NORTH CAROLINA REPORTS

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SUPREME COURT OF NORTH CAROLINA

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THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice

PAUL MARTIN NEWBY

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MICHAEL R. MORGAN
ANITA EARLS
PHIL BERGER, JR.
TAMARA PATTERSON BARRINGER

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BURLEY B. MITCHELL, JR.
HENRY E. FRYE
SARAH PARKER
MARK D. MARTIN
CHERI BEASLEY

Former Justices

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J. PHIL CARLTON
WILLIS P. WHICHARD
JAMES A. WYNN, JR.
FRANKLIN E. FREEMAN, JR.
G. K. BUTTERFIELD, JR.
ROBERT F. ORR
GEORGE L. WAINWRIGHT, JR.
EDWARD THOMAS BRADY
PATRICIA TIMMONS-GOODSON
ROBERT N. HUNTER, JR.
ROBERT H. EDMUNDS, JR.
BARBARA A. JACKSON
MARK A. DAVIS

Clerk
Grant E. Buckner

Librarian
Thomas P. Davis

Marshal
William Bowman

[1]Retired 31 December 2022. [2]Term ended 31 December 2022.

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ANDREW HEATH

Assistant Director
DAVID F. HOKE[3]

OFFICE OF APPELLATE DIVISION REPORTER

ALYSSA M. CHEN
JENNIFER C. PETERSON
NICCOLLE C. HERNANDEZ

[3]Retired 31 December 2022.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
1	Jerry R. Tillett	Manteo
	Eula Reid[1]	Elizabeth City
	R. Andrew Womble[2]	Manteo
2	Wayland Sermons	Washington
3A	Marvin K. Blount, III	Greenville
	Jeffery B. Foster	Greenville
6A	Norlan Graves[3]	Roanoke Rapids
	Brenda Branch[4]	Halifax
6B	Cy A. Grant, Sr.	Ahoskie
7A	Timothy W. Wilson[5]	Rocky Mount
7BC	Lamont Wiggins	Rocky Mount
	William D. Wolfe	Wilson
9	John Dunlow	Oxford
	Cindy Sturges	Louisburg
14	Orlando F. Hudson, Jr.[6]	Durham
	Michael O'Foghludha[7]	Durham
	Josephine Kerr Davis	Durham
	Brian K. Wilks	Durham
	Shamieka L. Rhinehart[8]	Durham
	Second Division	
3B	Joshua W. Wiley	New Bern
	Clinton D. Rowe	New Bern
4	Henry L. Stevens	Wallace
	Robert C. Roupe	Jacksonville
5	Phyllis M. Gorham	Wilmington
	R. Kent Harrell	Burgaw
	Frank Jones	Wilmington
8A	Imelda J. Pate	Kinston
8B	William W. Bland	Goldsboro
13A	Douglas B. Sasser[9]	Whiteville
13B	Jason C. Disbrow	Southport
16B	James Gregory Bell	Lumberton
	Tiffany P. Powers	Lumberton
	Third Division	
10	Paul C. Ridgeway	Raleigh
	G. Bryan Collins, Jr.	Raleigh
	A. Graham Shirley	Raleigh
	Rebecca W. Holt	Raleigh

DISTRICT	JUDGES	ADDRESS
	Vinston M. Rozier	Raleigh
	Keith O. Gregory	Raleigh
11A	C. Winston Gilchrist	Lillington
11B	Thomas H. Lock	Smithfield
	Paul A. Holcombe[10]	Smithfield
12	James F. Ammons, Jr.	Fayetteville
	Claire Hill	Fayetteville
	Gale M. Adams	Fayetteville
	Mark A. Sternlicht[11]	Fayetteville
	George R. Hicks[12]	Fayetteville
15A	D. Thomas Lambeth	Burlington
	Andy Hanford	Graham
16A	Stephan R. Futrell	Rockingham
	Dawn Layton	Rockingham
19B	James P. Hill	Asheboro
	Lee W. Gavin[13]	Asheboro
	W. Taylor Browne[14]	Asheboro
19D	James M. Webb	Southern Pines
	Michael A. Stone	Laurinburg
20A	Kevin M. Bridges	Oakboro
	Patrick Nadolski	Mount Gilead
20B	Jonathan Perry	Monroe
	N. Hunt Gwyn[15]	Monroe
	Matthew B. Smith[16]	Monroe

Fourth Division

DISTRICT	JUDGES	ADDRESS
15B	R. Allen Baddour	Chapel Hill
	Alyson A. Grine	Chapel Hill
17A	Edwin Graves Wilson, Jr.[17]	Eden
	Stanley L. Allen[18]	Sandy Ridge
	John M. Morris[19]	Reidsville
17B	Angela B. Puckett	Westfield
18	John O. Craig, III[20]	High Point
	R. Stuart Albright[21]	Greensboro
	Susan Bray[22]	Greensboro
	William Wood	Greensboro
	Lora C. Cubbage	Greensboro
	Stephanie L. Reese	High Point
	Tonia A. Cutchin[23]	Greensboro
19A	Martin B. McGee	Concord
19C	Timothy Gould[24]	Salisbury
	Michael S. Adkins[25]	Salisbury
21	L. Todd Burke	Winston-Salem
	David L. Hall	Winston-Salem
	Eric C. Morgan	Kernersville
	Richard S. Gottlieb	Winston-Salem
22A	Joseph Crosswhite	Statesville
	William Long	Statesville
22B	Mark E. Klass[26]	Lexington
	Lori Hamilton[27]	Mocksville
	Robert A. Broadie[28]	Lexington
23	Michael Duncan	Wilkesboro

DISTRICT	JUDGES	ADDRESS
	Fifth Division	
24	Gary Gavenus	Burnsville
	R. Gregory Horne	Boone
25A	Robert C. Ervin	Morganton
	Daniel A. Kuehnert	Morganton
25B	Nathaniel J. Poovey	Newton
	Gregory R. Hayes	Hickory
26	Carla Archie	Charlotte
	Lisa C. Bell[29]	Charlotte
	Karen Eady-Williams	Charlotte
	Louis A. Trosch	Charlotte
	George Bell	Charlotte
	Kimberly Best[30]	Charlotte
	Reggie McKnight	Charlotte
	Matthew J. Osman[31]	Charlotte
	Donald R. Cureton[32]	Charlotte
	David H. Strickland[33]	Charlotte
27A	David Phillips	Gastonia
	Jesse B. Caldwell, IV[34]	Gastonia
	Justin N. Davis[35]	Gastonia
27B	Forrest Donald Bridges[36]	Shelby
	W. Todd Pomeroy[37]	Lincolnton
	Sally Kirby-Turner[38]	Shelby
28	Alan Z. Thornburg	Asheville
29A	J. Thomas Davis	Forest City
29B	Peter B. Knight	Hendersonville
30A	William H. Coward	Highlands
30B	Bradley B. Letts	Hazelwood

SPECIAL JUDGES

Judge	Address
Louis A. Bledsoe, III	Charlotte
Athena Brooks[39]	Fletcher
J. Stanley Carmical[40]	Lumberton
Adam M. Conrad	Charlotte
Craig Croom	Raleigh
Julianna T. Earp	Greensboro
Mark A. Davis	Raleigh
Andrew Heath[41]	Raleigh
Michael L. Robinson	Winston-Salem
Steven R. Warren	Asheville
Edwin Graves Wilson, Jr.[42]	Hillsborough

EMERGENCY JUDGES

Judge	Address
Benjamin G. Alford	New Bern
Sharon T. Barrett	Asheville
Michael E. Beale	Rockingham

JUDGES	ADDRESS
W. Robert Bell	Charlotte
Christopher W. Bragg	Monroe
Susan E. Bray[43]	Greensboro
Allen Cobb	Wilmington
John O. Craig, III[44]	High Point
Julia Lynn Gullett	Statesville
James E. Hardin, Jr.	Hillsborough
Henry W. Hight, Jr.	Henderson
Alma Hinton	Roanoke Rapids
Jack Hooks	Whiteville
Jeffrey P. Hunt	Brevard
Robert F. Johnson	Burlington
Timothy S. Kincaid	Newton
Eric L. Levinson	Charlotte
Hugh Lewis	Charlotte
Vance Bradford Long	Asheboro
A. Moses Massey	Mount Airy
Jerry Cash Martin	Pilot Mountain
James W. Morgan	Shelby
Calvin Murphy	Charlotte
J. Richard Parker	Manteo
William R. Pittman	Raleigh
Mark Powell	Hendersonville
Ronald E. Spivey	Winston-Salem
Joseph E. Turner	Greensboro
Tanya T. Wallace	Rockingham

RETIRED/RECALLED JUDGES

W. Douglas Albright	Greensboro
Anthony M. Brannon	Durham
Stafford G. Bullock	Raleigh
Jesse B. Caldwell, III	Gastonia
J. Carlton Cole	Hertford
H. William Constangy	Charlotte
C. Preston Cornelius	Mooresville
Lindsay R. Davis	Greensboro
Richard L. Doughton	Sparta
B. Craig Ellis	Laurinburg
Larry G. Ford	Salisbury
James L. Gale	Greensboro
Walter Godwin	Tarboro
Beecher R. Gray	Durham
Zoro J. Guice, Jr.	Hendersonville
Thomas D. Haigwood	Greenville
Charles H. Henry	Jacksonville
Howard E. Manning, Jr.	Raleigh
John E. Nobles, Jr.	Morehead City
Marvin P. Pope	Asheville
John W. Smith	Raleigh

JUDGES	ADDRESS
James C. Spencer	Burlington
Quentin T. Sumner[45]	Rocky Mount
Mary Ann Tally	Fayetteville
Anna Mills Wagoner	Salisbury
Ralph A. Walker, Jr.	Raleigh
William Z. Wood, Jr.	Lewisville

[1]Retired 31 December 2022. [2]Sworn in 1 January 2023. [3]Resigned 31 December 2022. [4]Sworn in and became Senior Resident Judge 1 January 2023. [5]Sworn in and became Senior Resident Judge 12 January 2023. [6]Retired 31 December 2022. [7]Became Senior Resident Judge 1 January 2023. [8]Sworn in 20 March 2023. [9]Retired 30 June 2023. [10]Sworn in 1 January 2023. [11]Resigned 31 December 2022. [12]Sworn in 1 January 2023. [13]Retired 31 December 2022. [14]Sworn in 1 January 2023. [15]Retired 31 December 2022. [16]Sworn in 1 January 2023. [17]Resigned 31 December 2022. [18]Became Senior Resident Judge 1 January 2023. [19]Sworn in 1 January 2023. [20]Retired 30 September 2022. [21]Became Senior Resident Judge 1 October 2022. [22]Retired 30 September 2022. [23]Sworn in 1 January 2023. [24]Resigned 31 December 2022. [25]Sworn in and became Senior Resident Judge 1 January 2023. [26]Retired 31 December 2022. [27]Became Senior Resident Judge 1 January 2023. [28]Sworn in 1 January 2023. [29]Retired 31 December 2022. [30]Resigned 31 December 2022. [31]Sworn in 1 January 2023. [32]Sworn in 1 January 2023. [33]Sworn in 1 January 2023. [34]Resigned 31 December 2022. [35]Sworn in 1 January 2023. [36]Retired 31 December 2022. [37]Became Senior Resident Judge 1 January 2023. [38]Sworn in 16 March 2023. [39]Retired 31 December 2022. [40]Retired 30 June 2023. [41]Resigned 3 April 2023. [42]Sworn in 17 March 2023. [43]Sworn in 8 December 2022. [44]Sworn in 1 December 2022. [45]Appointed 1 November 2022.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	Edgar L. Barnes (Chief)	Manteo
	Amber Davis	Wanchese
	Robert P. Trivette	Kitty Hawk
	Meader W. Harris, III	Edenton
	Jennifer K. Bland[1]	Elizabeth City
	Jeff Moreland[2]	Elizabeth City
2	Regina Rogers Parker (Chief)	Williamston
	Christopher B. McLendon	Williamston
	Darrell B. Cayton, Jr.	Washington
	Keith B. Mason	Washington
3A	G. Galen Braddy (Chief)	Grimesland
	Brian DeSoto	Greenville
	Lee F. Teague	Greenville
	Wendy S. Hazelton	Greenville
	Daniel H. Entzminger	Greenville
	Mario Perez	Greenville
3B	L. Walter Mills (Chief)	New Bern
	W. David McFadyen, III	New Bern
	Bob R. Cherry[3]	Beaufort
	Paul J. Delamar	Bayboro
	Andrew Wigmore	Beaufort
	Debra L. Massie	New Bern
	James A. Pully[4]	New Bern
4	James L. Moore (Chief)	Jacksonville
	William B. Sutton	Clinton
	Michael C. Surles	Jacksonville
	Christopher J. Welch	Jacksonville
	Mario M. White	Clinton
	James Walter Bateman, III	Jacksonville
	Robert H. Gilmore	Clinton
	William Shanahan	Jacksonville
	Morgan H. Swinson	Jacksonville
5	J. H. Corpening, II (Chief)	Wilmington
	James H. Faison, III	Wilmington
	Sandra A. Ray	Wilmington
	Richard Russell Davis	Wilmington
	Melinda Haynie Crouch	Wrightsville Beach
	Jeffrey Evan Noecker	Wilmington
	Chad Hogston	Wilmington
	Robin W. Robinson	Wilmington
	Lindsey L. McKee	Wilmington
6	Brenda G. Branch (Chief)[5]	Roanoke Rapids
	W. Turner Stephenson, III (Chief)[6]	Roanoke Rapids
	Teresa R. Freeman	Roanoke Rapids
	Vershenia B. Moody	Windsor
	W. Rob Lewis, II[7]	Halifax
7	William Charles Farris (Chief)	Wilson
	Pell C. Cooper	Rocky Mount
	Anthony W. Brown	Spring Hope
	Wayne S. Boyette	Tarboro

DISTRICT	JUDGES	ADDRESS
	Elizabeth Freshwater Smith	Wilson
	Joseph E. Brown, III	Wilson
	William R. Solomon	Rocky Mount
8	Elizabeth A. Heath (Chief)	Kinston
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	Annette W. Turik	Kinston
	Jonathon Sergeant	Kinston
	Justin L. Minshew	Goldsboro
	Christopher A. Rogerson	Goldsboro
9	John W. Davis (Chief)	Louisburg
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	John H. Stultz, III	Roxboro
	Adam S. Keith	Louisburg
	Caroline S. Burnette	Henderson
	Benjamin S. Hunter	Louisburg
	Sarah K. Burnette	Oxford
10	Ned Wilson Mangum (Chief)	Raleigh
	Debra Ann Smith Sasser	Raleigh
	Christine M. Walczyk	Raleigh
	Eric Craig Chasse	Raleigh
	Anna Elena Worley	Raleigh
	Margaret Eagles	Raleigh
	Michael J. Denning[8]	Raleigh
	Louis B. Meyer, III	Raleigh
	Daniel J. Nagle[9]	Raleigh
	Vartan A. Davidian	Raleigh
	Sam S. Hamadani	Raleigh
	Ashleigh P. Dunston	Raleigh
	J. Brian Ratledge	Raleigh
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	Julie L. Bell	Knightdale
	James R. Black	Raleigh
	Mark L. Stevens	Raleigh
	Rashad Hunter	Raleigh
	Damion McCullers	Raleigh
	Jennifer Bedford	Raleigh
	Rhonda G. Young	Raleigh
	Cynthia Baddour Kenney[10]	Raleigh
11	Paul A. Holcombe (Chief)[11]	Smithfield
	Jerry F. Wood (Chief)[12]	Selma
	Jimmy L. Love, Jr.	Sanford
	Resson O. Faircloth, II	Erwin
	Mary H. Wells	Smithfield
	Joy A. Jones	Smithfield
	Jason H. Coats	Smithfield
	Terry F. Rose	Smithfield
	Brad A. Salmon[13]	Lillington
	Craig James	Smithfield
	Travis N. Wheeler[14]	Smithfield
	Jason P. Kimble[15]	Lillington
	Michael Onufer[16]	Smithfield

DISTRICT	JUDGES	ADDRESS
12	Toni S. King (Chief)	Fayetteville
	David H. Hasty	Fayetteville
	Lou Oliveria	Fayetteville
	Cheri Siler-Mack	Fayetteville
	Stephen C. Stokes	Fayetteville
	Tiffany M. Whitfield	Fayetteville
	Caitlin Evans	Fayetteville
	Francis M. McDuffie	Fayetteville
	Cull Jordan, III	Fayetteville
	Adam J.S. Phillips	Fayetteville
13	Scott Ussery (Chief)	Elizabethtown
	Pauline Hankins	Tabor City
	C. Ashley Gore	Whiteville
	J. Calvin Chandler	Shallotte
	Quintin M. McGee[17]	Leland
	Willie M. Callihan, Jr.	Whiteville
	Sarah McPherson[18]	Bolivia
	Bryan Wilson[19]	Bolivia
14	Patricia D. Evans (Chief)[20]	Durham
	Clayton Jones (Chief)[21]	Durham
	Doretta Walker	Durham
	Shamieka L. Rhinehart[22]	Durham
	Amanda L. Maris	Durham
	Dave Hall	Durham
	Dorothy H. Mitchell	Durham
	Kevin Jones[23]	Durham
15A	Bradley Reid Allen, Sr. (Chief)	Burlington
	Kathryn W. Overby	Burlington
	Larry D. Brown	Graham
	Rick Champion	Burlington
15B	Samantha Cabe (Chief)	Chapel Hill
	Sherri T. Murrell	Chapel Hill
	Hathaway S. Pendergrass	Chapel Hill
	Christopher T. Roper	Siler City
	Joal H. Broun	Hillsborough
16A	Amanda L. Wilson (Chief)	Rockingham
	Christopher W. Rhue	Laurinburg
	Sophie G. Crawford	Wadesboro
	Chevonne R. Wallace	Rockingham
16B	Angelica C. McIntyre (Chief)	Lumberton
	William J. Moore	Maxton
	Dale G. Desse	Maxton
	Brooke L. Clark	Lumberton
	Vanessa E. Burton[24]	Lumberton
	Greg Bullard	Lumberton
	Diane Surgeon	Lumberton
	Leah B. Lanier[25]	Lumberton
17A	James A. Grogan (Chief)	Reidsville
	Chris Freeman	Wentworth
	Christine F. Strader	Reidsville
	Erica S. Brandon	Wentworth

DISTRICT	JUDGES	ADDRESS
17B	William F. Southern III (Chief)	King
	Marion M. Boone	Dobson
	Thomas B. Langan	King
	Gretchen H. Kirkman[26]	Dobson
18	Theresa H. Vincent (Chief)	Summerfield
	Kimberly Michelle Fletcher	Greensboro
	Angela C. Foster	Greensboro
	Angela B. Fox	Greensboro
	Tabatha Holliday	Greensboro
	Tonia A. Cutchin[27]	Greensboro
	William B. Davis	Greensboro
	Larry L. Archie	Greensboro
	Brian K. Tomlin	Greensboro
	Marc R. Tyrey	High Point
	Kevin D. Smith	Greensboro
	Ashley L. Watlington-Simms	Greensboro
	Caroline Tomlinson-Pemberton	Greensboro
19A	Christy E. Wilhelm (Chief)	Concord
	Brent Cloninger	Mount Pleasant
	Nathaniel E. Knust	Concord
	Juanita Boger-Allen[28]	Concord
	Steve Grossman	Concord
	Michael G. Knox	Concord
	Sarah E. Street[29]	Concord
19B	Scott C. Etheridge (Chief)	Asheboro
	Robert M. Wilkins	Asheboro
	Sarah N. Lanier	Asheboro
	Barron Thompson	Asheboro
	Darren C. Allen[30]	Asheboro
19C	Charles E. Brown (Chief)[31]	Salisbury
	Beth Spencer Dixon (Chief)[32]	Salisbury
	Kevin G. Eddinger[33]	Salisbury
	Roy Marshall Bickett, Jr.	Salisbury
	James Randolph	Salisbury
	Cynthia Dry[34]	Salisbury
	Chris Sease[35]	Salisbury
19D	Donald W. Creed, Jr. (Chief)	Asheboro
	Regina M. Joe	Raeford
	Warren McSweeney	Carthage
	Steve Bibey	Carthage
	Beth Tanner[36]	Carthage
20A	John R. Nance (Chief)	Albemarle
	Thai Vang	Montgomery
	Phillip Cornett	Norwood
20B	Erin S. Hucks (Chief)	Monroe
	William F. Helms, III	Matthews
	Joseph J. Williams	Monroe
	Stephen V. Higdon	Monroe
	Matthew B. Smith[37]	Monroe
21	Victoria Lane Roemer (Chief)	Winston-Salem
	Lawrence J. Fine	Clemmons
	Camille D. Banks-Payne	Winston-Salem
	David Sipprell	Winston-Salem

DISTRICT	JUDGES	ADDRESS
	Theodore Kazakos	Winston-Salem
	Carrie F. Vickery	Winston-Salem
	George M. Cleland	Winston-Salem
	Whit Davis	Winston-Salem
	Valene K. McMasters	Winston-Salem
	Frederick B. Adams, II	Winston-Salem
	Kristen Kelly Broyles	Winston-Salem
22A	L. Dale Graham (Chief)	Taylorsville
	Edward L. Hendrick, IV	Taylorsville
	Christine Underwood	Olin
	Carole A. Hicks	Statesville
	Bryan A. Corbett	Statesville
	Thomas R. Young	Statesville
22B	Jimmy L. Myers (Chief)[38]	Advance
	Carlton Terry (Chief)[39]	Advance
	Mary Covington[40]	Thomasville
	Carlos Jané	Lexington
	Rosalind Baker[41]	Lexington
	Jon Wade Myers	Lexington
	Jon W. Welborn[42]	Lexington
	David S. Doherty[43]	Lexington
23	David V. Byrd (Chief)[44]	Wilkesboro
	Robert Crumpton (Chief)[45]	Wilkesboro
	William Finley Brooks	Wilkesboro
	Donna L. Shumate	Sparta
	Laura B. Luffman[46]	Wilkesboro
24	Theodore Wright McEntire (Chief)	Spruce Pine
	Hal Gene Harrison	Spruce Pine
	Rebecca E. Eggers-Gryder	Boone
	Matthew J. Rupp	Boone
25	Sherrie Wilson Elliott (Chief)	Newton
	Amy Sigmon Walker	Newton
	Robert A. Mullinax, Jr.	Newton
	Mark L. Killian	Hickory
	Clifton H. Smith	Hickory
	David W. Aycock	Hickory
	Wesley W. Barkley	Newton
	Richard S. Holloway	Lenoir
	Andrea C. Plyler	Hudson
	Scott D. Conrad[47]	Newton
26	Elizabeth Thornton Trosch (Chief)	Charlotte
	Christy Townley Mann	Charlotte
	Paige B. McThenia	Charlotte
	Jena P. Culler	Charlotte
	Tyyawdi M. Hands	Charlotte
	Sean Smith[48]	Charlotte
	Matt Osman[49]	Charlotte
	Gary Henderson	Charlotte
	Aretha V. Blake	Charlotte
	Tracy H. Hewett	Charlotte
	Faith Fickling	Charlotte
	Roy H. Wiggins	Charlotte
	Karen D. McCallum	Charlotte

DISTRICT	JUDGES	ADDRESS
	Michael J. Stading[50]	Charlotte
	Paulina N. Havelka[51]	Charlotte
	Jonathon R. Marvel	Charlotte
	C. Renee Little	Charlotte
	Shante' Burke-Hayer[52]	Charlotte
	Cecilia Oseguera[53]	Charlotte
	Rhonda Patterson[54]	Charlotte
	Roderick Davis[55]	Charlotte
	Jennifer Fleet[56]	Charlotte
	Alyssa Levine[57]	Charlotte
	Samantha Mobley[58]	Charlotte
	Matt Newton[59]	Charlotte
27A	John K. Greenlee (Chief)	Gastonia
	Angela G. Hoyle	Belmont
	James A. Jackson[60]	Gastonia
	Michael K. Lands	Gastonia
	Pennie M. Thrower	Gastonia
	Craig R. Collins	Gastonia
	Donald Rice	Cramerton
	Edgar F. Boyle[61]	Gastonia
27B	Jeanette R. Reeves (Chief)	Shelby
	K. Dean Black	Denver
	Justin K. Brackett	Shelby
	Micah J. Sanderson	Denver
	Brad Champion	Lincolnton
	Jamie Hodges	Lincolnton
28	J. Calvin Hill (Chief)	Asheville
	Patricia Kaufmann Young	Asheville
	Julie M. Kepple	Asheville
	Andrea Dray	Asheville
	Ward D. Scott	Asheville
	Edwin D. Clontz	Candler
	Susan Marie Dotson-Smith	Asheville
29A	Robert K. Martelle (Chief)	Rutherfordton
	Ellen Shelley	Marion
	Michelle McEntire	Graham
	Corey J. MacKinnon	Marion
29B	Thomas M. Brittain, Jr. (Chief)[62]	Mills River
	Kimberly Gasperson-Justice (Chief)[63]	Hendersonville
	Emily Cowan	Hendersonville
	Gene B. Johnson	Hendersonville
	D. Abe Hudson[64]	Hendersonville
	James Marshall[65]	Hendersonville
30	Roy T. Wijewickrama (Chief)	Waynesville
	Monica Hayes Leslie	Waynesville
	Donna Forga	Clyde
	Kristina L. Earwood[66]	Waynesville
	Tessa S. Sellers	Murphy
	Kaleb Wingate	Waynesville

EMERGENCY JUDGES

Judges	Address
Richard Abernathy	Gastonia
Kris D. Bailey	Cary
C. Christopher Bean[67]	Edenton
Rebecca W. Blackmore	Wilmington
Joseph A. Blick	Greenville
Monica M. Bousman	Garner
Jacqueline L. Brewer	Apex
Thomas M. Brittain, Jr.[68]	Etowah
Deborah P. Brown	Mooresville
Joseph M. Buckner	Chapel Hill
Susan R. Burch	Greensboro
William M. Cameron	Richlands
Lori G. Christian	Raleigh
William F. Fairley	Southport
Nancy E. Gordon	Durham
Paul A. Hardison	Jacksonville
James T. Hill	Durham
Richlyn D. Holt	Waynesville
Shelly S. Holt	Wilmington
Jeanie Houston	Yadkinville
F. Warren Hughes	Burnsville
Laurie L. Hutchins	Winston-Salem
Ericka Y. James	Goldsboro
Carol A. Jones	Kenansville
A. Elizabeth Keever	Fayetteville
Michael K. Lands[69]	Gastonia
David A. Leech	Greenville
Harold Paul McCoy, Jr.	Halifax
Lawrence McSwain	Greensboro
Wayne L. Michael	Lexington
Gordon Miller	Winston-Salem
Regan A. Miller	Charlotte
Charles M. Neaves	Elkin
Thomas R.J. Newbern	Aulander
Ali B. Paksoy	Shelby
Addie H. Rawls	Clayton
Dennis J. Redwing	Gastonia
Sarah C. Seaton	Jacksonville
Joseph E. Setzer, Jr.	Franklinton
Caron Stewart	Erwin
Robert J. Stiehl, III	Fayetteville
Jerry Waddell	Bryson City
Fredrick B. Wilkins, Jr.	Reidsville
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1. Effective 1 January 2021, the Supreme Court of North Carolina adopted a universal parallel citation form. *Administrative Order Concerning the Formatting of Opinions and the Adoption of a Universal Citation Form*, 373 N.C. 605 (2019).

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Baxter Lindsay Crawford IV ..... Columbia, SC
Joseph Crim ..... Haslett, MI
Elliott Crosland ..... Charlotte
William Garrett Crotty ..... Charlotte
Alex T. Crout ..... Raleigh
Earl Hampton Crumpler III ..... Raleigh
Laura Poston Cummings ..... Kings Mountain
Eric Lewis Cunningham ..... Greensboro
Kathleen Maura Cusack ..... Wilmington
Margaret Evelyn Daly ..... Raleigh
Vanessa Dane ..... Cornelius
Blake Logan Danser ..... Spring Lake
Alton Spencer Davies ..... Charlotte
John G. Davis Jr. ..... Raleigh
Mary Elizabeth Davis ..... Winston-Salem
Clayton Houston Davis ..... Elizabeth City
Maya Ashley Nicole Davis ..... Raleigh
Allan Michael Davis Jr. ..... Cary
Ashley Elizabeth Davis ..... Jacksonville, FL
Amanda Lynn Davis ..... Columbus, MS
Eriona Kyre Dawson ..... Burlington
Jeffrey Day ..... Charleston, SC
Brian Patrick Daza ..... Charlotte
Paulina De Leon ..... Raleigh
Zachary Damian De Leon ..... Charlotte
Samuel Wallace Deese ..... Greensboro
Katherine DeForest ..... Wilmington
Andrew Louis DeJoy ..... Los Angeles, CA
Michelle Rose Della Fave ..... Charlotte
Cullan M. Demianczyk ..... Leonardtown, MD
Patrick Shao Deng ..... Winston-Salem
Micah Deveaux ..... Williamsburg, VA
Chanyse Rene Dews ..... Durham
Roy Glenn Dixon III ..... Charlotte
Danielle Barbara Dobosz ..... Durham
Christopher Beaudoin Dodd ..... Chapel Hill
Jameson Anthony Edward Doub ..... Greenville
Patrick Michael Dowd ..... Waxhaw
Matthew Downer ..... Charlotte
Mary Slade Mooring Duke ..... Raleigh
Carter Dwight ..... Charlotte
Jonathan Scott Earnest ..... Raleigh
Patrick James Eckerd ..... Asheville
Douglas Eisner ..... Durham
Charles Tyler Ellenberg ..... Bayboro
Trey Ellis ..... Chapel Hill
Corbin Andrew Erickson ..... Asheville
Cameron Virginia Ervin ..... Roanoke, VA
Daniel Michael Esposito ..... Greensboro

Zechariah Carr Etheridge .... Greensboro
Zachery Dean Everidge .... Selma
Morgan Dee Ewing .... Chandler, AZ
Karmyn Marie Eyles .... Rolesville
Uju N. Ezeigbo .... Winston-Salem
Laney Marie Ezzell .... Spring Hope
Aaron Thomas Fadden .... Chapel Hill
Eric Faidley .... Durham
Meghan Brigid Falk .... Franklin, NJ
Hilary Landers Fankhauser .... Charlotte
Jacob Dawson Farrell .... Hillsborough
Derek Alain Farrugia .... Charlotte
Brittany Feldhake .... Raleigh
Alexandra Evelyn Ferri .... Wake Forest
James Thomas Fetter .... Clover, SC
Andrew William Flack .... Lexington, VA
Brian George Fleming .... Durham
Kathryn Flores .... Gainesville, FL
Nathan D. Fosnough .... Fort Wayne, IN
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Andrew James Franklin .... Shippensburg, PA
Samuel Byron Frazelle .... Richlands
Erica Frederick .... Apex
Justin Wyatt Freeman .... Linwood
Jackson Schreiber Freeman .... Raleigh
Caroline Tara Frey .... Charleston, SC
David Daniel Fronckowiak .... Oakland, CA
Gregory Terrae Funk .... Charlotte
Kolin Funk .... Mooresville
Alexis Gadzinski .... Charlotte
Natalie Christine Galdos .... Tampa, FL
Mathis Logan Gales .... Charlotte
Lyne Starling Gamble III .... Charlotte
Hope Garber .... Cary
Megan Anne Garcia-Davis .... Durham
John Carol Garrett III .... Raleigh
Andriel M. Gary .... Apex
Ania Renee Gatewood .... Concord
John Joseph Gauthier Jr. .... Charlotte
Aaron Blaine Gavin .... Bessemer, AL
Joseph Matthew Geenen .... Chapel Hill
Derek Alan Gehring .... Charlotte
Julia Gentile .... State College, PA
Thomas Miller Gerrard .... Goldsboro
Huntleigh Frederick Gilbard .... Winston-Salem
Alex Nicole Gillie .... Durham
Ashwat Chandra Giri .... Durham
Richard William Gittings .... Durham
Jordan Parrish Glassman .... Durham
Maureen F. Gleason .... Charleston, WV

Erica Ruby Gloyd .... Morrisville
Brandy Renee Godwin .... Zebulon
Allyson Elizabeth Gold .... Winston-Salem
Courtney Ashlynn Goldston .... Fuquay-Varina
Adrianna Elizabeth Gomez .... Fletcher
James Thomas Gooding III .... High Point
Kara Goray .... Raleigh
Taylor Patrick Gordon .... Winston-Salem
Sharante Gore .... Durham
Gabrielle Gorman .... Charlotte
Walt Jennings Grayson .... Belmont
Lucy Randolph Green .... Charlotte
Shanai KiShawna Green .... Durham
Misty Lynn Greene .... Angier
Sabrina Yvonne Greer .... Greensboro
Kersten Griesbaum .... Spring Lake
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Noel Fox Hudson .... Durham
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Wiley Bishop Hughes .... Winston-Salem
Benjamin James Hughes .... Raleigh
Harrison Beaumont Hull .... Durham
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John Hutson III .... Raleigh
Clara G. Ilkka .... Charlotte
Robert Irvin .... Davidson
Lindsey Jackson .... Raleigh
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Kionie James .... Greensboro
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Amy Jones .... Raleigh
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Arya Victoria Koneru .... Charlotte
Jordan Alexander Koonts .... Cary
Drew Meade Kromer .... Charlotte
Mikaela Chesney Kronk .... Lincolnton
Jake Austin Kruger .... Salisbury
Ayowunmi Rosalyn Kuforiji .... Greensboro
Jennifer Nicole Labbe .... Wellington, FL
Cory Matthew Lambert .... Raleigh
Luke Noel Landis .... Raleigh
Morgan Leigh Larsen .... Richlands
Jessica Lynn Leach .... Asheboro
Jarrett Evan Ledford .... Kings Mountain
Samantha Lynn LeJune .... Asheville
Mindy Luscely Lemus .... Durham
Kristen Cooley Lentz .... Cary
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Kyle George Lesmes .... Raleigh

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Dakota Mills Lipscombe .... Wilmington
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Nikol Litvan .... Hubert
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Tanner John Lockhead .... Durham
Avery Jo Locklear .... Landis
Hanna Long .... Charlotte
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Gabriella Lopez .... Greensboro
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Roger Aaron Love .... Durham
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Mitchell Lucas .... Durham
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Carter Man .... Greensboro
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Caroline Paige Margolis .... Raleigh
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Daniel James McCrorie .... Raleigh

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Trent McKenzie .... Charlotte
Andrew McLawhorn .... Raleigh
Xavier Jamil McLean .... Richlands
Hilary McLeod .... Raleigh
Riley Elaine McMillan .... Charlotte
Saima Sana Mehmood .... Charlotte
Valentina Mejia .... Charlotte
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Eliza Morgan Jacobs Meredith .... Little Rock, AR
Mason Meredith .... Raleigh
William Metcalf .... Fletcher
William Brock Miles .... Garner
Erica Christine Miller .... Crouse
Breanna Eleese Miller .... Winston-Salem
Corey Andrew Miller .... Wilmington
Mackenzie Marie Mills .... Linden
Jacob Brian Moan .... Monroe
Arnitra Renee Harris Moore .... Greensboro
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Rosa Bernice Morataya .... Charlotte
Kailey Madison Morgan .... Durham
Savannah N. Morgan .... Mt. Ulla
Alexandria Morgan .... Greensboro
Richard Hunter Morris .... Tarboro
Sarahan Elizabeth Moser .... Charlotte
Michael Moserowitz .... Durham
Gabrielle Lauren Motsinger .... Chapel Hill
Tyler Arthur Thomas Mott .... Waxhaw
Kristen Nicole Mulder .... Raeford
Justice P. Mullen .... Hendersonville
Alison Marie Murphy .... Hanahan, SC
Derek Carter Murray .... Belmont
Kenneth Mark Murray .... Los Angeles, CA
Jonathan Eugene Nail .... Mount Holly
Elizabeth Allesandra Napps .... Winston-Salem
Megan Maria Arredondo Neal .... Dallas, TX
Melanie Ng .... Kendall, FL
Jenna Lynn Nichols .... Pilot Mountain
Cameron Nieters .... Winston-Salem
Natalia Andrea Nino .... Raleigh
Benjamin Michael Norris .... Raleigh
Daniel C. Norton .... Charlotte
Britany Marie Nunez-Saraco .... Wendell
Elizabeth Lauren Feld Oblachinski .... Charlotte
Carly Nicole O'Dell .... Chapel Hill
Jesse Offchiss .... Charlotte
Brita Olsen .... Durham

Holly O'Neill .... Jupiter, FL
Rachel Ormand .... Raleigh
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Rashawnda E. Osborne .... Danville, VA
Olivia Claire Osburn .... Winston-Salem
Carol Owen .... North Myrtle Beach, SC
Justin Owens .... Wilson
Sarah Elizabeth Page .... Raleigh
Jennifer Ashley Palmer .... Harrisburg
Cara E. Palmer .... Charlotte
Leah Jane Parady .... Durham
Rebeka Lynn Parent .... Raleigh
Matthew Grayson Parker .... Carthage
Yanping Jiao Parks .... Raleigh
Abigail Parlier .... Hickory
Roshni Mahendra Patidar .... Charlotte
Alison Jean Patterson .... Winston-Salem
James Robert Paul .... Asheboro
Krista Skyler Peace .... Raleigh
Robert Chase Pearson .... Raleigh
Christian James Pedersen .... Cary
Richard Perez .... Winston-Salem
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Elizabeth G. Peters .... Charlotte
Andrew Reid Peterson .... Greenville
Hunter Grey Pethel .... Raleigh
Robert Yorke Pharr II .... Charleston, SC
Chelsey Phelps .... Charlotte
Andrew Philip .... Chapel Hill
Itane Omoyeye Coleman Phillips .... Winston-Salem
Allison Kaye Pickle .... Liberty
Kyle Pierce .... Greensboro
Chelsea Pieroni .... Durham
Rachel Hope Pilkington .... Matthews
Telana Poe .... Raleigh
Andrew Pollard .... Cary
Caroline Madison Pope .... Fayetteville
Hailey Porterfield .... Greensboro
Tommy Postek .... Stokesdale
Harrison Teasley Preddy .... Creedmoor
Vanna Prestage .... Raleigh
Shannon Eileen Prom Burnett .... Clemmons
Savannah Kate Putnam .... Morganton
Kamal Qteishat .... Charlotte
Helen Emma Quinn Gambino .... Southern Pines
Marissa Sierra Ramirez .... Raleigh
John Rankin .... Charlotte
Nigeria Zhane' Ravenel .... Kernersville
Tanner Ray .... Raleigh

Kelsey Elaine Rector .... Charlotte
Lauren Ashley Redmon .... Asheville
Joseph Reed .... Redwood Shores, CA
Rebecka Elisabet Reibe .... Raleigh
Megan Gerard Reilly-Dreas .... Greensboro
Kristin Johnson Rempe .... Charlotte
Hunter F. Revord .... Charlotte
Kaleigh Patricia Reynolds .... Forty Fort, PA
Miles Jensen Reynolds .... Charlotte
Christopher Earl Rhodes Jr. .... Durham
Lillie Lee Rhodes .... Farmville
Joseph Palmer Riddle IV .... Raleigh
Kent Christopher Ridge .... Thomasville
Kevin Fletcher Rinehart .... Columbia, SC
Madison Rinehart .... Cayce, SC
Mary Isabelle Riolo .... Charlotte
Camila Rivadeneira .... Deerfield Beach, FL
Ashton Rizzi .... Winston-Salem
Thomas James-Arthur Roberson .... Greensboro
Anna Leigh Robertson .... Danville, VA
Mary Skye Robertson .... Raleigh
Justin Tyler Rodgers .... Monroe
Drew Roeber .... Charlotte
David Andrew Rosano .... Wake Forest
Kevin Alexander Rothenberg .... Charlotte
Shana Lenise Rothwell .... Holly Springs
Diamond Zhanè Rowell .... Morrisville
William Charles Aaron Rubin .... Durham
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Grace Marie Russ .... Pinehurst
Luke William Ryan .... Durham
Mariam Jihad Sabra .... Raleigh
Noel Salas .... Maiden
Rachel Collins Samuelson .... Chapel Hill
Richard Jude Samulski Jr. .... Chapel Hill
Adam Leavitt Sanders .... Carthage
Austin Gordon Sanders .... Raleigh
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Connor Scharff .... Raeford
Charlie Schatz .... Wilson
John Schwarcz .... Durham
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Evelyn Viola Pro Sechler .... Chapel Hill
Mary J. Segal .... Greensboro
Louis Michael Segreti .... El Cajon, CA
Adreanna Bree Sellers .... District of Columbia
Frederick Serrano-Jimenez .... Wendell
Jill Kennedy Settlemyer .... Charlotte
Elijah Gabriel Setzer .... Farmington, CT

Maxwell Paul Shafer .... Wilmington
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Miriam Denise Sheppard .... Snow Hill
Alexander MacLean Sherret .... Forest City
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Hannah Shows .... Winston-Salem
Madison Sides .... Rocky Mount
Ethan Brady Siler .... Winston-Salem
Cameron Blake Silverglate .... Austin, TX
Hannah Brooke Simmons .... Durham
Michael Edmond Sindoni .... Raleigh
Shelby Ann Sipe .... Oceola, OH
Adam Skrzecz .... Raleigh
Ethan Slabosky .... Charlotte
Emily Nicole Slusser .... Fort Mill, SC
Christiane Smedley .... Raleigh
Torrance Monteff Smith .... Raleigh
Chanon Smith .... Chapel Hill
Sterlina Henson Smith .... Raleigh
Victoria Smith .... Seymour, TN
Elizabeth Darden Smith .... Wilson
Andrew Thomas Smith .... Burlington
Melissa Jo Smith .... Holly Springs
Emily Anne Solley .... Winston-Salem
Robert Linehan Sosower .... Durham
Catrina Lauren Spagnualo .... Raleigh
George Brandon Sparks .... Zebulon
Elliot Charles Spector .... Asheville
Barbara Rose Speer .... Greensboro
Carolyn Ruth Vernon Spilker .... Newton
Brittany Alexandria Spisak .... Winston-Salem
Emily Elizabeth Squicciarini .... Raleigh
Christina Marie Staudt .... Lakeview
Courtney Ann Stevens .... Raleigh
Katarina Dana Stockton .... Chapel Hill
Ataesheeana Lava’e Storr .... Greensboro
Caitlin Stulberg .... Asheville
Gabrielle Elise Supak .... Wilmington
Alec Suttle .... Chapel Hill
Derek Sutton .... Cary

William Holland Swain .... Cary
Tyler Talton .... Goldsboro
Haley Tanner .... Chapel Hill
David Laurence Tarbet .... Bermuda Run
Nicole S. Tashovski .... Raleigh
Ann Marie Taylor .... Cameron
Christopher Ryan Taylor .... Charlotte
Alexis Maya Tellerd .... Charlotte
Oleg Alexandrovich Telyukov .... Hillsborough
Sydney Rachael ter Avest .... Chapel Hill
Cara Beth Thierbach .... Indian Trail
Allison Thomas .... Indian Trail
Chapman Karlsson Thomas .... Raleigh
A'Kira Thomas .... Suffolk, VA
Amber Alexis Thompson .... Jacksonville
Gabriela Thoren .... Tuscaloosa, AL
Zachary Robert Tilley .... Carrboro
Charles Laverne Todd III .... Grundy, VA
Kimberly Michelle Tomkies .... Charlotte
Justin Torres .... Charlotte
Xavier Torres de Janon .... Mooresville
Brock Dale Towler .... Durham
Bradley Nolan Trexler .... Raleigh
Evaline Tsai .... Durham
Karmen Tubbs .... Mableton, GA
Anna Claire Tucker .... Charlotte
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Anna Marisa Turner .... Raleigh
Pime Ismael Ugarte .... Greensboro
Julie Ann Upshaw .... Highlands
Tanakorn Vachareeyanukul .... Winston-Salem
Alyssa Nicole Valdes .... Charlotte
Dana Lee Ventura .... Asheville
Nicholas Alexander Verderame .... Charlotte
Raylena Elizabeth Vines .... Jacksonville
Michael Joseph Vitale III .... Raleigh
William Walters .... Columbia, SC
Mallory Rae Ward .... Alamance
Dalen Ward .... Greensboro
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Brady Genis Webb .... Charlotte
Xaviera Jasmine Webb .... Sumter, SC
Sierra Weingartner .... Winston-Salem
Max Weiss .... Athens, OH
Rachel Weisz .... Cary
McKenzie Stokes West .... Wilkesboro
Astrid Gonzalez Whalen .... Cary
Jenny Nicole Wheeler .... Durham
Ryan Wheeler .... Charlotte
Jonathan Dalton White .... Sanford

Ashlea Turner White .... Raleigh
Emma Abigail White .... Lynchburg, VA
Emma S. Whitten .... Raleigh
Ashley Henehan Willard .... Winston-Salem
Desirae Williams .... Charlotte
Mary A. Williams .... Greensboro
Ashley Julianne Williams .... Raleigh
Savannah Victoria Williamson .... Greensboro
Jared Emerson Willis .... Greensboro
Robert Christopher Wilson .... Charlotte
John Samuel Wilson III .... Winston-Salem
Kelsie Anne Wiltse .... Charlotte
Alexander Riggs Wimmer .... Salisbury
Emilee Rose Winter .... Charlotte
Bartlomiej Pawel Wisla .... Charlotte
Blake Monroe Witty .... Asheville
William Edward Wolfe Jr. .... Chapin, SC
Jessica H. Wollum .... Winston-Salem
Christopher Deon Womack .... Greenville
Arielle Womack .... Greensboro
Chazle' Nashea Woodley .... Durham
Andrew Frederic Ohlinger Wright .... Burnsville
Samantha Rae Wyant .... Raleigh
Tyler W. Wyckoff .... Lindsay, CA
Stephen Matthew Wynne .... Charlotte
Daixi Xu .... Greensboro
Jennifer Yagoda .... Raleigh
Autumn Marie Young .... Fayetteville
Shanicia Nicole Young .... Roper
Nathan Robert Young .... Mint Hill
Eden Zakay .... Carrboro
Ting Zheng .... Cary
David Zhou .... Charlotte
Alexander Luka Zupancic .... Raleigh

The following persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners in 2022 and have been issued a certificate by the Board.

Zachary Ainsztein .... Applied from the State of New York
Kirk Patton Altman .... Applied from the State of Texas
Brook Antonio II .... Applied from the District of Columbia
Timothy James Anzenberger .... Applied from the State of Mississippi
Brian Assessor .... Applied from the State of Maryland
Edward Joseph Aucoin Jr. .... Applied from the State of Illinois
Min Choe Baharov .... Applied from the State of New York
Katrina Worrell Ballard .... Applied from the State of New York
Jeffrey James Banyas .... Applied from the State of Ohio
Miles Benjamin Berger .... Applied from the State of West Virginia

Cory Biggs .... Applied from the State of Arkansas
Aaron Bindman .... Applied from the State of Colorado
Kari Levine Bourg .... Applied from the State of Virginia
Sean Jarryd Bowen .... Applied from the State of New York
Matthew Ryan Bowles .... Applied from the District of Columbia
Matthew Brown .... Applied from the State of Massachusetts
Whitney Brownlow .... Applied from the State of Ohio
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Felicia Corsaro .... Applied from the State of New Jersey
Lindsay Cronin .... Applied from the State of Maryland
Elizabeth Marie Cruikshank Sanders .... Applied from the State of Georgia
Amy R. Dalal .... Applied from the State of Ohio
Benjamin Ari Davidson .... Applied from the District of Columbia
Kimberly Rae Davis .... Applied from the State of Arizona
Jason L. DeFrancesco .... Applied from the States of New York and New Jersey
Hilary Smith Delaney .... Applied from the State of Massachusetts
Andrew George Drozdowski .... Applied from the States of New Jersey and New York
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Alexandrea Marie Everson .... Applied from the State of Colorado
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Sandon Miles Fisher .... Applied from the State of Alaska
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Paul Heinmuller .... Applied from the State of Maryland
Kelsey Heino .... Applied from the States of Iowa and Nebraska
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Jason Higginbotham .... Applied from the State of Texas

Corinne S. Hockman .... Applied from the State of Texas
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Kara Lancaster .... Applied from the State of New York
Darin James Lang .... Applied from the States of Colorado and Nebraska
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Mark Alan Mohr .... Applied from the State of New York
Deanna Seward Mool .... Applied from the State of Illinois
Curtis G. Moore .... Applied from the State of Ohio
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Martha Sofia Rhea ....Applied from the State of Ohio
Wesley Austin Roberts ....Applied from the State of Georgia
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Lauren Elizabeth Shor .... Applied from the State of New York
Jerold Nathan Siegan ....Applied from the State of Illinois
Chelsea Alexandra Simon ....Applied from the State of West Virginia
James Earl Simon ....Applied from the State of West Virginia
Jaclyn Sitjar .... Applied from the State of New York
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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

C INVESTMENTS 2, LLC
v.
ARLENE P. AUGER, HERBERT W. AUGER, ERIC E. CRAIG, GINA CRAIG, LAURA DUPUY, STEPHEN EZZO, JANICE HUFF EZZO, ANNE CARR GILMAN WOOD, AS TRUSTEE OF THE FRANCIS DAVIDSON GILMAN, III TRUST FBO PETS UW DATED JUNE 20, 2007, LAUREN HEANEY, GINNER HUDSON, JACK HUDSON, ARTHUR MAKI, RUTH MAKI, JENNIE RAUBACHER, MATTHEW RAUBACHER, AS CO-TRUSTEES OF THE RAUBACHER/CHEUNG FAMILY TRUST DATED NOVEMBER 11, 2018, JEFFREY STEGALL, VALERIE STEGALL, AND C INVESTMENTS 4, LLC

No. 228A21

Filed 16 December 2022

Real Property—Real Property Marketable Title Act—exception under section 47B-3(13)—covenants restricting property to residential use

In a declaratory judgment action regarding residential subdivision lots subject to a set of nine covenants recorded in the 1950s, where the first of the covenants restricted the lots to residential use only while the remaining covenants governed the number, size, location, and type of structures or activities permitted on each lot, only the first covenant survived under N.C.G.S. § 47B-3(13)'s exception to the Real Property Marketable Title Act. Although the nine covenants provided for a general or uniform scheme of development, by the plain language of section 47B-3(13) only the covenant restricting the lots to residential use was shielded from extinguishment by the Act.

Chief Justice NEWBY dissenting.

Justices HUDSON and EARLS 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, 277 N.C. App. 420, 2021-NCCOA-209, affirming an order of summary judgment entered on 8 April 2019 by Judge Charles M. Viser in Superior Court, Mecklenburg County. The Court allowed defendants' petition for discretionary review as to additional issues. Heard in the Supreme Court on 19 September 2022.

Parker Poe Adams & Bernstein, LLP, by Michael G. Adams, Morgan H. Rogers, and W. Coker Holmes, for plaintiff-appellee, C Investments 2, LLC, and substituted party C Investments 4, LLC.

Davies Law Firm, PLLC, by Kenneth T. Davies; Robinson, Bradshaw & Hinson, P.A., by Richard A. Vinroot; and Nexsen Pruet, PLLC, by James C. Smith, for defendant-appellants, Arlene P. Auger, Herbert W. Auger, Eric E. Craig, Gina D. Craig, Stephen Ezzo, and Janice Huff Ezzo.

Caudle & Spears, P.A., by Christopher P. Raab and L. Cameron Caudle, Jr., for defendant-appellees Jennie Raubacher and Matthew Raubacher, as Co-Trustees of the Raubacher/Cheung Family Trust dated November 11, 2008.

Roberts & Stevens, P.A., by Kenneth R. Hunt and Wyatt S. Stevens, for Jon R. Bellows, Galliard S. Bellows, Thomas A. Schieber, Elizabeth G. Schieber, William L. Everist, Mary K. Everist, Daniel P. Comer, Meredith M. Comer, James S. O'Brien, Gisselle L. O'Brien, Sara Edmonds Green, Rebecca D. Tucker, Tony L. Wilkey, Diana M. Wilkey, Kenneth R. Hunt, and Shannon U. Hunt; and J. Boone Tarlton and Ervin L. Ball, Jr. for Wayne S. Stanko, and Janice Stanko, amici curiae.

Jordan Price Wall Gray Jones & Carlton, PLLC, by H. Weldon Jones, III, for Community Associations Institute, amicus curiae.

Offit Kurman, P.A., by Zipporah Basile Edwards and Robert B. McNeill, for North Carolina Land Title Association, amicus curiae.

Roberson Haworth & Reese, PLLC, by Alan B. Powell and Andrew D. Irby, for Lori H. Postal, amicus curiae.

Alexander Ricks, PLLC, by Amy P. Hunt, for Michael and Karyn Reardon, amici curiae.

Edmund T. Urban for Urban Title Company, Inc. and pro se, amici curiae.

Davies Law Firm, PLLC, by Kenneth T. Davies, for C. E. Williams, III, Margaret W. Williams, R. Michael James, Katherine H. James, Strawn Cathcart, Susan S. Cathcart, Mark B. Mahoney, and Noelle S. Mahoney; Robinson, Bradshaw & Hinson, P.A., by Richard A. Vinroot, pro se, and for Judith A. Vinroot; and Nexsen Pruet, PLLC, by James C. Smith, for Thomas M. Belk, Sarah F. Belk, D. Steve Boland, Katrice C. Boland, Shippen Browne, Bridget Browne, Joseph D. Downey, Kristen L. Downey, Jubel A. Early, Katherine C. Early, John K. Hudson, Carolyn B. Hudson, John Ames Kneisel, Anna Blair Kneisel, Alexander W. McAlister, Susan N. McAlister, Ian McDade, Victoria L. McDade, Mark William Mealy, Rose Patrick Mealy, Walter O. Nisbet, Danielle F. Nisbet, Scott John Rogers Smith, Mary Mallard Smith, G. Kennedy Thompson, Kathylee B. Thompson, George C. Ullrich, Margaret C. Ullrich, John R. Wickham, Charlotte H. Wickham, William S. Wilson, Ellen G. Wilson, Landon R. Wyatt, and Edith H. Wyatt, amici curiae.

MORGAN, Justice.

¶ 1 In this case we are called upon to determine the proper interpretation of North Carolina's Real Property Marketable Title Act, N.C.G.S. §§ 47B-1 to 47B-9 (2021) and its thirteenth enumerated exception. *See* N.C.G.S. § 47B-3(13). Defendants appeal from a divided Court of Appeals decision, which affirmed the trial court's grant of summary judgment to plaintiff and held that eight of the nine restrictive covenants governing plaintiff's lots within the parties' residential subdivision were extinguished by operation of the Act. Our review in this matter concerns whether the Court of Appeals correctly determined that the Act's thirteenth exception did not apply to save *all* of the nine restrictive covenants. By applying this Court's well-established principles of statutory construction and affording the Legislature's words their plain and unambiguous meaning, we conclude that the eight covenants at issue do not fall within the scope of the Act's exceptions and are therefore extinguished by operation of law. Accordingly, we affirm the opinion of the Court of Appeals.

I. Factual and Procedural Background

¶ 2 Country Colony is a residential subdivision located in Mecklenburg County, North Carolina, which was developed by husband and wife Henry G. and Miriam C. Newson in the 1950s. On 25 February 1952, prior to selling any parcels within Country Colony, the Newsons recorded nine restrictive covenants at the Mecklenburg County Register of Deeds which were intended to govern the subsequent development of the subdivision. These covenants were recorded in Book 1537 at page 517 and specified that they were to run with the land and remain binding on any and all subsequent parties and persons. The Newsons further provided that any lot owner within Country Colony could enforce the restrictions through proceedings at law or in equity against any other property owner in violation thereof. The covenants require that:

> 1. All lots in the tract shall be known and described and used for residential lots only.
>
> 2. No structure shall be erected, altered, placed or permitted to remain on any residential building plot other than one detached single-family dwelling not to exceed two and one-half stories in height and a private garage, and other outbuildings incidental to residential use of the plot.
>
> 3. No building shall be erected on any residential building plot nearer than 100 feet to the front lot line nor nearer than 20 feet to any side line.
>
> 4. No noxious or offensive trade or activity shall be carried on upon any lot nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood.
>
> 5. No trailer, basement, tent, shack, garage, barn or other outbuilding erected in the tract shall at any time be used as a residence temporarily or permanently, nor shall any structure of a temporary character be used as a residence.
>
> 6. No dwelling costing less than $10,000.00 shall be permitted on any lot in the tract. The ground floor area of the main structure, exclusive of one story open porches and open car ports, shall be not less than 1200 square feet in case of a one story structure. In the case of a one and one-half, two or two and

> one-half story structure, the ground floor area of the main structure, exclusive of one-story open porches or open car ports, shall not be less than nine hundred square feet. (It being the intention to require in each instance the erection of such a dwelling as would have cost not less than the minimum cost provided if same had been erected in January, 1952.)
>
> 7. A right of way is and shall be reserved along the rear of each lot and along the side line of each lot where necessary, for pole lines, pipes and conduits for use in connection with the supplying public utilities service [sic] to the several lots in said development.
>
> 8. In the event of the unintentional violation of any of the building line restrictions herein set forth, the parties hereto reserve the right, by and with the mutual written consent of the owner or owners, for the time being of such lot, to change the building line restrictions set forth in this instrument; provided, however, that such change shall not exceed ten percent of the original requirements of such building line restrictions.
>
> 9. None of the lots shown on said plat shall be subdivided to contain less than two acres and only one residence shall be erected on each of said lots.

¶ 3 Plaintiff is a North Carolina limited liability company that owns seven parcels within Country Colony, which it purchased between February 2016 and May 2017. Each parcel has a root title more than thirty years old that either entirely fails to mention, or does not specifically raise by reference to book and page or record, the aforementioned restrictive covenants. Neither is such information provided by any of the deeds subsequently contained within plaintiff's chains of title.

¶ 4 On 28 June 2018, plaintiff filed a complaint in Superior Court, Mecklenburg County, requesting declaratory relief regarding the validity and enforceability of the above covenants. Plaintiff argued, *inter alia*, that many of the covenants as applied to plaintiff's lots are invalid under the North Carolina Real Property Marketable Title Act, N.C.G.S. §§ 47B-1 to 47B-9 (2021), which provides that any conflicting claims placed upon one's title to real property in North Carolina shall be extinguished if not recorded within the chain of record title going back thirty

years, subject to certain exceptions. Two named defendants, Lawrence and Laura Tillman, who sought to sell their own property within Country Colony for development, filed an answer, counterclaim against plaintiff, and crossclaims against all other defendants seeking identical relief on 13 July 2018. Defendants Jennie and Matthew Raubacher filed an answer to plaintiff's complaint and demand for jury trial on 2 August 2018, as well as an answer to the Tillmans' crossclaim on 28 September 2018. Defendant Lauren Heaney submitted her own answers to the complaint and crossclaim on 3 August 2018 and 16 August 2018, respectively, and defendants Herbert Auger, Arlene Auger, Eric Craig, Gina Craig, Janice Huff Ezzo, Stephen Ezzo, Laura Dupuy, Ashfaq Uraizee, and Jabeen Uraizee (Auger defendants) filed an answer to the Tillmans' crossclaim and a motion to dismiss on 31 August 2018.

¶ 5 On 6 September 2018, plaintiff filed a motion for leave to amend its complaint, followed by an amended complaint filed on 26 October 2018, in order to join additional parties, properly identify the owners of a lot, and further clarify its argument relating to the Marketable Title Act. The Tillmans likewise amended their answer, counterclaim, and crossclaim on 1 November 2018. Following this, the Raubachers and the Auger defendants filed updated answers to plaintiff's amended complaint as well as the Tillmans' amended crossclaim between 19 November 2018 and 14 December 2018. Newly added defendant Anne Carr Gilman Wood, in her capacity as Trustee of the Francis Davidson Gilman, III Trust, filed an answer and affirmative defenses to plaintiff's amended complaint on 7 December 2018; likewise, Jeffrey and Valerie Stegall filed an answer and affirmative defenses to both plaintiff's amended complaint and the Tillmans' amended crossclaim on 4 January 2019. The remaining defendants defaulted by failing to timely respond to either plaintiff's complaint or the Tillmans' crossclaim.

¶ 6 On 20 December 2018, the Auger defendants filed a motion for summary judgment. Plaintiff and the Tillmans filed opposing motions for summary judgment on 21 December 2018, requesting that the trial court find that they held marketable title free and clear of all of the Newson covenants under the operative provisions of the Marketable Title Act. In support of their motions, plaintiff and the Tillmans each filed certified copies of their deeds establishing chains of title going back more than thirty years without reference to the Newson covenants. The Auger defendants submitted a memorandum in opposition to plaintiff's and the Tillmans' motions on 31 January 2019, arguing that the Newson covenants were validly created and not terminated by operation of the Marketable Title Act.

¶ 7 On 8 April 2019, the trial court entered an order granting plaintiff's and Tillman defendants' motions for summary judgment, finding that the Act operated to extinguish all but the first of the Newsons' restrictive covenants as applied to plaintiff's and the Tillmans' property. N.C.G.S. § 47B-2(c). The trial court found that none of the Act's thirteen enumerated exceptions applied to preserve these covenants, except for the first covenant, which restricted the subject property to use for residential lots only. Defendants appealed to the Court of Appeals, arguing that the trial court had erred by concluding that N.C.G.S. § 47B-3(13), which provides an exception for "[c]ovenants applicable to a general or uniform scheme of development which restrict the property to residential use only," did not additionally shield covenants two through nine from the extinguishment provisions of the Act.

¶ 8 The Court of Appeals affirmed the trial court's grant of summary judgment in favor of plaintiff and the Tillmans. *C Invs. 2, LLC v. Auger*, 277 N.C. App. 420, 2021-NCCOA-209. In its opinion, the Court of Appeals majority held that eight of the nine covenants at issue—which largely govern the type, location, and appearance of structures that can be erected on property within Country Colony—did not fit within the plain language of N.C.G.S. § 47B-3(13) which, according to the lower court's interpretation, exempts only covenants "concerning residential use, or more narrowly, multi-family or single-family residential use." *C Invs. 2*, ¶ 5. The Court of Appeals dissent agreed with the majority that most of the Country Colony covenants did not survive operation of the Act, but disagreed that the plain language of N.C.G.S. § 47B-3(13) was unambiguous. Distinguishing our precedent construing residential use covenants otherwise, the dissenting judge concluded that N.C.G.S. § 47B-3(13) covers not only covenants restricting property to residential *use*, but also applies to the *construction* of particular residential structures. *Id.*, ¶ 44 (Dillon, J., concurring in part, dissenting in part). Consequently, the dissent concluded that not only the first, but also the second and ninth covenants, ought to be shielded from extinguishment under the provisions of the Act. *Id.*

¶ 9 Defendants timely appealed to this Court pursuant to N.C.G.S. § 7A-30 on the basis of the Court of Appeals dissent.[1] We further allowed defendants' petition for discretionary review to consider whether N.C.G.S. § 47B-3(13) excepts covenants three through eight as well from extinguishment by operation of the Act.

---

1. The appealing defendants were Arlene and Herbert Auger, Eric and Gina Craig, Stephen and Janice Ezzo, and Ashfaq and Jabeen Uraizee. The Uraizees later withdrew from the proceedings after they sold their property.

II. Analysis

¶ 10 The question before this Court is which, if any, of Country Colony's restrictive covenants fall within the purview of N.C.G.S. § 47B-3(13) and are thus shielded from the extinguishment provisions of the Real Property Marketable Title Act. After careful consideration of the Act's plain words and legislative history, as well as our own precedent interpreting substantially identical language, we conclude that only the first of the nine covenants at issue survives operation of the Act. We therefore affirm the decision of the Court of Appeals.

¶ 11 We begin with an identification of the proper standard of review. Defendants are appealing an order of summary judgment granted by the trial court and affirmed by the Court of Appeals. "Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573 (2008) (extraneity omitted). In reviewing an order for summary judgment, we view presented evidence in the "light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651 (2001). Finally, we review matters of statutory interpretation de novo. *In re Ernst & Young, LLP*, 363 N.C. 612, 616 (2009).

¶ 12 This case presents a question of statutory interpretation of first impression before this Court, which warrants a review of our pertinent tenets of construction. "According to well-established North Carolina law, the intent of the Legislature controls the interpretation of a statute." *State v. Fletcher*, 370 N.C. 313, 327–28 (2017) (extraneity omitted). "[W]here 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." *Union Carbide Corp. v. Offerman*, 351 N.C. 310, 315 (2000) (second alteration in original) (quoting *State v. Camp*, 286 N.C. 148, 152 (1974)). "But where a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209 (1990). Legislative will "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." *State ex rel. N.C. Milk Commission v. Nat'l Food Stores, Inc.*, 270 N.C. 323, 332 (1967).

¶ 13 The statute before us in the present case is North Carolina's Real Property Marketable Title Act. The Act declares that, as a matter of

public policy, land is a "basic resource of the people of the State of North Carolina" that "should be made freely alienable and marketable so far as is practicable." N.C.G.S. § 47B-1(1). Accordingly, the Act states that, "if a person claims title to real property under a chain of record title for 30 years, and no other person has filed a notice of any claim of interest in the real property during the 30-year period, then all conflicting claims based upon any title transaction prior to the 30-year period shall be extinguished," subject to certain limited exceptions. *Id.* § 47B-1.

¶ 14 It is undisputed that plaintiff traces its interest in seven lots within Country Colony to root titles going back at least thirty years without reference to the Newson covenants.[2] The resolution of the instant case hinges upon the proper interpretation of one of the Act's exceptions. Subsection 47B-3 establishes that:

> Such marketable record title shall not affect or extinguish the following rights:
>
> . . . .
>
> (13) Covenants applicable to a general or uniform scheme of development which restrict the property to residential use only, provided said covenants are otherwise enforceable. The excepted covenant may restrict the property to multi-family or single-family residential use or simply to residential use. Restrictive covenants other than those mentioned herein which limit the property to residential use only are not excepted from the provisions of Chapter 47B.

Id. § 47B-3(13).

¶ 15 Country Colony is indisputably governed by a series of protective covenants that provide for a general or uniform scheme of development as envisioned by its developers, the Newsons. Defendants urge us to interpret N.C.G.S. § 47B-3(13) as meaning that, if a collection of covenants governing a general or uniform scheme of development includes a restriction mandating residential use among them, the Act exempts from extinguishment *all* covenants that apply to that general or uniform scheme of development. Thus, in accordance with defendants' statutory interpretation, all nine of Country Colony's covenants should be

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2. The Tillmans sold their property to C Investments 4 in December 2021. C Investments 4 has been substituted as a party in place of the Tillmans, Uraizees, Julkas, and Bridget Holdings, LLC. There is now a single plaintiff in this case, which is C Investments 2, LLC, and substituted party C Investments 4, LLC.

preserved because they together constitute a general or uniform scheme of development that restricts property within the subdivision to residential use. On the other hand, plaintiff construes this exception as applying to protect only those covenants that actually restrict property to residential use; under this view, only the subdivision's first covenant is exempted. The dissenting judge at the Court of Appeals interprets the Act as preserving those covenants which *either* restrict the property to residential use *or* permit only the construction of residential buildings of certain types upon the property and would exempt covenants one, two, and nine while extinguishing the remainder.

¶ 16 Based upon the plain language of the statute and the ordinary meaning of the words and phrases contained therein, as well as our own precedent in interpreting substantially identical language, we agree with plaintiff that N.C.G.S. § 47B-3(13) applies to preserve only the first of Country Colony's restrictive covenants.

A. Plain Meaning and Ordinary Tools of Construction

¶ 17 In our view, the plain words of N.C.G.S. § 47B-3(13) are unambiguous. Each sentence of this exception, read in harmony, combines with the others to carve out a limited exception for residential use restrictions occurring within the context of general or uniform schemes of development. The first sentence of the exception reads: "[M]arketable record title shall not affect or extinguish . . . [c]ovenants applicable to a general or uniform scheme of development which restrict the property to residential use only, provided said covenants are otherwise enforceable." *Id.* § 47B-3.

¶ 18 "Ordinary rules of grammar apply when ascertaining the meaning of a statute, and the meaning must be construed according to the context and approved usage of the language." *Dunn v. Pac. Emps. Ins. Co.*, 332 N.C. 129, 134 (1992). We presume that the Legislature chose its words with due care and comprehension of their ordinary meaning. *See Sellers v. Friedrich Refrigerators, Inc.*, 283 N.C. 79, 85 (1973) ("In construing a statute, it will be presumed that the legislature comprehended the import of the words employed by it to express its intent.") (extraneity omitted).

¶ 19 By its plain language, the first sentence of N.C.G.S. § 47B-3(13) refers to covenants that "restrict" property to "residential use," provided that these covenants are (1) "applicable to a general or uniform scheme of development" and (2) "otherwise enforceable." N.C.G.S. § 47B-3(13). This construction of the statute is the most grammatically sound; it recognizes that "restrict" in its chosen form refers to the plural referent "covenants" as opposed to the singular referent "scheme of

development," thus providing that the exception's scope is limited to those covenants that *restrict* property to residential use, as opposed to all covenants occurring within a scheme of development which *restricts* property to residential use. Moreover, the sentence's additional qualifications—that excepted covenants apply to "general or uniform schemes of development" and that they be "otherwise enforceable"—are not mere surplusage but provide important clarification for the exception as a whole.

¶ 20 The first qualification clarifies that the Marketable Title Act does not operate to disturb the common-law principle that only those covenants applicable to a general or uniform scheme of development, as opposed to personal covenants, may run with the land. *See Sedberry v. Parsons*, 232 N.C. 707 (1950); *Phillips v. Wearn*, 226 N.C. 290 (1946). This would not be the first time that the Legislature has chosen to codify the common-law into its general statutes. *See Cook v. Bankers Life & Cas. Co.*, 329 N.C. 488, 494 (1991) (Meyer, J., concurring in result) ("[A]s every lawyer knows, the legislature frequently enacts a statute which simply codifies existing common law, without any change whatsoever to the common law it codifies."); *see, e.g.*, *Ray v. N.C. DOT*, 366 N.C. 1, 6–7 (2012) (noting that the Legislature had codified the public duty doctrine and its exceptions as laid out by this Court in case law); *Giles v. First Va. Credit Servs.*, 149 N.C. App. 89, 105 (2002) (observing that the Legislature had "codified a right existing at common law."), *appeal dismissed and disc. rev. denied*, 355 N.C. 491 (2002).

¶ 21 The second qualification, requiring that the covenants be "otherwise enforceable," allows parties to continue to advance other arguments against the enforcement of restrictive covenants encumbering their property, such as plaintiff's own argument, alleged in its initial complaint, that "consistent, continuous violations" of the Newson restrictions by other landowners within the subdivision "and the passage of time have changed the condition of Country Colony and have rendered the [Newson covenants] unenforceable." Despite defendants' contention that this "proviso was obviously intended to exclude 'racial' or other obnoxious restrictions from enforcement," courts have found, and under this provision may continue to find, residential use restrictions unenforceable for reasons unrelated to their particular substance. *See, e.g.*, *Logan v. Sprinkle*, 256 N.C. 41, 47 (1961) (residential use restriction unenforceable under theory of abandonment when developers conveyed six of the eight lots in the development for the construction and operation of commercial enterprise); *Tull v. Drs. Bldg., Inc.*, 255 N.C. 23, 41 (1961) (considering whether laches, waiver, acquiescence, or estoppel prevents enforcement of residential use restrictions).

Under the plain language of N.C.G.S. § 47B-3(13), courts may continue to refuse to enforce outdated restrictive covenants through the application of common-law doctrines entirely separate from the Act's statutory provisions.

¶ 22 The next sentence of N.C.G.S. § 47B-3(13) further belies defendants' interpretation. It reads: "The excepted covenant may restrict the property to multi-family or single-family residential use or simply to residential use." N.C.G.S. § 47B-3(13).

¶ 23 "Because the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used." *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201 (2009). "Thus, in effectuating legislative intent, it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used." *Lunsford v. Mills*, 367 N.C. 618, 623 (2014). "Since a legislative body is presumed not to have used superfluous words, our courts must accord meaning, if possible, to every word in a statute." *N.C. Bd. of Exam'rs for Speech & Language Pathologists & Audiologists v. N.C. State Bd. of Educ.*, 122 N.C. App. 15, 21 (1996), *aff'd per curiam in part and disc. rev. improvidently allowed in part*, 345 N.C. 493 (1997) (per curiam).

¶ 24 As opposed to "numerical flip-flopping" serving no apparent purpose, this sentence's reference to a singular "excepted covenant" contemplates that individual covenants, rather than entire sets applicable to general or uniform schemes of development, be the subject of preservation under the exception. Defendants and amici here attempt to persuade us that this sentence of the statute serves to specify the appropriate residential use restrictions which may serve to allow entire sets of covenants applicable to a general or uniform scheme of development to be subject to the exception. But this sentence, grammatically and logically, reads that *individual* covenants are subject to exception ("*[t]he* excepted *covenant*") if and only if they fall within a narrow category of residential use restrictions.

¶ 25 Moreover, this narrow scope—allowing excepted covenants to "restrict the property to multi-family or single-family residential use or simply to residential use," N.C.G.S. § 47B-3(13)—conveys the General Assembly's intent that the exception go no further than to exempt those specific types of covenants. *See Campbell v. First Baptist Church*, 298 N.C. 476, 482 (1979) ("Under the doctrine of *expressio unius est exclusio alterius*, the mention of specific exceptions implies the exclusion of others."). Because the apparent purpose of this sentence is to provide

the appropriate description of a residential use restriction to be excepted under N.C.G.S. § 47B-3(13), the sentence would be ineffectual if we read it to cover *all* covenants pertaining to a general or uniform scheme of development containing *any* form of residential use restriction *regardless* of each covenant's individual scope. We should not, and therefore do not, favor such a statutory interpretation under our well-established tenets of construction.

¶ 26 It is at this point that we also discount the Court of Appeals dissenting judge's interpretation of N.C.G.S. § 47B-3(13). *See C Invs. 2*, ¶ 44 (Dillon, J., concurring in part, dissenting in part). This Court's precedent establishes that restrictions against certain usages of property and restrictions against the development of structures of a particular nature upon property are not one and the same. *J.T. Hobby & Son, Inc. v. Fam. Homes of Wake Cnty., Inc.*, 302 N.C. 64, 74–75 (1981) (holding that "a provision in a restrictive covenant as to the character of the structure which may be located upon a lot does not by itself constitute a restriction of the premises to a particular use"); *Huntington v. Dennis*, 195 N.C. 759, 760–61 (1928) (per curiam) (holding that the construction of an apartment building does not violate a residential use restriction because the building would be used for residential purposes only). "The Legislature is presumed to know the existing law and to legislate with reference to it." *State v. S. Ry. Co.*, 145 N.C. 495, 542 (1907). Because our decision in *Huntington* predates the passage of the Marketable Title Act in 1973, we presume that the Legislature was aware of these legal distinctions and thus of the significance of choosing to except residential use restrictions and not those permitting the construction of buildings of only a certain residential type.

¶ 27 Furthermore, our analysis of the restrictions at issue in *J.T. Hobby* and *Huntington* is derived from consideration of the same public policy principles motivating the passage of the Marketable Title Act—that land should be freed from unnecessary limitations against its use or alienation to the fullest extent feasible. *J.T. Hobby & Son*, 302 N.C. 64 at 70–71 ("[Restrictive] covenants are not favor[ed] by the law and they will be strictly construed to the end that all ambiguities will be resolved in favor of the unrestrained use of land. [This rule] is grounded in sound considerations of public policy: It is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent.") (citations omitted). Although we readily concede that a statute's reference to restrictive covenants is not the same as a restrictive covenant itself, and is therefore not subject to the same mandate of strict construction, nonetheless we see no reason to diverge

from our established interpretation of substantially identical language to exempt covenants two and nine from the extinguishment provisions of the Marketable Title Act given (1) our aforementioned presumption that the Legislature acts with reference to established law, including our decision in *Huntington*, and (2) the Act's own mandate of liberal construction in favor of the simplification and facilitation of the transfer of real property.

¶ 28 The final sentence of Subsection 47B-3(13) reads: "Restrictive covenants other than those mentioned herein which limit the property to residential use only are not excepted from the provisions of Chapter 47B." N.C.G.S. § 47B-3(13). This sentence presents, in our view, the most ambiguity among the provisions, but neither interpretation shades in defendants' favor. The two potential interpretations are as follows: (1) Restrictive covenants, other than those mentioned herein, which limit the property to residential use only are not excepted from the provisions of Chapter 47B, or (2) Restrictive covenants other than those mentioned herein, which limit the property to residential use only, are not excepted from the provisions of Chapter 47B. The former choice serves to reiterate that only those residential use restrictions which occur within the context of a general or uniform scheme of development and are otherwise enforceable are preserved under the Marketable Title Act. The latter alternative serves to reinforce plaintiff's position—that the scope of N.C.G.S. § 47B-3(13) is sharply circumscribed to covenants that actually limited property to residential use only and cannot be used to except covenants that do not relate to residential use.

