provides that persons involved in a North Carolina Industrial Commission case may be ordered to attend a mediated settlement conference in a related matter.

Rule 5. Sanctions for Failure to Attend the Mediated Settlement Conference or Pay the Mediator's Fee

Any person required to attend a mediated settlement conference or to pay a portion of the mediator's fee in compliance with N.C.G.S. § 7A-38.1 and these rules who fails to attend the conference or pay the mediator's fee without good cause shall be subject to the contempt power of the court and any monetary sanctions imposed by a resident or presiding superior court judge. The monetary sanctions may include, but are not limited to, the payment of fines, attorneys' fees, the mediator's fee, expenses, and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion, stating the grounds for the motion and the relief sought. The motion shall be served on all parties and on any person against whom sanctions are being sought. The court may initiate sanction proceedings upon its own motion by the entry of a show cause order.

If the court imposes sanctions, it shall do so after notice and a hearing in a written order making findings of fact and conclusions of law. An order imposing sanctions shall be reviewable upon appeal if the entire record, as submitted, is reviewed to determine whether the order is supported by substantial evidence.

Rule 6. Authority and Duties of the Mediator

(a) **Authority of the Mediator**.

(1) **Control of the Mediated Settlement Conference**. The mediator shall at all times be in control of the mediated settlement conference and the procedures to be followed. The mediator's conduct shall be governed by the Standards of Professional Conduct for Mediators.

(2) **Private Consultation**. The mediator may communicate privately with any participant prior to, and during, the

mediated settlement conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

(b) **Duties of the Mediator**.

(1) **Informing the Parties**. At the beginning of the mediated settlement conference, the mediator shall define and describe for the parties:

a. the process of mediation;

b. the differences between mediation and other forms of conflict resolution;

c. the costs of the mediated settlement conference;

d. the fact that the mediated settlement conference is not a trial, that the mediator is not a judge, and that the parties retain their right to a trial if they do not reach settlement;

e. the circumstances under which the mediator may meet and communicate privately with any of the parties, or with any other person;

f. whether, and under what conditions, communications with the mediator will be held in confidence during the mediated settlement conference;

g. the inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1;

h. the duties and responsibilities of the mediator and the participants; and

i. the fact that any agreement reached will be reached by mutual consent.

(2) **Disclosure**. The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice, or partiality.

(3) **Declaring Impasse**. It is the duty of the mediator to determine in a timely manner that an impasse exists and that the mediated settlement conference should end. The mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) **Reporting Results of the Mediated Settlement Conference**.

a. The mediator shall report to the court the results of the mediated settlement conference and any settlement reached by the parties prior to, or during, a recess of the conference. Mediators shall also report the results of mediations held in other superior court civil cases in which a conference was not ordered by the court. The report shall be filed on a Report of Mediator in Superior Court Civil Action, Form AOC-CV-813, within ten days of the conclusion of the conference or within ten days of the mediator being notified of the settlement, and shall include the names of the persons who attended the conference, if a conference was held. Local rules shall not require the mediator to send a copy of the parties' agreement to the court.

b. If an agreement upon all issues is reached prior to or at the mediated settlement conference, or during a recess of the conference, then the mediator's report shall state whether the action will be concluded by consent judgment or voluntary dismissal and state the name, address, and telephone number of the person designated by the parties to file the consent judgment or dismissal with the court. The mediator shall advise the parties that Rule 4(c) requires them to file the consent judgment or voluntary dismissal with the court within thirty days of the conference, or within ninety days if the State or a political subdivision of the State is a party to the action, or before expiration of the mediation deadline, whichever is later. The mediator shall indicate on the report that the parties have been so advised.

c. The Commission or the North Carolina Administrative Office of the Courts (NCAOC) may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.

d. A mediator who fails to report as required by this rule shall be subject to sanctions by the senior resident superior court judge. The sanctions shall

include, but are not limited to, fines or other monetary penalties, decertification as a mediator, and any other sanction available through the court's contempt power. The senior resident superior court judge shall notify the Commission of any action taken against a mediator under this subsection.

(5) **Scheduling and Holding the Mediated Settlement Conference**. It is the duty of the mediator to schedule and conduct the mediated settlement conference prior to the conference completion deadline set out in the court's order. The mediator shall make an effort to schedule the conference at a time that is convenient to all participants. In the absence of agreement, the mediator shall select a date and time for the conference. The deadline for completion of the conference shall be strictly observed by the mediator, unless the deadline is changed by written order of the senior resident superior court judge.

A mediator selected by agreement of the parties shall not delay scheduling or holding a conference because one or more of the parties has not paid an advance fee deposit as required by the agreement.

Comment

Parties subject to Chapter 159 of the General Statutes of North Carolina—which provides, among other things, that if an obligation is evidenced by a contract or agreement requiring the payment of money or by a purchase order for supplies and materials, then the contract, agreement, or purchase order shall include on its face a certificate stating that the instrument has been pre-audited to assure compliance with N.C.G.S. § 159-28(a) and that an obligation incurred in violation of N.C.G.S. § 159-28(a) or (a1) is invalid and may not be enforced—should, as appropriate, inform all participants at the beginning of the mediation of the preaudit requirement and the consequences for failing to preaudit under N.C.G.S. § 159-28.

Rule 7. Compensation of the Mediator and Sanctions

(a) **By Agreement**. When a mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator. Notwithstanding the terms of the parties' agreement with the mediator, subsection (d) of this rule shall apply to an issue involving compensation of the mediator. Subsections (e) and (f) of this rule shall apply unless the parties' agreement provides otherwise.

(b) **By Court Order**. When a mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $150 per hour. The parties shall also pay the mediator a one-time, per-case administrative fee of $150, due upon appointment.

(c) **Change of Appointed Mediator**. Under Rule 2(a), the parties may select a certified mediator to conduct the mediated settlement conference. Parties who fail to select a certified mediator and then desire a substitution after the court has appointed a mediator shall obtain court approval for the substitution. The court may approve the substitution only upon proof of payment to the court's original appointee of the $150 one-time, per-case administrative fee, any other amount owed for mediation services under subsection (b) of this rule, and any postponement fee owed under subsection (e) of this rule.

(d) **Indigent Cases**. No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator's fee. A mediator conducting a mediated settlement conference under these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the senior resident superior court judge for a finding of indigency and ask to be relieved of that party's obligation to pay a share of the mediator's fee using a Petition and Order for Relief from Obligation to Pay Mediator's Fee, Form AOC-CV-814.

The motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their dispute, subsequent to trial. In ruling upon the motion, the judge shall apply the criteria enumerated in N.C.G.S. § 1-110(a), but shall consider the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's motion.

(e) **Postponements and Fees**.

(1) As used in subsection (e) of this rule, "postponement" means to reschedule or not proceed with a mediated settlement conference once a date for a session of the conference has been scheduled by the mediator. After a conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) A mediated settlement conference session may be postponed by the mediator for good cause only after notice by the movant to all parties of the reason for the postponement and a finding of good cause by the mediator. Good cause exists when the reason for the postponement

involves a situation over which the party seeking the postponement has no control, including, but not limited to: (i) the illness of a party or attorney, (ii) a death in the family of a party or attorney, (iii) a sudden and unexpected demand by a judge that a party or attorney for a party appear in court for a purpose not inconsistent with the guidelines established by Rule 3.1(d) of the General Rules of Practice for the Superior and District Courts, or (iv) inclement weather exists, such that travel is prohibitive. Where good cause is found, the mediator shall not assess a postponement fee against a party.

(3) The settlement of a case prior to the scheduled date for mediation shall be good cause for postponement; provided, however, that the mediator was notified of the settlement immediately after it was reached and at least fourteen calendar days prior to the date scheduled for the mediation.

(4) Without a finding of good cause, a mediator may also postpone a scheduled mediated settlement conference session with the consent of all parties. A fee of $150 shall be paid to the mediator if the postponement is allowed. However, if the request for a postponement is made within seven calendar days of the scheduled date for mediation, then the postponement fee shall be $300. The postponement fee shall be paid by the party requesting the postponement, unless otherwise agreed to by the parties. Postponement fees are in addition to the one-time, per-case administrative fee provided for in subsection (b) of this rule.

(5) If the parties select a certified mediator and contract with the mediator as to compensation, then the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required under subsection (e) of this rule.

(f) **Payment of Compensation by Parties**. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the mediated settlement conference.

Comment

Comment to Rule 7(b). Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

It is not unusual for two or more related cases to be mediated collectively. A mediator shall use his or her business judgment in assessing the one-time, per-case administrative fee when two or more cases are mediated together, and set his or her fee according to the amount of time that he or she spent in an effort to schedule the matters for mediation. The mediator may charge a flat fee of $150 if scheduling was relatively easy, or multiples of that amount if more effort was required.

Comment to Rule 7(e). Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. It is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to a postponement in instances where, in the mediator's judgment, the mediation could be held as scheduled.

Comment to Rule 7(f). If a party is found by a senior resident superior court judge to have failed to attend a mediated settlement conference without good cause, then the court may require that party to pay the mediator's fee and related expenses.

Rule 8. Mediator Certification and Decertification

(a) The Commission may receive and approve applications for certification of persons to be appointed as superior court mediators. In order to be certified, an applicant must satisfy the requirements of this subsection.

(1) The applicant must complete: (i) at least forty hours of Commission-certified trial court mediation training, or at least forty hours of Commission-certified family and divorce mediation training; and (ii) a sixteen-hour Commission-certified supplemental trial court mediation training.

(2) The applicant must have the following training, experience, and qualifications:

a. An attorney-applicant may be certified if he or she:

1. is a member in good standing of the North Carolina State Bar; or

2. is a member similarly in good standing of the bar of another state and eligible to apply for admission to the North Carolina State

Bar under Chapter 1, Subchapter C, of the North Carolina State Bar Rules and the Rules Governing the Board of Law Examiners and the Training of Law Students, 27 N.C. Admin. Code 1C.0105; demonstrates familiarity with North Carolina court structure, legal terminology, and civil procedure; provides to the Commission three letters of reference about the applicant's good character, including at least one letter from a person with knowledge of the applicant's professional practice; and possesses the experience required by this subsection; and

3. has at least five years of experience after date of licensure as a judge, practicing attorney, law professor, or mediator, or has equivalent experience.

b. A nonattorney-applicant may be certified if he or she:

1. has completed a six-hour training provided by a Commission-certified trainer on North Carolina court organization, legal terminology, civil court procedure, the attorney–client privilege, the unauthorized practice of law, and the common legal issues arising in superior court civil actions;

2. has provided to the Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's experience qualifying the applicant under subsection (a)(2)(b)(3) of this rule; and

3. has completed either:

i. a minimum of twenty hours of basic mediation training provided by a trainer acceptable to the Commission and, after completing the twenty-hour training, has mediated at least thirty disputes over the course of at least three years, or has equivalent experience, and possesses a four year college degree from

an accredited institution, except that the four-year degree requirement shall not be applicable to mediators certified prior to 1 January 2005, and has four years of professional, management, or administrative experience in a professional, business, or governmental entity; or

ii. ten years of professional, management, or administrative experience in a professional, business, or governmental entity, and possesses a four-year college degree from an accredited institution, except that the four year degree requirement shall not be applicable to mediators certified prior to 1 January 2005.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible for certification under subsections (a)(2)(a) and (a)(2)(b) of this rule.

c. The applicant must complete the following observations:

1. **All Applicants**. All applicants for certification shall observe two mediated settlement conferences, at least one of which shall be of a superior court civil action.

2. **Nonattorney-Applicants**. Nonattorney-applicants for certification shall observe three mediated settlement conferences, in addition to those required under subsection (a)(2)(c)(1) of this rule, that are conducted by at least two different mediators. At least one of the additional observations shall be of a superior court civil action.

3. **Conferences Eligible for Observation.** Conferences eligible for observation under subsection (a)(2)(c) of this rule shall be those in cases pending before the North Carolina superior courts, the North Carolina Court of Appeals, the North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, or the federal district

courts in North Carolina that are ordered to mediation or conducted by an agreement of the parties which incorporates the rules of mediation of one of those entities.

Conferences eligible for observation shall also include those conducted in disputes prior to litigation that are mediated by an agreement of the parties and incorporate the rules for mediation of one of the entities named above.

All conferences shall be conducted by a certified superior court mediator under rules adopted by one of the above entities and shall be observed from their beginning to settlement or when an impasse is declared. Observations shall be reported on a Certificate of Observation – Mediated Settlement Conference Program, Form AOC-DRC-07.

All observers shall conform their conduct to the Commission's policy on *Requirements for Observer Conduct*.

(3) The applicant must demonstrate familiarity with the statutes, rules, and practices governing mediated settlement conferences in North Carolina.

(4) The applicant must be of good moral character and adhere to the Standards of Professional Conduct for Mediators when acting under these rules. On his or her application(s) for certification or application(s) for certification renewal, an applicant shall disclose any:

a. pending criminal charges;

b. criminal convictions;

c. restraining orders issued against him or her;

d. failures to appear;

e. pending or closed grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country;

f. disciplinary action taken against him or her by a professional licensing, certifying, or regulatory

body, whether in North Carolina, another state, or another country, including, but not limited to, disbarment, revocation, decertification, or suspension of any professional license or certification, including the suspension or revocation of any license, certification, registration, or qualification to serve as a mediator in another state or country, even if stayed;

g. judicial sanctions imposed against him or her in any jurisdiction; or

h. civil judgments, tax liens, or bankruptcy filings that occurred within the ten years preceding the date that the initial or renewal application was filed with the Commission.

A mediator shall report to the Commission any of the above-enumerated matters arising subsequent to the disclosures reported on the initial or renewal application for certification within thirty days of receiving notice of the matter.

As referenced in this subsection, criminal charges or convictions (excluding infractions) shall include felonies, misdemeanors, or misdemeanor traffic violations (including driving while impaired) under the law of North Carolina or another state, or under the law of a federal, military, or foreign jurisdiction, regardless of whether the adjudication was withheld (prayer for judgment continued) or the imposition of a sentence was suspended.

(5) The applicant must submit proof of qualifications set out in this rule on a form provided by the Commission.

(6) The applicant must pay all administrative fees established by the NCAOC upon the recommendation of the Commission.

(7) The applicant must agree to accept the fee ordered by the court under Rule 7 as payment in full of a party's share of the mediator's fee.

(8) The applicant must comply with the requirements of the Commission for completing and reporting continuing mediator education or training.

(9) The applicant must agree, once certified, to make reasonable efforts to assist applicants for mediator certification in completing their observation requirements.

(b) No mediator who held a professional license and relied upon that license to qualify for certification under subsections (a)(2)(a) or (a)(2)(b) of this rule shall be decertified or denied recertification because that mediator's license lapses, is relinquished, or becomes inactive; provided, however, that this subsection shall not apply to any mediator whose professional license is revoked, suspended, lapsed, relinquished, or whose professional license becomes inactive due to disciplinary action or the threat of disciplinary action from his or her licensing authority. Any mediator whose professional license is revoked, suspended, lapsed, or relinquished, or whose professional license becomes inactive, shall report the matter to the Commission.

(c) A mediator's certification may be revoked or not renewed at any time it is shown to the satisfaction of the Commission that a mediator no longer meets the qualifications set out in this rule or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible for certification under this rule. No application for certification renewal shall be denied on the grounds that the mediator's training and experience does not meet the training and experience required under rules which were promulgated after the date of the applicant's original certification.

Comment

Comment to Rule 8(a)(2). Commission staff has discretion to waive the requirements set out in Rule 8(a)(2)(a)(2) and Rule 8(a)(2)(b)(1), if the applicant can demonstrate sufficient familiarity with North Carolina legal terminology, court structure, and procedure.

Rule 9. Certification of Mediation Training Programs

(a) Certified training programs for mediators who are seeking certification as a mediator for matters in superior court shall consist of a minimum of forty hours of instruction. The curriculum of such programs shall include the following topics:

(1) Conflict resolution and mediation theory.

(2) Mediation process and techniques, including the process and techniques of trial court mediation.

(3) Communication and information gathering skills.

(4) Standards of conduct for mediators, including, but not limited to, the Standards of Professional Conduct for Mediators.

(5) Statutes, rules, and practices governing mediated settlement conferences in North Carolina.

(6) Demonstrations of mediated settlement conferences.

(7) Simulations of mediated settlement conferences, involving student participation as the mediator, attorneys, and disputants, which shall be supervised, observed, and evaluated by program faculty.

(8) Satisfactory completion of an exam by all students, testing their familiarity with the statutes, rules, and practices governing mediated settlement conferences in North Carolina.

(b) Certified training programs for mediators who are already certified as family financial mediators shall consist of a minimum of sixteen hours. The curriculum of such programs shall include the topics in subsection (a) of this rule and a discussion of the mediation and culture of insured claims. There shall be at least two simulations as described in subsection (a)(7) of this rule.

(c) A training program must be certified by the Commission before a mediator's attendance at the program may be used to satisfy the training requirement under Rule 8(a). Certification does not need to be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Commission if they are in substantial compliance with the standards set forth in this rule.

(d) To complete certification, a training program shall pay all administrative fees required by the NCAOC upon the recommendation of the Commission.

Rule 10. Other Settlement Procedures

(a) **Order Authorizing Other Settlement Procedures**. Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the senior resident superior court judge may order the use of the procedure requested under these rules or under local rules, unless the court finds that the parties did not agree on all of the relevant details of the procedure, including the items in Rule 1(c)(2), or that, for good cause, the selected procedure is not appropriate for the case or the parties.

(b) **Other Settlement Procedures Authorized by These Rules**. In addition to a mediated settlement conference, the following settlement procedures are authorized by these rules:

(1) Neutral evaluation under Rule 11 (a settlement procedure in which a neutral offers an advisory evaluation of the case following summary presentations by each party).

(2) Nonbinding arbitration under Rule 12 (a settlement procedure in which a neutral renders an advisory decision following summary presentations of the case by the parties).

(3) Binding arbitration under Rule 12 (a settlement procedure in which a neutral renders a binding decision following presentations by the parties).

(4) A summary trial (jury or non-jury) under Rule 13 (a settlement procedure that is either: (i) a nonbinding trial in which a privately procured jury or presiding officer renders an advisory verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer; or (ii) a binding trial in which a privately procured jury or presiding officer renders a binding verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer).

(c) **General Rules Applicable to Other Settlement Procedures**.

(1) **When Proceeding Is Conducted**. Other settlement procedures ordered by the court under these rules shall be conducted no later than the date for completion set out in the court's original mediated settlement conference order, unless extended by the senior resident superior court judge.

(2) **Authority and Duties of the Neutral**.

a. **Authority of the Neutral**.

1. **Control of the Proceeding**. The neutral, arbitrator, or presiding officer shall at all times be in control of the proceeding and the procedures to be followed.

2. **Scheduling the Proceeding**. The neutral, arbitrator, or presiding officer shall attempt to schedule the proceeding at a time that is convenient to the participants, attorneys, and the neutral. In the absence of agreement, the neutral shall select the date for the proceeding.

b. **Duties of the Neutral**.

1. **Informing the Parties**. At the beginning of the proceeding, the neutral, arbitrator, or presiding officer shall define and describe for the parties:

   i. the process of the proceeding;

   ii. the differences between the proceeding and other forms of conflict resolution;

   iii. the costs of the proceeding;

   iv. the inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1(*l*) and subsection (c)(6) of this rule; and

   v. the duties and responsibilities of the neutral and the participants.

2. **Disclosure**. The neutral has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice, or partiality.

3. **Reporting Results of the Proceeding**. The neutral, arbitrator, or presiding officer shall report the results of the proceeding to the court using a Report of Neutral Conducting Settlement Procedure Other Than Mediated Settlement Conference or Arbitration in Superior Court Civil Action, Form AOC-CV-817. The NCAOC may require the neutral to provide statistical data for evaluation of other settlement procedures.

4. **Scheduling and Holding the Proceeding**. It is the duty of the neutral, arbitrator, or presiding officer to schedule and conduct the proceeding prior to the completion deadline set out in the court's order. The deadline for completion of the proceeding shall be strictly observed by the neutral, arbitrator, or presiding officer, unless the deadline is changed by a written order of the senior resident superior court judge.

(3) **Extensions of Time**. A party or a neutral may request that the senior resident superior court judge extend the deadline for completion of the settlement procedure. The request for an extension shall state the reasons the extension is sought and shall be served by the movant on the other parties and the neutral. If the court grants the motion for an extension, then the order shall set a new deadline for the completion of the settlement procedure. A copy of the order shall be delivered to all parties and the neutral by the person who sought the extension.

(4) **Where the Proceeding Is Conducted**. The neutral, arbitrator, or presiding officer shall be responsible for reserving a place agreed to by the parties, setting a time for and making other arrangements for the proceeding, and for giving timely notice to all attorneys and unrepresented parties in writing of the time and location of the proceeding.

(5) **No Delay of Other Proceedings**. Settlement proceedings shall not be the cause for a delay of other proceedings in the case, including, but not limited to, the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the senior resident superior court judge.

(6) **Inadmissibility of Settlement Proceedings**. Evidence of statements made and conduct that occurs in a mediated settlement conference or other settlement proceeding conducted under this rule, whether attributable to a party, mediator, neutral, or neutral-observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the action or another civil action involving the same claim, except:

a. in proceedings for sanctions under subsection (c) of this rule;

b. in proceedings to enforce or rescind a settlement of the action;

c. in disciplinary proceedings before the North Carolina State Bar or any agency established to enforce the Standards of Professional Conduct for Mediators or standards of conduct for other neutrals; or

d. in proceedings to enforce laws concerning juvenile or elder abuse.

As used in this subsection, "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at a proceeding conducted under this rule, or during its recesses, shall be enforceable, unless the agreement has been reduced to writing and signed by the parties. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a conference or other settlement proceeding.

No mediator, neutral, or neutral-observer present at a settlement proceeding shall be compelled to testify or produce evidence in any civil proceeding concerning statements made and conduct that occurs in anticipation of, during, or as a follow-up to a conference or other settlement proceeding under subsection (c) of this rule. This includes proceedings to enforce or rescind a settlement of the action, except to attest to the signing of any agreements, and during proceedings for sanctions under this section, proceedings to enforce laws concerning juvenile or elder abuse, and disciplinary hearings before the North Carolina State Bar or any agency established to enforce the Standards of Professional Conduct for Mediators or standards of conduct for other neutrals.

(7) **No Record Made**. There shall be no record made of any proceedings under these rules, unless the parties have stipulated to binding arbitration or a binding summary trial, in which case any party, after giving adequate notice to opposing parties, may make a record of the proceeding.

(8) **Ex Parte Communications Prohibited**. Unless all parties agree otherwise, there shall be no ex parte communication prior to the conclusion of the proceeding between the neutral and a party or a party's attorney on any matter related to the proceeding, except about administrative matters.

(9) **Duties of the Parties**.

a. **Attendance**. All persons required to attend a mediated settlement conference under Rule 4

shall attend any other nonbinding settlement procedure authorized by these rules and ordered by the court, except those persons to whom the parties agree and the senior resident superior court judge excuses. Those persons required to attend other settlement procedures which are binding in nature, authorized by these rules, and ordered by the court, shall be those persons to whom the parties agree. Notice of the agreement shall be given to the court and the neutral by filing a Motion to Use Settlement Procedure Other Than Mediated Settlement Conference in Superior Court Civil Action and Order, Form AOC-CV-818.

b. **Finalizing Agreement**.

1. If an agreement that resolves all issues in the dispute is reached at the neutral evaluation, arbitration, or summary trial, then the parties to the agreement shall reduce the terms of the agreement to writing and sign it along with their counsel. A consent judgment or voluntary dismissal shall be filed with the court by such persons as the parties shall designate within fourteen days of the conclusion of the proceeding or before the expiration of the deadline for its completion, whichever is later. The person responsible for filing closing documents with the court shall also sign the report to the court. The parties shall give a copy of their signed agreement, consent judgment, or voluntary dismissal to the neutral, arbitrator, or presiding officer, and all parties at the proceeding.

2. If an agreement that resolves all issues in the dispute is reached prior to the evaluation, arbitration, or summary trial, or while the proceeding is in recess, then the parties shall reduce the terms of the agreement to writing and sign the writing along with their counsel and shall file a consent judgment or voluntary dismissal disposing of all issues with the court within fourteen days of the agreement or before the expiration of the deadline for completion of the proceeding, whichever is later.

3. When an agreement is reached upon all issues in the dispute, all attorneys of record must notify the senior resident superior court judge within four business days of the settlement and advise the judge of the persons who will sign the consent judgment or voluntary dismissal.

c. **Payment of the Neutral's Fee**. The parties shall pay the neutral's fee as provided by subsection (c)(12) of this rule.

(10) **Selection of Neutrals in Other Settlement Procedures**. The parties may select any person to serve as a neutral in a settlement procedure authorized under these rules. For arbitration, the parties may either select a single arbitrator or a panel of arbitrators. Notice of the parties' selection shall be given to the court and to the neutral by filing a Motion to Use Settlement Procedure Other Than Mediated Settlement Conference in Superior Court Civil Action and Order, Form AOC-CV-818, within twenty-one days after the entry of the order requiring a mediated settlement conference.

The motion shall state: (i) the name, address, and telephone number of the neutral; (ii) the rate of compensation of the neutral; and (iii) that the neutral and opposing counsel have agreed upon the selection and compensation.

(11) **Disqualification**. Any party may move the resident or presiding superior court judge of the district in which an action is pending for an order disqualifying the neutral and, for good cause, an order disqualifying the neutral shall be entered. Good cause exists if the selected neutral has violated any standards of conduct of the North Carolina State Bar or any standards of conduct for neutrals adopted by the Supreme Court.

(12) **Compensation of the Neutral**. A neutral's compensation shall be paid in an amount agreed to by the parties and the neutral. Time spent reviewing materials in preparation for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time.

Unless otherwise agreed by the parties or ordered by the court, the neutral's fee shall be paid in equal

shares by the parties. For purposes of this section, multiple parties shall be considered one party when they are represented by the same counsel. The presiding officer and jurors in a summary jury trial are neutrals within the meaning of these rules and shall be compensated by the parties.

(13) **Sanctions for Failure to Attend Other Settlement Procedure or Pay the Neutral's Fee**. Any person required to attend a settlement proceeding or to pay a neutral's fee in compliance with N.C.G.S. § 7A-38.1 and these rules who fails to attend the proceeding or pay the neutral's fee without good cause shall be subject to the contempt power of the court and any monetary sanctions imposed by a resident or presiding superior court judge. The monetary sanctions may include, but are not limited to, the payment of fines, attorneys' fees, the neutral's fee, expenses, and loss of earnings incurred by persons attending the proceeding. A party seeking sanctions against a person or a judge, upon his or her own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. The motion shall be served on all parties and any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so after giving notice to the person, holding a hearing, and issuing a written order that contains both findings of fact that are supported by substantial evidence and conclusions of law.

Rule 11. Rules for Neutral Evaluation

(a) **Nature of Neutral Evaluation**. Neutral evaluation is an informal, abbreviated presentation of the facts and issues by the parties to a neutral at an early stage of the case. The neutral is responsible for evaluating the strengths and weaknesses of the case, providing a candid assessment of liability, the settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The neutral is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

(b) **When the Neutral Evaluation Conference Is to Be Held**. As a guiding principle, the neutral evaluation conference should be held at an early stage of the case after the time for the filing of answers has expired, but in advance of the expiration of the discovery period.

(c) **Preconference Submissions**. No later than twenty days prior to the date established for the neutral evaluation conference to begin, each party shall provide the neutral with written information about the case and shall certify to the neutral that they provided a copy of such summary to all other parties in the case. The information provided to the neutral and the other parties shall be a summary of the significant facts and issues in the party's case, shall not be more than five pages in length, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the neutral and to the other parties under this paragraph shall not be filed with the court.

(d) **Replies to Preconference Submissions**. No later than ten days prior to the date set for the neutral evaluation conference to begin, any party may, but is not required to, send additional information to the neutral in writing, not exceeding three pages in length, responding to a question from an opposing party. The response shall be served on all other parties, and the party sending the response shall certify such service to the neutral, but the response need not be filed with the court.

(e) **Neutral Evaluation Conference Procedure**. Prior to a neutral evaluation conference, the neutral may request additional information in writing from any party. At the conference, the neutral may address questions to the parties and give the parties an opportunity to complete their summaries with a brief oral statement.

(f) **Modification of Procedure**. Subject to the approval of the neutral, the parties may agree to modify the procedures required by these rules for neutral evaluation.

(g) **Neutral's Duties**.

(1) **Neutral's Opening Statement**. At the beginning of the neutral evaluation conference, in addition to the matters set out in Rule 10(c)(2)(b), the neutral shall define and describe for the parties:

a. the fact that the neutral evaluation conference is not a trial, that the neutral is not a judge, that the neutral's opinions are not binding on any party, and that the parties retain the right to a trial if they do not reach a settlement; and

b. the fact that any settlement reached will be only by mutual consent of the parties.

(2) **Oral Report to Parties by Neutral**. In addition to the written report to the court required under these rules,

at the conclusion of the neutral evaluation conference, the neutral shall issue an oral report to the parties advising them of the neutral's opinion about the case. The opinion shall include a candid assessment of liability, an estimated settlement value, and the strengths and weaknesses of each party's claims in the event that the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reason for the neutral's suggestion. The neutral shall neither reduce his or her oral report to writing nor inform the court of the oral report.