¶ 29 Neither interpretation is dispositive and we do not wholly favor one reading over the other. On one hand, the lack of commas in this portion of the statute could imply that neither clause is intended to be non-restrictive, specifically, that both are intended to substantively limit or define the scope of "restrictive covenants." This analysis would favor the first interpretation because both phrases "other than those mentioned herein" as well as "which limit the property to residential use only" would serve to limit the meaning of "restrictive covenants" to those that concern residential use but are not otherwise covered by the exception. Under the second interpretation, however, the phrase "which limit the property to residential use only" would be non-restrictive because it would not meaningfully limit or define the scope of "restrictive covenants other than those mentioned herein" since *only* residential use covenants were mentioned therein. Either interpretation is, on some level, duplicative. However, instead of interpreting this final sentence of N.C.G.S. § 47B-3(13) as merely repeating the qualifications provided by

the first sentence, we consider the distinct prospect that the Legislature had envisioned disputes exactly like the one at issue here and was attempting to foreclose them by reiterating its intention that only those covenants which actually restrict property to residential use and are otherwise covered by the language of N.C.G.S. § 47B-3(13) would be excluded from the extinguishment provisions of the Act.

¶ 30 The dissent attempts to cast aspersions upon our interpretation of the clarity of the plain language of N.C.G.S. § 47B-3(13) and the customary interpretation of accompanying words, phrases, and punctuation in the statute by depicting our reference to the standard principles of statutory construction as some sort of concession to the correctness of the dissent's view that the language of the statute is ambiguous. In actuality, the converse is true: we emphasize the well-established guidelines of statutory construction, *not* because the law at issue is ambiguous, but in order to illustrate the established pathway by which we readily construe the statutory provision at issue and reach an outcome consistent with this Court's prior guidance which governs the proper interpretation of statutory law.

B. Legislative Intent and Public Policy Principles

¶ 31 "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*, 326 N.C. at 209 (extraneity omitted). As it is our position that the language of N.C.G.S. § 47B-3(13) is clear and unambiguous, we need not go further in our analysis. However, we believe that it is worth observing that our interpretation of N.C.G.S. § 47B-3(13) comports with the public policy principles which motivated the passage of the Real Property Marketable Title Act, does not undermine the purposes of the Act, and does not invite the ill consequences described by defendants and amici.

¶ 32 "In ascertaining [legislative] intent, a court may consider the purpose of the statute and the evils it was designed to remedy, the effect of the proposed interpretations of the statute, and the traditionally accepted rules of statutory construction." *Fletcher*, 370 N.C. at 327–28 (extraneity omitted). "The Court may also consider the policy objectives prompting passage of the statute and should avoid a construction which defeats or impairs the purpose of the statute." *O & M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 268 (2006) (extraneity omitted).

¶ 33 The intent of the legislative body which enacted the Real Property Marketable Title Act is expressly stated in the first passage of the statute:

> **§ 47B-1. Declaration of policy and statement of purpose.**
>
> It is hereby declared as a matter of public policy by the General Assembly of the State of North Carolina that:
>
> (1) Land is a basic resource of the people of the State of North Carolina and should be made freely alienable and marketable so far as is practicable.
>
> (2) Nonpossessory interests in real property, obsolete restrictions and technical defects in titles which have been placed on the real property records at remote times in the past often constitute unreasonable restraints on the alienation and marketability of real property.
>
> (3) Such interests and defects are prolific producers of litigation to clear and quiet titles which cause delays in real property transactions and fetter the marketability of real property.
>
> (4) Real property transfers should be possible with economy and expediency. The status and security of recorded real property titles should be determinable from an examination of recent records only.
>
> It is the purpose of the General Assembly of the State of North Carolina to provide that if a person claims title to real property under a chain of record title for 30 years, and no other person has filed a notice of any claim of interest in the real property during the 30-year period, then all conflicting claims based upon any title transaction prior to the 30-year period shall be extinguished. (1973, c. 255, s. 1.)

N.C.G.S. § 47B-1.

¶ 34 In addition, the Legislature mandated a liberal construction in order to effectuate its purpose of simplifying and facilitating real property title transactions:

> **§ 47B-9. Chapter to be liberally construed.**
>
> This Chapter shall be liberally construed to effect the legislative purpose of simplifying and facilitating

> real property title transactions by allowing persons to rely on a record chain of title of 30 years as described in G.S. 47B-2, subject only to such limitations as appear in G.S. 47B-3. (1973, c. 255, s. 1.)

Id. § 47B-9.

¶ 35 In this Court's view, extinguishing outdated covenants such as the Newsons' falls squarely within the express purpose of the Marketable Title Act to summarily extinguish "[n]onpossessory interests, . . . *obsolete restrictions* and technical defects in titles *which have been placed on the real property records at remote times in the past*" (emphases added) and which tend to be "prolific producers of litigation . . . caus[ing] delays in real property transactions and fetter[ing] the marketability of real property." *Id.* § 47B-1(3). The present case is illustrative of such a circumstance, wherein plaintiff's original complaint contained multiple theories upon which the trial court could have determined Country Colony's restrictive covenants to be unenforceable as applied to plaintiff's seven plots. Some would have required extensive factual inquiries into, for instance, the allegedly changed character of the subdivision and the disputed violations undertaken by defendants. By contrast, application of the Marketable Title Act properly resolved the dispute through summary judgment and in favor of more freely alienable and marketable title for both plaintiff and the Tillmans.

¶ 36 Our construction of N.C.G.S. § 47B-3(13) is in tandem with the statute's other provisions. Rather than stripping older neighborhoods of their character without recourse, the exception's limited applicability directs affected property owners to preserve their covenants through the procedures expressly afforded later in the Act. Residents of neighborhoods governed by sets of restrictive covenants who wish to preserve them may follow the procedure established by N.C.G.S. § 47B-4 in order to record a notice to be indexed in the relevant chains of title throughout their community and to keep potential buyers on notice of the restrictions for another thirty years to come:

> **§ 47B-4. Preservation by notice; contents; recording; indexing.**
>
> (a) Any person claiming a right, estate, interest or charge which would be extinguished by this Chapter may preserve the same by registering within such 30-year period a notice in writing, duly acknowledged, in the office of the register of deeds for the county in which the real property is situated, setting

> forth the nature of such claim, which notice shall have the effect of preserving such claim for a period of not longer than 30 years after registering the same unless again registered as required herein.

Id. § 47B-4(a).

¶ 37 This strikes us as the Legislature's intended balance between unburdening real property from cumbersome nonpossessory interests including outdated covenants and providing an avenue through which communities that continue to abide by and rely upon their neighborhood's restrictive covenants could preserve them. Indeed, by shifting the burden onto communities to take action to preserve non-residential use covenants that are not contained within chains of title going back thirty years by filing notices within the chains of all affected properties, the Legislature could both (1) ensure that only those covenants that are actually valued will continue to encumber property in the state while obsolete restrictions naturally abate, and (2) effectuate the statute's purpose to simplify the title transfer process by allowing purchasers of real property to determine the status of recorded real property titles from an examination of recent records only. This is precisely the type of deliberate policy choice which is best left to the Legislature. Although the dissent claims to heed legislative intent while simultaneously attributing ambiguity to the Legislature's statutory enactment to justify the dissent's archaic approach, we adhere to the plain and unambiguous meaning of N.C.G.S. § 47B-3(13) while determining that it harmonized with the overarching purposes and provisions of the Marketable Title Act.

III. Conclusion

¶ 38 We conclude that the Court of Appeals correctly held that all but the first of Country Colony's restrictive covenants as applied to plaintiff's property are to be extinguished under the Real Property Marketable Title Act and that the trial court correctly granted plaintiff's motion for summary judgment. We hold that a plain reading of N.C.G.S. § 47B-3(13) exempts from extinguishment only those covenants that actually require that a property be used residentially within the confines of a general or uniform scheme of development.

AFFIRMED.

Chief Justice NEWBY dissenting.

¶ 39 This case requires us to determine which types of restrictive covenants are excepted from extinguishment under N.C.G.S. § 47B-3(13) of the Real Property Marketable Title Act (the Act). Since the relevant statutory language is ambiguous, the intent of the legislature as expressed through our established rules of construction and the Act's purpose controls. When considering the reason behind the General Assembly's addition of subsection 13 and the Act's overall purpose, as well as giving every word meaning, it becomes apparent that the General Assembly intended to except from extinguishment entire sets of protective covenants under a general or uniform scheme of development which include a covenant restricting a subdivision to residential use. By eliminating all the protective covenants under a general or uniform scheme of development except the one restricting the property to residential use, the majority's decision today will destroy the character of many neighborhoods and communities across our state. I respectfully dissent.

¶ 40 On 28 February 1952, Henry G. Newson filed a plat map for a tract of real property that he and his wife owned in Mecklenburg County (Country Colony). Country Colony consisted of seventeen lots, with each being at least two acres. Before selling any of these lots, Newson filed a document which established the following protective covenants for Country Colony:

> 1. All lots in the tract shall be known and described and used for residential lots only.
>
> 2. No structure shall be erected, altered, placed or permitted to remain on any residential building plot other than one detached single-family dwelling not to exceed two and one-half stories in height and a private garage, and other outbuildings incidental to residential use of the plot.
>
> 3. No building shall be erected on any residential building plot nearer than 100 feet to the front lot line nor nearer than 20 feet to any side line.
>
> 4. No noxious or offensive trade or activity shall be carried on upon any lot nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood.

> 5. No trailer, basement, tent, shack, garage, barn or other outbuilding erected in the tract shall at any time be used as a residence temporarily or permanently, nor shall any structure of a temporary character be used as a residence.
>
> 6. No dwelling costing less than $10,000.00 shall be permitted on any lot in the tract. The ground floor area of the main structure, exclusive of one story open porches and open car ports, shall be not less than 1200 square feet in case of a one story structure. In the case of a one and one-half, two or two and one-half story structure, the ground floor area of the main structure, exclusive of one-story open porches or open car ports, shall not be less than nine hundred square feet. (It being the intention to require in each instance the erection of such a dwelling as would have cost not less than the minimum cost provided if same had been erected in January, 1952.)
>
> 7. A right of way and is and shall be reserved along the rear of each lot and along the side line of each lot where necessary, for pole lines, pipes and conduits for use in connection with the supplying public utilities service [sic] to the several lots in said development.
>
> 8. In the event of the unintentional violation of any of the building line restrictions herein set forth, the parties hereto reserve the right, by and with the mutual written consent of the owner or owners, for the time being of such lot, to change the building line restrictions set forth in this instrument; provided, however, that such change shall not exceed ten percent of the original requirements of such building line restrictions.
>
> 9. None of the lots shown on said plat shall be subdivided to contain less than two acres and only one residence shall be erected on each of said lots.

¶ 41 The Newsons then sold all seventeen lots in Country Colony and expressly subjected each conveyance to the protective covenants. Between 2016 and 2017, plaintiff C Investments 2, LLC, acquired seven contiguous parcels in Country Colony, derived from four of the original seventeen lots. Other than the original deeds from the Newsons,

there was no specific reference to the protective covenants in any of the chains of title for the lots that plaintiff purchased. On 28 June 2018, plaintiff filed a complaint against defendants, the respective owners of the remaining lots in Country Colony, seeking a declaratory judgment that protective covenants 2 through 9 are void under the Act, which provides, in relevant part, as follows:

> **§ 47B-2. Marketable record title to estate in real property; 30-year unbroken chain of title of record; effect of marketable title.**
>
> (a) Any person having the legal capacity to own real property in this State, who, alone or together with his predecessors in title, shall have been vested with any estate in real property of record for 30 years or more, shall have a marketable record title to such estate in real property.
>
> . . . .
>
> (c) Subject to the matters stated in [N.C.]G.S. [§] 47B-3, such marketable record title shall be free and clear of all rights, estates, interests, claims or charges whatsoever, the existence of which depends upon any act, title transaction, event or omission that occurred prior to such 30-year period. All such rights, estates, interests, claims or charges, however denominated, whether such rights, estates, interests, claims or charges are or appear to be held or asserted by a person sui juris or under a disability, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void.
>
> . . . .
>
> **§ 47B-3. Exceptions.**
>
> Such marketable record title shall not affect or extinguish the following rights:
>
> . . . .
>
> (13) Covenants applicable to a general or uniform scheme of development which restrict the property to residential use only, provided said covenants are otherwise enforceable. The excepted covenant may restrict

> the property to multi-family or single-family residential use or simply to residential use. Restrictive covenants other than those mentioned herein which limit the property to residential use only are not excepted from the provisions of Chapter 47B.

N.C.G.S. §§ 47B-2(a), -2(c), -3(13) (2021).

¶ 42 Defendants Lawrence and Linda Tillman filed a crossclaim also challenging the validity of the same protective covenants. Defendants Arlene and Herbert Auger, Eric and Gina Craig, and Stephen and Janice Ezzo[1] (appellants), however, sought to enforce the protective covenants. On 21 December 2018, C Investments 2, LLC, and defendants Lawrence and Linda Tillman (appellees) filed separate motions for summary judgment. The trial court entered an "Order Granting Plaintiff's And Tillmans' Motions for Summary Judgment" on 8 April 2019, concluding that N.C.G.S. § 47B-3(13) excepted from extinguishment only protective covenant 1 and that protective covenants 2 through 9 were thus null and void. Appellants appealed.

¶ 43 Before the Court of Appeals, appellants argued that "under N.C.[G.S.] § 47B-3(13), if a collection of covenants governing a uniform scheme of development include a restriction on residential use only, the Marketable Title Act exempts *all* covenants applying to that uniform scheme of development." *C Invs. 2, LLC v. Auger*, 277 N.C. App. 420, 2021-NCCOA-209, ¶ 16. In affirming the trial court's decision, the Court of Appeals reasoned that in subsection 13's first sentence, the phrase "which restrict," based on its plural form, must modify the plural word "covenants" rather than the singular phrase "scheme of development." *Id.* ¶ 17. Therefore, the Court of Appeals concluded that the exception in subsection 13 "applies only to 'covenants . . . which restrict the property to residential use only' and not to other covenants that are part of a general or uniform scheme of development and merely accompany a covenant restricting the property to residential use only." *Id.*

¶ 44 The Court of Appeals also concluded that such "residential use only" covenants do not include related covenants governing the size and number of structures on a lot. *Id.* ¶¶ 18–19. It reasoned that subsection 13's next two sentences "further define the types of covenants that are subject to the statutory exception and expressly state that the exception is limited *solely* to those covenants restricting property to residential use,

1. The remaining defendants are not parties to this appeal.

or more narrowly to multi-family or single-family residential use, and that it does *not* apply to other, related covenants." *Id.* ¶ 19. According to the Court of Appeals, the second sentence of subsection 13 indicates that the exception "applies solely to these specific covenants, not to other, related ones that might accompany these specific covenants as part of a uniform scheme of development." *Id.* ¶ 20. Finally, the Court of Appeals determined that subsection 13's third sentence "expressly indicates that the statute should *not* be read broadly and that it excepts only those covenants 'which limit the property to residential use.' " *Id.* ¶ 21 (quoting N.C.G.S. § 47B-3(13)). As such, the Court of Appeals concluded that protective covenants 2 through 9 are void and thus affirmed the trial court's order granting summary judgment in favor of appellees.

¶ 45 The dissenting opinion at the Court of Appeals agreed with the majority that subsection 13 excepts protective covenant 1. *Id.* ¶ 43 (Dillon, J., concurring in part and dissenting in part). It disagreed with the majority, however, by concluding that subsection 13 "describes both structural covenants and occupancy covenants; that is, occupancy covenants which limit the use of property to occupancy by a single family *and* structural covenants which limit the use of property to the development of a single-family type residential structure." *Id.* ¶ 44. As such, the dissenting opinion would have held that subsection 13 also excepts "the portions of Country Colony's second and ninth covenants, *which restrict the use of each lot to a single-family residential structure*." *Id.* Appellants appealed to this Court based upon the dissenting opinion at the Court of Appeals. We also allowed appellants' petition for discretionary review to address subsection 13's applicability to other protective covenants within a residential scheme of development.

¶ 46 At this Court, the majority opinion adopts the reasoning of the Court of Appeals majority, holding that subsection 13 only excepts from extinguishment those covenants that specifically restrict a property to residential use only. Interestingly, the majority states that the language of N.C.G.S. § 47B-3(13) is clear and unambiguous. Their analysis, however, negates this conclusion and applies canons of statutory construction to interpret the language of the statute. This Court recently explained that "[a]ccording 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 . . . .' " *State v. Carey*, 373 N.C. 445, 450, 838 S.E.2d 367, 372 (2020) (quoting *State v. Jackson*, 353 N.C. 495, 501, 546 S.E.2d 570, 574 (2001)). Accordingly, the majority ultimately concedes that the language of the statute is ambiguous by resorting to statutory construction to interpret its meaning.

¶ 47 Indeed, this case raises an issue of statutory interpretation. *See Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998) ("A question of statutory interpretation is ultimately a question of law for the courts."). "The principal goal of statutory construction is to accomplish the legislative intent." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (citing *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998)). "The best indicia of that intent are the language of the statute[,] . . . the spirit of the act[,] and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citation omitted). Furthermore, the purpose of statutory construction is to ensure every word or phrase provides meaning and that none are surplusage. *E.g.*, *State v. Williams*, 286 N.C. 422, 431, 212 S.E.2d 113, 119 (1975). The relevant question, then, is whether, based upon the applicable statutory provisions, the General Assembly intended that the only covenants to survive extinguishment are those that explicitly restrict a property to residential use only.

¶ 48 "The Real Property Marketable Title Act was enacted by the General Assembly of North Carolina in an effort to *expedite* the alienation and marketability of real property." *Heath v. Turner*, 309 N.C. 483, 488, 308 S.E.2d 244, 247 (1983) (emphasis added). In pursuit of this purpose, and relevant to the present case, the "cleansing provision" of N.C.G.S. § 47B-2(c) "declare[s] . . . null and void" protective covenants that exist solely due to "any act, title transaction, event or omission that occurred prior to such 30-year period." N.C.G.S. § 47B-2(c). In response to concerns expressed by Mecklenburg County residents that many residential neighborhoods outside Charlotte's zoning jurisdiction would be stripped of their protective covenants, however, the General Assembly included an exception for such covenants in subsection 13. Edward S. Finley, Jr., Note, *Property Law – North Carolina's Marketable Title Act – Will the Exceptions Swallow the Rule?*, 52 N.C. L. Rev. 211, 220 n.83 (1973) (hereinafter Note, *Marketable Title Act*). Specifically, subsection 13 excepts the following covenants from extinguishment:

> Covenants applicable to a general or uniform scheme of development which restrict the property to residential use only, provided said covenants are otherwise enforceable. The excepted covenant may restrict the property to multi-family or single-family residential use or simply to residential use. Restrictive covenants other than those mentioned herein which limit

> the property to residential use only are not excepted from the provisions of Chapter 47B.

N.C.G.S. § 47B-3(13).

¶ 49 When carefully reviewing subsection 13's language within the context of the exception's purpose, it becomes apparent that the General Assembly intended to except all the covenants that are part of a general or uniform "residential only" scheme of development. The first sentence explains that in order for covenants to be excepted, they must meet three elements: (1) the covenants must be "applicable to a general or uniform scheme of development"; (2) the covenants must operate to "restrict the property to residential use only"; and (3) the covenants must be "otherwise enforceable." *Id.*

¶ 50 The third element requires that these covenants must not be void for some reason other than extinguishment under N.C.G.S. § 47B-2(c). In other words, none of the covenants can be unenforceable because they violate public policy. The majority's interpretation makes this element meaningless.

¶ 51 Regarding the first element, "[t]he primary test of the existence of a general plan for the development or improvement of a tract of land divided into a number of lots is whether substantially common restrictions apply to all lots of like character or similarly situated." *Sedberry v. Parsons*, 232 N.C. 707, 711, 62 S.E.2d 88, 91 (1950). As such, for a covenant to be excepted by subsection 13, it must first be part of a series of "substantially common restrictions" that apply to all "similarly situated" lots within a subdivided tract of land. *Id.*; *see* N.C.G.S. § 47B-3(13). The majority concedes that "Country Colony is indisputably governed by a series of protective covenants that provide for a general or uniform scheme of development as envisioned by its developers, the Newsons."

¶ 52 In order to meet the second element, these covenants must establish the subject subdivision as one for "residential use only." N.C.G.S. § 47B-3(13). This element reveals an ambiguity within subsection 13. On the one hand, a hyper-literal reading of this element as adopted by the majority could mean that the only covenants excepted are those single covenants which specifically state that the subject property is limited to residential use only. This reading, however, seemingly contradicts the reason for subsection 13's existence and fails to effectively advance the Act's general purpose of expediting real property transactions. Furthermore, as previously discussed, this hyper-literal approach renders the "otherwise enforceable" clause meaningless. On the other hand, a more contextual reading of this element could mean that an entire set

of covenants—i.e., those that comprise a general or uniform scheme of development—is excepted so long as it specifically restricts a subdivision to residential use only. This reading should be adopted because it more appropriately reflects the General Assembly's intent by addressing the reason behind subsection 13's addition while also advancing the Act's purpose. *See State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) ("When . . . a statute is ambiguous, judicial construction must be used to ascertain the legislative will. Furthermore, where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." (internal quotation marks and citations omitted)). The absurd result here is the destruction of the character of neighborhoods and communities across North Carolina. Furthermore, proper statutory construction requires an interpretation that does not render meaningless any aspect of the statute.

¶ 53 Notably, the only other time a North Carolina court has considered subsection 13, it adopted this interpretation. In *Rice v. Coholan*, 205 N.C. App. 103, 695 S.E.2d 484 (2010), the Court of Appeals held the exception covered all restrictions applicable to a common scheme of development. The development at issue in *Rice* was restricted to residential purposes, however it also had restrictions governing the location, number, and architecture of any buildings constructed on the lots. *Rice*, 205 N.C. App. at 114, 695 S.E.2d at 491. The court noted the restrictions were "substantially common restrictions applicable to all lots of like character" and were a general plan of development. *Id.* at 114, 695 S.E.2d at 492. Accordingly, the court held the restrictive covenants were not extinguished by the Act and thus enforceable. *Id.*

¶ 54 As mentioned above, the Act was amended in committee to add subsection 13 in response to concerns from Mecklenburg County residents that many residential neighborhoods outside Charlotte's zoning jurisdiction would be stripped of their protective covenants. Note, *Marketable Title Act* at 220 n.83. In amending the statute to include the exception, "preservation of uniform residential sections through equitable servitudes, patterned to function like zoning ordinances, prevailed over notions favoring individual aspects of private ownership and court reluctance to honor titles encumbered by equitable servitudes." *Id.* at 220.

¶ 55 Moreover, former Senator Michael P. Mullins, who introduced the amendment to add subsection 13, furnished an Appellate Rule 31 certificate for use by defendants' counsel to provide the following insight in the present case:

> My purpose and intent in proposing that amendment was to protect from extinguishment under the Marketable Land Title Act then under consideration all prior recorded residential covenants and restrictions applicable to a "general or uniform scheme of development", and not simply one such restriction that "restrict(s) the property to multi-family or single-family use or simply to residential use . . . (and) that's it. Anything else is gone," as the Court [of Appeals] had incorrectly concluded. To the contrary, my purpose and intent, and that of my proposed amendment – as expressed in the first sentence thereof – was to protect collectively all otherwise enforceable restrictive "covenants applicable to general or uniform schemes of development" restricting property for "residential use", and not simply those which limited such property to "multi-family or single-family use or simply to residential use," respectively.

Though one senator's statement does not establish the General Assembly's intent in adding subsection 13, it certainly is instructive when deciding between two clashing meanings of an ambiguous statute. The hyper-literal reading adopted by the majority ignores this legislative history. In doing so, the majority strips property owners of the very protective covenants that subsection 13 was designed to protect.

¶ 56 Furthermore, the General Assembly's purpose in promulgating the Act was "to *expedite* the alienation and marketability of real property." *Heath*, 309 N.C. at 488, 308 S.E.2d at 247 (emphasis added). The majority's approach, which results in a sort of line-item vetoing of protective covenants that are part of a general or uniform scheme of development, does not accomplish this purpose. Rather, allowing substantially common covenants to remain valid does not add any burden on a purchaser of real property. Under the majority's test, that purchaser already has a duty to search his chain of title beyond the thirty-year threshold to find the covenant that specifically restricts the property to residential use only. Because that covenant must be part of a general or uniform scheme of development to be excepted, it will appear in the same document as the other related common covenants. As such, the title searcher will have found the entire scheme without any additional effort. Thus, a hyper-literal reading of the second element, namely, that the covenants must operate to "restrict the property to residential use only," does not advance the Act's purpose. Because the majority's approach contradicts

the reason for subsection 13's existence and fails to advance the Act's general purpose, it is apparent that the more contextual reading, which allows all substantially common covenants within a residential use only subdivision to survive extinguishment, is more aligned with the General Assembly's intent.[2]

¶ 57 Moreover, subsection 13's second sentence reads: "The excepted covenant may restrict the property to multi-family or single-family residential use or simply to residential use." N.C.G.S. § 47B-3(13). This sentence appears to clarify the inclusiveness of the "residential use only" requirement in the second element of the first sentence. In other words, the subject subdivision could include multi-family units only, single-family units only, or both. This sentence, however, does not say that the only covenants covered by subsection 13 are those single covenants that specifically limit a property to residential use. As such, the second sentence does not add another element that excepted covenants must meet but simply clarifies an already existing element within the first sentence.

¶ 58 The third and final sentence of subsection 13 states: "Restrictive covenants other than those mentioned herein which limit the property to residential use only are not excepted from the provisions of Chapter 47B." *Id.* This sentence explains that all restrictive covenants which fail to meet the elements laid out in the first sentence are subject to N.C.G.S. § 47B-2(c)'s cleansing provision. Notably, according to the common law,

> [a] restriction which is merely a personal covenant with the grantor does not run with the land and can be enforced by him only. . . . *In the absence of a general plan of subdivision[ ] development and sales subject to uniform restrictions*, restrictions limiting the use of a portion of the property sold are deemed to be personal to the grantor and for the benefit of land retained.

Stegall v. Hous. Auth. of City of Charlotte, 278 N.C. 95, 100–01, 178 S.E.2d 824, 828 (1971) (citations omitted). Therefore, the third sentence preserves this common law rule by clarifying that such personal covenants are extinguished under N.C.G.S. § 47B-2(c).

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2. This contextual reading is also more appropriate because it avoids a potential constitutional question regarding the extinguishment of property rights without notice or hearing. *See In re Arthur*, 291 N.C. 640, 642, 231 S.E.2d 614, 616 (1977) ("Where one of two reasonable constructions will raise a serious constitutional question, the construction which avoids this question should be adopted."); *see also* U.S. Const. amend. V.

¶ 59 Having clarified subsection 13's ambiguity, it is clear that all nine restrictive covenants for Country Colony meet subsection 13's three elements and are thus excepted from extinguishment under N.C.G.S. § 47B-2(c). As mentioned above, the third element is not at issue. The second element is satisfied because the first covenant explicitly states that "[a]ll lots in the tract shall be known and described and used for residential lots only." Thus, the covenants have the cumulative effect of creating a residential use only subdivision.

¶ 60 The first element is also satisfied because all nine covenants are "applicable to a general or uniform scheme of development." N.C.G.S. § 47B-3(13). "The primary test of the existence of a general plan for the development or improvement of a tract of land divided into a number of lots is whether substantially common restrictions apply to all lots of like character or similarly situated." *Sedberry*, 232 N.C. at 711, 62 S.E.2d at 91. Here covenants 2 through 9 read as follows:

> 2. No structure shall be erected, altered, placed or permitted to remain on any residential building plot other than one detached single-family dwelling not to exceed two and one-half stories in height and a private garage, and other outbuildings incidental to residential use of the plot.
>
> 3. No building shall be erected on any residential building plot nearer than 100 feet to the front lot line nor nearer than 20 feet to any side line.
>
> 4. No noxious or offensive trade or activity shall be carried on upon any lot nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood.
>
> 5. No trailer, basement, tent, shack, garage, barn or other outbuilding erected in the tract shall at any time be used as a residence temporarily or permanently, nor shall any structure of a temporary character be used as a residence.
>
> 6. No dwelling costing less than $10,000.00 shall be permitted on any lot in the tract. The ground floor area of the main structure, exclusive of one story open porches and open car ports, shall be not less than 1200 square feet in case of a one story structure. In the case of a one and one-half, two or two and

> one-half story structure, the ground floor area of the main structure, exclusive of one-story open porches or open car ports, shall not be less than nine hundred square feet. (It being the intention to require in each instance the erection of such a dwelling as would have cost not less than the minimum cost provided if same had been erected in January, 1952.)
>
> 7. A right of way and is and shall be reserved along the rear of each lot and along the side line of each lot where necessary, for pole lines, pipes and conduits for use in connection with the supplying public utilities service [sic] to the several lots in said development.
>
> 8. In the event of the unintentional violation of any of the building line restrictions herein set forth, the parties hereto reserve the right, by and with the mutual written consent of the owner or owners, for the time being of such lot, to change the building line restrictions set forth in this instrument; provided, however, that such change shall not exceed ten percent of the original requirements of such building line restrictions.
>
> 9. None of the lots shown on said plat shall be subdivided to contain less than two acres and only one residence shall be erected on each of said lots.

Each of these covenants either governs the types and locations of buildings that can be erected on the lots, governs the types of activities permitted on the lots, creates rights of way, allows for alterations to existing building lines, or governs the size of the lots. As conceded by the majority, there is no question that these restrictions are "substantially common." *Id.* Moreover, none violate public policy, thus meeting the statutory test of being otherwise enforceable. Therefore, all of Country Colony's covenants fall within subsection 13's exception and should survive extinguishment under N.C.G.S. § 47B-2(c). *See* N.C.G.S. §§ 47B-2(c), -3(13).

¶ 61 Because subsection 13's language is ambiguous, this Court must avoid a hyper-literal reading and instead adopt a reading that gives every word meaning and appropriately considers the context and purpose behind the statute's promulgation. If this Court were to adopt such a contextual reading, it would see that the General Assembly intended to except from extinguishment those sets of protective covenants under a general or uniform scheme of development which collectively operate

to restrict a subdivision to residential use. The Court of Appeals' decision should be reversed. Sadly, the majority's decision will likely result in the destruction of the character of neighborhoods and communities across North Carolina. I respectfully dissent.

Justices HUDSON and EARLS join in this dissenting opinion.

CEDARBROOK RESIDENTIAL CENTER, INC. AND FRED LEONARD
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, ADULT CARE LICENSURE SECTION

No. 36A22

Filed 16 December 2022

Tort Claims Act—state agency—regulatory action—adult care home

The claims of an adult care home and its owner (plaintiffs) against the N.C. Department of Health and Human Services (defendant) seeking damages pursuant to the State Tort Claims Act for defendant's allegedly negligent inspection of and regulatory action against the adult care home were barred because the State Tort Claims Act did not waive the state's sovereign immunity for "negligent regulation" and, by its plain language, the Act did not apply because private persons do not exercise regulatory power. Furthermore, plaintiffs' claims should have been dismissed for the additional reason that plaintiffs failed to state a claim for negligence, as state regulators do not owe a duty of care to regulated entities.

Justice EARLS concurring in the result only.

Chief Justice NEWBY dissenting.

Justice BERGER 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, 281 N.C. App. 9, 2021-NCCOA-689, affirming an order entered on 6 November 2020 by the North Carolina Industrial Commission denying defendant's motion to dismiss pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure. Heard in the Supreme Court on 4 October 2022 in the

Historic 1767 Chowan County Courthouse in the Town of Edenton pursuant to N.C.G.S. § 7A-10(a).

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Joseph A. Ponzi and Howard L. Williams, for plaintiff-appellees.

Robinson, Bradshaw & Hinson, P.A., by Adam K. Doerr and Demi Lorant Bostian; and Joshua H. Stein, Attorney General, by Amar Majmundar, Special Deputy Attorney General, for defendant-appellant.

Disability Rights North Carolina by Lisa Grafstein and Kristine Sullivan, for Disability Rights North Carolina, Friends of Residents in Long Term Care, AARP, and AARP Foundation, amici curiae.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by John E. Harris and James C. Wrenn, Jr., for North Carolina Senior Living Association and North Carolina Assisted Living Association, amici curiae.

ERVIN, Justice.

¶ 1 This case arises from a dispute between plaintiffs Cedarbrook Residential Center, Inc., an adult care home, and its owner, Fred Leonard, on the one hand, and defendant North Carolina Department of Health and Human Services, on the other hand, arising from certain regulatory actions taken by the department in response to deficiencies that the employees of the department's Adult Care Licensure Section had identified during inspections of plaintiffs' facility. After plaintiffs contested the department's actions by initiating a contested case before the Office of Administrative Hearings, the parties reached a settlement pursuant to which the department agreed to withdraw its allegations in exchange for plaintiffs' agreement to take certain remedial steps that were intended to address the alleged deficiencies. Subsequently, plaintiffs filed a claim with the Industrial Commission pursuant to the North Carolina State Tort Claims Act in which they alleged that departmental employees had been negligent in the course of inspecting and exercising regulatory authority over plaintiffs' facility and sought to recover damages arising from increased operating expenses, decreased revenue, and lost profits from a planned sale of the facility that, in plaintiffs' view, had been proximately caused by the department's negligence. Although the

department sought dismissal of plaintiffs' claims on the grounds that they were barred by the doctrine of sovereign immunity, that the claims that plaintiffs sought to assert against the department were not cognizable under the State Tort Claims Act, that plaintiffs had failed to plead a valid negligence claim against the department, and that plaintiffs' claims were foreclosed by the public duty doctrine, the Commission denied the department's dismissal motion, a decision that a divided panel of the Court of Appeals affirmed. *Cedarbrook Residential Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 281 N.C. App. 9, 2021-NCCOA-689. The department noted an appeal to this Court based upon a dissenting opinion at the Court of Appeals. After careful consideration of the parties' arguments in light of the record and the applicable law, we reverse the decision of the Court of Appeals and remand this case to that court for further remand to the Commission for additional proceedings not inconsistent with this opinion.

I. Factual Background

A. Substantive Facts

¶ 2 Cedarbrook is an adult care home located in Nebo that is owned and operated by Mr. Leonard. Cedarbrook "provid[es] a place of residence for disabled adults, including those with historic mental illness who are primarily stable in their recovery, though occasionally volatile," and who "are a challenging population with a distinct culture, for whom few housing options exist in North Carolina." As an adult care home,[1] Cedarbrook is subject to oversight by the department's Adult Care Licensure Section pursuant to Chapter 131D of the North Carolina General Statutes, N.C.G.S. § 131D-1 *et seq.* (2021), which provides a comprehensive regulatory framework governing adult care homes that is intended to "ensure that adult care homes provide services that assist the residents in such a way as to assure quality of life and maximum flexibility in meeting individual needs and preserving individual autonomy," N.C.G.S. § 131D-4.1.

¶ 3 The General Assembly has delegated numerous regulatory powers to the department, including the authority to license and inspect adult care

1. An adult care home is defined as "[a]n assisted living residence in which the housing management provides 24-hour scheduled and unscheduled personal care services to two or more residents, either directly or for scheduled needs, through formal written agreement with licensed home care or hospice agencies," including residents "with cognitive impairments whose decisions, if made independently, may jeopardize the safety or well-being of themselves or others and therefore require supervision." N.C.G.S. § 131D-2.1(3).

homes, N.C.G.S. § 131D-2.4, and to adopt rules relating to the monitoring and supervision of residents, the quality of care provided to residents, and the staffing levels provided at such facilities, N.C.G.S. § 131D-4.3. In addition, the department is required to assess administrative penalties against any adult care home that is found to be in violation of applicable state and federal laws and regulations, including any provision of the "Adult Care Home Residents' Bill of Rights," N.C.G.S. § 131D-34, codified as Article 3 of Chapter 131D, N.C.G.S. § 131D-19 *et seq.*, which embodies the General Assembly's desire "to promote the interests and well-being of residents in adult care homes and assisted living residences" so that "every resident's civil and religious liberties, including the right to independent personal decisions and knowledge of available choices, shall not be infringed" and so that "the facility shall encourage and assist the resident in the fullest possible exercise of those rights," N.C.G.S. § 131D-19. In support of this policy, the relevant statutory provisions set out an extensive "declaration of rights" that are available to residents of adult care homes, N.C.G.S. § 131D-21, and charges the department and local social services agencies with the responsibility for their enforcement, N.C.G.S. §131D-26.

¶ 4 In November 2015, the department conducted an inspection of Cedarbrook, during which it identified numerous concerns about the manner in which the facility was being operated, and reported those deficiencies to Cedarbrook in a "Statement of Deficiencies." As a result of these alleged deficiencies, the department suspended new admissions at Cedarbrook on 19 November 2015 and issued a notice of its intent to revoke Cedarbrook's license on 17 December 2015. After a follow-up inspection conducted in March 2016, the department issued another Statement of Deficiencies in which it concluded that Cedarbrook had "failed to submit acceptable plans of protection [for its residents] in compliance with [N.C.G.S §] 131D-34(a)" despite the department's repeated requests that it do so. In these two Statements of Deficiencies, which totaled more than 400 pages, the department described the problems that it had identified at Cedarbrook, including, but not limited to,

i. Supervision and staffing issues, including a resident who went missing and was later found near I-40, around five miles away from Cedarbrook;

ii. Reports of residents performing sex acts for money or sodas from the Cedarbrook commissary;

iii. Admitting and failing to discharge residents exhibiting dangerous and aggressive behavior, including physical aggression and arson;

iv. Smoking inside the facility;

v. Hoarding behaviors creating a safety hazard;

vi. Failing to protect residents' privacy when administering medication; and

vii. Issues with maintenance of medical equipment, such as walkers and wheelchairs.

As a result of these two inspections, the department concluded that Cedarbrook had committed five Type A1 violations, one Type A2 violation, and eight Type B violations.[2]

¶ 5 Based upon these findings, on 18 March 2016, the department issued a "Directed Plan of Protection," which it believed to be necessary "to ensure the health, safety, and welfare of the residents." The Directed Plan of Protection required Cedarbrook to address the problems that had been identified in the Statements of Deficiencies by, among other things, increasing on-site staffing levels, assessing all residents who had been diagnosed with a mental illness or an intellectual developmental disability for the purpose of ensuring that they received appropriate care and supervision, providing additional staff training, and reviewing and, to the extent necessary, revising Cedarbrook's policies concerning the use and suspected use of illicit drugs and alcohol by Cedarbrook residents. On 16 May 2016, the department withdrew its notice of intent to revoke the facility's operating license and issued a provisional license based upon its determination, in accordance with N.C.G.S. § 131D-2.7, that there was a "reasonable probability" that Cedarbrook could remedy the deficiencies that the department had identified.

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2. A "Type A1 Violation" is "a violation by a facility of the regulations, standards, and requirements set forth in [N.C.G.S. §] 131D-21 or applicable State or federal laws and regulations governing the licensure or certification of a facility which results in death or serious physical harm, abuse, neglect, or exploitation." N.C.G.S. § 131D-34(a)(1). A "Type A2 Violation" involves a violation that "results in substantial risk that death or serious physical harm, abuse, neglect, or exploitation will occur." N.C.G.S. § 131D-34(a)(1a). A "Type B Violation" is a violation that "is detrimental to the health, safety, or welfare of any resident, but which does not result in substantial risk that death or serious physical harm, abuse, neglect, or exploitation will occur. N.C.G.S. § 131D-34(a)(2). The applicable statute authorizes the department to impose substantial financial penalties for each identified violation. *See generally* N.C.G.S. § 131D-34.

¶ 6 Cedarbrook disputed the department's regulatory findings and filed a petition with the Office of Administrative Hearings in which it formally challenged the validity of those findings and the lawfulness of the regulatory actions that the department had taken. On 6 July 2016, the Office of Administrative Hearings stayed the department's decision to suspend further admissions at Cedarbrook, a sanction that the department formally lifted on 12 August 2016. Prior to the holding of a formal contested case hearing before an administrative law judge, the parties reached a settlement pursuant to which the department agreed to withdraw all the violations that it had identified in the Statements of Deficiencies in return for Cedarbrook's agreement to take certain remedial actions.[3]

B. Procedural History

¶ 7 On 25 October 2018, plaintiffs filed an affidavit and verified claim for damages with the Commission pursuant to the State Tort Claims Act, N.C.G.S. § 143-291 *et seq.*, in which they alleged that the department had abused its authority in investigating and taking regulatory actions against Cedarbrook and that the department had been "negligent," with "its negligence [having] caused extensive harm to Cedarbrook, its owner [Mr. Leonard], and, although not claimants here, its residents."[4] More specifically, plaintiffs alleged that the department "owed [plaintiffs] a duty of reasonable care in the exercise of its authority to investigate the facility and take licensure action against [Cedarbrook]" and that the department had breached that duty by "(1) conducting the [inspections] of Cedarbrook; (2) writing and publishing the Statements of Deficiencies; (3) issuing the Directed Plan of Protection against Cedarbrook and leaving it in place for nearly five months; and (4) issuing the [suspension of admissions], and leaving it in place for nearly eight months." Plaintiffs further alleged that, "[a]s a direct and proximate result of [the department's] negligence," plaintiffs had suffered damages in the form of lost revenue stemming from a decreased facility population, an increase in

3. Although plaintiffs highlight the department's withdrawal of the alleged violations in their complaint and their briefing before this Court as evidence that the department's regulatory actions had been unjustified, plaintiffs' counsel admitted during oral argument that the withdrawal of the alleged violations had stemmed from the fact that the parties had reached a settlement of their differences.

4. Most of plaintiffs' affidavit and a significant portion of their brief to this Court is devoted to a detailed discussion of the specific violations identified by the department and an explanation of the basis for plaintiffs' belief those alleged violations lacked any legal or factual justification. Given that the truthfulness of these specific factual contentions is not germane to the proper resolution of the legal questions that are currently before us in this case, we will not discuss the validity of the department's substantive allegations against Cedarbrook in any detail in this opinion.

operating expenses stemming from the Directed Plan of Protection, and the cancellation of an agreement to sell Cedarbrook into which Mr. Leonard had entered prior to the suspension of admissions.

¶ 8 On 8 January 2019, the department filed a motion seeking to have plaintiffs' claim dismissed for lack of subject matter jurisdiction pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1); for lack of personal jurisdiction pursuant to N.C.G.S. § 1A-1, Rule 12(b)(2); and for failure to state a claim upon which relief could be granted pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). N.C.G.S. § 1A-1, Rule 12. According to the department, plaintiffs' claims were barred by the doctrine of sovereign immunity, plaintiffs' claims were not cognizable under the State Tort Claims Act, plaintiffs had failed to plead a valid negligence claim against the department, and plaintiffs' claims were barred by the public duty doctrine. On 13 March 2019, Deputy Commissioner James C. Gillen entered an order denying the department's dismissal motion. After the department sought an immediate appeal from the Deputy Commissioner's order to the Commission, the Commission authorized the department to take such an appeal on the grounds that its invocation of the doctrine of sovereign immunity implicated a substantial right, citing *Viking Utils. Corp. v. Onslow Water & Sewer Auth.*, 232 N.C. App. 684, 686 (2010), and *Green v. Kearney*, 203 N.C. App. 260, 266 (2010).

¶ 9 Following a hearing held on 10 September 2019, the Commission entered an order on 6 November 2020 in which it affirmed the Deputy Commissioner's decision to deny the department's dismissal motion. First, the Commission rejected the department's subject matter and personal jurisdiction arguments on the grounds that the State Tort Claims Act worked a partial waiver of the State's sovereign immunity and that plaintiffs had complied with the statutory requirements for asserting a claim against the department pursuant to the State Tort Claims Act by filing an affidavit with the Commission and identifying multiple departmental employees who had allegedly acted in a negligent manner. Second, the Commission concluded that the department was not entitled to rely upon the public duty doctrine in responding to plaintiffs' claims on the grounds that the General Assembly had amended the State Tort Claims Act in 2008 to limit the availability of the public duty doctrine for the purposes of the State Tort Claims Act to situations involving injuries resulting from an allegedly negligent failure "to protect the claimant from the action of others or from an act of God by a law enforcement officer" or from the actions "of an officer, employee, involuntary servant[,] or agent of the State to perform a health or safety inspection required by statute," citing N.C.G.S. § 143-299.1A(a). Given

that plaintiffs' claims "concern the alleged[ly] negligent performance of the inspection (survey) process conducted by [the department]," which is not one of the exceptions listed in the statute, the Commission determined that "the public duty doctrine d[id] not apply" in this case. In addition, the Commission concluded that plaintiffs had alleged sufficient facts to support the assertion of a viable negligence claim against the department on the grounds that

> [t]aking the allegations as true, the Commission finds and concludes [that] there is sufficient showing that [the department] breached its "duty of reasonable care in the exercise of its authority to investigate the facility and take licensure actions" and that [the department] negligently issued statements of deficiencies, causing the suspension of admissions and reducing the value of Cedarbrook and causing loss of funds through the collapse of a prospective sale and prospective income. Thus, [plaintiffs'] argument is not that it is pursuing claims on behalf of the residents. Rather, [plaintiffs'] standing argument is that it was harmed by the loss of the prospective sale and income caused by [the department's] allegedly negligent issuance of [a] statement of deficiencies.

Finally, the Commission rejected the department's argument that plaintiffs were not entitled to relief under the State Tort Claim Act on the grounds that the department's agents had acted intentionally, rather than negligently, reasoning that "[p]laintiffs did not allege that [the department had] intended to cause [p]laintiffs harm in undertaking the various licensure actions against them" and that they had, instead, "alleged that [the department's] conduct was negligent in the inspection and surveying process," so that "[p]laintiffs' claims under the Tort Claims Act are not barred by the intentional nature of [the department's] actions," *citing Crump v. N.C. Dept. of Env't & Nat. Res.*, 216 N.C. App. 39, 40 (2011). The department noted an appeal to the Court of Appeals from the Commission's order.

C. Court of Appeals Decision

¶ 10 In seeking relief from the Commission's order before the Court of Appeals, the department argued that the Commission had erred by failing to dismiss plaintiffs' claims and "effectively recognizing a claim for 'negligent regulation' that permits a regulated entity to sue its state regulator under the [State] Tort Claims Act[.]" Among other things, the

department contended that (1) the limited waiver of sovereign immunity worked by the State Tort Claims Act did not allow the assertion of plaintiffs' claims against the department since the State Tort Claims Act only permits a party to sue the State "where the State of North Carolina, *if a private person*, would be liable" and "[p]rivate persons cannot be held liable for regulatory actions;" (2) the Commission's interpretation of the State Tort Claims Act authorized an "end-run" around the process that the General Assembly created for the purpose of allowing aggrieved parties to challenge allegedly unlawful regulatory actions using the North Carolina Administrative Procedure Act; (3) the public duty doctrine operated to bar plaintiffs' claims; and (4), even if the State Tort Claims Act did apply to claims like the one that plaintiffs sought to assert, they had failed to plead a valid negligence claim. (emphasis in original). In addition, the department argued that plaintiffs' claims should not be permitted to proceed as a matter of public policy given that allowing a regulated entity to assert a claim sounding in tort against the entity responsible for regulating its activities "could dissuade regulators from performing their statutorily mandated dut[ies]" in an effective manner.

¶ 11 A divided panel of the Court of Appeals filed an opinion affirming the Commission's order, with a majority of the Court of Appeals having agreed that plaintiffs should be allowed to pursue a claim against the department pursuant to the State Tort Claims Act for acting negligently in the course of performing its regulatory duties. *Cedarbrook*, ¶ 16; *id.*, ¶ 35 (Dietz, J., concurring). According to Judge Arrowood, writing for the court, the Commission had appropriately determined that plaintiffs had complied with the requirements for invoking the State Tort Claims Act by filing an affidavit with the Commission that contained the required information. *Id.* ¶ 11. The Court of Appeals rejected the department's contention that "private persons cannot be held liable for regulatory actions" in an action brought pursuant to the State Tort Claims Act on the grounds that the department's argument "misconstrues the meaning of 'private person' under the [State Tort Claims Act]," that the relevant legislation must " 'be construed so as to effectuate its purpose of waiving sovereign immunity so that a person injured by the negligence of a State employee may sue the State as he would any other person,' " and that "the 'private person' language within the [State Tort Claims Act] pertains to the nature of the proceedings but does not operate to bar waiver of sovereign immunity," with the department's argument to the contrary resting upon a "fail[ure] to acknowledge that many cases presented to the Commission and to [the Court of Appeals] on appeal involve regulatory action." *Id.* ¶ 12 (quoting *Zimmer v. N.C. Dep't of Transp.*, 87 N.C. App. 132, 136 (1987)).

¶ 12 In addition, the Court of Appeals held that, "[a]lthough the General Assembly has provided several remedies under the Administrative Procedure Act, the availability of an administrative remedy does not preclude plaintiff[s] from seeking a remedy under the [State Tort Claims Act]." *Id.* ¶ 14. In support of this proposition, the court cited *Nanny's Korner Day Care Center, Inc. v. North Carolina Department of Health and Human Services*, 264 N.C. App. 71, *appeal dismissed*, *disc. rev. denied*, 372 N.C. 700 (2019), in which the department had taken regulatory action against a daycare center and required the daycare center to notify its clients of an allegation of sexual abuse of one of its children by a staff member, resulting in a loss of business for the daycare center and its eventual closure. *Id.* at 73–75. The daycare center sought relief from the department under the State Tort Claims Act and, subsequently, instituted a civil action in superior court in which it alleged that it had been injured as the result of a deprivation of its due process rights. *Id.* at 75. Although the Court of Appeals concluded that the daycare center's claim under the State Tort Claims Act was barred by the applicable statute of limitations, it also held that the daycare center had no right to assert a direct constitutional claim against the department on the grounds that it "had an adequate state remedy in the form of the Industrial Commission through the [State] Tort Claims Act," with the fact that the daycare center had failed "to comply with the applicable statute of limitations not render[ing] its remedy inadequate." *Id.* at 79–80. In this case, the Court of Appeals held that, in light of its prior decision in *Nanny's Korner*, it was required to hold that "a regulated entity has a state remedy under the [State Tort Claims Act]." *Cedarbrook*, ¶ 16.

¶ 13 Moreover, the Court of Appeals agreed with the Commission that the 2008 amendments to the State Tort Claims Act relating to the availability of the public duty doctrine as a defense in proceedings initiated pursuant to State Tort Claims Acts precluded the department from invoking the public duty doctrine as an affirmative defense in this case, *id.* ¶¶ 19–20, with the Court of Appeals having reached this result based upon this Court's decision in *Ray v. North Carolina Department of Transportation*, in which we recognized that, even though the new statute "incorporated much of our public duty doctrine case law," the General Assembly had "also made clear that the doctrine is to be a more limited one than the common law might have led us to understand," 366 N.C. 1, 7 (2012). The Court of Appeals held that, in light of the plain statutory language, the public duty doctrine is only available as a defense in a proceeding held pursuant to the State Tort Claims Act if the alleged injury "is the result of (1) a law enforcement officer's negligent failure to protect the plaintiff from actions of others or an act of God, or (2) a State

officer's, employee's, involuntary servant's, or agent's negligent failure to perform a health or safety inspection required by statute." *Id.* at 8 (citing N.C.G.S. § 143-299.1A(a)). As a result of the fact that "plaintiffs' claim is based on allegedly negligent licensure actions taken after a series of inspections" rather than upon an "alleged[ly] negligent failure *to perform* a health or safety inspection," the Court of Appeals held that the public duty doctrine did not operate to bar the assertion of plaintiffs' claim against the department in this proceeding. *Cedarbrook*, ¶ 23 (emphasis in original).

¶ 14 The Court of Appeals also rejected the department's contention that plaintiffs had failed to state a claim against the department sounding in negligence, concluding that this aspect of the department's argument was "intertwined with its interpretation of the public duty doctrine" and that, since the department was not entitled to invoke the public duty doctrine in bar of plaintiffs' claims, its challenge to the sufficiency of plaintiffs' negligence claims necessarily failed as well. *Id.* ¶ 25. In addition, the Court of Appeals noted that "[the department's] argument that it should not be held liable for acting intentionally pursuant to authority granted by the General Assembly 'overlooks the fact that the focus is not on whether [the department's] actions were intentional, but rather whether [it] intended to injure or damage [plaintiffs],' " *id.*, ¶ 26 (quoting *Crump*, 216 N.C. App. at 44–45), so that, "[i]n order for [the department's] argument to succeed," "a showing that [the department's] employees intended to cause harm to plaintiffs would be required," with "[n]othing in the record" tending to "suggest that [they] intended to" do so, *id.* ¶ 26.

¶ 15 Finally, the Court of Appeals observed that "[o]ur Courts have repeatedly affirmed the Commission's authority to make determinations of negligence where a party alleges harm caused by an agency's regulatory actions" and that it was "not persuaded by [the department's] concern that affirming the Commission here will encourage regulators to abandon their statutorily mandated duties." *Id.* ¶ 31. The Court of Appeals pointed out that the General Assembly served as the policy-making body in state government and that the department's public policy concerns "would be more appropriately directed to the General Assembly," particularly given that "the General Assembly [had] limited the applicability of the public duty doctrine through legislative action." *Id.* ¶ 32.

¶ 16 Judge Dietz filed a separate opinion in which he concurred in the logic adopted by the court while emphasizing the binding nature of *Nanny's Korner* and attempting to refute arguments that were advanced in the dissenting opinion by Judge Tyson. *Id.* ¶¶ 35–37 (Dietz, J., concurring). Among other things, Judge Dietz observed that, while the policy

considerations raised by the department and in Judge Tyson's dissent "might be reasons for our Supreme Court to exercise its discretion to take this case and examine the holding in *Nanny's Korner*," the Court of Appeals was required to follow its own existing precedent. *Id.* ¶ 38.

¶ 17 In his dissenting opinion, Judge Tyson asserted that plaintiffs had "failed to show any legal duty owed or breach thereof, or proximate cause in their putative negligence action"; that "[c]laims challenging an agency's regulatory actions are properly heard under the North Carolina Administrative Procedure Act"; and that the Court of Appeals' decision "will lead to a stampede of nonjusticiable suits against regulatory state agencies which are clearly barred by sovereign immunity except for the limited waiver of that immunity under the [State Tort Claims Act]." *Id.* ¶ 39 (Tyson, J., dissenting). According to Judge Tyson, "[i]t has long been established that an action cannot be maintained against [a state agency] unless it consents to be sued or upon its waiver of immunity, and that *this immunity is absolute and unqualified*." *Id.* ¶ 47 (quoting *Guthrie v. N.C. St. Ports Auth.*, 307 N.C. 522, 534 (1983)) (emphasis in *Guthrie*, alterations added by Judge Tyson). As a result, Judge Tyson explained, "[t]he State is immune from suit unless and until it has expressly consented to be sued." *Id.* ¶ 48 (quoting *Guthrie*, 307 N.C. at 534).

¶ 18 Although Judge Tyson agreed with his colleagues that the State Tort Claims Act constitutes a partial waiver of the State's sovereign immunity, he concluded that the "private person" clause constitutes "a substantive statutory limiting requirement." *Id.* ¶ 53 (citing *Frazier v. Murray*, 135 N.C. App. 43, 48 (1999)). According to Judge Tyson, plaintiffs' allegations "are wholly based on regulatory actions and sanctions [that the department] cited plaintiff[s] for violating," with "[n]o 'private person' [having] any right or authority to perform these exclusively state regulatory actions or to inspect or sanction a licensee for violations of laws and regulations." *Id.* ¶ 54 (citing N.C.G.S. § 131D-2.4).

¶ 19 In addition, Judge Tyson concluded that plaintiffs had failed to properly plead a viable negligence claim given their failure to establish that the department owed them a "duty not to 'negligently regulate' " Cedarbrook, that any breach of such a duty had occurred, or that "the purported breach was the proximate cause of their harm." *Id.* ¶ 62. Judge Tyson distinguished this case from an earlier, unpublished Court of Appeals decision in which the estate of an elderly adult care home resident filed a claim against the department under the State Tort Claims Act after the resident disappeared from the facility and was later declared deceased. *Tang v. N.C. Dep't of Health & Hum. Servs.*, 2021 WL 5071898, 2021-NCCOA-611, ¶¶ 8–11 (unpublished). In that case, the

Court of Appeals upheld the Commission's determination that the department owed a statutory duty of care to adult care home residents to ensure that the facilities in which they were living were operated safely, that "[t]here was competent evidence for the Commission to find that [the department] breached its duty to plaintiff in failing to properly assess [safety] violations at [the facility] and in failing to take reasonable steps to address the deficiencies," and that the department's violations of this duty proximately resulted in the resident's death. *Id.* ¶ 27. In reaching this result, the Court of Appeals noted that the Commission had found that "it was foreseeable that [the department's] failure to exercise its regulatory authority to address [nonoperational alarms on the facility's exit doors]—at a facility known for past deficiencies and non-compliance—would result in [the resident's] injury." *Id.* ¶ 28.

¶ 20 After considering the Court of Appeals' decision in this case in comparison with the approach adopted in *Tang*, Judge Tyson concluded that his colleagues were holding the department and other state regulatory agencies to "an impossible standard" under which they would be "(1) liable for enforcing the statutory mandates; and, (2) also liable for failing to enforce those very same statutory mandates with the Industrial Commission sitting in judgment of their 'reasonableness.' " *Cedarbrook*, ¶ 66. For this reason, Judge Tyson would have concluded that "[t]he limited waiver of sovereign immunity under the [State Tort Claims Act] simply does not recognize or permit plaintiff[s'] claim." *Id.*

¶ 21 Finally, Judge Tyson disputed the validity of his colleagues' conclusion that *Nanny's Korner* constituted controlling precedent for purposes of this case on the grounds that the language upon which the majority of the Court of Appeals had relied was mere dicta. *Id.* ¶ 69. Instead, Judge Tyson would have held that, in the event that the department "or its employee-agent did not act professionally or reasonably during the scope of their investigation or in preparing its 400-page 'Statement of Deficiencies,' " the Administrative Procedure Act "provides an adequate and exclusive state remedy for allegedly improper or unjustified regulatory action by a state agency or employees." *Id.* ¶ 71. According to Judge Tyson, "[i]f plaintiff[s] had continued to pursue [their] claims before the [Office of Administrative Hearings] and won, [they] could have pursued reversal of the administrative action, remedial actions, and an award of attorneys' fees in the contested case by showing [that the department] 'substantially prejudiced' its rights and acted 'arbitrarily or capriciously.' " *Id.* ¶ 72 (quoting N.C.G.S. § 150B-33). The department noted an appeal to this Court based upon Judge Tyson's dissent.

II. Analysis

A. Standard of Review

¶ 22 Although an order denying a motion to dismiss based upon the doctrine of sovereign immunity is interlocutory, such orders are immediately appealable because they affect a substantial right. *State ex rel. Stein v. Kinston Charter Acad.*, 379 N.C. 560, 2021-NCSC-163, ¶ 23; N.C.G.S. § 7A-27(b)(3)(a) (2021). Appellate courts review the denial of a motion to dismiss based on the doctrine of sovereign immunity utilizing a de novo standard of review. *White v. Trew*, 366 N.C. 360, 363 (2013). The dismissal of a pleading based upon a failure to state a claim for which relief can be granted pursuant to N.C.G.S. §1A-1, Rule 12(b)(6) is appropriate when "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166 (2002). In reviewing the sufficiency of claims asserted against state agencies pursuant to the State Tort Claims Act, "we treat [the] plaintiff's factual allegations contained in his affidavit before the Industrial Commission as true." *Hunt v. N.C. Dep't of Lab.*, 348 N.C. 192, 194 (1998).[5]

B. Sovereign Immunity and the State Tort Claims Act

¶ 23 In seeking relief from the decisions of the lower courts before this Court, the department begins by arguing that it is shielded by sovereign immunity from tort liability arising from the actions that it took in regulating Cedarbrook and that the State Tort Claims Act does not effect even a partial waiver of its sovereign immunity defense to such a claim. We find the department's argument to be persuasive.

¶ 24 The common law doctrine of sovereign immunity is well-established in North Carolina and "prevents a claim for relief against the State

5. Although plaintiffs contend in their brief that, in asserting that its regulatory actions were necessary to ensure compliance with the relevant laws and the applicable standards of care, the department "ignores the appropriate standard of review" and "disregards the operative facts entirely," the extent to which the actions that the department took against Cedarbrook were legally or factually justified has no bearing upon whether the claim that plaintiffs have asserted against the department is cognizable under the State Tort Claims Act. As a result, while the allegation set out in the claim and affidavit are assumed to be true, the extent to which plaintiffs are or are not entitled to assert a negligence-based claim for damages against the department and whether the department owes plaintiffs a legally recognized duty does not hinge upon the nature or extent of the underlying facts.

except where the State has consented or waived its immunity." *Kinston Charter Acad.*, ¶ 21 (quoting *Harwood v. Johnson*, 326 N.C. 231, 238 (1990)). Sovereign immunity is "absolute and unqualified," *Guthrie*, 307 N.C. at 534, and "so firmly established that it should not and cannot be waived by indirection or by procedural rule" and can only be foregone "by plain, unmistakable mandate of the lawmaking body," *Orange Cnty. v. Heath*, 282 N.C. 292, 296 (1972). As a result, the State and its agencies are "immune from suit unless and until [the State] has expressly consented to be sued," *Guthrie*, 307 N.C. at 534 (quoting *Great Am. Ins. Co. v. Gold*, 254 N.C. 168, 173 (1961)), with statutes "that permit suit in derogation of sovereign immunity [to] be strictly construed," *Stone v. N.C. Dep't of Lab.*, 347 N.C. 473, 479 (1998); *see also Guthrie*, 307 N.C. at 538.

¶ 25 The General Assembly enacted the State Tort Claims Act in 1951, in which it constituted the Commission as "a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State." N.C.G.S. § 143-291(a).

> The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

Id. In the event that the Commission concludes that an officer, employee, involuntary servant, or agent of the State acted negligently in the course of carrying out his or her public duties and that those injuries proximately resulted in any injury to the plaintiff, the Commission is required to determine the amount of damages to which the plaintiff is entitled, subject to a statutory cap of $1,000,000 per person, per occurrence. *Id.*; N.C.G.S. § 143-299.2. Thus, by enacting the State Tort Claims Act, the State "partially waived its sovereign immunity by consenting to direct suits brought as a result of negligent acts committed by its employees in the course of their employment." *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 329 (1982).

¶ 26 According to the department, the fact that the State Tort Claims Act operates in partial derogation of the State's sovereign immunity means

that its provisions must be strictly construed, citing *Stone*, 347 N.C. at 479. First, the department argues that the "plain language and legislative history of the [State] Tort Claims Act show that the General Assembly intended to waive sovereign immunity from traditional tort claims, not regulatory action by the State." Second, the department contends that it cannot be sued by Cedarbrook based upon the regulatory actions that it took against the facility given that the State Tort Claims Act "only permits parties to sue state agencies 'where the [agency], *if a private person*, would be liable,' " with private persons being unable to exercise regulatory authority, quoting N.C.G.S. § 143-291(a) (alteration and emphasis added in brief). Third, the department argues that the Court of Appeals "incorrectly construed the [State] Tort Claims Act to circumvent the limited remedies the General Assembly established for challenges to regulatory action," which allow adult care homes to challenge penalties and suspensions in accordance with the applicable provisions of the Administrative Procedure Act, citing N.C.G.S. §§ 131D-2.7(d)(4), -34(e). In other words, the department argues, "[a]lthough the General Assembly made clear that adult care homes may contest [the department's] regulatory actions [in the Office of Administrative Hearings], it did not authorize such facilities to pursue a claim for damages" and that, "[e]ven when an adult care home successfully contests a suspension or penalty, the legislature provided no mechanism that would allow a facility to recover compliance costs it may have incurred in dealings with its regulators."

¶ 27 Finally, the department argues that *Nanny's Korner* "cannot support the weight the Court of Appeals majority placed on it" given that *Nanny's Korner* arose from a trial court's decision to dismiss a constitutional due process claim rather than a decision by the Commission under the State Tort Claims Act and given that the Court of Appeals in that case "did not analyze the 'private person' standard under the [State] Tort Claims Act, the elements of a negligence claim involving regulatory action, or the public duty doctrine." According to the department, the issue before the Court of Appeals in this case "was simply not the focus of *Nanny's Korner*, and the [Court of Appeal's] indirect and unnecessary comments in that case, without benefit of full briefing and argument, did not provide a sufficient basis for the Court of Appeals to create a new cause of action against the State" that had not previously been recognized. In any event, the department argues, this Court is not bound by *Nanny's Korner*.

¶ 28 In response, plaintiffs assert that "the [State] Tort Claims Act contains no carve-out for agency exercise of regulatory authority" and, instead, "expressly provides that a claim is available as a result of the

negligence of any agency employee 'acting within the scope of his office, employment . . . or authority,' " quoting N.C.G.S. § 143-291(a) (emphasis added in brief). According to plaintiffs, "[j]ust as driving a bus is within a bus driver's scope of employment, [the department's] licensure actions against Cedarbrook were within the scope of its employees' authority" and, for that reason, fall within the scope of the State Tort Claims Act. Plaintiffs argue that the department "turns the meaning of the 'private person' clause on its head, as a mechanism to assume away agency misconduct rather than an acknowledgement of the waiver of sovereign immunity." In plaintiffs' view, the "private person" language "merely serves to effectuate one of the [State] Tort Claims Act's two purposes: waiving sovereign immunity," quoting *Patrick v. N.C. Dept' of Health & Hum. Servs.*, 192 N.C. App. 713, 719 (2008). As a result, plaintiffs contend that the department's position "is unsupported by the plain language of the [State] Tort Claims Act, its purpose as a waiver of sovereign immunity, and the cases that address the 'private person' clause."

¶ 29 A careful consideration of the record in light of the applicable law persuades us that the department has the better of this dispute. As an initial matter, plaintiffs have not cited, and our own research has not identified, any decision of either this Court or the Court of Appeals in the more than seventy years since the enactment of the State Tort Claims Act that suggests that an entity subject to regulation by a state agency is entitled to assert a claim for damages against that agency predicated on the theory that the agency regulated the entity in question in a negligent manner. The absence of such authority is telling given that thousands of businesses, nonprofits, and other entities have been subject to regulatory actions by state agencies, many of which undoubtedly believe that they have suffered reputational and financial harm as the result of misguided regulatory decisions. *See, e.g.*, *Ocean Hill Joint Venture v. N.C. Dep't of Env't, Health & Nat. Res.*, 333 N.C. 318 (1993) (addressing a developer's administrative challenge to the imposition of civil penalties by the Department of Environment, Health and Natural Resources stemming from alleged violations of the Sedimentation Pollution Control Act); *Parkway Urology, P.A. v. N.C. Dep't of Health & Hum. Servs.*, 205 N.C. App. 529 (2010) (addressing a hospital's challenge to a decision by the Department of Health and Human Services to award a certificate of need to a nearby hospital allowing it to purchase a piece of equipment used for cancer treatment, in which the challenger alleged that the department's decision would reduce the number of patients that it could serve and substantially and adversely affect its revenues). The absence of any authority indicating that the legal theory upon which plaintiffs rely has any viability strongly suggests that it does not.

¶ 30 In the lengthy period prior to the enactment of the State Tort Claims Act, the General Assembly addressed claims advanced by private citizens seeking compensation for personal injuries arising from State action by enacting case-specific pieces of legislation or delegating authority to various state agencies to adjudicate the validity of such claims. *See A Survey of Statutory Changes in North Carolina in 1951*, 29 N.C. L. Rev. 351, 417 (1951). For example, in 1935, the General Assembly enacted legislation authorizing the State Board of Education to settle personal injury and wrongful death claims arising from accidents involving school buses, regardless of the extent to which those actions stemmed from negligent conduct. *Id.* (citing N.C.G.S. §§ 115-340 to -346 (now repealed)). Similarly, in 1947, the General Assembly "lumped private claims in an omnibus bill, and authorized the state agencies concerned, upon investigation, to pay claimants not in excess of the sums listed therein." *Id.* (citing An Act to Provide for the Investigation and Payment of Certain Claims Growing Out of Motor Vehicle Accidents Involving Governmental Employees, ch. 1092, 1947 N.C. Sess. Laws 1640, 1640–46). Finally, the 1949 General Assembly enacted legislation, which was something of a precursor to the State Tort Claims Act, authorizing the Commission to hear and settle specific negligence claims, most of which arose from accidents involving school buses, that had been asserted against various state agencies. *Id.* (citing An Act to Authorize the North Carolina Industrial Commission to Hear and Determine Certain Tort Claims Against State Departments and Agencies, ch. 1138, 1949 N.C. Sess. Laws, 1360, 1360–74).

¶ 31 With the passage of the State Tort Claims Act in 1951, the General Assembly created a "permanent machinery . . . to handle future negligence claims against the state." *Id.* As one contemporaneous law review article explained, the State Tort Claims Act

> provides for both administrative and judicial settlement of claims against all departments, institutions[,] and agencies of the state, resulting from a negligent act of a state employee while acting within the scope of his employment and without contributory negligence on the part of the claimant. *If not expressly, clearly by implication [the Act] contemplates both personal injury and wrongful death claims. Whether a claim may be filed for property injury is not so clear.*

Id. (emphasis added). As a result, the legislative history of the State Tort Claims Act suggests that the General Assembly intended to create a

formal mechanism to address personal injury and wrongful death claims asserted against the State by private citizens stemming from alleged negligence on the part of the relevant state employees in lieu of the ad hoc method for addressing such claims that had existed until that point in time.[6]

¶ 32 At the time that it enacted the State Tort Claims Act, the General Assembly "incorporated the common law of negligence," *Stone*, 347 N.C. at 479, meaning that, when such claims are brought before the Commission, "negligence is determined by the same rules as those applicable to private parties," *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709 (1988); *accord Barney v. N.C. State Highway Comm'n*, 282 N.C. 278, 284 (1972). As we noted in *Bolkhir*, "[t]he essence of negligence is behavior creating an unreasonable danger to others," so that, in order to establish negligence for purposes of the State Tort Claims Act, "[a] plaintiff must show that: (1) [the] defendant failed to exercise due care in the performance of some legal duty owed to [the] plaintiff under the circumstances; and (2) the negligent breach of such duty was the proximate cause of the injury." *Bolkhir*, 321 N.C. at 709.

¶ 33 The history of litigation under the State Tort Claims Act clearly indicates that it was intended to address traditional kinds of negligence claims, with this Court and the Court of Appeals having routinely considered cases involving traditional negligence-based torts under the rubric of the State Tort Claims Act. In *Bolkhir*, for example, the plaintiff's son was injured when he fell through the glass paneling of a screen door at the entrance of the university-owned apartment in which the plaintiff and his family were living. *Id.* at 708. The plaintiff sued under the State Tort Claims Act, with the Commission ultimately "conclude[ing] that [the] defendant's employee negligently created an unsafe condition" by replacing the screen door's mesh paneling with glass paneling. *Id.*; *see also Lyon & Sons, Inc. v. N.C. State Bd. of Educ.*, 238 N.C. 24, 25

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6. The subsequent revisions that the General Assembly has made to the State Tort Claims Act likewise demonstrate that the General Assembly primarily contemplated liability arising from a state employee's involvement in automobile accidents. For example, a report submitted to the 1999 General Assembly by the Legislative Research Commission regarding the estimated cost of raising the statutory cap on recovery under the State Tort Claims Act from $150,000 to $500,000 focused on liability arising from automobile accidents. *See* Legislative Research Commission, State Tort Liability & Immunity, Report to the 2000 Session of the 1999 General Assembly of North Carolina, 29–31 (2000), https://www.ncleg.gov/files/library/studies/2000/st11064.pdf. According to the report, of the $6,736,781 that the Commission had awarded pursuant to the State Tort Claims Act during the 1998–1999 reporting period, $5,874,041, or 87%, stemmed from losses arising from automobile and school bus accidents. *Id.* at 30.

(1953) (holding that a school bus driver employed by the State negligently backed a bus into the plaintiff's automobile); *Brewington v. N.C. Dep't of Corr.*, 111 N.C. App. 833, 834 (1993) (holding that an inmate incarcerated in a state correctional facility had been injured in a fall resulting from negligent maintenance by the staff of the facility in which the inmate was housed).

¶ 34 The claim that plaintiffs have asserted against the department in this case bears no resemblance to the types of negligence claims for which the State Tort Claims Act has traditionally provided a means for obtaining a recovery against a state agency. A careful reading of the claim that plaintiffs have asserted against the department indicates that it rests entirely upon discretionary actions that were taken in pursuit of the department's statutory authority to regulate adult care homes. As a result, even though their claim is not couched in such terms, plaintiffs are seeking to recover damages from the department for what amounts to "negligent regulation," *Cedarbrook*, ¶ 44 (Tyson, J., dissenting), which is not the sort of claim that any North Carolina court has previously recognized. On the contrary, this Court has held that, when the General Assembly "has vested [a state agency] with broad powers to protect the health and well-being of the general public," the discretionary decisions that it makes in exercising that authority "are not generally the type of decisions for which the State is liable to private citizens in tort." *Myers v. McGrady*, 360 N.C. 460, 468 (2006).

¶ 35 In addition, the plain language of the State Tort Claims Act forecloses claims like those that plaintiffs have attempted to assert in this case. As has already been noted, the Act only permits private parties to bring claims under the State Tort Claims Act in situations in which "the State of North Carolina, *if a private person*, would be liable to the claimant in accordance with the laws of North Carolina." N.C.G.S. § 143-291(a) (emphasis added). Put another way, "[u]nder the Act[,] the State is liable *only* under circumstances in which a private person would be." *Stone*, 347 N.C. at 478 (emphasis in original); *see also Guthrie*, 307 N.C. at 536–37 (holding that claims "under the provision of [the State Tort Claims Act are] limited to the same category with respect to tort claims against the agency covered as if such agency were a private person and such private person would be liable under the laws of North Carolina") (quoting *Branch Banking & Tr. Co. v. Wilson Cnty. Bd. of Educ.*, 251 N.C. 603, 609 (1960)). Private persons do not, of course, exercise regulatory power and, therefore, cannot be held liable for engaging in regulatory activities in a negligent manner. *See Stone*, 347 N.C. at 478 (explaining that "[o]nly governmental entities possess authority to enact and enforce

laws for the protection of the public").[7] As a result, the plain language of the State Tort Claims Act precludes a finding that a state agency is liable to a private party for what amounts to negligent regulation.

¶ 36 In allowing plaintiffs' claims under the State Tort Claims Act to proceed, the Court of Appeals concluded that "the 'private person' language within the [State Tort Claims Act] pertains to the nature of the proceedings but does not operate to bar waiver of sovereign immunity." *Cedarbrook*, ¶ 12. The Court of Appeals did not cite any authority in support of this statement, and it is not entirely clear to us what the court meant in making it. If the Court of Appeals intended to suggest that the State Tort Claims Act is merely intended to allow State agencies to be held liable under the same procedures that could be used to hold private persons liable in tort, we are unable to accept that logic for two reasons. First, tort claims against the State are heard by the Commission, while tort claims against private persons are adjudicated in the General Court of Justice. *Compare* N.C.G.S. § 143-291(a) *with* N.C.G.S. § 7A-240. Second, the State Tort Claims Act provides that the State will be held liable under "*circumstances* [i.e., a set of facts] where . . . a private person[ ] would be liable" under North Carolina law rather than in accordance with the "proceedings" by which a private person would be held liable. N.C.G.S. § 143-291(a) (emphasis added). As a result, the Court of Appeals' apparent understanding of the "private person" provision found in N.C.G.S. § 143-291(a) finds no support in either our precedent or the relevant statutory language.

¶ 37 In addition, the Court of Appeals' understanding of the "private person" provision cannot be squared with the relevant canons of statutory construction. According to well-established North Carolina law, "when construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself" and, "when the language of a statute

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7. *Stone* was the first case to recognize that the State Tort Claims Act incorporated the common law public duty doctrine, which "provides that governmental entities and their agents owe duties only to the general public, not to individuals, absent a 'special relationship' or 'special duty' between the entity and the injured party." 347 N.C. at 477–78 (citing *Braswell v. Braswell*, 330 N.C. 363, 370–71 (1991)). Although the General Assembly amended the State Tort Claims Act in 2008 for the purpose of limiting the circumstances under which the public duty doctrine constituted a defense to claims against the State, see An Act to Limit the Use of the Public Duty Doctrine as an Affirmative Defense for Claims Under the State Tort Claims Act in which the Injuries of the Claimant are the Result of the Alleged Negligent Failure of Certain Parties to Protect Claimants from the Action of Others, S.L. 2008-170, § 1, 2008 N.C. Sess. Laws 690, 691 (codified at N.C.G.S. § 143-299.1A), the 2008 amendments did not disturb this Court's understanding of the "private person" provision of N.C.G.S. § 143-291(a).

is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute." *State v. Morgan*, 372 N.C. 609, 614 (2019) (cleaned up). As we have already explained, the State Tort Claims Act permits an individual to sue the State when an agent or employee of the State acts in a negligent manner and under circumstances in which liability in tort would arise under North Carolina law if that agent or employee were acting in his or her private capacity. *See Frazier*, 135 N.C. App. at 48 (observing that "[t]ort liability for negligence attaches to the state and its agencies under the [State] Tort Claims Act only 'where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina' ") (quoting N.C.G.S. § 143-291(a)). As a result, we agree with Judge Tyson that the "private person" language contained in N.C.G.S. § 143-291(a) imposes a substantive, rather than a procedural, limitation upon the types of claims that are cognizable under the State Tort Claims Act. *Cedarbrook*, ¶ 53 (Tyson, J., dissenting).

¶ 38 In the event that, contrary to our reading of the relevant statutory language, the "private person" provision contained in N.C.G.S. § 143-291(a) was deemed to be ambiguous, we "must interpret the statute to give effect to legislative intent." *State v. Curtis*, 371 N.C. 355, 358 (2018) (cleaned up). As is demonstrated by even a cursory examination of the Administrative Procedure Act, the General Assembly has enacted a process by which regulated entitles are entitled to challenge the lawfulness of and seek redress from allegedly unlawful regulatory actions. More specifically, N.C.G.S. §§ 131D-2.7(d)(4) and 131D-34(e) provide that parties wishing to contest the validity of a departmental decision to suspend admissions to an adult care home or to challenge a penalty that the department has sought to impose arising from deficiencies in the operation of an adult care home are entitled to a hearing in accordance with the Administrative Procedure Act. *See* N.C.G.S. § 150B-1 *et seq.*; *see also Empire Power Co. v. N.C. Dep't of Env't Mgmt.*, 337 N.C. 569, 594 (1994) (recognizing that "[t]he primary purpose of the [Administrative Procedure Act] is to confer procedural rights, including the right to an administrative hearing, upon any person aggrieved by an agency decision"). We have difficulty concluding that the General Assembly would create a specific process pursuant to which regulated entities are entitled to challenge the lawfulness of a state agency's regulatory decisions while simultaneously waiving sovereign immunity so as to allow those entities to assert a negligence-based claim for damages against the agency arising from the same regulatory decision under the State Tort Claims Act, particularly given this Court's consistent recognition that statutes in "derogation of sovereign immunity should be strictly construed." *Stone*,

347 N.C. at 479; *see also Guthrie*, 307 N.C. at 538. As a result, basic principles of statutory construction suggest that any uncertainty concerning the meaning of the "private person" language contained in N.C.G.S. § 143-291(a) should be resolved *against*, rather than in favor of, a waiver of sovereign immunity.[8]

¶ 39 The interpretation of the "private person" provision of N.C.G.S. § 143-291(a) that we believe to be appropriate is consistent with the manner in which the federal courts have interpreted the virtually identical provision that appears in the Federal Tort Claims Act, with this Court having previously examined cases arising under the Federal Tort Claims Act in interpreting the State Tort Claims Act. *See, e.g.*, *Lyon & Sons*, 238 N.C. at 32–33 (discussing interpretations of the Federal Tort Claims Act and applying those interpretations in construing its North Carolina analogue). According to the Federal Tort Claims Act, federal district courts have exclusive jurisdiction over

> civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, *under circumstances where the United States, if a private person, would be liable to the claimant* in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1) (emphasis added). Federal courts have held that the reference to a "private person" in 28 U.S.C. § 1346(b)(1) imposes a substantive limit upon the types of tort claims that can be asserted against the United States that requires that those claims be comparable to the types of claims that could be asserted against a private person.

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8. Plaintiffs cite *Patrick* for the proposition that the "private person" language does not bar their claims because it "merely serves to effectuate one of the [State] Tort Claims Act's two purposes: waiving sovereign immunity." 192 N.C. App. at 719 (citing *Teachy*, 306 N.C. at 329). The issue in *Patrick*, however, was whether the plaintiff's claim against the department in that case was barred by *public official immunity*. *Id.* at 716. The Court of Appeals rejected an argument advanced by the department that, because public official immunity protected its individual employees as "private persons" from liability for performing discretionary governmental duties absent evidence of malice or corruption, the department could not be held liable under the State Tort Claims Act. *Id.* at 718. Thus, the *Patrick* court's discussion of the "private person" language merely indicates that the department could not escape the limited waiver of sovereign immunity provided in the State Tort Claims Act on the grounds that the employees whose alleged negligence gave rise to the claim could not be held liable as individuals.

See, e.g., *C.P. Chem. Co. v. United States*, 810 F.2d 34, 37 (2d Cir. 1987) (holding that "[t]he plain meaning of section 1346(b) is that the United States cannot be held liable when there is no comparable cause of action against a private citizen"); *Jayvee Brand, Inc. v. United States*, 721 F.2d 385, 390 (D.C. Cir. 1983) (concluding that "quasi-legislative or quasi-adjudicative action by an agency of the federal government is action of the type that private persons could not engage in and hence could not be liable for under local law").

¶ 40 In *Jayvee Brand*, a children's sleepwear manufacturer sued the Consumer Product Safety Commission under the Federal Tort Claims Act seeking monetary damages that the manufacturer alleged to have been negligently caused by the Commission's regulatory actions. 721 F.2d at 387. After agreeing that the Commission had acted unlawfully by failing to follow proper procedures in the course of taking the challenged regulatory action and that these "wrongful acts" had been committed by an " 'employee of the Government while acting within the scope of his office or employment,' " the United States Court of Appeals for the District of Columbia Circuit concluded that, since these actions were "of the type that private persons could not engage in and hence could not be liable for under local law," the federal courts lacked "jurisdiction to entertain a suit against the federal government" under the Federal Tort Claims Act. *Id.* at 390 (quoting 28 U.S.C. § 1346(b)(1)). In support of this determination, the court explained that

> [a]ppellants ask us to make a major innovation in the law by holding that the [Federal Tort Claims Act] provides damage actions as an additional means of policing the internal procedures of governmental agencies. They have not, however, given us particularly good reasons for such an extraordinary step, and everything we have seen counsels against it. There is, in the first place, absolutely no evidence that in enacting the [Federal Tort Claims Act] Congress intended to police internal governmental law-making procedures with damage actions. Appellants' theory of governmental liability because of the [Commission's] failure to follow the procedures specified by section 371(e) of the Federal Food, Drug, and Cosmetic Act would seem to impose liability for any agency's failure to follow procedures prescribed by any regulation or statute, including the Administrative Procedure Act. Congress has provided elaborate mechanisms of judicial review so that rules adopted by improper

> procedures may be declared nullities. Nowhere, so far as we are aware, has Congress stated that, in addition, the affected parties could collect damages from the government. Surely, so striking a mode of policing procedural regularity as the use of damage actions for millions or hundreds of millions of dollars would have been mentioned. Appellants have drawn our attention to no language in any statute or any legislative history that suggests a conscious intention by any member of Congress to accomplish such a result. That in itself would appear nearly conclusive of the issue before us. It may also be significant that no plaintiffs before those here have ever advanced such a theory. These are negative reasons to doubt that Congress intended the government to be liable in damages for adopting a rule through defective procedures.

Id. at 391.

¶ 41 Similarly, in analyzing the legislative intent underlying the enactment of the Federal Tort Claims Act, the Supreme Court of the United States observed that "it was not intended that the constitutionality of legislation, the legality of regulations, *or the propriety of a discretionary administrative act* should be tested through the medium of a damage suit for tort." *Dalehite v. United States*, 346 U.S. 15, 27 (1953) (cleaned up) (emphasis added). Instead, the Court concluded, the legislative history of the Federal Tort Claims Act revealed that "[u]ppermost in the collective mind of Congress were the ordinary common-law torts." *Id.* at 28.

¶ 42 The same observations can be made about the State Tort Claims Act. As we have already noted, plaintiffs have provided no support for a conclusion that the General Assembly "intended to police internal governmental law-making procedures with damage actions." *Jayvee Brand*, 721 F.2d at 391. On the contrary, the General Assembly enacted the Administrative Procedure Act, which provides a mechanism for challenging allegedly unlawful actions taken by regulatory agencies such as the department, for that purpose. Considering the existence of this remedy for unlawful regulatory actions provided by the Administrative Procedure Act, it is difficult for us to believe the General Assembly also intended for a plaintiff to be able to bring what amounts to a damage claim for "negligent regulation" against a regulatory agency. Had it intended to make both such remedies available to parties adversely affected by the regulatory actions taken by state agencies, we believe that the General Assembly would have more clearly indicated that such

suits were available than is evident from an examination of the relevant existing statutory provisions.[9] This is especially true given the general principle that a waiver of sovereign immunity must be explicit rather than implied. *See Heath*, 282 N.C. at 296. As a result, our review of the relevant federal precedent and significance of that precedent for North Carolina law strongly counsels against acceptance of the theory that plaintiffs have espoused in this case.

¶ 43 In support of its decision to allow plaintiffs' claim against the department to proceed, the Court of Appeals relied upon its prior decision in *Nanny's Korner*. *Cedarbrook*, ¶ 16; *see also id.*, ¶ 38 (Dietz, J., concurring). In *Nanny's Korner*, a daycare center filed an affidavit under the State Tort Claims Act against the department's Division of Child Development and Early Education in which it sought to recover damages as the result of the department's alleged failure to conduct an independent investigation into the allegations of child sexual abuse that had been made against one of the daycare center's staff members. 264 N.C. App. at 75. After the Commission dismissed the daycare center's claim pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), on the grounds that the center's claim was barred by the three-year statute of limitations applicable to claims asserted under the State Tort Claims Act, the daycare center argued that its claim was not time-barred and that it had "the right to bring a direct constitutional claim since no adequate state remedy exists." *Id.* at 75, 80. In rejecting the daycare center's argument, the Court of Appeals held that the center "[did] not have a direct constitutional claim because it had an adequate state remedy in the form of the Industrial Commission through the [State] Tort Claims Act." *Id.* at 80. However, the Court of Appeals continued, the Commission had correctly determined that the center's claim was barred by the applicable statute of limitations, with the daycare center's "failure to comply with the applicable statute of limitations not render[ing] its remedy inadequate" on the theory that, if the daycare center's "claim under the [State] Tort Claims Act had been successful, the remedy would have compensated [it] for the same injury alleged in the constitutional claim." *Id.*

¶ 44 Aside from the fact that *Nanny's Korner* is not binding on this Court, we agree with the department that the Court of Appeals did not

9. In addition to the complete absence of any precedent for plaintiffs' claim in the jurisprudence of this Court, the Court of Appeals, or the federal courts, plaintiffs have failed to identify, and we have not been able to find, a single decision in which the courts of any other state have allowed a regulated entity to assert a damage claim against a state agency stemming from the allegedly negligent exercise of that agency's discretionary regulatory authority.

fully examine the extent, if any, to which the State Tort Claims Act permits the type of claim that the daycare center pursued in that case and that is before us now. Instead, after concluding that any claim that the center might have been able to assert pursuant to the State Tort Claims Act was time-barred, the Court of Appeals stated, without explaining or citing any supporting authority, that the State Tort Claims Act would have provided the daycare center with an adequate remedy sufficient to preclude the availability of a direct action under the state constitution. In other words, while the holding in *Nanny's Korner* speaks for itself, the legal analysis that the Court of Appeals conducted regarding the availability of the State Tort Claims Act under the circumstances presented in that case was merely cursory. Although we do not fault the Court of Appeals for relying upon *Nanny's Korner* as binding precedent in the present case, we also do not, following a more rigorous analysis of the pertinent legal questions, find *Nanny's Korner* to be persuasive, and for that reason overrule it to the extent it conflicts with this opinion.[10]

C. Negligence

¶ 45 In addition, the department contends that, even if plaintiffs' claims are not barred by the doctrine of sovereign immunity, they have failed to state a claim for relief sounding in negligence as required by the State Tort Claims Act. According to the department, "[p]laintiffs *must* plead duty, breach, causation, and damages—the foundational elements of every tort claim—to survive a motion to dismiss," but "[d]espite over 250 paragraphs of allegations," have failed to do so, citing *Stone*, 347 N.C. at 477. After careful consideration of the record in light of the applicable law, we conclude that plaintiffs have failed to allege the existence of the sort of legal duty necessary to support a negligence claim.

¶ 46 First, the department argues that plaintiff's "allegations that [the department] owes it a duty are conclusory assertions of law, unsupported

10. According to plaintiffs, *Nanny's Korner* demonstrates that "the effect of disallowing a claim under the [State] Tort Claims Act would be to create a constitutional claim where the legislature has already provided an adequate statutory remedy" and that, " '[w]here one of two reasonable constructions will raise a serious constitutional question, the construction which avoids this question should be adopted,' " quoting *Long v. Fowler*, 378 N.C. 138, 2021-NCSC-81, ¶ 24). For the reasons that we have already provided, however, the interpretation of the State Tort Claims Act upon which plaintiffs rely is not a reasonable one given that it has no support in the language or history of the State Tort Claims Act and given that there is no reason to believe that the General Assembly intended for the State Tort Claims Act to provide the sort of remedy plaintiffs seek. If plaintiffs believe that they have a valid constitutional claim against the department, they are free to pursue it in the appropriate forum if they so choose, but no claim of that nature is before us in this appeal, and we express no opinion concerning its legal or factual viability.

by fact." In the department's view, the Court of Appeals erred in determining that, by "fil[ing] an affidavit containing five components required for all claimant affidavits asserting liability under the [State] Tort Claims Act," plaintiffs sufficiently stated a claim for negligence given that mere compliance with the filing requirements "does not relieve a plaintiff of its obligation to plead facts supporting its claim," citing *Cedarbrook*, ¶ 11. In addition, the department contends that the Court of Appeals "erred in conflating the public duty doctrine and the duty element of a negligence claim," reasoning that, even though these legal principles are related, the department's inability to rely upon the public duty doctrine as an affirmative defense has no bearing upon the extent to which the department owed plaintiffs a duty of care sufficient to support the assertion of a negligence claim.

¶ 47 In the department's view, the Court of Appeals' decision "creates dueling tort duties that [the department] cannot satisfy consistent with the statutory obligations the General Assembly imposed on it." According to the department, the Court of Appeals' decision in this case, when read in conjunction with its decision in *Tang*, "would create an 'impossible standard' where [the department] would be liable for both 'enforcing [ ] statutory mandates' and 'for failing to enforce those very same mandates,' " quoting *Cedarbrook*, ¶ 66 (Tyson, J., dissenting). The department contends that, rather than placing it in "an untenable position that could endanger the residents that [the department] is charged with protecting," it "should be free to hold adult care homes responsible for properly supervising residents . . . without concern that a facility like Cedarbrook or its owner will sue [the department] in tort if it disagrees." The department claims that allowing the Court of Appeals' decision to stand "would be an unprecedented expansion of the [State] Tort Claims Act" given that departmental employees charged with regulating adult care homes "have only ever been charged with protecting the residents of those facilities, not the companies that operate them," and have never been held to "owe[ ] a duty to the *owners* of those companies, such that Mr. Leonard could attempt to hold [the department] liable for his lost profits on a planned sale of Cedarbrook." (emphasis in original).

¶ 48 Second, the department argues that plaintiffs' claim rests upon "intentional regulatory actions" in which its employees engaged and that "intentional, discretionary acts taken pursuant to regulatory authority do not give rise to a tort claim," citing *Williams v. N.C. Dep't of Just., Crim. Standards Div.*, 273 N.C. App. 209, 212 (2020); *Frazier*, 135 N.C. App. at 48. According to the department, the regulatory actions that its employees took in this case are similar to those at issue in *Williams* and

Frazier in that, "[a]lthough [plaintiffs] label[ ] them as negligence, they are intentional actions by a state agency taken to administer and enforce laws passed by the General Assembly." In light of that fact, the department asserts that any "attempt to apply tort concepts like breach in the regulatory context" would be inappropriate given that constructs like the "reasonable person" standard are "ill-suited to analyzing [plaintiffs'] proposed claim of negligent regulation." As a result, the department contends that "the issues in this case, and the exercise of regulatory authority in general, present regulatory and policy questions that tort law was not designed to answer," with such questions being "best left to proceedings before an administrative law judge with specialized expertise, as the legislature intended."

¶ 49 Finally, the department argues that "[r]egulations do not proximately cause damages to a regulated entity in tort, and a regulated entity's compliance costs are not recoverable as damages." In the department's view, plaintiffs' alleged damages, which take the form of increased operating expenses associated with compliance with the Directed Plan of Protection, lost revenue resulting from the suspension of further admissions to Cedarbrook, and lost profits from a failed attempt to sell Cedarbrook, "bear no resemblance to the kinds of damages recoverable in tort." The department argues that "it is the financial responsibility of business owners to run their businesses in accordance with state health and safety laws" and that, "if there is any question as to whether a certain cost should qualify as a business expense or a misapplication of regulatory action, the legislature has designated an administrative law judge as the arbiter of this decision." In addition, the department claims that, "[i]f individuals and businesses can bring tort actions against these agencies in the Industrial Commission simply by alleging that the agency acted 'unreasonably' in executing its regulatory duties[;] . . . the State's liability would be unmanageable and unprecedented." For all these reasons, the department contends that, even if the regulatory actions taken against Cedarbrook "were inconsistent with the law and administrative regulations governing adult care homes, as [p]laintiffs claim, this is not a tort."

¶ 50 Plaintiffs respond that both this Court and the Court of Appeals have held that agency personnel owe a duty of care in exercising their regulatory authority, citing *Multiple Claimants v. N.C. Dep't of Health & Hum. Servs.*, 361 N.C. 372, 378 (2007); *Gammons v. N.C. Dep't of Hum. Res.*, 344 N.C. 51, 63 (1996); *Tang*, ¶¶ 27–28; *Haas v. Caldwell Sys., Inc.*, 98 N.C. App. 679, 682–83 (1987); *Zimmer v. N.C. Dep't of Transp.*, 87 N.C. App. 132, 132 (1987). In plaintiffs' view, an agency's

duty of care "extends to the regulated party," which is "the party most directly affected by that exercise of authority," in cases in which "it is reasonably foreseeable that an agency's negligence in the exercise of regulatory authority could harm the parties the agency exercises that authority against." According to plaintiffs, both this Court and the Court of Appeals have endorsed awarding damages under the State Tort Claims Act in situations involving claims "arising from the negligent exercise of regulatory authority against the regulated party," citing *Watts v. N.C. Dep't of Env't & Nat. Res.*, 182 N.C. App. 178, 181–85) (2007), *aff'd* 362 N.C. 497 (2008); *Nanny's Korner*, 264 N.C. App. at 80; *Crump*, 216 N.C. App. at 46; *Russell v. N.C. Dep't of Env't & Nat. Res.*, 227 N.C. App. 306, 309 (2013); *Strickland v. UNC-Wilmington*, 213 N.C. App. 506, 511 (2011); *Husketh v. N.C. Dep't of Corr.*, No. COA09-411, 2010 WL 157557, at *3 (N.C. Ct. App. Jan. 19, 2010) (unpublished).

¶ 51 In addition, plaintiffs argue that the statutory scheme governing the operation of adult care homes imposes a legally enforceable duty on the department in favor of both the facility and the facility's residents. According to plaintiffs, "the statutory scheme recognizes that [adult care] homes provide important services in their local communities," with the General Assembly having "appropriately and necessarily balanced the needs of all actors in the adult care home industry—the residents; adult care homes, their staff, supervisors, and administrators; local departments of social services; local management entities; physicians and other medical professionals; and [the department]." As a result, plaintiffs claim, "the rights of residents do not displace the rights of adult care homes themselves," with the statutory scheme "recogniz[ing] that [the department] owes duties to adult care homes like Cedarbrook."

¶ 52 Plaintiffs further contend that the intentional nature of the department's regulatory actions does not preclude the assertion of a negligence claim against the department on the theory that, even though the department "is correct that [plaintiffs'] claims are based—at least in part—on intentional conduct of [departmental] employees, the [c]omplaint does not allege that those employees <u>intended to cause harm</u> to [plaintiffs]." (emphasis in original). According to plaintiffs, the same argument upon which the department relies in this case was rejected in *Crump*, in which the Court of Appeals explained that "the focus is not on whether [the employee's] actions were intentional, but rather on whether he intended to injure or damage the [plaintiffs]," quoting *Crump*, 216 N.C. App. at 44–45. "In other words," plaintiffs explain, " '[o]ne who undertakes to do something and does it negligently commits a *negligent* act,' " quoting *Jackson v. N.C. Dep't of Crime Control & Pub. Safety*, 97 N.C. App. 425, 432 (1990) (emphasis added in brief).

¶ 53 Finally, plaintiffs argue that they are entitled to recover "direct and indirect damages suffered as a result of [the department's] negligence." According to plaintiffs, "[t]he harms suffered by [plaintiffs]—including what [the department] euphemistically terms 'compliance costs'—are squarely within the sort of direct and indirect damages allowed in tort," citing *Champs Convenience Store, Inc. v. United Chem. Co.*, 329 N.C. 446, 463 (1991), including tort claims brought under the State Tort Claims Act, citing *Phillips v. N.C. State Univ.*, 206 N.C. App. 258, 266–67 (2010). Plaintiffs contend that the damages that they seek to recover in this case represent "the natural and probable result of [the department's] actions against it," making the department "liable under the plain language of the [State] Tort Claims Act for the compensatory and consequential damages caused by its negligence." Plaintiffs dismiss the department's concerns about the "unprecedented and untenable" liability that will allegedly result from the Court of Appeals' decision by claiming that this argument fails to recognize that the State Tort Claims Act waives sovereign immunity for negligence claims, that recovery under the State Tort Claims Act is limited to $1,000,000 arising from a single occurrence, and that "the State's liability for its negligence has not yet been so enormous that the General Assembly has seen fit to revoke that waiver in the nearly 70 years the [State] Tort Claims Act has been in existence." On the contrary, plaintiffs argue, the General Assembly's recent decision to limit the availability of the public duty doctrine in proceedings brought pursuant to the State Tort Claims Act may reflect a legislative determination that "the risk of tort liability promotes better agency conduct and that the relatively rare occurrence of actionable (and thus compensable) agency negligence is a 'price' well worth paying for improved agency accountability."

¶ 54 After carefully evaluating the parties' arguments, we hold that plaintiffs have failed to show that the department owed them a legally recognized duty sufficient to support a negligence claim under the State Tort Claims Act. According to well-established North Carolina law, "[t]o establish actionable negligence, [a] plaintiff must show that: (1) [the] defendant failed to exercise due care in the performance of *some legal duty owed to* [*the*] *plaintiff under the circumstances*; and (2) the negligent breach of such duty was the proximate cause of the injury." *Bolkhir*, 321 N.C. at 706 (emphasis added) (citing *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 232 (1984)); *accord Wood*, 355 N.C. at 166; *Mattingly v. N.C. R.R. Co.*, 253 N.C. 746, 750 (1961). "A duty is defined as an 'obligation, *recognized by the law*, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks.' " *Davis v. N.C. Dep't of Hum. Res.*, 121 N.C. App. 105,

112 (1995) (emphasis added) (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 30, at 164–65 (5th ed. 1984)). The extent to which a particular defendant owes a duty to a particular plaintiff constitutes a question of law, subject to de novo review. *Connette v. Charlotte-Mecklenburg Hosp. Auth.*, 382 N.C. 57, 2022-NCSC-95, ¶ 7.

¶ 55 In the affidavit that they filed with the Commission in this case, plaintiffs' allegation that the department owed them a legally recognized duty of care consisted of nothing more than the following:

> 245. [The department] owed Cedarbrook a duty of reasonable care in the exercise of its authority to investigate the facility and take licensure actions against it.
>
> . . . .
>
> 249. [The department] owed Mr. Leonard, as President and owner of Cedarbrook, a duty of reasonable care in the exercise of its authority to investigate the facility and take licensure actions against it.

The allegations that plaintiffs have advanced in support of their contention that the department owned them a duty of care sufficient to support a negligence claim are completely conclusory in nature. *See Sutton v. Duke*, 277 N.C. 94, 95 (1970) (noting that, for purposes of evaluating the validity of a motion to dismiss, "the well-pleaded material allegations of the complaint are taken as admitted," but "conclusions of law or unwarranted deductions of fact are not admitted"). Despite the fact that plaintiffs have failed to allege any facts or to cite any legal authority in support of their contention that the department owed them a legally recognized duty of care, the Court of Appeals appears to have failed to consider the extent, if any, to which such a duty of care existed, having determined, instead, that the issue of whether the department owed a legally recognized duty to plaintiffs was "intertwined with its interpretation of the public duty doctrine."[11] *Cedarbrook*, ¶ 25.

¶ 56 A careful review of the decisions upon which plaintiffs rely in support of their contention that the department owed them a duty of care sufficient to support their "negligent regulation" claim shows that each

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11. As we explain in greater detail below, the duty of care component of a negligence claim is legally and conceptually distinct from the affirmative defense of the public duty doctrine, with the Court of Appeals having erred to the extent that it reached a contrary conclusion.

of those cases clearly indicate that the relevant duty of care runs to the person or persons whom the agency's regulatory actions were intended to protect rather than to the entity being regulated. In *Multiple Claimants*, for example, the estates of several inmates who died in a fire at the Mitchell County jail filed suit against the department under the State Tort Claims Act on the basis of allegations that a departmental employee had negligently failed to inspect the fire safety equipment utilized in the jail. 361 N.C. at 373. The duty of care upon which this Court relied in allowing the plaintiff's claim to proceed was not to the jail or the county that operated it, but rather to the prisoners whom such fire safety regulations were designed to protect.[12] *Id.* at 379; *see also Gammons*, 344 N.C. at 63 (concluding that the department, by means of its relationship with the Cleveland County Director of Social Services, owed a duty to the residents of Cleveland County to respond to reports of child abuse and could be held liable for negligence in the event that it failed to do so); *Tang*, ¶ 28 (holding that the department had breached its duty of care to the residents of a senior care facility with a history of violations when the department failed to address certain deficiencies in external door security and resident supervision); *Haas*, 98 N.C. App. at 682–83 (concluding that the Department of Human Resources and the Department of Natural Resources and Community Development could be held liable to residents living near a county-operated incinerator as the result of their allegedly negligent exercise of "permitting, supervision, inspection and monitoring authority" that resulted in the emission of harmful and noxious gasses from the incinerator); *Zimmer*, 87 N.C. App. at 135 (holding that the fact that decisions made by employees of the Department of Transportation regarding the selection, design, and maintenance of detour routes associated with a highway construction project were "discretionary governmental functions" did not preclude a finding that the department was liable under the State Tort Claims Act for injuries sustained by a truck driver who had been injured in an accident that allegedly resulted from a negligently designed detour route). Simply put, neither this Court nor the Court of Appeals has ever found that a state agency owed a duty of care sufficient to support a claim sounding in negligence to an entity that was subject to the agency's discretionary regulatory authority (e.g., the jail operator in *Multiple Claimants*, the

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12. The primary issue in *Multiple Claimants* was whether the "special relationship" exception to the public duty doctrine applied in that case, 361 N.C. at 372–73, with the Court concluding that the plaintiffs had "properly alleged facts that establish the existence of a special relationship between [the department] and the inmates" so as to preclude the department from relying upon the public duty doctrine as a defense to the claims that had been asserted against it, *id.* at 379.

senior living center in *Tang*, or the waste disposal facility in *Haas*). This distinction is critical given that "the duty owed by each defendant to [a] plaintiff is determined by the relationship subsisting between them." *Kientz v. Carlton*, 245 N.C. 236, 240 (1957).[13]

¶ 57 Similarly, plaintiffs' argument that the statutory scheme applicable to adult care facilities imposes a duty on the department that runs to the facilities themselves lacks merit. A careful analysis of the statutory provisions upon which plaintiffs rely in support of this argument indicates that those provisions are intended to protect the *residents* of adult care facilities rather than the facility owners or operators. For example, the various provisions governing training and licensing requirements for individuals working in adult care homes, *see* N.C.G.S. §§ 131D-2.2; 131D-2.15; 131D-4.5B, 131D-40; 131D-45, are intended to protect the *residents* of those facilities, with none of these statutory provisions containing any support for the notion that they are intended to protect adult care facility owners or operators as well. Instead, the General Assembly has clearly indicated that the purpose underlying the statutory scheme for regulating adult care homes is "to promote the interests and well-being of the *residents* in adult care homes and assisted living residences" licensed by the department. N.C.G.S. § 131D-19 (emphasis added).[14]

¶ 58 Although plaintiff has argued that the Court of Appeals' decision in *Watts* supports a determination that an agency can be held liable for the

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13. The distinction discussed in the text of this opinion also explains why claims like those at issue in *Gammons* and *Tang* were not foreclosed by the "private person" provision contained in N.C.G.S. § 143-291(a), with the negligence claims at issue in those cases having been premised upon an alleged failure on the part of the department to fulfill a duty to the plaintiff that was imposed by statute. *See Gammons*, 344 N.C. at 63 (finding the department liable on the basis of a *respondeat superior* theory stemming from a failure on the part of a county social services director to fulfill his statutory obligation to protect minor children from physical abuse); *Tang*, ¶ 16 (affirming a finding by the Commission that the department had breached its statutory duty to an adult care home resident by failing to properly inspect the facility in which the resident resided). According to well-established North Carolina law, private persons can be held liable for failing to comply with statutory duties. *See, e.g.*, *Stikeleather Realty & Inv. Co. v. Broadway*, 242 N.C. App. 507, 517 (2015) (discussing the statutory duties owed to tenants by landlords under the Residential Rental Agreements Act, N.C.G.S. §§ 42-38 to -39, for the purpose of ensuring that residential premises are fit for human habitation); *Mozingo v. Pitt Cnty. Mem'l Hosp., Inc.*, 101 N.C. App. 578, 585 (1991) (noting that, when a patient procures the medical services of a physician, "a duty arises requiring the physician to conform to the statutory standard of care"). Plaintiffs have failed to identify any statutory duty that they were owed by the department.

14. Additional support for our conclusion that the statutory scheme governing adult care homes is intended to protect residents and not the facilities in which they live can be found in the fact that residents, or the department acting on their behalf, may institute a civil action against an adult care home to enforce the provisions of the Adult Care Home Residents' Bill of Rights. *See* N.C.G.S. § 131D-28.

"negligent exercise of regulatory authority against the regulated party," we do not find this argument to be persuasive. In *Watts*, the plaintiff filed an affidavit with the Commission in which it alleged that an agent of the North Carolina Department of Environment and Natural Resources had negligently inspected and issued an improvement permit for a parcel of land that was subsequently deemed to be unsuitable for the plaintiff's house construction plans. 182 N.C. App. at 180. Although the Department of Environmental and Natural Resources sought dismissal of the plaintiff's claim on the basis of the public duty doctrine, the Court of Appeals held that the plaintiff's claim was entitled to proceed under the "special duty exception" given that the employee who had performed the inspection had "made a promise to [the] plaintiff by issuing the improvement permit warranting that [the] plaintiff could construct a three-bedroom home on the property as described in the site plan," that the plaintiff had "relied on the permit in negotiating the purchase of the property," and that the Department of Environment and Natural Resources had subsequently revoked the permit, "causing [the] plaintiff to incur additional expenses in order to use the lot as he had planned." *Id.* at 180–84. As a result, the Court of Appeals affirmed the Commission's decision to award compensatory damages to the plaintiff. *Id.* at 189.

¶ 59 We are not persuaded that *Watts* has any bearing upon the proper resolution of the issues that are before us in this case. Aside from the fact that the specific issue that was before the Court of Appeals in *Watts* was the availability of the public duty doctrine as an affirmative defense to the claims that plaintiff had asserted rather than whether the Department of Environment and Natural Resources owed a legally recognized duty to the plaintiff, the claim at issue in *Watts* bears no resemblance to the "negligent regulation" claim that plaintiffs have asserted in this case, which rests upon a contention that a regulated entity is entitled to assert a negligence claim against a state agency responsible for enforcing a complex regulatory scheme created by statute. As a result, nothing in *Watts* supports the sweeping conclusion that a regulatory agency owes a duty of care sufficient to support a negligence claim in favor of the entities that are subject to its regulation.[15]

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15. Although plaintiffs point out that this Court affirmed the Court of Appeals decision in *Watts*, our per curiam opinion clearly indicates that our decision rested upon the Commission's finding that the Department of Environment and Natural Resources had admitted that it had negligently issued the relevant permit, so as to have "effectively waived its argument that it owe[d] no duty to [the] plaintiff under the public duty doctrine." *Watts*, 362 N.C. at 498. For that reason, we "express[ed] no opinion [concerning the validity of] the analysis of the public duty doctrine by the Court of Appeals." *Id.*

¶ 60 The other decisions upon which plaintiffs rely are equally irrelevant to the proper resolution of the issue that is before us in this case. *See Crump*, 216 N.C. App. at 42 (recognizing the validity of a claim that had been asserted against the Department of Environmental and Natural Resources by property owners who alleged that the agency had negligently issued a permit authorizing the construction of a septic system upon property that was not suitable for the installation of such a system); *Russell*, 227 N.C. App. at 309 (same); *Strickland*, 213 N.C. App. at 511 (recognizing the validity of a wrongful death claim that had been asserted against the University of North Carolina at Wilmington based upon an allegation that university police officers had "negligently provided false, misleading, and irrelevant information" to the New Hanover County Sheriff's Office in connection with the service of an arrest warrant upon the decedent, whom the officers accidentally killed during the execution of the arrest warrant); *Husketh*, 2010 WL 157557, at *1 (upholding a claim asserted by inmate against the Department of Correction on the grounds that its employees had been "negligent in failing to apply the appropriate sentencing statutes for his convictions").[16] As with *Multiple Claimants* and other cases previously discussed, these cases all involved plaintiffs whose interests the relevant regulatory regimes were designed to protect, rather regulated entities impacted by the kind of complex, discretionary administrative decisions that are at issue in this case.

¶ 61 Finally, we conclude that the public policy concerns raised by Judge Tyson and the department, while by no means dispositive, counsel against a holding that regulated entities are entitled to sue the agencies responsible for exercising discretionary regulatory authority over those entities under the State Tort Claims Act unless we are clearly required to do so. As Judge Tyson observed, upholding the Court of Appeals' decision in this case would subject those agencies to the risk of liability for both overly aggressive and insufficiently aggressive exercise of their regulatory authority, *see Cedarbrook*, ¶ 66 (Tyson, J., dissenting).[17] The

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16. The only case in North Carolina that we have found that tends to suggest that the department owes a legal duty to the entities that it regulates is *Nanny's Korner*, which, as we have already explained, is neither persuasive nor binding upon this Court.

17. The facts at issue in *Multiple Claimants* serve to illustrate the conundrum that would be created for regulatory agencies under the approach advocated for by plaintiffs. In the event that we were to accept the validity of the position that plaintiffs have espoused in this case, Mitchell County would have been entitled to maintain an action against the department under the State Tort Claims Act in the event that the department had conducted a proper inspection of the jail, detected the problems with the fire safety equipment that led to the fire that occurred at that facility, and ordered the County to address those

creation of such conflicting duties of care is inherently problematic, *see Koch v. Bell, Lewis & Assocs.*, 176 N.C. App. 736, 740 (2006) (declining to recognize the existence of a duty between an insurance adjuster and a claimant on the grounds that the recognition of such a duty would "subject the adjuster to conflicting loyalties" given that the adjustor "owes a duty to the insurer who engaged him," so that the creation of "[a] new duty [to the claimant] would conflict with that duty, and interfere with its faithful performance" (quoting *Sanchez v. Lindsey Morden Claims Servs., Inc.*, 72 Cal. App. 4th 249, 253 (1999))), and it is particularly troublesome in situations like this one, in which the principal concern motivating the creation of the relevant regulatory regime was the protection of the residents of adult care homes rather than the entities that own and operate them.

¶ 62 Admittedly, it is theoretically possible to find a middle ground between too much regulation and no regulation at all. However, this middle ground is one that the General Assembly, rather than the judicial branch, should be responsible for identifying. *See Mann Media, Inc. v. Randolph Cnty. Plan. Bd.*, 356 N.C. 1, 16 (2002) (noting that, under the Administrative Procedure Act, a court reviewing an agency decision "does not have authority to override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law" (quoting *Lewis v. N.C. Dep't of Hum. Res.*, 92 N.C. App. 737, 740 (1989))). In this instance, at least, we believe that tort law principles are ill-suited to the identification of the proper scope of regulatory activity. *See Myers*, 360 N.C. at 468 (holding that, when the General Assembly "has vested [a state agency] with broad powers to protect the health and well-being of the general public," the discretionary decisions that it is required to make in exercising that authority "are not generally the type of decisions for which the State is liable to private citizens in tort"); *see also United States v. Varig Airlines*, 467 U.S. 797, 820 (1984) (holding that "[j]udicial intervention in [discretionary] decisionmaking through private tort suits would require the courts to 'second-guess' the political, social, and economic judgments of an agency exercising its regulatory function"). In reaching this conclusion, we note that the exercise

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deficiencies in a manner that the County believed to be "unreasonable." We decline to interpret the State Tort Claims Act in such a way as to discourage state regulatory agencies from carrying out their legislatively ordained functions in an effective manner. *See State v. Jones*, 359 N.C. 832, 837 (2005) (observing that, "[i]n construing statutes[,] courts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results," (quoting *State ex rel. Comm'r of Ins. v. N.C. Auto Rate Admin. Office*, 294 N.C. 60, 68 (1978))).

of regulatory authority by state agencies generally requires a level of expertise and the exercise of some amount of discretion that is difficult to evaluate using the "reasonable person" standard. *See Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 473 (2002) (noting that, to prevail in a negligence action, a plaintiff must show that the defendant owed the plaintiff a legal duty and "fail[ed] to exercise the degree of care that a reasonable and prudent person would exercise under similar conditions"). Although the courts have had extensive experience applying the "reasonable person" standard in establishing liability for injuries sustained in automobile accidents and other areas subject to traditional tort-based liability, in which the manner in which the "reasonable person" standard should be applied is well-established, *see, e.g.*, *Hobbs v. Queen City Coach Co.*, 225 N.C 323, 331 (1945) (holding that, in the exercise of ordinary care, "it is incumbent upon the operator of a motor vehicle to keep [the] same under control, and to keep a reasonably careful lookout, so as to avoid collision with persons and vehicles upon the highway"), we are not aware of any precedent that could guide the Commission in determining how a "reasonable regulator" would have exercised its discretionary authority in dealing with investigations like those conducted at Cedarbrook.[18]

¶ 63 More importantly, however, the General Assembly has created a system for the specific purpose of resolving disputes over the validity of regulatory actions by state agencies like the department. In 1985, the General Assembly established the Office of Administrative Hearings

> to ensure that administrative decisions are made in a fair and impartial manner to protect the due process rights of citizens who challenge administrative action and to provide a source of independent administrative law judges to conduct administrative hearings in contested cases in accordance with Chapter 150B of the General Statutes and thereby prevent the commingling of legislative, executive, and judicial functions in the administrative process.

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18. In addition, the State Tort Claims Act requires the Commission to determine if the plaintiff had been contributorily negligent, N.C.G.S. § 143-291(a), with such a determination being subject to the "the same rules as those applicable to litigation between private individuals," *Medley v. N.C. Dep't of Corr.*, 330 N.C. 837, 840–41 (1992) (quoting *Barney*, 282 N.C. at 284). It is not at all clear to us how the Commission would evaluate the existence of contributory negligence, which prohibits recovery where "the plaintiff's own negligence contributed to his injury," *Draughon v. Evening Star Holiness Church of Dunn*, 374 N.C. 479, 483 (2020), under circumstances in which the plaintiff's own conduct prompts the regulatory actions that are the alleged cause of the plaintiff's injury.

N.C.G.S. § 7A-750; *see also Empire Power*, 337 N.C. at 594–95 (holding that, unless otherwise provided by law, the Administrative Procedure Act controls the rights of any party "aggrieved by an agency decision," including the right to review of that decision by the Office of Administrative Hearings). As we have already explained, the Administrative Procedure Act provides a means by which adult care facilities can seek relief from the department's regulatory decisions. *See* N.C.G.S. §§ 131D-2.7(d)(4), -34(e).

¶ 64 A decision on the part of this Court to allow an "aggrieved party" to challenge those exact same decisions by both seeking relief pursuant to the Administrative Procedures Act and by filing a tort claim with the Commission would subvert the legislative framework that the General Assembly has created for such disputes. As this Court held more than forty years ago:

> [a]s a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts. This is especially true where a statute establishes, as here, a procedure whereby matters of regulation and control are first addressed by commissions or agencies particularly qualified for the purpose. In such a case, the legislature has expressed an intention to give the administrative entity most concerned with a particular matter the first chance to discover and rectify error. Only after the appropriate agency has developed its own record and factual background upon which its decision must rest should the courts be available to review the sufficiency of its process. An earlier intercession may be both wasteful and unwarranted. To permit the interruption and cessation of proceedings before a commission by untimely and premature intervention by the courts would completely destroy the efficiency, effectiveness, and purpose of the administrative agencies.

Presnell v. Pell, 298 N.C. 715, 721–22 (1979) (cleaned up). It seems incongruous to us to allow plaintiffs, who challenged the validity of the department's regulatory decisions by seeking administrative relief from the Office of Administrative Hearings before reaching a settlement with the department that involved the withdrawal of the allegations that the department had made against plaintiffs, to have another bite at the

proverbial apple by asserting a damage claim before the Commission under the State Tort Claims Act.[19]

¶ 65 After claiming that "[t]he remedies afforded under the Administrative Procedure[s] Act and the [State] Tort Claims Act are not mutually exclusive" and noting that the Administrative Procedure Act does not permit an award of compensatory damages, plaintiffs argue that, unless they are also permitted to assert a damage claim against the department pursuant to the State Tort Claims Act, they will have been deprived of an adequate remedy for the department's allegedly unlawful action. We do not find this argument persuasive.

¶ 66 According to the Administrative Procedure Act, if an administrative law judge finds that a regulatory action taken by a state agency has "substantially prejudiced the petitioner's rights" and the state agency "has acted arbitrarily or capriciously," the judge may order the agency to pay the petitioner's attorney's fees. N.C.G.S. § 150B-33(b)(11). In addition, when a petitioner seeks judicial review of the administrative law judge's decision in a contested case, the petitioner is entitled to recover attorney's fees if the reviewing court determines that "the agency acted without substantial justification in pressing its claim against the [petitioner]" and that "there are no special circumstances that would make the award of attorney's fees unjust." N.C.G.S. § 6-19.1(a); *cf.*, *Crowell Constructors*, *Inc. v. State ex rel. Cobey*, 342 N.C. 838, 844 (1996) (holding that, to avoid having to pay attorney's fees to the petitioner, the agency need only demonstrate that its actions were "rational and legitimate to such degree that a reasonable person *could* find it satisfactory or justifiable in light of the circumstances then known to the agency"). Thus, it appears to us that the General Assembly has concluded, in the exercise of its legislative authority, that the monetary relief available in the event of a successful challenge to the lawfulness of a regulatory decision made by a state agency is limited to the recovery of attorney's fees and that, in the event that the General Assembly had intended to make

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19. We do not wish to be understood as in any way faulting plaintiffs for their decision to reach a settlement with the department or to suggest that their decision to do so, standing alone, precluded them from seeking monetary relief from the department under the State Tort Claims Act, particularly given that "[t]he law favors the settlement of controversies out of court." *Penn Dixie Lines*, *Inc. v. Grannick*, 238 N.C. 552, 555 (1953); *see also* N.C.G.S. § 150B-22(a) (providing that it is state policy that, as an initial matter, "any dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty, should be settled through informal procedures"). Instead, we simply hold that the remedy available to a party aggrieved by a regulatory decision made by a state agency is the one provided for under the Administrative Procedure Act or some similar statutory scheme.

additional monetary relief available to a party that had successfully challenged the lawfulness of such a regulatory decision, it would have said so in more explicit terms. *See Cabarrus Cnty. Bd. of Educ. v. Dep't of State Treasurer*, 374 N.C. 3, 14 (2020) (noting that the existence of proposed legislation addressing the subject of the case that was before the Court "shows that, in the event that the General Assembly wished to exempt the process of establishing a cap factor [for state employee retirement benefits] from the rulemaking provisions of the Administrative Procedure Act, it knows how to do so"). As a result of this set of circumstances and the General Assembly's clear authority to determine the nature and extent of any non-constitutional remedies for unlawful actions by state agencies, we decline to infer the existence of a right to recover compensatory damages under the State Tort Claims Act arising from allegedly unlawful regulatory actions in the absence of explicit legislative authorization for such an award.[20]

¶ 67 Finally, our reluctance to endorse a claim for "negligent regulation" is reinforced by a concern that, if we were to recognize the existence of such a claim, the total dollar value of the tort liability obligations that the State would incur would be increased and the workload of the Commission under the State Tort Claims Act would, in all probability, be substantially affected as well. Even if most of those claims were

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20. Amici North Carolina Senior Living Association and North Carolina Assisted Living Association cite *Ivey v. North Carolina Prison Department*, 252 N.C. 615 (1960), and *Amos v. Oakdale Knitting Co.*, 331 N.C. 348 (1992), to argue that interpreting the "statutory silence" concerning the availability of compensatory damages for wrongful administrative actions under Chapter 131D to foreclose the availability of such relief would be contrary "to [the] North Carolina courts' approach to statutory silence on exclusive and alternative remedies." The issue in *Ivey* was whether the 1957 amendments to the Workers' Compensation Act had eliminated the right that this Court had previously recognized for a prison inmate to recover damages under the State Tort Claims Act relating to injuries sustained as the result of the negligence of a State employee, with this Court opining that, "[i]f the Legislature intended to withdraw a prisoner's right to pursue a tort claim, the logical procedure would be by amendment to the section of the [State] Tort Claims Act which gives that right." *Ivey*, 252 N.C. at 617–19. The issue in *Amos* was whether the existence of a statutory remedy under the North Carolina Wage and Hour Act precluded the plaintiff from asserting a common law wrongful discharge claim against the employer, with this Court noting that, when "determining whether the state legislature intended to preclude *common law actions*, we first look to the words of the statute to see if the legislature expressly precluded *common law remedies*." 331 N.C. at 358 (emphasis added). Nothing in *Ivey* or *Amos* suggests that the General Assembly's failure to provide a *statutory* right to compensatory damages under the Administrative Procedure Act indicates that they intended such damages to be available under the State Tort Claims Act, particularly given that such a determination would result in a more expansive waiver of the State's sovereign immunity than this Court has previously recognized. *See Stone*, 347 N.C. at 479 (noting that statutes "that permit suit in derogation of sovereign immunity should be strictly construed").

ultimately determined to be meritless, so that the amount of money paid out in compensatory damages was not large, the resulting expenditure of time and resources by the State would likely be significant. We are not inclined to believe that the General Assembly intended to authorize such an imposition upon the public fisc and the State's non-monetary resources in the absence of some clear indication that it intended to act in that fashion. *See Corum v. Univ. of North Carolina*, 330 N.C. 761, 785 (1992) (observing that the modern doctrine of sovereign immunity "seems to rest on a respect for the positions of two coequal branches of government—the legislature and the judiciary," and, therefore, "courts have deferred to the legislature the determination of those instances in which the sovereign waives its traditional immunity").

¶ 68 In light of our determination that the department did not owe a legal duty to plaintiffs in light of the circumstances that are before us in this case, we need not address the parties' arguments regarding breach and damages. *See Stone*, 347 N.C. at 482 (noting that, "[a]bsent a duty, there can be no liability"). Nothing in the applicable statutory provisions or prior caselaw recognizes the validity of a claim like the one that plaintiffs have asserted in this case, and we hold that no such claim exists. As a result, for all these reasons, we reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for further remand to the Commission with instructions that plaintiffs' claims against the department be dismissed.

D. Public Duty Doctrine

¶ 69 Finally, the department argues that plaintiffs' claims are barred by the public duty doctrine "because [the department] owes a duty to the public, not adult care home owners or operators." As a result of our determination that plaintiffs' claims are barred by the doctrine of sovereign immunity and that plaintiffs have failed to identify a legal duty that the department owed to them sufficient to support a claim for damages pursuant to the State Tort Claims Act, we need not address the extent, if any, to which the public duty doctrine serves as a barrier to the claims that plaintiffs have advanced in this case. On the other hand, we do believe that we need to clarify the relationship between the public duty doctrine and the duty element of a negligence claim to make it clear that the existence of a legal duty running from a state agency to a tort claimant does not turn on whether the public duty doctrine applies in a given case.

¶ 70 The public duty doctrine "provides that governmental entities and their agents owe duties only to the general public, not to individuals, absent a 'special relationship' or 'special duty' between the entity and the

injured party." *Stone*, 347 N.C. at 477–78. (citing *Braswell v. Braswell*, 330 N.C. 363, 370–71 (1991)). The public duty doctrine was designed "to prevent an overwhelming burden of liability on governmental agencies with limited resources," *id.* at 481 (cleaned up), by making it clear that a "governmental entity is not liable for negligence for failure to carry out statutory duties," *Isenhour v. Hutto*, 350 N.C. 601, 606–07 (1999). As a general proposition, the public duty doctrine has been deemed applicable in situations involving allegations arising from "the governmental entity's negligent control of an external injurious force or of the effects of such force." *Strickland*, 213 N.C. App. at 512. *See e.g.*, *Myers*, 360 N.C. at 461–62 (allegations that the Department of Environment and Natural Resources had acted negligently in attempting to control a forest fire that caused injury to the plaintiffs); *Wood*, 355 N.C. at 163 (allegations that Guilford County had negligently failed to provide adequate security at the county courthouse where the plaintiff had been assaulted by a third party); *Stone*, 347 N.C. at 476–77 (allegations that the Department of Labor had negligently failed to inspect a factory prior to a fire in which multiple workers were killed or injured); *Hunt*, 348 N.C. at 194–95 (allegations that the Department of Labor had negligently inspected an amusement park ride that later malfunctioned, resulting in injury to the plaintiff); *Braswell*, 330 N.C. at 366–67 (allegations that a county sheriff had negligently failed to protect the claimant's mother and to properly supervise the deputy sheriff who murdered her).

¶ 71 In *Stone*, we held that the common law public duty doctrine applied to claims brought against the State under the State Tort Claims Act. 347 N.C. at 482. In 2008, however, the General Assembly amended the State Tort Claims Act to formally codify the public duty doctrine in the tort claims act context and to limit its application to the following types of claims:

> (1) The alleged negligent failure to protect the claimant from the action of others or from an act of God by a law enforcement officer as defined in subsection (d) of this section.
>
> (2) The alleged negligent failure of an officer, employee, involuntary servant or agent of the State to perform a health or safety inspection required by statute.

N.C.G.S. § 143-299.1A(a). As we later recognized in *Ray*, while the General Assembly had "incoporat[ed] much of our public duty doctrine case law into the [State Tort Claims Act]," it had "also made clear that

the doctrine is to be a more limited one than the common law might have led us to understand." 366 N.C. at 7.

¶ 72 The Court of Appeals in this case held that, because the department's allegedly negligent conduct did not fit within the contours of one of the exceptions enumerated in N.C.G.S. § 143-299.1A(a), the public duty doctrine had no application to the facts of this case. *Cedarbrook*, ¶ 23. In addition, the Court of Appeals rejected the department's argument that plaintiffs had failed to identify a legal duty running from the department to plaintiffs sufficient to support a negligence claim on the grounds that the argument to this effect was "intertwined with [the department's] interpretation of the public duty doctrine." *Id.* ¶ 24. The Court of Appeals erred to the extent that it equated the nature and extent of the public duty doctrine as applied in proceedings conducted pursuant to the State Tort Claims Act with the nature and extent of the legal duty that is necessary to support a negligence claim.

¶ 73 Unlike the duty of care, which is an *element* of any negligence claim that a plaintiff must establish regardless of whether the claim is against a state agency under the State Tort Claims Act or a private party under the common law, *see Stone*, 347 N.C. at 479, the public duty doctrine is an *affirmative defense* to an otherwise valid negligence claim against the State, *see Ray*, 366 N.C. at 8; *see also Myers*, 360 N.C. at 465 (describing the public duty doctrine as "a separate rule of common law negligence that may limit tort liability, even when the State has waived sovereign immunity"). For that reason, while the public duty doctrine protects governmental entities from liability based upon a failure to carry out a statutorily created duty that is designed to protect the public at large rather than a specific individual, *Isenhour*, 350 N.C. at 606–07, and "operates to prevent plaintiffs from establishing the first element of a negligence claim—duty to the individual plaintiff," *Ray*, 366 N.C. at 5, the mere fact that the doctrine does not apply with respect to a particular set of facts does not, without more, determine whether the duty of care necessary to support the assertion of a negligence claim exists in the first place. Although the two legal doctrines are related, they are not identical, and the absence of one does not prove the existence of the other.

¶ 74 Assuming, without in any way deciding, that the Court of Appeals correctly determined that the 2008 amendments to the State Tort Claims Act precluded the department from successfully asserting the public duty doctrine in this case, that determination does not automatically establish that the department owed a duty of care to plaintiffs sufficient to support a negligence claim against the department under the State Tort

Claims Act. Instead, plaintiffs were still required to identify a recognized legal duty owed to them by the department, *see Pinnix v. Toomey*, 242 N.C. 358, 362 (1955) (observing that "[a]ctionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law"), with the Court of Appeals having erred by concluding that the inapplicability of the public duty doctrine sufficed to establish that the department owed plaintiffs a legal duty supporting a negligence claim against the department under the State Tort Claims Act.

III. Conclusion

¶ 75 Thus, for the reasons set forth above, we hold that the Commission erred in failing to dismiss plaintiffs' claims given that plaintiffs' claims are barred by sovereign immunity and that plaintiffs failed to assert a viable negligence claim against the department. As a result, we reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for further remand to the Commission for additional proceedings not inconsistent with this opinion.

REVERSED.

Justice EARLS concurring in the result only.

¶ 76 Although I concur that "plaintiffs failed to assert a viable negligence claim against the department," I arrive at that result in this case for a fundamentally different reason from my colleagues. In my view, the many allegations of the complaint in this matter all involve intentional, not negligent, acts. Thus, rather than engage in the judicial nullification of statutory rights by invoking an all-encompassing sovereign immunity for regulatory agencies, this case is most appropriately resolved by the normal function a court should perform in ruling on a motion to dismiss. The court should examine the allegations of the complaint to determine if they state a cause of action for negligence. *Deminski v. State Bd. of Educ.*, 377 N.C. 406, 2021-NCSC-58, ¶ 12.

¶ 77 Plaintiffs have a cause of action under the State Tort Claims Act (STCA) to sue "departments, institutions and agencies of the State" when the claim "arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority." N.C.G.S. § 143-291(a) (2021). However, in this case, the conduct of the Department of Health and Human Services (DHHS) employees that caused plaintiffs' alleged injury was intentional conduct and thus does not meet the

standard required for negligence claims. *See Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709 (1988) ("To establish actionable negligence, plaintiff must show that: (1) defendant failed to exercise due care in the performance of some legal duty owed to plaintiff under the circumstances; and (2) the negligent breach of such duty was the proximate cause of the injury.").

¶ 78 The "overall goal" of the STCA was to "give greater access to the courts to plaintiffs . . . [that] were injured by the State's negligence." *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 11 (2012). This Court previously has held that the STCA applies to cases involving state agencies. For example, we have held that the STCA applies to actions taken by an employee of the State Ports Authority, the North Carolina Department of Environment and Natural Resources, the Department of Labor, the Department of Transportation and the Department of Health and Human Services. *See Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 537 (1983) (determining the Industrial Commission had jurisdiction because the STCA applied to negligent actions taken by an employee of the State Ports Authority); *Myers v. McGrady*, 360 N.C. 460, 467 (2006) ("We hold that the public duty doctrine applies to negligence claims filed under the [STCA] against [the North Carolina Department of Environment and Natural Resources] for alleged mismanagement of forest fires."); *Stone v. N.C. Dep't of Lab.*, 347 N.C. 473, 481–83 (1998) (determining the public duty doctrine applies to cases under the STCA and applying it to a case involving negligence by the Department of Labor for not inspecting a food plant); *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 331, 333 (1982) (determining that the trial court did not err by denying motions to dismiss a complaint on grounds that Department of Transportation was immune under the doctrine of sovereign immunity and determining the STCA applies to third-party complaints); *Multiple Claimants v. N.C. Dep't of Health & Hum. Servs.*, 361 N.C. 372, 379 (2007) (determining the public duty doctrine did not apply to a claim arising under the STCA against DHHS for the death of four inmates following a fire at a county jail).

¶ 79 However, to bring a claim under the STCA, a party must prove the standard elements of negligence, which include duty, breach, causation, and damages. *Bolkhir*, 321 N.C. at 709 ("Under the [STCA], negligence is determined by the same rules as those applicable to private parties."). "The [STCA] does not give [courts] jurisdiction to award damages based on intentional acts." *Frazier v. Murray*, 135 N.C. App. 43, 48 (1999) (citing *Jenkins v. Dep't of Motor Vehicles*, 244 N.C. 560 (1956)). Intentional acts are also legally distinguishable from negligent acts. *Id.*

¶ 80 Our Court has not decided a case involving intentional actions taken by regulatory agencies, but the Court of Appeals has done so twice. In *Williams v. North Carolina Department of Justice, Criminal Standards Division*, 273 N.C. App. 209, 212 (2020), the Court of Appeals held that the CEO of a company providing traffic control services that was subjected to regulatory action could not bring a claim against the agency. There, the court expressed that it was "well-settled" that the STCA does not permit recovery for intentional acts like the alleged regulatory action at issue in that case. *Id.* (quoting *Fennell v. N.C. Dep't of Crime Control & Pub. Safety*, 145 N.C. App. 584, 592 (2001)). Similarly, in *Frazier*, 135 N.C. App. 43, the Disciplinary Hearing Commission of the North Carolina State Bar pursued criminal contempt charges against a disbarred attorney who continued to practice law in violation of multiple orders. *Id.* at 45. The attorney was imprisoned and filed a tort claim against the Commission and its members for false imprisonment and intentional infliction of emotional distress. *Id.* at 46. There, the Court of Appeals concluded that "[i]njuries intentionally inflicted by employees of a state agency are not compensable under the [STCA]." *Id.* at 48. Both *Williams* and *Frazier* are instructive in determining the case at bar.

¶ 81 DHHS's regulatory acts are analogous to those in *Williams* and *Frazier* because they involved intentional regulatory acts. These actions are not accidents, inadvertent, unintended, or the result of a failure to use reasonable care. *See Yancey v. Lea*, 354 N.C. 48, 53 (2001) ("Negligence, a failure to use due care, *be it slight or extreme*, connotes inadvertence." (quoting *Hinson v. Dawson*, 244 N.C. 23, 28 (1956))). Rather, they were actions taken intentionally by a state agency to enforce laws passed by the General Assembly under N.C.G.S. §§ 131D-21 (providing residents' rights), 131D-34 (providing administrative penalties), 131D-2.7 (providing for suspension of admission). DHHS acted intentionally in determining Cedarbrook's violations under N.C.G.S. § 131D-21. When it classified those violations and determined what penalties should apply it acted pursuant to N.C.G.S. § 131D-34. And when DHHS subsequently suspended admissions at Cedarbrook, it acted intentionally pursuant to N.C.G.S. § 131D-2.7. In carrying out these regulatory actions, DHHS acted intentionally and cannot be held liable under a theory of negligence or the STCA. *See Williams*, 273 N.C. App. at 213–15; *Frazier*, 135 N.C. App. at 46. Thus, I agree with the majority that Cedarbrook has failed to assert a viable claim for negligence.

¶ 82 It is unnecessary to reach the many other issues raised by the parties. Indeed, it is beyond the scope of this case to opine on the question of whether state employees engaged in regulatory actions are subject to

the STCA for their negligence because in this case, the acts that allegedly caused plaintiffs' injuries were intentional acts. It is also unnecessary to interpret the "private person" language of the STCA or overrule any portion of the *Nanny's Korner* decision. *See Nanny's Korner Day Care Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 264 N.C. App. 71 (2019). Therefore, I do not join in any portion of the majority opinion in this matter and join in the result only, reversing the decision of the Court of Appeals and remanding for dismissal of plaintiffs' affidavit for failure to assert a claim of negligence against DHHS.

Chief Justice NEWBY dissenting.

¶ 83 What is the remedy when a state actor negligently regulates a business causing significant operational and financial disruption or the business's closure? Potential remedies include three approaches: (1) a constitutional tort under article I, section 1 of the North Carolina Constitution (fruits of their own labor)[1]; (2) an action for negligence under the State Tort Claims Act (STCA); or (3) an administrative review under the Administrative Procedure Act (APA). The majority's decision removes the STCA as a potential option. Specifically, here we consider whether a state-regulated entity may bring a negligence claim against its state regulator under the STCA or whether the entity is limited to an administrative remedy under the APA and/or a constitutional tort claim. Because the STCA provides a limited waiver of the state's sovereign immunity, this Court has previously allowed regulated claimants to bring certain negligence claims challenging the state's regulatory activities under the STCA. Further, since state regulators are granted broad regulatory authority, it is appropriate to require regulators to conduct investigations and use their authority in a non-negligent manner. As such, state regulators owe a duty of care to both the regulated entities subject to their authority and to the individuals whom the regulations are designed to protect. Additionally, the availability of an administrative remedy under the APA does not preclude a claimant from seeking a

1. We also recognize that a regulatory taking under article I, section 19 (law of the land) is a potential remedy. Article I, section 19 of our state constitution provides that "[n]o person shall be . . . deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. As a result of the state's largely unchecked regulatory authority, the state's significant interference with a regulated entity could rise to the level of a constitutional taking. In the present case, counsel for the North Carolina Department of Health and Human Services (DHHS) did not have an answer at oral argument when asked at what point the state's regulatory actions constitute a taking. *See* Oral Argument at 1:01:42, Cedarbrook Residential Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs. (No. 36A22), https://www.youtube.com/watch?v=5CThlVBanJY.

more adequate remedy under the STCA. Accordingly, the decision of the Court of Appeals should be affirmed. I respectfully dissent.

¶ 84 Plaintiff Cedarbrook Residential Center, Inc. (Cedarbrook) is a licensed adult care home in Nebo, North Carolina, that serves residents with disabilities and mental illnesses. Cedarbrook is owned by plaintiff Fred Leonard.[2] Defendant North Carolina Department of Health and Human Services, Division of Health Service Regulation, Adult Care Licensure Section (DHHS) is the state agency charged with licensing, inspecting, and enforcing the provisions that govern adult care homes such as Cedarbrook. Specifically relevant to this case, Cedarbrook serves a "challenging disabled population" and works to provide a "safe and stable environment" that is supportive of its residents' mental health challenges.

¶ 85 In November of 2015, DHHS conducted an extensive investigation of Cedarbrook and interviewed its residents and employees to ensure the facility was operating in compliance with the governing regulations.[3] At the time of the investigation, Cedarbrook was a Four Star facility, the highest rating available under DHHS's rating system. Utilizing investigatory techniques inappropriate for the residents in plaintiffs' type of facility, DHHS, however, found numerous alleged violations and recorded its findings in "Statements of Deficiencies" (statements) that exceeded 400 pages. The statements largely consisted of copies of the surveyor notes from the investigations and interviews, rather than reasoned agency findings. The statements recorded deficiencies in supervision, staffing, and sanitation, among many other areas. Based on the identified deficiencies, DHHS issued financial penalties and suspended Cedarbrook from admitting new residents.

¶ 86 In May of 2016, DHHS granted Cedarbrook a provisional operating license, but DHHS later found that Cedarbrook failed to present acceptable plans to cure the deficiencies. Accordingly, DHHS issued a Directed Plan of Protection requiring Cedarbrook to implement increased staffing and administrative measures. As a result of DHHS's suspension order, provisional license, and regulatory actions, Cedarbrook's occupancy dropped more than 50%, the facility incurred additional costs to comply

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2. Plaintiffs Cedarbrook Residential Center and Fred Leonard are collectively referred to as "Cedarbrook."

3. The majority repeatedly discounts the relevance of the allegations asserted in plaintiffs' affidavit. With a motion to dismiss, however, we are to treat the factual allegations as true and view the facts in the light most favorable to the non-moving party. A brief review of the relevant facts here is important to understand the duty of state regulators to proceed in a reasonable manner. Perhaps the majority chooses to discount the facts because the facts illustrate a breach of the duty of reasonable care.

with the mandates of the Directed Plan of Protection, Cedarbrook's revenues declined, and Mr. Leonard lost a potential sale of the facility.

¶ 87 Cedarbrook initially challenged DHHS's regulatory actions by filing a contested case in the Office of Administrative Hearings (OAH). OAH entered a stay enjoining DHHS's suspension order. DHHS, however, continued to issue proposed penalties against Cedarbrook exceeding $340,000. Prior to the hearing, the parties settled, and DHHS agreed to withdraw all of the agency actions it had taken against Cedarbrook.

¶ 88 On 25 October 2018, plaintiffs filed an Affidavit and Verified Claim for Damages against DHHS in the Industrial Commission asserting negligence claims based on DHHS's investigative and regulatory actions.[4] The Verified Claim for Damages alleges that:

> [DHHS] breached the duty owed to [Cedarbrook and Mr. Leonard] in (1) conducting the surveys of Cedarbrook; (2) writing and publishing the Statements of Deficiencies; (3) issuing the Directed Plan of Protection against Cedarbrook, and leaving it in place for nearly five months; and (4) issuing the Erroneous Suspension, and leaving it in place for nearly eight months.

Plaintiffs' Verified Claim for Damages specifically details that the manner in which DHHS conducted the investigations, the methods DHHS used in performing the interviews, and the process the surveyors employed in drafting the statements were unreliable, aggressive, and harmful to the residents. Plaintiffs allege that the DHHS surveyors "double-teamed" residents, asked suggestive questions, and intruded on the residents' privacy. Additionally, plaintiffs allege that the summary nature of drafting the statements was unreliable and resulted in mischaracterizations, conclusory statements, and unsupported allegations. As a result of DHHS's alleged negligent regulatory activity, plaintiffs claim damages in excess of $1,000,000 for lost business income and the loss of a potential sale of the facility.

¶ 89 On 8 January 2019, DHHS filed a response and motion to dismiss pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina

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4. The concurring opinion characterizes plaintiffs' complaint as alleging intentional acts and thus contends that plaintiffs' claims are not cognizable under the STCA. The essence of plaintiffs' allegations, however, is not that the regulators intentionally sought to harm Cedarbrook but that they were negligent in their investigation, which resulted in negligent regulation.

Rules of Civil Procedure and a motion to stay discovery. The Deputy Commissioner denied DHHS's motion to dismiss on 13 March 2019. DHHS appealed to the Full Commission, which approved DHHS's request for an interlocutory appeal on 9 May 2019. The Full Commission held a hearing on 10 September 2019 and entered an order affirming the denial of DHHS's motion to dismiss on 6 November 2020. The Full Commission concluded that the STCA "waived sovereign immunity, and [Cedarbrook] complied with the requirements of [invoking] the [STCA] in filing [its] Affidavit." The Full Commission further concluded that the public duty doctrine did not bar plaintiffs' claims and that plaintiffs pled a valid claim for negligence. DHHS appealed to the Court of Appeals.

¶ 90 On appeal, DHHS argued, in relevant part, that the Industrial Commission erred by denying DHHS's motion to dismiss because the APA, rather than the STCA, provides plaintiffs with an adequate state remedy. *Cedarbrook Residential Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 281 N.C. App. 9, 2021-NCCOA-689, ¶ 13. The Court of Appeals, relying on *Nanny's Korner Day Care Center, Inc. v. North Carolina Department of Health and Human Services*, 264 N.C. App. 71, 80, 825 S.E.2d 34, 41, *appeal dismissed, disc. rev. denied*, 372 N.C. 700, 831 S.E.2d 89 (2019), held that a regulated entity does have an adequate state remedy under the STCA. *Cedarbrook*, ¶ 16. The Court of Appeals reasoned that "the availability of an administrative remedy [through the APA] does not preclude plaintiff from seeking a remedy under the STCA" for the negligent actions of a state regulator. *Id.* ¶ 14. The Court of Appeals thus affirmed the Full Commission's order denying DHHS's motion to dismiss. *Id.* ¶ 33.

¶ 91 The dissenting judge disagreed that Cedarbrook could seek a remedy under the STCA. According to the dissenting judge, the "regulatory review function is clearly assigned under the [APA] to the [OAH]"; therefore, "[c]laims challenging an agency's regulatory actions are properly heard under the [APA]." *Id.* ¶¶ 39, 41 (Tyson, J., dissenting). As such, because of the administrative avenue provided through the APA, the "Industrial Commission cannot waive North Carolina's sovereign immunity under the STCA." *Id.* ¶ 40. The dissenting judge thus would have held that the relevant portion of *Nanny's Korner* discussing the availability of a remedy under the STCA is dicta. *Id.* ¶¶ 68–69. DHHS appealed to this Court based on the dissenting opinion.

¶ 92 The controlling question here is whether the STCA provides for a limited waiver of the state's sovereign immunity that allows a regulated entity to challenge a state regulator's negligent actions or whether the entity is limited to an administrative remedy and/or a constitutional

claim. This Court reviews the denial of a motion to dismiss on the basis of sovereign immunity de novo. *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013). Additionally, when reviewing a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, this Court treats the "factual allegations contained in [the] affidavit before the Industrial Commission as true." *Hunt v. N.C. Dep't of Lab.*, 348 N.C. 192, 194, 499 S.E.2d 747, 748 (1998) (citation omitted).

¶ 93 The doctrine of sovereign immunity "is firmly established in the law of North Carolina." *Lewis v. White*, 287 N.C. 625, 642, 216 S.E.2d 134, 145 (1975). This Court has long held that "an action cannot be maintained against [a state agency] unless it consents to be sued or upon its waiver of immunity, and that *this immunity is absolute and unqualified*." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 534, 299 S.E.2d 618, 625 (1983).

¶ 94 The STCA expressly provides a limited waiver of the state's sovereign immunity. It permits claims that arise:

> as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

N.C.G.S. § 143-291(a) (2021). The purpose of the STCA is to "give greater access to the courts to plaintiffs in cases in which they [are] injured by the [s]tate's negligence." *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 11, 727 S.E.2d 675, 683 (2012). Further, the STCA charges the North Carolina Industrial Commission with "hearing and passing upon [such] tort claims against . . . agencies of the State." N.C.G.S. § 143-291(a). To invoke the jurisdiction of the Industrial Commission under the STCA, the claimant need only file an affidavit in duplicate, containing the following:

> (1) The name of the claimant;
>
> (2) The name of the department, institution or agency of the State against which the claim is asserted, and the name of the State employee upon whose alleged negligence the claim is based;
>
> (3) The amount of damages sought to be recovered;

> (4) The time and place where the injury occurred;
>
> (5) A brief statement of the facts and circumstances surrounding the injury and giving rise to the claim.

N.C.G.S. § 143-297 (2021). Moreover, the STCA "incorporate[s] the common law of negligence." *Stone v. N.C. Dep't of Lab.*, 347 N.C. 473, 479, 495 S.E.2d 711, 715 (1998). As such, "negligence is determined by the same rules as those applicable to private parties." *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988).

¶ 95 The majority contends the STCA is inapplicable because private persons do not exercise regulatory power; therefore, the plain language of the STCA forecloses plaintiffs' claims. The majority holds that plaintiffs' negligence claim is not cognizable under the STCA and that a state regulator does not owe a duty of care to a regulated entity. Finally, the majority contends that the STCA is not the proper statutory avenue to challenge the state's regulatory actions because the statutes governing adult care homes allow entities to seek reversal of the state's regulatory actions under the APA through the OAH. According to the majority, because the APA provides for a remedy through the OAH, plaintiffs are precluded from seeking a remedy for DHHS's negligent regulatory actions under the STCA.

¶ 96 In holding that a negligence claim by a regulated entity against its state regulator is not cognizable under the STCA, the majority misreads *Nanny's Korner* and disregards its clear holding. In *Nanny's Korner*, DHHS was notified of a substantiated sexual abuse allegation at a daycare. *Nanny's Korner*, 264 N.C. App. at 72, 825 S.E.2d at 36. DHHS issued the daycare a written warning, and the daycare informed its customers of the allegation. *Id.* at 73–75, 825 S.E.2d at 37–38. As a result, the daycare lost business and was forced to close. *Id.* at 74–75, 825 S.E.2d at 38. After initially proceeding through the OAH, the daycare brought a negligence claim against DHHS under the STCA for failing to conduct an independent investigation of the allegation. *Id.* at 73–75, 825 S.E.2d at 37–38. The Industrial Commission, however, dismissed the daycare's negligence claim because the statute of limitations had run. *Id.* at 75, 825 S.E.2d at 38. Notably, in addressing the daycare's constitutional claim against DHHS, the Court of Appeals concluded that the constitutional claim failed because the daycare "had an adequate state remedy in the form of the Industrial Commission through the Torts Claim Act." *Id.* at 80, 825 S.E.2d at 41. Thus, the daycare could have pursued its negligent regulation claim against DHHS under the STCA had the claim been

timely filed. *See also Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 340, 678 S.E.2d 351, 355 (2009) (allowing the plaintiff to bring a constitutional claim when the plaintiff's negligence claim did "not provide an adequate remedy at state law [because] governmental immunity [stood] as an absolute bar"); *Helm v. Appalachian State Univ.*, 363 N.C. 366, 677 S.E.2d 454 (2009) (per curiam).

¶ 97 The majority here contends that the court in *Nanny's Korner* "did not fully examine the extent, if any, to which the [STCA] permits the type of claim that the daycare center pursued." However, in order to dispose of the daycare's constitutional claim, the court had to first consider the alternative remedies and address the availability of the daycare's negligence claim against DHHS under the STCA. The court explained that the STCA "explicitly grants authority to the North Carolina Industrial Commission to hear tort claims against State agencies." *Nanny's Korner*, 264 N.C. App. at 80, 825 S.E.2d at 41. Pivotal to the court's dismissal of the constitutional claim was its holding of a viable statutory remedy under the STCA had the negligence claim been timely filed. *See Craig*, 363 N.C. at 339–40, 678 S.E.2d at 355; *Helm*, 363 N.C. 366, 677 S.E.2d 454. The majority here discounts this important step and accordingly disregards that the court clearly expressed that the STCA is an available avenue for a regulated entity's negligence claim.

¶ 98 This Court has similarly recognized that negligence claims against state regulators challenging the state's regulatory activity are within the scope of the STCA. In *Multiple Claimants v. North Carolina Department of Health and Human Services*, for instance, the plaintiffs filed claims under the STCA alleging that DHHS was negligent in performing their duties of inspecting the jails. 361 N.C. 372, 373, 646 S.E.2d 356, 357 (2007). This Court held that DHHS had a duty of care to inspect the jails and ensure the facilities were complying with the regulatory requirements. *Id.* at 378, 646 S.E.2d at 361. As such, this Court allowed the plaintiffs to bring negligence claims challenging DHHS's regulatory actions under the STCA. *Id.* at 379, 646 S.E.2d at 361; *see also Ray*, 366 N.C. at 2–3, 727 S.E.2d at 677–78 (concluding that the plaintiffs' claims for negligent design and execution of narrowing a roadway and negligent failure to repair the road by the Department of Transportation are within the scope of the STCA); *Gammons v. N.C. Dep't of Hum. Res.*, 344 N.C. 51, 54, 472 S.E.2d 722, 724 (1996) (holding that the Industrial Commission had jurisdiction to hear a claim for the negligent investigation of child abuse by a state agency).[5]

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5. Many Court of Appeals decisions have similarly held that negligence claims against state agencies are within the scope of the State Tort Claims Act. *See Est. of Tang*

¶ 99 Accordingly, these cases illustrate instances in which regulatory activities have been held to be included under the STCA. The "the State . . . , *if a private person*" language includes state regulators. N.C.G.S. § 143-291(a) (emphasis added). The majority contends that "[p]rivate persons do not, of course, exercise regulatory power." As shown, this Court has previously recognized, however, instances where the state is liable for performing regulatory functions that private persons do not perform. *See Multiple Claimants*, 361 N.C. at 378, 646 S.E.2d at 360 (DHHS regulating and inspecting jails); *Ray*, 366 N.C. at 3, 727 S.E.2d at 677–78 (Department of Transportation designing and executing the narrowing of a roadway). Thus, the focus is not so much on the status of the government actor. The elements of negligence are the same under the STCA, and "negligence is determined by the same rules as those applicable to private parties." *Bolkhir*, 321 N.C. at 709, 365 S.E.2d at 900. Therefore, all actors are required to act in a non-negligent manner. Here DHHS's conduct and the manner in which it performed the inspections expose it to liability, rather than its status as a government actor.