(3) **Report of Neutral to Court**. Within ten days after the completion of the neutral evaluation conference, the neutral shall file a written report with the court using a Report of Neutral Conducting Settlement Procedure Other Than Mediated Settlement Conference or Arbitration in Superior Court Civil Action, Form AOC-CV-817. The neutral's report shall inform the court when and where the conference was held, the names of those who attended, and the name of any party, attorney, or representative of an insurance carrier known to the neutral to have been absent from the conference without permission. The report shall also inform the court whether an agreement upon all issues was reached by the parties and, if so, state the name of the person designated to file the consent judgment or voluntary dismissal with the court. Local rules shall not require the neutral to send a copy of any agreement reached by the parties to the court.

(h) **Neutral's Authority to Assist Negotiations**. If all parties to the neutral evaluation conference request and agree, then a neutral may assist the parties in settlement discussions.

Rule 12. Rules for Arbitration

In an arbitration, the parties select an arbitrator who shall hear the case and enter an advisory decision. The arbitrator's decision is made to facilitate the parties' negotiation of a settlement and is nonbinding, unless: (i) neither party timely requests a trial de novo, in which case the arbitrator's decision is entered by the senior resident superior court judge as a judgment; or (ii) the parties agree that the arbitrator's decision shall be binding.

(a) **Arbitrator's Canon of Ethics**. Arbitrators shall comply with the North Carolina Canons of Ethics for Arbitrators promulgated by the

Supreme Court. An arbitrator shall be disqualified and must recuse himself or herself in accordance with the North Carolina Canons of Ethics for Arbitrators.

(b) **Exchange of Information**.

(1) **Prehearing Exchange of Information**. At least ten days before the date set for the arbitration hearing, the parties shall exchange in writing:

a. a list of witnesses that the party expects to testify;

b. a copy of documents or exhibits that the party expects to offer into evidence; and

c. a brief statement of the issues and contentions of the party.

The parties may agree in writing to rely on stipulations and statements, sworn or unsworn, rather than a formal presentation of witnesses and documents, for all or part of the hearing. Each party shall bring the materials to the hearing and provide a copy of the materials to the arbitrator. The materials shall not be filed with the court or included in the case file.

(2) **Exchanged Documents Considered Authenticated**. Any document exchanged by the parties may be received in the hearing as evidence without further authentication; however, the party against whom the document is offered may subpoena and examine as an adverse witness the author, custodian, or a witness through whom the document might otherwise have been introduced. Documents not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.

(3) **Copies of Exhibits Admissible**. A copy of a document or exhibit that has been exchanged by the parties is admissible in an arbitration hearing in lieu of the original.

(c) **Arbitration Hearings**.

(1) **Witnesses**. Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.

(2) **Subpoenas**. Rule 45 of the North Carolina Rules of Civil Procedure shall apply to subpoenas for the attendance of witnesses and the production of documentary evidence at an arbitration hearing conducted under these rules.

(3) **Motions**. Designation of an action for arbitration does not affect a party's right to file a motion with the court.

a. The court, in its discretion, may consider and rule on a motion at any time. The court may defer consideration of an issue raised in a motion to the arbitrator for determination in the arbitration award. If the court defers the issue in the motion to the arbitrator, then the parties shall state their contentions regarding the motion to the arbitrator in the exchange of information that is required under subsection (b)(1) of this rule.

b. The pendency of a motion shall not be the cause for delaying an arbitration hearing, unless the court so orders.

(4) **Law of Evidence Used as Guide**. The law of evidence does not apply in an arbitration hearing, except as to privilege, but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect the arbitrator determines appropriate.

(5) **Authority of Arbitrator to Govern Hearings**. An arbitrator shall have the authority of a judge to govern the conduct of hearings, except for the court's contempt power. The arbitrator shall refer all matters involving contempt to the senior resident superior court judge.

(6) **Conduct of Hearing**. The arbitrator and the parties shall review the lists of witnesses, exhibits, and written statements concerning issues previously exchanged by the parties under subsection (b)(1) of this rule. The order of events during the hearing shall generally follow that of a trial with regard to opening statements and closing arguments of counsel, direct and cross-examination of witnesses, and the presentation of exhibits. However, in the arbitrator's discretion, the order of events may be varied.

(7) **No Record of Hearing Made**. No official transcript of an arbitration hearing shall be made. The arbitrator

may permit any party to make a record of the arbitration hearing in any manner that does not interfere with the proceeding.

(8) **Parties Must Be Present at Hearings; Representation**. Subject to the provisions of Rule 10(c)(9), all parties shall be present at hearings in person, or through a representative authorized to make binding decisions on the party's behalf, in all matters in controversy before the arbitrator. All parties may be represented by counsel or may appear pro se as permitted by law.

(9) **Hearing Concluded**. The arbitrator shall declare the hearing concluded when all the evidence has been presented and any arguments that the arbitrator permits have been completed. In exceptional cases, the arbitrator has the discretion to receive post-hearing briefs, but not evidence, if submitted within three days after the hearing concludes.

(d) **The Award**.

(1) **Filing the Award**. The arbitrator shall file an Arbitration Award – Superior Court, Form AOC-CV-806, signed by the arbitrator, with the clerk of superior court in the county where the action is pending, and shall provide a copy of the award to the senior resident superior court judge within twenty days of the conclusion of the hearing or the receipt of post-hearing briefs, whichever is later. The award shall inform the court of the absence of any party, attorney, or representative of an insurance carrier known to the arbitrator to have been absent from the arbitration without permission. The award form shall be used by the arbitrator as the arbitrator's report to the court and may also be used to record the arbitrator's award. If an agreement upon all issues was reached by the parties, then the award shall also inform the court of the agreement and state the name of the person designated to file the consent judgment or voluntary dismissal. Local rules shall not require the arbitrator to send a copy of any agreement reached by the parties to the court.

(2) **Findings; Conclusions; Opinions**. No findings of fact, conclusions of law, or opinions supporting an award are required.

(3) **Scope of Award**. The award must resolve all issues raised by the pleadings. The award may be in any amount supported by the evidence and shall include interest, as provided by law. The award may include attorneys' fees, as permitted by law.

(4) **Costs**. The arbitrator may include in an award court costs accruing through the arbitration proceedings in favor of the prevailing party.

(5) **Copies of Award to Parties**. The arbitrator shall deliver a copy of the award to all the parties or their counsel at the conclusion of the hearing, or the arbitrator shall serve the award after filing it with the court. A record shall be made by the arbitrator of the date and manner of service.

(e) **Trial De Novo**.

(1) **Trial De Novo as of Right**. Any party not in default for a reason subjecting that party to judgment by default who is dissatisfied with an arbitrator's award may have a trial de novo as of right upon filing an Arbitration Demand for Trial De Novo, Form AOC-CV-803 (Demand), with the court, and serving the Demand on all parties within thirty days of service of the arbitrator's award. A demand for a jury trial under Rule 38(b) of the North Carolina Rules of Civil Procedure does not preserve the right to a trial de novo. A demand by any party for a trial de novo, under this subsection, is sufficient to preserve the right of all other parties to a trial de novo. Any trial de novo under this subsection shall include all claims in the action.

(2) **No Reference to Arbitration in Presence of Jury**. A trial de novo shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without consent of all parties to the arbitration and the court's approval.

(f) **Judgment on the Arbitration Decision**.

(1) **Termination of Action Before Judgment**. A dismissal or consent judgment may be filed at any time before entry of judgment on an award.

(2) **Judgment Entered on Award**. If the case is not terminated by dismissal or consent judgment, and no party

files a demand for trial de novo within thirty days after the award is served, then the senior resident superior court judge shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be served on all parties or their counsel.

(g) **Agreement for Binding Arbitration**.

(1) **Written Agreement**. The arbitrator's decision may be binding upon the parties if all parties agree in writing. The agreement may be made at any time after the order for arbitration and prior to the filing of the arbitrator's decision. The written agreement shall be executed by the parties and their counsel and shall be filed with the clerk of superior court and the senior resident superior court judge prior to the filing of the arbitrator's decision.

(2) **Entry of Judgment on a Binding Decision**. The arbitrator shall file the decision with the clerk of superior court, and it shall become a judgment in the same manner as set out in N.C.G.S. § 1-569.25.

(h) **Modification Procedure**. Subject to approval of the arbitrator, the parties may agree to modify the procedures required by these rules for court-ordered arbitration.

Rule 13. Rules for Summary Trials

In a summary bench trial, evidence is presented in a summary fashion to a presiding officer, who shall render a verdict. In a summary jury trial, evidence is presented in summary fashion to a privately procured jury, which shall render a verdict. The goal of a summary trial is to obtain an accurate prediction of the ultimate verdict of a full civil trial as an aid to the parties and their settlement efforts.

Rule 23 of the General Rules of Practice for the Superior and District Courts also provides for summary jury proceedings. While parties may request the court's permission to utilize that process, it may not be substituted in lieu of a mediated settlement conference or other procedures outlined in these rules.

(a) **Pre-summary Trial Conference**. Prior to the summary trial, counsel for the parties shall attend a pre-summary trial conference with the presiding officer selected by the parties under Rule 10(c)(10). The presiding officer shall issue an order that does the following:

(1) Confirms the completion of discovery or sets a date for the completion.

(2) Orders that all statements made by counsel in the summary trial shall be founded on admissible evidence, either documented by deposition or other discovery previously filed and served, or by affidavits of the witnesses.

(3) Schedules all outstanding motions for hearing.

(4) Sets dates by which the parties exchange:

a. a list of the party's respective issues and contentions for trial;

b. a preview of the party's presentation, including notations as to the document (e.g., deposition, affidavit, letter, or contract) that supports that evidentiary statement;

c. all documents or other evidence that the party will rely on in making its presentation; and

d. all exhibits that the party will present at the summary trial.

(5) Sets the date by which the parties shall enter a stipulation, subject to the presiding officer's approval, detailing the time allowable for jury selection, opening statements, the presentation of evidence, and closing arguments (total time is usually limited to one day).

(6) Establishes a procedure by which private, paid jurors will be located and assembled by the parties, if a summary jury trial is to be held, and set the date by which the parties shall submit agreed upon jury instructions, jury selection questionnaire, and the number of potential jurors to be questioned and seated.

(7) Sets a date for the summary jury trial.

(8) Addresses such other matters as are necessary to place the matter in a posture for summary trial.

(b) **Presiding Officer to Issue Order if Parties Unable to Agree**. If the parties are unable to agree upon the dates and procedures set out in subsection (a) of this rule, then the presiding officer shall issue an order which addresses all matters necessary to place the case in a posture for summary trial.

(c) **Stipulation to a Binding Summary Trial**. At any time prior to the rendering of the verdict, the parties may stipulate that the summary trial will be binding on the parties and that the verdict will become a final judgment. The parties may also make a binding high/low agreement, wherein a verdict below a stipulated floor or above a stipulated ceiling would be rejected in favor of the floor or ceiling.

(d) **Evidentiary Motions**. Counsel shall exchange and file motions in limine and other evidentiary matters, which shall be heard prior to the trial. Counsel shall agree, prior to the hearing of the motions, as to whether the presiding officer's rulings will be binding in all subsequent hearings or nonbinding and limited to the summary trial.

(e) **Jury Selection**. In the case of a summary jury trial, potential jurors shall be selected in accordance with the procedure set out in the pre-summary trial order. These jurors shall complete a questionnaire previously stipulated to by the parties. Eighteen jurors, or a lesser number as the parties agree, shall submit to questioning by the presiding officer and each party for such time as is allowed under the summary trial pretrial order. Each party shall then have three peremptory challenges, to be taken alternately, beginning with the plaintiff. Following the exercise of all peremptory challenges, the first twelve seated jurors, or a lesser number as the parties may agree, shall constitute the panel.

After the jury is seated, the presiding officer, in his or her discretion, may describe the issues and procedures to be used in presenting the summary jury trial. The jury shall not be informed of the nonbinding nature of the proceeding, so as not to diminish the seriousness with which they consider the matter and in the event the parties later stipulate to a binding proceeding.

(f) **Presentation of Evidence and Arguments of Counsel**. Each party may make a brief opening statement. Following the opening statements, each side shall present its case within the time limits set in the summary trial pretrial order and may reserve a portion of its time for presenting rebuttal or surrebuttal evidence. Although closing arguments are generally omitted from a summary trial, subject to the presiding officer's discretion and the parties' agreement, each party may be allowed to make closing arguments within the time limits previously established.

Evidence shall be presented in summary fashion by the attorney for each party, without live testimony. Where the credibility of a witness is important in the dispute, the witness may testify in person or by video deposition. All statements of counsel shall be founded on evidence that would be admissible at trial and documented by prior discovery.

Affidavits offered into evidence shall be served upon opposing parties far enough in advance of the proceeding to allow time for affiants to be deposed. Counsel may read portions of the deposition to the jury. Photographs, exhibits, documentary evidence, and accurate summaries of evidence through charts, diagrams, evidence notebooks, or other visual means are encouraged, but shall be stipulated to by the parties or approved by the presiding officer.

(g) **Jury Charge**. In a summary jury trial, following the presentation of evidence by both parties, the presiding officer shall give a brief charge to the jury, relying on predetermined jury instructions and any additional instructions that the presiding officer deems appropriate.

(h) **Deliberation and Verdict**. In a summary jury trial, the presiding officer shall inform the jurors that they should attempt to return a unanimous verdict. The jury shall be given a verdict form stipulated to by the parties or approved by the presiding officer. The form may include specific interrogatories, a general liability inquiry, and/or an inquiry as to damages. If, after diligent efforts and a reasonable time to deliberate, the jury is unable to reach a unanimous verdict, then the presiding officer may recall the jurors and encourage them to reach a verdict quickly or inform them that they may return separate verdicts, in which case the presiding officer may distribute separate verdict forms.

In a summary bench trial, at the close of the presentation of evidence and arguments of counsel, and after allowing time for settlement discussions and consideration of the evidence by the presiding officer, the presiding officer shall render a decision. Upon a party's request, the presiding officer may allow three business days for the filing of post-hearing briefs. If the presiding officer takes the matter under advisement or allows post-hearing briefs, then the decision shall be rendered no later than ten days after the close of the hearing or filing of briefs, whichever is later.

(i) **Jury Questioning**. In a summary jury trial, the presiding officer may allow a brief conference with the jurors in open court after a verdict has been returned, in order to determine the basis of the jury's verdict. However, if a brief conference is utilized, then it should be limited to general impressions. The presiding officer should not allow counsel to ask detailed questions of jurors to prevent altering the summary trial from a settlement technique to a form of pretrial rehearsal. Jurors shall not be required to submit to counsels' questioning and shall be informed of the option to depart.

(j) **Settlement Discussions**. Upon retirement of the jury in a summary jury trial or the presiding officer in a summary bench trial,

the parties and/or their counsel shall meet for settlement discussions. Following the jury's verdict or decision by the court, the parties and/or their counsel shall meet to explore further settlement possibilities. The parties may request that the presiding officer remain available to provide input or guidance, as the presiding officer deems appropriate.

(k) **Modification of Procedure**. Subject to approval of the presiding officer, the parties may agree to modify the procedures set forth in these rules for summary trial.

(*l*) **Report of Presiding Officer**. The presiding officer shall file a written report no later than ten days after the verdict. The report shall be signed by the presiding officer and filed with the clerk of superior court in the county where the action is pending, with a copy of the report provided to the senior resident superior court judge. The presiding officer's report shall inform the court of the absence of any party, attorney, or representative of an insurance carrier known to the presiding officer to have been absent from the summary jury or summary bench trial without permission. The report may be used to record the verdict. In the event that an agreement was reached upon all issues in the dispute, the report shall also inform the court of the agreement and state the name of the person designated to file the consent judgment or voluntary dismissal. Local rules shall not require the presiding officer to send a copy of any agreement reached by the parties to the court.

Rule 14. Local Rule Making

The senior resident superior court judge of any judicial district conducting mediated settlement conferences under these rules is authorized to publish local rules, not inconsistent with these rules and N.C.G.S. § 7A-38.1, implementing conferences in that district.

Rule 15. Definitions

(a) "Senior resident superior court judge," as used throughout these rules, refers to the judge or, as appropriate, the judge's designee.

The phrase "senior resident superior court judge" also refers to a special superior court judge assigned to any action designated as a mandatory complex business case under N.C.G.S. § 7A-45.4, and to any judge to whom a case is assigned under Rule 2.1 and Rule 2.2 of the General Rules of Practice for the Superior and District Courts.

(b) "NCAOC form" refers to a form prepared, printed, and distributed by the NCAOC to implement these rules, or a form approved by local rule which contains at least the same information as a form

prepared by the NCAOC. Proposals for the creation or modification of a form may be initiated by the Commission.

Rule 16. Time Limits

Any time limit provided for by these rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the North Carolina Rules of Civil Procedure.

* * *

ORDER ADOPTING THE RULES FOR SETTLEMENT PROCEDURES IN DISTRICT COURT FAMILY FINANCIAL CASES

Pursuant to subsection 7A-38.4A(k) and subsection 7A-38.4A(*o*) of the General Statutes of North Carolina, the Court hereby adopts the Rules for Settlement Procedures in District Court Family Financial Cases, which appear on the following pages. These rules supersede the Rules of the North Carolina Supreme Court Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases, published at 367 N.C. 1139–73.

The Rules for Settlement Procedures in District Court Family Financial Cases become effective on 1 March 2020.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 23rd day of January, 2020.

Mark A. Davis

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of January, 2020.

Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

Rules for Settlement Procedures in District Court Family Financial Cases

Rule 1. Initiating Settlement Procedures

(a) **Purposes of Mandatory Settlement Procedures**. These rules are promulgated under N.C.G.S. § 7A-38.4A to implement a system of settlement events, which are designed to focus the parties' attention on settlement, rather than on trial preparation, and to provide a structured opportunity for settlement negotiations to take place. Nothing in these rules is intended to limit or prevent the parties from engaging in settlement procedures voluntarily, either prior to or after those ordered by the court under these rules.

(b) **Duty of Counsel to Consult with Clients and Opposing Counsel Concerning Settlement Procedures**. In furtherance of the purposes set out in subsection (a) of this rule, upon being retained to represent any party to a district court case involving a family financial issue, including equitable distribution, child support, alimony, postseparation support, or a claim arising out of a contract between the parties under N.C.G.S. §§ 50-20(d), 52-10, or 52-10.1, or under Chapter 52B of the General Statutes of North Carolina, counsel shall advise his or her client regarding the settlement procedures approved by these rules. At, or prior to, the scheduling and discovery conference mandated by N.C.G.S. § 50-21(d), counsel for a party shall attempt to reach an agreement with opposing counsel on an appropriate settlement procedure for the action.

(c) **Ordering Settlement Procedures**.

(1) **Equitable Distribution Scheduling and Discovery Conference**. At the scheduling and discovery conference in equitable distribution cases, or at an earlier time as specified by local rule, the court shall issue a scheduling order. The scheduling order must include a requirement that the parties and their counsel attend a mediated settlement conference or, if the parties agree, another settlement procedure conducted under these rules, unless excused by the court under subsection (d) of this rule or by the court or mediator under Rule 4(a)(2). The court shall dispense with the requirement to attend a mediated settlement conference or other settlement procedure only for good cause shown.

(2) **Scope of Settlement Proceedings**. Any other family financial issue existing between the parties at the time that the equitable distribution settlement proceeding

is ordered, or at any time thereafter, may be discussed, negotiated, or decided at the equitable distribution settlement proceeding. In judicial districts where a custody and visitation mediation program has been established under N.C.G.S. § 7A-494, a child custody or visitation issue may be the subject of settlement proceedings ordered under these rules, but only by agreement of all parties and the mediator, when the parties have been exempted from, or have fulfilled, the program requirements. In judicial districts where a custody and visitation mediation program has not been established, a child custody or visitation issue may be the subject of settlement proceedings ordered under these rules by agreement of all parties and the mediator.

(3) **Authorizing Settlement Procedures Other Than a Mediated Settlement Conference**. The parties and their attorneys are in the best position to determine which settlement procedure is appropriate for resolving their dispute. Therefore, the court shall order the use of any settlement procedure authorized under Rule 10, Rule 11, or Rule 12, or by local rule of the district court in the county or judicial district where the case is pending, if the parties have agreed upon the procedure to be used, the neutral to be employed, and the amount of compensation of the neutral. If the parties have not agreed on all three items, then the court shall order the parties and their attorneys to attend a mediated settlement conference conducted under these rules.

If the parties wish to use a another settlement procedure, then the parties must submit a Motion for an Order to Use Settlement Procedure Other Than Mediated Settlement Conference or Judicial Settlement Conference in Family Financial Case, Form AOC-CV-826, at the scheduling and discovery conference, which shall include:

a. the settlement procedure chosen by the parties;

b. the name, address, and telephone number of the neutral selected by the parties;

c. the rate of compensation of the neutral; and

d. a statement indicating that all parties consent to the motion.

(4) **Content of the Order**. Using an Order for Mediated Settlement Conference in Family Financial Case, Form AOC-CV-824, the court shall:

a. require that a mediated settlement conference or other settlement proceeding be held in the case;

b. establish a deadline for the completion of the mediated settlement conference or proceeding; and

c. require the parties to pay the neutral's fee at the conclusion of the mediated settlement conference or proceeding, unless otherwise ordered by the court.

If the settlement proceeding ordered by the court is a judicial settlement conference, then the parties shall not be required to compensate the neutral.

The court's ruling on the motion shall be contained in the court's scheduling order or, if no scheduling order is entered, shall be on the Order for Mediated Settlement Conference in Family Financial Case, Form AOC-CV-824. Any scheduling order entered at the completion of a scheduling and discovery conference held pursuant to local rule may be signed by the parties or their attorneys, in lieu of submitting the forms referenced in these rules for the selection of a mediator.

(5) **Court-Ordered Settlement Procedures in Other Family Financial Cases**.

a. **By Motion of a Party**. Any party to a dispute involving a family financial issue, which was not previously ordered to a mediated settlement conference, may move the court for an order requiring the parties to participate in a settlement procedure. The motion shall be in writing, state the reasons why the motion should be granted, and be served on the nonmovant. Any objection to the motion or any request by a party for a hearing on the motion shall be filed in writing with the court within ten days of the date the motion was served. Thereafter, the court shall rule upon the motion and notify the parties or their attorneys of the ruling. If the court orders a settlement proceeding, then the proceeding shall be a mediated settlement conference conducted under

these rules. The court may order other settlement procedures if the circumstances outlined in subsection (c)(3) of this rule have been satisfied.

b. **By Order of the Court**. Upon its own motion, the court may order the parties and the parties' attorneys to attend a mediated settlement conference in any dispute involving a family financial issue or in a contempt proceeding involving a family financial issue.

The court may order a settlement procedure other than a mediated settlement conference only upon motion of the parties and a finding that the circumstances outlined in subsection (c)(3) of this rule have been met. The court shall consider the ability of the parties to compensate the mediator or neutral for his or her services before ordering the parties to participate in a settlement procedure under subsection (c)(5) of this rule and shall comply with the provisions of Rule 2 regarding the appointment of a mediator.

(d) **Motion to Dispense with Settlement Procedures**. A party may file a motion to dispense with the settlement procedure ordered by the court. The motion shall state the reasons relief is sought and, for good cause shown, the court may grant the motion.

Good cause may include, but is not limited to, the fact that (i) the parties have participated in a settlement procedure, such as nonbinding arbitration or early neutral evaluation, prior to the court's order to participate in a mediated settlement conference; (ii) the parties have elected to resolve their case through arbitration under the Family Law Arbitration Act, N.C.G.S. §§ 50-41 to 50-62; or (iii) one of the parties has alleged domestic violence.

Comment

Comment to Rule 1(d). If a party is unable to pay the costs of the mediated settlement conference or lives a significant distance from the conference site, then the court should consider Rule 4 and Rule 7 prior to dispensing with mediation for good cause. Rule 4 permits a party to attend the conference electronically under certain circumstances, and Rule 7 permits parties to attend the conference and obtain relief from the obligation to pay the mediator's fee.

Rule 2. Designation of the Mediator

(a) **Designation of a Mediator by Agreement of the Parties**. By agreement, the parties may designate a family financial mediator certified under these rules by filing a Designation of Mediator in Family Financial Case, Form AOC-CV-825 (Designation Form), with the court at the scheduling and discovery conference. The Designation Form shall state: (i) the name, address, and telephone number of the designated mediator; (ii) the rate of compensation of the mediator; (iii) that the mediator and opposing counsel have agreed upon the designation and rate of compensation; and (iv) that the mediator is certified under these rules.

If the parties wish to designate a mediator who is not certified under these rules, the parties may nominate a noncertified mediator by filing a Designation Form with the court at the scheduling and discovery conference. If the parties choose to nominate a mediator, then the Designation Form shall state: (i) the name, address, and telephone number of the mediator; (ii) the training, experience, and other qualifications of the mediator; (iii) the rate of compensation of the mediator; (iv) that the mediator and opposing counsel have agreed upon the nomination; and (v) the rate of compensation, if any. The court shall approve the nomination if, in the court's opinion, the nominee is qualified to serve as the mediator and the parties and the nominee have agreed on the rate of compensation.

A copy of each form submitted to the court and the court's order requiring a mediated settlement conference shall be delivered to the mediator by the parties.

(b) **Appointment of a Mediator by the Court**. If the parties cannot agree on the designation of a mediator, then the parties shall notify the court by filing a Designation Form requesting that the court appoint a mediator. The Designation Form shall be filed at the scheduling and discovery conference and state that the attorneys for the parties have discussed the designation of a mediator and have been unable to agree on a mediator. Upon receipt of a Designation Form requesting the appointment of a mediator, or upon the parties' failure to file a Designation Form with the court, the court shall appoint a family financial mediator certified under these rules who has expressed a willingness to mediate disputes within the judicial district.

In appointing a mediator, the court shall rotate through a list of available certified mediators. Appointments shall be made without regard to race, gender, religious affiliation, or whether the mediator is a licensed attorney. The court shall retain discretion to depart from a strict rotation

of mediators when, in the court's discretion, there is good cause in a case to do so.

As part of the application or certification renewal process, all mediators shall designate the judicial districts in which they are willing to accept court appointments. Each designation is a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated district and will not charge for travel time and expenses incurred in carrying out his or her duties associated with those appointments. A mediator's refusal to accept an appointment in a judicial district designated by the mediator may be grounds for the mediator's removal from the district's appointment list by the Dispute Resolution Commission (Commission) or the chief district court judge.

The Commission shall provide the district court judges in each judicial district a list of certified family financial mediators requesting appointments in that district. The list shall contain each mediator's name, address, and telephone number. The list shall be provided to the judges electronically through the Commission's website at https://www.ncdrc.gov.

The Commission shall promptly notify the district court of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

(c) **Mediator Information**. To assist the parties in designating a mediator, the Commission shall assemble, maintain, and post a list of certified family financial mediators on its website at https://www.ncdrc.gov, accompanied by each mediator's contact information and the judicial districts in which each mediator is available to serve. When a mediator has supplied it to the Commission, the list shall also provide the mediator's biographical information, including information about the mediator's education, professional experience, and mediation training and experience.

(d) **Withdrawal or Disqualification of the Mediator**.

(1) Any party may move the chief district court judge of the judicial district where the case is pending for an order disqualifying the mediator using a Notice of Withdrawal/Disqualification of Mediator and Order for Substitution of Mediator, Form AOC-DRC-20. For good cause, an order disqualifying the mediator shall be entered.

(2) A mediator who wishes to withdraw from a case may file a Notice of Withdrawal/Disqualification of Mediator and

Order for Substitution of Mediator, Form AOC-DRC-20, with the chief district court judge of the judicial district where the case is pending.

(3) If a mediator withdraws or is disqualified, then a substitute mediator shall be designated or appointed under this rule. A mediator who has withdrawn or been disqualified shall not be entitled to receive an administrative fee, unless the mediation has been commenced.

Rule 3. The Mediated Settlement Conference

(a) **Where the Mediated Settlement Conference Is to Be Held**. The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree to a location, then the mediator shall be responsible for reserving a neutral location in the county where the case is pending, for making arrangements for the conference, and for giving timely notice of the time and location of the conference to all attorneys, pro se parties, and other persons required to attend.

(b) **When the Mediated Settlement Conference Is to Be Held**. As a guiding principle, the mediated settlement conference should be held after the parties have had a reasonable time to conduct discovery, but well in advance of the trial date. The mediator is authorized to assist the parties in establishing a discovery schedule and completing discovery.

The court's order issued under Rule 1(c)(1) shall state a deadline for completion of the conference which shall not be more than 150 days after issuance of the court's order, unless extended by the court. The mediator shall set a date and time for the conference under Rule 6(b)(5).

(c) **Extending Deadline for Completion**. The court may extend the deadline for completion of the mediated settlement conference upon the court's own motion, on stipulation of the parties, or on suggestion of the mediator.

(d) **Recesses**. The mediator may recess the mediated settlement conference at any time and may set times for reconvening. If the time for reconvening is set during the conference, then no further notification is required for persons present at the conference.

(e) **The Mediated Settlement Conference Is Not to Delay Other Proceedings**. The mediated settlement conference shall not be the cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the court.

Rule 4. Duties of Parties, Attorneys, and Other Participants in Mediated Settlement Conferences

(a) **Attendance**.

(1) The following persons shall attend a mediated settlement conference:

a. The parties.

b. At least one counsel of record for each party whose counsel has appeared in the case.

(2) Any party or other person required to attend a mediated settlement conference shall physically attend the conference until an agreement is reduced to writing and signed as provided in subsection (b) of this rule, or until an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including permitting participation without physical attendance, by:

a. agreement of all parties and persons required to attend the conference and the mediator; or

b. order of the court, upon motion of a party and notice to all parties and persons required to attend the conference and the mediator.