¶ 100 Next, the majority holds that state regulators do not owe a duty of care to regulated entities. The majority emphasizes the "critical" distinction between the duty of care that state regulators owe to individuals, who benefit from the regulations, and entities, which are regulated. The law of negligence, however, makes no such distinction. State regulators owe a duty of care to those subject to the state's regulatory authority and to those whom the state's actions are designed to protect. Thus, state regulators owe a duty of care to regulated entities and to individuals. It is not exclusively one or the other. The Court of Appeals' decision in *Crump v. North Carolina Department of Environment and Natural Resources*, 216 N.C. App. 39, 715 S.E.2d 875 (2011), is illustrative.

¶ 101 In *Crump*, the state negligently issued a septic tank permit, and the landowners recovered damages under the STCA. *Crump*, 216 N.C. App. at 39–40, 715 S.E.2d at 876–77.[6] The state's duty of care in properly

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v. N.C. Dep't of Health & Hum. Servs., 2021-NCCOA-611 (unpublished) (negligent enforcement of regulations governing an adult care home by DHHS); *Crump v. N.C. Dep't of Env't & Nat. Res.*, 216 N.C. App. 39, 715 S.E.2d 875 (2011) (negligent inspection of land for a septic tank permit by the Department of Environment and Natural Resources); *Haas v. Caldwell Sys.*, 98 N.C. App. 679, 392 S.E.2d 110 (1990) (negligent inspecting and monitoring of an incinerator); *Zimmer v. N.C. Dep't of Transp.*, 87 N.C. App. 132, 360 S.E.2d 115 (1987) (negligent designation of a detour route by the Department of Transportation).

6. *Crump* also demonstrates a situation in which "the State . . . , if a private person," is liable under the STCA. *See* N.C.G.S. § 143-291(a) (2021). Private persons do not inspect and issue septic tank permits. The Court of Appeals, however, held that the plaintiffs could recover for the state's negligent regulatory actions.

inspecting and issuing the permit extended to the landowners, those directly subject to the state's regulatory authority, as well as to the surrounding property owners, those who would be impacted by an improper septic system. Similarly, here, the state's duty arising from the inspection and regulation of Cedarbrook extends to the facility, the entity subject to the state's regulatory authority, and to the individuals living at the facility, those protected by regulations.

¶ 102 The majority also contends that recognizing that state regulators owe a duty to regulated entities would create conflicting duties of care, which are "inherently problematic."[7] In support, the majority relies on *Koch v. Bell, Lewis & Associates*, 176 N.C. App. 736, 740, 627 S.E.2d 636, 638–39 (2006), which declined to recognize the existence of a duty because of the "conflicting loyalties" an insurance adjuster owes to both the claimant and the insurer. Here, however, the state owes the same duty of care to both Cedarbrook and the residents at the facility. DHHS can ensure Cedarbrook is complying with the governing regulations by conducting a fair investigation while also satisfying their duties to the residents. Thus, unlike in *Koch*, there are no conflicting duties or loyalties that prevent DHHS from extending a duty of care to both the facility and the individuals. The state's duty to ensure that regulated entities are complying with the governing regulations does not conflict with the state's duty to perform the investigations in a non-negligent manner or treat the residents properly.

¶ 103 The majority concedes that "it is theoretically possible to find a middle ground between too much regulation and no regulation at all." In other words, there can be state action that complies with the state's duty to all parties involved. A non-negligent action ensures compliance with the duty to enforce regulations which protect those designed to be protected and is fair to the regulated entity. The majority contends that the General Assembly, rather than the judicial branch, should be responsible for identifying the "middle ground." Maintaining a "middle ground" by requiring state regulators to conduct investigations and exercise their regulatory authority in a non-negligent manner, however, creates a level

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7. The majority contends that the facts in *Multiple Claimants* illustrate the conflicting duties "conundrum" that regulatory agencies would face if regulatory negligence claims were permitted under the STCA. In applying plaintiffs' position here to the facts of *Multiple Claimants*, the majority assumes that the county in *Multiple Claimants* would challenge the state's findings as "unreasonable" upon the state's "proper inspection of the jail." To the contrary, the challenge is to the evidence-gathering process, or the manner in which the investigation is conducted, as well as the state's ultimate findings and identified violations. Thus, plaintiffs' claim here may be more appropriately characterized as a negligent regulation claim arising from a negligent investigation.

playing field. It ensures that state regulators treat all entities equally in the performance of their regulatory activity, while properly protecting those whom the statutes were designed to protect.

¶ 104 Because the General Assembly has granted the state significant regulatory authority over entities, state regulators, who can diminish or destroy a regulated business, should be required to conduct investigations and exercise their authority in a non-negligent manner. Proving negligence in the regulation of a business may be difficult given the discretion granted to the state agency. Nonetheless, in the extraordinary circumstance where the regulator is not justified in proceeding in the manner adopted, the injury caused by the regulator's negligence should be compensable. Thus, when a state agency is granted significant regulatory authority, the regulator should be held to exercise that power, over both the regulated entity and the individuals that the state's actions are intended to protect, in a non-negligent manner.

¶ 105 Here DHHS owes a duty of care to Cedarbrook, as well as the individuals living at the adult care home. Viewing the factual allegations in the affidavit as true and in the light most favorable to plaintiffs, Cedarbrook incurred substantial costs, experienced a significant decrease in revenue, and was required to revise many of its operating procedures as a result of DHHS's alleged negligent regulatory actions.[8] Accordingly, as provided in *Nanny's Korner* and as illustrated by our case law, the STCA's limited waiver of the state's sovereign immunity provides entities, such as Cedarbrook, with a statutory avenue under the STCA to bring a negligence claim against DHHS and seek compensable damages through the Industrial Commission. Because plaintiffs properly invoked the Industrial Commission's jurisdiction through their affidavit, plaintiffs should be able to pursue their negligence claims under the STCA.

¶ 106 Further, the availability of an administrative remedy through the OAH does not preclude claimants from seeking an adequate remedy under the STCA through the Industrial Commission. The statutory provisions governing adult care homes allow the facilities to challenge penalties and suspensions through an administrative hearing. *See* N.C.G.S. § 131D-2.7(d)(4) (2021) (contesting a suspension of admissions though an administrative hearing as provided by the APA); N.C.G.S. § 131D-34(e) (2021) (contesting a penalty through an administrative hearing as provided by the APA). The provisions, however, do not indicate that

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8. Moreover, Cedarbrook's residents suffered significant harm due to DHHS's intrusive investigation and interview methods.

proceeding under the APA through the OAH is an exclusive remedy. If the General Assembly intended to provide a mutually exclusive remedy, rather than a dual remedy, the legislature could have clarified this statutory intersection. Instead, the legislature has remained silent, and the courts have consistently interpreted the STCA to include challenges to the state's negligent regulatory activity.

¶ 107 Our state constitution, unlike the federal constitution, expressly provides that individuals are entitled to the fruits of their own labor as an inalienable right. N.C. Const. art. I, § 1. As a result of the majority's decision, a regulated entity will be forced to bring a constitutional tort claim when a state agency infringes upon its ability to operate and conduct business. Despite conceding that there may be instances when there is "too much regulation[,]" the majority's decision removes the appropriate statutory avenue for entities to seek recovery for negligence by state regulators under the STCA. Consequently, the majority's decision thwarts the very purpose of the STCA, which was enacted to provide "greater access to the courts to plaintiffs . . . [who have been] injured by the [s]tate's negligence." *Ray*, 366 N.C. at 11, 727 S.E.2d at 683. As such, the majority's decision also broadens the state's regulatory authority. Now, state regulators, who possess significant regulatory power over businesses, may conduct investigations of regulated entities with limited accountability. The STCA provided such accountability.

¶ 108 In summary, the majority's decision removes the STCA as a potential avenue for regulated entities contesting the state's negligent actions and forces entities to pursue an administrative remedy and/or a constitutional challenge. Because of the broad regulatory authority granted to state agencies, regulators should be required to exercise that authority, over both the regulated entity and the individuals protected by the regulations, in a non-negligent manner. The Court of Appeals thus properly affirmed the Full Commission's order denying DHHS's motion to dismiss. Accordingly, I respectfully dissent.

Justice BERGER joins in this dissenting opinion.

HARPER v. HALL

[383 N.C. 89, 2022-NCSC-121]

Editor's Note: This opinion was superseded on rehearing by the opinion of the Supreme Court of North Carolina in *Harper v. Hall*, 384 N.C. 292, filed on 28 April 2023. In the same 28 April 2023 opinion, the Supreme Court of North Carolina also overruled its prior opinion in *Harper v. Hall*, 380 N.C. 317 (2022).

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

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR RALPH HISE, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, TIMOTHY K. MOORE; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, PHILIP E. BERGER; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and DAMON CIRCOSTA, in his official capacity

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

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR RALPH E. HISE, JR., in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; REPRESENTATIVE TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives; SENATOR PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, in his official capacity as Chairman of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of the North Carolina State Board of Elections; JEFF CARMON III, in his official capacity as Member of the North Carolina State Board of Elections; STACY EGGERS IV, in his official capacity as Member of the North Carolina State Board of Elections; TOMMY TUCKER, in his official capacity as Member of the North Carolina State Board of Elections; and KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections

No. 413PA21

Filed 16 December 2022

1. Appeal and Error—motion to dismiss own appeal—denied—legislative redistricting plans—constitutionality—applicability to future elections

In a case involving legislative redistricting plans, where legislative defendants appealed to the Supreme Court from the trial court's ruling regarding the constitutionality of remedial redistricting maps, but then filed a motion to dismiss their own appeal on the basis that the election to which the remedial maps primarily applied had already taken place, the Supreme Court denied the motion—after noting that it had been filed just after legislative defendants' petition for certiorari to the United States Supreme Court was granted—in order to resolve an issue of great significance to the jurisprudence of this state.

2. Elections—legislative redistricting—constitutional compliance—whether fundamental right to substantially equal voting power is protected

The Supreme Court reaffirmed the constitutional standard articulated in *Harper v. Hall*, 380 N.C. 317 (2022), that, in order for redistricting maps to satisfy constitutional requirements, they must uphold voters' fundamental rights to vote on equal terms and to have substantially equal voting power. Assessment of evidence under this standard requires a broad consideration of constitutionality rather than a narrow focus on any particular statistical datapoints.

3. Elections—legislative redistricting—remedial congressional plan—lacking constitutional compliance—remedy

The trial court's determination that the legislature's proposed remedial congressional redistricting plan (RCP) did not meet the constitutional standard of protecting voters' fundamental rights to vote on equal terms and to substantially equal voting power—and therefore failed strict scrutiny—was supported by the court's findings of fact, which were in turn supported by competent evidence regarding the plan's partisan asymmetry. The trial court's adoption of the appointed Special Masters' proposed modified RCP was an appropriate remedy pursuant to N.C.G.S. § 120-2.4(a1), and the court's determination that the modified RCP satisfied the constitutional standard was supported by its findings of fact and competent evidence.

4. Elections—legislative redistricting—remedial state house plan—satisfaction of constitutional standards

The trial court's approval of the legislature's proposed remedial state house redistricting plan (RHP)—after determining that the

RHP complied with constitutional standards by protecting voters' fundamental rights to vote on equal terms and to substantially equal voting power and was therefore presumptively constitutional—was supported by the court's unchallenged findings of fact, which were in turn supported by competent evidence.

5. Elections—legislative redistricting—remedial state senate plan—lacking compliance with constitutional standards—remand required

The Supreme Court reversed the trial court's order approving the legislature's proposed remedial state senate redistricting plan (RSP) where certain of the trial court's findings were not supported by competent evidence and other findings served to undermine, rather than support, the trial court's conclusion that the RSP was presumptively constitutional. The matter was remanded to the trial court to oversee the creation of a modified RSP that satisfies the constitutional standard regarding partisan symmetry.

6. Elections—legislative redistricting—special masters and advisors—denial of motion to disqualify—abuse of discretion analysis

After the Supreme Court determined that redistricting maps constituted illegal partisan gerrymanders and remanded to the trial court to oversee the redrawing of those maps, and after the trial court appointed special masters to assist it in evaluating the legislature's proposed remedial maps, the trial court did not abuse its discretion when it denied the legislative defendants' motion to disqualify two of the special masters' advisors, who had a limited role in shaping the special masters' recommendations and whose ex parte communications with the special masters were due to expediency and involved only publicly available information.

7. Elections—legislative redistricting—remedial plans—equal protection challenge—threshold constitutional standard

In a legislative redistricting case in which, after remand, the trial court approved the legislature's proposed remedial house redistricting plan (RHP), an equal protection challenge to that plan—on the grounds that the plan would lead to vote dilution for Black voters—had no merit because the trial court's determination that the RHP satisfied the constitutional standard of upholding voters' fundamental right to vote on equal terms—which involved equal protection principles—was supported by the court's findings of fact, which were in turn supported by competent evidence, including that

the legislature conducted a racially polarized voting analysis which demonstrated that the remedial plan was constitutionally sufficient.

Chief Justice NEWBY dissenting.

Justices BERGER and BARRINGER join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-27(b)(1) from the unanimous decision of a three-judge panel entered on 23 February 2022 in the Superior Court, Wake County, approving Legislative Defendants' Remedial House and Senate Plans, rejecting their Remedial Congressional Plan, and adopting a Modified Remedial Congressional Plan. Heard in the Historic 1767 Chowan County Courthouse on 4 October 2022.

Patterson Harkavy LLP, by Burton Craige, Narendra K. Ghosh, and Paul E. Smith; Elias Law Group LLP, by Lalitha D. Madduri, Jacob D. Shelly, Graham W. White, and Abha Khanna; and Arnold & Porter Kaye Scholer LLP, by Elisabeth S. Theodore, R. Stanton Jones, and Samuel F. Callahan, for Harper Plaintiffs.

Robinson, Bradshaw & Hinson, P.A., by John R. Wester, Adam K. Doerr, Stephen D. Feldman, and Erik R. Zimmerman; and Jenner & Block LLP, by Sam Hirsch, Jessica Ring Amunson, Karthik K. Reddy, and Urja Mittal, for Plaintiff North Carolina League of Conservation Voters.

Southern Coalition for Social Justice, by Allison J. Riggs, Hilary H. Klein, Mitchell Brown, Katelin Kaiser, Jeffrey Loperfido, and Noor Taj; and Hogel Lovells US LLP, by J. Tom Boer and Olivia T. Molodanof, for Plaintiff Common Cause.

Nelson Mullins Riley & Scarborough LLP, by Phillip J. Strach, Thomas A. Farr, John Branch, and Alyssa M. Riggins; and Baker & Hostetler LLP, by E. Mark Braden and Katherine L. McKnight, for Legislative Defendants.

North Carolina Department of Justice, by Amar Majmundar, Senior Deputy Attorney General, Terence Steed, Special Deputy Attorney General, Mary Carla Babb, Special Deputy Attorney General, and Stephanie Brennan, Special Deputy Attorney General, for State Defendants.

HUDSON, Justice.

¶ 1 The foundational democratic principles of equality and popular sovereignty enshrined in our Constitution's Declaration of Rights vest in the people of this state the fundamental right to vote on equal terms. N.C. Const. art. I, §§ 1 (equality and rights of persons), 2 (sovereignty of the people), 10 (free elections), 12 (freedom of assembly), 14 (freedom of speech), 19 (equal protection of the laws); *see Harper v. Hall*, 380 N.C. 317, 2022-NCSC-17, ¶ 158–59 (summarizing these principles and rights). This fundamental right "encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views." *Harper*, ¶ 160. Put differently, it requires that "voters of all political parties [have] substantially equal opportunity to translate votes into seats." *Id.* ¶ 163. Therefore, when a districting plan systematically makes it harder for individuals of one political party to elect a governing majority than individuals of another party of equal size based upon that partisanship, it deprives a voter of his or her fundamental right to equal voting power. *Id.* "[S]uch a plan is subject to strict scrutiny and is unconstitutional unless the General Assembly can demonstrate that the plan is 'narrowly tailored to advance a compelling governmental interest.' " *Id.* ¶ 161 (citing *Stephenson v. Bartlett*, 355 N.C. 354, 377 (2002)).

¶ 2 In accordance with these principles, on 4 February 2022, this Court struck down the General Assembly's 2021 Congressional Map, State Senate Map, and State House Map as unconstitutional partisan gerrymanders that failed strict scrutiny. *See generally Harper*, 2022-NCSC-17. In doing so, we noted a few potential statistical measures that could be used by the General Assembly and reviewing courts in determining whether redistricting plans demonstrate "a significant likelihood . . . [of] giv[ing] the voters of all political parties substantially equal opportunity to translate votes into seats across the plan." *Id.* ¶ 163. However, we expressly declined to "identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander." *Id.* Rather than relying on certain measures dispositively, we emphasized that ultimately "[w]hat matters here . . . is that each voter's vote carries roughly the same weight when drawing a redistricting plan that translates votes into seats in a legislative body." *Id.* 169.

¶ 3 This was neither accident nor oversight. An individual statistical measure standing alone, though helpful, is not dispositive of constitutional compliance. Rather, it constitutes one datapoint within a broader

constellation of principles that a court may consider in reaching its ultimate constitutional determination: whether the proposed maps uphold or violate the fundamental right of all voters to vote on equal terms. *Id.* ¶¶ 163–69.

¶ 4 After determining that the 2021 Maps failed strict scrutiny, this Court gave the General Assembly the opportunity to submit remedial maps in accordance with N.C.G.S. § 120-2.4(a). *Id.* ¶ 178. We remanded the case to the trial court to oversee and assess the constitutionality of those remedial maps. *Id.* ¶ 223.

¶ 5 On 23 February 2022, the trial court issued its remedial order assessing the General Assembly's remedial maps. Therein, the trial court rejected the General Assembly's Remedial Congressional Plan but approved its Remedial House Plan and Remedial Senate Plan. The parties appealed each of these rulings to this Court.

¶ 6 Now, this Court must review the alignment of the trial court's remedial order with the foundational principles established in *Harper*. We determine that the trial court properly concluded that the Remedial Congressional Plan fell short of constitutional standards and that the Remedial House Plan met constitutional standards. These conclusions of law were supported by adequate factual findings, which were in turn supported by competent evidence. However, we hold that the trial court erred in its approval of the Remedial Senate Plan. Unlike the trial court's conclusions regarding the other plans, the trial court's conclusion of law regarding the Remedial Senate Plan lacked adequate factual findings supported by competent evidence. Indeed, the evidence dictates the opposite finding and conclusion. Therefore, we affirm the trial court's rejection of the Remedial Congressional Plan, affirm the trial court's approval of the Remedial House Plan, and reverse the trial court's approval of the Remedial Senate Plan.

¶ 7 In accordance N.C.G.S. § 120-2.4(a1), we now remand this case to the trial court to oversee the creation and adoption of a Modified Remedial Senate Plan that modifies Legislative Defendants' Remedial Senate Plan only to the extent necessary to achieve constitutional compliance. *See* N.C.G.S. § 120-2.4(a1) (2021).

¶ 8 In so doing, we expressly and emphatically reaffirm the fundamental right of citizens to vote on equal terms enshrined within our Constitution's Declaration of Rights, and this Court's constitutional responsibility and authority to assess legislative compliance therewith. *See Corum v. Univ. of N.C.*, 330 N.C. 761, 783 (1992) ("It is the state judiciary that has the responsibility to protect the state constitutional

rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State."). These principles are—and must remain—the enduring bedrock of our sacred system of democratic governance, and may be neither subordinated nor subverted for the sake of passing political expediency.

I. Factual and Procedural Background

¶ 9 A complete factual and procedural background of the liability phase of this litigation can be found in *Harper*, ¶¶ 12–93. Here, we briefly restate that background and summarize the subsequent remedial proceedings leading to the present appeal.

A. Liability Phase: 2021 Maps and *Harper I*

¶ 10 Every ten years, following the national census, the General Assembly is tasked with redrawing North Carolina's congressional and state legislative districts. *See* U.S. Const. art. I, § 4; N.C. Const. art. II, §§ 3, 5. Accordingly, on 4 November 2021, the General Assembly enacted new maps for North Carolina's congressional districts and state House of Representatives and Senate districts (2021 Maps). S.L. 2021-174, S.L. 2021-175, S.L. 2021-173; *see Harper*, 2022-NCSC-17, ¶¶ 14–18 (describing the 2021 redistricting process).

¶ 11 On 16 and 18 November 2021, NCLCV Plaintiffs[1] and Harper Plaintiffs[2] respectively filed complaints against Legislative Defendants challenging the constitutionality of the 2021 Maps under the North Carolina Constitution. Specifically, Plaintiffs asserted that the 2021 Maps engaged in extreme partisan gerrymandering and racial vote dilution in violation of the Free Elections Clause, art. I, § 10, the Equal Protection Clause, art. I, § 19, and the Freedom of Speech and Assembly Clauses, art. I, §§ 12, 14. Plaintiffs sought a declaratory judgment, a permanent injunction against the use of the 2021 Maps, and the creation and implementation of new, constitutionally compliant maps.

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1. NCLCV Plaintiffs include the North Carolina League of Conservation Voters, Inc., Henry M. Michaux Jr., Dandrielle Lewis, Timothy Chartier, Talia Fernós, Katherine Newhall, R. Jason Parsley, Edna Scott, Roberta Scott, Yvette Roberts, Jereann King Johnson, Reverend Reginald Wells, Yarbrough Williams Jr., Reverend Deloris L. Jerman, Viola Ryals Figueroa, and Cosmos George.

2. Harper Plaintiffs include Rebecca Harper, Amy Clare Oseroff, Donald Rumph, John Anthony Balla, Richard R. Crews, Lily Nicole Quick, Gettys Cohen Jr., Shawn Rush, Mark S. Peters, Kathleen Barnes, Virginia Walters Brien, Eileen Stephens, Barbara Proffitt, Mary Elizabeth Voss, Chenita Barber Johnson, Sarah Taber, Joshua Perry Brown, Laureen Floor, Donald M. MacKinnon, Ron Osborne, Ann Butzner, Sondra Stein, Bobby Jones, Kristiann Herring, and David Dwight Brown.

¶ 12 Plaintiffs' cases were consolidated and assigned to a three-judge panel of the Superior Court, Wake County, pursuant to N.C.G.S. § 1-267.1 and Rule 42 of the North Carolina Rules of Civil Procedure.[3] On 15 December 2021, the trial court granted Plaintiff Common Cause's motion to intervene in the consolidated case. In response to Plaintiffs' claims, Legislative Defendants asserted, *inter alia*, that the only limitations on redistricting legislation are those expressly found in article II, sections 2, 3, 4, and 5 of the North Carolina Constitution, and that Plaintiffs' claims were nonjusticiable.

¶ 13 From late December 2021 to early January 2022, the trial court conducted an expedited and extensive discovery and trial process. Plaintiffs and Legislative Defendants submitted evidence from several expert witnesses and accompanying reports regarding the 2021 Maps.

¶ 14 On 11 January 2022, the trial court issued its final judgment. Therein, the trial court found that all three of the 2021 Maps indeed constituted extreme partisan outliers that were the product of intentional, pro-Republican redistricting at the subordination of traditional, neutral redistricting principles. However, the trial court concluded that claims of partisan gerrymandering present purely political questions that are nonjusticiable under the North Carolina Constitution. Accordingly, the trial court held that the 2021 Maps were not unconstitutional and denied Plaintiffs' requests for declaratory and injunctive relief. Plaintiffs appealed to this Court from the trial court's judgment.

¶ 15 In February 2022, this Court reversed.[4] *Harper*, ¶ 223. The Court concluded that partisan gerrymandering claims are justiciable under the North Carolina Constitution, that our Constitution's Declaration of Rights enshrines the fundamental right to vote on equal terms, and that the 2021 Maps violated that right. *Id.* ¶¶ 7, 94.

¶ 16 First, the Court addressed Plaintiffs' standing. *Id.* ¶ 95. The Court noted that in accordance with *Committee to Elect Dan Forest v. Employees Political Action Committee*, 376 N.C. 558, 2021-NCSC-6, "direct constitutional challenges to statutes or other acts of government . . . require only the requisite concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for

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3. We take a moment of privilege to express the Court's gratitude to the panel for their diligent service to the state in this case: Judge A. Graham Shirley, Judge Nathaniel J. Poovey, and Judge Dawn M. Layton.

4. On 4 February 2022, the Court issued a preliminary order. On 14 February 2022, the Court issued its subsequent full opinion.

illumination of difficult constitutional questions." *Harper*, ¶ 96 (cleaned up). Here, the Court determined that the parties' allegations of the violation of their legal rights, even if widely shared with others, were sufficient to show such concrete adverseness. *Id.* The Court thus concluded that each individual and organizational plaintiff met the requirements for legal standing under our Constitution. *Id.* ¶ 99.

¶ 17 Second, the Court addressed justiciability. *Id.* ¶ 100. The Court noted that "simply because the Supreme Court [of the United States] has concluded partisan gerrymandering claims are nonjusticiable in *federal* courts, it does not follow that they are nonjusticiable in North Carolina courts." *Id.* ¶ 110 (emphasis added) (citing *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019)). Further, "the mere fact that responsibility for reapportionment is committed to the General Assembly does not mean that the General Assembly's decisions in carrying out its responsibility are fully immunized from any judicial review." *Id.* ¶ 115. Rather, the General Assembly's reapportionment power is subject to constitutional limitations, including compliance with the fundamental rights enshrined in the Declaration of Rights. *Id.* ¶ 119.

¶ 18 Then, the Court considered whether partisan gerrymandering violates those rights. *Id.* ¶ 121. After surveying the history of our Declaration of Rights generally, *id.* ¶¶ 122–32, the Court considered each pertinent clause in turn. First, the Court concluded that partisan gerrymandering "is cognizable under the free elections clause because it can prevent elections from reflecting the will of the people impartially and . . . diminish[ ] or dilut[e] voting power on the basis of partisan affiliation." *Id.* ¶ 141; N.C. Const. art. I, § 10. Second, the Court concluded that partisan gerrymandering is cognizable under the equal protection clause because it "diminishes or dilutes a voter's opportunity to aggregate with like-minded voters to elect a governing majority[,]" thus "infring[ing] upon that voter's fundamental rights to vote on equal terms and to substantially equal voting power." *Id.* ¶ 150; N.C. Const. art. I, § 19. Third, the Court concluded that partisan gerrymandering is cognizable under the free speech and freedom of assembly clauses because it imposes a burden on the fundamental right to equal voting power based on political viewpoint. *Id.* ¶ 157.

¶ 19 The Court summarized the intersection of the Declaration of Rights and partisan gerrymandering, emphasizing that together, the fundamental principles of equality and popular sovereignty "reflect the democratic theory of our constitutional system: the principle of political equality." *Id.* ¶ 158. In order to realize this principle,

> the channeling of "political power" from the people to their representatives in government through the democratic processes envisioned by our constitutional system must be done on equal terms. If through state action the ruling party chokes off the channels of political change on an unequal basis, then government ceases to "derive[ ]" its power from the people or to be "founded upon their will only," and the principle of political equality that is fundamental to our Declaration of Rights and our constitutionally enacted represented system of government is violated.

Id. Accordingly, "[t]o comply with the constitutional limitations contained in the Declaration of Rights which are applicable to redistricting plans, the General Assembly must not diminish or dilute on the basis of partisan affiliation any individual's vote." *Id.* ¶ 160. Therefore, "when a districting plan systematically makes it harder for individuals [of one party] to elect a governing majority than individuals in a favored party of equal size[,] the General Assembly deprives on the basis of partisan affiliation a voter of his or her right to equal voting power." *Id.* "[S]uch a plan is subject to strict scrutiny and is unconstitutional unless the General Assembly can demonstrate that the plan is narrowly tailored to advance a compelling governmental interest." *Id.* ¶ 161 (cleaned up).

¶ 20 The Court also noted various ways to measure partisan vote dilution. The Court explained that partisan vote dilution

> can be measured either by comparing the number of representatives that a group of voters of one partisan affiliation can plausibly elect with the number of representatives that a group of voters of the same size of another partisan affiliation can plausibly elect, or by comparing the relative chances of voters from each party electing a supermajority or majority of representatives under various possible electoral conditions.

Id. However, the Court did "not believe it prudent or necessary to . . . identify an exhaustive list of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander." *Id.* ¶ 163. Rather, the Court observed that

> as the trial court's findings of fact indicate[d], there are multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander. In particular, mean-median difference analysis;

> efficiency gap analysis; close-votes, close-seats analysis; and partisan symmetry analysis may be useful in assessing whether the mapmaker adhered to traditional neutral districting criteria and whether a meaningful partisan skew necessarily results from North Carolina's unique political geography. If some combination of these metrics demonstrates there is a significant likelihood that the districting plan will give the voters of all political parties substantially equal opportunity to translate votes into seats across the plan, then the plan is presumptively constitutional.

Id. While the Court identified "a mean-median difference of 1% or less" and an efficiency gap of 7% or less as potential "threshold[s] [for] a presumption of constitutionality . . . absent other evidence," we emphasized that ultimately "[w]hat matters here, as in the one-person, one-vote context, is that each voter's vote carries roughly the same weight when drawing a redistricting plan that translates votes into seats in a legislative body." *Id.* ¶¶ 166, 167, 169.

¶ 21 The Court then held that "[o]nce a plaintiff shows that a map infringes on their fundamental right to equal voting power . . . or that it imposes a burden on that right based on their views[,] . . . the map is subject to strict scrutiny and is presumptively unconstitutional." *Id.* ¶ 170. At that point, the government must demonstrate that the plan is nevertheless necessary to promote a compelling governmental interest. *Id.*

¶ 22 The Court then applied this constitutional standard to the 2021 Maps. *Id.* ¶¶ 178–213. Based on the trial court's extensive factual findings, the Court determined that all three of the 2021 Maps constituted partisan gerrymanders in violation of the North Carolina Constitution's Declaration of Rights. *Id.* Because Legislative Defendants failed to show that the 2021 Maps were nevertheless narrowly tailored to a compelling governmental interest, the Court concluded that each of the plans failed strict scrutiny. *Id.* ¶¶ 195 (Congressional Map), 205 (State House Map), 213 (State Senate Map).

¶ 23 Finally, the Court addressed the General Assembly's compliance with *Stephenson* requirements regarding racially polarized voting. *Id.* ¶¶ 214–16. The Court concluded that compliance with article I, sections 3 and 5, and article II, sections 3 and 5 of our Constitution "requires the General Assembly to conduct racially polarized voting analysis within their decennial redistricting process in order to assess whether any steps must be taken to avoid the dilution of minority voting strength." *Id.* ¶ 216.

¶ 24 In compliance with N.C.G.S. § 120-2.4(a), the Court then remanded the case to the trial court "to oversee the redrawing of the maps by the General Assembly or, if necessary, by the court." *Id.* ¶ 223. In so doing, the Court ordered that "the General Assembly shall now have the opportunity to submit new congressional and state legislative districting plans that satisfy all provisions of the North Carolina Constitution." *Id.* The Court concluded by noting its "sincere hope . . . that these new maps ensure that the channeling of 'political power' from the people to their representatives in government through elections . . . is done on equal terms so that ours is a 'government of right' that 'originates from the people' and speaks with their voice." *Id.*

B. Remedial Phase: Remedial Plans and Trial Court's Remedial Order

¶ 25 Thus began the remedial phase of this case. On 16 February 2022, the trial court issued an order appointing three former North Carolina jurists—Justice Robert F. Orr (ret.), Justice Robert H. Edmunds Jr. (ret.), and Judge Thomas W. Ross (ret.)—to serve as Special Masters.[5] The Special Masters' task was twofold. First, they assisted the trial court in reviewing the parties' proposed remedial plans via a written report. Second, they were to assist the trial court in developing an alternative, constitutionally compliant remedial plan in the event that the General Assembly's proposed remedial plan fell short.

¶ 26 To assist in these tasks, the Special Masters were authorized to hire advisors (Special Masters' Advisors). They hired Dr. Bernard Grofman, Dr. Tyler Jarvis, Dr. Eric McGhee, and Dr. Samuel Wang.

¶ 27 On 18 February 2022, Legislative Defendants timely submitted their Remedial Plans to the trial court. These included the Remedial Congressional Plan (RCP), Remedial House Plan (RHP), and Remedial Senate Plan (RSP).

¶ 28 On 21 February 2022, Legislative Defendants filed a motion to disqualify two of the Special Masters' Advisors, Dr. Wang and Dr. Jarvis, because they had engaged in prohibited ex parte communications with Plaintiffs' experts.

¶ 29 On 21 February 2022, Plaintiffs timely submitted their comments and objections to Legislative Defendants' Remedial Plans. NCLCV Plaintiffs objected to the RCP and RSP. NCLCV Plaintiffs did not specifically object

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5. We take a moment of privilege to express the Court's gratitude to the Special Masters for their diligent service to the state in this case.

to the RHP, but instead requested that the trial court conduct its own analysis of the RHP. Harper Plaintiffs objected to the RCP and RSP but did not object to the RHP. Plaintiff Common Cause generally objected to all three Remedial Plans, and specifically contended that House District 10 of the RHP and Senate District 4 of the RSP must be redrawn.

¶ 30 Thereafter, the Special Masters' Advisors submitted their analysis of each of the proposed remedial plans. Because this analysis served as the foundational evidence for the Special Masters' and trial court's subsequent findings of fact, we briefly summarize this evidence here.

¶ 31 ***RCP Analysis.*** Dr. Grofman determined that the RCP "creates a distribution of voting strength across districts that is very lopsidedly Republican." He determined that "[b]ecause they all point in the same direction, the political effects statistical indicators of partisan gerrymandering strongly suggest the conclusion that this congressional map should be viewed as a pro-Republican gerrymander." He determined that the RCP yielded an efficiency gap of 6.37% but noted that that this was "not . . . proof that there is no vote dilution" because, based on other measures, "legislative map drawers have apparently sought to draw a congressional map that just narrowly pass[es] a supposed threshold test for partisan gerrymandering."

¶ 32 Dr. McGhee determined that the RCP yielded an efficiency gap of 6.4%, a mean-median difference of 1.1%, a partisan asymmetry of 4.9%, and a declination metric of 0.14, all favoring Republicans. He noted that "[t]he values with incumbency factored in all lean more Republican . . . , and this incumbency effect is greater than it was in the [2021] enacted plan." Relatively, he noted that while the RCP shows improvement from the 2021 enacted plan on several measures of partisan symmetry, it is "clearly worse" than the remedial congressional plans proposed by Plaintiffs.

¶ 33 Dr. Wang determined that the RCP yields an average efficiency gap of 6.8% and an average mean-median difference of 1.2%, both favoring Republicans. He determined that in nine out of ten sample elections, "Republicans won more seats than the Democrats with the same vote share." "Averaging across all 10 elections, the advantage was 1.7 more seats for Republicans, or 12% of the 14-seat Congressional delegation."

¶ 34 Finally, Dr. Jarvis determined that the RCP "consistently favors Republicans" across all applicable measures. He determined that the RCP yields an efficiency gap of 8.8%, a mean-median difference of 0.9%, a partisan bias of 5.2%, and a declination metric of 11.6%, all favoring Republicans.

¶ 35 ***RHP Analysis.*** Dr. Grofman determined that although the RHP "creates a distribution of voting strength across districts that is very lopsidedly Republican," it "is genuinely far more competitive than either of the other two legislatively proposed maps." He observed that under the RHP, "unlike the other maps, the Democrats do not have to win all of the competitive seats to win a majority in the House. Moreover, unlike the [RCP and RSP], . . . the competitive seats [in the RHP] are substantially Democrat in directionality." He further noted that

> quit[e] important in judging the constitutionality of this map in the full context are the facts that: (a) the Harper plaintiffs have not chosen to offer an alternative [RHP] but are apparently content to see the legislative map implemented by the Court, (b) the map was passed by a clear bipartisan consensus in the legislature, including members of the legislature who belong to particular minority communities, and (c) that while it still is further from being non-dilutive than the NCLCV [RHP] alternative, it is far closer to Plaintiffs' map than it is to the rejected [2021] enacted NC House map.

He determined that while the RHP's efficiency gap "remains in a pro-Republican direction," it is "at the low level of 2.72[%]."In considering "the totality of the circumstances . . . and recognizing that this map is still not ideal (nor need it be)," he concluded that the RHP "simply lacks the same clear indicia of egregious bias found in the previously rejected maps and still found . . . in the [RCP] and [RSP]."

¶ 36 Dr. McGhee likewise determined that the RHP "still favors Republicans when all seats are open, but substantially less [than the 2021 congressional map]." He determined that the RHP yields an efficiency gap of 3.0%, a mean-median difference of 1.4%, a partisan asymmetry of 2.9%, and a declination metric of 0.16, all favoring Republicans. Dr. McGhee concluded that the RHP "still favors Republicans: the party would likely hold about 64 of 120 seats with half the vote, and it would take the Democrats somewhere close to 52% of the vote to bring that number down to 60." Relatively, he determined that the RHP "is very similar to" NCLCV Plaintiffs' proposed remedial house map on metrics of partisan symmetry, that it "do[es] a reasonably good job of respecting traditional geographic principles," and that it reflects "very similar compactness" as Plaintiffs' proposed remedial House map. He concluded that the RHP's partisan symmetry is "closer [to NCLCV's proposed remedial plan] than was the case for either the [RSP] or the [RCP]," noting

that the NCLCV Plaintiffs' plan is only "a little better." He concluded that this "relatively marginal improvement hints that it may be difficult to do better while still abiding by other constraints."

¶ 37 Dr. Wang determined that the RHP favors Republicans in all six metrics evaluated: seat partisan asymmetry, mean-median difference, partisan bias, lopsided wins, declination angle, and efficiency gap. Specifically, he determined that the RHP yielded an efficiency gap of 3.1%, a mean-median difference of 0.9%, a partisan asymmetry of 7.2 seats, and a declination angle of 4.5 degrees.

¶ 38 Finally, Dr. Jarvis determined that the RHP "appear[s] to be mostly typical in terms of the number of seats won." He determined that the RHP yields an efficiency gap of 2.7%, a mean-median difference of 1.5%, an average partisan bias of 2.7%, and a declination metric of 5.7%.

¶ 39 ***RSP Analysis***. Dr. Grofman determined that the RSP "creates a distribution of voting strength across districts that is very lopsidedly Republican." He determined the RSP's vote bias indicates "a substantial pro-Republican bias" in which a statewide majority of Republican voters would be able to win a majority of the seats while "only a win by considerably more than 50% of the statewide vote can yield the Democrats a majority of the seats." He determined that "[b]ecause they all point in the same direction, the political effects statistical indicators of partisan gerrymandering argue for the conclusion that th[e] [RSP] should be viewed as a pro-Republican gerrymander." He concluded that "the dilutive effects of th[e] RSP] . . . are still . . . quite substantial."

¶ 40 Dr. McGhee determined that the RSP "still favors Republicans when all seats are open." He concluded that the RSP yields an efficiency gap of 4.8%, a mean-median difference of 2.2%, a partisan asymmetry of 4.8%, and a declination metric of 0.20, all favoring Republicans. He observed that "[t]he [efficiency gap] value now clearly falls below the commonly identified threshold of 7%, though the [mean-median difference] value falls well above the 1% number cited by Legislative Defendants." He determined that "[a]ll the metric values for both the open seat and incumbency scenarios are more than 50% likely to favor Republicans throughout the decade." He concluded that

> the [mean-median difference] and [partisan symmetry] metrics, which are more relevant for a state legislative plan because they connect directly to control of the chamber, suggest that in a tied election Republicans would still hold 27 or 28 [of 50 total] seats, and that Democrats would need to win as much

> as 53 percent of the vote to claim 25 seats. The odds are about three to one that Republicans would maintain this advantage throughout the decade.

Relatively, Dr. McGhee observed that the Republican advantage within Plaintiffs' proposed RSP "is often less than half the size of the same advantage in the Legislative Defendants' [RSP]." "This suggests that there is nothing foreordained about the advantages in the Legislative Defendants' plan."

¶ 41 Dr. Wang determined that the RSP favors Republicans in all six metrics evaluated: seat partisan asymmetry, mean-median difference, partisan bias, lopsided wins, declination angle, and efficiency gap. Specifically, he determined that the RSP yields an efficiency gap of 2.2%, a mean-median difference of 0.8%, and an average partisan asymmetry of 2.1 seats, all favoring Republicans.

¶ 42 Finally, Dr. Jarvis determined that analysis of the RSP reveals that it "is often a significant outlier in favor of the Republicans." He determined that the RSP yields an efficiency gap of 4.0%, a mean-median difference of 1.4%, an average partisan bias of 4.0%, and a declination metric of 7.0%.

¶ 43 Based upon this evidence, the Special Masters submitted their report to the trial court on 23 February 2022 (Special Masters' Report). As an initial matter, the Special Masters addressed Legislative Defendants' motion to disqualify Drs. Wang and Jarvis. While the Special Masters "acknowledge[d] the technical breach of th[e] [c]ourt's mandate that no *ex parte* communication occur between parties and non-parties," they "respectfully recommend[ed] that the [c]ourt deny the motion." Denial was proper, the Special Masters contended, because: (1) the communications were not made in bad faith; (2) the communications were solely for the purpose of proceeding as quickly as possible; (3) the information sought was all publicly available; and (4) the analysis provided by Drs. Wang and Jarvis, though helpful, was not determinative in any of the Special Masters' recommendations.

¶ 44 Next, the Special Masters recommended that the trial court approve the RHP and RSP but reject the RCP.

¶ 45 Regarding the RHP, the Special Masters' Report stated as follows:

> The advisors as well as the experts of the parties ("experts") all found the efficiency gap of the proposed [RHP] to be less than 7%. The majority of the advisors and experts found the mean-median difference of the proposed [RHP] to be less than 1%. In

> addition to these facts, the Special Masters considered the findings of the advisors on the partisan symmetry analysis, the declination metrics, and their opinions on partisan bias and evidence of partisan gerrymandering. Considering all of this information as well as the totality of the circumstances, the Special Masters conclude under the metrics identified by the North Carolina Supreme Court that the proposed [RHP] meets the test of presumptive constitutionality. Further the Special Masters did not find substantial evidence to overcome the presumption of constitutionality and recommend to the trial court that it give appropriate deference to the General Assembly and uphold the constitutionality of the [RHP].

¶ 46 Similarly, regarding the RSP, the Special Masters' Report stated as follows:

> All of advisors and experts found the efficiency gap of the proposed [RSP] to be less than 7%. The majority of the advisors and experts found the mean-median difference of the proposed [RSP] to be less than 1%. In addition to these facts, the Special Masters considered the findings of the advisors on the partisan symmetry analysis, the declination metrics, and their opinions on partisan bias and evidence of partisan gerrymandering. Considering all of this information as well as the totality of the circumstances, the Special Masters conclude under the metrics identified by the North Carolina Supreme Court [that] the [RSP] meets the test of presumptive constitutionality. Further the Special Masters did not find substantial evidence to overcome the presumption of constitutionality and recommend to the trial court that it give appropriate deference to the General Assembly and uphold the constitutionality of the [RSP].

¶ 47 Regarding the RCP, however, the Special Masters' Report stated as follows:

> Unlike the proposed [RHP] and [RSP], there is substantial evidence from the findings of the advisors that the proposed congressional plan has an efficiency gap above 7% and a mean-median difference

> of greater than 1%. The Special Masters considered this evidence along with the advisors' findings on the partisan symmetry analysis and the declination metrics. There is disagreement among the parties as to whether the proposed [RCP] meets the presumptively constitutional thresholds suggested by the Supreme Court. The Special Masters, considering the reports of their advisors and the experts of the parties while giving appropriate deference to the General Assembly, are of the opinion that the proposed [RCP] fails to meet the threshold of constitutionality and recommend that the [t]rial [c]ourt reject the proposed [RCP] as being unconstitutional.

¶ 48 As instructed, the Special Masters therefore submitted to the trial court "a modified version of the proposed [RCP] submitted by Legislative Defendants." (Modified RCP). The Report stated that "[i]t is [the Special Masters'] opinion that the [Modified RCP] satisfies the requirements of the Supreme Court." Specifically, the Special Masters noted that because

> the Constitution of North Carolina provides that the General Assembly has the responsibility of redistricting, [they] focused on the [RCP] submitted by the Legislative Defendants. On that basis, the Special Masters worked solely with [Advisor] Dr. Bernard Grofman and his assistant to amend the Legislative Defendants' plan to enhance its consistency with the opinion of the Supreme Court of North Carolina, the Constitutions of the United States and of North Carolina, and the expressed will of the General Assembly.

The Special Masters then determined that

> the [M]odified [RCP] recommended for adoption to the [t]rial [c]ourt achieves the partisan fairness and "substantially equal voting power" required by the Supreme Court of North Carolina without diluting votes under the Voting Rights Act while maintaining the number of county splits, retaining equal populations, compactness, and contiguity, as well as respecting municipal boundaries. Dr. Grofman's analysis of the [M]odified [RCP] recommended by the Special Masters indicates that the plan has an efficiency gap of 0.63%, a mean-median difference of 0.69%, seat

> bias of 0.28%, and vote bias of 0.10%. According to Dr. Grofman, "this is the most non-dilutive plan in partisan terms of any map that has been submitted to the [c]ourt."
>
> Accordingly, the Special Masters recommend[ed] to the [t]rial [c]ourt that it order the State of North Carolina to utilize the [M]odified [RCP] prepared by the Special Masters in the 2022 Congressional election.

¶ 49 On 23 February 2022, the trial court issued its subsequent remedial order. In alignment with the recommendations of the Special Masters, the trial court approved Legislative Defendants' RHP and RSP but rejected their RCP and implemented the Special Masters' Modified RCP.

¶ 50 First, the trial court summarized the General Assembly's remedial process. The trial court noted that in addition to the traditional neutral redistricting criteria considered in the creation of the 2021 Maps, the General Assembly intentionally used partisan election data in the creation of the Remedial Plans in compliance with this Court's remedial order. The trial court further noted that "[t]he General Assembly conducted an abbreviated racially polarized voting ("RPV") analysis to determine whether racially polarized voting is legally sufficient in any area of the state such that Section 2 of the Voting Rights Act *requires* the drawing of a district to avoid diluting the voting strength of African American voters during the remedial process." The trial court subsequently found "that the General Assembly satisfied the directive in the Supreme Court Remedial Order to determine whether the drawing of a district in an area of the state is required to comply with Section 2 of the Voting Rights Act."

¶ 51 The trial court then summarized the Special Masters' Report. The trial court found that while "[t]he Special Masters' findings demonstrate that the [RHP] and [RSP] meet the requirements of the Supreme Court's Remedial Order and full opinion[,] . . . [t]he Special Masters' findings demonstrate that the [RCP] does not meet [those] requirements." The trial court then "adopt[ed] in full the findings of the Special Masters."

¶ 52 The trial court went on to review each of Legislative Defendants' Remedial Plans. First, the court assessed the RCP. The trial court observed that the RCP passed both chambers of the General Assembly by a strict party-line vote, with Republicans voting for and Democrats voting against. Assessing the partisanship of the RCP, the trial court observed that "[t]he Supreme Court Remedial Order stated that a combination of different methods could be used to evaluate the partisan fairness

of a districting plan; of those methods, the General Assembly used the 'mean-median' test and the 'efficiency gap' test to analyze the partisan fairness of the Remedial Plans." The trial court then found, based upon "the analysis performed by the Special Masters and their advisors, that the [RCP] is not satisfactorily within the statistical ranges set forth in the Supreme Court's full opinion. *See Harper v. Hall*, 2022-NCSC-17, ¶ 166 (mean-median difference of 1% or less) and ¶ 167 (efficiency gap less than 7%)." The trial court further determined "that the partisan skew in the [RCP] is not explained by the political geography of North Carolina."

¶ 53 Second, the trial court addressed the RSP. The court noted that the plan passed both chambers of the General Assembly by a strict party-line vote, with Republicans voting for and Democrats voting against. The court subsequently found, based upon "the analysis performed by the Special Masters and their advisors, that the [RSP] is satisfactorily within the statistical ranges set forth in the Supreme Court's full opinion. *See Harper v. Hall*, 2022-NCSC-17, ¶ 166 (mean-median difference of 1% or less) and ¶ 167 (efficiency gap less than 7%)." The court found that "to the extent there remains a partisan skew in the [RSP], that partisan skew is explained by the political geography of North Carolina." The court determined that "the measures taken by the General Assembly for the purposes of incumbency protection in the [RSP] are consistent with the equal voting power requirements of the North Carolina Constitution" and that "the General Assembly did not subordinate traditional neutral districting criteria to partisan criteria or considerations in the [RSP]."

¶ 54 Third, the trial court addressed the RHP. The court noted that six amendments to the plan were offered by Democratic Representatives and passed, and the RHP then proceeded to pass the House by a vote of 115-5 and pass the Senate by a vote of 41-3. The court observed that "[t]he 'aye' votes in the House and Senate were by members of both political parties[,]" while "[t]he 'no' votes in the House and Senate were solely by members of the Democratic Party." Regarding the RHP's use of partisanship, the court found, based upon and confirmed by "the analysis performed by the Special Masters and their advisors, that the [RHP] [is] satisfactorily within the statistical ranges set forth in the Supreme Court's full opinion. *See Harper v. Hall*, 2022-NCSC-17, ¶ 166 (mean-median difference of 1% or less) and ¶ 167 (efficiency gap less than 7%)." The court found that "to the extent there remains a partisan skew in the [RHP], that partisan skew is explained by the political geography of North Carolina." The court determined that "the measures taken by the General Assembly for the purposes of incumbency protection in the [RHP] are consistent with the equal voting power requirements of

the North Carolina Constitution" and that "the General Assembly did not subordinate traditional neutral districting criteria to partisan criteria or considerations in the [RHP]."

¶ 55 Next, the trial court considered the proposed alternative remedial plans. Because the court was "satisfied with the [RHP] and [RSP], [it] did not need to consider an alternative plan" for those maps. In accordance with N.C.G.S. § 120-2.4(a1), the trial court ordered the use of the Special Masters' "interim districting plan for the 2022 North Carolina Congressional election that differs from the [RCP] to the extent necessary to remedy the defects identified by the [c]ourt." The trial court determined that the Modified RCP "was developed in an appropriate fashion, is consistent with N.C.G.S. § 120-2.4(a1), and is consistent with the North Carolina Constitution and the Supreme Court's full opinion." (Footnote omitted).

¶ 56 Based on these factual findings, the trial court then reached its legal conclusions. First, the trial court noted this Court's ruling in *Harper* that "there are multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander" and that "[i]f some combination of these metrics demonstrates there is a significant likelihood that the districting plan will give the voters of all political parties substantially equal opportunity to translate votes into seats across the plan, then the plan is presumptively constitutional." *Harper*, ¶ 163.

¶ 57 The trial court then specified its legal conclusions regarding the Remedial Plans. The trial court concluded that the RSP and RHP "satisf[y] the Supreme Court's standards" and therefore concluded that the RHP and RSP "are presumptively constitutional." The trial court concluded that "no evidence presented to the [c]ourt is sufficient to overcome this presumption for the [RSP] and [RHP], and those plans are therefore constitutional and will be approved.

¶ 58 However, the trial court "conclude[d] that the [RCP] does not satisfy the Supreme Court's standards." Accordingly, the court concluded that the RCP "is not presumptively constitutional and is therefore subject to strict scrutiny." The court concluded that "[t]he General Assembly has failed to demonstrate that [the RCP] is narrowly tailored to a compelling governmental interest, and . . . therefore . . . conclude[d] that the [RCP] is unconstitutional."

¶ 59 Accordingly, the trial court was required to adopt a new, constitutionally compliant congressional plan. "Given that the ultimate authority and directive is given to the Legislature to draw redistricting maps," the trial court declined to adopt Plaintiffs' proposed plans. Instead,

it concluded "that the appropriate remedy is to modify the [RCP] to bring it into compliance with the Supreme Court's order. *See* N.C.G.S. § 120-2.4(a1)." The trial court concluded that the Modified RCP "as proposed by the Special Masters satisfies the Supreme Court's standards and should be adopted . . . for the 2022 North Carolina Congressional elections."

¶ 60 Based on these factual findings and legal conclusions, the trial court then ordered the following:

> 1. The [RSP] and [RHP] . . . are hereby APPROVED by the [c]ourt.
>
> 2. The [RCP] . . . is hereby NOT APPROVED by the [c]ourt.
>
> 3. The [Modified RCP] as recommended by the Special Masters is hereby ADOPTED by the [c]ourt and approved for the 2022 North Carolina Congressional elections.

¶ 61 On 23 February 2022, contemporaneously with its remedial order, the trial court issued an order denying Legislative Defendants' motion to disqualify Drs. Wang and Jarvis "for the reasons expressed in the Special Masters' Report."

C. Present Appeal

¶ 62 Following the trial court's remedial order, all parties appealed to this Court. Harper Plaintiffs and NCLCV Plaintiffs appealed the trial court's acceptance of the RSP. Plaintiff Common Cause appealed the trial court's acceptance of both the RSP and RHP and the trial court's determination that the General Assembly satisfied racially polarized voting requirements. Legislative Defendants appealed the trial court's rejection of the RCP. We briefly summarize each party's arguments in turn.

¶ 63 First, Harper Plaintiffs and NCLCV Plaintiffs argue that the trial court erred in approving the RSP. They argue that the evidence shows that the RSP constitutes a partisan gerrymander that violates the *Harper* standard by creating stark partisan asymmetry; that is, by failing to give voters of all parties substantially equal opportunity to translate votes into seats. They contend that under *Harper*, individual statistical metrics can *inform* but not *replace* the determination as to whether a map complies with this foundational principle. They assert that the trial court erroneously used two statistical measures (mean-median difference and efficiency gap) as a substitute for constitutional compliance,

and therefore that its approval of the RSP must be rejected. Specifically, they contend that two of the trial court's factual findings—those finding that the RSP falls within certain statistical ranges and that any remaining partisan skew can be explained by political geography—lack competent evidence, and indeed are contrary to the evidence. Approving the trial court's approach, they warn, would greenlight partisan gerrymandering and gamesmanship by allowing the General Assembly to create maps that meet certain metrics but nevertheless still create stark partisan asymmetry. Finally, they argue that after rejecting the RSP, this Court should ensure that lawful maps endure by ordering that a new remedial map be adopted not just for this year, but until the next redistricting cycle following the 2030 census. This result is required, they assert, based on the prohibition against mid-decade redistricting within article II, sections 3 and 5 of the North Carolina Constitution.[6]

¶ 64 Second, Plaintiff Common Cause argues that the trial court failed to evaluate whether the RHP and RSP comport with all constitutional requirements by failing to fully consider evidence of racially polarized voting. They contend that the RHP and RSP dilute the voting strength of Black voters and destroy functioning crossover districts in violation of equal protection principles.[7] Separately, they argue that both the RHP and RSP must be struck down as unconstitutional partisan gerrymanders in violation of the *Harper* standard. They assert that the RHP and RSP deny substantially equal voting power, that the trial court's attribution of the plans' partisan bias to political geography is legally and factually erroneous, and that the plans therefore must receive and necessarily fail strict scrutiny. Accordingly, they argue that this Court should ensure constitutional compliance by adopting Common Cause's proposed remedial maps.

¶ 65 Third, Legislative Defendants argue that the trial court erred in rejecting the RCP and adopting the Modified RCP. They contend that the trial court failed to give the RCP proper deference accorded to legislative enactments, and that the Special Masters' findings regarding the RCP were clearly erroneous. Further, Legislative Defendants argue that the trial court abused its discretion in denying Legislative Defendants' motion to disqualify Special Masters' Advisors Drs. Wang

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6. In response, Legislative Defendants argue that the trial court's approval of the RHP and RSP should be affirmed and that this Court lacks the authority to adopt an alternative remedial plan.

7. In response, Legislative Defendants argue that the General Assembly properly performed RPV analysis, which showed that majority-minority districts are not required to comply with Section 2 of the Voting Rights Act.

and Jarvis. Accordingly, they assert that this Court should reverse the trial court's approval of the Modified RCP and its denial of their motion to disqualify.[8]

¶ 66 On 13 July 2022, Legislative Defendants filed with this Court a motion to dismiss "the entirety of their portion of" this appeal. Therein, Legislative Defendants asserted that dismissal of their own previous appeal was appropriate because the Modified RCP "ordered by the trial court is only applicable to the 2022 election, and that map will apply to the 2022 election regardless of the outcome of the appeal in this Court." In response, Harper Plaintiffs and NCLCV Plaintiffs opposed Legislative Defendants' motion to dismiss, arguing that the motion constitutes "a transparent effort to prevent this Court from addressing important questions—questions that Legislative Defendants have erroneously told the U.S. Supreme Court are unresolved—about the meaning of North Carolina statutes that authorize North Carolina courts to conduct state constitutional review of congressional-districting plans, including [N.C.G.S.] §§ 1-267.1(a), 120-2.3, and 120-2.4."

¶ 67 This case came before this Court for oral argument again on 4 October 2022.

II. Analysis

¶ 68 Now, this Court must review the alignment of the trial court's remedial order with the foundational principles established in *Harper*. "When the trial court conducts a trial without a jury, the trial court's findings of fact have the force and effect of a jury verdict and are conclusive on appeal if there is competent evidence to support them . . . ." *Stephenson v. Bartlett*, 357 N.C. 301, 309 (2003) (cleaned up). If this Court determines "that the findings of fact are supported by the evidence, we must then determine whether those findings of fact support the conclusions of law." *Id.* This Court reviews a trial court's conclusions of law de novo. *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 332 (2019). After consideration, we affirm the trial court's rejection of the RCP, affirm the trial court's approval of the RHP, and reverse the trial court's approval of the RHP. Before reaching these determinations, we must address Legislative Defendants' motion to dismiss this appeal, which we deny. Finally, we must also address Plaintiff Common Cause's equal protection arguments, which we reject.

8. In response, Plaintiffs argue that the trial court properly rejected the RCP and denied Legislative Defendants' motion to disqualify.

A. Legislative Defendants' Motion to Dismiss Appeal

¶ 69 **[1]** As an initial matter, we must address Legislative Defendants' motion to dismiss their own appeal. Because this motion was raised for the first time in this Court, we review it within our own discretion. After consideration, we deny Legislative Defendants' motion.

¶ 70 In essence, Legislative Defendants contend that their appeal should be dismissed because its outcome will have limited impact. That is, regardless of whether this Court affirms or reverses the portion of the trial court's order rejecting of the RCP and adopting the Modified RCP, the Modified RCP has already been used in the November 2022 elections and will ostensibly be replaced before future elections. Harper Plaintiffs and NCLCV Plaintiffs, by contrast, contend that Legislative Defendants' motion seeks to "have it both ways" by "arguing about the meaning of North Carolina law to the U.S. Supreme Court while simultaneously withdrawing any attempts to have this Court address their misinterpretation of state statutes and the state constitution."

¶ 71 Lacking a crystal ball with which to divine Legislative Defendants' purpose, we turn to context. While Legislative Defendants' motion correctly notes that "2022 is the only election to which the [Modified RCP] will apply," that has been true since the trial court issued its remedial order adopting the Modified RCP on 23 February 2022. Since then, Legislative Defendants not only appealed the trial court's ruling regarding the RCP, but have continued to move their appeal forward through motions practice throughout the spring and into the summer.

¶ 72 On 30 June 2022, however, the Supreme Court of the United States granted Legislative Defendants' petition for certiorari in *Moore v. Harper*, *cert. granted*, 142 S. Ct. 2901 (2022). There, the Court will consider whether the federal Constitution's Elections Clause prohibits state courts from resolving state constitutional challenges to a state legislature's congressional redistricting plans. Within their petition, Legislative Defendants rebut Plaintiffs' claim that certain state statutes expressly authorize state courts to review challenges to congressional redistricting plans for compliance with the state Constitution. On 8 July 2022, Plaintiffs each filed a notice with this Court noting this development. Legislative Defendants filed their motion to dismiss their own appeal in this Court three business days later.

¶ 73 This chronology is impossible to ignore, and indicates that Legislative Defendants sought to dismiss their own appeal in order to avoid a ruling by this Court that might affect their arguments before the Supreme Court of the United States. In any event, this issue is of great significance to the

jurisprudence of our state and is squarely and properly before this Court through the trial court's remedial order and Legislative Defendants' subsequent appeal. Accordingly, we deny Legislative Defendants' motion to dismiss.

B. *Harper*'s Constitutional Standard

¶ 74 **[2]** Next, before reviewing the Remedial Plans, we take this opportunity to clarify and reaffirm the constitutional standard recognized by this Court in *Harper v. Hall*, 380 N.C. 317, 2022-NCSC-17.

¶ 75 Constitutional compliance is not grounded in narrow statistical measures, but in broad fundamental rights. Therefore, a trial court reviewing the constitutionality of a challenged proposed districting plan must assess whether that plan upholds the fundamental right of the people to vote on equal terms and to substantially equal voting power. *Harper*, ¶ 7. This fundamental right "encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views." *Id.* ¶ 160. Put differently, it requires that "voters of all political parties [have] substantially equal opportunity to translate votes into seats." *Id.* ¶ 163.

> When, on the basis of partisanship, the General Assembly enacts a districting plan that diminishes or dilutes a voter's opportunity to aggregate with likeminded voters to elect a governing majorit—that is, when a districting plan systematically makes it harder for individuals because of their party affiliation to elect a governing majority than individuals in a favored party of equal size—the General Assembly deprives on the basis of partisan affiliation a voter of his or her right to equal voting power.

Id. ¶ 160.

¶ 76 Although *Harper* mentions several potential datapoints that may be used in assessing the constitutionality of a proposed districting plan, those measures are not substitutes for the ultimate constitutional standard noted above. *See id.* ¶¶ 165–69. That is, a trial court may not simply find that a districting plan meets certain factual, statistical measures and therefore dispositively, legally conclude *based on those measures alone* that the plan is constitutionally compliant. Constitutional compliance has no magic number. Rather, the trial court may consider certain datapoints within its wider consideration of the ultimate legal conclusion: whether the plan upholds the fundamental right of the people to vote on equal terms and to substantially equal voting power.

¶ 77 This is for good reason. As both Plaintiffs and Legislative Defendants recognize, individual datapoints are vulnerable to manipulation and are not independently dispositive of whether a map gives all voters a substantially equal opportunity to translate votes into seats. Rather, it is only when these metrics and record evidence align to "demonstrate[ ] [that] there is a significant likelihood that the districting plan will give the voters of all political parties substantially equal opportunity to translate votes into seats across the plan" that a challenged plan may again be considered presumptively constitutional. *Id.* ¶ 163.

¶ 78 Contrary to the claims of the dissent, applying this standard, though of course imperfect, is not impossible. There are many possible redistricting maps that could uphold the fundamental right of all voters to vote on equal terms, just as there are many possible factors that a trial court may consider in assessing the ultimate constitutionality of those maps. This is because our constitution speaks in broad foundational principles, not narrow statistical calculations. As in other realms, the absence of any one dispositive mathematical metric in redistricting does not absolve the judiciary of its constitutional duty to interpret and protect the constitutional rights of the citizens of our state. *See Corum*, 330 N.C. at 783 ("It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens . . . ."). Indeed, the very history of this case itself reveals that the judiciary, though not always in perfect agreement, may meaningfully engage with these principles toward the shared goal of ensuring the preservation of constitutional rights and the maintenance of our sacred system of democratic governance.

¶ 79 Here, the trial court appears to have leaned very heavily upon its factual findings regarding two datapoints, mean-median difference and efficiency gap, in reaching its ultimate legal conclusion that the RHP and RSP "satisfy the Supreme Court's standards."[9] However, the trial court also expressly adopted into its factual findings the findings within the Special Masters' Report. That Report, in turn, considered within its determination not just these two datapoints, but also "the findings of the advisors on the partisan symmetry analysis, the declination metrics, . . . their opinions on partisan bias and evidence of partisan gerrymandering[,]" and "the totality of the circumstances." Further, the trial court acknowledged the broader constitutional standard at least in passing in its factual findings regarding incumbency protection and traditional neutral districting criteria, which noted "the equal voting power requirements

9. To be clear, the ultimate standard for constitutional compliance originates from the fundamental rights enshrined in the Constitution itself, not from this Court.

of the North Carolina Constitution." In so doing, the remedial order indicates that the trial court functionally considered how the evidence presented supported or undermined the compliance of the plans with the broader constitutional standard, rather than using two datapoints as substitutes for constitutional compliance.[10] However, we encourage future trial courts considering the constitutionality of districting plans to specify how the evidence does or does not support the plan's alignment with the broader constitutional standard of upholding the fundamental right to vote on equal terms and avoiding partisan asymmetry, not merely where its falls within certain statistical ranges.

C. Remedial Congressional Plan

¶ 80 **[3]** With the proper constitutional standard clarified, we must now review the trial court's legal conclusions regarding the constitutionality of the RCP, RHP, and RSP in alignment with that standard. We review conclusions of law de novo to determine whether they are supported by findings of fact. *Stephenson*, 357 N.C. at 309; *Sykes*, 372 N.C. at 332. Factual findings are conclusive on appeal if they are supported by competent evidence. *Stephenson*, 357 N.C. at 309. We first address the trial court's rejection of Legislative Defendants' RCP. After consideration, we affirm.

¶ 81 In Conclusion of Law 7, the trial court "conclude[d] that the [RCP] does not satisfy the Supreme Court's standards" for constitutional compliance. The trial court subsequently concluded that "the [RCP] is not presumptively constitutional and is therefore subject to strict scrutiny." The court ultimately concluded that because "[t]he General Assembly has failed to demonstrate that the[ ] [RCP] is narrowly tailored to a compelling governmental interest, . . . [it] is unconstitutional."

¶ 82 These conclusions of law are supported by Findings of Fact 28 through 35. Therein, the trial court found that the RCP was passed on a strict party-line vote, that the RCP "is not satisfactorily within the statistical ranges set forth" in *Harper*, and that "the partisan skew in the [RCP] is not explained by the political geography of North Carolina." Further, the Special Masters' Report, as expressly adopted in full into the trial court's remedial order, found that "there is substantial evidence from the findings of the advisors that the [RCP] has an efficiency gap above 7% and a mean-median difference of greater than 1%." After consideration of this evidence "along with the advisors' findings on the partisan symmetry analysis and the declination metrics," the Special Masters stated

10. The trial court's brevity here must also be considered within the context of its extremely compressed schedule on remand.

their "opinion that the [RCP] fails to meet the threshold of constitutionality." They therefore "recommend[ed] that the [t]rial [c]ourt reject the [RCP] as being unconstitutional."

¶ 83 These factual findings are supported by competent evidence in the record. Specifically, none of the Special Masters' Advisors determined that the RCP yielded both an efficiency gap below 7% and a mean-median difference below 1%. Beyond these two measures, the Advisors determined that the RCP reflects stark and durable partisan asymmetry, as illustrated by their observations that Republicans would consistently win more seats than Democrats with the same share of votes across a variety of electoral conditions. More broadly, the Advisors determined that the RCP "consistently favors Republicans" across all applicable measures, "creates a distribution of voting strength across districts that is very lopsidedly Republican," and "should be viewed as a pro-Republican gerrymander." Finally, the Advisors determined that the RCP created far worse partisan asymmetry than possible alternatives.[11]

¶ 84 Collectively, this evidence amply supports the trial court's factual findings that the RCP does not satisfy constitutional standards. Those factual findings, in turn, adequately support the trial court's subsequent conclusion of law that the RCP must be assessed under, and fails, strict scrutiny. Accordingly, we affirm the trial court order's rejection of the RCP.

¶ 85 Next, we must address the trial court's subsequent remedy: the adoption of the Modified RCP. In Conclusion of Law 8, the trial court stated that "[g]iven the ultimate authority and directive is given to the Legislature to draw redistricting maps, we conclude that the appropriate remedy is to modify the Legislative [RCP] to bring it into compliance with the Supreme Court's order. *See* N.C.G.S. § 120-2.4(a1)." Subsequently, the court concluded that "[t]he [Modified RCP] as proposed by the Special Masters satisfies the Supreme Court's standards and should be adopted by th[e] [c]ourt for the 2022 North Carolina Congressional elections."

¶ 86 As an initial matter, the trial court is correct: N.C.G.S. § 120-2.4(a1) states, in pertinent part, that "[i]n the event the General Assembly does

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11. Of course, because there are any number of potential maps that could satisfy constitutional standards, the existence of an alternative plan with greater partisan symmetry does not dispositively prove the unconstitutionality of a less symmetrical plan. However, as with any other piece of evidence, the existence or absence of an alternative plan with significantly greater partisan symmetry—especially one that still honors traditional neutral districting criteria—may serve as one datapoint within the trial court's broader constitutional determination.

not act to remedy [a previously] identified defect[ ] to its [redistricting] plan within th[e] [required] period of time, the court may impose an interim districting plan." N.C.G.S. § 120-2.4(a1) (2021). The statute further clarifies that this interim plan "may differ from the districting plan enacted by the General Assembly only to the extent necessary to remedy any defects identified by the court." *Id.* In alignment with its broader statutory framework including N.C.G.S. § 1-267.1 (entitled "Three-judge panel for actions challenging plans apportioning or redistricting State legislative or congressional districts; claims challenging the facial validity of an act of the General Assembly") and N.C.G.S. § 120-2.3 (entitled "Contents of judgments invalidating apportionment or redistricting acts), N.C.G.S. § 120-2.4 expressly authorizes judicial review of legislative redistricting plans for state constitutional compliance and judicial adoption of modified remedial plans in the event that the General Assembly fails to remedy constitutional defects within its own proposed plans. Accordingly, the trial court properly complied with N.C.G.S. § 120-2.4(a1) in adopting the Modified RCP.

¶ 87 Further, the trial court's conclusion of law that the Modified RCP satisfies the constitutional standard is supported by its findings of fact. These factual findings determined that the Modified RCP "was developed in an appropriate fashion, is consistent with N.C.G.S. § 120-2.4(a1), and is consistent with the North Carolina Constitution and the Supreme Court's full opinion." (Footnote omitted). The Special Masters' Report, as expressly adopted in full into the trial court's remedial order, likewise found that the Modified RCP "satisfies the requirements of the Supreme Court" and "achieves the partisan fairness and 'substantially equal voting power' required by the Supreme Court of North Carolina."

¶ 88 These findings of fact are supported by competent evidence. The evidence indicates that the Modified RCP "has an efficiency gap of 0.63%, a mean-median difference of 0.69%, seat bias of 0.28%, and vote bias of 0.10%." According to Dr. Grofman, "this is the most non-dilutive plan in partisan terms of any map that has been submitted to the [c]ourt." Finally, the evidence indicates that the Modified RCP achieves this level of partisan symmetry while still complying with traditional neutral districting criteria such as "maintaining the number of county splits, retaining equal population, compactness, and contiguity, as well as respecting municipal boundaries."

¶ 89 Collectively, this evidence amply supports the trial court's factual findings that the Modified RCP was developed in an appropriate fashion, is consistent with N.C.G.S. § 120-2.4(a1), and meets constitutional standards. Those factual findings, in turn, adequately support the trial court's

subsequent conclusion of law that adopting the Modified RCP is legally and constitutionally appropriate remedy. Accordingly, we affirm the trial court order's adoption of the Modified RCP.

D. Remedial House Plan

¶ 90 **[4]** Second, we address the trial court's approval of Legislative Defendants' Remedial House Plan (RHP). After consideration, we affirm.

¶ 91 In Conclusion of Law 4, the trial court "conclude[d] that the [RHP] satisfies the Supreme Court's standards" for constitutional compliance. It subsequently concluded that "the [RHP is] presumptively constitutional" and that because "no evidence presented to the [c]ourt is sufficient to overcome this presumption[,] . . . th[e] [RHP is] therefore constitutional and will be approved."

¶ 92 These conclusions of law are supported by Findings of Fact 51 through 63, none of which have been specifically challenged as unsupported by evidence. Therein, the trial court found that the RHP was "amended by six amendments offered by Democratic Representatives" and ultimately passed the House and Senate with sweeping bipartisan approval. The trial court found, "based upon and confirmed by the analysis of the Special Masters and their advisors, that the [RHP is] satisfactorily within the statistical ranges set forth in the Supreme Court's full opinion." The court found that "to the extent there remains a partisan skew in the [RHP], that partisan skew is explained by the political geography of North Carolina." Regarding the General Assembly's consideration of incumbency protection, the trial court found that "the measures taken by the General Assembly for the purposes of incumbency protection in the [RHP] were applied evenhandedly" and "are consistent with the equal voting power requirements of the North Carolina Constitution." The trial court found "that the General Assembly did not subordinate traditional neutral districting criteria to partisan criteria or considerations in the [RHP]." Further, the Special Masters' Report, as expressly adopted in full into the trial court's remedial order, found that "[t]he advisors as well as the experts of the parties . . . all found the efficiency gap of the [RHP] to be less than 7%" and "[t]he majority of the advisors and experts found the mean-median difference of the [RHP] to be less than 1%." The Special Masters determined, based on these facts and "the findings of the advisors on the partisan symmetry analysis, the declination metrics, and their opinions on partisan bias and evidence of partisan gerrymandering," that "the [RHP] meets the test of presumptive constitutionality."

¶ 93 Moreover, these factual findings are supported by competent evidence. The Special Masters' Advisors determined that the RHP yields

an average efficiency gap of about 2.88%, an average mean-median difference of about 1.27%, a partisan asymmetry of 2.9%, and a declination metric of 0.16. Although the RHP shows some Republican bias, the Advisors determined that the RHP "is genuinely far more competitive than either of the other two legislatively proposed maps" and "simply lacks the same clear indicia of egregious bias found in the previously rejected maps and still found . . . in the [RCP] and [RSP]." Dr. Jarvis determined that the RHP "appear[s] to be mostly typical in terms of the number of seats won," and Dr. McGhee observed that the RHP's similarity to the NCLCV proposed plan "hints that it may be difficult to do better while still abiding by other constraints." Contextually, the Advisors observed that neither the Harper Plaintiffs nor the NCLCV Plaintiffs challenged the RHP on appeal, and that the RHP "was passed by a clear bipartisan consensus in the legislature."

¶ 94 Collectively, this evidence supports the trial court's factual findings that the RHP meets constitutional standards. Those factual findings, in turn, adequately support the trial court's subsequent conclusion of law that the RHP is constitutional and should be approved. Accordingly, we affirm the trial court's order approving the RHP. In accordance with article II section 5(4) of our Constitution, the RHP is now "established" under law and therefore "shall remain unaltered until the return of another decennial census of population taken by order of Congress."

E. Remedial Senate Plan

¶ 95 **[5]** Third, we address the trial court's approval of Legislative Defendants' Remedial Senate Plan (RSP). After consideration, we reverse.

¶ 96 In Conclusion of Law 3, the trial court "conclude[d] that the [RSP] satisfies the Supreme Court's standards." It subsequently concluded that "the [RSP is] presumptively constitutional," and that because "no evidence presented to the [c]ourt is sufficient to overcome this presumption[,] . . . th[e] [RSP is] therefore constitutional and will be approved."

¶ 97 These conclusions of law are based on Findings of Fact 36 through 50, but, unlike for the RHP, are not supported by all of those findings. For instance, Finding of Fact 36 found that the RSP kept many of the same county groupings as the unconstitutional 2021 Senate plan. Finding of Fact 38 found that the RSP passed both chambers of the General Assembly on strict party-line votes. Finding of Fact 39 found that suggested Senate plans drawn by Democrats were rejected and only "the plan proposed by the Republican Redistricting and Election Committee members was then put to a vote by the Senate Committee and advanced to the full chamber." Though far from dispositive, these contextual

factual findings undermine, rather than support, the trial court's subsequent conclusion that the RSP meets constitutional standards of partisan symmetry. These contrary factual findings, in part, distinguish the trial court's analysis of the RSP from its analysis of the RHP.

¶ 98 Other findings of fact regarding the RSP, though supportive of the trial court's legal conclusions, are expressly challenged by Plaintiffs and, we conclude, are unsupported by competent evidence.[12] For instance, Finding of Fact 42 found that "based upon the analysis performed by the Special Masters and their advisors, . . . the [RSP] is satisfactorily within the statistical ranges set forth in the Supreme Court's full opinion." Finding of Fact 43 found "that to the extent there remains a partisan skew in the [RSP], that partisan skew is explained by the political geography of North Carolina." These two findings constitute the keystone of the trial court's factual support for its legal conclusion that the RSP is constitutionally compliant, but neither are supported by competent evidence.

¶ 99 First, Finding of Fact 42 is not supported by competent evidence. Far from supporting the constitutionality of the RSP, the analysis performed by the Special Masters and their Advisors strongly indicates that the RSP reflects "a <u>substantial</u> pro-Republican bias" that "should be viewed as a pro-Republican gerrymander" and constitutes "a significant outlier in favor of the Republicans." Statistically, all but one Advisor, Dr. Wang, determined that the RSP yields a mean-median difference of over 1%, and the average of all four advisors' mean-median difference calculation is also above 1%. Even Dr. Wang concluded that the RSP indicates notable partisan bias in all six metrics evaluated. And because the Special Masters expressly noted that Dr. Wang's analysis "was not determinative of any recommendations made by the Special Masters to the court," it is clear that this finding of fact cannot rest on his single calculation alone. Further, the evidence indicates the RSP's durable partisan asymmetry is such that "in a tied election Republicans would still hold 27 or 28 seats, and that Democrats would need to win as much as 53 percent of the vote to claim 25 seats."

¶ 100 Finding of Fact 43 is likewise unsupported by competent evidence. There, the trial court found "that to the extent there remains a partisan skew in the [RSP], that partisan skew is explained by the political geography of North Carolina." As an initial matter, this finding is an incomplete statement of the requirement established in *Harper*, which stated that a court may use statistical measures in assessing "whether

12. Because these factual findings are expressly challenged as lacking competent evidence, they require a more careful review than findings or conclusions that are more generally rebutted or wholly unmentioned.

a meaningful partisan skew *necessarily results* from North Carolina's unique political geography." *Harper*, ¶ 163 (emphasis added). In any event, the evidence shows the opposite. The Advisors specifically determined that alternative remedial Senate plans often reflect "less than half the size of the [partisan] advantage in the Legislative Defendants' [RSP]," indicating "that there is nothing foreordained about the advantages in the Legislative Defendants' plan." This evidence likewise distinguishes the RSP from the RHP, which was found to reflect very similar partisan symmetry as alternative plans, thus "hint[ing] that it may be difficult to do better while still abiding by [traditional] constraints." Indeed, when alternative plans reflect substantially less partisan asymmetry while adhering equally or better to traditional neutral redistricting criteria, it indicates that the more asymmetrical plan is necessarily *not* explained by political geography.

¶ 101 To be clear, none of these datapoints are individually dispositive. Cumulatively, though, they directly and significantly undermine, rather than support, the trial court's factual findings that the RSP satisfies constitutional standards. Given this lack of competent evidentiary support, these challenged findings of fact must be rejected as support for their subsequent legal conclusions.

¶ 102 Without these keystone factual findings, the trial court's subsequent conclusions of law crumble. That is, without any findings that the RSP satisfies constitutional standards, the trial court's conclusion affirming the RSP's constitutionality is wholly unsupported and likewise fails. Accordingly, we reverse the trial court's approval of the RSP.

¶ 103 Given this reversal, this Court must now implement a remedy. Under N.C.G.S. § 120-2.4(a1), when "the General Assembly does not act to remedy any identified defects" to a remedial districting plan, "the court may impose an interim districting plan . . . that . . . differ[s] from the districting plan enacted by the General Assembly only to the extent necessary to remedy any defects identified by the court." In accordance with this express statutory authorization and the Court's constitutional authority to remedy the violation of fundamental rights, *see Corum*, 330 N.C. at 783, we remand this case to the trial court to oversee the creation of a Modified RSP. This plan must modify Legislative Defendants' RSP only to the extent necessary to achieve constitutional compliance by ensuring that individuals "of all political parties are given substantially equal opportunity to translate votes into seats across the plan." *Harper*, ¶ 163. Upon its review, if the trial court concludes that the proposed Modified RSP meets this constitutional standard, then we instruct the trial court to adopt the Modified RSP.

F. Legislative Defendants' Motion to Disqualify Special Masters' Advisors

¶ 104 **[6]** Next, we must address Legislative Defendants' contention that the trial court abused its discretion in denying Legislative Defendants' motion to disqualify two of the Special Masters' Advisors. This Court reviews a trial court's discretionary ruling for an abuse of that discretion. *Davis v. Davis*, 360 N.C. 518, 523 (2006). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are 'manifestly unsupported by reason.' " *Id.* (quoting *Clark v. Clark*, 301 N.C. 123, 129 (1980)). We hold that the trial court did not abuse its discretion in denying Legislative Defendants' motion to disqualify for three reasons.

¶ 105 First, while "the analysis provided by Drs. Wang and Jarvis was helpful . . . , it was not determinative of any recommendations made by the Special Masters to the [c]ourt." Second, the ex parte communications between the Advisors and Plaintiffs' experts "do not appear to have been made in bad faith" and "were solely for the purpose of proceeding as quickly as possible within the abbreviated time frame allotted for the remedial process." Third, all of the information sought by the Advisors "was publicly available . . . at the time of the communications questioned." Accordingly, the trial court's denial of Legislative Defendants' motion to disqualify was amply supported by reason. We therefore affirm the trial court's denial of Legislative Defendants' motion.

G. Equal Protection Challenge

¶ 106 **[7]** Finally, we must address Plaintiff Common Cause's equal protection arguments. Specifically, Common Cause contends that RHP District 10 and RSP District 4 violate state equal protection requirements by failing to protect against vote dilution for Black voters and due to the intentional destruction of functioning crossover districts for Black voters. In response, Legislative Defendants assert the General Assembly satisfactorily performed a racially polarized voting analysis which showed that majority-minority districts are not required for Voting Rights Act (VRA) compliance, and that the General Assembly lacked good reason to conclude that drawing remedial districts without reference to race was required to protect from VRA Section 2 liability. Because this Court has already reversed the trial court's constitutional approval of the RSP, we focus primarily on Plaintiff Common Cause's RHP challenge. After consideration, we reject Plaintiff Common Cause's claim.

¶ 107 In *Harper*, this Court held "that under *Stephenson*, the General Assembly was required to conduct a racially polarized voting analysis prior to drawing district lines." *Harper*, ¶ 214. We further noted that this

responsibility “arises from our state constitution and decisions of this Court, including primarily *Stephenson*, and not from the VRA itself, or for that matter from any federal law.” *Id.*

¶ 108 Here, the trial court concluded that the RHP satisfied constitutional standards, which include principles of equal protection. This conclusion of law, as it relates to equal protection principles, was supported by Findings of Fact 16 and 17. Therein, the trial court found that “[t]he General Assembly conducted an abbreviated racially polarized voting (“RPV”) analysis to determine whether racially polarized voting is legally sufficient in any area of the state such that Section 2 of the [VRA] requires the drawing of a district to avoid diluting the voting strength of African American voters during the remedial process.” The trial court found that “Legislative Defendants’ expert Dr. Jeffery B. Lewis ran an analysis and concluded that all three Remedial Plans provide African Americans with proportional opportunity to elect their candidates of choice.” Accordingly, the trial court determined “that the General Assembly satisfied the directive in the Supreme Court Remedial Order to determine whether the drawing of a district in an area of the state is required to comply with Section 2 of the [VRA].”

¶ 109 The evidence on this issue, though limited, supports the trial court’s limited findings of fact and conclusion of law. Specifically, the record reflects that the General Assembly conducted RPV analysis during its remedial process in compliance with this Court’s order and opinion in *Harper*, and that this analysis concluded that the RHP met threshold requirements of providing Black voters with proportional opportunity to elect candidates of their choice. Although Plaintiff Common Cause notes contrary evidence indicating decreases in Black voting age population percentages within the two challenged districts under the RHP and RSP, this evidence does not lead to a conclusion that the trial court’s findings are unsupported by competent evidence. Further, because the federal authorities cited by Plaintiff Common Cause do not *require* the General Assembly to create functioning crossover districts based on this data under state equal protection principles, this Court is not in a position to consider Plaintiff’s requested remedy within an exclusively state law claim in state court. Accordingly, we affirm the trial court’s approval of the RHP on equal protection principles.

III. Conclusion

¶ 110 Our Constitution’s Declaration of Rights vests in the people of this state the fundamental right to vote on equal terms. N.C. Const. art. I, §§ 1 (equality and rights of persons), 2 (sovereignty of the people), 10

(free elections), 12 (freedom of assembly), 14 (freedom of speech), 19 (equal protection of the laws); *see Harper*, ¶ 158–59 (summarizing these principles and rights). In exercising its redistricting authority, the General Assembly is required to respect and uphold this fundamental right. *Id.* ¶ 160. Therefore, when the General Assembly enacts a districting plan that systematically makes it harder for certain voters to elect a governing majority based on partisan affiliation, that plan "is subject to strict scrutiny and is unconstitutional unless the General Assembly can demonstrate that the plan is narrowly tailored to advance a compelling governmental interest." *Id.* ¶ 161 (cleaned up). While individual datapoints about a districting plan may be helpful toward *assessing* constitutional compliance, they are not *substitutes* for constitutional compliance. Ultimately, a districting plan must comply with the broader constitutional standard of upholding the right to vote on equal terms and to substantially equal voting power. *Id.* ¶ 160.

¶ 111 Here, the trial court properly determined that Legislative Defendants' Remedial Congressional Plan fell short of that standard. In accordance with N.C.G.S. § 120-2.4(a1), it then properly adopted a Modified RCP. Therefore, we affirm the trial court's rejection of the RCP and adoption of the Modified RCP.

¶ 112 Next, the trial court properly determined that Legislative Defendants' Remedial House Plan met constitutional standards. We therefore affirm the trial court's approval of the RHP for use through the next decennial redistricting cycle.

¶ 113 However, the trial court erred in its determination that Legislative Defendants' Remedial Senate Plan met constitutional standards. Specifically, the trial court's legal conclusion that the RSP is constitutionally compliant is unsupported by findings of fact that are supported by competent evidence. Rather, the evidence strongly indicates that the RSP creates stark partisan asymmetry in violation of the fundamental right to vote on equal terms. We therefore reverse the trial court's approval of the RSP.

¶ 114 In accordance N.C.G.S. § 120-2.4(a1), we now remand this case to the trial court to oversee the creation of a Modified RSP that modifies Legislative Defendants' RSP only to the extent necessary to achieve constitutional compliance. After assessing the Modified RSP for constitutional compliance, we instruct the trial court, in accordance with N.C.G.S. § 120-2.4(a1), to adopt this Modified RSP.

¶ 115 If our state is to realize its foundational ideals of equality and popular sovereignty, it must first "ensure that the channeling of 'political

power' from the people to their representatives in government through elections, the central democratic process envisioned by our constitutional system, is done on equal terms." *Harper*, ¶ 223. Only then will ours truly be "a 'government of right' that 'originates from the people' and speaks with their voice." *Id.* As expressed in *Harper*, it remains the sincere hope of this Court that our state's leaders will exercise their constitutional authority—in redistricting and all other realms—in a manner that upholds these fundamental rights and principles. *Id.* Until then, it remains the solemn constitutional duty of this Court and our state judiciary to stand in the breach.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Chief Justice NEWBY dissenting.

¶ 116 To which branch of government does our constitution place the role of redistricting? The constitution expressly gives that responsibility to the legislative branch; even the majority so concedes. While paying lip service to this express grant of authority, the majority retains for itself the ultimate redistricting responsibility. As previously warned in the initial dissent in this case,

> [t]he majority replaces established principles with ambiguity, basically saying that judges alone know which redistricting plan will be constitutional and accepted by this Court based on analysis by political scientists. This approach ensures that the majority now has and indefinitely retains the redistricting authority, thereby enforcing its policy preferences.

Harper v. Hall (*Harper I*), 380 N.C. 317, 2022-NCSC-17, ¶ 229 (Newby, C.J., dissenting).

¶ 117 Today this prediction is fulfilled. In *Harper I* the majority effectively amended the state constitution to establish a redistricting commission composed of judges and political science experts. When, however, this commission, using the majority's redistricting criteria, reached an outcome with which the majority disagrees, the majority freely reweighs the evidence and substitutes its own fact-finding for that of the three-judge panel. Again, as predicted, "[t]he four members of this Court alone will approve a redistricting plan which meets their test of constitutionality." *Id.* ¶ 309.

¶ 118 On remand, despite very challenging deadlines established by the majority, the General Assembly redrew its redistricting maps, this time using the guidelines discussed by this Court in *Harper I*. The General Assembly made the policy decision to use various approved, constitutionally compliant procedures. It chose appropriate county groupings, utilized the most widely accepted redistricting software available, Maptitude, and adopted for its use the twelve statewide races suggested by one of plaintiffs' experts. It made the policy decision to rely on the two, extensively peer-reviewed, political science tests suggested by the majority. The majority said that if a redistricting plan met these tests, it would be "presumptively constitutional." *Id.* ¶¶ 166–67 (majority opinion). All of the General Assembly's remedial plans met these tests according to the Maptitude software.

¶ 119 The three-judge panel, its Special Masters, and their advisors did not give any deference to the General Assembly's policy choices listed above. Each advisor used his own preferred software and set of elections to analyze the remedial plans. Nevertheless, the Special Masters recommended, and the three-judge panel concluded, that the remedial House plan (RHP) and the remedial Senate plan (RSP) complied with the majority's criteria from *Harper I*. The three-judge panel, however, summarily rejected the remedial Congressional plan (RCP), as recommended by the Special Masters, and judicially adopted a plan created by the Special Masters in consultation with their advisors.

¶ 120 Now the majority agrees with the three-judge panel's acceptance of the RHP and its rejection of the RCP. The majority, however, holds unconstitutional beyond a reasonable doubt the RSP. While accepting the three-judge panel's findings of fact for the RHP, the majority wrongly reweighs the evidence, determines credibility, and substitutes its own judgment for that of the three-judge panel in order to strike down the RSP.

¶ 121 Despite the majority's judicial amendments to our constitution to create an active role for itself in redistricting, our case law directs that the General Assembly's policy determinations in enacting laws are entitled to a presumption of constitutionality. *See State ex rel. McCrory v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016). Showing that a policy decision is unconstitutional requires proof beyond any reasonable doubt. *See, e.g.*, *Jenkins v. State Bd. of Elections*, 180 N.C. 169, 172, 104 S.E. 346, 348 (1920). In compliance with the majority's directive, the General Assembly chose Maptitude, a set of twelve statewide elections, and two political science tests, Mean-Median Difference and Efficiency Gap, which were specifically approved in *Harper I*.

¶ 122 No one has challenged the General Assembly's policy choices as unconstitutional. According to Maptitude, all three remedial maps satisfied the Mean-Median Difference and Efficiency Gap criteria, thus meeting the majority's own test for presumptive constitutionality—this test being in addition to the long-standing requirement that we treat all acts of the General Assembly as constitutional.

¶ 123 Neither the majority nor the three-judge panel gave any deference to these policy choices. Instead, they disrespect another branch of government by treating the General Assembly as just another participant in their redistricting process. While the three-judge panel correctly upheld the RHP and the RSP, it wrongly rejected the RCP. The majority now wrongly rejects the RSP and upholds the three-judge panel's rejection of the RCP. The majority has effectively overturned its own decision in *Harper I*. There it said that if the Remedial Plans met specified thresholds for certain political science-based tests, the plans would be "presumptively constitutional." *Harper I*, 2022-NCSC-17, ¶¶ 166–67. Now, reversing course, it says none of these test scores can entitle a proposed redistricting plan to a presumption of constitutionality. It appears the majority seeks to apply strict scrutiny to all of Legislative defendants' Remedial Plans.

¶ 124 By its actions today, the majority confirms the dangers of judicial usurpation of the legislative redistricting role. By intentionally stating vague standards, it ensures that four members of this Court alone understand what redistricting plan is constitutionally compliant. Apparently, the General Assembly, the three Special Masters (each a former jurist), and the three-judge panel were unable to discern the constitutional "standard" set out in *Harper I*. Only the four justices here know what meets their standard.

¶ 125 When the constitution expressly assigns a task to a particular branch of government, the constitution prohibits the judicial branch from intruding into that task. Such intrusion violates separation of powers; the issue is nonjusticiable. Similarly, a matter is nonjusticiable if there is "a lack of judicially discoverable and manageable standards for resolving it." *Id.* ¶ 237 (Newby, C.J., dissenting) (quoting *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710 (1962)). While the presence of either factor makes a matter nonjusticiable, both are present here.[1]

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1. The majority wrongly states that the presence of both factors is required to render an issue nonjusticiable. *Harper I*, 2022-NCSC-17, ¶ 112 (majority opinion) ("This Court has recognized two criteria of political questions: (1) where there is 'a textually demonstrable constitutional commitment of the issue' to the 'sole discretion' of a 'coordinate political

¶ 126 As previously stated,

> [t]he majority ignores [the Supreme Court's] warnings, fails to articulate a manageable standard, and seems content to have the discretion to determine when a redistricting plan is constitutional. This approach is radically inconsistent with our historic standard of review, which employs a presumption that acts of the General Assembly are constitutional, requiring identification of an express constitutional provision and a showing of a violation of that provision beyond a reasonable doubt.
>
> The Supreme Court cautioned that embroiling courts in cases involving partisan gerrymandering claims by applying an "expansive standard" would amount to an "unprecedented intervention in the American political process."

Id. ¶¶ 310–11 (quoting *Rucho v. Common Cause*, 139 S. Ct. 2484, 2498 (2019)). Sadly, the majority continues to do just that. I respectfully dissent.

I. Factual and Procedural History

A. Initial Litigation

¶ 127 As required by both our state constitution and the Federal Constitution, the General Assembly, following the 2020 census, enacted redistricting plans for the North Carolina Senate and House of Representatives and for the North Carolina districts for the United States House of Representatives on 4 November 2021 (2021 Plans). North Carolina League of Conservation Voters (NCLCV) plaintiffs and Harper plaintiffs each challenged the legality of these plans, arguing they "establish[ed] severe partisan gerrymanders" and "engag[ed] in racial vote dilution" in violation of the Free Elections Clause, the Equal Protection Clause, the Freedom of Speech and Assembly Clauses, and the Whole County Provisions of the North Carolina Constitution. *See* N.C. Const. art. I, §§ 10, 19, 12, 14; *id.* art. II, §§ 3(3), 5(3). Both groups of plaintiffs also sought a preliminary injunction to enjoin use of the 2021 Plans.

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department[,]' *and* (2) those questions that can be resolved only by making 'policy choices and value determinations.' " (first alteration in original) (emphasis added) (quoting *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001))).

¶ 128 The NCLCV and Harper actions were consolidated and assigned to a three-judge panel of the Superior Court in Wake County. On 3 December 2021, the three-judge panel denied both NCLCV plaintiffs' and Harper plaintiffs' motions for preliminary injunction. NCLCV plaintiffs and Harper plaintiffs filed a notice of appeal with the North Carolina Court of Appeals.

¶ 129 The Court of Appeals denied NCLCV plaintiffs' and Harper plaintiffs' request for a temporary stay. NCLCV plaintiffs and Harper plaintiffs then filed several items with this Court, including two petitions for discretionary review prior to determination by the Court of Appeals, a motion to suspend appellate rules to expedite a decision, and a motion to suspend appellate rules and expedite schedule. On 8 December 2021, this Court allowed NCLCV plaintiffs' and Harper plaintiffs' petitions for discretionary review, granted a preliminary injunction, and temporarily stayed the candidate filing period for the 2022 election cycle "until such time as a final judgment on the merits of [NCLCV and Harper] plaintiffs' claims, including any appeals, is entered and [a] remedy, if any is required, has been ordered." In the same order, this Court also directed the three-judge panel to hold proceedings on "the merits of plaintiffs' claims and to provide a written ruling on or before . . . January 11, 2022."

¶ 130 Subsequently, Common Cause moved to intervene in the consolidated proceedings as a plaintiff on 13 December 2021. The three-judge panel granted Common Cause's motion to intervene, and on 16 December 2021, Common Cause filed its complaint alleging the 2021 Plans violated the Equal Protection Clause, the Free Elections Clause, and the Freedom of Speech and Freedom of Assembly Clauses of the North Carolina Constitution. Hereinafter, NCLCV plaintiffs, Harper plaintiffs, and Common Cause are collectively referred to as "plaintiffs."

¶ 131 Legislative defendants filed their Answers on 17 December 2021. Thereafter, the parties engaged in an "expedited two-and-a-half-week" discovery period, during which the three-judge panel ruled on ten discovery-related motions and the parties collectively designated ten expert witnesses and submitted accompanying reports. Altogether, the parties collectively submitted over 1000 pages of reports and materials to the three-judge panel. After the discovery period closed on 31 December 2021, the three-judge panel commenced a three-and-one-half day trial on 3 January 2022 during which it received approximately 1000 exhibits into evidence and testimony from numerous fact and expert witnesses.

¶ 132 On 11 January 2022, the three-judge panel entered a judgment concluding that plaintiffs' partisan gerrymandering claims presented

nonjusticiable, political questions because redistricting "is one of the purest political questions which the legislature alone is allowed to answer." Additionally, the three-judge panel concluded that the 2021 Plans did not violate North Carolina's Declaration of Rights because "[t]he objective constitutional constraints that the people of North Carolina have imposed on legislative redistricting are found in Article II, Sections 3 and 5 of the 1971 Constitution and not the Free Elections, Equal Protection, Freedom of Speech or Freedom of Assembly Clauses found in Article I of the 1971 Constitution."

¶ 133 Pursuant to this Court's 8 December 2021 order certifying the case for review prior to determination by the Court of Appeals, all plaintiffs filed notices of appeal to this Court from the three-judge panel's judgment. The case was argued before this Court on 2 February 2022. On 4 February 2022, in a four-to-three decision, this Court entered an Order (Remedial Order) adopting the findings of fact from the three-judge panel's judgment but concluding that the 2021 Plans were "unconstitutional beyond a reasonable doubt under the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause of the North Carolina Constitution." The Remedial Order reversed and remanded the matter to the three-judge panel for remedial proceedings and noted that a full opinion would follow. Three justices filed a dissent to the Remedial Order.

B. *Harper I*

¶ 134 Ten days later, the four-justice majority issued its full opinion. *See Harper I*, 380 N.C. 317, 2022-NCSC-17. The majority opinion first held that "partisan gerrymandering claims are justiciable in North Carolina courts under the . . . [North Carolina] Declaration of Rights" because there are "several manageable standards for evaluating the extent to which districting plans dilute votes on the basis of partisan affiliation." *Id.* ¶ 174. Specifically, the majority determined that various political science metrics could serve as a sufficient standard. *See id.* ¶¶ 163, 166–67. It indicated that a 1% or less Mean-Median Difference score and a 7% or less Efficiency Gap score could indicate a redistricting map is "presumptively constitutional." *See id.* ¶¶ 166–67. The majority, however, refused to state a precise standard, ultimately leaving that review to themselves. *Id.* ¶ 163 ("We do not believe it prudent or necessary to, at this time, identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander.").

¶ 135 Next, the majority held that "[p]artisan gerrymandering of legislative and congressional districts violates the free elections clause, the equal

protection clause, the free speech clause, and the freedom of assembly clause" of the North Carolina Constitution. *Id.* ¶ 160. Specifically, the majority reasoned that these provisions reflect "the principle of political equality," *id.* ¶ 158, which in turn requires that "the channeling of 'political power' from the people to their representatives in government through the democratic processes . . . must be done on equal terms," *id.* Accordingly, the majority concluded that to comport with these provisions in the Declaration of Rights, the General Assembly "must not diminish or dilute on the basis of partisan affiliation any individual's vote" because "[t]he fundamental right to vote includes the right to enjoy 'substantially equal voting power and substantially equal legislative representation.' " *Id.* ¶ 160 (quoting *Stephenson v. Bartlett* (*Stephenson I*), 355 N.C. 354, 382, 562 S.E.2d 377, 396 (2002)).

¶ 136 The majority determined that because "[t]he right to vote on equal terms is a fundamental right in this state," strict scrutiny must apply once a party demonstrates that a redistricting plan "infringes upon his or her fundamental right to substantially equal voting power" based on partisan affiliation. *Id.* ¶ 181. To trigger strict scrutiny, the majority held that a party must demonstrate that a redistricting plan "makes it systematically more difficult for a voter to aggregate his or her vote with other likeminded voters." *Id.* ¶ 180. A party may make this demonstration using a variety of political science-based metrics and tests such as:

> median-mean difference analysis; efficiency gap analysis; close-votes-close[-]seats analysis[;] partisan symmetry analysis; comparing the number of representatives that a group of voters of one partisan affiliation can plausibly elect with the number of representatives that a group of voters of the same size of another partisan affiliation can plausibly elect; and comparing the relative chances of groups of voters of equal size who support each party of electing a supermajority or majority of representatives under various possible electoral conditions. Evidence that traditional neutral redistricting criteria were subordinated to considerations of partisan advantage may be particularly salient in demonstrating an infringement of this right.

Id. Once a party makes this initial demonstration, the challenged redistricting plan "is unconstitutional [unless] the State can[ ] establish that it is narrowly tailored to advance a compelling governmental interest." *Id.* ¶ 181 (quoting *Stephenson I*, 355 N.C. at 377, 562 S.E.2d at 393). The

majority opined that “compliance with traditional neutral districting principles, including those enumerated in [the Whole County Provisions] of the North Carolina Constitution,” might constitute a compelling governmental interest that would overcome strict scrutiny, but “[p]artisan advantage” is not. *Id.*

¶ 137 The majority then applied these principles to the three-judge panel’s factual findings and determined that the evidence at trial demonstrated that all of the 2021 Plans were partisan gerrymanders. *Id.* ¶ 178. The majority then applied strict scrutiny to each map and concluded that the 2021 Plans were not “carefully calibrated toward advancing some compelling neutral priority.” *Id.* ¶¶ 195, 213; *see id.* ¶ 205. To the contrary, the majority concluded that each map “prioritized considerations of partisan advantage above traditional neutral districting principles,” and therefore, “must be rejected.” *Id.* ¶ 213; *see id.* ¶¶ 195, 205.

¶ 138 The majority concluded its *Harper I* opinion by reversing and remanding the case to the three-judge panel and instructing the three-judge panel to “oversee the redrawing of the maps by the General Assembly, or, if necessary, by the court.” *Id.* ¶ 223. The three dissenting justices determined plaintiffs’ claims were non-justiciable. The dissent noted that our state constitution expressly assigns the redistricting responsibility to the General Assembly and that the majority failed to identify a judicially discernable, manageable standard by which to adjudicate the partisan gerrymandering claims at issue. *See id.* ¶¶ 237–67 (Newby, C.J., dissenting).

C. Remand

1. Three-Judge Panel’s Initial Orders

¶ 139 This Court’s 4 February 2022 Remedial Order required an expedited process with abbreviated deadlines. The majority ordered the General Assembly to submit new congressional and state legislative districting plans “that satisfy all provisions of the North Carolina Constitution” by 18 February 2022. The Remedial Order also permitted plaintiffs to submit proposed remedial districting plans by the same deadline. The majority permitted all parties to file and submit comments on any of the submitted plans by 21 February 2022. The Remedial Order mandated that the three-judge panel “approve or adopt compliant congressional and state legislative districting plans no later than noon on 23 February 2022.” Any party could file an emergency application for stay pending appeal by 5:00 P.M. on that same day.

¶ 140 On 8 February 2022, the three-judge panel entered an order requiring that each party who submitted a proposed remedial plan must also

submit a corresponding explanation of the "data and other considerations" used in creating the plan. Specifically, each party had to explain whether "traditional neutral districting criteria" were used, whether incumbency was considered, whether any partisan skew "necessarily result[ed] from North Carolina's unique political geography," and any political science metrics utilized.

¶ 141 In the same 8 February 2022 order, the three-judge panel also informed the parties of its intent to appoint Special Masters to assist the panel in reviewing the parties' proposed remedial plans and, if needed, in developing alternative remedial plans. The order permitted each party to submit to the three-judge panel suggested individuals to serve as a Special Master. Each of the parties submitted their suggestions, but the three-judge panel instead appointed three individuals of its own choosing—former jurists Robert F. Orr, Robert H. Edmunds, Jr., and Thomas W. Ross—in a 16 February 2022 order (Appointment Order).

¶ 142 The Appointment Order authorized the Special Masters to hire assistants "reasonably necessary to facilitate their work." The Special Masters hired four advisors to assist in evaluating the Remedial Plans: Dr. Bernard Grofman, Dr. Tyler Jarvis, Dr. Eric McGhee, and Dr. Samuel Wang. Notably, two of the advisors—Dr. Grofman and Dr. Jarvis—were recommended by NCLCV plaintiffs as potential Special Masters, and at least one of the advisors—Dr. Wang—filed a brief in support of plaintiff Common Cause in previous litigation surrounding redistricting in North Carolina. *See* Brief of *Amici Curiae* Professors Wesley Pegden, Jonathan Rodden, and Samuel S.-H. Wang in Support of Appellees 2, *Rucho v. Common Cause*, 139 S. Ct. 2484 (No. 05-1631). None of the advisors were recommended by Legislative defendants.

2. General Assembly's Remedial Process

¶ 143 The General Assembly enacted new congressional and legislative plans (Remedial Plans) on 17 February 2022 and timely submitted them to the three-judge panel on 18 February 2022. Per the three-judge panel's 8 February 2022 and 16 February 2022 orders, the General Assembly also submitted a detailed memorandum describing the data and process used to create the Remedial Plans.

¶ 144 The General Assembly understood *Harper I* as requiring it "to intentionally create more Democratic districts in the [Remedial Plans]." To achieve this task, the General Assembly started with a blank slate and followed the same process to create each map. Each redistricting committee kept the county groupings used for the 2021 Plans as base maps. Accordingly, any single district county groupings from each of the 2021

Plans were carried over to the Remedial Plans; otherwise, each map was entirely new.

¶ 145 Next, each redistricting committee "dr[e]w new districts and ma[d]e adjustments tailored to legitimate criteria." The General Assembly made the policy decision to utilize Caliper's Maptitude redistricting software, a "widely accepted districting program," to draw and analyze the Remedial Plans. The General Assembly chose Maptitude, as opposed to another redistricting software, because it is "widely accepted" in the field of redistricting and is "used by a supermajority of the state legislatures, political parties, and public interest groups." *Overview: Maptitude for Redistricting Software*, https://www.caliper.com/mtredist.htm (last visited Dec. 7, 2022).

¶ 146 Although expressly prohibited by its previous redistricting criteria, the General Assembly "used partisan election data as directed by the Supreme Court's Remedial Order" to achieve its goal of "intentionally creat[ing] more Democratic districts." The General Assembly made the policy decision to utilize partisan data from the set of elections that plaintiffs' expert, Dr. Mattingly, used to analyze the [2021 Plans]. This set of elections included: Lieutenant Governor 2016, President 2016, Commissioner of Agriculture 2020, Treasurer 2020, Lieutenant Governor 2020, U.S. Senate 2020, Commissioner of Labor 2020, President 2020, Attorney General 2020, Auditor 2020, Secretary of State 2020, and Governor 2020 (Mattingly Election Set). Non-partisan, central staff "loaded [the] partisan election data into Maptitude to view the projected effect on partisanship that resulted from changes to district lines."

¶ 147 After Maptitude produced initial House, Senate, and congressional maps, the General Assembly analyzed the partisan fairness of each map using two political science metrics—the Mean-Median Difference and the Efficiency Gap. The General Assembly chose these two metrics because "they have been peer-reviewed in numerous articles by numerous scholars[ ] and because there is some (but not uniform) agreement among scholars regarding thresholds for measuring partisanship." For each of these metrics, the General Assembly selected threshold scores that, if achieved, would indicate that the relevant map contained an acceptable level of partisan fairness under *Harper I*.

¶ 148 The General Assembly selected threshold scores based on general agreement among political scientists:

> [I]t is widely considered by academics that a mean-median as close to zero as possible, but under [1%]

> is "presumptively constitutional." *See Harper v. Hall*, 2022-NCSC-17 ¶166. On the efficiency gap, scholars including NCLCV's Dr. Duchin have opined that anything below [8%] is presumptively legal while Dr. Jackman, used as an expert in *Gill v. Whitford*, and *Common Cause v. Rucho*, opined that anything below [7%] was constitutional.

The General Assembly also selected these threshold scores because the *Harper I* majority opined that they could indicate a presumptively constitutional level of partisanship:

> [U]sing the actual mean-median difference measure, from 1972 to 2016 the average mean-median difference in North Carolina's congressional redistricting plans was 1%. *Common Cause* [*v. Rucho*], 318 F. Supp. 3d [777,] 893 [(M.D.N.C. 2018)]. That measure instead could be a threshold standard such that any plan with a mean-median difference of 1% or less when analyzed using a representative sample of past elections is presumptively constitutional.
>
> With regard to the efficiency gap measure, courts have found "that an efficiency gap above 7% in any districting plan's first election year will continue to favor that party for the life of the plan." *Whitford v. Gill*, 218 F. Supp. 3d 837, 905 (W.D. Wis. 2016) *rev'd on other grounds*, 138 S. Ct. 1916 (2018). It is entirely workable to consider the seven percent efficiency gap threshold as a presumption of constitutionality, such that absent other evidence, any plan falling within that limit is presumptively constitutional.

Harper I, 2022-NCSC-17, ¶¶ 166–67 (majority opinion).

¶ 149 After making the policy choices of the political science metrics and threshold scores to be used, the General Assembly then adjusted each of the Remedial Plans until their Mean-Median Difference and Efficiency Gap scores were at or below the selected thresholds. After the adjustments were complete, Maptitude scored each of the Remedial Plans as follows:

	RHP	RSP	RCP
Mean-Median	0.7%	0.65%	0.61%
Efficiency Gap	0.84%[2]	3.97%	5.29%

¶ 150 Along with prioritizing the creation of more "purportedly Democratic leaning districts" and ensuring the Remedial Plans scored well on the selected metrics, the General Assembly also focused on the "neutral and traditional redistricting criteria" used in creating the 2021 Plans unless those criteria conflicted with *Harper I*.

¶ 151 After drawing their respective plans, each chambers presented their plans to the relevant redistricting committee. The General Assembly enacted the Remedial Plans on 17 February 2022 and submitted them to the three-judge panel on 18 February 2022.

¶ 152 After the General Assembly submitted the enacted Remedial Plans to the three-judge panel, plaintiffs submitted comments and objections. Significantly, none of the parties questioned the General Assembly's policy decision to utilize Maptitude or to use the Mattingly Election Set. The Special Masters also submitted a report on the Remedial Plans primarily based on four reports submitted by the advisors. Notably, in crafting their reports, none of the advisors used the General Assembly's chosen program, Maptitude, nor did they use the General Assembly's chosen Mattingly Election Set. Further, none of the advisors worked together in analyzing the Remedial Plans, nor did they submit a singular report. Instead, each advisor used his own preferred approach and summarized that approach in his own report.[3] The Special Masters' Report found that the RHP and RSP met the requirements of *Harper I* but that the RCP did not. Because the Special Masters concluded that the RCP was unconstitutional, they developed and submitted an alternative plan (Modified Congressional Plan), in consultation with one of the advisors, Dr. Bernard Grofman, for the three-judge panel to consider.[4]

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2. Legislative defendants were "unable to find a legislative plan passed anywhere else in the country with a lower efficiency gap" than the RHP. Thus, it would be unfair to use this Efficiency Gap score as a required standard.

3. Despite the majority's numerous implications that the advisors filed a singular report, this is untrue. Each advisor used an individual approach and supplied his own individual analysis.

4. One could legitimately question the objectivity of this court-appointed, de facto "redistricting commission" when one of the Special Masters publicly participated in advertisements for a Democratic candidate in a statewide senatorial campaign and for a Democratic congressional candidate in a district he created during this remedial process. *See* Jim Stirling, *Former Justice Bob Orr Puts His Thumb on the Scale for Congressional*

¶ 153 In reviewing the Remedial Plans, the three-judge panel "adopt[ed] in full the findings of the Special Masters," and, like the Special Masters, concluded that the RHP and RSP complied with the requirements of *Harper I*, but that the RCP was "not presumptively constitutional," was "subject to strict scrutiny," and was not "narrowly tailored to a compelling governmental interest." Accordingly, the three-judge panel concluded the RCP was unconstitutional. To support its holding, the three-judge panel relied primarily on the "analysis performed by the Special Masters and their advisors," and its conclusion that the RHP and RSP scored below the relevant thresholds for the Mean-Median Difference and Efficiency Gap metrics, but the RCP did not. The three-judge panel did not point to any other evidence regarding the purported level of partisan bias in the Remedial Plans.

¶ 154 Finally, because the three-judge panel rejected the General Assembly's RCP, it adopted the Modified Congressional Plan recommended by the Special Masters. All parties appealed.[5]

Democrats, John Locke Foundation (Nov. 7, 2022), https://www.johnlocke.org/former-justice-bob-orr-puts-his-thumb-on-the-scale-for-congressional-democrats/. Given this Special Master's direct participation in current elections involving a district he helped fashion, one wonders if the three-judge panel can allow his continued involvement.

Furthermore, one of the advisors to the Special Masters—Dr. Wang—came under investigation earlier this year for allegedly manipulating data in favor of Democrats in his role as a redistricting expert in another state. *See Princeton redistricting expert who analyzed N.C. voting maps faces university investigation*, WRAL News (April 28, 2022, 6:02 PM), https://www.wral.com/princeton-redistricting-expert-who-analyzed-nc-voting-maps-faces-university-investigation/20256616/.

Is the judicial creation of this "redistricting commission," which favors the political alignment of the majority of this Court, consistent with the fact that our constitution assigns the duty of redistricting to the General Assembly, which the people elected in 2020 using court-approved maps?

The majority upholds the three-judge panel's denial of Legislative defendants' motion to disqualify two of the Special Masters' advisors for improper ex parte communications with some of plaintiffs' experts. The motion, however, should have been allowed. The role of advisor—a purportedly neutral subject matter expert—to the three Special Masters is vital to a proper, unbiased evaluation of the legislative redistricting plans. The Special Masters, three-judge panel, and the majority, in reweighing the evidence, place great weight on the opinions of each of the advisors. If the challenged advisors had been judges who engaged in similar ex parte communications, they would have been removed from the case and possibly faced sanctions. If this de facto "redistricting commission" is to supervise the remedial redistricting process, it must be above reproach. The motion to disqualify Drs. Wang and Jarvis should have been granted.

5. Legislative defendants have moved to dismiss their appeal of the court-generated Modified Congressional Plan, recognizing that, by statute, it will not be reused now that the recent 2022 election cycle has concluded. This Court invariably allows parties to craft their own appeals. The majority, however, believing a dismissal could hinder its own,

II. Standards of Review

A. Presumption of Constitutionality

¶ 155 In reviewing an act of the General Assembly, this Court is guided by a specific and binding standard of review—the presumption of constitutionality. *See generally State ex rel. McCrory*, 368 N.C. at 639, 781 S.E.2d at 252. The presumption of constitutionality has been well established for over 150 years. *See, e.g.*, *Holton v. Bd. of Comm'rs*, 93 N.C. 430, 435 (1885). This standard sets a high bar which only the highest quantum of proof—proof beyond a reasonable doubt—will overcome, and the party challenging a statute bears the burden of establishing its unconstitutionality. *Jenkins*, 180 N.C. at 172, 104 S.E. at 348 ("The party who undertakes to pronounce a law unconstitutional takes upon himself the burden of proving beyond any reasonable doubt that it is so.").

¶ 156 The presumption of constitutionality is not merely a standard of review; it is a function of the fundamental separation-of-powers principle found in Article I, Section 6 of our constitution: "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." Unquestionably, the separation-of-powers principle

> is the rock upon which rests the fabric of our government. Indeed, the whole theory of constitutional government in this State and in the United States is characterized by the care with which the separation of the departments has been preserved, and by a marked jealousy of encroachment by one upon another.

Person v. Bd. of State Tax Comm'rs, 184 N.C. 499, 502, 115 S.E. 336, 339 (1922).

¶ 157 The separation-of-powers clause is located within the Declaration of Rights in Article I, which is an expressive yet nonexhaustive list of protections afforded to citizens against governmental intrusion, along with "the ideological premises that underlie the structure of government." John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 46 (2d ed. 2013) [hereinafter *State Constitution*]. Placement

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self-appointed redistricting authority, denies Legislative defendant's motion. In doing so, the majority effectively punishes Legislative defendants for successfully seeking review by the Supreme Court of the United States of the role of state courts in congressional redistricting under the Federal Constitution. *See Moore v. Harper*, *cert. granted*, 1425 S. Ct. 2901 (2022).

of the separation-of-powers clause in the Declaration of Rights suggests that keeping each branch within its described spheres protects the people by limiting overall governmental power. The clause does not establish the various powers but simply states the powers of the branches are "separate and distinct." N.C. Const. art. I, § 6. Subsequent constitutional provisions develop the nature of those powers. *State Constitution* 46 ("Basic principles, such as popular sovereignty and separation of powers, are first set out in general terms, to be given specific application in later articles.").

¶ 158 Because "a constitution cannot violate itself," *Leandro v. State*, 346 N.C. 336, 352, 488 S.E.2d 249, 258 (1997), a branch's exercise of its express, constitutional authority by definition comports with the separation-of-powers principle. Accordingly, a violation of separation of powers only occurs when one branch of government exercises, or prevents the exercise of, a power reserved for another branch of government. *State ex rel. McCrory*, 368 N.C. at 650, 781 S.E.2d at 259 (Newby, J., concurring in part and dissenting in part). Understanding the prescribed powers of each branch is the basis for stability, accountability, and cooperation within state government. *See State v. Emery*, 224 N.C. 581, 584, 587–88, 31 S.E.2d 858, 861, 863–64 (1944).

¶ 159 The legislative power is vested in the General Assembly because "all people are present there in the persons of their representatives," *State Constitution* 95, and, therefore, the people act through the General Assembly, *see Baker v. Martin*, 330 N.C. 331, 336–37, 410 S.E.2d 887, 890 (1991). Pursuant to the text of the constitution, the General Assembly primarily exercises the people's political power though statutory enactments. *See* N.C. Const. art. II, §§ 22–23.

¶ 160 Relevant here, the General Assembly enacts redistricting plans through statute. In fact, both the Federal Constitution and the North Carolina Constitution expressly assign redistricting authority to the legislature. U.S. Const. art. I, § 4, cl. 1; N.C. Const. art. II, §§ 3, 5. Our state constitution also provides explicit limitations on the General Assembly's redistricting authority. N.C. Const. art. II. §§ 3, 5 (providing that each state Senator and state Representative must represent an equal number of people, each senate and representative district must consist of a contiguous territory, and senate and representative districts may not unduly divide counties).

¶ 161 The common law provided, and now the General Statutes provide, a limited role for the courts in reviewing the General Assembly's redistricting plans. *See* N.C.G.S. § 120-2.3 to -2.4 (2021). The General Assembly

enacted these statutory provisions in 2003 to limit and codify the common law process by which courts had been reviewing redistricting plans for some time. *See* An Act to Establish House Districts, Establish Senatorial Districts, and Make Changes to the Election Laws and to Other Laws Related to Redistricting, S.L. 2003-434, §§ 7–9, 2003 N.C. Sess. Laws (1st Extra Sess. 2003) 1313, 1415–16; *Stephenson I*, 355 N.C. at 385, 562 S.E.2d at 398. In fact, the General Assembly enacted these statutory provisions limiting the judicial branch's role in response to this Court's involvement in the redistricting process in 2001. *See Stephenson v. Bartlett* (*Stephenson III*), 358 N.C. 219, 221–22, 595 S.E.2d 112, 114–15 (2004). No doubt these limiting provisions, N.C.G.S. § 120-2.3 to -2.4; N.C.G.S. § 1-267.1 (2021), are in keeping with our federal and state constitutional provisions, U.S. Const. art. I, § 4, cl. 1; N.C. Const. art. II, §§ 3, 5.

¶ 162 Section 1-267.1 requires that a three-judge panel hear challenges to redistricting plans. N.C.G.S. § 1-267.1. Specifically, under N.C.G.S. § 120-2.3, courts review challenges regarding whether a redistricting plan is "unconstitutional or otherwise invalid." N.C.G.S. § 120-2.3. If a court finds a redistricting plan is unconstitutional, it must give the General Assembly an opportunity to remedy the identified defects by enacting a new redistricting plan. N.C.G.S. § 120-2.4(a). By statute, a court may not impose a remedial redistricting plan of its own unless "the General Assembly does not act to remedy" those defects. N.C.G.S. § 120-2.4(a1). Even then, a court-imposed redistricting plan may only differ from the General Assembly's enacted plan "to the extent necessary to remedy" the defects identified by the court and will only be used for the next general election. *Id.* After the next general election, the General Assembly will replace the court-imposed map with a new, legislatively enacted map. This limited role of judicial review comports with the principle of separation of powers because it respects that redistricting "is a legislative responsibility." *Stephenson III*, 358 N.C. at 230, 595 S.E.2d at 119 ("Not only do these statutes allow the General Assembly to exercise its proper responsibilities, they decrease the risk that the courts will encroach upon the responsibilities of the legislative branch.").[6]

6. In its remand instructions, the majority instructs the "[three-judge panel] to oversee" the redrawing of new senatorial districts. *Harper v. Hall* (*Harper II*), 2022-NCSC-121, ¶ 114. Pursuant to N.C.G.S. § 120-2.4(a), however, the General Assembly elected in November 2022 must have the first opportunity to redraw the RSP. *See Pender County v. Bartlett*, 361 N.C. 491, 509, 649 S.E.2d 364, 376 (2007) (striking a remedial legislative plan and remanding it to the General Assembly to redraw it for a second time, noting that "[r]edistricting is a legislative responsibility, [and] N.C.G.S. §§ 120-2.3 and 120-2.4 give the General Assembly a first, limited opportunity to correct the plans that the courts have determined are flawed." (second alteration in original) (quoting *Stephenson III*, 358 N.C. at 230, 595 S.E.2d 119)).

¶ 163 Without question, the legislative and policymaking powers belong to the General Assembly. *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004). Because the people have granted the legislative power, including the specific power of redistricting, exclusively to the General Assembly, *see* N.C. Const. art. II, §§ 1, 3, 5, the judicial branch should exercise its power to declare statutes unconstitutional with "great reluctance," *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 6 (1787), "recognizing that when it strikes down an act of the General Assembly, [it] is preventing an act of the people themselves," *State ex rel. McCrory*, 368 N.C. at 650, 781 S.E.2d at 259 (citing *Baker*, 330 N.C. at 336–37, 410 S.E.2d at 890).

¶ 164 The presumption of constitutionality, therefore, is a limiting tool of judicial review that helps the judicial branch avoid encroaching on the General Assembly's legislative authority. Where a statute is susceptible to two interpretations, one that is constitutional and one that is not, courts must adopt the former. *Wayne Cnty. Citizens Ass'n v. Wayne Cnty. Bd. of Comm'rs*, 328 N.C. 24, 29, 399 S.E.2d 311, 315 (1991). Courts will not declare a statute void unless that "conclusion is so clear that no reasonable doubt can arise, or the statute cannot be upheld on any reasonable ground." *Id.* (citing *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 63, 366 S.E.2d 697, 698 (1988)). Presuming that a statutory enactment is constitutional and resolving every doubt in favor of the statute ensures that the Court will not inadvertently prevent a lawful exercise of legislative power.

¶ 165 This exercise of judicial restraint is especially necessary to counterbalance the power of judicial review because our constitution does not enable the other branches to check our exercise of the judicial power to strike down statutes:

> The power of declaring laws unconstitutional should always be exercised with extreme caution, and every doubt resolved in favor of the statute. As has been well said, these rules are founded on the best of reasons, because, while the supreme judicial power may interfere to prevent a legislative, and other departments, from exceeding their powers, no tribunal has yet been devised to check the encroachments of the judicial power itself.

Jenkins, 180 N.C. at 170, 104 S.E.2d. at 347. Applying the presumption of constitutionality and adhering to its separation-of-powers principles, courts should presume that the General Assembly's policy decisions, made while acting pursuant to its legislative authority, are constitutional.

¶ 166 In this case, the General Assembly made various policy decisions during each step of the remedial map-drawing process, such as the decision to use Maptitude or to obtain partisan election data from the Mattingly Election Set. Accordingly, the three-judge panel should have started from the presumption that these policymaking decisions were constitutional. Then it should have reviewed the evidence to determine if, beyond a reasonable doubt, one or more of those policy decisions was arbitrary, flawed, or unreasonable so as to render at least one of the Remedial Plans unconstitutional. For example, such evidence might show that Maptitude is a defective software that vastly undercalculated the Remedial Plans' Mean-Median Difference and Efficiency Gap scores or that the Mattingly Election Set contained flawed data. If the evidence supported a determination that these policy decisions were constitutionally flawed beyond a reasonable doubt, only then could the three-judge panel have declared the affected map or maps constitutionally invalid. If the evidence did not demonstrate this sort of constitutional defect, however, it would be insufficient to overcome the presumption, and the three-judge panel would have been required to uphold the Remedial Plans. Accordingly, we consider whether the three-judge panel's "findings of fact and conclusions of law were appropriate and adequate" in approving the RSP and RHP and rejecting the RCP. *Stephenson v. Bartlett* (*Stephenson II*), 357 N.C. 301, 309, 582 S.E.2d 247, 252 (2003).

B. Findings of Fact and Conclusions of Law

¶ 167 In cases such as this one, in which the trial court presides over a trial without a jury, this Court's role of review is very limited. *See Bailey v. State*, 348 N.C. 130, 146, 500 S.E.2d 54, 63 (1998). In reviewing a trial court's findings of fact, "we are 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence.' " *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). If the trial court's findings of fact are supported by competent evidence, the findings "have the force and effect of a jury verdict and are conclusive on appeal if there is competent evidence to support them." *Stephenson II*, 357 N.C. at 309, 582 S.E.2d at 252 (quoting *Bailey*, 348 N.C. at 146, 500 S.E.2d at 63). Such findings are binding on appeal even if the "evidence is conflicting," *Williams*, 362 N.C. at 632, 669 S.E.2d at 294 (quoting *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601 (1971)), and "could be viewed as supporting a different finding," *Stephenson II*, 357 N.C. at 309, 582 S.E.2d at 252 (quoting *Bailey*, 348 N.C. at 146, 500 S.E.2d at 63); *see also Biggs v. Lassiter*, 220 N.C. 761, 770, 18 S.E.2d 419, 424 (1942) (noting that a trial court's findings of fact are binding on appeal

"unless there is no sufficient evidence to support them, or error has been committed in receiving or rejecting testimony upon which they are based, or some other question of law is raised with respect to said findings"). Where contradictory evidence exists, "the trial judge is in the best position to 'resolve the conflict.' " *Williams*, 362 N.C. at 632, 669 S.E.2d at 294 (quoting *Smith*, 278 N.C. at 41, 178 S.E.2d at 601). Likewise, the trial court determines the amount of weight given to various pieces of evidence. *In re I.K.*, 377 N.C. 417, 2021-NCSC-60, ¶ 25 ("It is the trial court's responsibility to pass upon the credibility of the witnesses and the weight to be given their testimony . . . ." (quoting *In re G.G.M.*, 377 N.C. 29, 2021-NCSC-25, ¶ 18)).

¶ 168 If we conclude that competent evidence supports the trial court's findings of fact, "we must then determine whether those findings of fact support the conclusions of law." *Stephenson II*, 357 N.C. at 309, 582 S.E.2d at 252. We review a trial court's conclusions of law de novo. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

III. Analysis

¶ 169 Here the majority upholds the three-judge panel's approval of the RHP but finds unconstitutional the RSP. It affirms the three-judge panel's conclusion that the RCP was unconstitutional and upholds the Modified Congressional Plan redrawn by the Special Masters. To reach these holdings, the majority briefly mentions the appropriate standards of review but then, when necessary, circumvents those standards to reach its desired results. The majority fails to apply the presumption of constitutionality in a manner consistent with our precedent and the textual allocation of power between the branches of government. Likewise, the majority fails to consistently limit itself to considering whether the three-judge panel's underlying findings of fact are supported by competent evidence. Instead, the majority freely reweighs and distorts evidence that is essentially the same to support two conflicting results—affirmation of the RHP but reversal of the RSP. The majority strips the three-judge panel of its responsibility to assess credibility and distribute weight to the evidence and freely substitutes its own judgment regarding weight and credibility.

¶ 170 The three-judge panel relied heavily on each map's Mean-Median Difference and Efficiency Gap scores in forming its findings of fact and reaching its ultimate conclusions of law. It focused on these metrics because in *Harper I* the majority identified threshold scores for these metrics that it said could serve as safe harbors of constitutionality. *See Harper I*, 2022-NCSC-17, ¶¶ 166–67. Here there is competent evidence

to support the three-judge panel's findings of fact that both the RHP and the RSP satisfy those thresholds. Nevertheless, the majority insists that the three-judge panel correctly approved the RHP but somehow incorrectly approved the RSP. The only explanation is that the majority has shaped its analysis to ensure a predetermined outcome.

¶ 171 Additionally, the majority affirms the three-judge panel's erroneous rejection of the RCP. The three-judge panel failed to give the RCP the correct presumption of constitutionality because it did not defer to the General Assembly's policy choices to use Maptitude and the Mattingly Election Set. It then adopted the Special Masters' summary rejection of the RCP and accepted the Special Masters' Modified Congressional Map.

¶ 172 The dissent in *Harper I* forecasted the incongruent results the majority reaches today. The majority's result confirms that there is no discernable, manageable standard by which to adjudicate partisan gerrymandering claims. *See id.* ¶ 241 (Newby, C.J., dissenting). Even though the majority insists that the General Assembly's Remedial Plans must pass the *Harper I* tests to be entitled to the presumption of constitutionality, *see id.* ¶ 163 (majority opinion), it now changes the tests. Further, this analysis flips the presumption of constitutionality on its head and permits the majority to select pieces of data from four, court-appointed political scientists and evidence presented by plaintiffs to uphold the redistricting plans it finds politically favorable and reject those that it does not. As discussed in the dissent in *Harper I*, the majority disingenuously commandeered this heightened standard approach from *Stephenson I*, 355 N.C. at 383–84, 562 S.E.2d at 396–97. *See id.* ¶¶ 258–59 (Newby, C.J., dissenting). In *Stephenson I*, however, this Court overcame the presumption of constitutionality by applying clear standards derived from the text of the constitution itself, rather than the ever-changing, nebulous "standards" of the majority's results-oriented approach.

A. Remedial House Plan

¶ 173 On remand, the General Assembly made the policy decision to use Maptitude along with partisan election data from its chosen Mattingly Election Set to draw and adjust the Remedial Plans until each fell within the Mean-Median Difference and Efficiency Gap thresholds identified by this Court in *Harper I*. The General Assembly chose to use the Mean-Median Difference and Efficiency Gap scores, as opposed to other tests, because these metrics have been peer-reviewed extensively and because scholars generally agree on the appropriate thresholds for measuring partisanship with these metrics. As measured by Maptitude, the RHP satisfied these threshold standards:

	RHP
Mean-Median	0.7%
Efficiency Gap	0.84%

¶ 174 In its order, the three-judge panel relied primarily on the reports of its Special Masters in making its findings of fact. Specifically, the Special Masters reviewed the "submissions from all of the parties as well as the reports of the advisors" and materials from the parties' "experts." In all, this evidence included twelve submissions and briefs from the parties, seven reports and affidavits from the parties' experts, and four reports from the Special Masters' advisors, totaling 716 pages. The Special Masters also considered the "findings of the advisors on the partisan symmetry analysis, the declination metrics, and their opinions on partisan bias and evidence of partisan gerrymandering." The advisors' evidence was extensive and diverse and included an array of partisan fairness metrics, differing counts of "competitive" seats, measures of compactness, and graphic comparisons to ensemble maps. Of note, each advisor submitted a separate report. They did not submit a single collective report as indicated by the majority. "Considering all of this information as well as the totality of circumstances," the Special Masters concluded that the RHP "meets the test of presumptive constitutionality . . . under the metrics identified by the North Carolina Supreme Court."

¶ 175 In turn, the three-judge panel "adopt[ed] in full the findings of the Special Masters" and reviewed "all remedial and alternative plans . . . as well as additional documents, materials, and information pertaining to the submitted plans" in making "additional specific findings" on the Remedial Plans. First, the three-judge panel summarized the General Assembly's process for drawing and analyzing all the Remedial Plans and found that it was constitutionally compliant:

> 13. The General Assembly's Remedial Criteria governing the remedial map drawing process were those neutral and traditional redistricting criteria adopted by the Joint Redistricting Committees on August 12, 2021 . . . unless the criteria conflicted with the Supreme Court Remedial Order and full opinion.
>
> 14. Although expressly forbidden by the previously-used August 2021 Criteria, the General Assembly as part of its Remedial Criteria intentionally used partisan election data as directed by the Supreme Court's

> Remedial Order. The General Assembly did so by loading such data into Maptitude, the map drawing software utilized by the General Assembly in creating districting plans . . . .
>
> 15. The Court finds that the General Assembly's use of partisan data in this manner comported with the Supreme Court Remedial Order.

The three-judge panel then addressed the RHP specifically, finding that it contained "key differences" that rendered it more competitive than the 2021 House Plan, that the General Assembly appropriately balanced incumbency protection with "traditional neutral districting criteria," that the RHP was "satisfactorily within the statistical ranges set forth in *[Harper I*]," and that any "partisan skew" remaining in the RHP was "explained by the political geography of North Carolina."

¶ 176 Based on these findings, the three-judge panel concluded that the RHP "satisfies th[is] [ ] Court's standards" in *Harper I*, and that none of the evidence presented was "sufficient to overcome th[e] presumption" that the RHP was constitutional. Accordingly, the three-judge panel approved the RHP.

¶ 177 The majority upholds the RHP by finding that competent evidence supports the relevant findings of fact which in turn support the conclusion that the RHP is constitutional. This result is correct, but the majority reaches it for the wrong reasons. In concluding that the relevant findings of fact are supported by competent evidence, the majority looks only to the evidence submitted by the Special Masters' advisors and does not even mention Legislative defendants' data or chosen remedial process. For example, the majority notes that "[t]he Special Masters' [a]dvisors determined that the RHP yields an average [E]fficiency [G]ap of about 2.88%, [and] an average [M]ean-[M]edian [D]ifference of about 1.27%,"[7] but does not acknowledge that Legislative defendants calculated an Efficiency Gap of 0.84% and a Mean-Median Difference of 0.70% using Maptitude and the Mattingly Election Set. *Harper II*, 2022-NCSC-121, ¶ 93.

7. Nowhere in *Harper I* does the majority mention using averages of Mean-Median Difference and Efficiency Gap scores to assess a map's partisan fairness. By definition, to determine an average requires giving equal weight to each score. Nevertheless, the majority now relies on these average scores in upholding the RHP, despite the fact that its calculation of the RHP's average Mean-Median Difference is significantly outside its stated parameter of 1% or less.

¶ 178 The majority's approach is inappropriate because, as already noted, the proper starting point when reviewing an act of the General Assembly is to exercise the presumption that the General Assembly's policy choices are constitutional. This Court should presume the General Assembly's policy choices, such as the use of Maptitude or the Mattingly Election Set, were constitutional and only review the advisors' reports to see whether they rebut the presumption beyond a reasonable doubt. The majority does the opposite, however.

¶ 179 No one alleged the General Assembly's policy decisions—such as, which redistricting software and which partisan election data to use—were unconstitutional. There was no evidence to that effect in the record. Thus, by looking exclusively to the advisors' evidence and ignoring entirely Legislative defendants' evidence, the majority's analysis defers to the advisors' methods and reports and uses them to build a case that the RHP is constitutional.

¶ 180 The majority's approach is erroneous because it adopts the *advisors'* policy determinations—that is, their selected analyses—as the redistricting standard. Such an approach reverses the presumption of constitutionality because it no longer requires the evidence to demonstrate that the General Assembly's plan fails to meet an objective standard of constitutionality. Instead, it requires the General Assembly to show that some group of unspecified political scientists agree that its policy determinations meet constitutional muster. This backwards approach permits the majority to weigh the various redistricting approaches from the individual advisors as it sees fit, rather than deferring to the General Assembly's selected redistricting approach. As a result, the majority can select the evidence that supports its preferred outcome and reject the evidence that does not.

¶ 181 With the RHP, the majority happened to reach the correct result without giving proper deference to the legislative branch's policy choices. Following this same approach, however, enables the majority to reach a contradictory result with the RSP. A comparison of the majority's treatment of the RSP with its treatment of the RHP demonstrates the inherent flaws in the majority's approach.

B. Remedial Senate Plan

¶ 182 Despite the three-judge panel's upholding of the RHP, as recommended by the Special Masters, the majority declines to give the RSP a presumption of constitutionality, applies strict scrutiny, and determines that it is unconstitutional beyond a reasonable doubt. The majority arrives at this conclusion despite the fact that the evidence regarding the

RSP and the RHP is very similar. Considered together, the majority's holdings regarding the RSP and the RHP make clear that it is simply re-weighing and, at times, mischaracterizing the evidence in order to reach its preferred outcome.

¶ 183 On remand, the General Assembly made the exact same policy choices and followed the exact same redrawing process for the RSP as it did for the RHP. It utilized Maptitude and the partisan election data from the Mattingly Election Set to draw and adjust the RSP until the RSP fell within the Mean-Median Difference and Efficiency Gap thresholds identified by this Court in *Harper I*. Just like the RHP, the RSP, as measured by Maptitude, satisfied the *Harper I* threshold standards:

	RSP
Mean-Median	0.65%
Efficiency Gap	3.97%

¶ 184 Likewise, the Special Masters considered very similar evidence in assessing the RSP as they did in assessing the RHP. Notably, from their weighing of this evidence the Special Masters made almost identical findings regarding the RHP and the RSP:

I. Proposed Remedial House Plan

> The advisors as well as the experts of the parties ("experts") all found the efficiency gap of the proposed [RHP] to be less than 7%. The majority of the advisors and experts found the mean-median difference of the proposed [RHP] to be less than 1%. In addition to these facts, the Special Masters considered the findings of the advisors on the partisan symmetry analysis, the declination metrics, and their opinions on partisan bias and evidence of partisan gerrymandering. Considering all of this information as well as the totality of circumstances, the Special Masters conclude under the metrics identified by the North Carolina Supreme Court that the proposed [RHP] meets the test of presumptive constitutionality. Further the Special Masters did not find substantial evidence to overcome the presumption of constitutionality and recommend to the [three-judge panel] that it give appropriate deference to the General Assembly and uphold the constitutionality of the [RHP].

II. Proposed Remedial Senate Plan

> All of the advisors and experts found the efficiency gap of the proposed [RSP] to be less than 7%. The majority of the advisors and experts found the mean-median difference of the proposed [RSP] to be less than 1%. In addition to these facts, the Special Masters considered the findings of the advisors on the partisan symmetry analysis, the declination metrics, and their opinions on partisan bias and evidence of partisan gerrymandering. Considering all of this information as well as the totality of circumstances, the Special Masters conclude under the metrics identified by the North Carolina Supreme Court [that] the [RSP] meets the test of presumptive constitutionality. Further the Special Masters did not find substantial evidence to overcome the presumption of constitutionality and recommend to the [three-judge panel] that it give appropriate deference to the General Assembly and uphold the constitutionality of the [RSP].

¶ 185 In turn, the three-judge panel adopted these findings "in full" and found that they demonstrated that the RHP and RSP "meet the requirements of [*Harper I*]." The panel also made "additional specific findings" regarding each plan. Similar to the Special Masters' findings, the three-judge panel's specific findings regarding the RSP and RHP were nearly identical:

> 36. In determining the base map for the State Senate Districts, the Senate also started from scratch. The Senate altered two county groupings and adopted groupings for Senate Districts 1 and 2 that were preferred by Common Cause Plaintiffs. The remaining county groupings remained the same. As a result, the 13 wholly-contained single district county groupings in the [RSP] were kept from the [2021 Senate] Plan.
>
> . . . .
>
> 39. The process for the development of the Remedial Senate Plan began with separate maps being drawn by the Senate Democratic Caucus and the Republican Redistricting and Election Committee

members, respectively. The plans were then exchanged and discussed; however, after the two groups could not come to a resolution, the plan proposed by the Republican Redistricting and Election Committee members was then put to a vote by the Senate Committee and advanced to the full chamber.

40. The [RSP] includes ten districts that were within ten points in the 2020 presidential race.

41. The [RSP] reflects key differences from the 2021 [ ] Senate Plan in the projected partisan makeup of districts in certain county groupings.

a. In the Cumberland-Moore County grouping, Senate District 21 is now more competitive.

b. In the Iredell-Mecklenburg County grouping, one district is more competitive.

c. In New Hanover County, the districts were made more competitive, resulting in a Senate District 7 that leans Democratic.

d. In Wake County, Senate Districts 17 and 18 are more Democratic leaning.

42. The Court finds, based upon the analysis performed by the Special Masters and their advisors, that the [RSP] is satisfactorily within the statistical ranges set forth in the Supreme Court's full opinion. *See Harper v. Hall*, 2022-NCSC-17, ¶ 166 ([M]ean-[M]edian [D]ifference of 1% or less) and ¶ 167 ([E]fficiency [G]ap less than 7%).

43. The Court finds that to the extent there remains a partisan skew in the [RSP], that partisan skew is explained by the political geography of North Carolina.

. . . .

51. In determining the base map for the State House Districts, the House started from scratch after

keeping only the 14 districts that were the product of single district county groupings.

. . . .

54. The [RHP] reflects key differences from the 2021 [ ] House Plan in the projected partisan makeup of districts in certain county groupings.

a. Buncombe County, which consisted of 1 Republican and 2 Democratic districts in the [2021 House] Plan, consists of 3 Democratic districts in the [RHP].

b. Pitt County, which consisted of 1 Republican and 1 Democratic district in the [2021 House] Plan, consists of 2 Democratic districts in the [RHP].

c. Guilford County now consists of 6 Democratic leaning districts.

d. Cumberland County now consists of 3 Democratic districts and 1 competitive district.

e. Mecklenburg and Wake Counties now consist of 13 Democratic leaning districts each.

f. New Hanover, Cabarrus, and Robeson Counties now contain an additional competitive district each.

55. The Court finds, based upon and confirmed by the analysis of the Special Masters and their advisors, that the [RHP] [is] satisfactorily within the statistical ranges set forth in the Supreme Court's full opinion. *See Harper v. Hall*, 2022-NCSC-17, ¶166 ([M]ean-[M]edian [D]ifference of 1% or less) and ¶167 ([E]fficiency [G]ap less than 7%).

56. The Court finds that to the extent there remains a partisan skew in the [RHP], that partisan skew is explained by the political geography of North Carolina.

¶ 186 The evidence underlying the three-judge panel's findings of fact regarding the RHP's and RSP's Mean-Median and Efficiency Gap scores was also characteristically the same. Both sets of findings were based on "the analysis of the Special Masters and their advisors":

Remedial Senate Plan							
	Grofman 6 election composite	McGhee Planscore	Wang 2016-2020	Jarvis	Mattingly 16 new Election Composite	Barber General Assembly's Mattingly Election Set	Maptitude
Mean-Median Diff.	0.77%	2.2%	0.8%	1.4%	1.3%	0.65%	0.63%
Efficiency Gap	4.24%	4.8%	2.2%	4.0%	4.07%	3.97%	3.98%

Remedial House Plan							
	Grofman 6 election composite	McGhee Planscore	Wang 2016-2020	Jarvis	Mattingly 16 new Election Composite	Barber General Assembly's Mattingly Election Set	Maptitude
Mean-Median Diff.	0.89%	1.4%	0.9%	1.5%	1.45%	0.7%	0.71%
Efficiency Gap	2.72%	3.0%	3.1%	2.7%	3.23%	0.84%	0.84%

For both plans, at least four advisors and experts calculated a Mean-Median Difference score of less than 1%, and all of the advisors and experts calculated an Efficiency Gap score of less than 7%.[8]

¶ 187 Given the similarities between both the three-judge panel's findings of fact regarding each plan and the evidence supporting those findings of fact, it is clear there was evidence supporting the panel's conclusion that both plans "meet th[is] [ ] Court's standards and requirements" from

8. The appropriate standard of review is whether any evidence supports the three-judge panel's findings of fact. Here there is clearly ample evidence in the record to support the three-judge panel's findings of fact that the RHP and the RSP were "satisfactorily within the statistical ranges set forth in [*Harper I*]."

Harper I, particularly when the three-judge panel was required to presume that the General Assembly's selected approach of using Maptitude, pulling partisan election data from the Mattingly Election Set, and relying on the resulting Mean-Median Difference and Efficiency Gap scores was constitutional. As a result, the majority's decision to overturn the RSP but uphold the RHP when each is supported by comparable evidence is inconsistent and can only be explained by the majority's desire to reach a particular outcome. To accomplish this outcome, the majority reweighs and defers exclusively to select portions of the evidence that the Special Masters and three-judge panel in fulfilling its duty as the fact-finder apparently chose to discount.

¶ 188 The majority says one of the "keystones" of the three-judge panel's decision is its erroneous views of the statistical data. For example, the majority notes that "all but one [a]dvisor" concluded that the RSP scored above the 1% Mean-Median Difference threshold but ignores the fact that all the advisors found that the RSP scored below the 7% Efficiency Gap threshold. *Harper II*, 2022-NCSC-121, ¶ 99. The majority's statement that "all but one [a]dvisor" calculated a Mean-Median Difference above 1% for the RSP is not only selective, but inaccurate. Half of the advisors, not one, calculated the RSP's Mean-Median Difference score as less than 1%. This inaccuracy illustrates why appellate courts must refrain from reweighing evidence and instead must defer to the trial court's assessment of the record. *See In re I.K.*, 2021-NCSC-60, ¶ 25 ("It is the trial court's 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. Because the trial court is uniquely situated to make this credibility determination appellate courts may not reweigh the underlying evidence presented at trial.").[9]

¶ 189 Nevertheless, according to the majority, this evidence undermines the three-judge panel's finding that the RSP met the statistical thresholds identified in *Harper I*. The same number of advisors, however, found that the RHP scored above the 1% Mean-Median Difference threshold as well. Inexplicably, the majority concludes that this fact weighs *against* the three-judge panel's findings of fact regarding the RSP but *supports* its findings of fact regarding the RHP.

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9. To the extent the majority questions the work of the three-judge panel and its assessment of the evidence, the correct resolution is to remand for clarification, not for an appellate court to reweigh evidence and find its own facts.

¶ 190 In upholding the RHP, the majority states that collectively "[t]he [ ] [a]dvisors determined that the RHP yields an average [E]fficiency [G]ap of about 2.88%, [and] an average [M]ean-[M]edian [D]ifference of about 1.27%." *Harper II*, 2022-NCSC-121, ¶ 93. The advisors' average scores for the RSP are very close to those for the RHP. For the RSP, the average of the advisors' Efficiency Gap scores is 3.81% and the average of their Mean-Median Difference scores is 1.29%. The average Mean-Median Difference scores for the two plans are within two-one-hundredths of a percentage point of each other. Why does 1.27% weigh in favor of the RHP's constitutionality but 1.29% weighs against the RSP's constitutionality? If there is something critical about that difference, the majority does not explain it.

¶ 191 The majority's use of average scores is also problematic for another reason. The advisors did not calculate the average of their Mean-Median Difference and Efficiency Gap scores. Instead, each advisor individually calculated a set of scores using his chosen redistricting software and set of elections, and then each advisor submitted his set of scores to the three-judge panel. The majority, on its own, calculates these average scores, giving each equal weight, and then relies on this new data to support its conclusion that the RHP is constitutional and the RSP is unconstitutional. The majority does this even though it never mentioned using averages of Mean-Median Difference and Efficiency Gap scores to assess a map's partisan fairness in *Harper I*.

¶ 192 In calculating its own average scores, the majority essentially reweighs the evidence to give equal weight and credibility to each of the advisors' calculations. It gives equal weight to these four sets of scores despite claiming to discount the analyses of the two advisors who engaged in forbidden ex parte communications.[10] The three-judge panel, however, should weigh the evidence, determine credibility, and find facts because it "is in the best position" to do so. *Williams*, 362 N.C. at 632, 669 S.E.2d at 294 (quoting *Smith*, 278 N.C. at 41, 178 S.E.2d at 601). In its order, the three-judge panel did not specify the weight that it gave to each of the advisors' scores, though it did incorporate the Special Masters' finding that "the analysis provided by Drs. Wang and Jarvis was helpful" but "not determinative" of any particular finding of fact. Accordingly, in averaging the advisors' scores and assigning each of their scores equal weight, the majority reweighs the evidence and attaches creditability to evidence that the three-judge panel and Special

10. *See generally* footnote 4.

Masters might have discounted. The majority usurps the three-judge panel's role as fact-finder by replacing the three-judge panel's assessment of the advisors' credibility with its own.[11]

¶ 193 Similarly, the majority rejects the three-judge panel's finding of fact that any "partisan skew" remaining in the RSP is "explained by the political geography of North Carolina." *Harper II*, 2022-NCSC-121, ¶ 100. The majority rejects this finding, claiming that it "is an incomplete statement of the requirement established in *Harper* [*I*]." *Id.* The three-judge panel, however, made the exact same finding of fact regarding the RHP: "The [trial] [c]ourt finds that to the extent there remains a partisan skew in the [RHP], that partisan skew is explained by the political geography of North Carolina." The majority, however, does not reject this identical finding of fact as an "incomplete statement" of its criteria from *Harper I*. Instead, the majority accepts this finding as "supported by competent evidence." *Id.* ¶ 93. How can this finding of fact support the conclusion that the RHP is constitutional, but weigh against the conclusion that the RSP is constitutional?[12]

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11. As already noted, the majority here freely disregards the appropriate standard of review and reweighs the evidence only when necessary to reach its preferred outcome. However, in another case also filed today, the same majority insists that it must defer to a trial court's findings of fact when supported by competent evidence:

> many of defendants' arguments in this case ask this Court to rewrite the trial court's findings of fact. But when the trial court conducts a trial without a jury, "the trial court's findings of fact have the force and effect of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even [if] the evidence could be viewed as supporting a different findings."

Holmes v. Moore, 2022-NCSC-122, ¶ 83 (quoting *In re Skinner*, 370 N.C. 126, 139, 804 S.E.2d 449, 458 (2017)). Thus, it is clear that the majority understands the appropriate standard of review, but simply ignores it at will to reach its favored outcome.

12. Notably, the three-judge panel's finding regarding political geography was borne out in the November 2022 election. While various political science tests may seek to assess the political geography of the state, nothing is more accurate in revealing the political geography than our most recent election. Six statewide Republican judicial candidates won their seats by at least 5%, each carrying at least eighty-one counties. *See* North Carolina State Board of Elections, https://er.ncsbe.gov/?election_dt=11/08/2022&county_id=0&office=JUD&contest=0 (last visited Dec. 8, 2022). Similarly, aggregating votes across the state, the Republican state senatorial candidates received 59% of the total vote share, while Republican state House candidates received over 57%. *See* North Carolina State Board of Elections, https://er.ncsbe.gov/?election_dt=11/08/2022&county_id=0&office=NCS&contest=0 (last visited Dec. 8, 2022); *see* North Carolina State Board of Elections, https://er.ncsbe.gov/?election_dt=11/08/2022&county_id=0&office=NCH&contest=0 (last visited Dec. 8, 2022).

¶ 194 Finally, in addition to the various errors contained in the majority's analysis listed above, the majority also gravely mischaracterizes the evidence from below. Most notably, the majority repeatedly cites from one of the advisors' reports but describes that cited data or opinion as if it were the collective conclusion of all four advisors. For example, the majority states the "[t]he [a]dvisors specifically determined that alternative remedial Senate plans often reflect 'less than half the size of the [partisan] advantage in the Legislative [d]efendants' [RSP].' " *Harper II*, 2022-NCSC-121, ¶ 100 (second and fourth alteration in original). This quote, however, is contained in only one of the advisors' reports; it is not, at least as far as the record reflects, the conclusion of all four advisors. Nevertheless, the majority describes this opinion as if it were reached by the advisors collectively.

¶ 195 The majority mischaracterizes various portions of evidence in this way throughout its opinion, essentially implying that the four advisors collectively assessed the Remedial Plans and generally agreed on every aspect of their analysis. This depiction is simply inaccurate. Each advisor individually analyzed the Remedial Plans using his own preferred metrics, election data, and calculation methods, and each reached different individual conclusions. Accordingly, the majority's rendering of the advisors' reports as a shared analysis is misleading.

¶ 196 Regardless of the various flaws in the majority's analysis, the appropriate standard of review in this case required the three-judge panel to assume that the General Assembly's methods and scores were valid and accurate unless the evidence demonstrates otherwise beyond a reasonable doubt. The General Assembly, one expert, and two of the four advisors agreed that the RSP scored below the 1% threshold for Mean-Median Difference, and the General Assembly, one expert, and all four advisors agreed that the RSP scored below the 7% threshold for Efficiency Gap. This evidence is more than competent to support the three-judge panel's finding that the RSP is "satisfactorily within the statistical ranges set forth in" *Harper I*, and it was the duty of the three-judge panel to weigh this evidence. As a result, it does not matter that some of the advisors and experts calculated scores above the thresholds.

¶ 197 The majority is bound by the three-judge panel's findings of fact if they are supported by competent evidence, even when there is a conflict, *Williams*, 362 N.C. at 632, 669 S.E.2d at 294, and the three-judge panel could have made "a different finding," *Stephenson II*, 357 N.C. at 309, 582 S.E.2d at 252. The majority fails to employ the correct standard of review by seeking evidence that contradicts the three-judge panel's findings of fact, rather than looking for evidence that supports those

findings. The majority is required to presume the General Assembly acted constitutionally absent evidence showing, beyond a reasonable doubt, that it did not.