(b) **Scheduling**. Participants required to attend the mediated settlement conference shall promptly notify the mediator, after selection or appointment, of any significant problems that they may have with the dates for mediated settlement conference sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated conference session is scheduled by the mediator. If a scheduling conflict in another court proceeding arises after a conference session has been scheduled by the mediator, then participants shall promptly attempt to resolve the conflict under Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina on 20 June 1985.

(c) **Finalizing Agreement**.

(1) If an agreement is reached at the mediated settlement conference, then the parties shall reduce the essential terms of the agreement to writing.

a. If the parties conclude the mediated settlement conference with a written document containing all

of the terms of their agreement for property distribution and do not intend to submit their agreement to the court for approval, then the agreement shall be signed by all parties and formally acknowledged as required by N.C.G.S. § 50-20(d). If the parties conclude the conference with a written document containing all of the terms of their agreement and intend to submit their agreement to the court for approval, then the agreement shall be signed by all parties, but need not be formally acknowledged. In all cases, the mediator shall report a settlement to the court and include in the report the name of the person responsible for filing closing documents with the court.

b. If the parties reach an agreement at the mediated settlement conference regarding property distribution and do not intend to submit their agreement to the court for approval, but are unable to complete a final document reflecting their settlement or have it signed and acknowledged as required by N.C.G.S. § 50-20(d), then the parties shall produce a written summary of their understanding and use it to guide them in writing any agreements as may be required to give legal effect to their understanding. If the parties intend to submit their agreement to the court for approval, then the agreement must be in writing and signed by the parties, but need not be formally acknowledged. The mediator shall facilitate the production of the summary and shall either:

1. report to the court that the matter has been settled and include in the report the name of the person responsible for filing closing documents with the court; or

2. declare, in the mediator's discretion, a recess of the mediated settlement conference.

If a recess is declared, then the mediator may schedule another session of the conference if the mediator determines that it would assist the parties in finalizing a settlement.

(2) In all cases where an agreement is reached after being ordered to mediation, whether prior to, or during, the

mediation, or during a recess, the parties shall file a consent judgment or voluntary dismissal with the court within thirty days of the agreement or before the expiration of the mediation deadline, whichever is later. The mediator shall report to the court that the matter has been settled and who reported the settlement.

(3) An agreement regarding the distribution of property, reached at a proceeding conducted under this section or during a recess of the mediated settlement conference, which has not been approved by a court, shall not be enforceable unless it has been reduced to writing, signed by the parties, and acknowledged as required under N.C.G.S. § 50-20(d).

(d) **Payment of the Mediator's Fee**. The parties shall pay the mediator's fee as provided by Rule 7.

(e) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

Comment

Comment to Rule 4(c). Consistent with N.C.G.S. § 7A-38.4A(j), no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall ensure that the terms of the agreement are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which an agreement on all issues has been reached should be disposed of as expeditiously as possible. This assures that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep the terms of the settlement confidential, then they may timely file closing documents with the court, as long as those documents do not contain confidential terms (e.g., a voluntary dismissal or consent judgment resolving all claims). Mediators will not be required by local rules to submit agreements to the court.

Rule 5. Sanctions for Failure to Attend the Mediated Settlement Conference or Pay the Mediator's Fee

Any person required to attend a mediated settlement conference or to pay a portion of the mediator's fee in compliance with N.C.G.S. § 7A-38.4A and these rules who fails to attend the conference or pay the mediator's fee without good cause shall be subject to the contempt power of the court and any monetary sanctions imposed by the court.

The monetary sanctions may include, but are not limited to, the payment of fines, attorneys' fees, the mediator's fee, expenses, and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. The motion shall be served on all parties and on any person against whom sanctions are being sought. The court may initiate sanction proceedings upon its own motion by the entry of a show cause order.

If the court imposes sanctions, it shall do so after notice and a hearing, in a written order making findings of fact and conclusions of law. An order imposing sanctions shall be reviewable upon appeal if the entire record, as submitted, is reviewed to determine whether the order is supported by substantial evidence.

Rule 6. Authority and Duties of the Mediator

(a) **Authority of the Mediator**.

(1) **Control of the Mediated Settlement Conference**. The mediator shall at all times be in control of the mediated settlement conference and the procedures to be followed. The mediator's conduct shall be governed by the Standards of Professional Conduct for Mediators.

(2) **Private Consultation**. The mediator may communicate privately with any participant during the mediated settlement conference. However, there shall be no ex parte communication before or outside the conference between the mediator and any counsel or party regarding any aspect of the proceeding, except about scheduling matters. Nothing in this rule prevents the mediator from engaging in ex parte communications with the consent of the parties for the purpose of assisting settlement negotiations.

(b) **Duties of the Mediator**.

(1) **Informing the Parties**. At the beginning of the mediated settlement conference, the mediator shall define and describe for the parties:

a. the process of mediation;

b. the differences between mediation and other forms of conflict resolution;

c. the costs of the mediated settlement conference;

d. the fact that the mediated settlement conference is not a trial, that the mediator is not a judge, and that the parties retain their right to a trial if they do not reach settlement;

e. the circumstances under which the mediator may meet and communicate privately with any of the parties, or with any other person;

f. whether, and under what conditions, communications with the mediator will be held in confidence during the mediated settlement conference;

g. the inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.4A(j);

h. the duties and responsibilities of the mediator and the participants; and

i. the fact that any agreement reached will be reached by mutual consent.

(2) **Disclosure**. The mediator has a duty to be impartial and to disclose to all participants any circumstance bearing on possible bias, prejudice, or partiality.

(3) **Declaring Impasse**. It is the duty of the mediator to determine in a timely manner that an impasse exists and that the mediated settlement conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) **Reporting Results of the Mediated Settlement Conference**.

a. The mediator shall report the results of the mediated settlement conference and any settlement reached by the parties prior to, or during, a recess of the conference to the court. Mediators shall also report the results of mediations held in other district court family financial cases in which a mediated settlement conference was not ordered by the court. The report shall be filed on a Report of Mediator in Family Financial Case, Form AOC-CV-827, within ten days of the conclusion of the conference or within ten days of being notified of the settlement, and shall include the names of the persons who attended the conference, if a conference was held.

If a partial agreement was reached at the conference, then the report shall state the issues that remain for trial. Local rules shall not require the mediator to send a copy of the parties' agreement to the court.

b. If an agreement upon all issues was reached at the mediated settlement conference, then the mediator's report shall state whether the dispute will be resolved by a consent judgment or voluntary dismissal, and the name, address, and telephone number of the person designated by the parties to file the consent judgment or dismissal with the court, as required under Rule 4(b)(2). The mediator shall advise the parties that, consistent with Rule 4(b)(2), their consent judgment or voluntary dismissal is to be filed with the court within thirty days of the conference or before the expiration of the mediation deadline, whichever is later. The mediator's report shall indicate that the parties have been so advised.

c. The Commission or the North Carolina Administrative Office of the Courts (NCAOC) may require the mediator to provide statistical data for evaluation of the mediated settlement conference program.

d. A mediator who fails to report as required by this rule shall be subject to sanctions by the court. The sanctions shall include, but are not limited to, fines or other monetary penalties, decertification as a mediator, and any other sanctions available through the court's contempt power. The court shall notify the Commission of any sanction imposed against a mediator under this section.

(5) **Scheduling and Holding the Mediated Settlement Conference**. The mediator shall schedule and conduct the mediated settlement conference prior to the conference completion deadline set out in the court's order. The mediator shall make an effort to schedule the conference at a time that is convenient to all participants. In the absence of agreement, the mediator shall select a date and time for the conference. The deadline for completion of the conference shall be strictly observed by the mediator, unless the deadline is changed by written order of the court.

A mediator selected by agreement of the parties shall not delay scheduling or conducting the conference because one or more of the parties has not paid an advance fee deposit as required by the agreement.

Rule 7. Compensation of the Mediator and Sanctions

(a) **By Agreement**. When a mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator. Notwithstanding the terms of the parties' agreement with the mediator, subsection (e) of this rule shall apply to an issue involving compensation of the mediator. Subsections (d) and (f) of this rule shall apply unless the parties' agreement provides otherwise.

(b) **By Court Order**. When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $150 per hour. The parties shall also pay the mediator a one-time, per-case administrative fee of $150, which accrues upon appointment.

(c) **Change of Appointed Mediator**. Parties who fail to select a mediator and then desire a substitution after the court has appointed a mediator shall obtain court approval for the substitution. The court may approve the substitution only upon proof of payment to the court's original appointee of the $150 one-time, per-case administrative fee, any other amount due for mediation services under subsection (b) of this rule, and any postponement fee owed under subsection (f) of this rule.

(d) **Payment of Compensation by the Parties**. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. Payment shall be due upon the completion of the mediated settlement conference.

(e) **Inability to Pay**. No party found by the court to be unable to pay its full share of the mediator's fee shall be required to do so. Any party required to pay a share of a mediator's fee under subsections (b) and (c) of this rule may move the court for relief using a Petition and Order for Relief from Obligation to Pay All or Part of Mediator's Fee in Family Financial Case, Form AOC-CV-828.

In ruling upon the motion, the court may consider the income and assets of the movant and the outcome of the dispute. The court shall enter an order granting or denying the party's motion. The court may require that one or more shares be paid out of the marital estate.

Any mediator conducting a mediated settlement conference under these rules shall accept as payment in full of a party's share of the

mediator's fee that portion paid by, or on behalf of, the party pursuant to a court order issued under this rule.

(f) **Postponements and Fees**.

(1) As used in subsection (f) of this rule, "postponement" means to reschedule or not proceed with a mediated settlement conference once a date for the conference has been scheduled by the mediator. After a conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) A mediated settlement conference may be postponed by a mediator for good cause only after notice by the movant to all parties of the reason for the postponement and a finding of good cause by the mediator. Good cause exists when the reason for the postponement involves a situation over which the party seeking the postponement has no control, including, but not limited to: (i) the illness of a party or attorney, (ii) a death in the family of a party or attorney, (iii) a sudden and unexpected demand by the court that a party or attorney for a party appear in court for a purpose not inconsistent with the guidelines established by Rule 3.1(d) of the General Rules of Practice for the Superior and District Courts, or (iv) inclement weather exists, such that travel is prohibitive. Where good cause is found, the mediator shall not assess a postponement fee.

(3) The settlement of a case prior to the scheduled date for mediation shall be good cause for postponement; provided, however, that the mediator was notified of the settlement immediately after it was reached and at least fourteen calendar days prior to the date scheduled for the mediation.

(4) Without a finding of good cause, a mediator may also postpone a scheduled mediated settlement conference session with the consent of all parties. A fee of $150 shall be paid to the mediator if the postponement is allowed. However, if the request for a postponement is made within seven calendar days of the scheduled date for mediation, then the postponement fee shall be $300. The postponement fee shall be paid by the party requesting the postponement, unless otherwise agreed to by the parties. Postponement fees are in addition to the one-time,

per-case administrative fee provided for in subsection (b) of this rule.

(5) If the parties select a certified mediator and contract with the mediator as to compensation, then the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required under subsection (f) of this rule.

Comment

Comment to Rule 7(b). Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

Comment to Rule 7(d). If a party is found by the court to have failed to attend a mediated settlement conference without good cause, then the court may require that party to pay the mediator's fee and related expenses.

Comment to Rule 7(f). Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. It is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to a postponement in instances where, in the mediator's judgment, the mediation could be held as scheduled.

Rule 8. Mediator Certification and Decertification

(a) The Commission may receive and approve applications for certification of persons to be appointed as mediators for family financial matters in district court. In order to be certified, an applicant must satisfy the requirements of this subsection.

(1) The applicant for certification must have a basic understanding of North Carolina family law. Applicants should be able to demonstrate that they have completed at least twelve hours of basic family law education by:

a. attending workshops or programs on topics such as separation and divorce, alimony and postseparation support, equitable distribution, child custody and support, and domestic violence;

b. completing an independent study on these topics, such as viewing or listening to video or audio programs on family law topics; or

c. having equivalent North Carolina family law experience, including work experience that satisfies one

of the categories set forth in the Commission's policy on interpreting Rule 8(a)(1) (e.g., the applicant is an experienced family law judge or board certified family law attorney).

(2) The applicant for certification must:

a. have an Advanced Practitioner Designation from the Association for Conflict Resolution (ACR) and have earned an undergraduate degree from an accredited four-year college or university; or

b. have completed either (i) forty hours of Commission certified family and divorce mediation training; or (ii) forty hours of Commission-certified trial court mediation training and sixteen hours of Commission certified supplemental family and divorce mediation training; and be

1. a member in good standing of the North Carolina State Bar or a member similarly in good standing of the bar of another state and eligible to apply for admission to the North Carolina State Bar under Chapter 1, Subchapter C, of the North Carolina State Bar Rules and the Rules Governing the Board of Law Examiners and the Training of Law Students, 27 N.C. Admin. Code 1C.0105, with at least five years of experience after the date of licensure as a judge, practicing attorney, law professor, or mediator, or must possess equivalent experience;

2. a licensed psychiatrist under N.C.G.S. § 90-9.1, with at least five years of experience in the field after the date of licensure;

3. a licensed psychologist under N.C.G.S. §§ 90-270.1 to -270.22, with at least five years of experience in the field after the date of licensure;

4. a licensed marriage and family therapist under N.C.G.S. §§ 90-270.45 to -270.63, with at least five years of experience in the field after the date of licensure;

5. a licensed clinical social worker under N.C.G.S. § 90B-7, with at least five years of experience in the field after the date of licensure;

6. a licensed professional counselor under N.C.G.S. §§ 90-329 to -345, with at least five years of experience in the field after the date of licensure; or

7. an accountant certified in North Carolina, with at least five years of experience in the field after the date of certification.

(3) If the applicant is not licensed to practice law in one of the United States, then the applicant must have completed six hours of training on North Carolina legal terminology, court structure, and civil procedure, provided by a Commission-certified trainer. An attorney licensed to practice law in a state other than North Carolina shall satisfy this requirement by completing a self-study course, as directed by Commission staff.

(4) If the applicant is not licensed to practice law in North Carolina, then the applicant must provide three letters of reference to the Commission about the applicant's good character, including at least one letter from a person with knowledge of the applicant's professional practice and experience qualifying the applicant under subsection (a) of this rule.

(5) The applicant must have observed, as a neutral observer and with the permission of the parties, two mediations involving a custody or family financial issue conducted by a mediator who (i) is certified under these rules, (ii) has an Advanced Practitioner Designation from the ACR, or (iii) is a mediator certified by the NCAOC for custody matters. Mediations eligible for observation shall also include mediations conducted in matters prior to litigation of family financial disputes that are mediated by agreement of the parties and incorporate these rules.

If the applicant is not an attorney licensed to practice law in one of the United States, then the applicant must observe three additional mediations involving civil or family-related disputes, or disputes prior to litigation that are conducted by a Commission-certified mediator

and are conducted pursuant to a court order or an agreement of the parties incorporating the mediation rules of a North Carolina state or federal court.

All mediations shall be observed from their beginning until settlement, or until the point that an impasse has been declared, and shall be reported by the applicant on a Certificate of Observation - Family Financial Settlement Conference Program, Form AOC-DRC-08. All observers shall conform their conduct to the Commission's policy on *Guidelines for Observer Conduct*.

(6) The applicant must demonstrate familiarity with the statutes, rules, standards of practice, and standards of conduct governing mediated settlement conferences conducted in North Carolina.

(7) The applicant must be of good moral character and adhere to the Standards of Professional Conduct for Mediators when acting under these rules. On his or her application(s) for certification or application(s) for certification renewal, an applicant shall disclose any:

a. pending criminal charges;

b. criminal convictions;

c. restraining orders issued against him or her;

d. failures to appear;

e. pending or closed grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country;

f. disciplinary action taken against him or her by a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country, including, but not limited to, disbarment, revocation, decertification, or suspension of any professional license or certification, including the suspension or revocation of any license, certification, registration, or qualification to serve as a mediator in another state or country, even if stayed;

g. judicial sanctions imposed against him or her in any jurisdiction; or

h. civil judgments, tax liens, or bankruptcy filings that occurred within the ten years preceding the date that the initial or renewal application was filed with the Commission.

A mediator shall report to the Commission any of the above-enumerated matters arising subsequent to the disclosures reported on the initial or renewal application for certification within thirty days of receiving notice of the matter.

As referenced in this subsection, criminal charges or convictions (excluding infractions) shall include felonies, misdemeanors, or misdemeanor traffic violations (including driving while impaired) under the law of North Carolina or another state, or under the law of a federal, military, or foreign jurisdiction, regardless of whether adjudication was withheld (prayer for judgment continued) or the imposition of a sentence was suspended.

(8) The applicant must submit proof of the qualifications set out in this rule on a form provided by the Commission.

(9) The applicant must pay all administrative fees established by the NCAOC upon the recommendation of the Commission.

(10) The applicant must agree to accept the fee ordered by the court under Rule 7 as payment in full of a party's share of the mediator's fee.

(11) The applicant must comply with the requirements of the Commission for completing and reporting continuing mediator education or training.

(12) The applicant must agree, once certified, to make reasonable efforts to assist applicants for mediator certification in completing their observation requirements.

(b) No mediator who held a professional license and relied upon that license to qualify for certification under subsection (a)(2)(b) of this rule shall be decertified or denied recertification because the mediator's license lapses, is relinquished, or becomes inactive; provided, however, that this subsection shall not apply to a mediator whose professional license is revoked, suspended, lapsed, or relinquished, or whose professional license becomes inactive due to disciplinary action, or the threat of disciplinary action, from the mediator's licensing authority. Any mediator whose professional license is revoked, suspended, lapsed,

relinquished, or whose professional license becomes inactive shall report the matter to the Commission.

(c) A mediator's certification may be revoked or not renewed at any time if it is shown to the satisfaction of the Commission that a mediator no longer meets the qualifications set out in this rule or has not faithfully observed these rules or those of any judicial district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible for certification under this rule. No application for certification renewal shall be denied on the ground that the mediator's training and experience does not satisfy a training and experience requirement promulgated after the date of the mediator's original certification.

Comment

Comment to Rule 8(a)(3). Commission staff has discretion to waive the requirements set out in Rule 8(a)(3) if an applicant can demonstrate sufficient familiarity with North Carolina legal terminology, court structure, and civil procedure.

Rule 9. Certification of Mediation Training Programs

(a) Certified training programs for mediators who are seeking certification under Rule 8(a)(2)(b) shall consist of a minimum of forty hours of instruction. The curriculum of such programs shall include the following topics:

(1) Conflict resolution and mediation theory.

(2) Mediation process and techniques, including the process and techniques of mediating family and divorce matters in district court.

(3) Communication and information gathering.

(4) Standards of conduct for mediators, including, but not limited to, the Standards of Professional Conduct for Mediators.

(5) Statutes, rules, and practices governing mediated settlement conferences for family financial matters in district court.

(6) Demonstrations of mediated settlement conferences, both with and without attorney involvement.

(7) Simulations of mediated settlement conferences, involving student participation as the mediator, attorneys, and disputants, which shall be supervised, observed, and evaluated by program faculty.

(8) An overview of North Carolina law as it applies to child custody and visitation, equitable distribution, alimony, child support, and postseparation support.

(9) An overview of family dynamics, the effect of divorce on children and adults, and child development.

(10) Protocols for screening cases for issues involving domestic violence and substance abuse.

(11) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules, and practices governing settlement procedures for family financial matters in district court.

(b) Certified training programs for mediators certified under Rule 8(a) shall consist of a minimum of sixteen hours of instruction and the curriculum shall include the topics listed in subsection (a) of this rule. There shall be at least two simulations as required by subsection (a)(7) of this rule.

(c) A training program must be certified by the Commission before a mediator's attendance at the program may be used to satisfy the training requirement under Rule 8(a). Certification does not need to be given in advance of attendance. Training programs attended prior to the promulgation of these rules, attended in other states, or approved by the ACR may be approved by the Commission if they are in substantial compliance with the standards set forth in this rule. The Commission may require attendees of an ACR-approved program to demonstrate compliance with the requirements of subsections (a)(5) and (a)(8) of this rule.

(d) To complete certification, a training program shall pay all administrative fees required by the NCAOC, in consultation with the Commission.

Rule 10. Other Settlement Procedures

(a) **Order Authorizing Other Settlement Procedures**. Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the court may order the use of the settlement procedures under subsection (b) of this rule, unless the court finds: that the parties did not agree on the procedure to be utilized, the neutral to conduct the procedure, or the neutral's compensation; or that the procedure selected is not appropriate for the case or the parties. A judicial settlement conference may be ordered only if permitted by local rule.

(b) **Other Settlement Procedures Authorized by These Rules**. In addition to a mediated settlement conference, the following settlement procedures are authorized by these rules:

(1) Neutral evaluation under Rule 11 (a settlement procedure in which a neutral offers an advisory evaluation of the case following summary presentations by each party).

(2) A judicial settlement conference under Rule 12 (a settlement procedure in which the court assists the parties in reaching their own settlement, if allowed by local rule).

(3) Other settlement procedures under Rule 13 (a settlement procedure described and authorized by local rule pursuant to Rule 13).

The parties may agree to arbitrate the dispute under the Family Law Arbitration Act, N.C.G.S. §§ 50-41 to 50-62, which shall constitute good cause for the court to dispense with the settlement procedures authorized under Rule 1(d).

(c) **General Rules Applicable to Other Settlement Procedures**.

(1) **When the Proceeding Is Conducted**. The neutral shall schedule and conduct the proceeding no later than 150 days from the issuance of the court's order, or no later than the deadline for completion set out in the court's order, unless the deadline is extended by the court. The neutral shall make an effort to schedule the proceeding at a time that is convenient to all participants. In the absence of agreement, the neutral shall select a date and time for the proceeding. The deadline for the completion of the proceeding shall be strictly observed by the neutral, unless the deadline is changed by written order of the court.

(2) **Extensions of Time**. A party or a neutral may request that the court extend the deadline for completion of the settlement proceeding. The request for an extension shall state the reasons the extension is sought and shall be served by the movant on the other parties and the neutral. The court may grant the extension and enter an order setting a new deadline for the completion of the settlement proceeding. A copy of the order shall be delivered to all parties and the neutral by the person who sought the extension.

(3) **Where the Proceeding Is Conducted**. Settlement proceedings shall be held in any location agreeable to the parties. If the parties cannot agree to a location, then the neutral shall be responsible for reserving a neutral place, making arrangements for the proceeding, and giving timely notice of the time and location of the proceeding to all attorneys and pro se parties.

(4) **No Delay of Other Proceedings**. Settlement proceedings shall not be the cause for a delay of other proceedings in the case, including, but not limited to, the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the court.

(5) **Inadmissibility of Settlement Proceedings**. Evidence of statements made and conduct that occurs in a mediated settlement conference or other settlement proceeding conducted under this rule, whether attributable to a party, mediator, neutral, or neutral-observer present at the settlement proceeding, shall not be subject to discovery and shall be inadmissible in any proceeding in the case or in another civil dispute involving the same claim, except:

a. in proceedings for sanctions under subsection (c) of this rule;

b. in proceedings to enforce or rescind a settlement of the dispute;

c. in disciplinary proceedings before the North Carolina State Bar or any agency established to enforce the Standards of Professional Conduct for Mediators or standards of conduct for other neutrals; or

d. in proceedings to enforce laws concerning juvenile or elder abuse.

As used in this subsection, "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

No settlement agreement to resolve any or all issues reached at a proceeding conducted under this rule, or during its recesses, shall be enforceable unless the agreement has been reduced to writing, signed by the parties, and complies with the requirements of Chapter 50 of the

General Statutes of North Carolina. No evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No mediator, neutral, or neutral-observer present at a settlement proceeding under this rule shall be compelled to testify or produce evidence in any civil proceeding concerning statements made and conduct that occurs in anticipation of, during, or as a follow-up to a mediated settlement conference or other settlement proceeding under subsection (c) of this rule. This includes proceedings to enforce or rescind a settlement of the dispute, except to attest to the signing of any agreement, and during proceedings for sanctions under this section, proceedings to enforce laws concerning juvenile or elder abuse, and disciplinary hearings before the North Carolina State Bar or any agency established to enforce the Standards of Professional Conduct for Mediators or standards of conduct for other neutrals.

(6) **No Record Made**. There shall be no stenographic or other record made of any proceedings under these rules.

(7) **Ex Parte Communications Prohibited**. Unless all parties agree otherwise, there shall be no ex parte communication prior to the conclusion of the proceeding between the neutral and a party or a party's attorney on any matter related to the proceeding, except about administrative matters.

(8) **Duties of the Parties**.

a. **Attendance**. All parties and attorneys shall attend any settlement proceeding ordered by the court.

b. **Finalizing Agreement**.

1. If an agreement that resolves all issues in the dispute is reached at the neutral evaluation, judicial settlement conference, or other settlement proceeding, then the essential terms of the agreement shall be reduced to writing in a summary memorandum, unless the parties have reduced their agreement to writing in another form, signed the writing, and, in all other respects, complied with the requirements of Chapter 50 of the General Statutes of

North Carolina. The parties and the parties' attorneys shall use the summary memorandum to guide them in drafting any agreements or orders that may be required to give legal effect to the terms of their agreement. Within thirty days of the proceeding, all final agreements and other dispositive documents shall be executed by the parties and notarized, and all judgments or voluntary dismissals shall be filed with the court by such persons as the parties or the court designate.

2. If an agreement that resolves all issues in the dispute is reached prior to the neutral evaluation, judicial settlement conference, or other settlement proceeding, or is finalized while the proceeding is in recess, then the parties shall reduce the terms of the agreement to writing and sign the writing, along with their counsel. The agreement shall comply with the requirements of Chapter 50 of the General Statutes of North Carolina. Any consent judgment or voluntary dismissal disposing of all issues shall be filed with the court within thirty days of the proceeding or before the expiration of the deadline for completion of the proceeding, whichever is later.

3. When an agreement is reached upon all issues, all attorneys of record must notify the court within four business days of the settlement and advise the court who will sign the consent judgment or voluntary dismissal.

c. **Payment of the Neutral's Fee**. The parties shall pay the neutral's fee under subsection (c)(12) of this rule, except that no compensation shall be required for a judicial settlement conference.

(9) **Sanctions for Failure to Attend Other Settlement Procedure or Pay the Neutral's Fee**. Any person required to attend a settlement proceeding or pay a neutral's fee in compliance with N.C.G.S. § 7A-38.4A and these rules who fails to attend the proceeding or pay the neutral's fee without good cause shall be subject to

the contempt power of the court and any monetary sanctions imposed by the court. The monetary sanctions may include, but are not limited to, the payment of fines, attorneys' fees, the neutral's fee, expenses, and loss of earnings incurred by persons attending the settlement proceeding. A party seeking sanctions against a party, or the court on its own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. The motion shall be served on all parties and any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so after notice and a hearing in a written order making findings of fact, supported by substantial evidence, and conclusions of law.

(10) **Selection of Neutrals in Other Settlement Procedures**. The parties may select any person whom they believe can assist them with the settlement of their case to serve as a neutral in a settlement proceeding authorized under these rules, except in a judicial settlement conference.

Notice of the parties' selection shall be given to the court and to the neutral by filing a Motion for an Order to Use Settlement Procedure Other Than Mediated Settlement Conference or Judicial Settlement Conference in Family Financial Case, Form AOC-CV-826, at the scheduling and discovery conference or the court appearance during which potential settlement procedures are considered by the court. The motion shall state: (i) the name, address, and telephone number of the neutral selected; (ii) the rate of compensation of the neutral; and (iii) that the neutral and opposing counsel have agreed upon the selection and compensation.

If the parties are unable to select a neutral by agreement, then the court shall deny the motion and order the parties to attend a mediated settlement conference.

(11) **Disqualification of Neutrals**. Any party may move the court for an order disqualifying a neutral and, for good cause, an order disqualifying the neutral shall be entered. Good cause exists if the selected neutral has violated the standards of conduct of the North Carolina State Bar or any standards of conduct for neutrals adopted by the Supreme Court.

(12) **Compensation of Neutrals**. A neutral's compensation shall be paid in an amount agreed to by the parties and the neutral. Time spent reviewing materials in preparation for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time. The parties shall not compensate a settlement judge.

(13) **Authority and Duties of the Neutral**.

a. **Authority of the Neutral**.

1. **Control of the Proceeding**. The neutral shall at all times be in control of the proceeding and the procedures to be followed.

2. **Scheduling the Proceeding**. The neutral shall make a good faith effort to schedule the proceeding at a time that is convenient to the participants, attorneys, and the neutral. In the absence of agreement, the neutral shall select the date and time for the proceeding. The deadline set by the court for the completion of the proceeding shall be strictly observed by the neutral, unless the deadline is changed by written order of the court.

b. **Duties of the Neutral**.

1. **Informing the Parties**. At the beginning of the proceeding, the neutral shall define and describe for the parties:

i. the process of the proceeding;

ii. the differences between the proceeding ordered by the court and other forms of conflict resolution;

iii. the costs of the proceeding;

iv. the admissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1(*l*) and subsection (c)(5) of this rule; and

v. the duties and responsibilities of the neutral and the participants.

2. **Disclosure**. The neutral has a duty to be impartial and to advise all participants of any

circumstances bearing on possible bias, prejudice, or partiality.

3. **Reporting the Results of the Proceeding**. The neutral, settlement judge, or other type of neutral shall report the results of the proceeding to the court within ten days, using a Report of Neutral Conducting Settlement Procedure Other Than Mediated Settlement Conference in Family Financial Case, Form AOC-CV-834, in accordance with Rule 11 and Rule 12. The NCAOC, in consultation with the Commission, may require the neutral to provide statistical data for evaluation of other settlement procedures.