C. Remedial Congressional Plan

¶ 198 The General Assembly drew and scored the RCP using the exact same approach as it followed for the RHP and RSP. As with the other two maps, Maptitude measured the RCP's Mean-Median Difference and Efficiency Gap scores within the majority's thresholds:

	RCP
Mean-Median Difference	0.61%
Efficiency Gap	5.29%

¶ 199 In reviewing the RCP, the three-judge panel and the Special Masters once again seemed to take the same approach. They examined the same extensive evidence from the "submissions from all of the parties as well as the reports of the advisors" and materials from the parties' "experts." From this evidence, the Special Masters found that "there is substantial evidence from the findings of the advisors that the [RCP] has an [E]fficiency [G]ap above 7% and a [M]ean-[M]edian [D]ifference of greater than 1%," and that "[t]here is disagreement among the parties as to whether the proposed [RCP] meets the presumptively constitutional thresholds suggested by th[is] [ ] Court." However, the scores do not support this finding:

	Remedial Congressional Plan							
	Grofman 6 election composite	McGhee Planscore	Wang 2016-2020	Wang 10 Election	Jarvis	Mattingly 16 new Election Composite	Barber General Assembly's Mattingly Election Set	Maptitude
Mean-Median Diff.	0.66%	1.1%	0.7%	1.2%	0.9%	1.01%	0.61%	0.61%
Efficiency Gap	6.37%	6.4%	7.4%	6.8%	8.8%	7.31%	5.29%	5.3%

¶ 200 Once again, the Special Masters also considered "the advisors' findings on the partisan symmetry analysis and the declination metrics." The advisors completed the same diverse array of partisan fairness metrics, counts of "competitive" seats and compactness, and graphic

comparisons to ensemble maps for the RCP as they did for the other two plans. Considering all of this evidence, the Special Masters concluded that the RCP "fails to meet the threshold of constitutionality" set forth in *Harper I* and recommended that the three-judge panel reject the RCP.

¶ 201 Given their recommendation, the Special Masters created and submitted the Modified Congressional Plan that, in their opinion, satisfied the standards from *Harper I*. In creating the Modified Congressional Plan, the Special Masters "focused" on the RCP and "worked solely" with one of the advisors, Dr. Bernard Grofman, and his assistant to amend it. Dr. Grofman created three maps for the Special Masters' consideration. The Special Masters selected one of Dr. Grofman's maps and then "modified" it "to improve the [E]fficiency [G]ap and [M]ean-[M]edian [D]ifference scores" using Dave's Redistricting App.[13]

¶ 202 The three-judge panel adopted the Special Masters' findings in full, and proceeded to make its own, additional findings regarding the RCP. First, as with the RHP and RSP, the three-judge panel approved of the General Assembly's remedial process for drawing the RCP. Then the three-judge panel noted that the RCP contained "key differences from the 2021 Congressional Plan" that made it more competitive, including the fact that "[f]our congressional districts are some of the most politically competitive in the country." Next, the three-judge panel looked to the RCP's Mean-Median Difference and Efficiency Gap scores and found, "based upon the analysis performed by the Special Masters and their advisors, that the [RCP] is not satisfactorily within the statistical ranges set forth in [*Harper I*]." Finally, the three-judge panel found "that the partisan skew in the [RCP] is not explained by the political geography of North Carolina." As a result, the three-judge panel found that "[t]he Special Masters' findings demonstrate that the [RCP] does not meet the requirements of th[is] [ ] Court's Remedial Order and full opinion" in *Harper I*.

¶ 203 The three-judge panel then turned to the Special Masters' Modified Congressional Plan. The three-judge panel found that the Special Masters' plan "was developed in an appropriate fashion, is consistent with N.C.G.S. § 120-2.4(a1), and is consistent with the North Carolina Constitution and th[is] [ ] Court's [*Harper I*] opinion."

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13. Not only is the composition of this de facto redistricting commission suspect, *see generally* footnote 4, but the actual 2022 election results reflect the Democratic bias in the Modified Congressional Plan. Democrats had 47% of the statewide aggregate congressional votes but won one-half of the seats. *See* North Carolina State Board of Elections, https://er.ncsbe.gov/?election_dt=11/08/2022&county_id=0&office=FED&contest=0 (last visited Dec. 8, 2022).

¶ 204 Based on these findings, the three-judge panel concluded that the RCP "does not satisfy th[is] [ ] Court's standards" from *Harper I* and therefore, was "not presumptively constitutional." Accordingly, the three-judge panel concluded that the RCP was subject to strict scrutiny. Applying strict scrutiny, the three-judge panel concluded that "[t]he General Assembly has failed to demonstrate that their [RCP] is narrowly tailored to a compelling governmental interest," and thus, concluded that the RCP was unconstitutional. As a result, the three-judge panel concluded that the Special Masters' Modified Congressional Plan should be adopted instead.

¶ 205 Although the three-judge panel weighed the same volume and variety of evidence in reviewing the RCP as it did with the RSP and RHP, this evidence was not competent to support its findings of fact that the RCP "does not meet the requirements of [*Harper I*]" or its conclusions of law that the RCP was unconstitutional. The evidence is not competent to support a rejection of the RCP because, under the presumption of constitutionality, the standard of proof for declaring an act of the General Assembly unconstitutional is significantly higher than that for accepting that an act of the General Assembly is constitutional. To support the three-judge panel's findings of fact regarding the RCP, competent evidence would have to rebut the presumption that the General Assembly acted constitutionally beyond a reasonable doubt.

¶ 206 Overall, the three-judge panel only made two specific findings of fact that support its conclusion of law that the RCP was unconstitutional:

> 34. The Court finds, based upon the analysis performed by the Special Masters and their advisors, that the [RCP] is not satisfactorily within the statistical ranges set forth in the Supreme Court's full opinion. *See Harper v. Hall*, 2022-NCSC-17, ¶ 166 (mean-median difference of 1% or less) and ¶ 167 (efficiency gap less than 7%).
>
> 35. The Court finds that the partisan skew in the [RCP] is not explained by the political geography of North Carolina.

The only other findings of fact that were specific to the RCP were (1) that the General Assembly's remedial process and use of partisan data "comported with" this Court's Remedial Order, and (2) that the RCP contained "key differences" that made four of its districts "some of the most politically competitive in the country." Neither of these findings supports a conclusion that the RCP is unconstitutional. Accordingly, the

three-judge panel's rejection of the RCP appears to be based primarily, if not solely, on its finding that the plan did not meet the Mean-Median Difference and Efficiency Gap thresholds. In turn, the three-judge panel based this finding of fact "upon the analysis performed by the Special Masters and their advisors."

¶ 207 The Maptitude software used by the General Assembly, however, produced results which found that the RCP's Mean-Median Difference and Efficiency Gap scores were within the thresholds identified by this Court in *Harper I*, and the three-judge panel approved of the General Assembly's method for calculating those scores. The three-judge panel's order contains no finding that identifies the RCP's actual Mean-Median Difference and Efficiency Gap scores. Nor does it identify any purported flaw in the General Assembly's metrics or process that rendered its scores inaccurate as compared with those calculated by the advisors. The order summarily found that "based upon the analysis performed by the Special Masters and their advisors," the scores for the General Assembly's RCP were too high. However, as shown, the scores were consistent with those for the RHP and RSP, which were upheld by the three-judge panel. In fact the RCP's average Mean-Median Difference score is 0.88% and its average Efficiency Gap score is 6.91%. Both are clearly within the "presumptively constitutional" ranges identified by the majority in *Harper I*.

¶ 208 Accordingly, it appears that the three-judge panel, instead of presuming that the General Assembly acted constitutionally in drawing, adjusting, and scoring the RCP, deferred to the reports of the Special Masters and the advisors. Again, such a backwards approach ignores the presumption of constitutionality altogether and defeats its purpose entirely. Even taken together, these reports do not overcome the presumption of constitutionality's high bar. None of the advisors even addressed the General Assembly's remedial process or metrics, let alone demonstrated that the legislature's decisionmaking was arbitrary, unreasonable, or otherwise constitutionally flawed. Why were Maptitude's Mean-Median Difference and Efficiency Gap scores sufficient for the RHP and the RSP, but not for the RCP?

¶ 209 Additionally, while the advisors and the experts each calculated slightly different scores, this is not surprising because each utilized different redistricting software, partisan election data, and calculation methods. For example, each of the advisors used different redistricting software from the others, and none chose to use Maptitude, as had the General Assembly. Dr. Grofman used Dave's Redistricting App to calculate the RCP's Mean-Median Difference and Efficiency Gap scores, and

Dr. McGhee used a web-based redistricting software called PlanScore. It is not clear from Dr. Grofman's or Dr. McGhee's reports how these technologies calculate the relevant metrics or whether they do so differently than Maptitude.

¶ 210 Likewise, each of the advisors used different sets of elections as their source of partisan data to measure the RCP. Once again, none chose the same set of elections as each other or as the General Assembly. Dr. Jarvis, for example, pulled partisan election data from eleven statewide elections. Nine of these matched the General Assembly's Mattingly Election Set, but two did not. Dr. Grofman used "major statewide races [in] 2016–2020," but did not specify how many election contests or which ones. Dr. Wang used a set of ten statewide elections to create his own sets of hypothetical partisan election data. Dr. Wang varied the vote totals in each of these elections "above and below an average [vote total]" in order to "evaluat[e] a range of future [vote total] scenarios that may arise in the coming decade." Dr. Wang also created a composite of vote totals by averaging together three data points: (1) the average two-party vote share of the 2016 and 2020 presidential elections; (2) the average two-party vote share of the 2016 and 2020 United States Senate elections; and (3) the average two-party vote share of the 2020 elections for Governor and Attorney General. None of the advisors stated why they preferred their selected set of elections or hypothetical elections or purported to explain why their selection should be substituted for the General Assembly's.

¶ 211 Additionally, Dr. McGhee took a very "different approach" to calculating the Mean-Median Difference and Efficiency Gap scores. Instead of analyzing which party's candidate would win in a proposed new district by using data from prior election contests, Dr. McGhee used PlanScore to "predict" potential partisan outcomes in the future. Dr. McGhee did not explain which elections PlanScore applied to predict future election results, nor did he explain the criteria used by PlanScore to make such predictions. Dr. McGhee also calculated two sets of Mean-Median Difference and Efficiency Gap scores. He calculated one set from a simulated election that assumed that no incumbents ran for reelection and another set from a simulated election that assumed that all incumbents ran for reelection in the proposed district containing their residence.

¶ 212 Accordingly, none of the advisors used the same software or followed the same methods as the General Assembly, which explains the variance among the calculated scores. Once again, we should defer to the General Assembly's policy choices, such as its decision to use Maptitude and the Mattingly Election Set over the policy choices of

others. It does not matter that the advisors chose to use different software, election results, or calculation methods if that evidence does not demonstrate that the General Assembly's alternative choices were constitutionally flawed.

¶ 213 These varying results prove that the process of drawing a redistricting map involves and requires a multitude of policy choices. At each step of the process, the General Assembly could have chosen to do something different. The General Assembly could have chosen Dave's Redistricting App or another redistricting software instead of Maptitude. Alternatively, the General Assembly might have chosen a different set of elections to supply its partisan election data. It could have pulled data from five previous elections, instead of twelve. Or, it could have used only presidential elections, instead of a variety of statewide contests.

¶ 214 But the General Assembly did not make any of these decisions. The mere existence of other possible redistricting methods does not raise a suspicion, let alone demonstrate beyond a reasonable doubt, that the General Assembly's selected approach was constitutionally inadequate in any way. If "every doubt" is to be "resolved in favor of" an act of the General Assembly, *Jenkins*, 180 N.C. at 170, 104 S.E. at 347, then the three-judge panel should have deferred to the General Assembly's policy choices and its chosen redistricting method when presented with nothing more than an array of alternative calculation methods and scores from court-appointed political scientists. Accordingly, the three-judge panel erred in rejecting the RCP, and this Court should reverse that portion of its order.

¶ 215 Nevertheless, the majority, like the three-judge panel, defers to the report of the Special Masters and ignores the presumption of constitutionality entirely. The majority flips the presumption of constitutionality on its head by deferring to the policy choices of four court-appointed political scientists to invalidate the policy choices of the people's chosen representatives. For example, in affirming the three-judge panel's rejection of the RCP, the majority notes that none of the advisors found that the RCP "yielded both an [E]fficiency [G]ap below 7% and a [M]ean-[M]edian [D]ifference below 1%." *Harper II*, 2022-NCSC-121, ¶ 83. The majority does not recognize, however, that the General Assembly's Maptitude software measured the RCP's Efficiency Gap as 5.29% and its Mean-Median Difference as 0.61%, both well below the thresholds identified by this Court in *Harper I*. The majority simply defers to the advisors' findings on the RCP's Mean-Median Difference and Efficiency Gap scores without explaining how the advisors' analysis shows that the General Assembly's calculation of these scores was constitutionally

flawed. Nor does the majority create its own averages for the RCP as it did the RHP and RSP. If it had it would see that both scores for the RCP are within the "presumptively constitutional" ranges identified in *Harper I*. The RCP has an average Mean-Median Difference of 0.88% and an average Efficiency Gap of 6.91%.

¶ 216 In doing so, the majority usurps the role of the General Assembly—the policymaking branch of government—by replacing the General Assembly's discretionary redistricting decisions with its own preferred redistricting approaches. More broadly, however, the majority eliminates the presumption of constitutionality entirely and inserts the judiciary squarely into future policy decisions that rightfully belong to the General Assembly. Under the majority's analytical framework, it appears that any act of the General Assembly may be declared unconstitutional so long as there is at least one scientist, scholar, specialist, or expert willing to opine that the statute fails under at least one political science-based metric. As a result, the majority has wrenched political power from the people and vested it entirely in its own hands.

¶ 217 This Court's decision from more than a century ago in *Jenkins v. State Board of Elections*, 180 N.C. 169, 104 S.E. 346 (1920), illustrates the significance of the separation-of-powers principles and the strength of the presumption of constitutionality. In that case the General Assembly exercised its legislative authority to amend the State's election laws to allow absentee voting. Specifically, the General Assembly enacted the Absentee Voters Law, which permitted any registered voter who was "absent from the county in which" he was registered, *id.* at 172, 104 S.E. at 348, to vote using mail-in ballot forms provided by the State Board of Elections, Compl. 7, *Jenkins*, 180 N.C. 169 (No. 260). J.J. Jenkins, who was running for the Office of State Treasurer, Pl.'s Br. 1, *Jenkins*, 180 N.C. 169 (No. 260), filed suit challenging the Absentee Voters Law as a violation of Article VI of the state constitution and sought to enjoin the State Board of Elections from implementing the statute in the 1920 general election, *id.* at 7, 8.

¶ 218 The plaintiff primarily argued that the Absentee Voters Law conflicted with Article VI, Section 2 of the North Carolina Constitution. *See id.* at 2–29. At the time, Article VI, Section 2 of the North Carolina Constitution required that, to qualify to vote in a particular county or district, a person must have "resided . . . in the precinct, ward or other election district, in which he offers [to] vote, four months next preceding the election." N.C. Const. of 1868, art. VI, § 2. The plaintiff contended that this provision not only required voters to reside in their respective

county or district for the requisite period of time but also prohibited voters from submitting a ballot unless they were physically present in their county or district of residence. *See* Pl.'s Br. at 11–13.

¶ 219 Before this Court, the plaintiff made several arguments to support this contention. For example, he argued that the verb "offer" in Article VI, Section 2 referred to a voter's act of submitting a ballot, not the local board of elections' act of accepting and counting a ballot. *Id.* at 13. Accordingly, the act of submitting the ballot had to occur in the voter's county of residence and could not be completed by mailing a ballot from another location. *Id.* The plaintiff also analogized the phrase "offers to vote" to an offer to form a contract, which is "complete the moment [it] passes out of the hands of the [offeree]." *Id.* at 14. Thus, like a contract offer, the plaintiff argued that a voter's "offer[ ] to vote" was complete the moment he submitted it for acceptance by his local board of elections. *Id.* at 17. Thus, according to the plaintiff, the voter could only submit his ballot by hand in the county in which he resided. *Id.* Lastly, the plaintiff also compared Article VI, Section 2 to similar provisions in other state constitutions that were held to prohibit absentee voting laws. *Id.* at 18–19. Accordingly, the plaintiff concluded that the Absentee Voters Law violated Article VI, Section 2 by permitting voters to "offer to vote" from locations outside their county or district of residence.

¶ 220 In answering this question, this Court first explained that the well-settled presumption of constitutionality applied. *Jenkins*, 180 N.C. at 170, 104 S.E. at 347 ("No rule of construction is better settled, both upon principle and authority, than that legislative enactments are presumed to be constitutional until the contrary is shown. It is only when they plainly conflict with some provision of the [c]onstitution that they should be declared void."). The Court then noted that the plaintiff raised a compelling argument that Article VI, Section 2 required a voter to "offer[ ] to vote" while physically present in his county or district of residence. *Id.* at 172, 104 S.E. at 348. The Court admitted that, as a result, there was some doubt regarding the constitutionality of the Absentee Voters Law. *Id.* ("[W]e must admit that the question is perplexing and involved in doubt."). Regardless, the Court determined that raising a compelling argument of unconstitutionality was insufficient to overcome the presumption of constitutionality's high bar. *Id.* at 172–73, 104 S.E. at 348. Accordingly, this Court concluded that it was, therefore, required to uphold the statute:

> [W]e think the language of the [c]onstitution is susceptible of a fair interpretation which will sustain the statute, in which case it is our duty to uphold it

> and give to the law the benefit of the doubt. The party who undertakes to pronounce a law unconstitutional takes upon himself the burden of proving beyond any reasonable doubt that it is so. Nothing should have the effect of avoiding a statute duly enacted but a *direct* collision between its provisions and the [c]onstitution. That collision is not so clear as to justify us in setting aside a statute, which is the law in a majority of the States of the Union, and, so far as we can find, has not been contested in recent years.

Id.

¶ 221 Thus, the presumption of constitutionality imposes a high bar to surmount and can only be overcome if it is clear beyond a reasonable doubt that the relevant enactment directly conflicts with an express provision of the constitution. *See Baker*, 330 N.C. at 334–37, 410 S.E.2d at 889–90. As applied to this case, plaintiffs have not shown that the General Assembly's Remedial Plans, presumed constitutional, violate the constitution beyond a reasonable doubt.

IV. Political Question

¶ 222 The dissenting opinion in *Harper I* explained in great detail that partisan gerrymandering claims present nonjusticiable political questions because the North Carolina Constitution textually assigns the issue of redistricting to the legislature and because there is no judicially discernible, manageable standard by which courts may adjudicate such claims. *See Harper I*, 2022-NCSC-17, ¶¶ 237–67 (Newby, C.J., dissenting). The exact justiciability pitfalls forecasted by the dissenting opinion in *Harper I* permeated the proceedings on remand, and they are present again in the majority's decision today. Accordingly, revisiting the political question analysis from *Harper I* is warranted.

¶ 223 "The Supreme Court of the United States has explained that 'as essentially a function of the separation of powers,' courts must refuse to review issues that are better suited for the political branches." *Id.* ¶ 237 (quoting *Baker*, 369 U.S. at 217, 82 S. Ct. at 710). Such matters are nonjusticiable, political questions. One characteristic of a political question is the absence of a standard that is judicially discoverable and manageable. *Id.*

¶ 224 As explained in the dissent in *Harper I*, the Supreme Court of the United States recently provided detailed guidance regarding the nonjusticiability of partisan gerrymandering claims in *Rucho v. Common Cause*,

139 S. Ct. 2484 (2019). *See Harper I*, 2022-NCSC-17, ¶¶ 238–45. In *Rucho* the Supreme Court determined that claims of excessive partisanship—brought by a group of Maryland and North Carolina voters regarding their states' congressional maps—were nonjusticiable. 139 S. Ct. at 2491.

¶ 225 The Court first noted that "[p]artisan gerrymandering claims have proved far more difficult to adjudicate" than other types of redistricting issues because "while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, 'a jurisdiction may engage in constitutional political gerrymandering.' " *Id.* at 2497 (quoting *Hunt v. Cromartie*, 526 U.S. 541, 551, 119 S. Ct. 1545, 1551 (1999)). Because some level of partisan gerrymandering is constitutional, "[t]he 'central problem' " with such claims is " 'determining when political gerrymandering has gone too far,' " *id.* (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 296, 124 S. Ct. 1769, 1787 (2004) (plurality opinion)), and "providing a standard for deciding how much partisan dominance is too much," *id.* (quoting *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 420, 126 S. Ct. 2594, 2611 (2006) (opinion of Kennedy, J.). Because of this inherent difficulty, the Supreme Court stressed that if there exists a standard for resolving such claims, it "must be grounded in a 'limited and precise rationale,' be 'clear, manageable, and politically neutral,' " *id.* at 2498 (quoting *Vieth*, 541 U.S. at 306–08, 124 S. Ct. at 1793 (Kennedy, J., concurring in the judgment)), and "reliably differentiate unconstitutional from 'constitutional political gerrymandering,' " *id.* at 2499 (quoting *Cromartie*, 526 U.S. at 551, 119 S. Ct. at 1551).

¶ 226 The Supreme Court then examined whether it could find such a standard in the Federal Constitution. The Court explained that partisan gerrymandering claims are effectively requests for courts to allocate political power to achieve proportional representation, something the Federal Constitution does not require. *Id.* ("Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation . . . ." (quoting *Davis v. Bandemer*, 478 U.S. 109, 130, 106 S. Ct. 2797, 2809 (1986) (plurality opinion))). Accordingly, partisan gerrymandering claims do not seek to redress a violation of any particular constitutional provision; rather, such claims "ask the courts to make *their own political judgment* about how much representation particular political parties *deserve*—based on the votes of their supporters" and "to apportion political power as a matter of fairness." *Id.* (first emphasis added). This judgment call is not the kind of "clear, manageable, and politically neutral" standard required for justiciable issues. *Id.* at 2498 (quoting *Vieth*, 541 U.S. at 306–08, 124 S. Ct. at 1793 (Kennedy, J., concurring in

the judgment)); *see also id.* at 291, 124 S. Ct. at 1784 (plurality opinion) (" 'Fairness' does not seem to us a judicially manageable standard. . . . Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking.").

¶ 227 The Court also concluded that, unlike one-person, one-vote claims, the Federal Constitution was devoid of any objective, mathematical metric for measuring "political fairness": "[T]he one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly." *Rucho*, 139 S. Ct. at 2501.

¶ 228 Finding no appropriate standard in the Federal Constitution, the Supreme Court then turned to the political science-based tests proposed by the *Rucho* plaintiffs. *Id.* at 2503–04. These tests proved insufficient as well:

> The appellees assure us that "the persistence of a party's advantage may be shown through sensitivity testing: probing how a plan would perform under other plausible electoral conditions." Experience proves that accurately predicting electoral outcomes is not so simple, either because the plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time. . . .
>
> Even the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change. Voters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations. Many voters split their tickets. Others never register with a political party, and vote for candidates from both major parties at different points during their lifetimes. For all of those reasons,

> asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.

Id. (citations omitted). In conclusion, the Supreme Court held that partisan gerrymandering claims are nonjusticiable because there is "no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions." *Id.* at 2507.

¶ 229 Today's decision further illustrates the wisdom of that Court's observations. According to the majority, the General Assembly and six jurists were unable to understand and apply the criteria set forth by the majority in *Harper I*. If, as the majority insists, the "test" from *Harper I* "provide[s] a clear standard" so that the General Assembly can "reliably" identify and avoid political gerrymandering, *Harper I*, 2022-NCSC-17, ¶ 310 (quoting *Rucho*, 139 S. Ct. at 2499), then why did the General Assembly, the three-judge panel, and the Special Masters all fail to discern and apply that standard on remand? The fact that they could not properly understand and apply the criteria discussed in *Harper I* is prima facie evidence that the majority's standard is unworkable. The majority even concedes that its standard from *Harper I* is "imperfect" and "vulnerable to manipulation," *Harper II*, 2022-NCSC-121, ¶¶ 78, 77, yet it continues to insist its standard must be applied.

¶ 230 Additionally, the majority's holding today renders the applicable "standard" going forward even less manageable than the standard it iterated in *Harper I*. In *Harper I* the majority suggested "possible bright-line standards" from "political science literature." *Harper I*, 2022-NCSC-17, ¶ 165 (majority opinion). It specifically opined that "any plan with a [M]ean-[M]edian [D]ifference of 1% or less when analyzed using a representative sample of past elections is presumptively constitutional." *Id.* ¶ 166. Similarly, it concluded that a "seven percent [E]fficiency [G]ap threshold" was presumptively constitutional. *Id.* ¶ 167. Now the majority backs away from any possible bright-line standard and basically removes any presumption by stating that even these threshold scores that it identified cannot reliably identify a constitutional redistricting plan:

> Constitutional compliance has no magic number. Rather, the trial court may consider certain datapoints within its wider consideration of the ultimate legal conclusion: whether the plan upholds the fundamental right of the people to vote on equal terms and to substantially equal voting power.

Harper II, 2022-NCSC-121, ¶ 76. How the General Assembly, constitutionally tasked with the redistricting responsibility, or a three-judge panel can recognize whether a redistricting plan meets this criteria, however, the majority does not say.

V. Conclusion

¶ 231 When is a legislative redistricting plan constitutional? Only four justices on this Court know, and they refuse to say why the plans at issue today are unconstitutional. Why are they reluctant to say?

¶ 232 Ambiguity leads to redistricting by the judiciary, which appears to be the goal. Legislative defendants' redistricting decisions and their Remedial Plans are entitled to our historic deference. The majority gives the General Assembly none.

¶ 233 The majority admits its standard is "imperfect," *Harper II*, 2022-NCSC-121, ¶ 78, but argues it can be applied by a three-judge panel. Absent from its discussion is the branch that is constitutionally assigned redistricting responsibilities—the legislative branch. The majority ignores the primary role of the General Assembly in seeking to interpret and apply the vague "standard" it discusses.

¶ 234 Properly analyzed under the correct standard of review, all three of the General Assembly's Remedial Plans should be approved. The RCP and the RSP meet the criteria of presumptive constitutionality set forth in *Harper I*. Most telling, the majority strikes down the RSP when the three Special Masters and the three-judge panel all agreed that it was constitutionally compliant under *Harper I*. Apparently, six jurists and the General Assembly were unable to discern and apply the correct constitutional test or recognize a constitutional redistricting plan. Once again, only four justices know what redistricting plan will meet their view of constitutionality. I respectfully dissent.

Justices BERGER and BARRINGER join in this dissenting opinion.

Editor's Note: The opinion of the Supreme Court of North Carolina in *Holmes v. Moore*, published in the advance sheets at this citation, 383 N.C. 171, was withdrawn from the bound volume because it was superseded on rehearing by the opinion of the Supreme Court of North Carolina in *Holmes v. Moore*, 384 N.C. 426, filed on 28 April 2023.

[PAGES 172–223 INTENTIONALLY OMITTED.]

IN RE C.G.

[383 N.C. 224, 2022-NCSC-123]

IN THE MATTER OF C.G.

No. 308A21

Filed 16 December 2022

1. Constitutional Law—right to an impartial tribunal—involuntary commitment—no counsel present for the State—trial court questioning witnesses

For the reasons stated in *In re J.R.*, 383 N.C. 273 (2022), the Supreme Court affirmed the Court of Appeals' decision that the trial court in an involuntary commitment hearing did not deprive respondent of his due process right to an impartial tribunal where counsel for the State did not appear at the hearing and the trial court questioned the witnesses. Nothing about the manner in which the trial court conducted the hearing tended to cast doubt upon its impartiality; rather, the court simply presided over the hearing, asking questions to increase understanding of the case and illuminate relevant facts to determine whether respondent required continued involuntary commitment.

2. Mental Illness—involuntary commitment—danger to self—insufficiency of findings to support conclusion

An involuntary commitment order was reversed where the trial court's findings of fact—including that respondent suffered from schizoaffective disorder, hallucinations, and disorganized thoughts; was noncompliant with medications when outside the hospital; was unable to sufficiently tend to his dental and nourishment needs; and lived with a physically abusive roommate—failed to support its conclusion that respondent posed a danger to himself. Although the court's findings regarding respondent's symptoms demonstrated that

respondent was mentally ill (a required conclusion under N.C.G.S. § 122C-268(j) to support involuntary commitment), these findings, without more, were insufficient to establish that respondent faced a reasonable probability of future physical debilitation absent involuntary commitment (which, pursuant to N.C.G.S. § 122C-3(11)a, is one definition of "dangerous to self," which is also a conclusion required under section 122C-268(j)).

Chief Justice NEWBY concurring in part and dissenting in part.

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

Justice EARLS concurring in part and dissenting in part.

Justices HUDSON and MORGAN join in this opinion concurring in part and dissenting in part.

Justice BARRINGER concurring in part and dissenting in part.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 278 N.C. App. 416, 2021-NCCOA-344, affirming an order entered on 7 February 2020 by Judge Doretta Walker in District Court, Durham County. On 27 October 2021, this Court allowed respondent's petition for discretionary review to consider an additional issue. Heard in the Supreme Court on 20 September 2022.

Joshua H. Stein, Attorney General, by James W. Doggett, Deputy Solicitor General, and South A. Moore, General Counsel Fellow, for the State.

Glenn Gerding, Appellate Defender, by Katy Dickinson-Schultz, for respondent-appellant.

Disability Rights North Carolina by Lisa Grafstein, Holly Stiles, and Elizabeth Myerholtz for Disability Rights North Carolina, National Association of Social Workers, Promise Resource Network, and Peer Voice North Carolina, amici curiae.

ERVIN, Justice.

¶ 1 This case and its five companions raise an important issue regarding the constitutional rights of those who face the prospect of involuntary commitment as a result of mental illness. More specifically, these cases require us to address the question of whether a trial court presented with a petition to have an individual involuntarily committed for additional inpatient treatment pursuant to N.C.G.S. § 122C-261 *et seq.* violates that person's due process rights by conducting a hearing concerning the petition in the absence of counsel representing the State on the grounds that the use of such procedures violates the respondent's right to an impartial tribunal. In addition, respondent argues that, even if no due process violation occurred in this case, the trial court's written findings of fact failed to support its conclusion that respondent was mentally ill and posed a danger to himself so that he could be involuntarily committed pursuant to N.C.G.S. § 122C-268(j).

¶ 2 A majority of the Court of Appeals held that the proceedings, as conducted, did not result in a due process violation and that the trial court's findings were sufficient to support a prima facie inference that respondent could not care for himself. *In re C.G.*, 278 N.C. App. 416, 2021-NCCOA-344, ¶¶ 25, 36. The dissenting judge disagreed with his colleagues' decision with respect to the due process issue without directly commenting upon the sufficiency of the trial court's findings. *Id.* ¶ 46 (Griffin, J., dissenting). After careful consideration of the arguments advanced in the parties' briefs, we affirm the decision of the Court of Appeals with respect to the due process issue for the reasons set forth in *In re J.R.*, 383 N.C. 273, 2022-NCSC-127, but reverse the Court of Appeals' decision to affirm the trial court's order to have respondent involuntarily committed on the grounds that the record evidence and the trial court's findings did not support that determination.

I. Background

A. Involuntary Commitment Statutory Scheme

¶ 3 Any person "who has knowledge of an individual who has a mental illness and is either (i) dangerous to self, as defined in [N.C.G.S. §] 122C-3(11)a., or dangerous to others, as defined in [N.C.G.S. §] 122C-3(11)b., or (ii) in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness," may file an affidavit delineating the facts upon which the affiant's opinion is based and seeking the entry of an order to have the respondent taken into custody for examination. N.C.G.S. § 122C-261(a) (2021). If, after reviewing the affidavit, a clerk or magistrate "finds reasonable grounds to believe that the facts alleged in the affidavit are true" and that the respondent

appears to satisfy one of the three relevant statutory criteria, the clerk or magistrate shall order that the respondent be taken into custody. N.C.G.S. § 122C-261(b).

¶ 4 After the respondent has been taken into custody, a commitment examiner has twenty-four hours within which to determine if the respondent "has a mental illness" and "is dangerous to self . . . or others" so as to warrant inpatient commitment. N.C.G.S. § 122C-263(c), (d)(2).[1] In the event that the examiner concludes that inpatient commitment is justified, the respondent will be admitted for treatment to a mental health unit known as a "24-hour facility," N.C.G.S. §§ 122C-3(14)(g), -262(d) (2021), with the examiner being required to prepare a report that specifically recommends that the respondent receive inpatient treatment and having the option, if no one has already sought to have the respondent involuntarily committed, to file an involuntary commitment petition after completing the examination, N.C.G.S. § 122C-261(d). Within twenty-four hours after the respondent's arrival at a 24-hour facility, a physician, other than the one that conducted the initial examination, must examine the respondent and, upon determining that the respondent is mentally ill and constitutes a danger to himself or others, hold the respondent at the facility pending a hearing before the district court, with the second examiner also being required to prepare a report containing his or her commitment recommendation. N.C.G.S. § 122C-266(a), (c).

¶ 5 Within ten days after the respondent has been taken into custody, the district court must hold a hearing for the purpose of determining whether the respondent should remain involuntarily committed. N.C.G.S. § 122C-268(a). At this hearing, the respondent is entitled to be represented by counsel of his own choosing or appointed by the trial court, N.C.G.S. §§ 122C-268(d), -270(a); to have the commitment reports filed in support of the decision to commit the respondent and other relevant documents shared with the trial court, N.C.G.S. §§ 122C-263(3), -266(c), -269(b); and to have the right to confront and cross-examine witnesses, including the commitment examiners, N.C.G.S. § 122C-268(f). As a prerequisite for the respondent's continued involuntary commitment, the trial court must find "by clear, cogent, and convincing evidence" that the respondent is mentally ill and presents a danger to himself or others and make written findings of fact in support of that determination. N.C.G.S. § 122C-268(j). If the trial court makes the necessary findings, it

1. The commitment examiner must be a physician, eligible psychologist, or other health, mental health, or substance abuse professional certified to perform evaluations by the Secretary of the Department of Health and Human Services. N.C.G.S. §§ 122C-3(8a), -263.1.

is authorized to order that the respondent continue to be involuntarily committed in an inpatient facility for a period not to exceed ninety days. N.C.G.S. § 122C-271(b)(2).

B. C.G.'s Case

¶ 6 On 30 January 2020, Dr. Phillip Jones, a physician practicing at Duke University Medical Center, signed an affidavit and petition requesting that respondent be involuntarily committed on the grounds that he was mentally ill and presented a danger to himself. According to the affidavit, respondent had arrived at the emergency department earlier that day while exhibiting "psychotic and disorganized" behavior, with his Assertive Community Treatment team having been "unable to stabilize his psychosis in the outpatient environment."[2] According to Dr. Jones, respondent needed to be hospitalized "for safety and stabilization" given that he was "so psychotic [that] he is unable to effectively communicate his symptoms and [he] appears to have been neglecting his own self-care," with his difficulties having included a failure to take his prescribed medication. In addition, Dr. Jones completed a "First Examination for Involuntary Commitment" report that contained the same findings. Based upon this affidavit, a magistrate concluded that there were reasonable grounds to believe that respondent was mentally ill and a danger to himself and ordered that respondent be taken into custody for inpatient treatment at Duke.

¶ 7 On 31 January 2020, Dr. Miles Christensen completed a second examination, during which he observed that respondent had "talk[ed] to other people in the room during [the] interview," claimed that "god[']s people [were] putting voices in [his] head," and repeatedly stated that he was "[b]lessed and highly favored." According to Dr. Christensen, respondent would begin crying intensely without any apparent cause and, when asked to identify the goals that his hospitalization was intended to accomplish, replied, "I don't know, 90, 40, 50 pounds probably?" and stated that he wanted to gain weight. Dr. Christensen diagnosed respondent with schizoaffective disorder and concluded that respondent was a danger both to himself and to others.

¶ 8 On 7 February 2020, the trial court held a hearing for the purpose of determining whether respondent should be released or remain in the

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2. An Assertive Community Treatment team is "a community-based group of medical, behavioral health[,] and rehabilitation professionals who use a team approach to meet the needs of an individual with severe and persistent mental illness." *Assertive Community Treatment*, N.C. Dep't of Health and Hum. Servs., https://www.ncdhhs.gov/divisions/mental-health-developmental-disabilities-and-substance-abuse/adult-mental-health-services/assertive-community-treatment (last visited Nov. 15, 2022).

custody of Duke for further inpatient treatment. Although an assistant public defender was present to represent respondent, no counsel appeared on behalf of the State or Duke. At the outset, respondent's trial counsel objected to proceeding with the hearing in the absence of counsel for the State or Duke, arguing that the trial court could not "on its own initiat[ive]—or volition . . . conduct the business of the State." In overruling respondent's objection, the trial court noted that, while the district attorney's office, the attorney general's office, and Duke had all declined to participate, it did not believe that it could ignore its own statutory obligation to conduct the required hearing "as a result of people failing to do their duty[.]" In addition, respondent's trial counsel unsuccessfully sought dismissal of the involuntary commitment petition on the grounds that the findings contained in the first and second commitment examination reports were nothing more than conclusory statements that did not suffice to sustain an involuntary commitment order.

¶ 9 After the completion of these preliminary proceedings, the trial court called Dr. Max Schiff, a physician who was involved in respondent's treatment, to inform the court concerning "whether or not [he could] give [the trial court] enough evidence on this to go forward." Although respondent's trial counsel objected to the calling of Dr. Schiff as a witness on the grounds that Dr. Schiff had not performed either of the examinations that had resulted in respondent's commitment, the trial court overruled respondent's objection, explaining that, "if he doesn't know anything about this case, you can keep making your objection and we will go from there."

¶ 10 According to Dr. Schiff, respondent "has a long-standing history of mental illness with psychosis" and "currently carries a diagnosis of schizoaffective disorder, for which he's been treated since his late teens." In addition, Dr. Schiff stated that respondent's ACT team had initially brought him to the emergency room "in order to evaluate him for an acute change in his mental status with increasing disorganization, hallucinations, delusions, [and] abnormal psychomotor behavior," including reports that respondent had been "wandering around the streets" and throwing away the medication that he needed in order to remain stable. At the time that he examined respondent following the latter's arrival in the psychiatric unit, Dr. Schiff asserted that respondent "continued to demonstrate very profound disorganization of thought and behavior responding to hallucinations or internal stimuli," that it was "very difficult to elucidate a narrative from [respondent]," and that respondent claimed that "thoughts were being inserted into his head and occasionally controlling him, as well as containing derogatory content

that was quite disturbing to him." After the trial court asked for clarification about this aspect of his testimony, Dr. Schiff explained that respondent "was complaining of feeling that thoughts were being inserted into his head, that he could hear other people's thoughts or voices in his head," and that these thoughts or voices provided respondent "with derogatory content that was quite disturbing to him and made it difficult for [respondent] to attend to a normal interview."

¶ 11 According to Dr. Schiff, while respondent had been compliant with the treatment that had been provided to him at Duke, he had informed the hospital staff that he did not believe that he really needed medication or hospitalization and that he did not have any longstanding mental health problems. Dr. Schiff expressed concern that, despite respondent's improvement while under Duke's care, "if he were to be discharged, . . . there would be an immediate decompensation, given his continued level of disorganization and the hallucinations which are disturbing to him and, in the past, have led him to have aggressive behaviors in the community." In addition, Dr. Schiff informed the trial court that, during his time at Duke, respondent had "been the victim of assaults on a number of occasions as well as in the context of both his substance use and decompensated primary psychotic disorder." In response to the trial court's inquiry concerning how long Duke wished to retain respondent in involuntary commitment and what treatment plan Duke had in mind for respondent, Dr. Schiff indicated that Duke was seeking an additional thirty-day period of involuntary commitment and that Duke would continue to administer the medications that had been provided to respondent since his arrival.

¶ 12 On cross-examination, Dr. Schiff testified that, while he had not conducted either of the evaluations that had been performed in connection with respondent's commitment or signed either of respondent's evaluations, he had attended respondent's second evaluation and currently served as respondent's attending physician. After acknowledging that respondent's ACT team would be able to assist respondent outside the hospital, Dr. Schiff pointed out that, at the time that it had brought respondent to the emergency room, respondent's ACT team had concluded that "they could no longer support him in the community based on his level of disorganization and decompensation." Dr. Schiff said he had no knowledge of any efforts that respondent might have made to harm himself but noted that "there has been some aggression and aggressive behavior before" while stating that "[respondent has] put himself in situations that would place him in danger and could place him in danger again."

¶ 13 After the completion of Dr. Schiff's testimony, respondent's trial counsel called respondent to testify. When asked if he lived with anyone, respondent replied that he lived with "[my] brother and my friend. My—he's my brother first, but he's my friend second. I was in a relationship with him for 8, 9, 10 years. But it wasn't be nothing sexually wise like that with him again." In addition, respondent testified that, in the event that he was released, he would continue living with this man. Respondent denied having had any thoughts of self-harm or that he posed a threat to others but admitted that he sometimes got into arguments with a friend named "William," who would sometimes get angry with him. In such instances, respondent said that he would just acquiesce in whatever William wanted in order to avoid further trouble. Although respondent could not tell whether the medication that he was taking had provided him with any relief, he committed to continue to take that medication in the event that he was released. At that point, respondent had the following colloquy with his trial counsel:

> [Counsel]: What kind of assistance or help do you have in accessing medical help?
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> [Respondent]: My ACT team, Easterseals.
>
> [Counsel]: And do you cooperate with them?
>
> [Respondent]: Easter and seals. Yes, I do, yes.
>
> [Counsel]: And if they ask you to take medications, would you take them?
>
> [Respondent]: Yes.
>
> [Counsel]: And if they ask you to go see a doctor, would you go see a doctor?
>
> [Respondent]: They have. They have tried to get me to take care of my teeth more. They wanted me to go do that, but I didn't want to do that. I just disregarded it.
>
> [Counsel]: Why didn't you want to take care of your teeth?
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> [Respondent]: I brush my teeth at least once or twice a day. You are supposed to brush it three times and have three meals. I don't get three meals a day, but they have started to give me at least breakfast, a meal for breakfast, but he's been working on losing

> weight, and I'm trying to work with him, but I'm gonna have to eat more.

After claiming that his mother, who lived about fifteen or twenty minutes away, would help him remember to take his medications, respondent answered his trial counsel's question concerning whether he would like to be released by stating that, "I see her ankles and Amy—the Amy at [Duke]—[Duke] remind me of my mom's ankles, and she takes her water pills in the morning. I remind her."

¶ 14 In response to questions posed by the trial court, respondent stated that he had contact with his ACT team on Mondays, Wednesdays, and Thursdays and that he attended a substance abuse group meeting on Friday "here and there, once in a blue." Respondent told the trial court that he was provided with a bus ticket every time that he went to a group meeting and that he received a weekly check from Easterseals that he used to buy groceries. Respondent answered the trial court's question concerning what had happened right before his ACT team brought him to the hospital by stating, "I don't—I don't—I was—everything was the same, you know. It's just probably one of my first family or my second family just probably wanted me there," and reiterated that he did not know why he had been taken to the hospital except "just to eat and drink."

¶ 15 In response to the trial court's questions concerning the hallucinations that Dr. Schiff had described, respondent said, "I see—I see angels, white dots. I see angels" and "they just be like, white dots, different white dots floating in the air. I see them some, like not as much. I see black dots, but I see white dots more than the white dots." Respondent said that he knew that the white dots were angels, but that "[t]he black[ ] one just might be hallucinations or—that is negativity." When the trial court asked him whether he felt better inside or outside of the hospital, respondent answered that he had "bad habits," including smoking cigarettes and marijuana, and that he would pick up cigarette butts by his apartment "so nobody can slip and fall on it."

¶ 16 After respondent's counsel made her closing argument, during which she requested that respondent be released from involuntary commitment, the trial court announced, based upon "clear, cogent, and convincing evidence," that respondent had a mental illness, that he posed a danger to himself and to others, and that he was unable to care for himself. As a result, the trial court ordered that respondent remain involuntarily committed for another thirty days. On the same date, the trial court entered a written order that incorporated the examination reports prepared by Dr. Jones and Dr. Christensen and found "by clear, cogent, and convincing evidence" that respondent

> has [a] mental illness[,] that being schizoaffective disorder [and] has [a] long-standing [history] of mental illness which goes back to his late teens[,] he is 33 [years old] now. [Respondent] suffers from hallucinations, disorganized thoughts[, and] is noncompliant with medications when not in [the] hospital. His active psychosis causes him to be a danger to himself and others. His ACT team initially had him committed as they were unable to see to his needs due to his decompens[ation]. [Respondent] [is] unable to sufficiently [take] care of [his] needs[,] that being dental [and] nourishment needs. [Respondent] lives with [a] person who has anger issues [and respondent] has been [the] victim of assaultive [behavior and] disturbing thoughts which cause deterioration [and] leaves him unable to perceive dangers to himself.

Based upon these findings, the trial court concluded that respondent was mentally ill and posed a danger to himself and others. Respondent noted an appeal to the Court of Appeals from the trial court's order.

C. Court of Appeals Decision

¶ 17 In seeking relief from the trial court's order before the Court of Appeals, respondent began by arguing that the trial court's written findings of fact lacked sufficient evidentiary support and did not support its conclusion that respondent posed a danger to himself and others. Among other things, respondent contended that the trial court had violated his right to confront and cross-examine the witnesses against him when it admitted the examination reports of Dr. Jones and Dr. Christensen into evidence even though neither of them had testified at the hearing and that there was "no other clear, cogent, and convincing record evidence that [respondent] was dangerous to himself or others." In addition, respondent argued that the trial court had violated respondent's due process right to an impartial tribunal by "assuming the role of prosecutor by presenting the entirety of the State's case."

¶ 18 The Court of Appeals began by addressing respondent's due process argument, with a majority of the Court of Appeals having concluded that "the trial court only elicited evidence that would otherwise be overlooked as no counsel for the State was present," that "[t]he trial court did not ask questions meant to prejudice either party or impeach any witness," and that, as a result, "the trial court did not violate [r]espondent's right to an impartial tribunal." *C.G.*, ¶ 25. Judge Griffin dissented from his colleagues' conclusion with respect to the due process issue

on the grounds that respondent had been "deprived of his liberty by an officer of the court who, after expressing some reluctance, offered and admitted evidence against that individual, called an adverse witness to testify on his adversary's behalf, and examined that witness to elicit the State's evidence." *C.G.*, ¶ 46 (Griffin, J., dissenting).[3]

¶ 19 Next, the Court of Appeals evaluated whether the trial court's written findings of fact were supported by competent evidence and supported its determination that respondent should be involuntarily committed for additional inpatient treatment. As an initial matter, the Court of Appeals held that the trial court had erred by incorporating the commitment examination reports into its written findings of fact given that, even though such reports are generally admissible in involuntary commitment proceedings, respondent had been deprived of the right to confront and cross-examine the persons who had prepared those reports. *Id.* ¶¶ 27–28 (citing N.C.G.S. § 122C-268(f) (2019)). According to the Court of Appeals, neither Dr. Jones nor Dr. Christensen had been present at respondent's involuntary commitment hearing, so that the trial court had violated respondent's confrontation rights by incorporating the contents of those reports into its written findings of fact. *Id.* ¶ 28.[4]

¶ 20 Nevertheless, the Court of Appeals concluded that the testimony provided by Dr. Schiff and the trial court's remaining findings of fact were sufficient to support its decision to involuntarily commit respondent, so that the trial court's error in incorporating the examiners' reports into its findings of fact constituted harmless error. *Id.* ¶ 29 (citing *State v. Ferguson*, 145 N.C. App. 302, 307 (2001)). More specifically, the Court of Appeals held that the record contained sufficient evidence,

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3. As a result of the fact that we have addressed respondent's due process claim in detail in our opinion in a companion case, we will refrain from further discussion of the Court of Appeals' evaluation of that issue in this opinion.

4. Although Judge Griffin appeared to agree with his colleagues that the trial court had erred by incorporating the relevant reports into its written findings, he seems to have reached this conclusion on the grounds that, in light of the trial court's failure to formally admit the relevant reports into evidence, it had violated respondent's due process rights when it incorporated those reports into its written findings. *C.G.*, ¶ 54 (Griffin, J., dissenting). Judge Griffin did not, however, address the issue of whether the evidence and the trial court's written findings sufficed to support the trial court's decision to involuntarily commit respondent for additional inpatient treatment. As a result of the fact that the State did not note an appeal based upon this aspect of Judge Griffin's dissent or seek discretionary review of the Court of Appeals' decision with respect to this issue, the question of whether the Court of Appeals erred by holding that trial court improperly incorporated the contents of the examination reports into its written findings of fact is not properly before us for decision. *See* N.C. R. App. P. 10(a) (providing that issues not raised in a party's brief are deemed abandoned).

consisting of respondent's own testimony, to support the trial court's determination that respondent was a danger to himself because of his "inability to care for his own nourishment and dental needs." *Id.* ¶ 34. In addition, the Court of Appeals held that the trial court's finding that respondent's ACT team was unable to adequately ensure that his needs for nourishment and dental care would be met "created the [required] nexus between [r]espondent's mental illness and future harm to himself." *Id.* ¶ 35. Finally, the Court of Appeals concluded that "[a] showing of behavior that is grossly irrational, of actions that the individual is unable to control, . . . or of other evidence of severely impaired insight and judgment shall create a *prima facie inference* that the individual is unable to care for himself or herself." *Id.* ¶ 36 (quoting N.C.G.S. § 122C-3(11)(a)(1)(II) (emphasis added by Court of Appeals). In the Court of Appeals' view, Dr. Schiff's testimony concerning respondent's hallucinations and disturbed thinking, his description of the assaults that had been previously perpetrated upon respondent, and his concern that respondent would decompensate following discharge sufficed to support an inference that respondent would be unable to care for himself. *Id.* As a result, the Court of Appeals concluded that the trial court did not err by determining that respondent posed a danger to himself. *Id.*[5] Respondent noted an appeal to this Court from the Court of Appeals' decision with respect to the due process issue based on Judge Griffin's dissent, and we allowed respondent's request for discretionary review of the Court of Appeals' determination that the record evidence and the trial court's written findings sufficed to support the trial court's decision to have respondent involuntarily committed for additional inpatient treatment.

II. Analysis

A. Standard of Review

¶ 21 According to well-established North Carolina law, this Court reviews decisions of the Court of Appeals for errors of law. N.C. R. App. P. 16(a); *State v. Melton*, 371 N.C. 750, 756 (2018). "When constitutional rights are implicated, the appropriate standard of review is de novo." *In re Adoption of S.D.W.*, 367 N.C. 386, 391 (2014); *see also Dorsey v. UNC-Wilmington*, 122 N.C. App. 58, 66 (1996) (utilizing a de novo standard of review in determining whether the trial court had violated a party's due process right to an "impartial decisionmaker"). In addition, as the

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5. As a result of its conclusion that the evidence supported a finding that respondent posed a danger to himself, the Court of Appeals did not reach the issue of whether the trial court's determination that respondent posed a danger to others had sufficient support in the record evidence and the trial court's findings of fact. *C.G.*, ¶ 33.

Court of Appeals has correctly held, an involuntary commitment order is reviewed on appeal for the purpose of determining whether the trial court's findings of fact are supported by sufficient evidence and whether the trial court's findings support its determination that the respondent should be involuntarily committed for additional inpatient treatment, *In re N.U.*, 270 N.C. App. 427, 430 (2020), with the latter of these determinations also being subject to de novo review on appeal. "Under 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 (2008) (cleaned up). Although the involuntary commitment order at issue in this case has long since expired, respondent's appeal is not moot. *See In re E.D.*, 372 N.C. 111, 114 n.8 (2019) (concluding that "[t]he possibility that [the] respondent's commitment in this case might likewise form the basis for a future commitment, along with other obvious collateral consequences, convinces us that this appeal is not moot" (quoting *In re Hatley*, 291 N.C. 693, 695 (1977))).

B. Due Process

¶ 22 **[1]** In his first challenge to the Court of Appeals' decision, respondent argues that the trial court violated his due process right to an impartial tribunal when it "called the case, elicited all the evidence in favor of involuntarily committing [respondent], and then, based on the evidence [that] the [trial court] introduced, decided to involuntarily commit [respondent]." For the reasons set forth in our opinion in *In re J.R.*, 383 N.C. 273, 2022-NCSC-127, we hold that no due process violation occurred in this case given that nothing about the manner in which the trial court conducted respondent's involuntary commitment hearing tended to cast doubt upon the trial court's impartiality. "The trial court simply presided over the hearing, asking questions to increase understanding and illuminate relevant facts to determine whether respondent met the necessary conditions for commitment." *Id.* ¶ 24. As a result, we affirm the decision of Court of Appeals with respect to the due process issue.

C. Sufficiency of Written Findings Supporting Commitment

¶ 23 **[2]** In his second challenge to the trial court's involuntary commitment order, respondent argues that the trial court's findings of fact were not supported by competent evidence and that those findings were not sufficient to support a determination that respondent posed a danger to himself. As we have already noted, in order to involuntarily commit an individual for inpatient treatment, the trial court must "find by clear, cogent, and convincing evidence that the respondent is mentally ill" and that he or she is either "dangerous to self" or "dangerous to others."

N.C.G.S. § 122C-268(j).[6] A respondent poses a danger to himself when, "[w]ithin the relevant past," he or she has (1) acted in a manner that presents a reasonable probability that he or she will suffer serious physical debilitation in the near future; (2) attempted or threatened suicide and there is a reasonable probability of suicide; or (3) mutilated or attempted to mutilate himself or herself and there is a reasonable probability of serious self-mutilation, absent intervention and treatment. N.C.G.S. § 122C-3(11)(a). With respect to the first of these three scenarios, which is the only one that appears to be relevant for purposes of this case, the relevant statute provides that an individual poses a danger to himself if:

> I. The individual would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of the individual's daily responsibilities and social relations, or to satisfy the individual's need for nourishment, personal or medical care, shelter, or self-protection and safety.
>
> II. There is a reasonable probability of the individual's suffering serious physical debilitation within the near future unless adequate treatment is given pursuant to this Chapter. A showing of behavior that is grossly irrational, of actions that the individual is unable to control, of behavior that is grossly inappropriate to the situation, or of other evidence of severely impaired insight and judgment shall create a prima facie inference that the individual is unable to care for himself or herself.

N.C.G.S. § 122C-3(11)(a)(1). In addition, the relevant statutory language provides that "previous episodes of dangerousness to self, when applicable, may be considered when determining reasonable probability of physical debilitation, suicide, or self-mutilation." N.C.G.S. § 122C-3(11)(a). A trial court must make findings of fact that support both prongs of

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6. As a result of the fact that respondent has not contested the validity of the trial court's finding that he was mentally ill, that determination is binding for purposes of appellate review. *See State v. Fuller*, 376 N.C. 862, 2021-NCSC-20, ¶ 8 (holding that "[a] trial court's finding of an ultimate fact is conclusive on appeal if the evidentiary facts reasonably support the trial court's ultimate finding"). In addition, we conclude that the trial court's determination concerning respondent's mental illness is supported by Dr. Schiff's testimony that respondent suffers from a schizoaffective disorder and has a "long-standing history of mental illness with psychosis" and by respondent's admission that he had been diagnosed with a mental illness.

this test in order to support an involuntary commitment order. N.C.G.S. § 122C-268(j).

¶ 24 In seeking to persuade us to overturn the trial court's involuntary commitment order, respondent argues that the Court of Appeals' decision in this case "dramatically changed the test for what constitutes 'danger to self' " by "essentially [holding] that a person may be found to be dangerous to himself based solely on current self-care issues without any forward-facing showing of 'serious physical debilitation.' " According to respondent, the trial court was required to make specific findings concerning the probability that respondent would experience serious physical debilitation if released given that the Court of Appeals has previously held that "courts may not disregard the second prong of the definition of 'danger to self,' " citing *In re Monroe*, 49 N.C. App. 23, 29 (1980), *superseded on other grounds by statute*, An Act to Recodify the Mental Health, Mental Retardation, and Substance Abuse Laws of North Carolina, ch. 589, §§ 1–2, 1985 N.C. Sess. Laws 670, 672, *as recognized in In re J.P.S.*, 264 N.C. App. 58 (2019); *In re W.R.D.*, 248 N.C. App. 512, 516 (2016); *In re Whatley*, 224 N.C. App. 267, 273 (2012). In respondent's view, "[u]nder *Monroe*, *Whatley*, *W.R.D.*, and the plain language of the involuntary commitment statutes, being mentally ill and exhibiting symptoms of that mental illness, without more, are insufficient to support a finding of dangerous to self."

¶ 25 According to respondent, "none of the trial court's findings specifically addressed the future harm prong" of the statute. In addition, respondent contends that the record contains insufficient record evidence to support the trial court's order, with the Court of Appeals having erred by relying on Dr. Schiff's testimony that respondent "was still experiencing symptoms of his mental illness and that [respondent] told [Dr. Schiff] that he didn't think he needed his medication or had a long-standing mental illness," citing *C.G.*, ¶ 36. In respondent's view, "this evidence reflected the trial court's ultimate finding that [respondent] had a mental illness and described [respondent's] condition and symptoms at the time of the hearing, [but it does] not indicate that [respondent] presented a threat of 'serious physical debilitation' in the near future."

¶ 26 Finally, respondent argues that a "prima facie inference" that he lacked the ability to care for himself, which the trial court was entitled to make in the event that respondent displayed certain behaviors or actions, *see* N.C.G.S. § 122C-3(11)(a)(1)(II), did not relieve the trial court of its obligation to make a finding that respondent would have likely experienced serious physical debilitation in the event that he was not involuntarily committed. Respondent argues that a person's inability to

take care of his or her daily needs is not equivalent to facing a reasonable possibility that he or she would sustain serious harm and that the Court of Appeals' conclusion to the contrary "erodes the constitutional assurance that we don't involuntarily commit someone for having a mental illness," citing *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975). As a result, for all these reasons, respondent urges us to reverse the Court of Appeals' holding that the trial court's findings of fact sufficed to support its determination that he posed a danger to himself.

¶ 27 In seeking to persuade us to uphold the trial court's order, the State begins by arguing that respondent "does not contest the [trial] court's finding that he was not able to satisfy his basic needs and exercise self-control" and that, even if he had done so, those findings had sufficient record support. In addition, the State contends that the trial court "properly found that there was a reasonable probability of [respondent's] physical debilitation in the near future absent treatment." After acknowledging that the trial court is required to find that respondent would likely suffer physical debilitation in the near future in the event that he was released from involuntary commitment, the State argues that the trial court "need not say the magic words 'reasonable probability of future harm' " in order to make the required determination, quoting *J.P.S.*, 264 N.C. App. at 63.

¶ 28 According to the State, the trial court "specifically found that [respondent's] current psychosis will persist and endanger him in the near future" and "that [he] was likely to repeat his previous self-endangering conduct." First, the State contends that the trial court found that respondent had " '*active* psychosis' " that " 'causes him to be a danger to himself and others' " and that, "unless committed, [respondent] was likely to continue to experience self-endangering psychosis, hallucinations, and disorganized thoughts." (emphasis added in brief). In addition, the State argues that the trial court found that respondent "was noncompliant with his medicine when he was not in inpatient treatment," a fact that "indicate[s] that, if released, there was a reasonable probability that the symptoms causing [respondent's] physical debilitation would continue." The State contends that these findings are supported by Dr. Schiff's testimony that respondent had "very profound disorganization of thought and behavior responding to hallucinations," that his thoughts "contain[ed] derogatory content that was quite disturbing to [respondent]," and that respondent had thrown away his medications.

¶ 29 Second, the State argues that the trial court "made findings that indicate that, absent treatment, [respondent] was likely to engage in

conduct that had harmed him in the past." More specifically, the State asserts that the trial court found that "[respondent] lives with a person who has anger issues . . . and that [he] has, in fact, become a victim of assaultive behavior and disturbing thoughts, which caused deterioration and leaves him unable to perceive dangers to himself *resulting in his being assaulted*." (emphasis added in brief). According to the State, these findings "indicate that, absent treatment, [respondent's] disturbing thoughts would have persisted and there was a reasonable probability that [respondent] would both behave in ways that instigated others to violence and been unable to perceive the danger of being assaulted" given that respondent "lived with a roommate who struggled with anger management and with whom [respondent] had previously gotten into fights, and because, before he was committed, [respondent] had started wandering the streets."

¶ 30 Finally, the State argues that "the inference that [respondent] was unable to care for himself provides further support for the conclusion that there was a reasonable probability that [respondent] would suffer serious physical debilitation absent treatment," citing N.C.G.S. § 122C-3(11)(a)(1)(II). In the State's view, respondent's behavior warrants such an inference in light of the trial court's finding that respondent "suffers from hallucinations" and "disorganized thoughts" and the testimony presented at the hearing both by Dr. Schiff and by respondent. In addition, the State argues that the trial court's other findings, including its determination that respondent's ACT team had been unable to care for him, "combined with the inference that [respondent] was unable to care for himself, further indicate that [respondent] was likely to suffer physical debilitation in the near future."

¶ 31 After carefully reviewing the record, we hold that the trial court's written findings were insufficient to support its ultimate finding that respondent constituted a danger to himself. As we have already noted, the involuntary commitment statutes provide that "the court *shall* find by clear, cogent, and convincing evidence that the respondent is mentally ill and dangerous to self." N.C.G.S. § 122C-268(j) (emphasis added). For that reason, the required finding "must actually be made by the trial court" and "cannot simply be inferred from the record." *State v. Morgan*, 372 N.C. 609, 616 (2019) (holding that, "when the General Assembly has inserted the phrase 'the court finds' in a statute setting out the exclusive circumstances under which a defendant's probation may be revoked, the specific finding described in the statute must actually be made by the trial court and cannot simply be inferred from the record"). However, "[t]hese ultimate findings, standing alone, are insufficient to support the

trial court's order," since "the trial court must also 'record the facts upon which its ultimate findings are based.' " *In re N.U.*, 270 N.C. App. at 430 (quoting *In re Collins*, 49 N.C. App. 243, 246 (1980)). As a result, our review of the sufficiency of the trial court's order in this case must begin with an examination of its written findings.

¶ 32 As we have already noted, the trial court found in its written order that

> Respondent has [a] mental illness[,] that being schizoaffective disorder [and] has [a] long-standing [history] of mental illness which goes back to his late teens[,] he is 33 [years old] now. [Respondent] suffers from hallucinations, disorganized thoughts[, and] is noncompliant with medications when not in [the] hospital. His active psychosis causes him to be a danger to himself and others. His ACT team initially had him committed as they were unable to see to his needs due to his decompens[ation]. [Respondent is] unable to sufficiently [take] care of [his] needs[,] that being dental [and] nourishment needs. [Respondent] lives with [a] person who has anger issues [and respondent] has been [the] victim of assaultive [behavior and] disturbing thoughts which cause deterioration [and] leaves him unable to perceive dangers to himself.

As an initial matter, we observe that, contrary to the State's assertion, the trial court never found that "[respondent] was unable to satisfy his basic needs and exercise self-control." On the contrary, the trial court found that respondent could not take care of his "dental" and "nourishment" needs, rather than his "basic" needs, and said nothing about respondent's ability to exercise self-control. In addition, we note that the trial court did not find that, in the event that respondent was released from involuntary commitment, he would immediately decompensate or place himself in danger or that respondent's ACT team could not manage respondent's level of functioning in an outpatient environment. As a result, under the applicable legal standard, we are required to take the trial court's findings as they stand without reference to any other information that might be contained in the record, including Dr. Schiff's testimony that "there would be an immediate decompensation" upon discharge; that, in the absence of inpatient treatment, respondent "would immediately decompensate, be into a hospital," or "into a situation placing himself or others

in danger;" and that respondent's ACT team could not support respondent in an outpatient environment.

¶ 33 The trial court's findings, as written, cannot be deemed sufficient to support a determination that respondent posed a danger to himself given its failure to find that there was "a reasonable probability of [respondent] suffering serious physical debilitation within the near future" unless he was involuntarily committed. N.C.G.S. § 122C-3(11)(a)(1)(II). As the Court of Appeals has consistently held for several decades, the relevant statutory provision "mandates a specific finding of a probability of serious physical debilitation resulting from the more general finding of lack of self-caring ability." *Monroe*, 49 N.C. App. at 29; *see also W.R.D.*, 248 N.C. App. at 515 (holding that, in order to support a determination that the respondent posed a danger to himself, the trial court must find that the respondent cannot care for himself or herself *and* that there is a reasonable probability that the respondent will experience serious physical debilitation in the absence of continued inpatient treatment); *Whatley*, 224 N.C. App. at 273 (holding that "the trial court's findings reflect [the] [r]espondent's mental illness, but they do not indicate that [her] illness or any of her aforementioned symptoms will persist and endanger her within the near future").

¶ 34 In *Monroe*, the respondent's brother sought to have the respondent involuntarily committed on the grounds that he posed a danger to himself and others. 49 N.C. App. at 24. At the conclusion of the involuntary commitment hearing, the trial court determined that respondent was mentally ill and a danger to himself and others[7] based upon the following findings of fact:

> 1. The Respondent has been hospitalized at Dorothea Dix Hospital two times since 1975 prior to his current admission.
>
> 2. At the time of his last discharge from the hospital the Respondent's physician prescribed medicine for him to take, and his brother purchased the medicine for him. The Respondent took the medicine for only three weeks. The Respondent then refused to take any more of his medicine and stated to his brother, "You might as well give me the money because I will not take that. I don't need it."

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7. The statutory definition of "dangerous to self" at the time that the Court of Appeals decided *Monroe* was, for all relevant purposes, identical to the one that applies in this case. *Compare* N.C.G.S. 122-58.2(1) (1979) *with* N.C.G.S. 122C-3(11)(a) (2021).

> 3. As long as Respondent was taking his medicine he was in control of himself; but, once he stopped taking his medicine he started going down.
>
> 4. He has become uncontrollable at times.
>
> > a. During the night he is irregular in his sleeping. He is up from three to six times a night.
> >
> > b. At other times he is in his front yard or on his porch making all kinds of loud noises or calling inappropriately to anyone passing by and telling them to hold their head up or telling them how they should do.
>
> . . . .
>
> 5. Respondent disregards his nutritional needs by fasting for some periods and then eating a whole chicken or a whole loaf of bread. Respondent eats about five pounds of sugar every two days. He will sometimes consume five or six glasses of sweet water.
>
> . . . .
>
> 8. Respondent has the paranoid and delusional belief that his family is sexually seducing him and he has accused them of that. He believes that all of his relatives are against him.
>
> 9. On a previous hospital admission, Respondent was noted to be lying in bed all day staring up at the ceiling. He wouldn't move. This same type of behavior has been exhibited on his present admission.
>
> 10. Respondent has refused medication on this admission.

Id. at 26–27. On appeal, the Court of Appeals held that "neither the facts recorded by the trial court nor the record supports a conclusion or ultimate finding of dangerousness to self" on the basis that, "even if indicative of some danger, the facts do not support the finding that there is a reasonable probability of serious physical debilitation to the [r]espondent within the near future." *Id.* at 29 (cleaned up). The Court of Appeals also noted that, while the respondent's disregard of his nutritional needs "may be evidence of mental illness" or even characteristic

of an "inability to 'exercise self-control, judgment, and discretion in the conduct of his daily responsibilities,' " the record evidence did not show a "reasonable probability of serious physical debilitation to [the respondent] within the near future," with the State having failed to elicit any evidence "showing the present or future effect of these irregular dietary habits on respondent" and with the existence of "[u]nusual eating habits alone [ ] do not amount[ing] to danger as contemplated in the controlling statute." *Id.* (quoting N.C.G.S. § 122-58.2(1)(a)(1)(I) (1979)).

¶ 35 In *Whatley*, the trial court involuntarily committed the respondent for additional treatment after finding "by clear, cogent, and convincing evidence" that she

> was exhibiting psychotic behavior that endangered her and her newborn child. She is bipolar and was experiencing a manic stage. She was initially non-compliant in taking her medications but has been compliant over the past 7 days. Respondent continues to exhibit disorganized thinking that causes her not to be able to properly care for herself. She continues to need medication monitoring. Respondent has been previously involuntarily committed.

224 N.C. App. at 271. On appeal, the Court of Appeals held that "none of the [trial] court's findings demonstrate that there was 'a reasonable possibility of [the respondent] suffering serious physical debilitation within the near future' absent her commitment" and that, while "[e]ach of the trial court's findings pertain to either [the] [r]espondent's history of mental illness or her behavior prior to and leading up to the commitment hearing," they "do not indicate that these circumstances rendered [the] [r]espondent a danger to herself in the future." *Id.* at 273. In addition, the Court of Appeals held that, even though the trial court had determined that the respondent "needed medication monitoring and that she did not plan to follow up as an outpatient," the trial court had made "no finding that connect[ed] these concerns with the court's ultimate finding of 'dangerous to self' as defined in [N.C.G.S.] § 122C-3(11)(a)(1)." *Id.*

¶ 36 In *W.R.D.*, the Court of Appeals determined that the trial court's involuntary commitment order contained only two findings that could reasonably be construed as relevant to the issue of whether the respondent posed a "danger to self." 248 N.C. App. at 515.

> First, the trial court found that "it is not medically safe for Respondent to live outside of an inpatient

> commitment setting" because "Respondent maintains a belief that another doctor is his treating physician and will not be treated by Dr. Weigel"; "Respondent is diagnosed with paranoid schizophrenia, for which Respondent has refused treatment"; and "Respondent has heart health related issues, for which he is not compliant with prescribed medical treatment." Second, the trial court found that Respondent was "unable to take [sic] maintain his nutrition." The trial court did not include any additional findings of fact concerning Respondent's nutrition.

Id. at 515–16. After concluding that the record did not contain any evidence tending to show that the respondent's "refusal to acknowledge his mental illness" or his "refusal to take his prescription medication" created a "reasonable probability of his suffering serious physical debilitation within the near future" in the absence of immediate involuntary commitment, the Court of Appeals determined that the trial court's findings with respect to the respondent's "inability to 'maintain his nutrition' [were] not supported by competent evidence." *Id.* at 516.

¶ 37 Most recently, in *J.P.S.*, the Court of Appeals vacated an involuntary commitment order in which the trial court had found that the respondent posed a danger to himself based on evidence tending to show that

> (1) Respondent maintained grandiose thoughts that he had a military staff providing him with intelligence information; (2) Respondent ingested a large number of pills in an apparent suicide attempt; (3) Respondent had "a high dose of Adderall [and] Valium meds"; (4) Respondent presented with an agitated manner and required forced medication and restraints; (5) Respondent refused medication for mania and psychosis; and (6) Respondent suffered from post-traumatic stress disorder as a result of prior military service.

264 N.C. App. at 63. In declining to uphold the trial court's involuntary commitment order "because of the trial court's failure to include a finding of reasonable probability of some future harm," the Court of Appeals explained that, "[a]s in *Whatley*, the trial court's findings in this case 'reflect [the] [r]espondent's mental illness, but they do not indicate that [the] [r]espondent's illness or any of [his] aforementioned symptoms will persist and endanger [him] within the near future.' " *Id.* (quoting *Whatley*,

224 N.C. App. at 273). According to the Court of Appeals, while "the trial court need not say the magic words 'reasonable probability of future harm,' *it must draw a nexus between past conduct and future danger*." *Id.* (emphasis added) (quoting *Whatley*, 224 N.C. App. at 273).

¶ 38 The consistent theme in each of these decisions is that trial court's findings that an individual suffers from a mental illness, exhibits symptoms associated with that mental illness, and may not be able to take care of his or her needs are not sufficient to satisfy the second prong of the statutory test for the presence of a "danger to self." In this case, the trial court found that respondent suffered from schizoaffective disorder, hallucinations, and disorganized thoughts; that his ACT team had initially had respondent committed because "they were unable to see to his needs due to his decompensating;" that he was "noncompliant with medications" when he was not in the hospital; and that he was not able to sufficiently attend to his "dental [and] nourishment needs." A critical analysis of these findings and the underlying record evidence shows that they "[do] not demonstrate a 'reasonable probability of [respondent] suffering serious physical debilitation within the near future' without immediate, involuntary commitment," *W.R.D.*, 248 N.C. App. at 516, with the trial court having failed to couple its findings concerning respondent's past and current condition with any findings regarding the extent to which respondent faced a risk of "serious physical debilitation" in the event that he did not remain in inpatient care.

¶ 39 In seeking to persuade us to reach a different result, the State contends that the trial court's findings "show that [respondent's] symptoms were likely to persist" given that those findings use "present tense verbs" to describe respondent's symptoms and indicate that respondent "has an '*active* psychosis' that makes him 'a danger to himself.' " (emphasis added in brief). We do not find this argument persuasive. As an initial matter, the trial court findings in each of the Court of Appeals' decisions described above were also written in the present tense, but that fact did not convince the Court of Appeals to uphold the challenged orders. In addition, and more importantly, the fact that a respondent had significant mental health difficulties in the past and currently exhibits symptoms of mental illness, standing alone, does not tend to establish that these symptoms will necessarily occur or persist in the future or that he or she will suffer serious physical debilitation in the near future in the absence of additional inpatient treatment. *See J.P.S.*, 264 N.C. App. at 62 (stating that "[a] trial court's involuntary commitment of a person cannot be based solely on findings of the individual's 'history of mental illness or . . . behavior prior to and leading up to the commitment

hearing' " (quoting *Whatley*, 224 N.C. App. at 273)).[8] In addition, the trial court's finding that respondent's "active psychosis causes him to be a danger to himself" fails to explain how respondent's psychosis precludes him from attending to his physical needs or causes him to face a risk of serious physical debilitation in the near future. Simply put, findings or evidence that one has been or currently is mentally ill, or has, in the past, "decompensat[ed],"[9] without more, does not make one dangerous to himself or others, with the trial court's findings to that effect and the underlying record evidence failing to account for the fact that the second prong of the relevant statutory test requires proof that future physical harm is probable in the absence of involuntary commitment. *See O'Connor*, 422 U.S. at 575 (holding that "[a] finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement").[10]

¶ 40 We are equally unpersuaded by the State's claim that respondent's involuntary commitment was justified by the trial court's finding that respondent lived with a roommate who had anger problems and that respondent had previously been assaulted by others. As respondent points out, these facts "[do] not justify *his* commitment" against his will, with the Court of Appeals having rejected a virtually identical argument more than forty years ago in the course of considering the sufficiency

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8. The State relies on *Carr v. United States*, 560 U.S. 438, 448 (2010), for the proposition that "words used in the present tense include the future as well as the present." *Carr* involved the interpretation of a federal sex offender registration statute, with the quoted language having come directly from 1 U.S.C. § 1, which provides guidance for "determining the meaning of any Act of Congress." *Id.* We are unable to see how *Carr* has any relevance to the issue that is before us in this case, which involves the interpretation of a state court's handwritten factual findings contained in an involuntary commitment order.

9. In our understanding, "decompensation" is a term of art within the psychiatric profession that Dr. Schiff never defined during his testimony. Although the American Psychological Association defines "decompensation" as "a breakdown in an individual's defense mechanisms, resulting in a progressive loss of normal functioning or worsening of psychiatric symptoms," *American Psychological Association Dictionary of Psychology*, https://dictionary.apa.org/ decompensation (last visited December 6, 2022), neither the trial court's order nor Dr. Schiff's testimony demonstrates specifically how a likelihood of "decompensation" tended to show the existence of a "reasonable probability of [respondent] suffering serious physical debilitation within the near future" absent treatment in an inpatient facility.

10. More specifically, while the record does contain evidence tending to show that respondent suffered from active psychosis, was at a risk of decompensation, and had shown a level of decompensation in the recent past, that generalized evidence, without more, does not tend to show that respondent is at a risk of substantial debilitation in the near term in the event that he is released from involuntary commitment.

of psychiatric testimony that the respondent "was imminently dangerous to herself and others" because the respondent's mental health difficulties might cause others to engage in assaultive behavior. *See In re Hogan*, 32 N.C. App. 429, 434 (1977). As the Court explained,

> it is abundantly clear from his testimony given at the hearing that [the psychiatrist] arrived at his opinion that [the] respondent was imminently dangerous to herself or others solely because he felt that her persistence in trying to convert someone on the street might cause that person to resist the idea, so that "they could become physically aggressive toward her." If so, it would seem more appropriate to commit her aggressor rather than the respondent.

Id.; *see also Monroe*, 49 N.C. App. at 29–30 (holding that "[t]he chance that someone will harm [the] respondent in response to [his] action[s] cannot be found to be evidence of danger to self"). As a result, we hold that a risk that someone else might engage in unlawful conduct by assaulting respondent cannot support a determination that respondent poses a danger to himself sufficient to support the respondent's involuntary commitment for inpatient mental health treatment.