4. **Scheduling and Holding the Proceeding**. It is the duty of the neutral to schedule and conduct the proceeding prior to the completion deadline set out in the court's order. The deadline for completion of the proceeding shall be strictly observed by the neutral, unless the deadline is changed by a written order of the court.

Rule 11. Rules for Neutral Evaluation

(a) **Nature of Neutral Evaluation**. Neutral evaluation is an informal, abbreviated presentation of the facts and issues by the parties to a neutral at an early stage of the case. The neutral is responsible for evaluating the strengths and weaknesses of the case, providing a candid assessment of the merits of the case, the settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The neutral is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

(b) **When the Neutral Evaluation Conference Is to Be Held**. As a guiding principle, the neutral evaluation conference should be held at an early stage of the case, after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

(c) **Preconference Submissions**. No later than twenty days prior to the date established for the neutral evaluation conference to begin, each party shall provide the neutral with written information about the case and shall certify to the neutral that they provided a copy of such summary to all other parties in the case. The information provided to

the neutral and the other parties shall be a summary of the significant facts and issues in the party's case and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the neutral and to the other parties under this paragraph shall not be filed with the court.

(d) **Replies to Preconference Submissions**. No later than ten days prior to the date set for the neutral evaluation conference to begin, any party may, but is not required to, send additional information to the neutral in writing in response to a question from an opposing party. The response furnished to the neutral shall be served on all other parties and the party sending such response shall certify such service to the neutral, but the response shall not be filed with the court.

(e) **Neutral Evaluation Conference Procedure**. Prior to a neutral evaluation conference, the neutral may request additional information in writing from any party. At the conference, the neutral may address questions to the parties and give the parties an opportunity to complete their summaries with a brief oral statement.

(f) **Modification of Procedure**. Subject to the approval of the neutral, the parties may agree to modify the procedures required by these rules for neutral evaluation.

(g) **Neutral's Duties**.

(1) **Neutral's Opening Statement**. At the beginning of the neutral evaluation conference, in addition to the matters set out in Rule 10(c)(13)(b), the neutral shall define and describe for the parties:

a. the fact that the neutral evaluation conference is not a trial, that the neutral is not a judge, that the neutral's opinions are not binding on any party, and that the parties retain the right to a trial if they do not reach a settlement; and

b. the fact that any settlement reached will be only by mutual consent of the parties.

(2) **Oral Report to Parties by Neutral**. In addition to the written report to the court required under these rules, at the conclusion of the neutral evaluation conference, the neutral shall issue an oral report to the parties advising them of the neutral's opinion about the case. The opinion shall include a candid assessment of the merits of the case, an estimated settlement value, and the strengths

and weaknesses of each party's claims in the event that the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reason for the neutral's suggestion. The neutral shall neither reduce his or her oral report to writing nor inform the court of the oral report.

(3) **Report of Neutral to Court**. Within ten days after the completion of the neutral evaluation conference, the neutral shall file a written report with the court using a NCAOC form. The report shall inform the court when and where the conference was held, the names of those who attended the conference, and the name of any party or attorney known by the neutral to have been absent from the conference without permission. The report shall also inform the court whether an agreement was reached by the parties. If a partial agreement is reached at the conference, then the report shall state the issues that remain for trial. In the event of a full or partial agreement, the report shall also state the name of the person designated to file the consent judgment or voluntary dismissal with the court. Local rules shall not require the neutral to send a copy of any agreement reached by the parties to the court.

(h) **Neutral's Authority to Assist in Negotiations**. If all parties to the neutral evaluation conference request and agree, then a neutral may assist the parties in settlement discussions. However, if the parties do not reach a settlement during such discussions, then the neutral shall complete the conference and make his or her written report to the court as if the settlement discussions had not occurred. If the parties reach an agreement at the conference, then they shall reduce their agreement to writing as required under Rule 10(c)(8)(b).

Rule 12. Rules for Judicial Settlement Conferences

(a) **Settlement Judge**. A judicial settlement conference shall be conducted by a district court judge who is selected by the chief district court judge of the judicial district. Unless specifically approved by the chief district court judge, the settlement judge shall not be assigned to try the case in the event that the case proceeds to trial.

(b) **Conducting the Judicial Settlement Conference**. The form and manner of conducting a judicial settlement conference shall be in the discretion of the settlement judge. The settlement judge may not

impose a settlement on the parties, but will assist the parties in reaching a resolution of all claims.

(c) **Confidential Nature of the Judicial Settlement Conference**. A judicial settlement conference shall be conducted in private. There shall be no stenographic or other recording of the conference. Persons other than the parties and their counsel may attend the conference only with the consent of all parties. The settlement judge shall not communicate with anyone regarding communications made during the conference, except that the settlement judge may report that a settlement was reached and, with the parties' consent, the terms of the settlement.

(d) **Report of the Settlement Judge**. Within ten days after the completion of the judicial settlement conference, the settlement judge shall file a written report with the court using a NCAOC form, stating when and where the conference was held, the names of those persons who attended the conference, and the name of any party or attorney known by the settlement judge to have been absent from the conference without permission. The report shall also inform the court whether an agreement was reached by the parties. If a partial agreement is reached at the conference, then the report shall state the issues that remain for trial. In the event of a full or partial agreement, the report shall also state the name of the person designated to file the consent judgment or voluntary dismissal with the court. Local rules shall not require the settlement judge to send a copy of any agreement reached by the parties to the court.

Rule 13. Local Rule Making

The chief district court judge of any district conducting settlement procedures under these rules is authorized to publish local rules, not inconsistent with these rules and N.C.G.S. § 7A-38.4A, implementing settlement procedures in that district.

Rule 14. Definitions

(a) "Court," as used throughout these rules, refers to a judge of the district court in the judicial district where a case is pending who has administrative responsibility for the case as the assigned or presiding judge or, as appropriate, the judge's designee.

(b) "NCAOC form" refers to a form prepared, printed, and distributed by the NCAOC to implement these rules, or a form approved by local rule which contains at least the same information as a form prepared by the NCAOC. Proposals for the creation or modification of a form may be initiated by the Commission.

(c) "Family financial case" refers to any civil case in district court in which a claim for equitable distribution, child support, alimony, or postseparation support is made, or in which there are claims arising out of contracts between the parties under N.C.G.S. §§ 50-20(d), 52-10, 52-10.1, or under Chapter 52B of the General Statutes of North Carolina.

Rule 15. Time Limits

Any time limit provided for by these rules may be waived or extended for good cause shown. Time shall be counted pursuant to the North Carolina Rules of Civil Procedure.

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ORDER ADOPTING THE RULES OF MEDIATION FOR MATTERS BEFORE THE CLERK OF SUPERIOR COURT

Pursuant to subsection 7A-38.3B(b) of the General Statutes of North Carolina, the Court hereby adopts the Rules of Mediation for Matters Before the Clerk of Superior Court, which appear on the following pages. These rules supersede the Rules Implementing Mediation in Matters Before the Clerk of Superior Court, published at 367 N.C. 1109–24, and waived in part at 369 N.C. 977–78.

The Rules of Mediation for Matters Before the Clerk of Superior Court become effective on 1 March 2020.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 23rd day of January, 2020.

Mark A. Davis

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of January, 2020.

Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

Rules of Mediation for Matters Before the Clerk of Superior Court

Rule 1. Mediation of Matters Before the Clerk of Superior Court

(a) **Purposes of Mandatory Mediation**. These rules are promulgated under N.C.G.S. § 7A-38.3B to implement mediation in certain cases within the jurisdiction of the clerk of superior court. The procedures set out in these rules are designed to focus the parties' attention on settlement and resolution, rather than on preparation for contested hearings, and to provide a structured opportunity for settlement negotiations to take place. Nothing in these rules is intended to limit or prevent the parties from engaging in other settlement efforts voluntarily, either prior to, or after, the filing of a matter with the clerk.

(b) **Duty of Counsel to Consult with Clients and Opposing Counsel Concerning Settlement Procedures**. In furtherance of the purposes set out in subsection (a) of this rule, upon being retained to represent a party to a matter before the clerk, counsel shall discuss the options available to the parties to resolve their dispute through mediation and other settlement procedures without resort to a contested hearing. Counsel shall also discuss which settlement procedure and third party neutral would best suit their clients and the matter in dispute.

(c) **Initiating the Mediation by Order of the Clerk**.

(1) **Order of the Clerk**. The clerk of any county may, using an Order Regarding Mediation in Matters Before Clerk of Superior Court, Form AOC-G-301, order all persons identified in Rule 4 to attend mediation in any matter in which the clerk has original or exclusive jurisdiction, except in matters under Chapter 45 and Chapter 48 of the General Statutes of North Carolina and matters in which the jurisdiction of the clerk is ancillary.

(2) **Content of the Order**. The order shall:

a. require that a mediation be held in the case;

b. establish deadlines for the selection of a mediator and completion of the mediation;

c. state the names of the persons who shall attend the mediation;

d. state clearly that the persons ordered to attend the mediation have the right to select their own mediator, as provided by Rule 2;

e. state the rate of compensation of the court-appointed mediator, if the parties do not exercise their right to select a mediator under Rule 2; and

f. state that the parties shall be required to pay the mediator's fee in shares determined by the clerk.

(3) **Motion for Court-Ordered Mediation**. In matters not ordered to mediation, any party, interested person, or fiduciary may file a written motion with the clerk requesting that mediation be ordered. The motion shall state the reasons why the order should be allowed and shall be served in accordance with Rule 5 of the North Carolina Rules of Civil Procedure on the nonmovant, interested persons, and fiduciaries designated by the clerk or identified by the petitioner in the pleadings. Objections to the motion may be filed in writing within five days after the date of service of the motion. Thereafter, the clerk shall rule on the motion without a hearing and notify the parties or their attorneys of the ruling.

(4) **Informational Brochure**. The clerk shall provide the parties with a brochure prepared by the Dispute Resolution Commission (Commission) explaining the mediation process and the operations of the Commission, along with a copy of both the order under subsection (c)(1) of this rule and the motion under subsection (c)(3) of this rule.

(5) **Motion to Dispense with Mediation**. A named party, interested person, or fiduciary may move the clerk to dispense with a mediation ordered by the clerk. The motion shall state the reasons that relief is sought and shall be served on all persons ordered to attend the mediation and the mediator. For good cause shown, the clerk may grant the motion.

(6) **Dismissal of Petition for Adjudication of Incompetence**. The petitioner shall not voluntarily dismiss a petition for adjudication of incompetence after a mediation is ordered.

Rule 2. Designation of the Mediator

(a) **Designation of a Mediator by Agreement of the Parties**. By agreement, the parties may designate a mediator certified by the Commission within the time period set out in the clerk's order. However,

in estate and guardianship matters, the parties may designate only those mediators who are certified under these rules for estate and guardianship matters.

A Designation of Mediator in Matter Before Clerk of Superior Court, Form AOC-G-302 (Designation Form), must be filed within the time period set out in the clerk's order. The petitioner should file the Designation Form; however, any party may file the Designation Form. The party filing the Designation Form shall serve a copy on all parties and the mediator designated to conduct the mediation. The Designation Form shall state: (i) the name, address, and telephone number of the mediator designated; (ii) the rate of compensation of the mediator; (iii) that the mediator and the persons ordered to attend the mediation have agreed on the designation and the rate of compensation; and (iv) under which rules the mediator is certified.

(b) **Appointment of a Mediator by the Clerk**. In the event that a Designation Form is not filed with the clerk within the time period for filing stated in the clerk's order, the clerk shall appoint a mediator certified by the Commission. The clerk shall appoint only those mediators certified under these rules for estate and guardianship matters to those matters. The clerk may appoint any certified mediator who has expressed a desire to be appointed to mediate all other matters within the jurisdiction of the clerk.

Except for good cause, mediators shall be appointed by the clerk by rotation from a list of those certified mediators who wish to be appointed for matters within the clerk's jurisdiction, without regard to occupation, race, gender, religion, national origin, disability, or whether the mediator is an attorney.

As part of the application or annual certification renewal process, all mediators shall designate those counties for which they are willing to accept court appointments. Each designation shall be deemed to be a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated county and will not charge for travel time and expenses incurred in carrying out his or her duties associated with those appointments. A mediator's refusal to accept an appointment in a county designated by the mediator may be grounds for removal from that county's court-appointment list by the Commission or by the clerk of that county.

The Commission shall provide to the clerk of each county a list of superior court mediators requesting appointments in that county who are certified in estate and guardianship proceedings, and those certified

in other matters before the clerk. The list shall contain each mediator's name, address, and telephone number. The list shall be provided to the clerks electronically on the Commission's website at https://www.ncdrc.gov. The Commission shall promptly notify the clerk of any disciplinary action taken with respect to a mediator on the list of certified mediators for the county.

(c) **Mediator Information Directory**. The Commission shall maintain for the consideration of the clerks, and those designating mediators for matters within the clerk's jurisdiction, a directory of certified mediators who request appointments in those matters and a directory of mediators who are certified under these rules. The directory shall be provided to the clerks on the Commission's website at https://www.ncdrc.gov.

(d) **Disqualification of the Mediator**. Any person ordered to attend a mediation under these rules may move the clerk of the county in which the matter is pending for an order disqualifying the mediator. For good cause, an order disqualifying the mediator shall be entered. If the mediator is disqualified, a replacement mediator shall be designated or appointed under this rule. Nothing in this subsection shall preclude a mediator from disqualifying himself or herself.

Rule 3. The Mediation

(a) **Where the Mediation Is to Be Held**. The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree on a location, then the mediator shall be responsible for reserving a neutral place in the county where the action is pending, for making arrangements for the conference, and for giving timely notice of the time and location of the conference to all attorneys, pro se parties, and other persons required to attend.

(b) **When the Mediation Is to Be Held**. The clerk's order issued under Rule 1(c)(3) shall state a deadline for completion of the mediation. The mediator shall set a date and time for the mediation under Rule 6(b)(5) and shall conduct the mediation before the deadline, unless the deadline is extended by the clerk.

(c) **Extending Deadline for Completion**. The clerk may extend the deadline for completion of the mediation upon the clerk's own motion, upon stipulation by the parties, or upon the suggestion of the mediator.

(d) **Recesses**. The mediator may recess the mediation at any time and may set times for reconvening that are prior to the deadline for

completion. If the time for reconvening is set before the mediation is recessed, then no further notification is required for persons present at the mediation.

(e) **The Mediation Is Not to Delay Other Proceedings**. The mediation shall not be the cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the hearing of the matter, except by order of the clerk.

Rule 4. Duties of Parties, Attorneys, and Other Participants in Mediations

(a) **Attendance**.

(1) All persons ordered by the clerk to attend a mediation conducted under these rules shall physically attend the mediation until either an agreement is reduced to writing and signed, as provided in subsection (b) of this rule, or an impasse has been declared. Any person required to attend the mediation may have the attendance requirement excused or modified, including the allowance of that person's participation by telephone or teleconference, by:

a. agreement of all persons ordered to attend the mediation and the mediator; or

b. order of the clerk, upon the motion of a person ordered to attend the mediation and notice to all other persons ordered to attend the mediation and the mediator.

(2) Any nongovernmental entity ordered to attend a mediation conducted under these rules shall be represented at the mediation by an officer, employee, or agent who is not the entity's outside counsel and who has authority to decide on behalf of the entity whether, and on what terms, to settle the matter.

(3) Any governmental entity ordered to attend a mediation conducted under these rules shall be represented at the mediation by an employee or agent who is not the entity's outside counsel and who has authority to decide on behalf of the entity whether, and on what terms, to settle the matter; provided, however, that if proposed settlement terms can be approved only by a governing board, the employee or agent shall have authority to negotiate on behalf of the governing board.

(4) An attorney ordered to attend a mediation under these rules has satisfied the attendance requirement when at least one counsel of record for any person ordered to attend has attended the mediation.

(5) Other persons may participate in a mediation at the discretion of the mediator.

(6) Persons ordered to attend a mediation shall promptly notify the mediator, after selection or appointment, of any significant problems they have with the dates for mediation sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated mediation session is scheduled by the mediator.

(b) **Finalizing Agreement**.

(1) If an agreement is reached at the mediation, in matters that, as a matter of law, may be resolved by the parties by agreement, then the parties to the agreement shall reduce the terms of the agreement to writing and sign the writing along with their counsel. The parties shall designate a person who will file a consent judgment or a voluntary dismissal with the clerk, and that person shall sign the mediator's report. If an agreement is reached prior to or during a recess of the mediation, then the parties shall inform the mediator and the clerk that the matter has been settled and, within ten calendar days of the agreement, file a consent judgment or voluntary dismissal with the court.

(2) In all other matters, including guardianship and estate matters, if an agreement is reached upon some or all of the issues at the mediation, then the persons ordered to attend the mediation shall reduce the terms of the agreement to writing and sign the writing along with their counsel, if any. Such agreements are not binding upon the clerk, but may be offered into evidence at the hearing of the matter and may be considered by the clerk for a just and fair resolution of the matter. Evidence of statements made and conduct occurring in a mediation where an agreement is reached is admissible under N.C.G.S. § 7A-38.3B(g)(3).

All written agreements reached in such matters shall include the following language in a prominent

location in the document: "This agreement is not binding on the clerk but will be presented to the clerk as an aid to reaching a just resolution of the matter."

(c) **Payment of the Mediator's Fee**. The persons ordered to attend the mediation shall pay the mediator's fee as provided by Rule 7.

(d) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

Rule 5. Sanctions for Failure to Attend Mediation or Pay the Mediator's Fee

Any person ordered to attend a mediation under these rules who fails to attend or to pay a portion of the mediator's fee in compliance with N.C.G.S. § 7A-38.3B and these rules without good cause shall be subject to the contempt power of the clerk and any monetary sanctions imposed by the clerk. The monetary sanctions may include, but are not limited to, the payment of fines, attorneys' fees, the mediator's fee, expenses, and loss of earnings incurred by persons attending the mediation.

Any person seeking sanctions against another person shall do so in a written motion stating the grounds for the motion and the relief sought. The motion shall be served upon all persons ordered to attend the mediation. The clerk may initiate proceedings for sanctions upon his or her own motion by the entry of a show cause order. If the clerk imposes sanctions, then the clerk shall do so, after notice and a hearing, in a written order making findings of fact and conclusions of law. An order imposing sanctions is reviewable by the superior court under N.C.G.S. §§ 1-301.2 to 301.3, and by the appellate courts under N.C.G.S. § 7A-38.1(g).

Rule 6. Authority and Duties of the Mediator

(a) **Authority of the Mediator**.

(1) **Control of the Mediation**. The mediator shall at all times be in control of the mediation and the procedures to be followed. The mediator's conduct shall be governed by the Standards of Professional Conduct for Mediators.

(2) **Private Consultation**. The mediator may communicate privately with any participant or counsel prior to, during, and after the mediation. The fact that private communications have occurred with a participant before the

conference shall be disclosed to all other participants at the beginning of the mediation.

(b) **Duties of the Mediator**.

(1) **Informing the Parties**. At the beginning of the mediation, the mediator shall define and describe for the parties:

a. the process of mediation;

b. the costs of mediation and the circumstances in which participants will not be assessed the costs of mediation;

c. the fact that the mediation is not a trial, that the mediator is not a judge, and that the parties retain the right to a hearing if they do not reach a settlement;

d. the circumstances under which the mediator may meet and communicate privately with the parties or with any other person;

e. whether, and under what conditions, communications with the mediator will be held in confidence during the conference;

f. the inadmissibility of conduct and statements under N.C.G.S. § 7A-38.3B;

g. the duties and responsibilities of the mediator and the participants; and

h. the fact that any agreement reached will be reached by mutual consent and reported to the clerk under subsection (b)(4) of this rule.

(2) **Disclosure**. The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice, or partiality.

(3) **Declaring Impasse**. It is the duty of the mediator to determine in a timely manner when an impasse exists and when the mediation should end. The mediator shall inquire of and consider the desires of the parties to cease or continue the mediation.

(4) **Reporting Results of the Mediation**.

a. The mediator shall report to the court in writing on a form prescribed by the North Carolina

Administrative Office of the Courts (NCAOC) within five days of completing the mediation whether the mediation resulted in settlement or whether an impasse was declared. If settlement occurred prior to or during a recess of the mediation, then the mediator shall file the report of settlement within five days of receiving notice of the settlement and, in addition to the other information required, report on who informed the mediator of the settlement.

b. The mediator's report shall identify those persons attending the mediation, the time spent conducting the mediation and fees charged for the mediation, and the names and contact information of the persons designated by the parties to file a consent judgment or dismissal with the clerk, as required by Rule 4(b). Mediators shall provide statistical data for evaluation of the mediation program as required from time to time by the Commission or the NCAOC. Mediators shall not be required to send agreements reached in mediation to the clerk, except in estate and guardianship matters and other matters which may be resolved only by order of the clerk.

c. Mediators who fail to report as required under this rule shall be subject to the contempt power of the court and sanctions.

(5) **Scheduling and Holding the Mediation**. It is the duty of the mediator to schedule and conduct the mediation prior to the mediation completion deadline set out in the clerk's order. The mediator shall make an effort to schedule the mediation at a time that is convenient to all participants. In the absence of agreement, the mediator shall select a date and time for the mediation. The deadline for completion of the mediation shall be strictly observed by the mediator, unless the deadline is changed by a written order of the clerk.

Rule 7. Compensation of the Mediator

(a) **By Agreement**. When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the mediator.

(b) **By Order of the Clerk**. When the mediator is appointed by the clerk, the parties shall compensate the mediator for mediation services at the rate of $150 per hour. The parties shall also pay the mediator a one-time, per-case administrative fee of $150, due upon appointment.

(c) **Payment of Compensation**. In matters within the clerk's jurisdiction that, as a matter of law, may be resolved by the parties by agreement, the mediator's fee shall be paid in equal shares by the parties, unless otherwise agreed to by the parties. Payment shall be due upon completion of the mediation.

In all other matters before the clerk, including guardianship and estate matters, the mediator's fee shall be paid in shares determined by the clerk. A share of a mediator's fee may only be assessed against the estate of a decedent, a trust or guardianship, or against a fiduciary or interested person upon the entry of a written order making specific findings of fact justifying the assessment of costs.

(d) **Change of Appointed Mediator**. Parties who fail to select a certified mediator within the time set out in the clerk's order, but desire a substitution after the clerk has appointed a certified mediator, shall obtain the approval of the clerk for the substitution. The clerk may approve the substitution only upon proof of payment to the clerk's original appointee of the $150 one-time, per-case administrative fee, any other amount owed for mediation services under subsection (b) of this rule, and any postponement fee owed under subsection (f) of this rule, unless the clerk determines that payment of the fees would be unnecessary or inequitable.

(e) **Indigent Cases**. No person ordered to attend a mediation found to be indigent by the clerk for purposes of these rules shall be required to pay a share of the mediator's fee. Any person ordered by the clerk to attend a mediation may move the clerk for a finding of indigency and ask to be relieved of that person's obligation to pay a share of the mediator's fee. The motion shall be heard subsequent to the completion of the mediation, or if the parties do not settle their dispute, subsequent to the conclusion of the dispute. In ruling upon the motion, the clerk shall apply the criteria enumerated in N.C.G.S. § 1-110(a), but shall take into consideration the outcome of the dispute and whether a decision was rendered in the movant's favor. The clerk shall enter an order granting or denying the person's request for a finding of indigency. Any mediator conducting a mediation under these rules shall waive the fee requirement for persons found by the court to be indigent.

(f) **Postponements**.

(1) As used in subsection (f) of this rule, "postponement" means to reschedule or not proceed with a mediation once a date for the mediation has been scheduled by the mediator. After a mediation has been scheduled for a specific date, a person ordered to attend may not unilaterally postpone the mediation.

(2) A mediation may be postponed by the mediator for good cause only after notice by the movant to all persons of the reason for the postponement and a finding of good cause by the mediator. Upon a finding of good cause, a postponement fee shall not be assessed.

(3) Without a finding of good cause, a mediator may postpone a scheduled mediation session with the consent of all parties. If the mediation is postponed, a postponement fee of $150 shall be paid to the mediator. However, if the mediation is postponed within two business days of the scheduled date, then the postponement fee shall be $300. Postponement fees shall be paid by the party requesting the postponement. If it is not possible to determine who is responsible, then the clerk shall assess responsibility. Postponement fees are in addition to the one-time, per-case administrative fee provided for in subsection (b) of this rule. A postponement fee shall not be assessed when the mediator is responsible for the postponement.

(4) If all persons ordered to attend the mediation select the mediator and they contract with the mediator as to compensation, then the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required by subsection (f) of this rule.

(g) **Sanctions for Failure to Pay the Mediator's Fee**. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one-time, per-case administrative fee, the hourly fee for mediation services, or any postponement fee), or willful failure of a party contending indigent status to promptly move the clerk for a finding of indigency, shall constitute contempt of court and may result, after notice and a hearing, in the imposition of sanctions by the court under Rule 5.

Rule 8. Mediator Certification and Decertification

(a) The Commission may receive and approve applications for the certification of persons to be appointed as mediators for matters before the clerk.

(b) To be appointed by the clerk as a mediator in all cases within the clerk's jurisdiction, except in guardianship and estate matters, a person shall be certified by the Commission for either the superior or district court mediation programs.

(c) To be appointed by the clerk as a mediator in guardianship and estate matters within the clerk's jurisdiction, a person shall be certified as a mediator by the Commission for either superior or district court mediation programs and complete a course, at least ten hours in length and approved by the Commission under Rule 9, concerning estate and guardianship matters within the clerk's jurisdiction.

(d) To be approved as a mediator by the Commission under subsections (b) or (c) of this rule, a person shall also:

(1) submit proof of all qualifications set out in this rule on a form provided by the Commission;

(2) pay all administrative fees established by the NCAOC upon the recommendation of the Commission; and

(3) agree to accept the fee ordered by the clerk under Rule 7 as payment in full of a party's share of the mediator's fee.

(e) A mediator's certification may be revoked or not renewed whenever it is shown to the satisfaction of the Commission that a mediator no longer meets the qualifications described in this rule or has not faithfully observed these rules, those of any county in which he or she has served as a mediator, or the Standards of Professional Conduct for Mediators. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible for certification as a mediator under this rule.

Rule 9. Certification of Mediation Training Programs

(a) Certified training programs for mediators who are seeking certification as a mediator under these rules for estate and guardianship matters within the jurisdiction of the clerk shall consist of a minimum of ten hours of instruction. The curriculum of such programs shall include the following topics:

(1) Factors distinguishing estate and guardianship mediation from other types of mediation.

(2) The aging process and societal attitudes toward the elderly, disabled, and persons with a mental illness.

(3) How to ensure full participation of respondents and identifying interested persons and nonparty participants.

(4) Medical concerns of the elderly, disabled, and persons with a mental illness.

(5) Financial and accounting concerns in the administration of estates and financial accounting concerns of the elderly, disabled, and persons with a mental illness.

(6) Family dynamics relative to the elderly, disabled, and persons with a mental illness, and relative to deceased persons.

(7) How to assess physical and mental capacity.

(8) The availability of community resources for the elderly, disabled, and persons with a mental illness.

(9) Principles of guardianship law and procedure.

(10) Principles of estate law and procedure.

(11) Statutes, rules, and forms applicable to mediation conducted under these rules.

(12) Ethical and conduct issues relevant to mediations conducted under these rules.

The Commission may adopt guidelines for trainers amplifying these topics and may set out minimum time frames and materials that trainers shall allocate to each topic. The guidelines shall be available at the Commission's office and posted on the Commission's website at https://www.ncdrc.gov.

(b) A training program must be certified by the Commission before a mediator's attendance at the program may be used to satisfy the training requirement under Rule 8(c). Certification does not need to be given in advance of attendance. Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Commission if they are in substantial compliance with the standards set forth in this rule.

(c) To complete certification, a training program shall pay all administrative fees required by the NCAOC, in consultation with the Commission.

Rule 10. Procedural Details

The clerk shall make all orders that are just and necessary to safeguard the interests of all persons, and may supplement all necessary procedural details in a manner that is not inconsistent with these rules.

Rule 11. Definitions

(a) "Clerk," as used throughout these rules, refers to the clerk of superior court or, as appropriate, the clerk's assistant or designee.

(b) "NCAOC form" refers to a form prepared, printed, and distributed by the NCAOC to implement these rules, or a form approved by local rule which contains at least the same information as a form prepared by the NCAOC. Proposals for the creation or modification of a form may be initiated by the Commission.

Rule 12. Time Limits

Any time limit provided for by these rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the North Carolina Rules of Civil Procedure.

* * *

ORDER ADOPTING THE RULES OF MEDIATION FOR MATTERS IN DISTRICT CRIMINAL COURT

Pursuant to subsection 7A-38.3D(d) of the General Statutes of North Carolina, the Court hereby adopts the Rules of Mediation for Matters in District Criminal Court, which appear on the following pages. These rules supersede the Rules Implementing Mediation in Matters Pending in District Criminal Court, published at 367 N.C. 1125–38.

The Rules of Mediation for Matters in District Criminal Court become effective on 1 March 2020.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 23rd day of January, 2020.

Mark A. Davis

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of January, 2020.

Amy L. Funderburk

AMY L. FUNDERBURK
Clerk of the Supreme Court

Rules of Mediation for Matters in District Criminal Court

Rule 1. Voluntary Mediation of Criminal Matters in District Court

(a) **Purposes of Mediation**. These rules are promulgated under N.C.G.S. § 7A-38.3D to implement programs for voluntary mediation of certain criminal cases within the jurisdiction of the district court. The procedures in these rules are intended to assist private parties, with the help of a neutral mediator, in discussing and resolving their disputes and in conserving judicial resources. The chief district court judge, the district attorney, and the community mediation center shall determine whether to establish a program in a district court judicial district. Because participation in this program and in the mediation process is voluntary, no defendant, complaining witness, or any other person who declines to participate in mediation, or whose case cannot be settled in mediation, shall face any adverse consequences as a result of his or her failure to participate or reach an agreement. Consistent with N.C.G.S. § 7A-38.3D(j), a party's participation or failure to participate in mediation must be held confidential and not revealed to the court or the district attorney.

(b) **Definitions**.

(1) **Court**. "Court," as used throughout these rules, refers to a district court judge or, as appropriate, the judge's designee.

(2) **Mediation Process**. "Mediation process," as used throughout these rules, encompasses intake, screening, and mediation until either an impasse is declared or the case is dismissed.

(3) **District Attorney**. "District attorney," as used throughout these rules, refers to the district attorney, an assistant district attorney, or any staff member or designee of the district attorney.

(c) **Initiating the Mediation**.

(1) **Suggestion by the Court**. In judicial districts that establish a voluntary mediation program, the court may encourage private parties to attend mediation. In determining whether to encourage mediation, the court should consider:

a. whether the parties are willing to participate;

b. whether continuing prosecution is in the best interests of the parties or any nonparties impacted by the dispute;

c. whether the parties involved in the dispute have an expectation of a continuing relationship and whether there is an issue underlying their dispute that has not been addressed and which may create later conflict or require court involvement;

d. whether cross-warrants have been filed in the case; and

e. whether the case might otherwise be subject to voluntary dismissal.

(2) **Multiple Charges**. Multiple charges pending in the same court against a single defendant, or pending against multiple defendants and involving the same complainant or complainants, may be consolidated for the purpose of holding a single mediation in the matter. Charges pending in multiple courts may be consolidated for purposes of mediation with the consent of those courts.

(3) **Timing of Suggestion**. The court shall encourage parties to attend and participate in mediation as soon as practicable. Since there is no possibility of incarceration resulting from any agreement reached in mediation, the court is not required to provide a court-appointed attorney to a defendant prior to mediation.

(4) **Notice to Parties**. When the parties have agreed to attend mediation, the court shall provide notice to the parties, either orally or in writing on a form prescribed by the North Carolina Administrative Office of the Courts (NCAOC), of the following: (i) the deadline for completion of the mediation process, (ii) the name of the mediator who will mediate the dispute or the name of the community mediation center who will provide the mediator, and (iii) the fact that the defendant may be required to pay the dismissal fee set forth in Rule 5(b)(2). In lieu of providing this information orally or in writing, the court may refer the complaining witness and defendant to a community mediation center, whose staff shall advise the parties of the above information.

(5) **Motion for Mediation**. Any complainant or defendant may move the court, either orally or in writing, to have a mediation conducted in his or her dispute. If the motion is in writing, then the motion may be on a NCAOC form. The court shall determine whether the dispute is appropriate for referral to mediation.

(6) **Screening**. After a screening of the case or parties, a mediator or a community mediation center to which the parties are referred for mediation shall advise the court if the matter is not appropriate for mediation.

Rule 2. Program Administration

Under N.C.G.S. § 7A-38.3D(c), a community mediation center may assist a judicial district in administering and operating its mediation program for criminal matters in district court. The court may delegate to a center responsibility for the scheduling of cases and the center may provide volunteer and/or staff mediators to conduct the mediations. The center shall also maintain files in such mediations; record caseload statistics and other information as required by the court, the Dispute Resolution Commission (Commission), or the NCAOC, including tracking the number of cases referred to mediation and the outcome of those mediations; and, in accordance with N.C.G.S. § 7A-38.7 and N.C.G.S. § 7A-38.3D(m), oversee the dismissal process for cases resolved in mediation.

Rule 3. Appointment of the Mediator

(a) **Authority to Appoint**. When the parties have agreed to attend mediation, the court shall appoint a mediator provided by a community mediation center, or shall designate a center to appoint a mediator to conduct the mediation. The mediator appointed shall be certified under Rule 7 or shall be working toward certification under the supervision of the center to which the dispute is referred for mediation.

(b) **Disqualification of the Mediator**. For good cause shown, a complainant or defendant may move the court to disqualify the mediator appointed to conduct the mediation. If the mediator is disqualified, then the court shall appoint a new mediator to conduct the mediation. Nothing in this subsection precludes a mediator from disqualifying himself or herself.

Rule 4. The Mediation

(a) **Scheduling the Mediation**. The mediator appointed to conduct the mediation, or the community mediation center to which the matter has been referred by the court for appointment of a mediator,

shall be responsible for any scheduling that must be done prior to the mediation, any reporting required by these rules or local rules, and for maintaining any files that pertain to the mediation.

(b) **Where the Mediation Is to Be Held**. Mediation shall be held in the courthouse or, if a suitable space is available, in the offices of a community mediation center, or at any other place agreed upon by the mediator and parties.

(c) **Extending the Deadline for Completion**. The court may extend the deadline for completion of the mediation process upon its own motion or upon the suggestion of community mediation center staff.

(d) **Recesses**. The mediator may recess the mediation at any time and may set times for reconvening. If the time for reconvening is set before the mediation is recessed, then no further notification is required for persons present at the mediation. In recessing a matter, the mediator shall consider whether the parties wish to continue the mediation and whether they are making progress toward resolving their dispute.

(e) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

Rule 5. Duties of the Parties

(a) **Attendance**.

(1) **Physical Attendance Required**. A complainant or defendant who has agreed to attend mediation must physically attend the proceeding until an agreement is reached or the mediator has declared an impasse.

(2) **Attendees**. The following persons may attend and participate in mediation:

a. **Parents or Guardians of a Minor Party**. A parent or guardian of a minor complainant or defendant who has been encouraged by the court to attend may attend and participate in mediation. However, the court shall encourage attendance by a parent or guardian only in consultation with the mediator, and the mediator may later excuse the participation of a parent or guardian if the mediator determines that the parent or guardian's presence is not helpful to the process.

b. **Attorneys**. Attorneys representing the parties may physically attend and participate in mediation. Attorneys may also participate by advising clients before, during, and after mediation sessions, including monitoring compliance with any agreement reached.

c. **Others**. In the mediator's discretion, others whose presence and participation is deemed helpful either to resolving the dispute or addressing an issue underlying it may be permitted to attend and participate, unless and until the mediator determines that their presence is no longer helpful. Mediators may exclude anyone wishing to attend and participate, but whose presence and participation the mediator deems would likely be disruptive or counterproductive.

(3) **Exceptions to Physical Attendance**. A party or other person may be excused from physically attending the mediation and may be allowed to participate either by telephone or through an attorney:

a. by agreement of the complainant, defendant, and mediator; or

b. by order of the court.

(4) **Scheduling**. The complainant and defendant, and any parent, guardian, or attorney who will be attending the mediation, will:

a. make a good faith effort to cooperate with the mediator or community mediation center to schedule the mediation at a time that is convenient to all participants;

b. promptly notify the mediator or community mediation center of any significant scheduling concerns that may impact that person's ability to be present for mediation; and

c. notify the mediator or the community mediation center about any other concern that may impact a person's ability to attend and meaningfully participate—for example, the need for wheelchair access or for a deaf or foreign language interpreter.

(b) **Finalizing Agreement**.

(1) **Written Agreement**. If an agreement is reached at the mediation, then the complainant and defendant are to ensure that the terms of the agreement are reduced to writing and signed by the parties. Agreements that are not reduced to writing and signed will not be enforceable. If no agreement is reached in mediation, an impasse will be declared and the matter will be referred back to the court.

(2) **Dismissal Fee**. For charges to be dismissed by the district attorney, unless the parties agree to some other apportionment, the defendant shall pay a dismissal fee, as set out in N.C.G.S. § 7A-38.7 and N.C.G.S. § 7A-38.3D(m), to the clerk of superior court in the county where the case was filed and supply proof of payment to the community mediation center administering the program for the judicial district. Payment is to be made in accordance with the terms of the parties' agreement. The center shall, thereafter, provide the district attorney with a dismissal form, which may be a NCAOC form. In its discretion, the court may waive the dismissal fee under N.C.G.S. § 7A-38.3D(m) when the defendant is indigent, unemployed, a full-time college or high school student, a recipient of public assistance, or for any other appropriate reason. The mediator shall advise the parties where and how to pay the fee.

Rule 6. Authority and Duties of the Mediator

(a) **Authority of the Mediator**.

(1) **Control of the Mediation**. The mediator shall at all times be in control of the mediation process and the procedures to be followed. The mediator's conduct shall be governed by the Standards of Professional Conduct for Mediators.

(2) **Private Consultation**. The mediator may communicate privately with any participant or counsel prior to, and during, the mediation. The fact that a private communication has occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3) **Inclusion and Exclusion of Participants at the Mediation**. In the mediator's discretion, the mediator

may encourage or allow persons other than the parties or their attorneys to attend and participate in the mediation, provided that the mediator has determined the presence of such persons to be helpful in resolving the dispute or addressing an issue underlying it. Mediators may also exclude persons other than the parties and their attorneys whose presence the mediator deems would likely be, or which has been, counterproductive.

(4) **Scheduling the Mediation**. The mediator or community mediation center staff involved in scheduling, shall make a good faith effort to schedule the mediation at a time that is convenient to the parties and any parent, guardian, or attorney who will be attending. In the absence of agreement, the mediator or staff member shall select the date for the mediation and notify those who will be participating. Parties are to cooperate with the mediator in scheduling the mediation, including providing information as required by Rule 5(a)(4).

(b) **Duties of the Mediator**.

(1) **Informing the Parties**. At the beginning of the mediation, the mediator shall define and describe for the parties:

a. the process of mediation;

b. the fact that mediation is not a trial and that the mediator is not a judge, attorney, or therapist;

c. the fact that the mediator is present only to assist the parties in reaching their own agreement;

d. the circumstances under which the mediator may meet and communicate privately with the parties or with any other person;

e. whether, and under what conditions, communications with the mediator will be held in confidence during the mediation;

f. the inadmissibility of conduct and statements as provided in N.C.G.S. § 7A-38.3D(i);

g. the duties and responsibilities of the mediator and the participants;

h. the fact that any agreement reached will be by mutual consent;

i. the fact that, if the parties are unable to agree and the mediator declares an impasse, the parties and the case will return to court; and

j. the fact that, if an agreement is reached in mediation and the parties agree to request a dismissal of the charges pending in the case, the defendant shall pay a dismissal fee in accordance with N.C.G.S. § 7A-38.7 and N.C.G.S. § 7A-38.3D(m), unless: (i) the court, in its discretion, has waived the fee for good cause; or (ii) the parties agree to some other apportionment. Payment of the dismissal fee shall be made to the clerk of superior court in the county where the case was filed, and the community mediation center must provide the district attorney with a dismissal form and proof that the defendant has paid the dispute resolution fee before the charges can be dismissed.

(2) **Disclosure**. Consistent with the Standards of Professional Conduct for Mediators, the mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice, or partiality.

(3) **Declaring Impasse**. Consistent with the Standards of Professional Conduct for Mediators, it is the duty of the mediator to determine timely when an impasse exists and when the mediation should end. The mediator shall inquire of and consider the desires of the parties to cease or continue the mediation.

(4) **Reporting Results of the Mediation**. The mediator or community mediation center shall report the outcome of mediation to the court in writing on a NCAOC form by the date the case is next calendared. If the criminal case is scheduled for court on the same day as the mediation, then the mediator shall inform the attending district attorney of the outcome of the mediation before the close of court on that date, unless alternative arrangements are approved by the district attorney.

(5) **Scheduling and Holding the Mediation**. It is the duty of the mediator and the community mediation center to schedule and conduct the mediation prior to any deadline set by the court. Deadlines shall be strictly observed

by the mediator and the community mediation center, unless the deadline is extended by the court.

Rule 7. Mediator Certification and Decertification

(a) The Commission may receive and approve applications for the certification of persons to be appointed as district criminal court mediators. In order to be certified, an applicant must satisfy the requirements of this subsection.

(1) The applicant must be affiliated, at the time of application, with a community mediation center established under N.C.G.S. § 7A-38.5 as either a volunteer or staff mediator, and must have received the community mediation center's endorsement that he or she possesses the training, experience, and skills necessary to mediate criminal matters in district court.

(2) The applicant must have the following training and experience:

a. The applicant must:

1. have a four-year degree from an accredited college or university; have four years of post-high school education through an accredited college, university, or junior college; have four years of full-time work experience; or have any combination thereof;

2. have two years of experience as a staff or volunteer mediator at a community mediation center; or

3. have an Advanced Practitioner Designation from the Association for Conflict Resolution.

b. The applicant must have completed either:

1. twenty-four hours of training in a Commission certified district criminal court mediation training program; or

2. forty hours of Commission-certified superior court or family financial mediation training and four hours of additional training about the rules, procedures, and practices for mediating criminal matters in district court.

c. The applicant must:

1. observe at least two court-referred district court mediations for criminal matters, conducted by a mediator certified under these rules; and

2. co-mediate or solo-mediate at least three court referred district court mediations for criminal matters, under the observation of staff affiliated with a community mediation center whose district criminal court mediation training program has been certified by the Commission under Rule 8.

The observation, co-mediation, and solo-mediation requirements set forth in this subsection may be waived in the event the applicant demonstrates that she or he has at least five years of experience mediating criminal matters in district court, and the center which the applicant has served verifies the experience claimed.

(3) The applicant must demonstrate familiarity with the statutes, rules, and practices governing mediations for criminal matters in district court in North Carolina;

(4) The applicant must be of good moral character and adhere to the Standards of Professional Conduct for Mediators when acting under these rules. On his or her application(s) for certification or application(s) for certification renewal, an applicant shall disclose any:

a. pending criminal charges;

b. criminal convictions;

c. restraining orders issued against him or her;

d. failures to appear;

e. pending or closed grievances or complaints filed with a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or another country;

f. disciplinary action taken against him or her by a professional licensing, certifying, or regulatory body, whether in North Carolina, another state, or

another country, including, but not limited to, disbarment, revocation, decertification, or suspension of any professional license or certification, including the suspension or revocation of any license, certification, registration, or qualification to serve as a mediator in another state or country, even if stayed;

g. judicial sanctions imposed against him or her in any jurisdiction; or

h. civil judgments, tax liens, and bankruptcy filings that occurred within the ten years preceding the date that the initial or renewal application was filed with the Commission.

A mediator shall report to the Commission any of the above-enumerated matters arising subsequent to the disclosures reported on the initial or renewal application for certification within thirty days of receiving notice of the matter.

As referenced in this subsection, criminal charges or convictions (excluding infractions) shall include felonies, misdemeanors, or misdemeanor traffic violations (including driving while impaired) under the law of North Carolina or another state, or under the law of a federal, military, or foreign jurisdiction, regardless of whether the adjudication was withheld (prayer for judgment continued) or the imposition of a sentence was suspended.

(5) The applicant must commit to serving as a district court mediator under the direct supervision of a community mediation center authorized under N.C.G.S. § 7A-38.5 for a period of at least two years.

(6) The applicant must comply with the requirements of the Commission for continuing mediator education and training.

(7) The applicant must submit proof of qualifications set out in this rule on a form provided by the Commission.

(b) The Mediation Network of North Carolina, or individual community mediation centers participating in the program, shall assist the Commission in implementing the certification process established in this rule by:

(1) documenting subsection (a) of this rule for the mediator and the Commission;

(2) reviewing the documentation with the mediator in a face-to-face meeting scheduled no less than thirty days from the mediator's request to apply for certification;

(3) making a written recommendation on the applicant's certification to the Commission, which shall come from center staff familiar with the applicant and the applicant's character and experience; and

(4) forwarding the documentation for subsection (a) of this rule and the recommendation to the Commission, along with the mediator's completed certification application form.

(c) A mediator's certification may be revoked or not renewed if, at any time, it is shown to the satisfaction of the Commission that a mediator no longer meets the qualifications described in this rule or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible for certification under this rule. Certification renewal shall be required every two years.

(d) A community mediation center may withdraw its affiliation with a mediator who has been certified under these rules. Such disaffiliation does not revoke the mediator's certification. A mediator's certification is portable, and a mediator may agree to be affiliated with a different center. However, to mediate criminal matters in district court under this program, a mediator must be affiliated with the community mediation center providing services in that judicial district. A mediator may be affiliated with more than one center and provide services in the county served by those centers.

A community mediation center that receives or initiates a complaint against a mediator who is affiliated with its program and certified under these rules shall notify the Commission and forward a copy of the complaint to the Commission within thirty days of its receipt by the center, regardless of whether the center was able to successfully resolve the complaint. For purposes of this rule, a "complaint" is a concern raised by a mediation participant, court official, attorney, or community mediation center staff member or volunteer that suggests: (i) that the mediator may have engaged in conduct that violates these rules, the Standards of Professional Conduct for Mediators, or any local court rules adopted to implement the program in a district the mediator serves; or (ii) that the mediator has engaged in conduct that raises an issue about the mediator's character or practice. If a community mediation center withdraws

its affiliation with a mediator who has been certified under these rules, then the community mediation center shall notify the Commission within thirty days of the disaffiliation. The center shall cooperate with the Commission if it investigates any such complaints.

(e) Commission staff shall notify the executive director of the Mediation Network of North Carolina, and the executive director of the community mediation center that is sponsoring the application of an applicant seeking certification as a district criminal court mediator, of any matter regarding the character, conduct, or fitness to practice of the applicant. Staff shall notify the executive director of the Mediation Network of North Carolina and the executive director of the community mediation center with whom a mediator is affiliated of any finding of probable cause by the Commission under Rule 9 of the Rules of the Dispute Resolution Commission, after review of any complaint filed against the mediator alleging an issue of character, conduct, or fitness to practice.

Rule 8. Certification of Mediation Training Programs

(a) Certified training programs for mediators who are seeking certification as district criminal court mediators shall consist of a minimum of twenty-four hours of instruction. The curriculum of such programs shall include the following topics:

(1) Conflict resolution and mediation theory.

(2) Mediation process and techniques, including the process and techniques of mediating criminal matters in district court.

(3) Agreement writing.

(4) Communication and information gathering.

(5) Standards of conduct for mediators including, but not limited to, the Standards of Professional Conduct for Mediators.

(6) Statutes, rules, forms, and practices governing mediations for criminal matters in district court.

(7) Demonstrations of mediations for criminal matters in district court.

(8) Simulations of mediations for criminal matters in district court, involving student participation as the mediator, victim, offender, and attorneys, which shall be supervised, observed, and evaluated by program faculty.

(9) Courtroom protocol.

(10) Domestic violence awareness.

(11) Satisfactory completion of an exam by all students, testing their familiarity with the statutes, rules, and practices governing mediations for criminal matters in district court.

(b) A training program must be certified by the Commission before a mediator's attendance at the program may be used to satisfy the training requirement under this rule. Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Commission if they are in substantial compliance with the standards set forth in this rule.

(c) Certification renewal shall be required every two years.

Rule 9. Local Rule Making

The chief district court judge of any judicial district conducting mediations under these rules is authorized to publish local rules, not inconsistent with these rules and N.C.G.S. § 7A-38.3D, implementing mediation in that district.

* * *

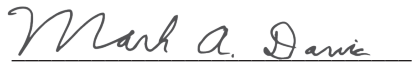
ORDER ADOPTING THE RULES OF MEDIATION FOR FARM NUISANCE DISPUTES

Pursuant to subsection 7A-38.3(e) of the General Statutes of North Carolina, the Court hereby adopts the Rules of Mediation for Farm Nuisance Disputes, which appear on the following pages. These rules supersede the Revised Rules of the North Carolina Supreme Court Implementing the Prelitigation Farm Nuisance Mediation Program, published at 367 N.C. 1099–108.

The Rules of Mediation for Farm Nuisance Disputes become effective on 1 March 2020.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 23rd day of January, 2020.



For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of January, 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court

Rules of Mediation for Farm Nuisance Disputes

Rule 1. Submission of Dispute to Prelitigation Farm Nuisance Mediation

(a) Mediation shall be initiated by filing a Request for Prelitigation Mediation of Farm Nuisance Dispute, Form AOC-CV-820 (Request Form), with the clerk of superior court in a county in which the action may be brought. The party filing the Request Form shall mail a copy of the Request Form by Certified Mail, return receipt requested, to each party to the dispute.

(b) The clerk of superior court shall accept the Request Form and shall file it in a miscellaneous file under the name of the requesting party.

Rule 2. Exemption from N.C.G.S. § 7A-38.1

A dispute mediated under N.C.G.S. § 7A-38.3 shall be exempt from the provisions of N.C.G.S. § 7A-38.1.

Rule 3. Selection of the Mediator

(a) **Time Period for Selection**. The parties to the dispute shall have twenty-one days from the date of the filing of the Request Form to select a mediator to conduct their mediation and to file an Appointment of Mediator in Prelitigation Farm Nuisance Dispute, Form AOC-CV-821 (Appointment Form).

(b) **Selection of the Certified Mediator by Agreement**. The clerk of superior court shall provide each party to the dispute with a list of certified superior court mediators serving the judicial district encompassing the county in which the Request Form was filed. If the parties are able to agree on a mediator from that list to conduct their mediation, then the party who filed the Request Form shall notify the clerk of superior court by filing an Appointment Form. The Appointment Form shall state: (i) the name, address, and telephone number of the certified mediator selected; (ii) the rate of compensation to be paid to the mediator; and (iii) that the mediator and the parties to the dispute have agreed on the selection and the rate of compensation.

(c) **Court Appointment of the Mediator**. If the parties to the dispute cannot agree on the selection of a certified superior court mediator, then the party who filed the Request Form shall file an Appointment Form with the clerk of superior court, moving the senior resident superior court judge to appoint a certified superior court mediator. The Appointment Form shall be filed with the clerk of superior court within twenty-one days of the date of the filing of the Request Form. The Appointment Form shall state whether any party prefers the mediator

to be a certified attorney mediator or a certified nonattorney mediator. If the parties state a preference, then the senior resident superior court judge shall appoint a mediator in accordance with that preference. If no preference is expressed, then the senior resident superior court judge may appoint any certified superior court mediator.

As part of the application or annual certification renewal process, all mediators shall designate those judicial districts for which they are willing to accept court appointments. Each designation shall be deemed to be a representation that the designating mediator has read and will abide by the local rules for, and will accept appointments from, the designated district, and will not charge for travel time and expenses incurred in carrying out his or her duties associated with those appointments. A mediator's refusal to accept an appointment in a judicial district designated by the mediator may be grounds for removal from that district's court appointment list by the Dispute Resolution Commission (Commission), or by the senior resident superior court judge.

The Commission shall provide the senior resident superior court judge of each judicial district a list of those certified superior court mediators requesting appointments in that district. The list shall contain each mediator's name, address, and telephone number. The list shall be provided to the senior resident superior court judge electronically through the Commission's website at https://www.ncdrc.gov.

The Commission shall promptly notify the senior resident superior court judge of any disciplinary action taken with respect to a mediator on the list of certified mediators for the judicial district.

(d) **Mediator Information Directory**. To assist parties in learning more about the qualifications and experience of certified mediators, the Commission shall post a list of certified superior court mediators on its website at https://www.ncdrc.gov, accompanied by each mediator's contact and biographical information, availability, and whether the mediator is willing to mediate farm nuisance disputes.

Rule 4. The Prelitigation Farm Nuisance Dispute Mediation

(a) **When the Mediation Is to Be Completed**. The mediation shall be completed within sixty days of either the filing of an Appointment Form that selects a mediator by agreement or the entry of an order that appoints a mediator to conduct the mediation.

(b) **Extending the Deadline for Completion**. The senior resident superior court judge may extend the deadline for completion of the mediation upon the judge's own motion, upon stipulation of the parties, or upon the suggestion of the mediator.

(c) **Where the Mediation Is to Be Held**. The mediated settlement conference shall be held in any location agreeable to both the parties and the mediator. If the parties cannot agree to a location, then the mediator shall be responsible for reserving a neutral place in the county in which the Request Form was filed, for making arrangements for the conference, and for giving timely notice of the time and location of the conference to all attorneys, pro se parties, and other persons required to attend.

(d) **Recesses**. The mediator may recess the mediation at any time and may set a time for reconvening, except that the time for reconvening must fall within a thirty-day period from the date of the order appointing the mediator. No further notification is required for persons present at the recessed mediation session.

(e) **Duties of the Parties, Attorneys, and Other Participants**. Rule 4 of the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions is hereby incorporated by reference.

(f) **Sanctions for Failure to Attend**. Rule 5 of the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions is hereby incorporated by reference.

Rule 5. Authority and Duties of the Mediator

(a) **Authority of the Mediator**.

(1) **Control of the Mediation**. The mediator shall at all times be in control of the mediation and the procedures to be followed. The mediator's conduct shall be governed by the Standards of Professional Conduct for Mediators.

(2) **Private Consultation**. The mediator may communicate privately with any participant prior to, and during, the mediation. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3) **Scheduling the Mediation**. The mediator shall make a good faith effort to schedule the mediation at a time that is convenient to the participants, attorneys, and mediator. In the absence of agreement, the mediator shall select the date for the mediation.

(b) **Duties of the Mediator**.

(1) **Informing the Parties**. At the beginning of the mediation, the mediator shall define and describe for the parties:

a. the process of mediation;

b. the differences between mediation and other forms of conflict resolution;

c. the costs of mediation;

d. the fact that mediation is not a trial, that the mediator is not a judge, and that the parties may pursue their dispute in court if mediation is not successful;

e. the circumstances under which the mediator may meet and communicate privately with any of the parties, or with any other person;

f. whether, and under what conditions, communications with the mediator will be held in confidence during the mediation;

g. the inadmissibility of conduct and statements as provided by N.C.G.S. § 7A-38.1(*l*);

h. the duties and responsibilities of the mediator and the participants; and

i. the fact that any agreement reached will be reached by mutual consent.

(2) **Disclosure**. The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice, or partiality.

(3) **Declaring Impasse**. It is the duty of the mediator to determine timely when an impasse exists and when the mediation should end.

(4) **Scheduling and Holding the Mediation**. It is the duty of the mediator to schedule and conduct the mediation within the time frame established by Rule 4. The mediator shall strictly observe Rule 4 unless an extension has been granted in writing by the senior resident superior court judge.

(5) **No Recording**. There shall be no stenographic, audio, or video recording of the mediation process by any participant. This prohibition includes recording either surreptitiously or with the agreement of the parties.

Rule 6. Compensation of the Mediator

(a) **By Agreement**. When the mediator is stipulated to by the parties, compensation shall be as agreed upon between the parties and the

mediator, except that no administrative fee or fees for services shall be assessed against a party if all parties waive mediation prior to the occurrence of an initial mediation session.

(b) **By Court Order**. When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $150 per hour. The parties shall also pay to the mediator a one-time, per-case administrative fee of $150, except that no administrative fee or fees for services shall be assessed against a party if all parties waive mediation prior to the occurrence of an initial mediation meeting.

(c) **Indigent Cases**. No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator's fee. Any mediator conducting a mediation under these rules shall waive the fee requirement for parties found by the court to be indigent. Any party may move the senior resident superior court judge for a finding of indigency and to be relieved of that party's obligation to pay a share of the mediator's fee.

The motion shall be heard subsequent to the completion of the mediation or, if the parties do not settle their dispute, subsequent to trial. In ruling upon such motion, the judge shall apply the criteria in N.C.G.S. § 1-110(a) but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request for a finding of indigency.

(d) **Postponement Fee**. As used in this rule, "postponement" means to reschedule or not proceed with a mediation once a date for the mediation has been agreed upon and scheduled by the parties and the mediator. After a mediation has been scheduled for a specific date, a party may not unilaterally postpone the mediation. A mediation may be postponed only after notice to all parties of the reason for the postponement, payment of a postponement fee to the mediator, and after consent is given by the mediator and the opposing attorney. If the mediation is postponed within seven business days of the scheduled date, then a postponement fee shall be assessed. The postponement fee shall be $300 if the mediation is postponed within three business days of the scheduled date, and $150 if the mediation is postponed more than three business days, but less than seven business days, prior to the scheduled date. Postponement fees shall be paid by the party requesting the postponement, unless otherwise agreed to by the parties. Postponement fees are in addition to the one-time, per-case administrative fee provided for in subsection (b) of this rule.

(e) **Payment of Compensation by Parties**. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall

be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the mediator's fee shall pay the fee equally. Payment shall be due upon completion of the mediation.

(f) **Sanctions for Failure to Pay the Mediator's Fee**. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one-time, per-case administrative fee, the hourly fee for mediation services, or any postponement fee), or willful failure of a party contending indigent status to promptly move the senior resident superior court judge for a finding of indigency, shall constitute contempt of court and may result, following notice, in a hearing and the imposition of monetary sanctions by a resident or presiding superior court judge.

Comment

Comment to Rule 6(b). Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses.

Comment to Rule 6(d). Though Rule 6(d) provides that mediators shall assess a postponement fee, it is understood that there may be rare situations in which the circumstances occasioning a request for a postponement are beyond the control of the parties (e.g., an illness, serious accident, or unexpected and unavoidable trial conflict). If a party takes steps to notify the mediator as soon as possible in such circumstances, then the mediator may, in his or her discretion, waive the postponement fee.

Nonessential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite settlement. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

Comment to Rule 6(e). If a party is found by a senior resident superior court judge to have failed to attend a mediation without good cause, then the court may require that party to pay the mediator's fee and related expenses.