¶ 41 Finally, the State argues that "the inference that [respondent] was unable to care for himself provides further support for the conclusion that there was a reasonable probability that [respondent] would suffer serious physical debilitation absent treatment," citing N.C.G.S. § 122C-3(11)(a)(1)(II). Admittedly, the record in this case could support a determination of "grossly irrational" or "grossly inappropriate" behavior on the part of respondent and contains "other evidence of impaired insight and judgment" on respondent's part that is sufficient to "create a prima facie inference that [respondent] is unable to care for himself."[11] N.C.G.S. § 122C-3(11)(a)(1)(II). As the State acknowledges, however, "an inference that respondents are unable to care for themselves cannot alone satisfy the second prong" of the statutory definition of "danger to self." In addition, as we have already explained, an inference that someone is "unable to care for himself" does not necessarily mean that that person is at risk of "suffering serious physical debilitation within the near future" in the absence of inpatient mental health treatment, with the fact that the respondent is "unable to care for himself" being

11. Interestingly, it was the Court of Appeals that first drew this inference. There is no indication in the record that the trial court did so.

insufficient to obviate the need to "draw a nexus between [the respondent's] past conduct and future danger." *J.P.S.*, 264 N.C. App. at 63.

¶ 42 Thus, for all these reasons, we hold that the Court of Appeals erred by concluding that the trial court's findings and the record evidence were sufficient to support a determination that respondent posed a danger to himself and that respondent's involuntary commitment could be justified on that basis.[12] As a result, we reverse the trial court's involuntary commitment order and remand this case to the trial court for further proceedings not inconsistent with this opinion.[13] We take this action with the understanding that, as the Court of Appeals observed in *W.R.D.*, our decision "does not mean that [r]espondent is competent, or that he cannot properly be committed at some future hearing." 248 N.C. App. at 513. Instead, "[w]e simply hold that the trial court's findings and

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12. An examination of the sufficiency of the evidence concerning the extent to which respondent posed a danger to himself is necessary in order to permit the Court to determine whether this case should be remanded to the trial court for the purpose of allowing the trial court to consider whether, in the event that the trial court had made proper findings of fact that were supported by the evidence, respondent should have been involuntarily committed.

13. Although the trial court also found that respondent was a danger to others, the Court of Appeals did not review the sufficiency of this finding or whether the evidence supported it in light of its determination that the trial court had properly found that respondent posed a danger to himself. *C.G.*, ¶ 33. Although the State made a relatively brief argument in the Court of Appeals that the trial court's findings and the record evidence would have supported a determination that respondent posed a danger to others, it made no effort to present any such argument before this Court and has not requested that, in the event that we did not uphold the trial court's involuntary commitment order on the grounds that respondent posed a danger to himself, we remand this case to the Court of Appeals for the purpose of allowing it to determine whether the trial court's involuntary commitment order could be upheld on the basis that respondent posed a risk to others. Aside from the issue of whether the remand approach remains viable as a matter of appellate procedure, we note that the relevant statute provides that a respondent is "dangerous to others" if, "[w]ithin the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; and that there is a reasonable probability that this conduct will be repeated." N.C.G.S. § 122C-3(11)(b). The trial court made no written findings that tend to suggest that respondent's conduct would satisfy this statutory definition, and nothing in the record evidence appears to us to be sufficient to support such a determination. Dr. Schiff's assertion that respondent's hallucinations have in the past "led him to have aggressive behaviors in the community," without explaining what those behaviors were, and respondent's vague statement that he and William had "gotten into it" are hardly "clear, cogent, and convincing evidence" of the infliction, attempted infliction, threatened infliction, or creation of a substantial risk of "serious bodily harm on another." As a result, we decline to remand this case to the Court of Appeals for consideration of the extent to which, if at all, the trial court's involuntary commitment order should be upheld on the basis of a determination that respondent posed a danger to others.

the evidence in the record are insufficient to satisfy the statutory criteria for involuntary commitment," *id.*, with a firm adherence to the relevant statutory requirements in these cases being essential given the "massive curtailment of liberty" and "stigmatizing consequences" that accompany involuntary commitment. *Vitek v. Jones*, 445 U.S. 480, 491–92 (1980).

III. Conclusion

¶ 43 Thus, for the reasons set forth in *In re J.R.*, 383 N.C. 273, 2022-NCSC-127, we affirm the Court of Appeals' decision with respect to the due process issue while holding that the record evidence and the trial court's written findings of fact do not suffice to support the trial court's involuntary commitment order. As a result, we reverse the Court of Appeals' decision, in part, and remand this case to that Court for further remand to the District Court, Durham County, for further proceedings not inconsistent with this opinion.

AFFIRMED, IN PART; REVERSED, IN PART; AND REMANDED.

Chief Justice NEWBY concurring in part and dissenting in part.

¶ 44 I agree with the majority's conclusion that respondent's due process right to an impartial tribunal was not violated for the reasons stated in *In re J.R.*, 2022-NCSC-127. I write separately, however, because the trial court did make forward-looking findings of fact that draw a nexus between respondent's past conduct and a reasonable probability of future harm. Because the trial court's findings of fact are supported by competent evidence and are sufficient to indicate a reasonable probability of respondent suffering future harm without adequate treatment, the Involuntary Commitment Order should be affirmed. Accordingly, I respectfully concur in part and dissent in part.

¶ 45 On 30 January 2020, respondent was taken to the emergency department by his outpatient care team, the Assertive Community Treatment (ACT) team. An ACT team consists of various mental health care providers who assist respondent when he is not in the hospital and monitor him weekly to ensure that he is taking his medication and that his dental and nourishment needs are met. Phillip Jones, M.D. first examined respondent when he arrived at the hospital and reported that respondent was "so psychotic [that] he [was] unable to effectively communicate his symptoms." Dr. Jones completed a commitment report, concluding that respondent was dangerous to himself, and petitioned for respondent's involuntary commitment. The next day, Miles Christensen, M.D.

conducted a second examination of respondent and completed a second commitment report. He observed that respondent was hearing voices, experiencing hallucinations, and "crying intensely." Dr. Christensen diagnosed respondent with schizoaffective disorder and recommended that respondent be committed.

¶ 46 The trial court held an involuntary commitment hearing on 7 February 2020. Max Schiff, M.D., respondent's attending physician, testified. Dr. Schiff explained that respondent's ACT team brought respondent to the hospital because the team "could no longer support him in the community" as an outpatient due to "an acute change in his mental status with increasing disorganization, hallucinations, delusions, abnormal psychomotor behavior, . . . [and] wandering around the streets." Dr. Schiff described that respondent was still demonstrating "very profound disorganization of thought and behavior responding to hallucinations" during his evaluation of respondent. According to Dr. Schiff, respondent had not taken his medications, "which had previously stabilized him[,]" and respondent informed him that "thoughts were being inserted into his head and [were] occasionally controlling him." Dr. Schiff expressed concern that, if respondent was discharged, he "would immediately decompensate . . . into a situation placing himself or others [in] danger."

¶ 47 Respondent also testified at the hearing. Respondent explained that he sees black dots and angels, which he described as white dots. Respondent stated that he had been taking his medication and would continue to do so, but he could not "tell a difference" if the medication was helping him.

¶ 48 At the close of the hearing, the trial court concluded that respondent was mentally ill and a danger to himself and others. The trial court recorded the following findings of fact:

> Respondent has [a] mental illness that being schizoaffective [disorder and] has long[-]standing [history] of mental illness which goes back to his late teens[.] [H]e is 33 [years old] now. Resp[ondent] suffers from hallucinations, disorganized thoughts[, and] is noncompliant with medications when not in [the] hospital. His active psychosis causes him to be a danger to himself and others. His ACT team initially had him committed as they were unable to see to his needs due to his decompensating [and] unable to sufficiently take care of needs that being dental [and] nourishment needs. [Respondent] lives with [a]

> person who has anger issues [and respondent] has been [a] victim of assaultive [behavior and] disturbing thoughts which cause deterioration [and] leaves [respondent] unable to perceive dangers to himself.

¶ 49 The trial court ordered that respondent be involuntarily committed for thirty days. Respondent appealed.

¶ 50 On appeal, respondent challenged the trial court's conclusion that he was a danger to himself or others under N.C.G.S. § 122C-3(11)(a). The Court of Appeals concluded that the "trial court properly found Respondent was a danger to himself."[1] *In re C.G.*, 278 N.C. App. 416, 2021-NCCOA-344, ¶ 33. The Court of Appeals reasoned that the finding that respondent's ACT team was unable to care for his dental and nourishment needs "created the nexus between Respondent's mental illness and future harm to himself." *Id.* ¶ 35. Therefore, according to the Court of Appeals, "the trial court satisfied the requirement [that] it find a reasonable probability of future harm absent treatment." *Id.* The Court of Appeals thus affirmed the commitment order. *Id.* ¶ 37.

¶ 51 Respondent petitioned this Court to consider whether the Court of Appeals erred in concluding that the trial court's written findings of fact were supported by competent evidence and were sufficient to support its conclusion that respondent is dangerous to himself. This Court allowed respondent's petition.[2]

¶ 52 The task here is to determine whether the Court of Appeals properly held that the trial court's findings of fact were supported by competent evidence and, in turn, supported its conclusion that respondent is a danger to himself. This Court reviews decisions of the Court of Appeals for legal error. *State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994). Appellate review of a commitment order "is limited to determining '(1) whether the court's ultimate findings are indeed supported by the "facts" which the court recorded in its order as supporting its findings, and (2) whether in any event there was competent evidence to support the court's findings.' " *In re Moore*, 234 N.C. App. 37, 42–43, 758 S.E.2d 33, 37

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1. Accordingly, the Court of Appeals did not reach the issue of whether the trial court's conclusion that respondent is a danger to others was supported by sufficient evidence.

2. Respondent also appealed to this Court as of right based upon the dissenting opinion at the Court of Appeals, regarding the due process issue. Because the due process issue was resolved based upon the holding in the lead case, that issue is not further discussed herein.

(quoting *In re Hogan*, 32 N.C. App. 429, 433, 232 S.E.2d 492, 494 (1977)), *disc. rev. denied*, 367 N.C. 527, 762 S.E.2d 202 (2014).

¶ 53 "To support an inpatient commitment order, the court shall find by clear, cogent, and convincing evidence that the respondent is mentally ill and dangerous to self . . . or dangerous to others . . . ." N.C.G.S. § 122C-268(j) (2021). An individual is a danger to himself if he has acted in a way that shows all of the following:

> I. The individual would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of the individual's daily responsibilities and social relations, or to satisfy the individual's need for nourishment, personal or medical care, shelter, or self-protection and safety.
>
> II. There is a reasonable probability of the individual's suffering serious physical debilitation within the near future unless adequate treatment is given pursuant to this Chapter. A showing of behavior that is grossly irrational, of actions that the individual is unable to control, of behavior that is grossly inappropriate to the situation, or of other evidence of severely impaired insight and judgment shall create a prima facie inference that the individual is unable to care for himself or herself.

N.C.G.S. § 122C-3(11)(a)(1) (2021).

¶ 54 Thus, the trial court must make findings that address both respondent's current inability to care for himself and the probability that respondent would suffer serious physical debilitation in the future without treatment.

¶ 55 Specifically at issue here is whether the trial court made forward-looking findings sufficient to support a reasonable probability of respondent suffering serious harm in the future without adequate treatment. To satisfy this prong, the trial court's findings must simply "*indicate* that respondent is a danger to himself in the future." *See In re Moor*e, 234 N.C. App. at 44–45, 758 S.E.2d at 38 (emphasis added). The trial court "must draw a nexus between past conduct and future danger"; however, it "need not say the magic words 'reasonable probability of future harm.' " *In re J.P.S.*, 264 N.C. App. 58, 63, 823 S.E.2d 917,

921 (2019) (citing *In re Whatley*, 224 N.C. App. 267, 273, 736 S.E.2d 527, 531 (2012)).

¶ 56 The majority contends the trial court's findings of fact are insufficient to support the conclusion that respondent is dangerous to himself. According to the majority, the trial court's findings do not indicate a reasonable probability of respondent suffering serious physical debilitation in the future. Rather, the majority contends the trial court's findings focus on respondent's behavior prior to the commitment hearing and fail to draw a nexus to a risk of future harm.

¶ 57 Here the trial court did make findings about respondent's likely future conduct and risk of harm without adequate treatment. The trial court found that respondent "*suffers* from hallucinations [and] disorganized thoughts" and has "*active* psychosis" which "*causes* him to be a danger to himself."[3] The trial court's findings thus indicate that respondent poses a danger to himself by drawing a nexus between respondent's present symptoms—hallucinations, disorganized thoughts, and active psychosis—and the risk of dangerousness if the symptoms remained untreated.

¶ 58 Dr. Schiff provided forward-looking testimony that supports the trial court's findings. Dr. Schiff testified that if respondent were discharged, "there would be an immediate decompensation, given [respondent's] continued level of disorganization and . . . hallucinations." Dr. Schiff explained that without inpatient treatment, respondent would "immediately . . . plac[e] himself . . . [in] danger." *See In re Moore*, 234 N.C. App. at 44–45, 758 S.E.2d at 38 (affirming a commitment order where the trial court's finding of a "high risk of decompensation if released and without medication" supported the conclusion that respondent posed a danger to himself in the future). Dr. Schiff's concerns thus support the trial court's finding that respondent's symptoms caused him to be a danger to himself.

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3. The majority correctly recognizes that the trial court must actually find that respondent is a danger to himself; it "cannot simply be inferred from the record." Yet, the majority faults the trial court in its order for connecting respondent's active psychosis and his present symptoms to the risk that respondent poses a danger to himself but for failing to explain how respondent's symptoms lead to such a risk. Additionally, the majority contends that "the findings or evidence that one has been or currently is mentally ill, or has, in the past, 'decompensat[ed],' *without more*, does not make one dangerous to himself or others." Here, however, the trial court also found that (1) both respondent and the ACT team were unable to treat respondent's outpatient needs; (2) respondent is unable to perceive dangers to himself; (3) respondent is unable to obtain sufficient nourishment; and (4) respondent has been a victim of assaultive behavior which causes deterioration. These findings demonstrate how respondent's present symptoms affect his behavior and cause him to be a danger to himself.

¶ 59 The trial court also found that respondent is noncompliant with his medication when he is not in the hospital and that respondent's ACT team brought him to the hospital because the team was unable to attend to his decompensation and his dental and nourishment needs. Dr. Schiff's testimony supports these findings. Dr. Schiff explained that respondent admitted he was not taking his medication, "which had previously stabilized him[,]" and that the ACT team was unable to support respondent's current "level of disorganization and decompensation" in the outpatient environment. Respondent's testimony also supports the trial court's finding that respondent and the ACT team were unable to meet respondent's dental and nourishment needs. Respondent testified that the ACT team had "started to give [him] at least breakfast," but he does not "get three meals a day" when he is not in the hospital. Thus, respondent was unable to obtain proper bodily nourishment, which is essential for respondent to sustain himself. Additionally, respondent testified that he "disregarded" the ACT team's suggestion that he take care of his teeth. Therefore, despite the ACT team's efforts, respondent was unwilling to take care of his dental needs. Therefore, the trial court's findings, supported by Dr. Schiff's testimony, indicate that respondent's symptoms, level of active psychosis, and dental and nourishment needs could not be treated with outpatient resources.[4] As such, there is a reasonable probability that respondent's present symptoms would persist and increase his risk of suffering physical debilitation and further decompensation without inpatient care, and thus would cause him to be a danger to himself.

¶ 60 In sum, the trial court's findings of fact directly link respondent's past behavior and current symptoms to a risk of future harm. Respondent's history of mental illness and noncompliance with medication coupled with his current hallucinations, disorganized thoughts, active psychosis, and decompensation that could not be treated with outpatient resources indicate a reasonable probability of respondent suffering serious

4. The majority concedes that the record could support a prima facie inference that respondent is unable to care for himself based on respondent's "grossly irrational" or "grossly inappropriate" behavior. The majority acknowledges, though, that such an inference alone cannot satisfy the second prong of the "dangerous to self" definition. Here, however, such a prima facie inference does not stand alone and is supported by Dr. Schiff's testimony that the ACT team is also unable to support respondent due to his decompensation and treat respondent's needs in the outpatient environment. Not only is respondent unable to care for himself, but the ACT team, the outpatient team specifically designed to assist respondent when he is not in the hospital, is also unable to see to respondent's needs. Thus, absent inpatient treatment, the trial court correctly concluded that respondent is a danger to himself.

physical debilitation in the future. The Court of Appeals thus properly affirmed the commitment order. Accordingly, I concur in part and dissent in part.

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

Justice EARLS concurring in part and dissenting in part.

¶ 61 I dissent from the majority's holding on the due process issue in this case for the reasons stated in my dissenting opinion in *In re J.R.*, 2022-NCSC-127.

Justices HUDSON and MORGAN join in this opinion concurring in part and dissenting in part.

Justice BARRINGER concurring in part and dissenting in part.

¶ 62 Although I agree with the majority's conclusion that respondent's due process right to an impartial tribunal was not violated for the reasons stated in *In re J.R.*, 2022-NCSC-127 and that the written findings of fact are insufficient to support the trial court's determination that respondent posed a danger to himself, I cannot agree with the conclusion that the evidence in the record in this matter is insufficient to satisfy the statutory criteria for involuntary commitment. Not only is this issue not before us, but the record is more than sufficient to satisfy the statutory criteria for involuntary commitment if proper findings of fact had been made. Therefore, I respectfully concur in part and dissent in part.

¶ 63 The only issue that respondent petitioned for review[1] by this Court is whether "the Court of Appeals err[ed] by concluding that the trial court's written findings of fact were supported by evidence and were sufficient to support its conclusion that [respondent] was dangerous to himself." We allowed respondent's petition for discretionary review on this issue, and that is the issue respondent briefed. The majority answered this question in the negative, and I agree with that conclusion. The trial court's written findings of fact were as follows:

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1. Respondent also appealed as of right to this Court on account of the dissenting opinion at the Court of Appeals. The dissent in the Court of Appeals disagreed with the Court of Appeals majority with respect to the due process issue.

> Respondent has [a] mental illness that being schizoaffective [disorder and] has long[-]standing [history] of mental illness which goes back to his late teens[.] [H]e is 33 [years old] now. Resp[ondent] suffers from hallucinations, disorganized thoughts[, and] is non-compliant with medications when not in [the] hospital. His active psychosis causes him to be a danger to himself and others. His [Assertive Community Treatment (ACT)] team initially had him committed as they were unable to see to his needs due to his decompensating [and] unable to sufficiently take care of needs that being dental [and] nourishment needs. [Respondent] lives with [a] person who has anger issues [and respondent] has been [a] victim of assaultive [behavior and] disturbing thoughts which cause deterioration [and] leaves [respondent] unable to perceive dangers to himself.

¶ 64 As identified by my colleagues, the trial court specifically found that respondent "*suffers* from hallucinations [and] disorganized thoughts" and has "*active* psychosis" which "*causes* him to be a danger to himself." Psychosis is "[a]n acute or chronic mental state marked by loss of contact with reality, disorganized speech and behavior, and often by hallucinations or delusions, seen in certain mental illnesses, such as schizophrenia." *Psychosis*, *The American Heritage Dictionary* (5th ed. 2018). However, the trial court's other findings focused on the respondent's state and his outpatient team's (ACT team) inability to care for him *at the time of his commitment*, rather than his outpatient team's ability to care for him and the consequences if respondent was released out of inpatient care *at or around the time of the hearing.*

¶ 65 Going further than assessing the findings of fact is neither necessary nor appropriate under Rule 16 of our Rules of Appellate Procedure. N.C. R. App. P. 16(a) ("[R]eview in the Supreme Court is limited to consideration of the issues stated in the notice of appeal filed pursuant to Rule 14(b)(2) or the petition for discretionary review and the response thereto filed pursuant to Rule 15(c) and (d), unless further limited by the Supreme Court, and properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court.").

¶ 66 However, if we reach the issue of whether the record is sufficient to satisfy the statutory criteria for involuntary commitment, specifically the "dangerous to self" portion of the statute, this Court should conclude that the testimony from respondent's attending physician and

respondent himself, as reflected in the transcript, is sufficient to support a conclusion that respondent is dangerous to himself.

¶ 67 The relevant subsection of the statute is as follows:

> a. Dangerous to self. — Within the relevant past, the individual has done any of the following:
>
> 1. The individual has acted in such a way as to show all of the following:
>
> I. The individual would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of the individual's daily responsibilities and social relations, or to satisfy the individual's need for nourishment, personal or medical care, shelter, or self-protection and safety.
>
> II. There is a reasonable probability of the individual's suffering serious physical debilitation within the near future unless adequate treatment is given pursuant to this Chapter. *A showing of behavior that is grossly irrational, of actions that the individual is unable to control, of behavior that is grossly inappropriate to the situation, or of other evidence of severely impaired insight and judgment shall create a prima facie inference that the individual is unable to care for himself or herself.*
>
> . . . .
>
> *Previous episodes of dangerousness to self, when applicable, may be considered when determining reasonable probability of physical debilitation, suicide, or self-mutilation.*

N.C.G.S. § 122C-3(11)(a) (2021) (emphases added).

¶ 68 At the hearing, Dr. Max Schiff testified that he was concerned that "if [respondent] were to be discharged, that there would be an immediate decompensation." He explained that immediate decompensation would lead to respondent being placed "into a hospital or into a situation placing himself or others at danger at this point." Decompensation in psychiatry is "the failure to generate effective psychological coping mechanisms in response to stress, resulting in personality disturbance or disintegration, esp[ecially] that which causes relapse in schizophrenia." *Decompensation*, *New Oxford American Dictionary* (3rd ed. 2010); *see also Decompensation*, *The American Heritage Dictionary* (5th ed. 2018).

¶ 69 Dr. Schiff also testified that just the week prior to the hearing he and respondent's Assertive Community Treatment team met with respondent and the ACT team "felt that [respondent was] quite far from his baseline last week." Dr. Schiff explained that he continues to work with the ACT team "in attempting to assess [respondent's] baseline and whether or not they are able to support him in the community." Dr. Schiff testified that the ACT team felt that "they could no longer support [respondent] in the community based on his level of disorganization and decompensation last week." Dr. Schiff further testified that respondent's behavior was "disorganized and psychotic in nature" and that "there has been some aggression and aggressive behavior before." While Dr. Schiff has been "pleased with [respondent's] response [to treatment] so f[a]r," Dr. Schiff stated, "[H]e remains with a high level of psychosis that makes me concerned about his decompensation, were he . . . to be released and not in the monitored setting."

¶ 70 Respondent also testified at the hearing. When asked by his counsel with whom he lived, respondent stated:

> My brother and my friend. My — he's my brother first, but he's my friend second. I was in a relationship with him for 8, 9, 10 years. But it wasn't be nothing sexually wise like that with him again. And his best friend, which is my roommate, which is my brother.

¶ 71 When asked whether he would like to be released from commitment, respondent did not answer the question but instead responded, "I see her ankles and Amy — the Amy at Williams Ward — Williams Ward remind me of my mom's ankles, and she takes her water pills in the morning. I remind her." Respondent also acknowledged that he was having hallucinations and explained that he "see[s] angels, white dots . . . floating in the air" and "black dots," which "just might be hallucinations or . . . negativity."

¶ 72 Given this record, there was more than sufficient testimony to support a conclusion that respondent is dangerous to himself. The trial court could have made findings of fact that linked respondent's past behavior and current symptoms to a risk of future harm if inpatient treatment was discontinued. Therefore, I concur in part and dissent in part.

IN THE MATTER OF C.G.F.

No. 312A21

Filed 16 December 2022

Appeal pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 278 N.C. App. 604, 2021-NCCOA-364, affirming an involuntary commitment order entered on 14 February 2020 by Judge Pat Evans in District Court, Durham County. Heard in the Supreme Court 20 September 2022.

Joshua H. Stein, Attorney General, by James W. Doggett, Deputy Solicitor General, and South A. Moore, General Counsel Fellow for the State-appellee.

Glenn Gerding, Appellate Defender, by Wyatt Orsbon, Assistant Appellate Defender, for respondent-appellant.

Disability Rights North Carolina, by Lisa Grafstein, Holly Stiles, and Elizabeth Myerholtz, for Disability Rights North Carolina, National Association of Social Workers, Promise Resource Network, and Peer Voice North Carolina, amici curiae.

PER CURIAM.

¶ 1 For the reasons stated in *In re J.R.*, 2022-NCSC-127, the decision of the Court of Appeals is affirmed.

AFFIRMED.

Justices HUDSON, MORGAN, and EARLS dissent for the reasons stated in Justice Earls' dissenting opinion in *In re J.R.*, 2022-NCSC-127.

IN THE MATTER OF CUSTODIAL LAW ENFORCEMENT RECORDING SOUGHT BY CITY OF GREENSBORO

No. 364PA19

Filed 16 December 2022

Police Officers—body camera recordings—release to city council members—motion to modify restrictions—arbitrary ruling

Where the trial court abused its discretion by summarily denying a city's motion to modify restrictions that the court had previously placed on the city council's use and discussion of police body camera recordings from a particular incident of arrest, the order was vacated and the matter remanded for a new hearing. The trial court's denial was arbitrary because the court failed to provide any factual basis to support its decision, and there was no competent evidence in the record which would have supported a finding that the restrictions did not constitute a substantial impediment to the council members' discharge of their duties.

Chief Justice NEWBY concurring in result only.

Justice BARRINGER joins in this concurring in result only opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 and on appeal of right of a substantial constitutional question pursuant to N.C.G.S. § 7A-30(1) of a unanimous decision of the Court of Appeals, 266 N.C. App. 473 (2019), affirming an order entered on 23 February 2018 by Judge Susan E. Bray in Superior Court, Guilford County. Heard in the Supreme Court on 29 August 2022.

Fox Rothschild LLP, by Patrick M. Kane and Kip David Nelson, for petitioner-appellant City of Greensboro.

Ward and Smith P.A., by Chris S. Edwards and Alexander C. Dale, court-appointed amicus curiae.

Mark Dorosin, Elizabeth Haddix, Jaclyn Maffetore, Cheyenne N. Chambers, and Kimberly M. Rehberg for Beloved Community Center of Greensboro, League of Women Voters of the Piedmont Triad, Reclaiming Democracy, Roch Smith Jr., Guilford Anti-Racism Alliance, Homeless Union of Greensboro, Triad City

Beat, *The Carolina Peacemaker*, *Pulpit Forum of Greensboro and Vicinity*, *Democracy Greensboro*, *UNCG Chapter of the American Association of University Professors*, *St. Barnabas Episcopal Church*, *Community Play!/All Stars Alliance*, *American Civil Liberties Union of North Carolina Legal Foundation*, *NC WARN*, *and City of Durham*, *NC*, *amici curiae.*

HUDSON, Justice.

¶ 1 Here, we consider an order entered pursuant to N.C.G.S. § 132-1.4A(g) to release police video recordings of an incident on 10 September 2016 in Greensboro. In the order, the trial court imposed restrictions upon the possible use and discussion of the recordings by the Greensboro City Council. Interpreting these conditions as a "gag order," the City of Greensboro asked the trial court to modify the restrictions. The trial court summarily denied that request. On appeal, the Court of Appeals affirmed the trial court's order and maintained that the City was not entitled to relief. Because we conclude that the trial court abused its discretion by denying, without explanation, the City's Motion to Modify Restrictions, we vacate the decision of the Court of Appeals and remand the case to the trial court for a new hearing on the City's motion.

I. Factual and Procedural Background

¶ 2 On the evening of 10 September 2016, several police officers for the City of Greensboro arrested four Black men on a busy public sidewalk downtown. In a short cell phone video posted to YouTube titled "Greensboro police brutality,"[1] the officers can be seen shoving and arresting two of the men. Among other images, the YouTube video shows the police apparently using a chokehold on Aaron Garrett before throwing him to the ground. Mr. Garrett was able to stand and back away with his arms lowered and palms open. Several police officers are seen firing their tasers into Mr. Garrett, who is then depicted screaming, before he falls to the sidewalk while electricity visibly courses through his body.

¶ 3 The entire incident, including the prelude and aftermath, was also recorded on several body cameras worn by the police officers. While the YouTube video is less than two minutes long and depicts a single perspective, there are approximately four hours of police body camera

1. *Greensboro Police Brutality*, YouTube (Sept. 13, 2016), https://www.youtube.com/watch?v=MzdS-aSVR0w.

video showing the incident from multiple angles. This case concerns the videos from these police-worn body cameras.

¶ 4 One of the arrested individuals alleged misconduct by the police and reported the officers to the Professional Standards Division (PSD) of the Greensboro Police Department. The PSD conducted an internal investigation and in 2017 concluded that the police officers behaved appropriately. The same individual then appealed the decision to the Greensboro Police Community Review Board (PCRB).

¶ 5 At that point, more than a year after the 2016 incident, various entities petitioned the Superior Court, Guilford County, for the release of the police body camera videos pursuant to N.C.G.S. § 132-1.4A(g), which governs the release of such videos. The PCRB petitioned for the release of the videos as part of its investigation. Two of the arrested individuals and the City also petitioned for the release of the videos. Subsection 132-1.4A(g) reads, in pertinent part, as follows: "The court . . . may place any conditions or restrictions on the release of the recording that the court, in its discretion, deems appropriate." N.C.G.S. § 132-1.4A(g) (2021).

¶ 6 The trial court addressed all these petitions in one proceeding. On 16 January 2018, the trial court initiated an in-camera review of the videos and scheduled a hearing on the petitions, after which the trial court entered an order on 23 January 2018, granting the release of the videos with restrictions. Specifically, in response to the City's petition, the trial court checked the following boxes on the form order, under "findings of fact":

> [X] Release is necessary to advance a compelling public interest.
>
> [X] The recording contains information that is otherwise confidential or exempt from disclosure or release under State or federal law.
>
> [X] The person requesting release is seeking to obtain evidence to determine legal issues in a current or potential court proceeding.
>
> [ ] Release would reveal information regarding a person that is of a highly sensitive personal nature.
>
> [X] Release may harm the reputation or jeopardize the safety of a person.
>
> [X] Release would create a serious threat to the fair, impartial, and orderly administration of justice.

> [X] Confidentiality is necessary to protect either an active or inactive internal or criminal investigation or potential internal or criminal investigation.
>
> [X] There is good cause shown to release all portions of a recording.
>
> [X] Other (*if applicable*): It is appropriate to place certain restrictions on the release.

The court then specified additional restrictions in an attachment to the order, which included the following language:

> Recordings are to be viewed in presence and under direction and control of the City Attorney for Greensboro or his designee. No one other than the City Manager, City Council members, or legal counsel for the City shall be present. No photographs, screen shots or other duplications or recordings of the body-worn camera footage shall be made. All viewers shall sign a pledge of confidentiality and are not to disclose or discuss the body-worn camera recordings except with each other in their official capacity as managers, council members and legal counsel for the City of Greensboro and as necessary to perform their legal duties. Failure to comply with these restrictions subjects viewers to the contempt powers of the court (fine of up to $500 and imprisonment of up to 30 days). If any of these restrictions pose a substantial impediment to the city manager, council members or city legal counsel from discharging their duties, the City Attorney may request modification of the restrictions (with notice and opportunity to be heard given to all parties).

The trial court placed similar restrictions on the other petitioners (the PCRB and the two arrested individuals).

¶ 7 Convinced that the order operated as a gag that imposed a substantial impediment to the discharge of its members' duties, the City Council voted unanimously to request that the trial court lift the restrictions on speaking about the videos. The members of the City Council also decided to refrain from watching the videos until the order was lifted or modified. The City then filed a Motion to Modify Restrictions with the trial court.

¶ 8 At the subsequent hearing, the trial court responded abruptly after learning that the City was requesting a modification of the restrictions before viewing the videos, as the following colloquy demonstrates:

> THE COURT: Well, that makes a difference. I'm not really inclined to entertain their motion if they haven't even bothered to watch it.
>
> [THE CITY'S ATTORNEY]: Well, it's not that they haven't bothered to watch it. They definitely want to watch it.
>
> THE COURT: Well, then, let them watch it. The motions are denied.
>
> . . . .
>
> [THE CITY'S ATTORNEY]: And, Your Honor, if I could clarify, Your Honor —
>
> THE COURT: That just doesn't make sense to me at all.
>
> [THE CITY'S ATTORNEY]: If I could clarify, Your Honor —
>
> THE COURT: In fact I think that's ridiculous to say I want to be able to discuss something I didn't even watch.
>
> [THE CITY'S ATTORNEY]: If I could clarify that. It wasn't that — it's not that council does not want to watch this. They absolutely want to watch it.
>
> THE COURT: Well —
>
> [THE CITY'S ATTORNEY]: It's a matter of — the question is, if Your Honor would go back and look at the council meeting, it's a question of, well, do we watch it and then we can't talk about it. Kind of like, you know, how does that help us? How does that help us answer the questions of our constituents?
>
> So the issue was, we would love to be able to talk about it once we watch it. So it's not a matter of they are just like too busy to watch it or that they don't want to watch it. They just wanted clarification as to whether or not they would be able to discuss it after they watch it.

THE COURT: The motion is denied.

In a subsequent written order memorializing the denial of the City's motion, the trial court did not offer any reasoning or explanation for its decision; the order stated only the following: "[H]aving considered the entire court file and having heard arguments from all counsel, the [c]ourt has determined, in the [c]ourt's discretion, that all of the Motions should be denied." The City appealed, claiming that the court committed an "abuse of discretion as it pertains to City Council's First Amendment rights."

¶ 9 Before the Court of Appeals, the City argued that the trial court erred by imposing and refusing to modify a gag order on the City Council. Among other arguments, the City maintained that the gag order was arbitrary because the trial court did not "articulate any factual basis for [its] findings and provided no reasoning as to why the gag order was appropriate." Moreover, the City noted that the subsequent order denying its Motion to Modify Restrictions contained no explanation at all.

¶ 10 The police officers responded by stating that they also wanted the videos to be released and that they likewise wanted the gag order to be lifted. The officers emphasized that the recordings will show they did nothing wrong. However, for various reasons, they urged the Court of Appeals to dismiss the City's appeal. For instance, the officers asserted that the order was interlocutory. The officers also argued that the trial court did not abuse its discretion because state law explicitly gives the trial court authority to impose any conditions on the release of body camera video. The officers contended that the City simply made poor arguments to the trial court and that such "advocacy failures" do not render the trial court's ruling an abuse of discretion.

¶ 11 In a published, unanimous opinion filed on 6 August 2019, the Court of Appeals affirmed the trial court's denial of the City's Motion to Modify Restrictions. *In re Custodial Law Enf't Recording*, 266 N.C. App. 473, 479 (2019). The Court of Appeals declined to entertain the City's argument that the restrictions were an unjustified abuse of discretion. *Id.* at 476. The Court of Appeals instead analyzed the case on First Amendment grounds and relied on a single case, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), to conclude that the order did not violate the City's First Amendment rights because "the gag order only restricts the council's speech about matters that the council, otherwise, had no right to discover[,]" *In re Custodial Law Enf't Recording*, 266 N.C. App. at 477. However, *Seattle Times* had not been briefed, argued, or cited by any party at the Court of Appeals. Further complicating matters, the Court

of Appeals did not state the level of First Amendment scrutiny they applied. And—perhaps because the record here is sparse—the Court of Appeals did not explain its conclusion that "protecting the reputation and safety of those individuals, as well as safeguarding the administration of justice, presents a substantial government interest for which the trial court's restrictions are no greater than necessary." *Id.* at 479.

¶ 12 The City appealed to this Court on the basis of a constitutional question and, in the alternative, petitioned the Court for discretionary review. On 3 February 2021, this Court both retained the notice of appeal and allowed the City's petition.

II. Analysis

¶ 13 The City now argues that the Court of Appeals misapplied fundamental principles of constitutional law and that its decision must be reversed. The City contends primarily that the City Council members have a right to publicly discuss the body camera videos, that the gag order violates this right, and that the violation cannot be justified under strict or intermediate scrutiny. The City does not mount a facial challenge to the statute. The City also contends that the trial court abused its discretion. It asks for this matter to be remanded to the trial court with instructions to lift the gag order on the City Council members.

¶ 14 In response, the police officers themselves withdrew from participating in the case after we allowed review. Court-appointed amicus curiae (respondent) argues that the decision of the Court of Appeals should be affirmed for three reasons. First, respondent argues that the City does not have free speech rights. Second, respondent claims that even if the City has free speech rights, the gag order is subject to and survives intermediate scrutiny. Third, respondent asserts that, in the alternative, the restrictions are not a gag order but a permissible set of time, place, and manner restrictions.

¶ 15 We hold that the trial court's summary denial of the City's Motion to Modify Restrictions was arbitrary, and therefore it was an abuse of discretion. Accordingly, we need not consider the constitutional arguments raised here. *See James v. Bartlett*, 359 N.C. 260, 266 (2005) ("[A]ppellate courts must 'avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds.' " (quoting *Anderson v. Assimos*, 356 N.C. 415, 416 (2002))). We vacate the decision of the Court of Appeals and remand to the trial court for a new hearing on the City's Motion to Modify Restrictions.

A. Standard of Review

¶ 16 By statute, trial courts enjoy the authority to "place any conditions or restrictions on the release of the recording that the court, in its discretion, deems appropriate." N.C.G.S. § 132-1.4A(g). Accordingly, orders imposing or denying relief from restrictions on the release of body camera videos are reviewed for abuse of discretion. A trial court abuses its discretion when its ruling "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Chappell v. N.C. Dep't of Transp.*, 374 N.C. 273, 280 (2020) (quoting *State v. Hennis*, 323 N.C. 279, 285 (1988)). A trial court also abuses its discretion when it makes an error of law. *Da Silva v. WakeMed*, 375 N.C. 1, 5 n.2 (2020). Questions of law are reviewed de novo. *Id.* at 5.

B. Abuse of Discretion Analysis

¶ 17 First, the City has preserved the argument that the denial of its Motion to Modify Restrictions is an abuse of discretion. The City argued to the trial court that the restrictions "pose a substantial impediment" to the City Council and prevent its members "from fulfilling their Oath of Office." The City appealed from the trial court's denial of its motion claiming the denial "constitut[ed] an abuse of discretion as it pertains to City Council's First Amendment rights." The City's discussion of First Amendment rights is only indirectly applicable to the abuse of discretion analysis. However, this is not the only argument the City makes. Before the Court of Appeals, the City argued that the denial of the Motion to Modify Restrictions "contained no rationale at all." The City dedicated several pages of its brief to arguing that the denial was internally inconsistent, unexplained, unsupported by the evidence, and harmful to "the Council members' ability to fulfill their Oath of Office." In its brief to this Court, the City again pursues that argument: "[E]ven if the trial court had the discretion envisioned by the Court of Appeals in the abstract, maintaining the gag order was inappropriate in these circumstances." Thus, it is appropriate for this Court to review the trial court's denial of the City's Motion to Modify Restrictions for abuse of discretion on grounds that it is arbitrary or manifestly unsupported by reason.

¶ 18 Next, we conclude that the trial court's denial of the City's motion was arbitrary. In its Motion to Modify Restrictions filed on 16 February 2018, the City explained that the City Council had voted to watch the videos but it had also voted to request relief from the restrictions first. The motion contained several possible reasons why the restrictions were a substantial impediment: the restrictions directly contradicted the City Council members' duties as elected officials, prevented the City Council

members from engaging in political discourse, impeded the City Council members' ability to respond to questions from the public, prevented the City Council members from supervising other municipal departments, and made little sense given that the cellphone video of the event was already circulating in the community.[2]

¶ 19 The City also maintained that several potential justifications for the restrictions no longer pertained. The internal investigations had concluded, and the criminal trials of all individuals depicted in the videos were over. On 19 February 2018, even the police officers' attorney agreed that lifting the gag would benefit the police officers stating, "I understand that it — that there is probably a benefit in some respect to the police officers so that the city council members can say, well, everything was right. The police did the right thing." Yet in ruling on the motion, the trial court, rather than considering these proffered reasons to modify the restrictions, apparently considered one fact and one fact alone:

> [THE CITY'S ATTORNEY]: As of today the city council does not know what's on the body-worn camera footage.
>
> THE COURT: Well, that makes a difference. I'm not really inclined to entertain their motion if they haven't even bothered to watch it.
>
> [THE CITY'S ATTORNEY]: Well, it's not that they haven't bothered to watch it. They definitely want to watch it.
>
> THE COURT: Well, then, let them watch it. The motions are denied.

¶ 20 This ruling can only be deemed arbitrary, given that the trial court gave no explanation of the possible relevance of viewing the video to whether the restrictions "pose a substantial impediment" to the City Council members' ability to fulfill their duties. Without more discussion of the reasons for the denial of the motions, we cannot know if there were any. Thus, we conclude that the trial court's reaction to one possibly irrelevant factor by immediately denying the Motion to Modify Restrictions fails to demonstrate any exercise of discretion, but rather its abuse.

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2. The trial court had previously noted that, "I think the real danger is if you have excerpts or snippets of this being shown and people don't see the whole — the whole view, it's — it can be very — it can misrepresent the whole event."

¶ 21 Moreover, the written order fails to clarify the trial court's ruling. "To show an abuse of discretion and reverse the trial court's order, the appellant has the burden to show the trial court's rulings are manifestly unsupported by reason, or could not be the product of a reasoned decision." *Winkler v. N.C. State Bd. of Plumbing*, 374 N.C. 726, 735 (2020) (cleaned up). This is a high bar and is not an opportunity to second guess the trial court's wisdom. The only consideration is "whether the trial court's actions are fairly supported by the record." *State v. Whaley*, 362 N.C. 156, 160 (2008) (quoting *State v. Peterson*, 361 N.C. 587, 603 (2007)). "Fairly supported" means "there is competent evidence to support the court's findings and . . . those findings support the court's conclusions." *GE Betz, Inc. v. Conrad*, 231 N.C. App. 214, 242 (2013) (citing *Dyer v. State*, 331 N.C. 374, 376 (1992)), *writ denied*, *review denied*, 367 N.C. 786 (2014). In sum, if there is any competent evidence to support the trial court's findings and conclusions, then there is no abuse of discretion.

¶ 22 Here, the order contains no findings of fact, analysis, explanation, or conclusions of law. Instead, the order merely states the following: "[T]he [c]ourt having considered the entire court file and having heard arguments from all counsel, the [c]ourt has determined, in the [c]ourt's discretion, that all of the Motions should be denied." "Where no findings are made, proper findings are presumed, and our role on appeal is to review the record for competent evidence to support these presumed findings." *Carlisle v. CSX Transp., Inc.*, 193 N.C. App. 509, 516 (2008) (quoting *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615 (2000)). On such review, we must assume the trial court found that the restrictions did not pose a substantial impediment to the City Council members in discharging their duties.

¶ 23 However, because no competent evidence in the record supports the finding that the restrictions are not a substantial impediment, we hold that the trial court abused its discretion in denying the City's motion. Notably, there is almost no evidence in the record at all. All we have are the City's motions, the transcripts, and the court's bare-bones orders. Before the trial court, the police officers' attorney could not point to evidence and instead argued that some people will still "allege[ ] conspiracies and everything else" and argued, "[I]t's a better policy, I would contend, Your Honor, to stick with Your Honor's order in all situations because I think that is going to end some of this nonsense that we're spending on body-cam footage." Even if these assertions were evidence, they do not support the conclusion that the restriction is not a substantial impediment to the City Council. Because the trial court's ruling is entirely unsupported by the record, we conclude that the trial court abused its discretion in denying the City's Motion to Modify Restrictions.

III. Conclusion

¶ 24 History teaches that opaque decision-making destroys trust; recent history involving police body cameras emphasizes this risk. Nearly every party here sought transparency. Both the arrested individuals and the police officers recorded their actions. The City Council sought to answer questions and explain the City's response by publicly discussing the facts behind their decisions. And the officers themselves hoped to clear their names by urging the release of all of the body camera videos. Yet, with no explanation, the trial court halted this process, leaving the people of Greensboro in the dark for more than six years. On this record, we hold that the trial court abused its discretion.

¶ 25 We vacate the decision of the Court of Appeals and remand to that court for further remand to the trial court for a new hearing on the Motion to Modify Restrictions and for such further proceedings not inconsistent with this decision, as are warranted.

VACATED AND REMANDED.

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

Chief Justice NEWBY concurring in the result only.

¶ 26 The General Statutes grant trial courts great latitude in determining the release of body camera recordings. N.C.G.S. § 132-1.4A(g) (2021). No one questions that the trial court's original order complied with the statute. Although N.C.G.S. § 132-1.4A(g) does not require the trial court to make findings of fact, on the record before this Court, the basis for the denial of the motion is unclear, rendering it impossible for this Court to determine if the ruling was arbitrary. Thus, the matter should be remanded to the trial court for clarification. Therefore, I concur in the result only.

Justice BARRINGER joins in this concurring opinion.

IN RE E.M.D.Y.

[383 N.C. 272, 2022-NCSC-126]

IN THE MATTER OF E.M.D.Y.

No. 279A21

Filed 16 December 2022

Appeal pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 278 N.C. App. 604, 2021-NCCOA-365, remanding an order entered on 15 May 2020 by Judge Pat Evans in District Court, Durham County. On 21 July 2022, this Court allowed the motion of respondent in *In re J.R.*, 2022-NCSC-127, to consolidate these cases for oral argument. Heard in the Supreme Court on 20 September 2022.

Glenn Gerding, Appellate Defender, by Jillian C. Katz, Assistant Appellate Defender, for respondent-appellant.

Joshua H. Stein, Attorney General, by South A. Moore, General Counsel Fellow, and James W. Doggett, Deputy Solicitor General, for the State.

Disability Rights North Carolina, by Lisa Grafstein, Holly Stiles, and Elizabeth Myerholtz for Disability Rights North Carolina, National Association of Social Workers, Promise Resource Network, and Peer Voice North Carolina, amicus curiae.

PER CURIAM.

¶ 1 For the reasons stated in *In re J.R.*, 2022-NCSC-127, the decision of the Court of Appeals is affirmed.

AFFIRMED.

Justices HUDSON, MORGAN, and EARLS dissent for the reasons stated in Justice Earls' dissenting opinion in *In re J.R.*, 2022-NCSC-127.

IN THE MATTER OF J.R.

No. 313A21

Filed 16 December 2022

Mental Illness—involuntary commitment—private facility—no counsel for petitioner—trial court questioning witnesses—due process

In a bench trial on an involuntary commitment petition filed by a private medical facility, respondent's due process right to an impartial tribunal was not violated when the trial court, in the absence of counsel for the petitioning physician, called witnesses and elicited testimony. The trial court did not take on the role of prosecutor but rather merely asked neutral and clarifying questions of witnesses based upon the contents of the petition.

Justice EARLS dissenting.

Justices HUDSON and MORGAN join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 278 N.C. App. 604, 2021-NCCOA-366, affirming an involuntary commitment order entered on 3 January 2020 by Judge Pat Evans in District Court, Durham County. Heard in the Supreme Court on 20 September 2022.

Joshua H. Stein, Attorney General, by James W. Doggett, Deputy Solicitor General, and South A. Moore, General Counsel Fellow, for the State.

Glenn Gerding, Appellate Defender, by Wyatt Orsbon, Assistant Appellate Defender, for respondent-appellant.

Disability Rights North Carolina, by Lisa Grafstein, Holly Stiles, and Elizabeth Myerholtz, for Disability Rights North Carolina, National Association of Social Workers, Promise Resource Network, and Peer Voice North Carolina, amicus curiae.

BERGER, Justice.

¶ 1 Respondent was involuntarily committed after the trial court concluded that respondent had a mental illness and was dangerous to himself. Based upon a dissent at the Court of Appeals, the issue before this Court is whether respondent's due process rights were violated when the trial court, in the absence of counsel for the petitioner, called witnesses and elicited testimony during the hearing. For the reasons stated below, we affirm the decision of the Court of Appeals that respondent's due process rights were not violated.

I. Factual Background

¶ 2 In late fall 2019, respondent was found unconscious on a Durham street after he suffered an alcohol-induced seizure. On December 9, 2019, a Duke University Medical Center (DUMC) physician, Dr. Ayumi Nakamura, petitioned for the involuntary commitment of respondent. That same day, a magistrate entered an order for respondent to be taken into custody and held at DUMC while respondent awaited judicial review.

¶ 3 On January 3, 2020, respondent came before the trial court for an involuntary commitment hearing pursuant to N.C.G.S. § 122C-267. N.C.G.S. § 122C-267 (2021). Upon calling of the case for hearing, respondent's counsel immediately objected to the proceeding because the State did not have a representative present. The trial court did not explicitly overrule counsel's objection but instead stated the following:

> [L]et the record reflect, that the Public Defend[er's] Office objects to this court proceeding in this hearing without the District Attorney's Office participating. The District Attorney's Office of Durham County has notified this [c]ourt that they will not be participating in these hearings as in prior years, and this [c]ourt intends to go forward with this hearing, and the Respondent is more than welcome to appeal this [c]ourt's decision.[1]

¶ 4 The trial court then called Dr. Sandra Brown, a physician and psychiatrist from DUMC who had been subpoenaed to testify. The court

1. The trial court noted that the Durham County District Attorney's Office had notified the trial court that it would not be participating, but it is unclear why the district attorney's office would have been expected to participate in this hearing at all when a doctor from DUMC was the petitioner in the case. The record does not contain any reference to pending criminal charges, respondent's capacity to proceed in a criminal case, or a determination that respondent had been found not guilty of a criminal charge by reason of insanity. *See* N.C. Const. art. IV, § 18; N.C.G.S. §§ 7A-61; 122C-264(d)–(d1), 122C-268(c), 122C-268.1, 122C-276 (2021).

began direct examination of Dr. Brown by asking her the following: "state your name and occupation for this [c]ourt, and tell me what it is you want me to know about this matter."

¶ 5 Dr. Brown testified that respondent had a history of chronic obstructive pulmonary disease (COPD) and alcohol use disorder, and he had been hospitalized approximately eight times in the prior year for alcohol withdrawal or for hyponatremia, related to the disorder. Respondent also suffered from deficits in executive functioning and bipolar disorder which caused manic episodes. Respondent had not received full treatment for his conditions because he left against medical advice on each admission. Additionally, respondent had been squandering his retirement money, had been homeless, was drinking regularly, and had been charged frequently with being intoxicated in public.

¶ 6 The trial court then asked Dr. Brown, "Anything else?" Dr. Brown responded by explaining that respondent's behavior of spending money was likely due to his alcohol use disorder and the bipolar manic episodes that he was experiencing as a result of his bipolar disorder, and she opined that these behaviors were "likely to cause harm to self." Dr. Brown expressed concern that respondent would not get necessary medications and that he would not be properly tapered off a potentially dangerous and addictive medication if he were not involuntarily committed.

¶ 7 Again, the trial court asked, "Anything else?" Dr. Brown responded that she had nothing more to share with the court. Respondent's counsel then cross-examined Dr. Brown. After cross examination concluded, the following exchange occurred:

> [Trial Court]: Dr. Brown, is it your testimony that the Respondent is a danger to himself?
>
> [Dr. Brown]: Yes.
>
> [Trial Court]: All right. And what about whether or not he's a danger to others?
>
> [Dr. Brown]: I believe, at this time, he is not a direct danger to others, but in the past he has been intoxicated in public, and it's hard to predict what someone like that might do.
>
> [Trial Court]: All right. And how long are you asking that he be committed for?

> [Dr. Brown]: We're asking for 30 days, given that we're not sure exactly what will happen with the guardianship proceedings, and we feel that it's important for that to be settled, as far as creating a safe plan for aftercare.
>
> [Trial Court]: All right. Based on my questions, does the Respondent have anything else they wish to ask this witness?
>
> [Respondent's counsel]: No, Your Honor.
>
> [Trial Court]: All right. . . . Any other evidence on behalf of the Petitioner?
>
> [No audible response.]
>
> [Trial Court]: Will there be any other evidence on behalf of the Respondent?

¶ 8 Counsel for respondent then called respondent to the witness stand. Respondent testified on his own behalf. He expressed that he did not feel that he has ever posed a threat to himself or others. He answered affirmatively when asked by his counsel whether he was aware that he had a mental health diagnosis and that he needed medication to treat his mental health issues. He also expressed a desire to "be responsible for [him]self" but would be willing to work with a guardian. Once respondent's counsel concluded questioning respondent, the trial court asked respondent, "Anything else you want me to know . . .?" Respondent replied in the negative.

¶ 9 The trial court then asked respondent's counsel, "Do you wish to be heard further, counsel? Any other evidence? Any argument?" Respondent's counsel responded that she had no further evidence to present on respondent's behalf and the trial court allowed respondent's counsel to proceed to closing argument.

¶ 10 At the end of the hearing, the trial court stated that it found that respondent had a mental illness and was a danger to himself, and the trial court entered a thirty-day commitment order. Further, the trial court made written findings that there was clear, cogent, and convincing evidence to support involuntary commitment; that respondent was suffering from bipolar disorder, COPD, and alcohol abuse; and that respondent was a danger to himself.

¶ 11 Respondent gave notice of appeal in open court and subsequently filed a written notice of appeal.[2] On July 20, 2021, a divided panel of the Court of Appeals affirmed the trial court's order of commitment "for the reasons stated in the majority opinion and concurring opinion addressing the 'Due Process Concerns' issue in *In re C.G.*, [278] N.C. App. [416], 2021-NCCOA-344." *In re J.R.*, 278 N.C. App. 604, 2021-NCCOA-366, ¶ 7; *see In re C.G.*, 278 N.C. App. 416, 2021-NCCOA-344, ¶ 25 (finding that "the trial court did not violate Respondent's right to an impartial tribunal"). The dissenting judge in *In re C.G.* stated that he could not "conclude that Respondent received a full and fair hearing before a neutral officer of the court." *Id.* ¶ 46 (Griffin, J., dissenting).

¶ 12 Respondent appeals to this Court based upon the dissent at the Court of Appeals. On November 15, 2021, this Court allowed respondent's motion to designate respondent's case as the lead case on appeal. In his appeal, respondent contends that the Court of Appeals erred in determining that his due process rights were not violated. Specifically, respondent argues that the trial court failed to remain independent and impartial when it "elicited the evidence supporting [respondent]'s involuntary commitment and then, based on the evidence the judge introduced, decided to involuntarily commit [respondent]." Respondent implicitly requests a blanket rule that would prohibit the trial court from asking questions which elicit evidence and satisfy the burden of proof because, in so doing, the trial court ceases to be impartial. We decline to adopt such a rule.

II. Analysis

¶ 13 Both our federal and state constitutions require due process. The Constitution of the United States declares that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law," U.S. Const. amend XIV, § 1, and our State Constitution states that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land," N.C. Const. art. I, § 19.

¶ 14 Under our law, "anyone who has knowledge of an individual who has a mental illness and is either (i) dangerous to self . . . or dangerous

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2. Five other respondents appealed from involuntary commitments orders on similar grounds. *See In re C.G.*, No. COA20-520 (Durham); *In re Q.J.*, No. COA20-551 (Durham); *In re C.G.F.*, No. COA20-574 (Durham); *In re E.M.D.Y.*, No. COA20-685 (Durham); *In re R.S.H.*, No. COA20-777 (Durham).

to others . . . or (ii) in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness," may file an affidavit and petition the court to have the individual involuntarily committed. N.C.G.S. § 122C-261(a) (2021). After the initial affidavit is filed, the clerk or magistrate must determine whether "reasonable grounds" exist to believe that the facts in the affidavit are true, respondent has a mental illness, and one of the aforementioned criteria are met, before taking the individual into custody. N.C.G.S. § 122C-261(b).

¶ 15 Once an individual is taken into custody, the individual must go before a commitment examiner for further determinations of whether the requirements for involuntary commitment are met. N.C.G.S. §§ 122C-263(c), 122C-263(d)(2). If the examiner recommends involuntary commitment, the individual must be admitted to a 24-hour facility where the individual must be examined by a physician to determine once again if the criteria for involuntary commitment are met. N.C.G.S. §§ 122C-263(d)(2), 122C-266.

¶ 16 From that point, if the physician recommends involuntary commitment, within ten days a hearing must take place before the trial court. N.C.G.S. § 122C-268(a). An individual may be involuntarily committed if the trial court finds "by clear, cogent, and convincing evidence" that the respondent is mentally ill and is a danger to himself or others. N.C.G.S. § 122C-268(j).

¶ 17 An individual facing involuntary commitment has numerous procedural protections, including the right to counsel, N.C.G.S. § 122C-268(d); the right to have the commitment reports and other relevant documents shared with the trial court, N.C.G.S. § 122C-266(c); and the right to confront and cross examine witnesses. N.C.G.S. § 122C-268(f).

¶ 18 It is uncontroverted that an involuntary commitment proceeding implicates the deprivation of a liberty interest, triggering due process concerns. The Supreme Court of the United States has "repeatedly . . . recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 1809, 60 L. Ed. 2d 323 (1979) (citing *Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972)); *Humphrey v. Cady*, 405 U.S. 504, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972); *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967); *Specht v. Patterson*, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967)). One such element of due process protection is the presence of an independent decisionmaker. *See Vitek v. Jones*, 445 U.S. 480, 495–96, 100 S. Ct. 1254, 1264–65, 63 L. Ed. 2d 552 (1980) (holding that

the district court properly determined the procedures necessary, including that an independent decisionmaker is a requirement of due process, in the involuntary commitment context). "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S. Ct. 1610, 1613, 64 L. Ed. 2d 182 (1980). Accordingly, "a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955).

¶ 19 However, this Court has recognized that "[j]udges do not preside over the courts as moderators, but as essential and active factors or agencies in the due and orderly administration of justice. It is entirely proper, and sometimes necessary, that they ask questions of a witness . . . ." *State v. Hunt*, 297 N.C. 258, 263, 254 S.E.2d 591, 596 (1979) (quoting *Eekhout v. Cole*, 135 N.C. 583, 583, 47 S.E. 655, 657 (1904)). Further, instances arise that *require* the trial court to ask questions to fulfill its role in the judicial process. In *State v. Perry*, this Court declared that "there are times in the course of a trial, when it becomes *the duty* of the judge to propound competent questions in order to obtain a proper understanding and clarification of the testimony of the witness or to bring out some fact that has been overlooked." 231 N.C. 467, 470, 57 S.E.2d 774, 776 (1950).

¶ 20 Notably, the rules of evidence contemplate that the court will actively participate in proceedings. Rule 614 of the North Carolina Rules of Evidence expressly allows judges to participate by calling witnesses and questioning them. The rule states that "[t]he court may, on its own motion . . . call witnesses, and all parties are entitled to cross-examine witnesses thus called." N.C.G.S. § 8C-1, Rule 614(a) (2021). Additionally, "[t]he court may interrogate witnesses, whether called by itself or by a party." N.C.G.S. § 8C-1, Rule 614(b) (2021). In neither case does a trial court shed its impartiality or abandon its role as an independent decisionmaker.

¶ 21 Respondent contends, however, that when counsel for a petitioner does not appear, the trial court acts as prosecutor for the State when it asks questions and elicits testimony which tends to support the commitment of respondent. It is true, as respondent argues, that in *Vitek*, the U.S. Supreme Court concluded that involuntary commitment proceedings are adversarial in nature. 445 U.S. at 495, 100 S. Ct. at 1265. However, "[w]hat makes a system adversarial rather than inquisitorial is not the presence of counsel . . . but rather, the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro

and con adduced by the parties." *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2, 111 S. Ct. 2204, 2210, 115 L. Ed. 2d 158 (1991). In this case, the judge properly decided on the basis of facts presented at the hearing and arguments of the parties—respondent, respondent's counsel, and a doctor at DUMC who sought to have respondent committed for his health. As such, the judge did not take on the role of a prosecutor merely because counsel was not present.

¶ 22 Under our law, a trial court does not, and cannot as a matter of practicality, automatically cease to be impartial when it merely calls witnesses and asks questions of witnesses which elicit testimony. Such an argument elevates form over substance and would have potentially far-reaching, negative consequences for various types of pro se cases, contempt proceedings, domestic violence actions and sensitive juvenile hearings, let alone commitment proceedings. As the Supreme Court has stated, an argument such as respondent's "assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity." *Richardson v. Perales*, 402 U.S. 389, 410, 91 S. Ct. 1420, 1432, 28 L. Ed. 2d 842 (1971).

¶ 23 Here, a bench trial occurred based upon a petition filed by DUMC. No jury was present, and there was no risk of any improper influence by the trial court's actions. *See State v. Smith*, 240 N.C. 99, 102, 81 S.E.2d 263, 265 (1954) (announcing that "the probable effect or influence upon the jury" prevents a judge from casting doubt on the credibility of a witness or impeaching a witness such that it would prejudice either party). The trial court did not ask questions designed or calculated to impeach any witnesses, the judge merely asked questions based upon the contents of the petition, such as asking whether there was "anything else" that the witness would like to say and asking the witness to "tell [the court] what it is you want [the court] to know about this matter." The most specific questions asked by the trial court were clarifying questions to fulfill the trial court's *duty* to "obtain a proper understanding and clarification of the testimony of the witness" to confirm whether the requirements for involuntary commitment had been met. *Perry*, 231 N.C. at 470, 57 S.E.2d at 776.

¶ 24 In *State v. Stanfield*, the Court of Appeals found that when "the judge asked a neutral question which, depending upon the answer would benefit either the State or the defendant," no violation of due process occurred. 19 N.C. App. 622, 626, 199 S.E.2d 741, 744 (1973). In short, even though the "testimony tended to prove an element" of the offense with which the defendant was charged, it was not sufficient to be improper questioning by the judge. *Id.* at 626, 199 S.E.2d at 744.

¶ 25 Here, the trial court remained an independent decisionmaker, and the answers to the trial court's questions weighed toward commitment of respondent. The testimony given in response to the court's questions established the required elements to have respondent committed, but like *Stanfield*, that alone is not sufficient to find a violation of due process. The trial court did not advocate for any particular resolution and did not exceed constitutional bounds with its questions even though the responses supported involuntary commitment.

¶ 26 Respondent argues that the trial court attempted to fulfil two roles of both adjudicator and prosecutor. While we disagree that the trial court stepped into any role other than its proper role as an independent decisionmaker, we recognize that the United States Supreme Court has addressed the ability of an adjudicator to perform dual roles. In doing so, the Court has found that due process is not violated when the same individual both investigates and adjudicates, while making it clear that when the accuser doubles as the adjudicator, due process is violated. *Withrow v. Larkin*, 421 U.S. 35, 52, 95 S. Ct. 1456, 1467, 43 L. Ed. 2d 712 (1975); *Williams v. Pennsylvania*, 579 U.S. 1, 8, 136 S. Ct. 1899, 1905, 195 L. Ed. 2d 132 (2016); *In re Murchison*, 349 U.S. at 139, 75 S. Ct. at 627.

¶ 27 In the context of administrative agencies, the Supreme Court of the United States has rejected "the bald proposition . . . that agency members who participate in an investigation are disqualified from adjudicating." *Withrow*, 421 U.S. at 52, 95 S. Ct. at 1467. Put another way, both investigating and adjudicating a matter is not sufficient, standing alone, to disqualify a judge for lacking impartiality.

¶ 28 Yet, the Supreme Court has also concluded that the same person acting as accuser and adjudicator offends due process. *Williams*, 579 U.S. at 8, 136 S. Ct. at 1905 (citing *In re Murchison*, 349 U.S. at 136). In *Murchison*, the judge acted as a grand jury and then tried cases as the judge. 349 U.S. at 137, 75 S. Ct. at 625. The Court held that due process was violated when a judge acted as both a grand jury, the accuser, and the adjudicator of the case. *Id.* at 139, 75 S. Ct. at 627.

¶ 29 Here, however, the trial court did not function as an investigator or an accuser. The trial court did not investigate the underlying facts or initiate the filing of the petition to have respondent committed; those functions, i.e., being the investigator and the accuser, were performed by individuals with DUMC. The trial court simply presided over the hearing and asked questions to increase understanding and illuminate relevant facts to determine whether respondent met the necessary conditions for commitment.

¶ 30 By calling the witness from DUMC to testify and asking even-handed questions, the trial court did not advocate for or against the involuntary commitment of respondent; it merely heard evidence in conjunction with contents of the petition and applied the law to the facts as presented. These neutral and clarifying questions do not call into question the trial court's impartiality and do not offend due process.

III. Conclusion

¶ 31 For the reasons stated herein, the trial court did not violate respondent's due process right to an impartial tribunal, and we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice EARLS dissenting.

¶ 32 *In re J.R.* and its companion cases[1] arose when Duke Hospital, a private entity, filed a petition for the involuntary commitment of each of the six respondents in these cases. Under North Carolina law, counsel for the State must appear at any hearing concerning an involuntary commitment at a state facility, such as those at one of the State's three regional psychiatric hospitals or at UNC Hospitals in Chapel Hill. N.C.G.S. §§ 122C-268(b), 122C-270(f) (2021). But when a person is held in custody for treatment at private facilities, counsel for the State is under no statutory obligation to appear. § 122C-268(b). For commitments related to private facilities, like those at Duke Hospital, "the Attorney General *may*, in his discretion, designate an attorney who is a member of his staff to represent the State's interest." *Id.* (emphasis added). This statute differs substantially from that of other states which explicitly contemplate the issue before this Court and provide that counsel for the State or petitioning party must appear and present the case to the trial court.[2]

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1. *See In re C.G.*, No. 308A21; *In re R.S.H.*, No. 317A21; *In re E.M.D.Y.*, No. 279A21; *In re Q.J.*, No. 309A21; *In re C.G.F.*, No. 312A21. These cases were consolidated for oral argument on this due process issue.

2. *See, e.g.*, N.D. Cent. Code § 25-03.1-19(2) (Lexis, effective Aug. 1, 2021) ("At the hearing, evidence in support of the petition must be presented by the state's attorney, private counsel, or counsel designated by the court."); Kan. Stat. Ann. § 59-2959(e) (Lexis, effective July 1, 2022) ("If the petitioner is not represented by counsel, the county or district attorney shall represent the petitioner, prepare all necessary papers, appear at the hearing and present such evidence as the county or district attorney determines to be of aid to the court in determining whether or not there is probable cause to believe that the person with respect to whom the request has been filed is a mentally ill person subject to involuntary commitment for care and treatment under this act, and that it would be

¶ 33 The majority holds that there is no due process violation when a person is involuntarily committed after a trial judge comingles adjudicatory and prosecutorial functions by eliciting the testimony of witnesses and building the record that then is the basis to support the individual's involuntary commitment so long as the judge merely asks "even-handed questions" that are "neutral and clarifying." However, when a party does not appear, the judge necessarily must comingle these functions, thereby abandoning their role as an impartial decisionmaker and violating the respondent's right to due process. *See Sung v. McGrath*, 339 U.S. 33, 46 (1950), *superseded by statute as recognized in Marcello v. Bonds*, 349 U.S. 302 (1955). To be sure, a trial judge is placed in a difficult position when deciding whether to proceed after hearing from the State that it would "not be participating in these hearings" even though it had elected to do so "in prior years." This is the functional equivalent of a party failing to appear at all. It is one thing for a trial court to proceed when a party appears but is unrepresented by counsel, it is quite another

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in the best interests of the person to be detained until the trial upon the petition."); Iowa Code § 229.12(1) (West, effective July 1, 2018) ("At the hospitalization hearing, evidence in support of the contentions made in the application shall be presented by the county attorney."); N.J. Stat. Ann. § 30:4-27.12(b) (West, effective Aug. 11, 2010) ("[T]he assigned county counsel is responsible for presenting the case for the patient's involuntary commitment to the court, unless the county adjuster is licensed to practice law in this State, in which case the county adjuster shall present the case for the patient's involuntary commitment to the court."); Minn. Stat. § 253B.08(5a) (West, effective Aug. 1, 2020) ("The proposed patient or the patient's counsel and the county attorney may present and cross-examine witnesses, including court examiners, at the hearing."); Haw. Rev. Stat. § 334-60.5(e) (West, effective July 1, 2018) ("The attorney general, the attorney general's deputy, special deputy, or appointee shall present the case for hearings convened under this chapter, except that the attorney general, the attorney general's deputy, special deputy, or appointee need not participate in or be present at a hearing whenever a petitioner or some other appropriate person has retained private counsel who will be present in court and will present to the court the case for involuntary hospitalization."); Or. Rev. Stat. § 426.095(3) (West, effective June 16, 2015) ("The person alleged to have a mental illness and the individual representing the state's interest shall have the right to cross-examine all the following: (a) Witnesses. (b) The individual conducting the investigation. (c) The examining physicians or other licensed independent practitioners who have examined the person."); Fla. Stat. § 394.467(6)(a)(2) (West, effective July 1, 2016) ("The state attorney for the circuit in which the patient is located shall represent the state, rather than the petitioning facility administrator, as the real party in interest in the proceeding."); Ariz. Rev. Stat. Ann. § 36-503.01 (West, effective July 1, 2016) ("Whenever a physician or other person files a petition for court-ordered evaluation or court-ordered treatment on behalf of a state or county screening, evaluation or mental health treatment agency, the attorney general or the county attorney for the county in which the proceeding is initiated, as the case may be, shall represent the individual or agency in any judicial proceeding for involuntary detention or commitment and shall defend all challenges to such detention or commitment."); 18 Vt. Stat. Ann. § 7615(d) (Lexis, effective July 1, 2014) ("The attorney for the State and the proposed patient shall have the right to subpoena, present, and cross-examine witnesses, and present oral arguments.").

thing for a trial court to proceed when a party with the burden of proof fails to appear.

¶ 34 Setting up a straw man by taking respondent's argument to illogical extremes, the majority mischaracterizes respondent's position as "implicitly request[ing] a blanket rule that would prohibit the trial court from asking questions which elicit evidence and satisfy the burden of proof because, in so doing, the trial court ceases to be impartial." Respondent and the amicus party in these cases are seeking the fundamental due process guarantees of a neutral factfinder and a truly adversarial process when an individual's personal liberty is at stake. They are not arguing that a trial court can never ask a witness a question. The problem in these cases is that the trial court elected to proceed to hear a case when one party failed to appear. The fact that, as the majority points out, the respondent has a right to counsel does not satisfy their right to a neutral decisionmaker.

¶ 35 When a person is involuntarily committed to a psychiatric hospital, they experience a "massive curtailment of liberty." *Vitek v. Jones*, 445 U.S. 480, 491 (1980) (quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972)). Accordingly, the person has a "powerful" "interest . . . in not being arbitrarily classified as mentally ill and subjected to unwelcome treatment." *Id.* at 495. In the case of involuntary commitment, the deprivation of liberty does not stop with the person's "loss of freedom from confinement" and involuntary commitment — as the name implies — but also involves "[c]ompelled treatment." *Id.* at 492 (citing *Addington v. Texas*, 441 U.S. 418, 427 (1979)). Involuntary commitment also comes with serious collateral consequences such as restrictions on a parent's fundamental right to custody and control of their children, being forbidden from owning a firearm, and being prohibited from obtaining several types of professional licenses, including a license to practice law. *See In re Carter*, 25 N.C. App. 442, 443–44 (1975) (wife's involuntary commitment "may well affect the determination" of her child custody dispute with her husband); *District of Columbia v. Heller*, 554 U.S. 570, 626, 627 n.26 (2008) ("longstanding prohibitions" on the possession of firearms by people suffering from mental illness are "presumptively lawful"); N.C.G.S. § 83A-15(a) (2021) (architectural license may be denied, suspended, or revoked due to mental disability); N.C.G.S. § 84-28(g) (2021) (law license may be inactivated because of mental incompetence); N.C.G.S. § 90-14(a) (2021) (medical license may be revoked due to mental illness); N.C.G.S. § 90-171.37(a) (2021) (nursing license may be denied, suspended, or revoked because of mental illness). Indeed, a person's involuntary commitment is "always an ominous presence"

that may be used to attack their competence, credibility, and character whenever there is "any interaction between the individual and the legal system." *In re Hatley*, 291 N.C. 693, 695 (1977) (quoting *In re Ballay*, 482 F.2d 648, 652 (D.C. Cir. 1973)). Our society can also be unkind to people with mental illness, and "[w]hether we label this phenomena 'stigma' or choose to call it something else . . . we [must] recognize that [involuntary commitment] . . . can have a very significant impact on the individual." *Vitek*, 445 U.S. at 492 (first and second alterations in original) (quoting *Addington*, 441 U.S. at 425–26). Accordingly, the United States Supreme Court has acknowledged that "an erroneous commitment is sometimes as undesirable as an erroneous conviction." *Addington*, 441 U.S. at 428 (citing J. Wigmore, Evidence § 1400 (Chadbourn rev. 1974)).

¶ 36 A person cannot be committed against their will without due process of law. *Addington*, 441 U.S. at 425. This concept is expressly stated in *Addington*, which noted that the United States Supreme Court "repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Id.*; *see, e.g.*, *Jackson v. Indiana*, 406 U.S. 715 (1972); *Humphrey*, 405 U.S. 504; *In re Gault*, 387 U.S. 1 (1967); *Specht v. Patterson*, 386 U.S. 605 (1967). The hallmark of due process is "fundamental fairness," *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24 (1981), and in the context of judicial proceedings, this equates to the right to a "full and fair hearing," *Miller v. French*, 530 U.S. 327, 350 (2000). This right is essential in guarding against erroneous involuntary commitment and is designed to give the person to be committed the ability to "understand the nature of what is happening to him" and to "challenge the contemplated action." *Vitek*, 445 U.S. at 496.

¶ 37 J.R. argues that in these circumstances, the trial court acts as a prosecutor for the State when it elicits testimony that supports commitment of the respondent. In response, the majority acknowledges that the United States Supreme Court held in *Vitek*, 445 U.S. 480, that involuntary commitment proceedings are adversarial proceedings but then illogically maintains that because a medical doctor testified as a witness in this case, the trial judge did not actually take on the role of a prosecutor.

¶ 38 The adversarial nature of involuntary commitment hearings was indeed acknowledged by the United States Supreme Court in *Vitek*, 445 U.S. 480, and *Addington*, 441 U.S. 418. The Court observed that these proceedings are based on an "essentially medical" question, *Vitek*, 445 U.S. at 495, and the determination "turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists." *Addington*, 441 U.S. at 429. It is precisely because of this, and " '[t]he

subtleties and nuances of psychiatric diagnoses' that . . . the requirement of adversary hearings [is justified]." *Vitek*, 445 U.S. at 495 (first alteration in original) (quoting *Addington*, 441 U.S. at 429); *see also Foucha v. Louisiana*, 504 U.S. 71, 81 (1992) (Louisiana's statutory commitment procedure for insanity acquittee violated due process because, among other things, it failed to provide the acquittee with an "adversary hearing"); *French v. Blackburn*, 428 F. Supp. 1351, 1356 (M.D.N.C. 1977) (involuntary commitment procedure under repealed Chapter 122 of the General Statutes afforded due process because, among other things, it provided "a full adversary hearing"), *aff'd*, 443 U.S. 901 (1979); *Logan v. Arafeh*, 346 F. Supp. 1265, 1270 (D. Conn. 1972) (because Connecticut's involuntary commitment statute required "an adversary hearing," among other things, it complied with due process), *aff'd sub nom.*, *Briggs v. Arafeh*, 411 U.S. 911 (1973). Further, over thirty years ago our own Court of Appeals held that one of the safeguards in commitment cases guaranteed by due process is "a full adversary hearing." *In re Hernandez*, 46 N.C. App. 265, 269 (1980) (citing *French*, 428 F. Supp. 1351).

¶ 39 The adversarial model is distinct from "the inquisitorial model in which the judge — a neutral decisionmaker — conducts an independent investigation" and instead "our adversarial system requires the parties to present their own arguments and evidence at trial." *State v. Lawrence*, 365 N.C. 506, 512 (2012). It follows that under this model, the judge must decide whether a person is to be involuntarily committed based on the "facts and arguments pro and con adduced by the parties" and not based on the judge's own "factual and legal investigation." *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991).

¶ 40 Although the majority acknowledges that involuntary commitment hearings are subject to due process protections, they hold that "[i]t is entirely proper, and sometimes necessary, that [a judge] ask questions of a witness," citing *State v. Hunt*, 297 N.C. 258, 263 (1979). In doing so, they cite two of this Court's decisions in criminal cases, *Hunt*, 297 N.C. 258, and *State v. Perry*, 231 N.C. 467 (1950). However, these cases are not analogous to J.R.'s case because they contemplate an entirely different scenario and thus answer a separate question, namely if a judge may ask questions of a witness in criminal cases where both parties are represented by counsel. Because of the nature of criminal cases, the State was required to appear and put on its case by calling witnesses, introducing evidence, and eliciting testimony. Thus, in those cases it may become "the duty of the judge to propound competent questions in order to obtain a proper understanding and clarification of the testimony of the witness or to bring out some fact that has been overlooked"

without violating the defendant's due process rights. *Perry*, 231 N.C. at 470. Importantly, J.R. does not argue that there is a due process violation any time a judge asks a question. Rather, he argues that in this case the judge did not simply ask the doctor a question or two to clarify her testimony or develop some overlooked fact, as this Court contemplated in *Perry*. *See Perry*, 231 N.C. at 470. Instead, the trial court called the only witness, asked all the questions, and elicited all the evidence used to support J.R.'s commitment.