Comment to Rule 6(f). If the Prelitigation Farm Nuisance Mediation Program is to be successful, it is essential that mediators, both party-selected and court-appointed, be compensated for their services. Rule 6(f) is intended to give the court express authority to enforce payment of fees owed to both party selected and court-appointed mediators. In instances where the mediator is party selected, the court may enforce fees which exceed the caps set forth in Rule 6(b) (hourly fee and administrative fee) and Rule 6(d) (postponement fee and cancellation fee), or which provide for payment of services or expenses not provided for in Rule 6, but agreed to among the parties (e.g., payment for travel time or mileage).

Rule 7. Waiver of Mediation

The parties to a farm nuisance dispute may waive mediation by informing the mediator of their waiver in writing. The party who requested mediation shall file a Waiver of Prelitigation Mediation in Farm Nuisance Dispute, Form AOC-CV-822 (Waiver Form), with the clerk of superior court and shall mail a copy of the Waiver Form to the mediator and all parties named in the Request Form.

Rule 8. Mediator's Certification that the Mediation Has Concluded

(a) **Contents of Certification**. Following the conclusion of mediation or the receipt of a Waiver Form signed by all parties to the farm nuisance dispute, the mediator shall prepare a Mediator's Certification in Prelitigation Farm Nuisance Dispute, Form AOC-CV-823 (Certification Form). If a mediation was held, then the Certification Form shall state the date on which the mediation was concluded and report the general results of the mediation. If a mediation was not held, then the Certification Form shall either: (i) state why a mediation was not held and identify any parties named in the Request Form who failed, without good cause, to attend or participate in mediation; or (ii) state that all parties waived mediation in writing under Rule 7.

(b) **Deadline for Filing Mediator's Certification**. The mediator shall file the completed Certification Form with the clerk of superior court within seven days of either the completion of the mediation, the failure of the mediation to be held, or the receipt of a signed Waiver Form. The mediator shall serve a copy of the Certification Form on each of the parties named in the Request Form.

Rule 9. Certification of Mediation Training Programs

The Commission may specify a curriculum for a farm nuisance dispute mediation training program and may set qualifications for trainers.

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AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ELECTION, SUCCESSION AND DUTIES OF OFFICERS

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 26, 2019.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning election, succession and duties of officers as particularly set forth in 27 N.C.A.C. 1A, Section .0400, be amended as follows (unless a new rule is indicated, additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0400, Election Succession, and Duties of Officers

.0409 President

The president shall preside over meetings of the North Carolina State Bar and the council. The president shall sign all resolutions and orders of the council in the capacity of president. The president shall execute, along with the secretary, all contracts ordered by the council. Pursuant to Rule .0412, the president is authorized to act in the name of the State Bar under emergent circumstances. The president will perform all other duties prescribed for the office by the council.

.0412 Emergency Authority [NEW RULE]

When prompt action is required due to emergent circumstances and it is not practicable or reasonable to assemble a quorum of the council, the president, in consultation with the officers and counsel, is authorized to act in the name of the State Bar to the extent necessary to carry out the functions of the State Bar until the next meeting of the council. Action taken pursuant to this rule shall be presented to the council for ratification at the next council meeting.

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, 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 26, 2019.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of August, 2019.

s/Alice Neece Mine
Alice Neece Mine, 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 25th day of September, 2019.

s/Cheri L. Beasley
Cheri L. Beasley, 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 25th day of September, 2019.

s/Mark A. Davis
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING STANDING COMMITTEES AND BOARDS 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 April 26, 2019.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning standing committees and boards of the State Bar, as particularly set forth in 27 N.C.A.C. 1A, Section .0700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .0700, Standing Committees and Boards of the State Bar

.0701 Standing Committees and Boards

(a) Standing Committees…

(1) Executive Committee…

(2)…

(3) Grievance Committee. It shall be the duty of the Grievance Committee to exercise the disciplinary and disability functions and responsibilities set forth in Section .0100 of Subchapter 1B of these rules and to make recommendations to the council for such amendments to that section as the committee deems necessary or appropriate. The Grievance Committee shall sit in subcommittees as assigned by the president…. One subcommittee shall oversee the Attorney Client Assistance Program. It shall be the duty of the Attorney Client Assistance subcommittee to develop and oversee policies and programs to help clients and lawyers resolve difficulties or disputes, including fee disputes, using means other than the formal grievance or civil litigation processes; ~~to establish and implement a disaster response plan, in accordance with the provisions of Section .0300 of Subchapter 1D of these rules, to assist victims of disasters in obtaining legal representation and to prevent the improper solicitation of victims by lawyers;~~ and to perform such other duties and consider such other matters as the council or the president may designate…

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, 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 26, 2019.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of August, 2019.

s/Alice Neece Mine
Alice Neece Mine, 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 25th day of September, 2019.

s/Cheri L. Beasley
Cheri L. Beasley, 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 25th day of September, 2019.

s/Mark A. Davis
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING MODEL BYLAWS FOR JUDICIAL DISTRICT BARS

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 26, 2019.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning model bylaws for judicial district bars, as particularly set forth in 27 N.C.A.C. 1A, Section .1000, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .1000, Model Bylaws for Use by Judicial District Bars

.1010 Committees

(a) Standing committee(s): The standing committees shall be the Nominating Committee, Pro Bono Committee, ~~Fee Dispute Resolution Committee,~~ Grievance Committee, and Professionalism Committee provided that, with respect to ~~the Fee Dispute Resolution Committee and~~ the Grievance Committee, the district meets the State Bar guidelines relating thereto.

~~(b) Fee Dispute Resolution Committee:~~

~~(1) The Fee Dispute Resolution Committee shall consist of at least six but not more than eighteen persons appointed by the president to staggered three-year terms as provided in the district bar's Fee Dispute Resolution Plan.~~

~~(2) The Fee Dispute Resolution Committee shall be responsible for implementing a Fee Dispute Resolution Plan approved by the Council of the North Carolina State Bar to resolve fee disputes efficiently, economically, and expeditiously without litigation.~~

~~(c)~~ (b) Grievance Committee: …

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, 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 26, 2019.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of August, 2019.

s/Alice Neece Mine
Alice Neece Mine, 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 25th day of September, 2019.

s/Cheri L. Beasley
Cheri L. Beasley, 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 25th day of September, 2019.

s/Mark A. Davis
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE RULES ON DISCIPLINE AND DISABILITY OF ATTORNEYS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 26, 2019.

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 discipline and disability of attorneys, as particularly set forth in 27 N.C.A.C. 1B, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys

.0106 Grievance Committee: Powers and Duties

The Grievance Committee will have the power and duty

(1) to direct the counsel to investigate any alleged misconduct or disability of a member of the North Carolina State Bar coming to its attention;

(2) …

(14) to operate the Attorney Client Assistance Program (ACAP). Functions of ACAP can include without limitation:

(a) assisting clients and attorneys in resolving issues arising in the client/attorney relationship that might be resolved without the need to open grievance files; and

(b) operating the Fee Dispute Resolution Program.

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, 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 26, 2019.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of August, 2019.

s/Alice Neece Mine
Alice Neece Mine, 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 25th day of September, 2019.

s/Cheri L. Beasley
Cheri L. Beasley, 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 25th day of September, 2019.

s/Mark A. Davis
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR GOVERNING JUDICIAL DISTRICT GRIEVANCE COMMITTEES

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 26, 2019.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar governing judicial district grievance committees, as particularly set forth in 27 N.C.A.C. 1B, Section .0200, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1B, Section .0200, Rules Governing Judicial District Grievance Committees

.0202 Jurisdiction and Authority of District Grievance Committees

(a) District Grievance Committees are Subject to the Rules of the North Carolina State Bar …

(b) …

(d) Grievances Involving Fee Disputes

(1) Notice to Complainant of Fee Dispute Resolution Program …

(2) Handling Claims Not Involving Fee Dispute …

(3) Handling Claims Not Submitted to Fee Dispute Resolution by Complainant …

(4) Referral to Fee Dispute Resolution Program - Where a complainant timely elects to participate in fee dispute resolution, ~~and the judicial district in which the respondent attorney maintains his or her principal office has a fee dispute resolution committee, the chairperson of the district grievance committee shall refer the portion of the grievance involving a fee dispute to the judicial district fee dispute resolution committee. If the judicial district in which the respondent attorney maintains his or her principal office does not have a fee arbitration committee,~~ the chairperson of the district grievance committee shall refer the portion of the grievance involving a fee dispute to the State Bar Fee Dispute Resolution Program for resolution. If the grievance consists entirely of a fee dispute, and the complainant timely elects to participate in fee dispute resolution, no grievance file will be established.

(e) Authority of District Grievance Committees …

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, 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 26, 2019.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of August, 2019.

s/Alice Neece Mine
Alice Neece Mine, 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 25th day of September, 2019.

s/Cheri L. Beasley
Cheri L. Beasley, 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 25th day of September, 2019.

s/Mark A. Davis
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR GOVERNING THE PRACTICAL TRAINING OF LAW STUDENTS

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 19, 2019.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar governing the practical training of law students, as particularly set forth in 27 N.C.A.C. 1C, Section .0200, be amended as follows (unless a new rule is indicated, additions are underlined, deletions are interlined):

27 N.C.A.C. 1C, Section .0200, Rules Governing the Practical Training of Law Students

.0201 Purpose

The ~~following~~ rules in this subchapter are adopted for the following purposes: to ~~encourage~~ support the development of clinical legal education programs at North Carolina's law schools ~~to~~ in order that the law schools may provide their students with supervised practical training of varying kinds during the period of their formal legal education~~; and~~ to enable law students to obtain supervised practical training while serving as legal interns for government agencies; and to assist law schools in providing substantial opportunities for student participation in *pro bono* service.

.0202 Definitions

The following definitions shall apply to the terms used in this section:

(a) Clinical legal education program – Experiential educational program that engages students in "real world" legal matters through supervised practice experience. Under the supervision of a faculty member or site supervisor who is accountable to the law school, students assume the role of a lawyer either as a protégé, lead counsel, or a member of a lawyer team.

~~(1)~~ (b) Eligible persons - Persons who are unable financially to pay for ~~the~~ legal advice or services ~~of an attorney,~~ as determined by a standard established by a judge of the General Court of Justice, a legal services ~~corporation~~ organization, government entity, or a ~~law school~~ clinical legal ~~aid clinic providing representation.~~ education program. "Eligible persons" ~~includes~~ may include minors who are not financially independent; students enrolled in secondary and higher education

schools who are not financially independent; non-profit organizations serving low-income communities; and other organizations financially unable to pay for legal advice or services.

(c) Field placement – Practical training opportunities within a law school's clinical legal education program that place students in legal practice settings external to the law school. Students in a field placement represent clients or perform other lawyering roles under the supervision of practicing lawyers or other qualified legal professionals. Faculty have overall responsibility for assuring the educational value of the learning in the field. Supervising attorneys provide direct feedback and guidance to the students. Site supervisors have administrative responsibility for the legal intern program at the field placement. Such practical training opportunities may be referred to as "externships."

~~(2)~~(d) Government agencies - The federal or state government, any local government, or any agency, department, unit, or other entity of federal, state, or local government, specifically including a public defender's office or a district attorney's office.

~~(3)~~(e) Law school - An ABA accredited law school or a law school actively seeking accreditation from the ABA and licensed by the Board of Governors of the University of North Carolina. If ABA accreditation is not obtained by a law school so licensed within three years of the commencement of classes, legal interns may not practice, pursuant to these rules, with any ~~legal aid~~ clinic of the law school.

~~(4) Legal aid clinic - A department, division, program, or course in a law school that operates under the supervision of an active member of the State Bar and renders legal services to eligible persons.~~

(f) Law school clinic - Courses within a law school's clinical legal education program that place students in a legal practice setting operated by the law school. Students in a law school clinic assume the role of a lawyer representing actual clients or performing other lawyering roles. Supervision of students is provided by faculty employed by the law school (full-time, part-time, adjunct) who are active members of the North Carolina State Bar or another bar as appropriate for the legal matters undertaken.

~~(5)~~(g) Legal intern - A law student who is certified to provide supervised representation to clients under the provisions of the rules of this ~~Subchapter~~ subchapter.

~~(6)~~(h) Legal services ~~corporation~~ organization - A nonprofit North Carolina ~~corporation organized exclusively to provide representation to~~

~~eligible persons~~ organization organized to operate in accordance with N.C. Gen. Stat. §84-5.1.

(i) *Pro bono* activity – An opportunity while in law school for students to provide legal services to those unable to pay, or otherwise under a disability or disadvantage, consistent with the objectives of Rule 6.1 of the Rules of Professional Conduct.

(j) Rules of Professional Conduct – The Rules of Professional Conduct adopted by the Council of the North Carolina State Bar, approved by the North Carolina Supreme Court, and in effect at the time of application of the rules in this subchapter.

(k) Site supervisor – The attorney at a field placement who assumes administrative responsibility for the legal intern program at the field placement and provides the notices to the State Bar required by Rule .0205(b) of this subchapter. A site supervisor may also be a supervising attorney at a field placement.

~~(7)~~(l) Supervising attorney - An active member of the North Carolina State Bar ~~who satisfies the requirements of Rule .0205 of this Subchapter~~, or an attorney who is licensed in another jurisdiction as appropriate for the legal work to be undertaken, who has practiced law as a full-time occupation for at least two years, and who supervises one or more legal interns pursuant to the requirements of the rules in this subchapter.

.0203 Eligibility

To engage in activities permitted by these rules, a law student must satisfy the following requirements:

~~(1)~~(a) be enrolled as a J.D. or LL.M. student in a law school approved by the Council of the North Carolina State Bar;

~~(2) have completed at least three semesters of the requirements for a professional degree in law (J.D. or its equivalent);~~

~~(3)~~ (b) be certified in writing by a representative of his or her law school, authorized by the dean of the law school to provide such certification, as being of good character with requisite legal ability and ~~training~~ legal education to perform as a legal intern, which education shall include satisfaction of the prerequisites for participation in the clinic or field placement;

~~(4)~~(c) be introduced by an attorney admitted to practice in the tribunal or agency to every judicial official who will preside over a matter in which the student will appear, ~~to the court in which he or she is~~

~~appearing by an attorney admitted to practice in that court~~ and, pursuant to Rule .0206(c) of this subchapter, obtain the tribunal's or agency's consent to appear subject to any limitations imposed by the presiding judicial official; such introductions do not have to occur in open court and the consent of the judicial official may be oral or written;

~~(5)~~(d) neither ask for nor receive any compensation or remuneration of any kind from any ~~client~~ eligible person ~~for~~ to whom he or she renders services, but this shall not prevent an attorney, legal services ~~corporation~~ organization, law school, or government agency from paying compensation to the law student or charging or collecting a fee for legal services performed by such law student; and

~~(6)~~(e) certify in writing that he or she has read ~~and is familiar with~~ the North Carolina ~~Revised~~ Rules of Professional Conduct and is familiar with the opinions interpretive thereof.

.0204 ~~Certification as Legal Intern~~ Form and Duration of Certification

Upon receipt of the written materials required by Rule .0203~~(3)~~(b) and ~~(6)~~(e) and Rule .0205~~(6)~~(b), the North Carolina State Bar shall certify that the law student may serve as a legal intern. The certification shall be subject to the following limitations:

(a) Duration. The certification shall be effective for 18 months or until the announcement of the results of the first bar examination following the legal intern's graduation whichever is earlier. If the legal intern passes the bar examination, the certification shall remain in effect until the legal intern is sworn-in by a court and admitted to the bar.

(b) Withdrawal of Certification. The certification shall be withdrawn by the State Bar, without hearing or a showing of cause, upon receipt of

(1) notice from a representative of the legal intern's law school, authorized to act by the dean of the law school, that the legal intern has not graduated but is no longer enrolled;

(2) notice from a representative of the legal intern's law school, authorized to act by the dean of the law school, that the legal intern is no longer in good standing at the law school;

(3) notice from a supervising attorney that the supervising attorney is no longer supervising the legal intern and that no other qualified attorney has assumed the supervision of the legal intern; or

(4) notice from a judge before whom the legal intern has appeared that the certification should be withdrawn.

.0205 Supervision

(a) Supervision Requirements. A supervising attorney shall

(1) ~~be an active member of the North Carolina State Bar who has practiced law as a full-time occupation for at least two years;~~

~~(2)~~ for a law school clinic, concurrently supervise ~~no more than two legal interns concurrently, provided, however, there is no limit on the number of~~ an unlimited number of legal interns ~~who may be supervised concurrently by an~~ if the supervising attorney ~~who~~ is a full-time, ~~or~~ part-time, or adjunct member of a law school's faculty or staff whose primary responsibility ~~as a faculty member~~ is supervising legal interns in a ~~legal aid~~ law school clinic and, further provided, the number of legal interns concurrently supervised is not so large as to compromise the effective and beneficial practical training ~~supervision~~ of the legal interns or the competent representation of clients ~~that an attorney who supervises legal interns through an externship or out-placement program of a law school legal aid clinic may supervise up to five legal interns~~;

(2) for a field placement, concurrently supervise no more than two legal interns; however, a greater number of legal interns may be concurrently supervised by a single supervising attorney if the appropriate faculty supervisor determines, in his or her reasoned discretion, that the effective and beneficial practical training of the legal interns and the competent representation of clients will not be compromised;

(3) assume personal professional responsibility for any work undertaken by a legal intern while under his or her supervision;

(4) assist and counsel with a legal intern in the activities permitted by these rules and review such activities with the legal intern, all to the extent required for the proper practical training of the legal intern and the ~~protection~~ competent representation of the client; and

(5) read, approve and personally sign any pleadings or other papers prepared by a legal intern prior to the filing thereof, and read and approve any documents prepared by a legal intern for execution by a client or third party prior to the execution thereof.~~;~~

~~(6) prior to commencing the supervision, assume responsibility for supervising a legal intern by filing with the North Carolina State Bar a signed notice setting forth the period during which supervising attorney expects to supervise the activities of an identified legal intern, and that the supervising attorney will adequately supervise the legal intern in accordance with these rules; and~~

~~(7) notify the North Carolina State Bar in writing promptly whenever the supervision of a legal intern ceases.~~

(b) Filing Requirements.

(1) Prior to commencing supervision, a supervising attorney in a law school clinic shall provide a signed statement to the North Carolina State Bar (i) assuming responsibility for the supervision of identified legal interns, (ii) stating the period during which the supervising attorney expects to supervise the activities of the identified legal interns, and (iii) certifying that the supervising attorney will adequately supervise the legal interns in accordance with these rules.

(2) Prior to the commencement of a field placement for a legal intern(s), the site supervisor shall provide a signed statement to the North Carolina State Bar (i) assuming responsibility for the administration of the field placement in compliance with these rules, (ii) identifying the participating legal intern(s) and stating the period during which the legal intern(s) is expected to participate in the program at the field placement, (iii) identifying the supervising attorney(s) at the field placement, and (iv) certifying that the supervising attorney(s) will adequately supervise the legal intern(s) in accordance with these rules.

(3) A supervising attorney in a law school clinic and a site supervisor for a legal intern program at a field placement shall notify the North Carolina State Bar in writing promptly whenever the supervision of a legal intern concludes prior to the designated period of supervision.

(c) Responsibilities of Law School Clinic in Absence of Legal Intern. During any period when a legal intern is not available to provide representation due to law school seasonal breaks, graduation, or other reason, the supervising attorney shall maintain the status quo of a client matter and shall take action as necessary to protect the interests of the client until the legal intern is available or a new legal intern is assigned to the matter. During law school seasonal breaks, or other periods when a legal

intern is not available, if a law school clinic or a supervising attorney is presented with an inquiry from an eligible person or a legal matter that may be appropriate for representation by a legal intern, the representation may be undertaken by a supervising attorney to preserve the matter for subsequent representation by a legal intern. Communications by a supervising attorney with a prospective client to determine whether the prospective client is eligible for clinic representation may include providing immediate legal advice or information even if it is subsequently determined that the matter is not appropriate for clinic representation.

(d) Independent Legal Practice. Nothing in these rules prohibits a supervising attorney in a law school clinic from providing legal services to third parties outside of the scope of the supervising attorney's employment by the law school operating the clinic.

.0208 Field Placements [NEW RULE]

(a) A law student enrolled in a field placement at an organization, entity, agency, or law firm shall be certified as a legal intern if the law student will (i) provide legal advice or services in matters governed by North Carolina law to eligible persons or government agencies outside the organization, entity, agency, or law firm or (ii) appear before any North Carolina tribunal or agency on behalf of an eligible person or a government agency.

(b) Supervision of a legal intern enrolled in a field placement may be shared by two or more attorneys employed by the organization, entity, agency, or law firm, provided one attorney acts as site supervisor, assuming administrative responsibility for the legal intern program at the field placement and providing the notices to the State Bar required by Rule .0205(b) of this subchapter. All supervising attorneys at a field placement shall comply with the requirements of Rule .0205(a).

.0209 Relationship of Law School and Clinics; Responsibility Upon Departure of Supervising Attorney or Closure of Clinic [NEW RULE]

(a) Relationship to Other Clinics. The clinics that are a part of a clinical legal education program at a law school may each operate as an independent entity (the "independent clinic model") or they may operate collectively as one entity with each clinic acting as a department or division of the entity (the "unified clinic model"). In the independent clinic model, clinics function independently of each other, including the maintenance of separate offices and separate conflicts-checking and case management systems. In the unified clinic model, clinics may share offices as well as conflicts-checking and case management systems.

(b) Application of the Rules of Professional Conduct. For the purposes of applying the Rules of Professional Conduct, each law school clinic operated pursuant to the independent clinic model shall be considered one law firm and clinics operated pursuant to the unified clinic model shall collectively be considered one law firm.

(c) Relationship with Law School. The relationship between law school clinics and the law school in which they operate shall be managed in a manner consistent with the requirements of the Rules of Professional Conduct. Procedures shall be established by both the clinics and the law school that are reasonably adequate to protect confidential client information from disclosure including disclosure to the law school administration, non-participating law school faculty and staff, and non-participating students of the law school. The rule of imputed disqualification, as stated in Rule 1.10(a) of the Rules of Professional Conduct, shall not apply to the law school administrators, non-participating law school faculty and staff, and non-participating law school students if reasonable efforts are made to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of clients. *See* Rule 1.6(c) of the Rules of Professional Conduct.

(d) Responsibility for Maintenance of Client Files. Client files shall be maintained and safeguarded by a law school clinic in accordance with the Rules of Professional Conduct and the ethics opinions interpretative thereof. Closed client files shall be returned to the client or shall be safeguarded and maintained by a law school clinic until disposal is permitted under the Rules of Professional Conduct. *See* RPC 209.

(e) Engagement Letter. In addition to the consent agreement required by Rule .0206(d) of this section for any representation of an individual client in a matter before a tribunal, a written engagement letter or memorandum of understanding with each client is recommended. The writing should state the general nature of the legal services to be provided and explain the roles and responsibilities of the clinic, the supervising attorney, and the legal intern. *See* Rule 1.5, cmt. [2] of the Rules of Professional Conduct ("A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.")

(f) Responsibility upon Departure of Supervising Attorney. Upon the departure of a supervising attorney from a law school clinic, the administration of the law school and of the clinic shall promptly identify a replacement supervising attorney for any active case in which no other supervising attorney is participating. In such cases, the departing attorney and the clinic administration shall protect the interests of

all affected clients by taking appropriate steps to preserve the status quo of the legal matters of affected clients, consistent with the Rules of Professional Conduct and the ethics opinions interpretative thereof. If the departing attorney will not continue the representation after departure from the clinic, the attorney shall comply with Rule 1.16 of the Rules of Professional Conduct and all court rules for withdrawal from representation. Affected clients shall be notified and advised that (i) they have the right to counsel of choice (which may include the departing attorney if the departing attorney intends to engage in legal practice outside of the law school clinic); (ii) their file will be transferred to the new supervising attorney in the absence of other instructions from the client; and (iii) they may instruct the clinic to mail or deliver the file to the client or to transfer the file to legal counsel outside of the clinic. If instructed by a client, a file shall be promptly returned to the client or transferred to authorized legal counsel outside of the clinic.

(g) Responsibility upon Closure of a Law School Clinic. If a law school clinic is closed for any reason, the supervising attorney, with support from the law school, shall take appropriate steps to preserve the status quo of the legal matters of clients, consistent with the Rules of Professional Conduct and the ethics opinions interpretative thereof. The administration of the law school and of the clinic shall promptly notify all affected clients that (i) they have the right to counsel of choice (which may include the supervising attorney if the supervising attorney will engage in legal practice after closure of the clinic); (ii) the file will be mailed to or delivered to the client and the supervising attorney will withdraw from representation in the absence of other instructions from the client; and (iii) they may instruct the clinic to transfer the file to authorized legal counsel outside of the clinic (which may include the supervising attorney). If the supervising attorney will not continue the representation after closure of the clinic, the attorney shall comply with Rule 1.16 of the Rules of Professional Conduct and all court rules for withdrawal from representation.

.0210 *Pro Bono* Activities [NEW RULE]

(a) *Pro Bono* Activities for Law Students. *Pro bono* activities for law students may be facilitated by a law school acting under the auspices of a clinical legal education program or another program or department of the law school. As used in this rule, "auspices" means administrative or programmatic support or supervision.

(b) Student Certification Not Required. Regardless of whether the *pro bono* activity is provided under the auspices of a clinical legal education program or another program or department of a law school, a law

student participating in a *pro bono* activity made available by a law school is not required to be certified as a legal intern if

(1) the law student will not perform any legal service; or

(2) all of the following conditions are satisfied: (i) the student will perform specifically delegated substantive legal services for third parties (clients) under the direct supervision of an attorney who is an active member of the North Carolina State Bar or licensed in another jurisdiction as appropriate to the legal services to be undertaken (the responsible attorney); (ii) the legal services shall not include representation of clients before a tribunal or agency; (iii) the responsible attorney is personally and professionally responsible for the representation of the clients and for the law student's work product; and (iv) the role of the law student as an assistant to the responsible attorney is clearly explained to each client in advance of the performance of any legal service for the client by the law student.

(c) Law School Faculty and Staff Providing *Pro Bono* Services Under Auspices of a Clinical Legal Education Program. Any member of the law school's faculty or staff who is an active member of the North Carolina State Bar or licensed in another jurisdiction as appropriate to the legal work to be undertaken may serve as the responsible attorney for a *pro bono* activity if the activity is provided to eligible persons under the auspices of the law school's clinical legal education program and the responsible attorney complies with the relevant supervision requirements set forth in Rule .0205(a)(2)-(5) of this subchapter.

(d) Responsibility for Client File. Unless otherwise specified in this rule, if a client file is generated by a *pro bono* activity, it shall be maintained and safeguarded by the responsible attorney in compliance with the Rules of Professional Conduct and the ethics opinions interpretative thereof. If the *pro bono* activity is provided under the auspices of a clinical legal education program and the responsible attorney is a member of the law school's faculty or staff, the client file shall be maintained and safeguarded by the clinical legal education program in compliance with the Rules of Professional Conduct and the Rule .0209(d). If the *pro bono* activity is sponsored by a legal services organization or government agency, the legal services organization or government agency shall maintain and safeguard the client file. If the *pro bono* activity is sponsored by more than one legal services organization or government agency, the co-sponsors shall determine which entity shall maintain and safeguard the client file and shall so inform the client.

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, 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 19, 2019.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of August, 2019.

s/Alice Neece Mine
Alice Neece Mine, 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 25th day of September, 2019.

s/Cheri L. Beasley
Cheri L. Beasley, 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 25th day of September, 2019.

s/Mark A. Davis
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE FEE DISPUTE RESOLUTION PROGRAM

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 26, 2019.

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 fee dispute resolution program, as particularly set forth in 27 N.C.A.C. 1D, Section .0700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0700, Procedures for Fee Dispute Resolution

.0701 Purpose and Implementation

The purpose of the Fee Dispute Resolution Program is to help clients and lawyers settle disputes over fees. ~~In doing so, the~~ The Fee Dispute Resolution Program ~~shall~~ will attempt to assist ~~the~~ lawyers and clients in resolving disputes concerning ~~determining the appropriate fee for~~ legal fees and expenses. ~~services rendered.~~ The State Bar ~~shall~~ will implement the Fee Dispute Resolution Program under the auspices of the Grievance Committee (the committee) as part of the Attorney Client Assistance Program (ACAP). It will be offered to clients and ~~their~~ lawyers at no cost. ~~A person other than the client who pays the lawyer's legal fee or expenses may file a fee dispute. The person who paid the fees or expenses will not be permitted to participate in the fee dispute resolution process.~~

.0702 Jurisdiction

(a) The committee has jurisdiction over a disagreement arising out of a client-lawyer relationship concerning the fees and expenses charged or incurred for legal services provided by a lawyer licensed to practice law in North Carolina.

(b) The committee does not have jurisdiction over the following:

(1) a dispute concerning fees or expenses established by a court, federal or state administrative agency, ~~or~~ federal or state official, or private arbitrator or arbitrator panel;

~~(2) a dispute involving services that are the subject of a pending grievance complaint alleging violation of the Rules of Professional Conduct;~~

~~(3)~~(2) a dispute over fees or expenses that are or were the subject of litigation or arbitration unless

(i) a court, arbitrator, or arbitration panel directs the matter to the State Bar for resolution, ~~or~~

(ii) both parties to the dispute agree to dismiss the litigation or arbitration without prejudice and pursue resolution through the State Bar's Fee Dispute Resolution program~~;~~, or

(iii) litigation was commenced pursuant to 27 N.C. Admin. Code 1D § .0707(a);

~~(4)~~(3) a dispute between a lawyer and a service provider, such as a court reporter or an expert witness;

(4) a dispute over fees or expenses that are the subject of a pending Client Security Fund claim, or a Client Security Fund claim that has been fully paid.

(5) a dispute between a lawyer and a person or entity with whom the lawyer had no client-lawyer relationship~~, except that the committee has jurisdiction over a dispute between a lawyer and a third-party payor of legal fees or expenses~~; and

(6) a dispute concerning a fee charged for services provided by the lawyer that do not constitute the practice of law.

(c) The committee will encourage settlement of fee disputes falling within its jurisdiction ~~pursuant to Rule .0708 of this subchapter~~.

.0704 Confidentiality

The Fee Dispute Resolution Program is a subcommittee of the Grievance Committee, which maintains all information in the possession of the Fee Dispute Resolution Program. Pursuant to N.C. Gen. Stat. § 84-32.1, documents in the possession of the Fee Dispute Resolution Program are confidential and are not public records. ~~The existence of and content of any petition for resolution of a disputed fee and of any lawyer's response to a petition for resolution of a disputed fee are confidential.~~

.0706 Powers and Duties of the Vice-Chairperson

The vice-chairperson of the Grievance Subcommittee overseeing ACAP, or his ~~/~~ or her designee, who must be a councilor, will:

(a) approve or disapprove any recommendation that an impasse be declared in any fee dispute ~~petition for resolution of a disputed fee be dismissed~~; and

~~(b) call and preside over meetings of the committee; and~~

~~(c)~~(b) refer to the Grievance Committee all cases in which it appears ~~to the vice chairman~~ that

(i) a lawyer might have demanded, charged, contracted to receive or received an illegal or clearly excessive fee or a clearly excessive amount for expenses in violation of Rule 1.5 of the Rules of Professional Conduct; or

(ii) a lawyer might have failed to refund an unearned portion of a fee in violation of Rule 1.5 the Rules of Professional Conduct; or

(iii) a lawyer might have violated one or more Rules of Professional Conduct other than or in addition to Rule 1.5.

.0707 Processing Requests for Fee Dispute Resolution

(a) ~~Requests~~ A request for resolution of a disputed fee must be submitted in writing to the coordinator of the Fee Dispute Resolution Program addressed to the North Carolina State Bar, PO Box 25908, Raleigh, NC 27611. A lawyer is required by ~~Rule 1.5 of the~~ Rules of Professional Conduct 1.5 to notify in writing a client with whom the lawyer has a dispute over a fee (i) of the existence of the Fee Dispute Resolution Program and ~~to wait at least 30 days after the client receives such notification before filing a lawsuit to collect a disputed fee~~ (ii) that if the client does not file a petition for fee dispute resolution within 30 days after the client receives such notification, the lawyer will be permitted by Rule of Professional Conduct 1.5 to file a lawsuit to collect the disputed fee. …

(b) ~~All~~ A petition~~s~~ for resolution of a disputed fee must be filed (i) before the expiration of the statute of limitation applicable in the General Court of Justice for collection of the funds in issue or (ii) within three years of the termination of the client-lawyer relationship, whichever is later.

(c) The State Bar will process fee disputes and grievances in the following order:

(1) If a client submits to the State Bar simultaneously a grievance and a request for resolution of disputed fee involving the same attorney-client relationship, the request for resolution of disputed fee will be processed first and the grievance will not be processed until the fee dispute resolution process is concluded.

(2) If a client submits a grievance to the State Bar and the State Bar determines it would be appropriate for the Fee Dispute Resolution Program to attempt to assist the client and the lawyer in settling a dispute over a legal fee, the attempt to resolve the fee dispute will occur first. If a grievance file has been opened, it will be stayed until the Fee Dispute Resolution Program has concluded its attempt to facilitate resolution of the disputed fee.

(3) If a client submits a request for resolution of a disputed fee to the State Bar while a grievance submitted by the same client and relating to the same attorney-client relationship is pending, the grievance will be stayed while the Fee Dispute Resolution Program attempts to facilitate resolution of the disputed fee.

(4) Notwithstanding the provisions of subsections (c)(1),(2), and (3) of this section, the State Bar will process a grievance before it processes a fee dispute or at the same time it processes a fee dispute whenever it determines that doing so is in the public interest.

~~(c)~~(d) The coordinator of the Fee Dispute Resolution Program or a facilitator will review ~~investigate~~ the petition to determine its suitability for fee dispute resolution. If it is determined that the dispute is not suitable for fee dispute resolution, the coordinator and/or the facilitator will prepare a ~~dismissal letter setting forth the reasons the petition is not suitable for fee dispute resolution facts and a recommendation for its dismissal~~ letter setting forth the reasons the petition is not suitable for fee dispute resolution and recommending that the petition be discontinued and that the file be closed. The coordinator and/or the facilitator will forward the ~~dismissal~~ letter to the vice-chairperson. If the vice chairperson agrees with the recommendation, the petition will be ~~dismissed~~ discontinued and the file will be closed. The coordinator and/or facilitator will notify the ~~party~~ parties in writing ~~of the dismissal~~ that the file was closed. Grounds for ~~dismissal~~ concluding that a petition is not suitable for fee dispute resolution or for closing a file include, but are not limited to, the following:

(1) the petition is frivolous or moot; or

(2) the committee lacks jurisdiction over one or more of the parties or over the subject matter of the dispute~~;~~.

~~(3) the fee has been earned; or~~

~~(4) the expenses were properly incurred.~~

~~(d)~~(e) If the vice-chairperson disagrees with the recommendation ~~for dismissal~~ to close the file, the coordinator will schedule a settlement conference.

.0708 Settlement Conference ~~Proceedings~~ Procedure

(a) The coordinator will assign the case to a facilitator.

(b) The ~~facilitator~~ State Bar will send a ~~Letter of Notice~~ letter of notice to the respondent lawyer by certified mail notifying the respondent that the petition was filed and notifying the respondent of the obligation to provide a written response to the letter of notice, signed by the respondent, within 15 days of service of the letter of notice upon the respondent, and enclosing copies of the petition and of any relevant materials provided by the petitioner.

(c) Within 15 days after the ~~Letter of Notice~~ letter of notice is served upon the ~~lawyer~~ respondent, the ~~lawyer~~ respondent must provide a written response to the petition signed by the respondent. The facilitator may ~~is authorized to~~ grant requests for extensions of time to respond. The ~~lawyer's~~ response must be a full and fair disclosure of all the facts and circumstances pertaining to the dispute. The response shall include all documents necessary to a full and fair understanding of the dispute. The response shall not include documents that are not necessary to a full and fair understanding of the dispute. The facilitator will provide a copy of the ~~lawyer's~~ response to the ~~client~~ petitioner unless the ~~lawyer~~ respondent objects in writing.

(d) The facilitator will conduct an investigation.

(e) The facilitator will conduct a telephone settlement conference. ~~between the parties.~~ The facilitator ~~is authorized to carry out~~ may conduct the settlement conference by ~~separate telephone calls with each of the parties or by conference calls~~ conference call or by telephone calls between the facilitator and one party at a time, depending upon which method the facilitator believes has the greater likelihood of success.

(f) The facilitator will ~~define and describe~~ explain the following to the parties:

…

(6) the circumstances under which the facilitator may communicate privately with any ~~of the parties~~ party or with any other person;

…

(g) ~~The facilitator has a duty~~ It is the duty of the facilitator to be impartial and to advise ~~all participants~~ the parties of any circumstance that might cause either party to conclude that the facilitator has a possible bias, prejudice, or partiality.

(h) It is the duty of the facilitator to timely determine when the dispute cannot be resolved by settlement and to declare that an impasse exists and that the settlement conference should end.

(i) Upon completion of the settlement conference, the facilitator will prepare a disposition letter to be sent to the parties ~~detailing~~ explaining:

(1) that the settlement conference resulted in a settlement and the terms of settlement; or

(2) that the settlement conference resulted in an impasse.

.0709 Record Keeping

The coordinator of fee dispute resolution will keep a record of each request for fee dispute resolution. The record must contain the following information:

(1) the ~~client's~~ petitioner's name;

(2) the date the petition was received;

(3) the ~~lawyer's~~ respondent's name;

(4) the district in which the ~~lawyer~~ respondent resides or maintains a place of business;

(5) what action was taken on the petition and, if applicable, how the dispute was resolved; and

(6) the date the file was closed.

.0710 District Bar Fee Dispute Resolution

Subject to the approval of the council, any judicial district bar may adopt a fee dispute resolution program for the purpose of resolving disputes involving lawyers residing or doing business in the district. The State Bar does not offer arbitration as a form of dispute resolution. The judicial district bar may offer arbitration to resolve a disputed fee. A judicial district bar fee dispute resolution program shall have jurisdiction over disputes that would otherwise be addressed by the State Bar's ACAP department. Such programs may be tailored to accommodate local conditions but they must be offered without cost and must comply with the jurisdictional restrictions set forth in Rule .0702 of this subchapter.

.0711 District Bar Settlement Conference Proceedings

(a) The chairperson of the judicial district bar fee dispute committee will assign the case to a facilitator who will conduct a settlement conference. The facilitator is responsible for arranging the settlement conference at a time and place convenient to all parties.

(b) The lawyer who is named in the petition must attend the settlement conference in person and may not send a representative in his or her place. If a party fails to attend a settlement conference without good cause, the facilitator may either reschedule the settlement conference or recommend dismissal of the petition.

(c) The facilitator must at all times be in control of the settlement conference and the procedures to be followed. The facilitator may communicate privately with any participant prior to and during the settlement conference. Any private communication with a participant will be disclosed to all other participants at the beginning of the settlement conference or, if the private communication occurs during the settlement conference, immediately after the private communication occurs. The facilitator will explain the following at the beginning of the settlement conference:

(1) the procedure that will be followed;

(2) the differences between a facilitated settlement conference and other forms of conflict resolution;

(3) that the settlement conference is not a trial;

(4) that the facilitator is not a judge;

~~(5) that participation in the settlement conference does not deprive the parties of any right they would otherwise have to pursue resolution of the dispute through the court system if they do not reach a settlement;~~

~~(6) the circumstances under which the facilitator may meet and communicate privately with any of the parties or with any other person;~~

~~(7) whether and under what conditions communications with the facilitator will be held in confidence during the settlement conference;~~

~~(8) that any agreement reached will be reached by mutual consent; and~~

~~(9) that, if the parties reach an agreement, that agreement will be reduced to writing and signed by the parties and their counsel, if any, before the parties leave the settlement conference.~~

~~(d) The facilitator has a duty to be impartial and to advise all participants of any circumstance that might cause either party to conclude that the facilitator has a possible bias, prejudice, or partiality.~~

~~(e) It is the duty of the facilitator to timely determine when the dispute cannot be resolved by settlement and to declare that an impasse exists and that the settlement conference should end.~~

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, 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 26, 2019.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of August, 2019.

s/Alice Neece Mine
Alice Neece Mine, 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 25th day of September, 2019.

s/Cheri L. Beasley
Cheri L. Beasley, 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 25th day of September, 2019.

s/Mark A. Davis
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

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 26, 2019.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar governing the administration of the continuing legal education program, as particularly set forth in 27 N.C.A.C. 1D, Section .1500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, SECTION .1500, RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

.1501 Scope, Purpose, and Definitions

(a) Scope …

(c) Definitions

(1) …

(5) "Continuing legal education" or "CLE" is any legal, judicial or other educational ~~activity~~ program accredited by the board. Generally, CLE will include educational ~~activities~~ programs designed...

(6) …

(11) "On demand" program shall mean an accredited educational program accessed via the internet that is available at any time on a provider's website and does not include live programming.

(12) "Online" program shall mean an accredited educational program accessed through a computer or telecommunications system such as the internet and can include simultaneously broadcast and on demand programming.

(13)~~(11)~~ "Participatory CLE" shall mean ~~courses~~ programs or segments of ~~courses~~ programs that encourage…

(14)~~(12)~~ "Professional responsibility" shall mean those ~~courses~~ programs or segments of ~~courses~~ programs devoted to…

(15)~~(13)~~ "Professionalism" ~~courses~~ programs are ~~courses~~ programs or segments of ~~courses~~ programs devoted to the identification and examination of, and the encouragement of adherence to, nonmandatory aspirational standards of professional conduct which transcend the requirements of the Rules of Professional Conduct. Such ~~courses~~ programs address…

(16)~~(14)~~ "Registered sponsor" …

(17)~~(15)~~ "Rules" …

(18)~~(16)~~ "Sponsor" …

(19)~~(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. §143B1320(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 and the course content requirements in Rule .1602(e) 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.~~

(20)~~(18)~~ "Year" …

.1512 Source of Funds

(a) …

(1) …

(2) The board shall fix a reasonably comparable fee to be paid by individual attorneys who attend for CLE credit approved continuing legal education ~~activities~~ programs for which…

.1517 Exemptions

(a) …

(i) CLE Record During Exemption Period. During a calendar year in which the records of the board indicate a member is exempt… the board shall not maintain a record of such member's attendance at accredited continuing legal education ~~activities~~ programs. Upon the termination of the member's exemption, the member may request carry over credit up to a maximum of twelve (12) credits for any accredited continuing legal education ~~activity~~ program attended during the calendar year immediately preceding the year of the termination of the exemption. Appropriate documentation of attendance at such ~~activities~~ programs will be required by the board.

(j) …

.1518 Continuing Legal Education Requirements ~~Program~~

(a) Annual Requirement. …

(c) Professionalism Requirement for New Members. …

(1) Content and Accreditation. The State Bar … To be approved as a PNA Program, the program must be provided by a sponsor registered under Rule .1603 of this subchapter and ~~the~~ a sponsor must satisfy the annual content requirements, and submit a detailed description of the program to the board for approval at least ~~45~~ days prior to the ~~presentation~~ program…

(2) …

(d) Exemptions from Professionalism Requirement for New Members...

.1519 Accreditation Standards

The board shall approve continuing legal education programs that meet the following standards and provisions.

(a) …

(c) Credit may be given for continuing legal education ~~activities~~ programs where live instruction is used or mechanically or electronically recorded or reproduced material is used, including videotape, ~~or~~ satellite transmitted, and online programs. ~~Subject to the limitations set forth in Rule .1604(e) of this subchapter, credit may also be given for continuing legal education activities on CD-ROM and on a computer website accessed via the Internet.~~

(d) Continuing legal education materials are to be prepared, and ~~activities~~ programs conducted, by an individual or group qualified by practical or academic experience. Credit shall not be given for any continuing legal education ~~activity~~ program taught or presented by a disbarred lawyer except a ~~course~~ program on professional responsibility (including a ~~course or~~ program on the effects of substance abuse and chemical dependency, or debilitating mental conditions on a lawyer's professional responsibilities) taught by a disbarred lawyer whose disbarment date is at least five years (60 months) prior to the date of the ~~activity~~ program. The advertising for the ~~activity~~ program shall disclose the lawyer's disbarment.

(e) Live ~~C~~continuing legal education ~~activities~~ programs shall be conducted in a setting physically suitable to the educational ~~activity~~ nature of the program and, when appropriate, equipped with suitable writing surfaces or sufficient space for taking notes.

(f) Thorough, high quality, and carefully prepared written materials should be distributed to all attendees at or before the time the ~~course~~ program is presented. These may include written materials printed from a website or computer presentation~~, computer website, or CD-ROM~~. A written agenda or outline for a ~~presentation~~ program satisfies this requirement when written materials are not suitable or readily available for a particular subject. The absence of written materials for distribution should, however, be the exception and not the rule.

(g) A sponsor of an approved program must remit fees as required and keep and maintain attendance records of each continuing legal education program sponsored by it, which shall be furnished to the board in accordance with regulations. Participation in an online program must be verified as provided in Rule .1601(d).

(h) Except as provided in Rules .1501 and~~.1604~~ .1602(h) of this subchapter, in-house continuing legal education and self-study shall not be approved or accredited for the purpose of complying with Rule .1518 of this subchapter.

(i) Programs that cross academic lines…may be considered for

approval…However, the board must be satisfied that the content of the ~~activity~~ program would enhance legal skills or the ability to practice law.

.1520 Registration of Sponsors and Program Approval

(a) Registration of Sponsors. An organization desiring to be designated as a registered sponsor of programs~~, or other continuing legal education activities~~ may apply…

(1)

(b) …

.1521 Credit Hours

The board may designate by regulation the number of credit hours to be earned by participation, including, but not limited to, teaching, in continuing legal education ~~activities~~ programs approved by the board.

.1524 Reinstatement

(a) Reinstatement Within 30 Days of Service of Suspension Order …

(c) Reinstatement Petition

At any time more than 30 days after service of an order of suspension on a member, a member who has been suspended for noncompliance with the rules governing the continuing legal education program may seek reinstatement by filing a reinstatement petition with the secretary….. If not otherwise set forth in the petition, the member shall attach a statement to the petition in which the member shall state with particularity the accredited legal education ~~courses~~ programs that ~~which~~ the member has…

(d) …

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, 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 26, 2019.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of August, 2019.

s/Alice Neece Mine
Alice Neece Mine, 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 25th day of September, 2019.

s/Cheri L. Beasley
Cheri L. Beasley, 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 25th day of September, 2019.

s/Mark A. Davis
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

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 19, 2019.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar governing the administration of the continuing legal education program, 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

.1518 Continuing Legal Education Program

(a) Annual Requirement.

…

(c) Professionalism Requirement for New Members.

(1) Content and Accreditation…

~~(2) Evaluation. To receive CLE credit for attending a PNA Program, the participant must complete a written evaluation of the program which shall contain questions specified by the State Bar. Sponsors shall collate the information on the completed evaluation forms and shall send a report showing the collated information, together with the original forms, to the State Bar when reporting attendance pursuant to Rule .1601(e)(1) of this subchapter.~~

~~(3)~~**(2)** Timetable and Partial Credit…

~~(4)~~**(3)** Online and Prerecorded Programs…

NORTH CAROLINA
WAKE COUNTY

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s/Alice Neece Mine
Alice Neece Mine, Secretary

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This the 25th day of September, 2019.

s/Cheri L. Beasley
Cheri L. Beasley, Chief Justice

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This the 25th day of September, 2019.

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27 N.C.A.C. 1D, Section .1600, Regulations Governing the Administration of the Continuing Legal Education Program

.1601 General Requirements for ~~Course~~ Program Approval

(a) Approval. CLE programs may be approved upon the written application of a sponsor, including a registered sponsor, or of an active member on an individual program basis. An application for such CLE program approval shall meet the following requirements:

(1) If advance approval is requested by a sponsor, the application and supporting documentation, including one substantially complete set of the written materials to be distributed at the ~~course or~~ program, shall be submitted at least 50 days prior to the date on which the ~~course or~~ program is scheduled…

(2) In all other cases, the application and supporting documentation shall be submitted by the sponsor not later than 50 days after the date the ~~course or~~ program was presented or prior to the end of the calendar year in which the ~~course or~~ program was presented, whichever is earlier. Active members requesting credit must submit the application and supporting documentation within 50 days after the date the ~~course or~~ program was presented or, if the 50 days have elapsed, as soon as practicable after receiving notice from the board that the ~~course~~ program accreditation request was not submitted by the sponsor.

(3) …

(5) The application shall be accompanied by a ~~course~~ program outline …

(b) Program Quality and Materials…Any sponsor, including a registered sponsor, that expects to conduct a CLE program for which suitable written materials will not be made available to all attendees may obtain approval for that program only by application to the board at least 50 days in advance of the ~~presentation~~ program showing why written materials are not suitable or readily available for such a program.

(c) Facilities …

(d) ~~Computer-Based CLE: Verification of Attendance~~ Online CLE. The sponsor of an on-line ~~course~~ program must have a reliable method for recording and verifying attendance. ~~The sponsor of a CD-ROM course must demonstrate that there is a reliable method for the user or the sponsor to record and verify participation in the course.~~ A participant may periodically log on and off of ~~a computer-based CLE course~~ an online program provided the total time spent participating in the ~~course~~ program is equal to or exceeds the credit hours assigned to the program. A copy of the record of attendance must be forwarded to the board within 30 days after a member completes his or her participation in the ~~course~~ program.

(e) Records. Sponsors, including registered sponsors, shall within 30 days after the program is concluded

(1) …;

(2) remit to the board the appropriate sponsor fee; and, if payment is not received by the board within 30 days after the ~~course~~ program is concluded, interest at the legal rate shall be incurred…; and

(3) furnish to the board a complete set of all written materials distributed to attendees at the ~~course or~~ program.

(f) Announcement. Sponsors that have advanced approval for programs may include in their brochures or other program descriptions the information contained in the following illustration:

This ~~[course, seminar, or~~ program~~]~~ has been approved by the Board of Continuing Legal Education of the North Carolina State Bar for continuing legal education credit in the amount of ____ hours, of which ____ hours will also apply in the area of professional responsibility.

(g) Notice. Sponsors not having advanced approval shall make no representation concerning the approval of the ~~course~~ program for CLE credit by the board. The board will mail a notice of its decision on CLE ~~activity~~ program approval requests within ~~(45)~~ 45 days of their receipt when the request for approval is submitted before the program and within ~~(45)~~ 45 days when the request is submitted after the program. …

.1602 Course Content Requirements

(a) Professional Responsibility ~~Courses~~ Programs on Stress, Substance Abuse, Chemical Dependency, and Debilitating Mental Conditions - Accredited professional responsibility ~~courses~~ programs on stress, substance abuse, chemical dependency, and debilitating mental conditions shall concentrate on the relationship between stress, substance abuse, chemical dependency, debilitating mental conditions, and a lawyer's professional responsibilities. Such ~~courses~~ programs may also include (1) education on the prevention, detection, treatment and etiology of stress, substance abuse, chemical dependency, and debilitating mental conditions, and (2) information about assistance for chemically dependent or mentally impaired lawyers available through lawyers' professional organizations. No more than three hours of continuing education credit will be granted to any one such ~~course~~ program or segment of a ~~course~~ program.

(b) Law School Courses - Courses offered by an ABA accredited law school with respect to which academic credit may be earned may be approved ~~activities~~ programs. …

(c) Law Practice Management Programs…

(e) Technology Training Programs – A technology training program must have the primary objective of ~~A program on the selection of an information technology (IT) product, device; platform, application, web-based technology, or other technology tool, process, or methodology; or the use of an IT tool, process, or methodology to enhance~~ enhancing a lawyer's proficiency as a lawyer or ~~to improve~~ improving law office management and must satisfy ~~may be accredited as technology training if~~ the requirements of paragraphs (c) and (d) of this rule ~~are satisfied~~ as applicable. 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; g) practice management software; and h) a cybersecurity tool, process, or methodology specifically applied to the needs of the practice of law or law practice management. A program that provides general instruction on an IT tool, process, or methodology but does not include instruction on the practical application of the IT 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~~ programs 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 program that is sponsored by a manufacturer, distributor, broker, or merchandiser of an IT tool, process, or methodology unless the ~~course~~ program is solely about using the IT 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 tool, process, or methodology in return for presenting a CLE program about the IT tool, process, or methodology.

(f) Activities That Shall Not Be Accredited – CLE credit will not be given for general and personal educational activities. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit:

(1) …;

(2) …;

(3) courses designed primarily to sell services or products or to generate greater revenue, such as marketing or advertising (as distinguished from ~~courses~~ programs dealing with development of law office procedures and management designed to raise the level of service provided to clients).

(g) Service to the Profession Training - A ~~course~~ program or segment of a ~~course~~ program presented by a bar organization may be granted up to three hours of credit if the bar organization's ~~course~~ program trains volunteer attorneys in service to the profession, and if such ~~course~~ program or ~~course~~ segment meets the requirements of Rule .1519(b)-(g)~~(2)-(7)~~ and Rule .1601(b), (c), and (g) of this subchapter; if appropriate, up to three hours of professional responsibility credit may be granted for such ~~course~~ program or ~~course~~ program segment.

(h) In-House CLE and Self-Study. No approval will be provided for in-house CLE or self-study by attorneys, except as follows:

(1) programs exempted by the board under Rule .1501(c)(10) of this subchapter; and

~~(2) as provided in Rule .1604(e) of this subchapter; and~~

(2)~~(3)~~ live programs on professional responsibility, professionalism, or professional negligence/malpractice presented by a person or organization that is not affiliated with the lawyers attending the program or their law firms and that has demonstrated qualification to present such programs through experience and knowledge.

(i) Bar Review/Refresher Course. ~~Courses~~ Programs designed to review or refresh recent law school graduates or attorneys in preparation for any bar exam shall not be approved for CLE credit.

.1603 Registered Sponsors

(a) Application for Registered Sponsor Status. To be designated as a registered sponsor of programs ~~or other continuing legal education activities~~ under Rule .1520(a) of this subchapter, a sponsor must satisfy the following requirements: …

(b) …

.1604 [Reserved] ~~Accreditation of Prerecorded, Simultaneous Broadcast, and ComputerBased Programs~~

~~(a) Presentation Including Prerecorded Material. An active member may receive credit for attendance at, or participation in, a presentation where prerecorded material is used. Prerecorded material may be either in a video or an audio format.~~

~~(b) Simultaneous Broadcast. An active member may receive credit for participation in a live presentation which is simultaneously broadcast by telephone, satellite, live web streaming (webcasting), or video conferencing equipment. The member may participate in the presentation by listening to or viewing the broadcast from a location that is remote from the origin of the broadcast. The broadcast may include prerecorded material provided it also includes a live question and answer session with the presenter.~~

~~(c) Accreditation Requirements. A member attending a prerecorded presentation is entitled to credit hours if~~

~~(1) the live presentation or the presentation from which the program is recorded would, if attended by an active member, be an accredited course; and~~

~~(2) all other conditions imposed by the rules in Section .1600 of this subchapter, or by the board in advance, are met.~~

~~(d) Minimum Registration and Verification of Attendance. A minimum of three active members must register for the presentation of a prerecorded program. This requirement does not apply to the presentation of a live broadcast by telephone, satellite, or video conferencing equipment. Attendance at a prerecorded or simultaneously broadcast (by telephone, satellite, or video conferencing) program must be verified by (1) the sponsor's report of attendance or (2) the execution of an affidavit of attendance by the participant.~~

~~(e) Computer-Based CLE. Effective January 1, 2014, a member may receive up to six hours of credit annually for participation in a course on CD-ROM or on-line. A CD-ROM course is an educational seminar on a compact disk that is accessed through the CD-ROM drive of the user's personal computer. An on-line course is an educational seminar available on a provider's website reached via the Internet.~~

~~(1) A member may apply up to six credit hours of computer-based CLE to a CLE deficit from a preceding calendar year. Any computer-based CLE credit hours applied to a deficit from a preceding year will be included in calculating the maximum of six hours of computer-based CLE allowed in the preceding calendar year. A member may carry over to the next calendar year no more than six credit hours of computer-based CLE pursuant to Rule .1518(b) of this subchapter. Any credit hours carried-over pursuant to Rule .1518(b) of this subchapter will be included in calculating the six hours of computer-based CLE allowed in any one calendar year.~~

~~(2) To be accredited, a computer-based CLE course must meet all of the conditions imposed by the rules in Section .1600 of this subchapter, or by the board in advance, except where otherwise noted, and be interactive, permitting the participant to communicate, via telephone, electronic mail or a website bulletin board, with the presenter and/or other participants.~~

.1605 Computation of Credit

(a) …

(c) Teaching - As a contribution to professionalism, credit may be earned for teaching in an approved continuing legal education ~~activity~~ program or a continuing paralegal education ~~activity~~ program held in North Carolina and approved pursuant to Section .0200 of Subchapter G of these rules. ~~Presentations~~ Programs accompanied by thorough, high quality, readable, and carefully prepared written materials will qualify for CLE credit on the basis of three hours of credit for each thirty minutes of presentation. Repeat ~~presentations~~ programs qualify for one-half of the credits available for the initial ~~presentation~~ program. For example, an initial presentation of 45 minutes would qualify for 4.5 hours of credit.

(d) Teaching Law Courses

(1) …

(4) Credit Hours. Credit for teaching ~~activities~~ described in Rule .1605(d)(1) – (3) above may be earned without regard to whether the course is taught online or in a classroom. Credit will be calculated according to the following formula: …

.1606 Fees

(a) Sponsor Fee - …The fee is computed as shown in the following formula and example which assumes a 6-hour ~~course~~ program attended by 100 North Carolina lawyers seeking CLE credit:

Fee: $3.50 x Total Approved CLE Hours (6) x Number of NC Attendees (100) = Total Sponsor Fee ($2100)

(b) Attendee Fee - …It is computed as shown in the following formula and example which assumes that the attorney attended ~~an activity~~ a program approved for 3 hours of CLE credit:

Fee: $3.50 x Total Approved CLE hours (3.0) = Total Attendee Fee ($10.50)

(c) …

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, 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 26, 2019.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of August, 2019.

s/Alice Neece Mine
Alice Neece Mine, 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 25th day of September, 2019.

s/Cheri L. Beasley
Cheri L. Beasley, 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 25th day of September, 2019.

s/Mark A. Davis
For the Court

AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 26, 2019.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct, as particularly set forth in 27 N.C.A.C. 2, be amended as follows (additions are underlined, deletions are interlined):

Rules of Professional Conduct

27 N.C.A.C. 2, Rule 1.5, Fees

Rule 1.5 Fees

(a) A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee or charge or collect a clearly excessive amount for expenses. The factors to be considered in determining whether a fee is clearly excessive include the following:…

(b) …

(f) Any lawyer having a dispute with a client regarding a fee for legal services must:

(1) at least 30 days prior to initiating legal proceedings to collect a disputed fee, notify his or her client in writing of the existence of the North Carolina State Bar's program of fee dispute resolution; the notice shall state that if the client does not file a petition for resolution of the disputed fee with the State Bar within 30 days of the lawyer's notification, the lawyer may initiate legal proceedings to collect the disputed fee ~~client of the existence of the North Carolina State Bar's program of fee dispute resolution at least 30 days prior to initiating legal proceedings to collect the disputed fee~~; and

(2) participate in good faith in the fee dispute resolution process if the client submits a proper request. Good faith participation requires the lawyer to respond timely to all requests for information from the fee dispute resolution facilitator.

Comment

Appropriate Fees and Expenses

[1] …

Disputes over Fees

[10] Participation in the fee dispute resolution program of the North Carolina State Bar is mandatory when a client requests resolution of a disputed fee. A lawyer's obligation to respond timely to all requests for information from the fee dispute resolution facilitator continues even if the lawyer and the client reach a resolution of the dispute while the fee dispute petition is pending. Before filing an action to collect a disputed fee, the client must be advised of the fee dispute resolution program. Notification must occur not only when there is a specific issue in dispute, but also when the client simply fails to pay. However, when the client expressly acknowledges liability for the specific amount of the bill and states that he or she cannot presently pay the bill, the fee is not disputed and notification of the client is not required. ~~In making reasonable efforts to advise the client of the existence of the fee dispute resolution program, it is preferable to address a written communication to the client at the client's last known address~~. If the address of the client is unknown, the lawyer ~~should~~ must use reasonable efforts to acquire the current address of the client. Notification is not required in those instances where the State Bar does not have jurisdiction over the fee dispute as set forth in 27 N.C.A.C. 1D, .0702.

[11] …

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, 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 26, 2019.

Given over my hand and the Seal of the North Carolina State Bar, this the 15th day of August, 2019.

s/Alice Neece Mine
Alice Neece Mine, 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 25th day of September, 2019.

s/Cheri L. Beasley
Cheri L. Beasley, 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 25th day of September, 2019.

s/Mark A. Davis
For the Court

THE FOLLOWING ORDER, SIGNED BY THE COURT ON 28 AUGUST 1986, WAS INADVERTENTLY OMITTED FROM PUBLICATION IN THE NORTH CAROLINA REPORTS.

SUPREME COURT OF NORTH CAROLINA

****

In the Matter of)
Pilot Program of) O R D E R
Mandatory, Nonbinding)
Arbitration)

****

The North Carolina General Assembly authorized the Supreme Court of North Carolina "by such rules as it shall determine appropriate" to "provide for an experimental, pilot program in three judicial districts selected by the Court, of mandatory, nonbinding arbitration of all claims for money damages of $15,000 or less . . . provided . . . that no state funds shall be used to implement the pilot program," 1985 Sess. Laws ch. 698, §23. The Court has determined that such a pilot program should be instituted in this state on an experimental basis provided funds can be obtained to conduct the program.

Now, therefore, provided sufficient funds can be obtained to conduct the program, the Court orders:

(1) An experimental, pilot program of mandatory, nonbinding arbitration shall be operated for two years in the Third, Fourteenth, and Twenty-Ninth Judicial Districts;

(2) The program shall operate pursuant to the attached "Rules for Court Ordered Arbitration";

(3) These rules shall become effective on 1 January 1987;

(4) These rules shall be promulgated by their publication, together with this order, in the Advance Sheets of the Supreme Court and the Court of Appeals of North Carolina.

Done by the Court in conference this 28th day of August 1986.

Billings J.

For the Court

RULES FOR COURT-ORDERED ARBITRATION IN NORTH CAROLINA

Adopted August 12, 1986

COURT-ORDERED ARBITRATION

Rule 1

ACTIONS SUBJECT TO ARBITRATION

(a) Types of Actions; Exceptions. All civil actions filed in the trial divisions of the General Court of Justice which are not assigned to a magistrate and all appeals from judgments of magistrates in which there is a claim or there are claims for monetary relief not exceeding $15,000 total, exclusive of interest, costs and attorneys' fees, are subject to court-ordered arbitration under these rules except actions:

(1) Involving a class;

(2) In which there is a substantial claim for injunctive or declaratory relief;

(3) Involving:

(i) family law issues,

(ii) title to real estate,

(iii) wills and decedents' estates, or

(iv) summary ejectment;

(4) Which are special proceedings;

(5) In which a claim is asserted for an unspecified amount exceeding $10,000 in compliance with N.C.R. Civ. P. 8(a)(2);

(6) Involving a claim for monetary recovery in an unspecified amount later to be determined by an accounting or otherwise, if the claimant certifies in the pleading asserting the claim that the amount of the claim will actually exceed $15,000; or

(7) Which are certified by a party to be companion or related to similar actions pending in other courts with which the action might be consolidated but for lack of jurisdiction or venue.

(b) Arbitration by Agreement. The court may submit any other civil action to arbitration under these rules or any modification thereof, pursuant to agreement by the parties approved by the court.

(c) Court-Ordered Arbitration in Cases Having Excessive Claims. The court may order any case submitted to arbitration under these rules at any time before trial if it finds that the amount actually in issue is $15,000 or less, even though a greater amount is claimed.

(d) Exemption and Withdrawal from Arbitration.

(1) The court may exempt or withdraw any action from arbitration on its own motion or on motion of a party made not less than 10 days before the arbitration hearing and a showing that: (i) the amount of the claim(s) exceed(s) $15,000; (ii) the action is excepted from arbitration under Rule 1(a); or (iii) there is a strong and compelling reason to do so.

(2) During the pilot arbitration program, the court shall exempt from arbitration a random sample of cases so as to create a control group of cases to be used for comparison with arbitrated cases in evaluating the pilot arbitration program.

COMMENT

The purpose of these rules is to create an efficient, economical alternative to traditional litigation for prompt resolution of disputes involving money damage claims up to $15,000. The $15,000 jurisdictional limit by statute and Rule 1(a) applies only to the claim(s) actually asserted, even though the claim(s) is or are based on a statute providing for multiple damages, e.g. N.C. Gen. Stat. §§ 1-538, 75-16. An arbitrator may award damages in any amount which a party is entitled to recover. These rules do not affect the jurisdiction or functions of the magistrates where they have been assigned such jurisdiction. Counsel are expected to value their cases

reasonably without court involvement. The court has ultimate authority to order overvalued cases to arbitration. The court's authority and responsibility for conducting all proceedings and for the final judgment in a case are not affected by these rules, which merely give the court a new civil procedure. A false certification under Rule 1(a)(6) might trigger N.C.R. Civ. P. 11(a) and N.C. Gen. Stat. § 6-21.5 sanctions or State Bar disciplinary action.

"Family law issues" in Rule 1(a)(3)(i) includes all family law cases such as divorce, guardianship, adoptions, juvenile matters, child support, custody and visitation. Actions which are "special proceedings" or involve summary ejectment, referred to in Rule 1(a), are actions so designated by the General Statutes.

Rule 1(b) allows binding or non-binding arbitration of any case by agreement and permits the parties to modify these rules for a particular case. Court approval of any modification will give a variant proceeding the court's imprimatur and ensure adherence to their primary purpose. For example, arbitrators under these rules are not expected to decide protracted cases without fair compensation by the parties. This rule was not intended to provide compensation from the limited funds available to the pilot courts for protracted or exceptional cases. Therefore, the court should review and approve any such extraordinary stipulations.

Rule 1(c) is a safeguard against overvaluation of a claim to evade arbitration. It would become operative on motion of a party. This rule does not require (nor forbid) the court to examine any case on its own motion to determine its true value. The court may establish an administrative procedure for reviewing pleadings in cases appropriate for consideration by a judge for referral under Rule 1(c). See also the Comment to Rule 1(a).

Exemption or withdrawal may be appropriate under Rule 1(d)(1)(iii) in a challenge to established precedent in an action in which a trial de novo and subsequent appeal are probable or a case in which there has been prior mediation through the North Carolina Attorney General's office.

Rule 2

ARBITRATORS

(a) Selection. The court shall select and maintain a list of qualified arbitrators, which shall be a public record. Unless the parties file a stipulation identifying their choice of an arbitrator on the court's list within 60 days after the date the action was filed, the court will appoint an arbitrator, chosen at random from the list.

(b) Eligibility. An arbitrator shall have been a member of the North Carolina State Bar for at least five years and must be approved by the Senior Resident Superior Court Judge and the Chief District Court Judge for such service.

(c) Fees and Expenses. Arbitrators shall be paid a $75 fee by the court for each arbitration hearing when they file their awards with the court. An arbitrator may be reimbursed for expenses actually and necessarily incurred in connection with an arbitration hearing and paid a reasonable fee not exceeding $75 for work on a case not resulting in a hearing upon the arbitrator's written application to, and approval by, the Senior Resident Superior Court Judge, or the Chief Judge of the District Court, of the court in which the case was pending.

(d) Oath of Office. Arbitrators shall take an oath or affirmation similar to that prescribed in N.C. Gen. Stat. § 11-11, in a form approved by the Administrative Office of the Courts, before conducting any hearings.

(e) Disqualification. Arbitrators shall be disqualified and must recuse themselves if as a judge in the same action they would be disqualified or obliged to recuse themselves. Disqualification and recusal may be waived by the parties upon full disclosure of any basis for disqualification or recusal.

(f) Replacement of Arbitrator. If an arbitrator is disqualified, recused, unable, or unwilling to serve, a replacement shall be appointed in a random manner by the court.

COMMENT

Under Rule 2(a) the parties have a right to choose one arbitrator from the list if they wish to do so, but they have the burden of taking the initiative if they want to make the selection, and they must do it promptly.

Under Rule 2(c) filing of the award is the final act at which payment should be made, closing the matter for the arbitrator. The arbitrator should make the award when the hearing is concluded. Hearings must be brief and expedited so that an arbitrator can hear at least three per day. See Rule 3(n).

Payments and expense reimbursements authorized by Rule 2(c) are made subject to court approval to insure conservation and judicial monitoring of the funds available during the pilot program from the "private sources" specified in the enabling Act.

Rule 3

ARBITRATION HEARINGS

(a) Hearing Scheduled by the Court. Arbitration hearings shall be scheduled by the court and held in a courtroom, if available, or in any other public room suitable for conducting judicial proceedings and shall be open to the public.

(b) Pre-hearing Exchange of Information. At least 10 days before the date set for the hearing, the parties shall exchange:

(1) Lists of witnesses they expect to testify;

(2) Copies of documents or exhibits they expect to offer in evidence; and

(3) A brief statement of the issues and their contentions.

Parties may agree in writing to rely on stipulations and/or statements, sworn or unsworn, rather than a formal presentation of witnesses and documents, for all or part of the hearing.

(c) Exchanged Documents Considered Authenticated. Any document exchanged may be received in the hearing as evidence without further authentication; however, the party against whom it is offered may subpoena and examine as an adverse witness anyone who is the author, custodian or a witness through whom the document might otherwise have been introduced. Documents not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.

(d) Copies of Exhibits Admissible. Copies of exchanged documents or exhibits are admissible in arbitration hearings.

(e) Witnesses. Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.

(f) Subpoenas. N.C.R. Civ. P. 45 shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these rules.

(g) Authority of Arbitrator to Govern Hearings. Arbitrators shall have the authority of a trial judge to govern the conduct of hearings, except for the power to punish for contempt. The arbitrator shall refer all contempt matters to the court.

(h) Law of Evidence Used as Guide. The law of evidence does not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect he determines appropriate.

(i) No Ex Parte Communications with Arbitrator. No ex parte communication by a party or counsel with an arbitrator is permitted.

(j) Failure to Appear; Defaults; Rehearing. If a party who has been notified of the date, time and place of the hearing fails to appear without good cause therefor, the hearing may proceed and an award may be made by the arbitrator against the absent party upon the evidence offered by the parties present, but not by default for failure to appear. If a party is in default for any other reason but no judgment has been entered upon the default pursuant to N.C.R. Civ. P. 55(b) before the hearing, the arbitrator may hear

evidence and may issue an award against the party in default. The court may order a rehearing of any case in which an award was made against a party who failed to obtain a continuance of a hearing and failed to appear for reasons beyond his control. Such motion for rehearing shall be filed with the court within the time allowed for demanding trial de novo stated in Rule 5(a).

(k) No Record of Hearing Made. No official transcript of an arbitration hearing shall be made. The arbitrator may permit any party to record the arbitration hearing in any manner that does not interfere with the proceeding.

(l) Sanctions. Any party failing or refusing to participate in an arbitration proceeding in a good faith and meaningful manner shall be subject to sanctions by the court on motion of a party, or report of the arbitrator, as provided in N.C.R. Civ. P. 37(b)(2)(A) - 37(b)(2)(C) and N.C. Gen. Stat. § 6-21.5.

(m) Proceedings in Forma Pauperis. The right to proceed in forma pauperis is not affected by these rules.

(n) Limits of Hearings. Arbitration hearings shall be limited to one hour unless the arbitrator determines at the hearing that more time is necessary to ensure fairness and justice to the parties.

(1) A written application for a substantial enlargement of time for a hearing must be filed with the court and the arbitrator, if appointed, and must be served on opposing parties at the earliest practicable time, and no later than the date for pre-hearing exchange of information under Rule 3(b). The court will rule on these applications after consulting the arbitrator if appointed.

(2) An arbitrator is not required to receive repetitive or cumulative evidence.

(o) Hearing Concluded. The arbitrator shall declare the hearing concluded when all the evidence is in and any arguments he permits have been completed. In exceptional cases, he may in his discretion receive post-hearing briefs, but not evidence, if submitted within 3 days after the hearing has been concluded.

(p) Parties Must be Present at Hearings; Representation. All parties shall be present at hearings in person or through representatives authorized to make binding decisions on their behalf in all matters in controversy before the arbitrator. All parties may be represented by counsel. Only individuals may appear pro se.

(q) Motions. Designation of an action for arbitration does not affect a party's right to file any motion with the court.

(1) The court, in its discretion, may consider and determine any motion at any time. It may defer consideration of issues raised by motion to the arbitrator for determination in his award. Parties shall state their contentions regarding pending motions deferred to the arbitrator in the exchange of information required by Rule 3(b).

(2) Pendency of a motion shall not be cause for delaying an arbitration hearing unless the court so orders.

COMMENT

Rule 3(d) contemplates that the arbitrator shall return all evidence submitted when the hearing is concluded and the award has been made. Original documents and exhibits should not be marked in any way to identify them with the arbitration, to avoid possible prejudice in any future trial.

An arbitrator may at any time encourage settlement negotiations and may participate in such negotiations if all parties are present in person or by counsel. See Rule 3(p).

The purpose of Rule 3(n) is to ensure that hearings are limited and expedited. Failure to limit and expedite the hearings defeats the purpose of these rules. In this connection, note the option in Rule 3(b) for use of prehearing stipulations and/or sworn or unsworn statements to meet time limits.

Under Rule 3(o) the declaration that the hearing is concluded by the arbitrator formally marks the end of the hearing. Note Rule 4(a), which requires the arbitrator to file his award within three days after the hearing is concluded or post-hearing briefs are received. The usual practice should be a statement of the award at the close of the hearing, without submission of briefs. In the unusual case where an arbitrator is willing to receive posthearing briefs, he should specify the points he wants addressed promptly and succinctly. Time limits in these rules are governed by N.C.R. Civ. P. 6 and N.C. Gen. Stat. §§ 103-4, 103-5.

Under Rule 3(q) the court will rule on pre-hearing motions which dispose of the case on the pleadings or relate to the procedural management of the case. The court will normally defer to the arbitrator for his consideration motions addressed to the merits of a claim requiring a hearing, the taking of evidence, or examination of records and documents other than the pleadings and motion papers.

Rule 4

THE AWARD

(a) Filing the Award. The award shall be in writing, signed by the arbitrator and filed with the court within 3 days after the hearing is concluded or the receipt of post-hearing briefs, whichever is later.

(b) Findings; Conclusions; Opinions. No findings of fact and conclusions of law or opinions supporting an award are required.

(c) Scope of Award. The award must resolve all issues raised by the pleadings and may exceed $15,000.

(d) Copies of Award to Parties. The court shall forward copies of the award to the parties or their counsel.

COMMENT

Under Rule 4(a) the arbitrator should issue the award when the hearing is over and should not take the case under advisement. If the arbitrator wants post-hearing briefs, he must receive them within three days, consider them, and file his award within three days thereafter. See Rule 3(o) and its Comment.

See Rule 1(a) and its Comment in connection with Rule 4(c).

Rule 5

TRIAL DE NOVO

(a) Trial De Novo As Of Right. Any party not in default for a reason subjecting him to judgment by default who is dissatisfied with an arbitrator's award may have a trial de novo as of right upon filing a written demand for trial de novo with the court, and service of the demand on all parties, on an approved form within 30 days after the arbitrator's award has been filed, or within 10 days after an adverse determination of a Rule 3(j) motion to rehear.

(b) Filing Fee. A party filing a demand for trial de novo shall pay a filing fee equivalent to the arbitrator's compensation, which shall be held by the court until the case is terminated and returned to the demanding party only if there has been a trial in which, in the trial judge's opinion, the demanding party improved his position over the arbitrator's award. Otherwise, the filing fee shall be forfeited to the fund from which arbitrators are paid.

(c) No Reference to Arbitration in Presence of Jury. A trial de novo shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without the consent of all parties to the arbitration and the court's approval.

(d) No Evidence of Arbitration Admissible. No evidence that there have been arbitration proceedings or any fact concerning them may be admitted in a trial de novo, or in any other proceedings, without the consent of all parties to the arbitration and the court's approval.

(e) Arbitrator Not to be Called as Witness. An arbitrator may not be deposed or called as a witness to testify concerning anything said or done in an arbitration proceeding. His notes are privileged and not subject to discovery.

(f) Judicial Immunity. The arbitrator shall have judicial immunity to the same extent as a trial judge with respect to his actions in the arbitration proceeding.

COMMENT

Rule 5(c) does not preclude cross examination of a witness in a later proceeding concerning prior inconsistent statements during arbitration proceedings, if done in such a manner as not to violate the intent of Rules 5(c) and 5(d).

See also the Comment to Rule 6 regarding demand for trial de novo.

Rule 6

THE COURT'S JUDGMENT

(a) Termination of Action by Agreement Before Judgment. The parties may file a stipulation of dismissal or consent judgment at any time before entry of judgment on an award.

(b) Judgment Entered on Award. If the case is not terminated by agreement of the parties, and no party files a demand for trial de novo within 30 days after the award is filed, the court shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be mailed to all parties or their counsel.

COMMENT

A judgment entered on the arbitrator's award is not appealable because there is no record for review by an appellate court. By failing to demand a trial de novo the right is waived. Demand for jury trial pursuant to N.C.R. Civ. P. 38(b) does not preserve the right to a trial de novo. There must be a separate, specific, timely demand for trial de novo after the award has been filed.

Rule 7

COSTS

(a) Arbitration Costs. The arbitrator may include in an award court costs accruing through the arbitration proceedings in favor of the prevailing party.

(b) Costs Following Trial De Novo. If there is trial de novo, court costs may, in the discretion of the trial judge, include costs taxable under Rule 7(a) incurred in the arbitration proceedings.

(c) Costs Denied if Party Does Not Improve His Position in Trial De Novo. A party demanding trial de novo who does not improve his position may be denied his costs in connection with the arbitration proceeding by the trial judge, even though prevailing at trial.

Rule 8

ADMINISTRATION

(a) Actions Designated and Date Set Upon Filing. The court shall designate actions for arbitration upon the filing of the complaint or the docketing of an appeal from the magistrate and shall set a date within 90 days by which an arbitration hearing must begin.

(b) Notice. Notice that a case has been assigned to arbitration and the date, time and place of the hearing shall be served promptly on all parties.

(c) Date of Hearing Advanced by Agreement. A hearing may be held earlier than the date set by the court, by agreement of the parties with court approval.

(d) Forms. Forms for use in these arbitration proceedings must be approved by the Administrative Office of the Courts.

(e) Delegation of Nonjudicial Functions. To conserve judicial resources and facilitate the effectiveness of these rules, the court may delegate nonjudicial, administrative duties and functions to supporting court personnel and authorize them to require compliance with approved procedures.

(f) Definitions. "Court" as used in these rules means, depending upon the context in which it is used:

(1) The Senior Resident Superior Court Judge, if the action is pending in the Superior Court Division, or his delegate;

(2) The Chief District Court Judge, if the action is pending in the District Court Division, or his delegate; or

(3) Any assigned judge exercising the court's jurisdiction and authority in an action.

COMMENT

One goal of these rules is to expedite disposition of claims involving $15,000 or less. See Rule 8(a). Ninety days will allow 30 days for responsive motions and pleadings and 60 days for discovery, trial preparation, pretrial motions disposition and calendaring. A motion to continue a hearing will be heard by a judge mindful of this goal.

Rule 9

APPLICATION OF RULES

These Rules shall apply to cases filed on or after their effective date and to pending cases submitted by agreement of the parties under Rule 1(b) or referred to arbitration by order of the court.

COMMENT

A common set of rules has been adopted for the three pilot districts. These rules may be amended, to permit experiments with variant procedures or to take into account local conditions, with the prior approval of the Supreme Court of North Carolina. The enabling legislation, 1985 N.C. Sess. Laws, ch. 698 § 23, vests rulemaking authority in the Supreme Court, and this includes amendments.

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

TERMINATION OF PARENTAL RIGHTS—Continued

Grounds for termination—failure to make reasonable progress—sufficiency of findings—In a termination of parental rights case, the trial court's findings supported its conclusion that a mother failed to make reasonable progress under the circumstances toward correcting the conditions that led to the removal of her children, pursuant to N.C.G.S. § 7B-1111(a)(2). Although the mother argued that she complied with court-ordered services and therefore made reasonable progress, her argument failed to acknowledge that the primary reason for the removal of her children was the presence of the father—who had assaulted several of the children and the mother—in the home. The mother had voluntarily placed the children in foster care so that she could live with the father, and he remained in the home throughout the termination hearing. **In re A.R.A., 190.**

Grounds for termination—failure to pay a reasonable portion of the cost of care—In a termination of parental rights case, the trial court's findings established that respondent-mother had the ability to pay some amount toward the cost of care for her children while they were in the custody of the Department of Social Services but did not. Those findings supported the conclusion that grounds existed to terminate respondent-mother's parental rights. **In re J.M., 352.**

Grounds for termination—findings—In a termination of parental rights case, the trial court's extensive findings of fact as to the grounds for removal—likelihood that the neglect would be repeated, failure to remedy the conditions leading to the children's removal, and inability to provide care or supervision—were supported by clear and convincing evidence and the findings as a whole supported the legal conclusions. **In re J.M., 352.**

Grounds for termination—neglect—conclusions of law—The trial court properly terminated a mother's parental rights to her two children on the ground of neglect after concluding that the mother would be likely to neglect her children in the future, based on her failure to provide an explanation for or acknowledge her responsibility for multiple bone fractures suffered by her younger child while he was under her and her fiance's care. **In re D.W.P., 327.**

Grounds for termination—neglect—findings of fact—sufficiency of evidence —In a proceeding to terminate a father's parental rights in his son based on neglect, competent evidence supported the trial court's findings of fact regarding the father's failure to voluntarily contribute to his son's care from his wages and his violation of the conditions of his probation by incurring new criminal charges, but the evidence contradicted the trial court's finding that the father did not enroll in a domestic violence intervention program. **In re K.N., 274.**

Grounds for termination—neglect—likelihood of future neglect—The trial court's conclusion that a father's parental rights were subject to termination based on neglect was supported by the evidence where the father was willing to leave the child alone with her mother even though the mother was unfit for such responsibility, the parents exhibited marital discord during supervised visits with their child, and the parents intended to remain together. **In re Z.V.A., 207.**

Grounds for termination—neglect—sufficiency of findings—The trial court's findings of fact were insufficient to support its termination of a father's parental rights in his son on the ground of neglect where the trial court's only factual finding directly relating to the father's ability to care for his son concerned the father's incarceration. Incarceration, standing alone, cannot support termination on the ground of

TERMINATION OF PARENTAL RIGHTS—Continued

neglect without an analysis of the relevant facts and circumstances, which the trial court did not do. Other findings regarding the adequacy of the father's participation in different aspects of his case plan were not fleshed out enough to support a conclusion that neglect was likely to recur if the minor were returned to the father's care. **In re K.N., 274.**

Grounds for termination—neglect—sufficiency of findings—willfulness— The trial court's findings of fact were insufficient to support its termination of a father's parental rights in his daughter on the grounds of neglect by abandonment where the trial court made no findings concerning the father's ability to contact his daughter's legal custodian, exercise visitation, or pay any support. **In re N.D.A., 71.**

Grounds for termination—willful abandonment—sufficiency of findings—willfulness—The trial court's findings of fact were insufficient to support its termination of a father's parental rights in his daughter on the grounds of willful abandonment where the trial court made no findings concerning the father's ability to visit his daughter, to contact his daughter's legal custodian, or to pay support during the relevant time period. **In re N.D.A., 71.**

Grounds for termination—willful failure to make reasonable progress—nexus between court-approved plan and conditions which led to removal— The trial court's unchallenged findings of fact were sufficient to terminate a mother's parental rights in her daughter on the grounds that she willfully left her daughter in foster care for more than twelve months without making reasonable progress to correct the conditions which led to the child's removal from her care, and were based on clear, cogent, and convincing evidence that the mother failed to maintain contact with the department of social services while her daughter was in its custody or to participate in any aspect of the court-ordered case plan. Despite the mother's argument that the conditions she failed to correct were not those which directly led to her daughter's removal, there existed a sufficient nexus between the components of the case plan and the overall conditions which led to the daughter's removal from the mother's care. **In re C.J., 260.**

Grounds—failure to pay a reasonable portion of the cost of care—In a termination of parental rights case, there was no merit to respondent-mother's contention that she did not know she was required to pay for her children's care while they were in custody and therefore willful failure to pay a reasonable portion of the cost of care could not be a ground for termination. Parents have an inherent duty to support their children, and the absence of a court order, notice, or knowledge of a requirement to pay support is not a defense to the parent's obligation. Moreover, respondent-mother was on notice through repeated findings in the permanency planning orders. **In re S.E., 360.**

Grounds—neglect and willful abandonment—The trial court properly terminated a father's parental rights on the grounds of willful abandonment where the father made no effort to pursue a relationship with his daughter during the six months preceding the filing of the petition. Although the trial court may consider conduct outside the six-month window in evaluating a parent's credibility and intentions, the determinative period for adjudicating willful abandonment is the six months preceding the petition. **In re C.B.C., 16.**

Impartiality of trial court—questioning of witnesses—clarification—The trial court's questioning of witnesses during a termination of parental rights hearing

TERMINATION OF PARENTAL RIGHTS—Continued

did not go beyond the need to clarify matters addressed during testimony and did not show bias against the father. **In re N.D.A., 71.**

Judicial bias—permanent plan—adoption—child's best interest—The Supreme Court rejected an argument that the trial court was unfairly biased against parents in a termination of parental rights case where the trial court made a statement regarding its previous decision to send the child to live with her out-of-state aunt. At the time of that decision, the district court had already changed the primary permanent plan to adoption, and the statement in question was merely an explanation that the court had decided those steps were in the child's best interest at the time—rather than a definitive decision to terminate the parents' rights months before the termination hearing. **In re Z.V.A., 207.**

Neglect and willful abandonment—case plan compliance—limited progress —The trial court's order terminating a mother's parental rights to her children on the basis of neglect and willful abandonment was affirmed where the court's findings that the mother did not maintain stable employment or housing for at least six months and that she did not complete the recommended treatment for substance abuse and domestic violence were supported by competent evidence, and where the mother admitted to not feeling comfortable being reunified with her children until a much later date for fear of suffering a relapse. The findings of fact supported the trial court's conclusion that the mother had not made reasonable progress on her case plan, which in turn supported the grounds for termination of parental rights. **In re I.G.C., 201.**

No-merit brief—abandonment and neglect—The trial court's termination of a father's parental rights for abandonment and willful neglect was affirmed where the father's counsel filed a no-merit brief. The trial court's order was based on clear, cogent, and convincing evidence supporting the statutory grounds for termination. **In re J.B.S., 67.**

No-merit brief—neglect and felony assault against another child—The termination of a mother's parental rights was affirmed where her counsel filed a no-merit brief and the termination was based on substance abuse and felony assault against another child. The termination order was based on clear, cogent, and convincing evidence supporting statutory grounds for termination. **In re T.H., 85.**

No-merit brief—neglect and leaving child in placement—The termination of a mother's parental rights for neglect and for leaving her child in outside placement for twelve months without showing reasonable progress was affirmed where her counsel filed a no-merit brief and the order was based on clear, cogent, and convincing evidence supporting the statutory grounds for termination. **In re J.E., 69.**

No-merit brief—neglect and willful abandonment—The trial court's termination of a father's parental rights to his children for neglect and willful abandonment was affirmed where the father's counsel filed a no-merit brief. The trial court's order was supported by competent evidence and based on proper legal grounds. **In re I.G.C., 201.**

No-merit brief—neglect and willful failure to make reasonable progress— The termination of a mother's parental rights was affirmed where the mother had a history of substance abuse and her counsel filed a no-merit brief. The termination order was based on clear, cogent, and convincing evidence and was based on proper legal grounds. **In re Z.O.M., 87.**

UNFAIR TRADE PRACTICES

Summary judgment—substantial aggravating circumstances—intentional breach of consent order—not alone sufficient—The trial court did not err by granting summary judgment in favor of defendants on plaintiff's unfair and deceptive trade practices (UDTP) claim where plaintiff merely alleged the intentional breach of a consent order, which was not sufficient by itself to establish the required substantial aggravating circumstance to support a UDTP claim. **SciGrip, Inc. v. Osae, 409.**