¶ 41 The majority also notes that under *State v. Stanfield*, 19 N.C. App 622, 626 (1973), there is no due process violation even when a trial court elicits the testimony used to prove an element of the crime in a criminal case. However, as noted above, criminal cases are not analogous because both parties are represented by counsel. In the involuntary commitment context where an attorney for the State or petitioner is not present, the situation discussed in *Stanfield* does not exist and the judge will be forced, perhaps unwillingly, to act as the prosecuting party by calling all the witnesses and eliciting the testimony and other evidence necessary to commit the respondent.

¶ 42 The majority also states that because this was a bench trial, and there was no jury present, "there was no risk of any improper influence by the trial court's actions," citing *State v. Smith*, 240 N.C. 99, 102 (1954). But this conclusion does not address J.R.'s argument. J.R. does not contend that the trial court's questions improperly influenced a jury, instead his argument is that when a trial judge elicits testimony and weighs the evidence, there is a risk that the judge's impartiality is compromised. This principle was recognized nearly one hundred years ago by the United States Supreme Court in *Tumey v. Ohio*, 273 U.S. 510 (1927), where the Court explained that the test for impartiality is not whether judges "of the highest honor and the greatest self-sacrifice could carry . . . on [the proceeding] without danger of injustice," *id.* at 532. Instead, the test for impartiality is whether the judicial procedures "offer a possible temptation to the average [person] as a judge to forget the burden of proof required . . . or which might lead [them] not to hold the balance nice, clear, and true between the [S]tate and the accused." *Id.* The Supreme Court later affirmed this principle in *Sung*, 339 U.S. 33, where the Court noted that when the trial court has "at once" the responsibility of "presenting" the case and "appraising [its] strength," a "genuinely impartial hearing conducted with critical detachment, is psychologically improbable if not impossible," *id.* at 44. Accordingly, the Court concluded that "commingling" the functions of "investigation or advocacy" and "deciding" are "plainly undesirable." *Id.*

¶ 43 Additionally, in *In re Spivey* this Court has recognized that due process requires a neutral decisionmaker. 345 N.C 404, 417 (1997). There, a local district attorney was judicially removed from office after repeatedly calling an African American man a racial slur in public to provoke a fight. *Id.* at 408, 416. On appeal, the former district attorney argued the trial court had violated his due process rights by appointing independent counsel to present the evidence concerning his conduct because the appointment had "resulted in his being removed by a court which had directed and controlled the discovery and presentation of evidence against him." *Id.* at 417. But this Court rejected that argument reasoning that because the trial judge "should not both present the case against a district attorney and pass judgment on the case" the judge had the power to appoint independent counsel. *Id.* Thus, there was no due process violation.

¶ 44 Furthermore, the majority states that in the administrative agency context, the United States Supreme Court has rejected "the bald proposition . . . that agency members who participate in an investigation are disqualified from adjudicating," quoting *Withrow v. Larkin*, 421 U.S. 35, 52 (1975). However, administrative agencies are subject to Section 554 of the Administrative Procedure Act which states that "[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision." 5 U.S.C. § 554(d). Thus, many areas of federal agency law are subject to greater due process protections than the involuntary commitment proceedings contemplated in J.R.'s case.

¶ 45 At least two other states have held that in the context of involuntary commitment proceedings, a due process violation exists when the judge takes on the role of the prosecutor and questions the witness in support of commitment. In *In re Commitment of Raymond S.*, 263 N.J. Super. 428, 432 (Super. Ct. App. Div. 1993), New Jersey's intermediate appellate court explained:

> Although we were advised at oral argument that county counsel was present at the hearing, it is not reflected in the transcript. The case for commitment was advanced by the judge rather than by county counsel. Such procedure is inappropriate because of the statutory requirement that county counsel present the case for commitment, and also because it places the judge in the role of an adversary rather than that of a neutral decision maker.

Id. at 432. The Iowa Supreme Court has also found a due process violation when the judge "elicit[ed] testimony that . . . support[ed] the

applicants' burden of proof." *In re S.P.*, 719 N.W.2d 535, 539 (Iowa 2006). In *In re S.P.*, the court held

> that an analysis based solely upon the nature of the questions asked by the referee or district court judge is not wholly determinative of the issue of advocacy. We cannot provide the trial court a cookbook of right or wrong questions, but merely observe that any effective questioning will inevitably lead to the heart of the case. When the court itself directs the case in this way it is marshaling or assembling the evidence. Artfully crafted questions will not hide the court's role in the proceedings at that point—the role of deciding what evidence is needed to prove the case and steering the case down that road.

Id. at 539–40. There, the court cautioned against a case-by-case approach when a due process violation is raised due to the commingling of adjudicatory and prosecutorial functions.

¶ 46 Today, the majority affirms an unfortunate case-by-case legal standard where due process protections depend not on the adherence to well-established procedures of an adversarial process but rather on the particular questions asked by the judge. More fundamentally, this leaves trial judges, when faced with no party appearing as petitioner in a private-facility involuntary commitment proceeding, with the unenviable task of deciding how to present all the evidence necessary to meet the standard for involuntary commitment while also determining whether they have done a good enough job of doing so. The majority's opinion sets out some parameters by identifying the features that made the process in these cases adequate. Additionally, a trial judge cannot use language or conduct themselves in a way "which conceivably could be construed as advocacy in relation to petitioner or as adversative in relation to the respondent." *In re Q.J.*, 278 N.C. App. 452, 2021-NCCOA-346, ¶ 21 (quoting *In re Perkins*, 60 N.C. App. 592, 594 (1983)). Similarly, trial courts must "be careful to avoid prejudice to the parties." *Id.* ¶ 22 (citing *State v. Howard*, 15 N.C. App. 148, 150–51 (1972)). Finally, trial courts in these circumstances may not impeach a witness's credibility. *Id.* Based on our own caselaw, any of the above instances would violate a respondent's due process right to a neutral decisionmaker.

¶ 47 Finally, it is important to note that due process standards in these proceedings serve not only to protect against erroneous commitments but also ensure that the commitment process is not overused. Under

N.C.G.S. § 122C-268(j) (2021), an involuntary commitment order must be supported by findings demonstrating "clear, cogent, and convincing evidence that the respondent is mentally ill and dangerous to self . . . or dangerous to others." Under § 122C-3(11)(a), a person is considered a danger to themselves and can be involuntarily committed if:

> a. Within the relevant past, the individual has done any of the following:
>
> 1. The individual has acted in such a way as to show all of the following:
>
> I. The individual would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of the individual's daily responsibilities and social relations, or to satisfy the individual's need for nourishment, personal or medical care, shelter, or self-protection and safety.
>
> II. There is a reasonable probability of the individual's suffering serious physical debilitation within the near future unless adequate treatment is given pursuant to this Chapter. A showing of behavior that is grossly irrational, of actions that the individual is unable to control, of behavior that is grossly inappropriate to the situation, or of other evidence of severely impaired insight and judgment shall create a prima facie inference that the individual is unable to care for himself or herself.
>
> 2. The individual has attempted suicide or threatened suicide and that there is a reasonable probability of suicide unless adequate treatment is given pursuant to this Chapter.
>
> 3. The individual has mutilated himself or herself or has attempted to mutilate himself or herself and that there is a reasonable probability of serious self-mutilation unless adequate treatment is given pursuant to this Chapter.

§ 122C-3(11)(a)(1), (2), (3). Under this standard, "[p]revious episodes of dangerousness to self, when applicable, may be considered when determining reasonable probability of physical debilitation, suicide, or self-mutilation." *Id.* at § (11)(a)(3). Furthermore, under North Carolina law,

a person can be involuntarily committed if they are a danger to others. *Id.* at § (11)(b). A person is considered a danger to others if:

> Within the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; and that there is a reasonable probability that this conduct will be repeated. Previous episodes of dangerousness to others, when applicable, may be considered when determining reasonable probability of future dangerous conduct. Clear, cogent, and convincing evidence that an individual has committed a homicide in the relevant past is prima facie evidence of dangerousness to others.

Id. By requiring the above be shown, our law attempts to guard against overuse of and erroneous commitment.[3] However, the law cannot have its intended effect without full due process protections in place. Overuse of involuntary commitment is concerning for both the person being committed unnecessarily against their will and for our state. An overreliance on institutional treatment is generally more expensive and less effective than community-based alternatives. *See* N.C. Dep't of Health & Hum. Servs., *Strategic Plan for Improvement of Behavioral Health Services* 5, 87–88 (Jan. 31, 2018), https://medicaid.ncdhhs.gov/ media/3907/download. North Carolina data also shows that certain groups are more likely to be subjected to care in psychiatric hospitals, namely males and African Americans, and this likely correlates to their limited access to community-based services. *See* Tech. Assistance Collaborative, *An Assessment of the North Carolina Department of Health and Human Services' System of Services and Supports for Individuals with Disabilities: Submitted to the North Carolina Department of Health and Human Services* 93 (Apr. 30, 2021), https://www.ncdhhs.gov/media/12607 /download? attachment. But a lack of access to community-based services should not render involuntary psychiatric hospitalization the only available form of treatment. Thus, ensuring that appropriate due process

3. Reports indicate that in the last decade involuntary commitment use has increased by ninety-one percent in North Carolina. Taylor Knopf, *NC didn't track the data on mental health commitments, so some advocates did it instead*, North Carolina Health News (Dec. 21, 2020), https://www.northcarolinahealthnews.org/2020/12/21/nc-didnt-track-the-data-on-mental-health-commitments-so-some-advocates-did-it-instead/.

protections exist in involuntary commitment proceedings is paramount to guaranteeing that only those who truly require hospitalization are subjected to it against their will.

¶ 48 Therefore, I would hold that in civil involuntary commitment proceedings in which a petitioner fails to appear, a trial judge cannot put on the case for them, eliciting and then evaluating all the evidence. By doing so the trial court inevitably commingles the separate and distinct functions of prosecutor and neutral decisionmaker and denies the respondent in the proceeding important procedural due process guarantees that have long been understood to be a vital element of our adversarial system of justice.

Justices HUDSON and MORGAN join in this dissenting opinion.

IN THE MATTER OF K.P.

No. 251A21

Filed 16 December 2022

1. Child Abuse, Dependency, and Neglect—permanency planning order—eliminating reunification—achievement of revised permanent plan—required factual findings

In a permanency planning matter involving a neglected child, the trial court did not err by eliminating reunification with the juvenile as a permanent plan, where the court entered a permanency planning order changing the primary permanent plan from custody with a relative to custody with a "court-approved caretaker" (in this case, the juvenile's grandparents by marriage), found that the revised primary plan had been achieved through entry of the order, and made the required written findings pursuant to N.C.G.S. §§ 7B-906.1(d)(3) and 7B-906.2(b) that reunification efforts clearly would be inconsistent with the juvenile's health or safety.

2. Child Abuse, Dependency, and Neglect—permanency planning—custody to non-relatives—verification

The trial court in a neglect case properly verified under N.C.G.S. § 7B-906.1(j) that the juvenile's court-approved caretakers (in this case, the juvenile's grandparents by marriage) understood the legal significance of the juvenile's placement with them and that they possessed adequate resources to care appropriately for him. Although

the court did not enter any specific findings regarding the verification process, the record showed that the court considered reliable evidence, including testimony from the grandfather and from a social worker in the case, that the grandparents were willing to accept legal custody of the juvenile, had discussed the possibility of custody with the department of social services, and had adequately cared for the juvenile for seven months without any financial difficulty.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 278 N.C. App. 42, 2021-NCCOA-268, vacating an order entered on 21 July 2020 by Judge Christopher B. McLendon in District Court, Hyde County, and remanding for further findings. Heard in the Supreme Court on 14 February 2022.

Rodman, Holscher, Peck & Edwards, P.A., by Jacinta D. Jones, for petitioner-appellant Hyde County Department of Social Services.

Keith Karlsson for respondent-appellee Guardian ad Litem.

J. Thomas Diepenbrock for respondent-appellee mother.

MORGAN, Justice.

¶ 1 Petitioner appeals from a decision in the Court of Appeals which vacated a trial court order eliminating reunification as a permanent plan and ceasing further review hearings in a neglect and dependency case concerning the son of respondent-mother. The trial court entered the order at issue after it found that an alternate permanent plan of custody with a court-approved caretaker had been achieved and after the trial court had received evidence tending to show that the court-approved caretakers understood the legal significance of the juvenile's placement in their home. Upon appeal from respondent-mother, the Court of Appeals vacated the trial court's permanency planning order and remanded the case for further findings of fact. *In re K.P.*, 278 N.C. App. 42, 2021-NCCOA-268.

¶ 2 Because the trial court correctly found that a permanent plan had been achieved in this case as an alternative to reunification, and because the trial court properly verified that the juvenile's court-approved caretakers understood the legal significance of the juvenile's placement with them and that they possessed adequate resources to care appropriately

for the juvenile, we reverse the portions of the Court of Appeals opinion that found error in these portions of the trial court's order. Furthermore, we leave undisturbed the portion of the Court of Appeals opinion remanding the matter to the trial court to make the findings which are required by N.C.G.S. § 7B-906.1(n).

I. Factual and Procedural Background

¶ 3 On 22 March 2018, the Hyde County Department of Social Services (DSS) filed a juvenile petition which alleged that a three-month-old child named Kenneth[1] was a neglected and dependent juvenile. The supporting documentation alleged, as the trial court later found to be true, that Kenneth's putative father, George Phillips, had returned home early on 17 March 2018 to find his wife—respondent-mother—in bed with a man named Don Keller. A domestic violence incident ensued in which Phillips and Keller struggled over a knife in the presence of Kenneth and Kenneth's siblings[2] who all resided in the home with respondent-mother and her husband. As a result of the fracas, Keller was hospitalized and Phillips was arrested and charged with assault with a deadly weapon in the presence of a minor, along with other serious charges. Respondent-mother was charged with simple assault. Respondent-mother made arrangements for Kenneth to reside with his maternal aunt prior to respondent-mother's arrest. Kenneth stayed with his maternal aunt from 22 March 2018 until 22 May 2018, when the trial court determined that Kenneth would reside with Phillips's father, George Phillips, Sr., and his wife Mary Phillips, because the couple offered "a safe and stable living environment for the juvenile[ ]."

¶ 4 In light of the events which precipitated the removal of Kenneth and his siblings from the household in which respondent-mother and her husband resided, Phillips questioned Kenneth's paternity, prompting the trial court at a nonsecure custody hearing on 8 August 2018 to order respondent-mother's husband to submit to paternity testing. Kenneth remained in the custody of Phillips, Sr. and Mrs. Phillips. On 17 October 2018, the results of the paternity test revealed that Phillips was not the biological father of Kenneth. The trial court ordered Keller to submit to paternity testing after respondent-mother identified him as a potential father of Kenneth. In January 2019, Keller was determined to be Kenneth's biological father.

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1. Pseudonyms are used for the juvenile and his family members to protect the identity of the juvenile in conformance with the regular practice of this Court.

2. There are no matters regarding Kenneth's siblings which are at issue in this case.

¶ 5 Having discovered the lack of a biological relationship between Phillips and the juvenile Kenneth, the trial court held its first adjudication and disposition hearing concerning the underlying neglect and dependency petitions on 10 December 2018. At this hearing, the trial court adjudicated Kenneth to be a neglected juvenile because Kenneth "would reside in an injurious environment if returned to either [parent's] home[ ]." The trial court decreed that respondent-mother needed to address the issues which rendered her residence unsafe for Kenneth by participating in domestic violence counseling, participating in anger management classes, maintaining stable housing, and obtaining a valid driver's license with accompanying safe transportation. The trial court also noted its concerns about substance abuse that may have occurred in respondent-mother's home. Consistent with its earlier determination that Phillips, Sr. and Mrs. Phillips would provide a "safe and stable living environment" for the child, the trial court found that the home of Kenneth's grandparents by marriage[3] constituted "the least restrictive, most family like placement available" and that the "child's physical and mental health are good" because of the couple's provision of adequate care for Kenneth. These findings were consistent with earlier findings made by the trial court concerning the appropriateness of Kenneth's placement in the Phillips, Sr. home. These earlier findings had been entered in each of the trial court's orders continuing Kenneth's nonsecure custody with DSS which had been filed since the juvenile's placement in the Phillips, Sr. home. The trial court opted to maintain Kenneth in the custody of Phillips, Sr. and Mrs. Phillips despite the discovery of the lack of the presumed father-son relationship between Phillips and the juvenile Kenneth. Reunification with respondent-mother was set as the permanent plan.

¶ 6 At the permanency planning review hearing conducted on 25 March 2019, the trial court continued Kenneth's nonsecure custody in the home of Phillips, Sr. and Mrs. Phillips, while adding a concurrent permanent plan of custody with a relative to the existing plan of reunification with respondent-mother. Respondent-mother and Phillips, who had separated for a period of time, resumed their marital relationship in April 2019. In June 2019, Phillips, Sr. and Mrs. Phillips were serving as the placement for Kenneth and all three of his siblings. Mrs. Phillips reported that the household was experiencing behavioral issues with the children and financial hardship and stated that it would be preferable for two of the four children to be placed in another home. In

3. "Grandparents" by virtue of the legal status of the child Kenneth's mother—respondent-mother here—and Phillips as wife and husband.

response, the trial court ordered that Kenneth and one of his siblings be moved to the home of his "paternal step great grandparents" on 17 July 2019. Given respondent-mother's revived relationship with Phillips, Jr. and the couple's acquisition of appropriate housing, the trial court ordered the commencement of a trial home placement with Kenneth by 20 September 2019. However, a DSS investigation in October 2019 revealed that both respondent-mother and Phillips, Jr. had continued to commit acts of domestic violence upon one another in the presence of Kenneth and the other children during the trial home placement. The trial court terminated the trial home placement, removed Kenneth from the home once again, and placed Kenneth in the care of his maternal aunt in a nearby county. Kenneth was returned to the home of Phillips, Sr. and Mrs. Phillips after the child's temporary stay with his maternal aunt.

¶ 7 At a permanency planning review hearing on 13 January 2020, the trial court found that, except for having completed anger management and parenting classes as directed, respondent-mother had failed to successfully address any of the concerns which had resulted in Kenneth's ongoing removal from the home. Respondent-mother continued to be both the victim and perpetrator of domestic violence and had vacated the home she had temporarily shared with Phillips during their brief marital reconciliation in favor of moving to a two-bedroom apartment with her mother in Virginia. Respondent-mother did not have stable employment, had yet to obtain a valid driver's license, and had refused to submit to drug screens since the termination of the trial home placement. Despite her participation in services offered by DSS, respondent-mother had failed to accomplish the directives which were required to reunite with Kenneth and therefore had "acted inconsistent with the juvenile's health and safety." The trial court maintained the goal of reunification but revised the permanent plan options to include "custody to a court-approved caretaker" in addition to the existing permanent plans of reunification and custody to a relative.

¶ 8 At a 3 June 2020 permanency planning review hearing, the trial court received testimony that respondent-mother had obtained a driver's license without an accompanying mode of transportation and that she had ended her active involvement with Phillips. Otherwise, respondent-mother persisted in her failure to make any progress in obtaining appropriate housing, obtaining a verifiable or consistent source of income, or participating in domestic violence counseling after such discord reoccurred during the trial home placement. Respondent-mother expressed her view that further domestic violence counseling would be "irrelevant." Respondent-mother had only submitted to one out of the seven drug screens scheduled for her by DSS since December of 2019.

¶ 9 Meanwhile, Kenneth continued to thrive in his placement with Phillips, Sr. and Mrs. Phillips over the succeeding months, and the couple indicated a desire to serve as the child's permanent custodians. These grandparents by marriage provided appropriate care for Kenneth while maintaining a good working relationship with both respondent-mother and respondent-father Keller. In her testimony at the permanency planning review hearing held on 3 June 2020, respondent-mother acknowledged that the paternal step-grandmother by marriage Mrs. Phillips had done an exemplary job in taking care of Kenneth. DSS social worker Alisha Holloway likewise testified that Kenneth was "doing amazing" in the Phillips, Sr. home, adding that Phillips, Sr. and Mrs. Phillips had expressed a desire to accept legal custody of the child. In related fashion, some of the testimony which Phillips, Sr. offered at the hearing was as follows:

> [DSS Attorney]. And do you recall having conversations with the Department regarding taking custody of [Kenneth]?
>
> [George Phillips, Sr.]. Yes, ma'am.
>
> Q. And are you and your wife willing to do that at this time?
>
> A. Yes, ma'am.
>
> Q. And are you and your wife willing to provide permanence for [Kenneth] through a custody order?
>
> A. Yes, ma'am.
>
> Q. Now, how, if at all, are you employed, Mr. [Phillips]?
>
> A. I'm employed with Cherry Farm and Seed.
>
> . . . .
>
> Q. And if I may ask, Mr. [Phillips], what is an estimate of your annual salary?
>
> A. It depends year to year. I think last year was fifty-six, I think, something like that.
>
> Q. And since having [Kenneth] in your home, have you and your wife experienced any difficulty in financially caring for him?

A. No.

Q. Do you anticipate having any financial difficulty in continued care of [Kenneth]?

A. No; no, ma'am.

¶ 10 On 21 July 2020, the trial court entered an order pursuant to the 3 June 2020 permanency planning review hearing in which the trial court found that respondent-mother's "lack of progress and the history of the juvenile's case" rendered the permanent plan of custody to a court-approved caretaker as the most appropriate plan for Kenneth. The trial court reasoned that Phillips, Sr.'s and Mrs. Phillips's "commitment to serving as a permanent placement for [Kenneth]," combined with the couple's positive performance as temporary caretakers for the child, supported the conclusion that it was appropriate that legal and physical custody of the juvenile Kenneth be granted to them on a permanent basis. The trial court noted that the Phillips, Sr. household possessed the ability to financially support Kenneth without substantial assistance from outside sources, and that respondent-father Keller had consented to the joint recommendation of DSS and Kenneth's guardian ad litem that the paternal grandfather and the paternal step-grandmother be granted permanent custody. The trial court thereupon awarded legal and physical custody to Phillips, Sr. and Mrs. Phillips after concluding that Kenneth's best interests would be served by establishing such a custody arrangement. Because custody to a court-approved caretaker was one of three enumerated primary permanent plans which were identified and pursued in the present case, and since custody was being granted to court-approved caretakers with a demonstrated ability and willingness to provide a safe and stable home for Kenneth, the trial court concluded that a primary permanent plan had been achieved through the entry of the 21 July 2020 order. Because a primary permanent plan was achieved through the award of legal and physical custody to Phillips, Sr. and Mrs. Phillips, further efforts towards the achievement of the other two primary permanent plans of reunification and custody to a relative became unnecessary. As a result, the 21 July 2020 trial court order effectively eliminated reunification as a permanent plan.

¶ 11 Respondent-mother appealed the 21 July 2020 order to the Court of Appeals, asserting that (1) the trial court had eliminated reunification as a permanent plan without making findings that respondent-mother claims were required by N.C.G.S. §§ 7B-906.2(b) and (d), and 7B-906.1(d)(3); (2) the trial court had failed to verify that the court-approved caretakers Phillips, Sr. and Mrs. Phillips understood the legal significance of

the juvenile Kenneth's placement with them as required by N.C.G.S. § 7B-906.1(j) before being awarded custody of the child; and (3) the trial court failed to make findings required by N.C.G.S. § 7B-906.1(n) before ceasing further permanency planning review hearings.

¶ 12 In addressing the first issue, the Court of Appeals majority agreed with respondent-mother that the trial court erred by eliminating reunification as a primary or secondary permanent plan without first making required findings of fact. The majority explained that the trial court's conclusion following the 3 June 2020 final permanency planning review hearing that the "primary permanent plan for the juvenile . . . ha[d] been achieved through the entry of th[e] [o]rder" was directly refuted by the trial court's findings of fact in the order because the trial court had previously established custody to a relative as the "primary permanent plan," while custody to a court-approved caretaker had been designated by the trial court as one of the "concurrent permanent plans." *In re K.P.*, 2021-NCCOA-268, ¶ 20. According to the Court of Appeals majority, the primary permanent plan of custody to a relative could not have been achieved here by placing Kenneth with Phillips, Sr. and Mrs. Phillips because Phillips was not Kenneth's biological father. Therefore Phillips, Sr. and Mrs. Phillips were non-relatives instead of relatives. *Id.* As a result, the Court of Appeals majority opined that, as previously "made clear" by that court, "when a district court eliminates reunification as either a primary or secondary permanent plan, it must make findings pursuant to both N.C.[G.S.] §§ 7B-906.2(b) and (d)." *Id.* ¶ 18. The lower appellate court majority therefore determined that the trial court's failure to make sufficient findings pursuant to N.C.G.S. § 7B-906.2(d) regarding respondent-mother's "degree of success or failure toward reunification," and its failure to make findings pursuant to N.C.G.S. §§ 7B-906.2(b) and 7B-906.1(d)(3) that "reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety" and whether reunification efforts would be inconsistent with the juvenile's "need for a safe, permanent home within a reasonable period of time," in combination with the trial court's erroneous declaration that the primary permanent plan had been achieved, required that the trial court's order ceasing reunification efforts be vacated and the case be remanded to the trial court for further proceedings. *Id.* ¶ 21.

¶ 13 The Court of Appeals majority also agreed with respondent-mother regarding her contention that the trial court erred in failing to verify that Phillips, Sr. and Mrs. Phillips understood the legal significance of taking permanent custody of Kenneth. According to the lower appellate court, the evidence that (1) Phillips, Sr. and Mrs. Phillips did an excellent

job taking care of Kenneth as the juvenile's court-appointed caretakers; (2) the couple were willing to serve as a permanent placement for the child; and (3) the household could financially support Kenneth without substantial outside assistance was insufficient to "show the trial court received and considered reliable evidence that the guardian or custodian had adequate resources and understood the legal significance of custody or guardianship." *Id.* ¶ 23 (quoting *In re J.D.M.-J.*, 260 N.C. App. 56, 65 (2018)). The majority vacated the trial court's order on this ground also. *Id.* ¶ 24.

¶ 14 The Court of Appeals dissent disagreed with the majority on these issues. As for the trial court's elimination of reunification as a permanent plan, the dissenting judge noted that N.C.G.S. § 7B-906.2(b) allowed for the cessation of reunification efforts if the trial court found either that reunification would be inconsistent with the health and safety of the juvenile *or* that any permanent plan had been achieved, regardless of whether the fulfilled permanent plan was labeled "primary" or otherwise. *Id.* ¶ 34 (Jackson, J. concurring in part and dissenting in part). Because a permanent plan had been achieved through the entry of the trial court's June 2020 order, the dissent further reasoned that the trial court was not required to find that reunification would be inconsistent with the health or safety of the juvenile Kenneth. *Id.* ¶¶ 32, 38. In addressing the position of the Court of Appeals majority that the trial court erred in failing to make the required statutory findings under N.C.G.S. §§ 7B-906.2(b), 7B-906.2(d), and 7B-906.1(d)(3) regarding the status of reunification, the dissent identified and evaluated a number of the trial court's findings which the dissent considered to be sufficient to satisfy the findings mandated by the cited statutes. In the dissent's view, the trial court addressed all of the necessary considerations and entered all of the necessary findings to properly eliminate reunification as a permanent plan. *Id.* ¶ 41. Secondly, in responding to the Court of Appeals majority decision that the trial court failed to verify that Phillips, Sr. and Mrs. Phillips understood the legal significance of Kenneth's permanent placement in their home, the dissent opined that pertinent appellate caselaw holds that N.C.G.S. § 7B-906.1(j) is satisfied in this regard if the trial court received and considered evidence including, "*inter alia*, testimony from the potential guardian of a desire to take guardianship of the child, . . . and testimony from a social worker that the potential guardian was willing to assume legal guardianship." *Id.* ¶ 44 (quoting *In re J.D.M.-J.*, 260 N.C. App. at 68). The dissenting opinion went on to cite transcript passages and to summarize other testimony from the 3 June 2020 permanency planning review hearing, along with the trial court's resulting determinations, and expressed the belief that there

was compliance at the trial court level with N.C.G.S. § 7B-906.1(j). *Id.* ¶¶ 47–48. As for whether the trial court verified that the couple had adequate resources to care for Kenneth, the dissent observed that the statute itself establishes that "[t]he fact that the prospective custodian or guardian has provided a stable placement for the juvenile for at least six consecutive months is evidence that the person has adequate resources." *Id.* ¶ 49 (quoting N.C.G.S. § 7B-906.1(j) (2019)). The dissenting judge recognized that Kenneth had resided in the court-approved caretakers' household of Phillips, Sr. and Mrs. Phillips for seven consecutive months, and that Phillips, Sr. offered uncontradicted testimony regarding the household's ability to financially support Kenneth without any difficulty and that the couple had been financially caring for the child in this manner. *Id.* ¶¶ 50, 51.

¶ 15 With regard to the third issue, the trial court's lack of compliance with N.C.G.S. § 7B-906.1(n), DSS and Kenneth's guardian ad litem conceded before the Court of Appeals that the trial court failed to make the findings which were required to cease further review or permanency planning hearings under that provision. Given the concession made by DSS and the guardian ad litem, the Court of Appeals dissent agreed with the majority that the trial court failed to make the required findings under N.C.G.S. § 7B-906.1(n) upon the trial court's determination that further review hearings would end in light of the trial court's 21 July 2020 order. *Id.* ¶¶ 27 (majority opinion), 29 (Jackson, J., concurring in part and dissenting in part). Otherwise, the dissent disagreed with the majority's resolution of this case.

¶ 16 Petitioner DSS timely filed notice of appeal based on the divided decision of the Court of Appeals.

II. Analysis

¶ 17 DSS and the guardian ad litem for the juvenile Kenneth challenge the determination of the Court of Appeals majority that the trial court's 21 July 2020 order failed to contain (1) the findings necessary to eliminate reunification as a permanent plan, and (2) the verifications required to award custody of Kenneth to persons other than the child's parents. As a fundamental premise, we stated in *In re L.R.L.B.*, 377 N.C. 311, 2021-NCSC-49, that:

> Our review of a permanency planning 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. The trial court's findings of fact are conclusive on appeal if

> supported by any competent evidence.' The trial court's dispositional choices—including the decision to eliminate reunification from the permanent plan—are reviewed only for abuse of discretion, as those decisions are based upon the trial court's assessment of the child's best interests.

2021-NCSC-49, ¶ 11 (extraneity omitted).[4] "An abuse 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 (2015) (extraneity omitted).

A. Requirements for the Elimination of Reunification as a Permanent Plan

¶ 18 **[1]** N.C.G.S. § 7B-906.2(a) establishes that at any permanency planning hearing which is conducted pursuant to N.C.G.S. § 7B-906.1, the trial court shall adopt one or more of the permanent plans which are listed in N.C.G.S. § 7B-906.2(a) which the trial court finds to be in the juvenile's best interests. "Reunification" and "custody to a relative or other suitable person" are included as eligible permanent plans in the statutory provision. N.C.G.S. § 7B-906.2(a) (2021). N.C.G.S. § 7B-906.2(b), in its entirety, states:

> At any permanency planning hearing, the court shall adopt concurrent permanent plans and shall identify the primary plan and secondary plan. Reunification shall be a primary or secondary plan unless the court made written findings under G.S. 7B-901(c) or G.S. 7B-906.1(d)(3), the permanent plan is or has been achieved in accordance with subsection (a1) of this section, or the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety. The finding that reunification efforts clearly would be unsuccessful or inconsistent with the juvenile's health or safety may be made at any permanency planning hearing, and if made, shall eliminate reunification as a plan. Unless permanence has been achieved, the court shall order the county

4. "At a review or permanency-planning hearing, '[t]he [trial] court may consider any evidence, including hearsay evidence . . . that the [trial] court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.' " *In re C.C.G.*, 380 N.C. 23, 2022-NCSC-3, ¶ 28 (quoting N.C.G.S. § 7B-906.1(c)).

> department of social services to make efforts toward finalizing the primary and secondary permanent plans and may specify efforts that are reasonable to timely achieve permanence for the juvenile.

N.C.G.S. § 7B-906.2(b) (2021). "It is well settled that where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." *Union Carbide Corp. v. Offerman*, 351 N.C. 310, 314 (2000) (extraneity omitted). " 'Where a statute contains two clauses which prescribe its applicability, and the clauses are connected by a disjunctive (*e.g.* "or"), the application of the statute is not limited to cases falling within both clauses, but will apply to cases falling within either of them.' " *Spruill v. Lake Phelps Vol. Fire Dep't., Inc.*, 351 N.C. 318, 323 (2000) (quoting *Davis v. N.C. Granite Corp.*, 259 N.C. 672, 675 (1963)).

¶ 19 In a permanency planning order entered by the trial court on 20 December 2019 pursuant to a permanency planning review hearing held on 20 August 2019, the trial court stated that "[t]he permanent plan shall be reunification with a concurrent plan of custody with a relative." After the permanency planning review hearing conducted on 13 January 2020, the trial court entered an order dated 27 March 2020 and filed on 3 April 2020 in which it found in Finding of Fact 25 that "[t]he respondent parents have acted inconsistent with the juvenile's health and safety" and decreed that "[t]he primary permanent plan for the juvenile shall be custody to a relative with concurrent permanent plans of custody to a court-approved caretaker and reunification." In a subsequent permanency planning order entered by the trial court on 21 July 2020 after it conducted a 3 June 2020 permanency planning review hearing in the matter, the trial court made Findings of Fact 25, 26, and 27 as follows:

> 25. The respondent parents have acted inconsistent with the juveniles' health and safety.
>
> 26. In accordance with G.S. 7B-906.2, the primary permanent plan is custody to a court-approved caretaker, and that plan is being achieved with the entry of this order.
>
> 27. In accordance with G.S. 7B-906.2, there is no further need for a concurrent plan as the primary plan of custody to a court-approved caretaker is achieved.

The trial court consequently determined in the same order that "[t]he primary permanent plan for the juvenile of custody to a court-approved caretaker has been achieved through the entry of this order."

¶ 20 The Court of Appeals majority erroneously decided in the opinion which it rendered here that the trial court's 21 July 2020 permanency planning order did not make proper findings of fact based on competent evidence, pursuant to N.C.G.S. §§ 7B-906.1(d)(3) and 7B-906.2(b), to allow the trial court to remove reunification as a concurrent permanent plan and thereby implicitly to cease reunification efforts. *In re K.P.*, ¶ 19. Based on this faulty premise, the Court of Appeals went on to conclude that the trial court's 21 July 2020 order "fail[ed] to address the ultimate question of whether reunification would be unsuccessful or inconsistent with Kenneth's safety" by "ceas[ing] reunification efforts without making sufficient findings pertinent to N.C. Gen. Stat. § 7B-906.2(d) and the ultimate findings required by N.C. Gen. Stat. §§ 7B-906.2(b) and 7B-906.1(d)(3)." *Id.* ¶ 21. We agree with the Court of Appeals dissent regarding the proper assessment of the trial court's pertinent orders relating to the identification and prioritization of the permanent plans which were evaluated, the sufficiency of the trial court's findings to support its conclusions concerning the trial court's elections between and among the permanent plans, and the trial court's satisfaction of the mandatory determinations which the cited applicable statutes require. The trial court's findings, conclusions, and supporting rationale were properly reached and substantiated in light of the evidence adduced, and in light of the statutory law and appellate caselaw. This includes the determination made by the Court of Appeals majority that the trial court erred in the trial court's view of Phillips, Sr. and Mrs. Phillips as Kenneth's relatives for purposes of the fulfillment of the primary permanent plan of "custody to a relative" identified in the trial court's order dated 27 March 2020 and filed on 3 April 2020, even though the same result was realized when the couple received legal and physical custody of Kenneth pursuant to the trial court's recognition of their status as "court-approved caretaker[s]" in the trial court's 21 July 2020 order which designated "custody to a court-approved caretaker" as the primary permanent plan for the juvenile Kenneth.

¶ 21 In the instant case, there is competent evidence in the record to support the trial court's findings of fact, and in turn there are sufficient findings of fact to support the conclusions of law, which undergird the trial court's determinations in the orders which it issued to eliminate reunification as a permanent plan. These findings, conclusions, and ultimate determinations reached by the trial court on the matter of the elimination of reunification as a permanent plan in this case satisfy the statutory

requirements imposed upon a trial court under N.C.G.S. § 7B-906.1(d)(3) to make relevant written findings of fact as to whether efforts to reunite the juvenile Kenneth with either parent clearly would be inconsistent with the juvenile's health or safety and N.C.G.S. § 7B-906.2(b) to make written findings that reunification efforts clearly would be inconsistent with the juvenile's health or safety which therefore would eliminate reunification as a plan. Under the circumstances presented in this case, the trial court was not required to make further findings, conclusions, and ultimate determinations regarding the elimination of reunification. We do not discern any abuse by the trial court of its discretion to arrive at the findings, conclusions, and ultimate determinations which the trial court reached, in light of the deference given to the trial court concerning its assessment of the child's best interests. Additionally, in light of standard rules of statutory construction, the use of the disjunctive term "or" in N.C.G.S. § 7B-906.2(b) demonstrates that the satisfaction of any one of the three delineated circumstances which are identified in the statute, even to the exclusion of the remaining two circumstances, relieves the trial court of any further obligation to maintain reunification as a permanent plan. Since the trial court properly determined in its 21 July 2020 order that the revised primary permanent plan of custody to a court-approved caretaker had been achieved, and the trial court had made written findings that reunification efforts clearly would be inconsistent with the juvenile's health or safety, then the trial court was empowered to properly eliminate reunification as a primary or secondary plan because the trial court satisfied all of these components as found in N.C.G.S. § 7B-906.2(b).

¶ 22 In light of all of these aspects, we reverse the Court of Appeals' determination that the trial court erred in ceasing reunification efforts and ultimately eliminating reunification as a primary or secondary permanent plan.

B. Requirements for the Verification of Non-Parents to be Custodians

¶ 23 **[2]** N.C.G.S. § 7B-906.1(a) states, in pertinent part, that "[t]he court shall conduct a . . . permanency planning hearing within 90 days from the date of the initial dispositional hearing [and] permanency planning hearings shall be held at least every six months thereafter." N.C.G.S. § 7B-906.1(a) (2021). Pursuant to the trial court's execution of a permanency planning hearing, N.C.G.S. § 7B-906.1(j) provides, in pertinent part:

> If the court determines that the juvenile shall be placed in the custody of an individual other than

> a parent . . . , the court shall verify that the person receiving custody . . . understands the legal significance of the placement . . . and will have adequate resources to care appropriately for the juvenile. The fact that the prospective custodian . . . has provided a stable placement for the juvenile for at least six consecutive months is evidence that the person has adequate resources.

N.C.G.S. § 7B-906.1(j). While this Court has never addressed the minimum evidentiary requirements which are sufficient to support a trial court's verification that a non-parent "understands the legal significance of the placement" of the juvenile in the non-parent's custody and that the non-parent "will have adequate resources to care appropriately for the juvenile," the Court of Appeals provided instructive guidance on the matter in the opinion which it rendered in *In re J.D.M.-J.*, where the lower appellate court opined:

> N.C. Gen. Stat. § 7B-906.1(j) does not require the trial court to make any specific findings in order to make the verification. However, we have made clear that the record must show the trial court received and considered reliable evidence that the guardian or custodian had adequate resources and understood the legal significance of custody or guardianship.

260 N.C. App. at 65 (extraneity omitted).

¶ 24 During the course of conducting permanency planning review hearings in this case, the trial court determined that the juvenile Kenneth should be placed in the custody of an individual other than a parent. The tribunal placed the child in the custody of Phillips, Sr. and his wife Mrs. Phillips. The Court of Appeals majority concluded that the trial court "failed to fulfill its statutory obligation to verify that Mr. Phillips, Sr. and Mrs. Phillips (non-parents and non-relatives) understood the legal significance of their appointment as Kenneth's custodians," *In re K.P.*, ¶ 22, or "that the couple had the adequate resources to care appropriately for the juvenile," *id.* ¶ 23. On this issue of verification, the Court of Appeals majority ultimately decided that "neither the record [as] a whole nor the district court's findings of fact support the conclusion that Kenneth's custodians understood the legal significance of the placement or that they would have the adequate resources to care appropriately for the juvenile." *Id.* ¶ 24. Conversely, the dissenting opinion of the Court of Appeals took the position on verification that "testimony from the social

worker and Mr. Phillips Sr. demonstrates that the couple understood the legal significance of the appointment, and Kenneth's stable placement with Mr. Phillips Sr. and Mrs. Phillips for seven consecutive months demonstrates the couple had adequate resources to care for Kenneth." *Id.* ¶ 42 (Jackson, J., concurring in part and dissenting in part).

¶ 25 While the majority view and the dissenting view of the lower appellate court reach opposite outcomes on the issue of verification in the present case, both of them quote these cited passages from the transcript as dispositive of their respective opinions, with a social worker having testified for DSS as follows:

> Q. And have [Mr. Phillips, Sr., and Mrs. Phillips] expressed a desire to accept legal custody of [Kenneth]?
>
> A. Yes, they have.

Phillips, Sr. offered the following testimony:

> Q. And do you recall having conversations with the Department regarding taking custody of [Kenneth]?
>
> A. Yes, ma'am.
>
> Q. And are you and your wife willing to do that at this time?
>
> A. Yes, ma'am.
>
> Q. And are you and your wife willing to provide permanence for [Kenneth] through a custody order?
>
> A. Yes, ma'am

In addition, the Court of Appeals dissent noted this permanency planning review hearing testimony from Phillips, Sr.:

> Q. And if I may ask, Mr. [Phillips, Sr.], what is an estimate of your annual salary?
>
> A. It depends year to year. I think last year was fifty-six, I think, something like that.
>
> Q. And since having [Kenneth] in your home, have you and your wife experienced any difficulty in financially caring for him?
>
> A. No.

> Q. Do you anticipate having any financial difficulty in continued care of [Kenneth]?
>
> A. No; no, ma'am.
>
> Q. And have you been caring for [Kenneth] without any substantial financial contributions from the parents?
>
> A. No.
>
> Q. No contributions?
>
> A. No.

¶ 26 We agree with the Court of Appeals dissent on this matter of verification, conclude that the Court of Appeals majority erroneously decided this issue, and therefore reject the majority's conclusion regarding verification. Despite the lack of any specific findings which are expressly identified in N.C.G.S. § 7B-906.1(j) as being required to authorize a trial court to properly establish verification, we can determine from the record of the 3 June 2020 permanency planning review hearing that the trial court sufficiently verified that the court-approved caretakers Phillips, Sr. and Mrs. Phillips, in receiving legal and physical custody of the juvenile Kenneth, understood the legal significance of the placement and had adequate resources to care appropriately for the child. The combined testimony rendered by the DSS social worker and Phillips, Sr. amply support this determination. Similarly, the testimony given at the hearing by Phillips, Sr. with regard to the financial stability, resources, independence, and comfort level of the court-approved caretakers, when considered along with the undisputed evidence which showed that the seven consecutive months of Kenneth's placement with Phillips, Sr. and Mrs. Phillips exceeded the span of six consecutive months of such placement that N.C.G.S. § 7B-906.1(j) expressly recognizes as evidence that the prospective custodian has adequate resources, satisfactorily showed that the couple have adequate resources to care appropriately for the juvenile.

¶ 27 Given these circumstances, we reverse the decision of the Court of Appeals that the trial court erred by failing to fulfill the trial court's statutory obligations established by N.C.G.S. § 7B-906.1(j) concerning verification.

III. Conclusion

¶ 28 Petitioner appeals to this Court from the decision of the Court of Appeals on the basis of a dissent. For the reasons stated in the dissenting

opinion, we reverse the decision of that court as to the appealable issues of right, namely, the determinations by the Court of Appeals that the trial court erred (1) in ceasing reunification efforts and ultimately eliminating reunification as a primary or secondary plan, and (2) by failing to fulfill its statutory obligations under N.C.G.S. § 7B-906.1(j) concerning verification. The remaining issue addressed by the Court of Appeals, namely, that the trial court failed to comply with the requirement to make appropriate findings of fact pursuant to N.C.G.S. § 7B-906.1(n) before ordering the cessation of further reviews in this case, is not properly before this Court and the decision by the Court of Appeals on that issue remains undisturbed. This case is remanded to the Court of Appeals for further remand to the District Court, Hyde County, for further proceedings not inconsistent with this opinion.

REVERSED IN PART AND REMANDED.

IN THE MATTER OF L.Z.S.

No. 216A21

Filed 16 December 2022

Child Abuse, Dependency, and Neglect—parental right to counsel—motion to withdraw—lack of notice to parent—no forfeiture of right

The trial court in a neglect case erred by allowing respondent-father's counsel to withdraw at a permanency planning hearing—in which respondent-father had a statutory right to counsel—and by subsequently eliminating reunification as a permanent plan in respondent-father's absence, where the record reflected no notice to respondent-father that his counsel intended to withdraw and no inquiry by the trial court into the basis for his counsel's motion to withdraw. Although respondent-father had consistently failed throughout the case to appear at prior hearings and to communicate with his counsel, this failure was not so "egregious, dilatory, or abusive" as to constitute a forfeiture of his right to counsel.

Justice BERGER dissenting.

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

IN RE L.Z.S.

[383 N.C. 309, 2022-NCSC-129]

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from orders entered on 26 March 2021 by Judge Eula E. Reid in District Court, Chowan County, and on writ of certiorari to review orders entered on 13 August 2020 and 22 September 2020 by Judge Eula E. Reid in District Court, Chowan County. Heard in the Supreme Court on 22 March 2022.

Lauren Arizaga-Womble for petitioner-appellee Chowan County Department of Social Services.

A. Grant Simpkins for appellee Guardian ad Litem.

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

MORGAN, Justice.

¶ 1 Respondent-father appeals from several orders of the District Court, Chowan County: an order permitting respondent-father's court-appointed counsel to withdraw from representation of respondent-father in the case proceedings; an order ceasing efforts to reunify respondent-father with his son, Leon[1]; and two orders collectively terminating respondent-father's parental rights to Leon. Because the record is completely devoid of any mention of notice to respondent-father of the prospect that his appointed counsel might withdraw from the case, we reverse the trial court's order allowing respondent-father's appointed counsel to withdraw and the trial court's order ceasing reunification efforts and remand this case to the trial court for additional proceedings consistent with this opinion.

I. Factual and Procedural History

¶ 2 On 17 April 2019, the Chowan County Department of Social Services (DSS) obtained nonsecure custody of one-year-old Leon and removed the child from the custody of his mother, who is not a party to this appeal. DSS also filed a juvenile petition on 17 April 2019, alleging that Leon was a neglected juvenile because he had not received proper care, supervision, or discipline from his parents. Respondent-father, whose paternity had not yet been established at the time that the petition was filed, was incarcerated at Columbus Correctional Institution at the time

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

that DSS initiated the matter. Respondent-father was served on 24 June 2019 with the juvenile petition, along with a summons for an adjudication hearing scheduled for 27 June 2019. Respondent-father was absent from the 27 June 2019 adjudication hearing due to his ongoing incarceration. Respondent-father's counsel, who had been provisionally appointed by the trial court to represent respondent-father, then moved to withdraw from representation of respondent-father; the trial court allowed the motion to withdraw. At the adjudication hearing, Leon's mother stipulated that the child was a neglected juvenile, prompting the trial court to find that Leon was neglected as defined in N.C.G.S. § 7B-101(15). At a disposition hearing which was also conducted in the case on 27 June 2019, the record reflects that respondent-father was represented by newly appointed counsel. The trial court ordered a permanent plan of reunification of Leon with his mother, with no mention of respondent-father's continued involvement in the case. A review hearing was scheduled for 22 August 2019.

¶ 3 At the 22 August 2019 review hearing, respondent-father's new appointed counsel appeared on respondent-father's behalf. In an order entered on 23 September 2019 which resulted from the 22 August review hearing, the trial court found that respondent-father was incarcerated at Columbus Correctional Institution, located a considerable distance away from the juvenile Leon's home county of Chowan. The trial court also found that, since Leon's birth, respondent-father had "not provided the juvenile with any care, supervision or discipline and since the filing of [the neglect] petition has not been able to do so due to his incarceration." The 23 September 2019 order further reflected that respondent-father "is expected to be released from prison in November of 2019 and would like to have a relationship with the juvenile and would like to be considered as a placement resource for the juvenile." The trial court ordered a permanent plan of custody for Leon with his mother and a concurrent plan of custody for the child with respondent-father or a court-approved caretaker.

¶ 4 Between June 2019 and October 2019, DSS engaged with respondent-father telephonically while he was still incarcerated, including facilitating respondent-father's attendance at Child and Family Team Meetings and obtaining respondent-father's cooperation with an Out-of-Home Agreement. A DNA test ordered by the trial court confirmed that respondent-father was the biological father of Leon, whose paternity had remained at issue due to suspicion that Leon's mother had been married to another man at the time of Leon's birth. Respondent-father exhibited misconduct at the correctional facility shortly prior to his initial release date in November 2019, which caused a delay of respondent-father's

release from incarceration until 21 December 2019. After his release, respondent-father planned to live and work with his father in Moyock, North Carolina, and indicated a desire to serve as a placement for Leon.

¶ 5 Upon respondent-father's release from prison on 21 December 2019, his contact with the trial court and DSS was sparse and ineffectual. When respondent-father left Columbus Correctional Institution, he did not contact DSS in order to provide an address at which to locate him. DSS contacted the father of respondent-father by telephone on 2 January 2020 in an effort to ascertain the whereabouts of respondent-father. Respondent-father called DSS by telephone two days later but would not provide an address; instead, respondent-father indicated that he would contact DSS by telephone at a later date in order to schedule a meeting. After DSS did not receive communication from respondent-father within a reasonable period of time, the agency attempted to contact respondent-father on 20 January 2020 at the telephone number that he had provided but did not reach him. DSS unsuccessfully tried to contact respondent-father again by telephone on 5 February 2020, but his telephone was off and no voicemail message opportunity was available. On 6 February 2020, during a visitation session between Leon and the child's mother, DSS was able to make contact with respondent-father utilizing the mother's Facebook social media account to inform him of an upcoming Child and Family Team Meeting. Over the ensuing three months, DSS regularly attempted to contact respondent-father by telephone, and he would answer the calls on some occasions and ignore the calls at other times. During the brief conversations that DSS social workers were able to have with respondent-father, he would (1) refuse to provide an address so that DSS could complete a home assessment for the possible placement of Leon with respondent-father, (2) indicate that he would call DSS back via telephone with an address for the home assessment on a later date, and then (3) fail to call DSS back by telephone in order to provide the promised address. Respondent-father participated over the telephone in a Child and Family Team Meeting on 6 May 2020 during which respondent-father indicated that he was working for a construction company in Virginia, but respondent-father did not provide any information about his employer or his address. When a DSS representative asked respondent-father during a telephone call if respondent-father had provided any support for Leon since his release from incarceration, respondent-father responded that he considered DSS to be disrespecting him, and respondent-father ended the call. Respondent-father never provided a home address to DSS.

¶ 6 The trial court conducted a permanency planning review hearing during the two-day period of 11 June 2020 and 22 June 2020. Respondent-

father did not appear at the hearing but was represented by his court-appointed counsel. The trial court maintained Leon's permanent plan as reunification with his parents with a concurrent plan of custody with a court-approved caretaker, and found that the barriers to reunification for respondent-father specifically were his lack of a relationship with Leon, respondent-father's failure to provide respondent-father's address to DSS, and respondent-father's lack of participation in this matter with DSS. The trial court ordered respondent-father to provide his home address to DSS and to engage in an Out-of-Home Services Agreement. The tribunal set the next review hearing for 13 August 2020.

¶ 7 On the day of the 13 August 2020 permanency planning review hearing and prior to its start, respondent-father's court-appointed attorney filed a written notice to withdraw as counsel. The motion explained that respondent-father had not appeared at any of the court proceedings since respondent-father's release from prison, despite advising his counsel that he would do so. The motion further asserted that, "despite his attorney's requests," respondent-father had failed to contact his attorney and failed to be present for the case's court proceedings. On the same day of 13 August 2020 on which the motion to withdraw was filed, the trial court granted the motion. The record does not indicate that respondent-father was served with notice that his court-appointed counsel was withdrawing from the case or that there was any attempt to serve respondent-father with such notice. After respondent-father's counsel was allowed to withdraw from representation of respondent-father after regularly appearing on behalf of the parent at the case's court proceedings, the trial court then went on to conduct the scheduled permanency planning review hearing in the absence of respondent-father or any legal representation on his behalf. Following the solicitation of testimony from a DSS social worker and the juvenile's guardian ad litem, the trial court entered an order on 22 September 2020 pursuant to the 13 August 2020 permanency planning review hearing. In the order, the trial court found that the return of Leon to the custody of either parent "would be contrary to the welfare of said child at this time" and that continued efforts to reunify Leon with respondent-father "would clearly be futile or would be inconsistent with the child's health and safety." The trial court eliminated reunification of the juvenile Leon with either parent as a permanent plan, and instead the trial court identified adoption as a primary plan with a concurrent plan of guardianship with a relative or court-approved caretaker.

¶ 8 In the months following the 13 August 2020 permanency planning review hearing, DSS attempted to contact respondent-father a total of eleven times through the mail and by telephone. DSS sent a letter

to respondent-father via certified mail on 24 August 2020 which informed him of the trial court's decision to cease reunification efforts; respondent-father signed the receipt of the certified letter on 8 September 2020. On 9 September 2020, DSS sent to respondent-father a second certified letter with identical content, for which respondent-father's signature indicated receipt on 16 September 2020. On two occasions, DSS was able to successfully contact respondent-father by way of telephone; however, respondent-father became upset during each of the calls, refused to meet with DSS, and ended each call.

¶ 9 On 20 November 2020, DSS filed a petition to terminate respondent-father's parental rights to the juvenile Leon, on the grounds of neglect under N.C.G.S. § 7B-1111(a)(1), failure to make reasonable progress in correcting the conditions which led to Leon's removal from his parents' custody in the first instance under N.C.G.S. § 7B-1111(a)(2), failure to pay a reasonable portion of the costs of care for Leon despite the ability to do so under N.C.G.S. § 7B-1111(a)(3), and abandonment under N.C.G.S. § 7B-1111(a)(7). *See* N.C.G.S. § 7B-1111(a) (2021). Respondent-father was appointed the same attorney for the termination of parental rights matter as had been allowed to withdraw at the 13 August 2020 hearing. At the termination of parental rights adjudication and disposition hearings which began on 14 January 2021 and resumed on 11 February 2021, respondent-father attended with his appointed counsel. The trial court heard testimony from DSS social workers, Leon's guardian ad litem, and respondent-father himself. Respondent-father's attorney cross-examined DSS's witnesses and gave thorough closing arguments on respondent-father's behalf. In two separate orders which were both entered on 26 March 2021, the trial court found that all four of the alleged grounds for the termination of respondent-father's parental rights existed and determined that Leon's best interests would be served by the termination of respondent-father's parental rights.

II. Analysis

¶ 10 Respondent-father appeals from the trial court's 13 August 2020 order which allowed his court-appointed counsel to withdraw from representation of respondent-father and from the trial court's 22 September 2020 order which eliminated reunification as a permanent plan for Leon. In addition to these contentions, respondent-father also submits that the trial court's orders which terminated his parental rights must be vacated if this Court determines that the trial court's order which eliminated reunification as a permanent plan should be vacated, according to N.C.G.S. § 7B-1001(a2). *See* N.C.G.S. § 7B-1001(a2) (2019).

¶ 11 North Carolina law is replete with demonstrations of the established right of a parent to be represented by legal counsel in proceedings in which a child of the parent is in the nonsecure custody of a county's department of social services. Subsection 7B-602(a) of the General Statutes of North Carolina establishes that "[i]n cases where the juvenile petition alleges that a juvenile is abused, neglected, or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless that person waives the right." N.C.G.S. § 7B-602(a) (2021). Subsection 7B-906.1(a) requires the trial court to conduct a hearing in such abuse, neglect, and dependency cases "within 90 days from the date of the initial dispositional hearing" and "hearings shall be held at least every six months thereafter," with the hearing "be[ing] designated as [a] permanency planning hearing" in the event that "custody has been removed from a parent." N.C.G.S. § 7B-906.1(a) (2021). In a termination of parental rights case, N.C.G.S. § 7B-1101.1(a) guarantees that "[t]he parent has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right." N.C.G.S. § 7B-1101.1(a) (2021). As to waiver of counsel by parents in cases in which the outcomes of permanency planning review hearings may result in termination of parental rights proceedings, this Court has adopted the standard that " '[a] finding that a defendant has forfeited the right to counsel' has been restricted to situations involving 'egregious dilatory or abusive conduct on the part of the [litigant].' " *In re K.M.W.*, 376 N.C. 195, 209 (2020) (alterations in original) (quoting *State v. Simpkins*, 373 N.C. 530, 541 (2020)). Furthermore, as we also noted in our decision in *In re K.M.W.*, "Rule 16 of the General Rules of Practice prohibits an attorney from withdrawing from his or her representation of a client in the absence of '(1) justifiable cause, (2) *reasonable notice to the client*, and (3) the permission of the court.' " *Id.* (emphasis added) (quoting N.C. Gen. R. Prac. Super. & Dist. Ct. 16). "[T]his 'general rule presupposes that an attorney's withdrawal has been properly investigated and authorized by the court,' so that '[w]here an attorney has given his client no prior notice of an intent to withdraw, the trial judge has no discretion [to allow withdrawal].' " *Id.* (second alteration in original) (quoting *Williams & Michael, P.A. v. Kennamer*, 71 N.C. App. 215, 516 (1984)). "Under no circumstances may an attorney of record be permitted to withdraw on the day of trial without first satisfying the court that he has given his client *prior* notice which is both specific and reasonable." *Williams & Michael, P.A.*, 71 N.C. App. at 216–17.

¶ 12 In *In re K.M.W.*, two children were removed from the care of their mother after the local department of social services (DSS) became involved with the parents after the agency received a report concerning

the alleged occurrence of domestic violence between the mother and her boyfriend in the presence of the children and the alleged administration of medicine to the children in order to get the children to sleep. *In re K.M.W.*, 376 N.C. at 196. DSS filed a petition alleging that the children were neglected juveniles, and the trial court determined that the children were neglected juveniles. *Id.* at 197. After a number of hearings in the matter which included permanency planning review hearings conducted in December 2017, May 2018, August 2018, and November 2018, the respondent-mother indicated to the trial court at a hearing conducted on 8 January 2019 that she wanted to waive her right to a court-appointed attorney in the pending termination of parental rights case and that she desired to hire her own counsel for the matter. *Id.* at 197–200. The court-appointed counsel continued to represent the respondent-mother in the underlying neglect proceeding, while on 9 January 2019 the trial court entered an order allowing the court-appointed attorney's 3 January 2019 motion to withdraw as the respondent-mother's counsel based upon the respondent-mother's articulated wish to privately retain an attorney to represent the respondent-mother in the termination proceeding. *Id.* at 199–200. After the fifth permanency planning review hearing which occurred on 16 April 2019, the trial court relieved the respondent-mother's court-appointed attorney of representation responsibilities in the underlying neglect case after counsel was present for the hearing and the respondent-mother was absent, and in light of the fact that the respondent-mother had not been in contact with her court-appointed attorney since 20 November 2018. *Id.* at 200. On 30 April 2019, the respondent-mother's privately retained counsel filed motions to withdraw as the respondent-mother's attorney in the termination of parental rights phase of the case. *Id.* at 201. We observed that "[a]lthough the withdrawal motions were served upon counsel for DSS, they do not appear to have been served upon respondent-mother." *Id.* During a hearing that transpired on 14 May 2019 in the absence of the respondent-mother, her privately retained counsel reported to the trial court that the respondent-mother had requested him to withdraw from the termination of parental rights proceedings and that he had been unable to secure the respondent-mother's presence for the hearing. *Id.* Without further inquiry, the trial court granted counsel's motion to withdraw. *Id.* The respondent-mother was subsequently served with the trial court's order which allowed the withdrawal of her attorney. *Id.* A termination of parental rights hearing was conducted on 11 June 2019; the respondent-mother arrived late for the proceedings, which began in her absence, and she represented herself. *Id.* at 201–02. Ultimately, the trial court announced in open court that grounds existed for the termination

of the respondent-mother's parental rights and that her parental rights would be terminated. *Id.* at 202. The trial court formalized these determinations in an order issued on 27 June 2019. *Id.* On appeal to this Court, the respondent-mother argued that the record in the case did not show that she had received any notice that her privately retained attorney would seek to withdraw from representing her. *Id.* We agreed with the respondent-mother that the trial court erred by allowing the motion to withdraw of the respondent-mother's privately retained attorney, as we reasoned, among several considerations, that

> [a] careful examination of the record . . . indicates that neither the certificate of service attached to [the respondent-mother's attorney's] withdrawal motion nor any related correspondence shows that respondent-mother was served with a copy of the withdrawal motion prior to the date upon which [the respondent-mother's attorney] was allowed to withdraw. On the contrary, the certificate of service attached to [the respondent-mother's attorney's] withdrawal motion appears to reflect that the only party upon whom that motion was served was DSS.

Id. at 211.

¶ 13 In the present case, just as in *In re K.M.W.*, respondent-father had the statutory right to counsel in this matter which resulted from his juvenile son Leon being taken into the nonsecure custody of DSS due to the trial court's determination of the child's status as a neglected juvenile and remained throughout the trial court's administration of permanency planning review hearings and the eventual termination of parental rights hearing. Since respondent-father refrained from maintaining consistent communication with DSS and with his court-appointed counsel in a manner similar to the respondent-mother's failure to stay in contact with her counsel in *In re K.M.W.*, respondent-father's conduct in this regard cannot be deemed to be so egregious, dilatory, or abusive here so as to constitute a waiver or forfeiture of counsel in light of the determination that the respondent-mother's inconsistent interaction with her counsel in *In re K.M.W.* did not rise to such a level. Based on the trial record in *In re K.M.W.*, the respondent-mother was not provided with reasonable notice that her privately retained attorney would request the trial court to relieve him from representation of the respondent-mother at the termination of parental rights hearing, after the trial court had excused the respondent-mother's court-appointed attorney from representing the parent in the pivotal underlying neglect proceedings. Likewise,

respondent-father in the instant case was not apprised in advance by his counsel that the attorney would pursue withdrawal from the case on the day of the 13 August 2020 permanency planning review hearing and the record is bereft of any such notice to respondent-father. In both *In re K.M.W.* and the case at bar, the trial court allowed the motion to withdraw of the parent's attorney, without prior notice to the parent being apparent from the trial record, on the same day of the hearing during which the attorney's motion to withdraw was formally considered by the trial court, in the absence of the affected parent who had a statutory right to counsel at the hearing at which the motion to withdraw was allowed and without further inquiry by the trial court appearing in the record. This confluence of salient circumstances between the two cases mandates reversal here.

¶ 14 Although this Court has decided the case of *In re T.A.M.*, 378 N.C. 64, 2021-NCSC-77, which presented issues similar to those which are found in the current case but compelled us to conclude that the trial court had the discretion to properly grant the motion of the parent's attorney to withdraw from representation, the differences between these cases regarding the critical concept of prior notice provide the important distinctions between them so as to justify their different outcomes. In *In re T.A.M.*, the local DSS filed a petition which alleged that the child Tam was a neglected juvenile based on reports that the respondent-mother and the respondent-father were engaged in activities of substance abuse, domestic violence, and criminal offenses involving controlled substances. *Id.* ¶¶ 2, 7. The trial court found that the juvenile Tam[2] was neglected after an adjudicatory hearing and the parents' stipulation that the petition's allegations were accurate. *Id.* ¶ 8. Subsequently, Tam was placed in the nonsecure custody of DSS by the trial court. *Id.* After the respondent-mother gave birth to the child Kam while the parents were still involved in trial proceedings relating to Tam, DSS filed a petition in which it was alleged that the newborn child was a neglected juvenile. *Id.* ¶¶ 11–12. The trial court issued an order which authorized DSS to obtain nonsecure custody of Kam. *Id.* ¶ 12. As they did with their child Tam, the parents stipulated to the existence of the allegations contained in the DSS petition regarding Kam, and the trial court found that Kam was a neglected juvenile. *Id.* ¶ 14. Permanency planning and review hearings were conducted in the case. *Id.* ¶¶ 15–16. Eventually, DSS filed petitions to terminate the parental rights of both parents. *Id.* ¶ 17. The respondent-father's whereabouts were unknown at the time

2. In *In re T.A.M.*, pseudonyms were used to protect the identity of the juveniles and to promote ease of reading.

of the filing of the termination petitions. *Id.* After the respondent-father was unsuccessfully given notice of the termination of parental rights proceedings by publication, the trial court granted the motion of the respondent-father's counsel to withdraw from representation of the respondent-father due to the parent's failure to maintain contact with his attorney. *Id.* Several months later, the respondent-father appeared in the matter, and the trial court therefore reappointed the same attorney to represent the respondent-father and continued the hearing until three-and-one-half months later. *Id.* Upon the arrival of the new date for the termination of parental rights hearing, counsel for the respondent-father filed another motion to withdraw based upon the respondent-father's lack of communication with his attorney, the attorney's inability to know the respondent-father's wishes regarding the case, and the attorney's resulting lack of ability to properly represent the respondent-father's interests at the termination hearing. *Id.* Without the presence of the respondent-father's counsel due to the trial court's allowance of the attorney's motion to withdraw, and in the absence of the respondent-father, the trial court conducted the termination of parental rights hearing and ultimately terminated the parental rights of both parents. *Id.* ¶ 18. Both parents appealed to this Court, with the respondent-father's arguments being germane to the case sub judice in light of his contention that the trial court erred in granting his counsel's motion to withdraw at the termination of parental rights hearing in light of the respondent-father's statutory right to counsel. *Id.* ¶¶ 18–19. In determining that the trial court did not abuse its discretion in *In re T.A.M.* to grant the motion to withdraw of the respondent-father's counsel—as opposed to the trial court's presumed exercise of discretion in the present case which it did not possess pursuant to *In re K.M.W.*—we emphasized the following indications of notice to the respondent-father which were given to the parent in *In re T.A.M.* regarding the potential withdrawal of counsel from representation which do not exist regarding the potential withdrawal of counsel from representation of respondent-father here:

> The trial court first advised respondent-father of his responsibility to attend all trial court hearings and maintain communication with his court appointed attorney at the first appearance hearing on DSS's juvenile petition of neglect for Tam held on 11 October 2016. Furthermore, the trial court advised respondent-father that if he failed to attend trial court hearings or failed to maintain communication with his attorney, his attorney "may ask and be permitted to withdraw as his attorney of record, and the

> case may proceed without him being represented by an attorney."
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> . . . The trial court advised respondent-father for a third time that it was "his responsibility to maintain contact with his appointed attorney and . . . to attend all [trial c]ourt hearings" and that if he failed to communicate or attend all trial court hearings, his attorney "may ask and be permitted to withdraw as his attorney of record, and the case may proceed without him being represented by an attorney."
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> . . . Counsel for respondent-father informed the trial court that she had spoken to respondent-father that day [of the 30 January 2020 session of the termination of parental rights hearing] and informed respondent-father that if he did not appear at the termination-of-parental-rights hearing, she "would need to withdraw and the case would proceed in his absence." The attorney also stated that respondent-father did not object to his attorney's withdrawal as counsel. The trial court then granted respondent-father's attorney's motion to withdraw.

Id. ¶¶ 22, 25, 27 (third and fourth alterations in original) (footnote omitted).

¶ 15 We summarized these circumstances in which the respondent-father in *In re T.A.M.* was given notice that his counsel might be allowed to withdraw from representation in the event that the respondent-father failed to remain in communication with his attorney throughout the proceedings as we recounted that "[t]he trial court advised respondent-father on three separate occasions that it was his responsibility to maintain contact with his attorney and attend all trial court hearings." *Id.* ¶ 29. In addition to the trial court's efforts in conveying notice to the respondent-father in *In re T.A.M.* about the prospects of the withdrawal of the parent's counsel from representation, the respondent-father's attorney also reinforced the potential of counsel's withdrawal with notice being given to the respondent-father that this could occur if the respondent-father failed to heed the trial court's admonitions on this subject. In further drawing the stark distinctions between the procedural facts of *In re T.A.M.*

and the present case with regard to the withdrawal-of-counsel issue, it is particularly noteworthy that in *In re T.A.M.*, the respondent-father's attorney spoke with the respondent-father on the day of the termination hearing prior to the beginning of the hearing and directly informed the parent that counsel would need to withdraw from the case and the termination hearing would occur in the absence of the respondent-father if the respondent-father was not present for it. On the other hand, respondent-father's court-appointed attorney in the present case—as well as the privately retained attorney for the respondent-mother in *In re K.M.W.*—did not provide prior notice to the parent who had a statutory right to counsel that the attorney would seek to withdraw from representation at the hearing at which the parent had the statutory right to counsel. Furthermore, in both the present case and in *In re K.M.W.*, as opposed to *In re T.A.M.*, the trial court did not engage in further inquiry or expressly provide notice to the affected parent prior to the trial court granting the motion to withdraw from representation by counsel for the parent.

¶ 16 This Court stresses, as we similarly underscored in *In re T.A.M.*, that "such cases as these are fact-specific and hence dependent on the unique facts of any given case." *Id.* ¶ 30. Even with the differing outcomes of *In re K.M.W.*, *In re T.A.M.*, and the case at bar as a result of the varying facts which are singular to each case, the principle which is consistently implemented in, and commonly shown by, all of them is that "the trial court's discretion [to allow a respondent-parent's counsel to withdraw from representation] only comes into play when the parent has been provided adequate notice of counsel's intent to seek leave of court to withdraw and the trial court has adequately inquired into the basis for counsel's withdrawal motion." *Id.* ¶ 28 (quoting *In re K.M.W.*, 376 N.C. at 211). Completely absent from the record in the present case is any indication of notice to respondent-father from his counsel that the attorney was seeking to withdraw, any indication on the part of respondent-father's counsel that reasonable efforts were made by the attorney to provide notice of counsel's intention to withdraw, or any inquiry conducted by the trial court regarding the basis for the motion to withdraw of respondent-father's counsel. These circumstances require both a reversal of the trial court's order which allowed respondent-father's counsel to withdraw from representation and a remand of the case to the trial court in order to reconstitute the permanency planning review hearing originally held on 13 August 2020 at which the trial court erroneously permitted respondent-father's counsel to withdraw and where the trial court shall reconsider the propriety of ongoing reunification efforts for the juvenile Leon and respondent-father.

¶ 17 In light of our conclusion in *In re K.M.W.*, which was expressly based on the unequivocal premises espoused in the Court of Appeals case of *Williams & Michael, P.A.* and the governance of Rule 16 of the General Rules of Practice, we determine in the present case—consistent with the outcome in *In re K.M.W.*—that the trial court erred in allowing counsel for respondent-father to withdraw from representation without proper notice evident in the record of the attorney's intent to withdraw as counsel and without making further inquiry about the circumstances regarding the motion, in the absence of respondent-father at a hearing at which he had a statutory right to counsel, had not waived or forfeited counsel, and consequently did not have counsel to represent his parental interests.

III. Conclusion

¶ 18 Based upon the foregoing reasoning, we reverse the trial court's 13 August 2020 order allowing respondent-father's counsel to withdraw, reverse the trial court's 22 September 2020 order eliminating reunification as the case's permanent plan, and remand the case to the trial court for further proceedings not inconsistent with this opinion. Upon remand, the trial court is to determine respondent-father's eligibility for court-appointed counsel, appoint counsel for respondent-father if the parent is entitled to court-appointed counsel, and reconstitute the permanency planning review hearing which was originally conducted on 13 August 2020. In the event that the trial court determines upon remand that reunification efforts were properly ceased on 13 August 2020, then the trial court shall enter an order to that effect and the trial court's order which terminated the parental rights of respondent-father shall remain undisturbed. In the event that the trial court determines upon remand, after respondent-father's exercise or waiver of his statutory right to counsel, that reunification efforts were improperly ceased on 13 August 2020, then the trial court shall enter an order to that effect and the trial court's order which terminated the parental rights of respondent-father shall be vacated, without prejudice to DSS to pursue further proceedings.

REVERSED AND REMANDED.

Justice BERGER dissenting.

¶ 19 Because the trial court's order allowing withdrawal of counsel should be affirmed, as should the order eliminating reunification as the permanent plan, I respectfully dissent.

I. Withdrawal of Counsel

¶ 20 Parents have a statutory right to counsel in cases when the parent is named in a juvenile petition alleging abuse, neglect, or dependency. N.C.G.S. § 7B-602(a) (2021). Respondent-father was served with the juvenile petition on June 24, 2019, and it is undisputed that counsel was appointed for him on June 27, 2019.[1] However, from the time of counsel's appointment until the motion to withdraw was allowed on August 13, 2020, respondent-father failed to contact his counsel, failed to appear at any hearing, and failed to work with the department to have a role in his child's life despite having been served with the petition.

¶ 21 As this Court recently stated, "[a] parent, by repeatedly failing to communicate with appointed counsel, by failing to attend numerous hearings, and by admittedly avoiding receiving mail and other communications from [the department] and other interested parties," should not be permitted to "successfully manipulate the judicial system to seriously delay [ ] termination of parental rights proceeding[s]." *In re T.A.M.*, 378 N.C. 64, 2021-NCSC-77, ¶ 31. Sanctioning obstructive and dilatory tactics by uninterested parents "impair[s] judicial efficiency and drain[s] already scarce judicial resources, while thwarting the over-arching North Carolina policy to find permanency for the juvenile at the earliest possible age." *Id.*; *see also* N.C.G.S. § 7B-1100(2) (2021).

¶ 22 Here, respondent-father was served with a petition alleging that L.Z.S. was a neglected juvenile because he did not receive proper care,

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1. Although unclear from the record, it appears that attorney Brandon Belcher initially may have been appointed as provisional counsel as he was allowed to withdraw at the June 27, 2019 hearing. There is no order of appointment concerning Mr. Belcher in the record, and the trial court's order allowing Mr. Belcher's withdrawal has a blank in which the trial court should have listed the grounds for withdrawal, but that blank was not completed.

Attorney Preston Tyndall appears to have been appointed following Mr. Belcher's withdrawal. However, Mr. Tyndall's motion to withdraw states that he was appointed as provisional counsel, even though the notice of appointment does not designate that Mr. Tyndall was appointed as provisional counsel. Given the lack of clarity in the record, remand to the trial court for additional findings may be appropriate because if Mr. Tyndall was indeed provisional counsel, this issue may be controlled by the plain language of N.C.G.S. § 7B-602. *See* N.C.G.S. § 7B-602(a) (2021) ("[T]he court shall dismiss the provisional counsel if the respondent parent . . . [d]oes not appear at the hearing . . . .").

I also note that reliance on Rule 16 of the General Rules of Practice as in *In re K.M.W.*, 376 N.C. 195, 851 S.E.2d 849 (2020), is misplaced as it relates to provisional counsel because the rule requiring notice contradicts the plain language of the statute. Even if Rule 16 was applicable, the record contains no transcript of the hearing on the motion to withdraw such that we are able to discern what efforts were made by counsel to contact respondent-father. Remand, again, may be appropriate for additional findings on this issue.

supervision, or discipline. Despite service of the petition and, therefore, knowledge of the proceedings affecting his rights as a parent, respondent-father did not appear at the permanency planning hearings that occurred in February and June 2020 prior to filing of the motion to withdraw. Nor was respondent-father present on August 13, 2020, when the motion to withdraw was allowed by the trial court. In his motion to withdraw, respondent-father's attorney noted that respondent-father had failed to appear at any hearing since his release from prison in December 2019 and had never contacted his attorney. Further, the record is replete with findings that respondent-father failed to contact the department and failed to provide an address even after the department's numerous attempts to establish contact with him.

¶ 23 Consistent with our holding in *In re T.A.M.*, and because "a lawyer cannot properly represent a client with whom he has no contact," *Dunkley v. Shoemate*, 350 N.C. 573, 578, 515 S.E.2d 442, 445 (1999), the trial court did not err when it allowed counsel to withdraw.

II. Sufficiency of Findings to Eliminate Reunification

¶ 24 This Court will review a permanency planning review order to determine " 'whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusions of law.' The trial court's findings of fact are conclusive on appeal if supported by any competent evidence." *In re A.P.W.*, 378 N.C. 405, 2021-NCSC-93, ¶ 14 (alteration in original) (quoting *In re H.A.J.*, 377 N.C. 43, 2021-NCSC-26, ¶ 14). Further, "uncontested findings are binding on appeal." *Id.* ¶ 14.

¶ 25 This Court may take the findings from the order eliminating reunification as the permanent plan together with the order terminating parental rights in determining whether the findings suffice. *In re A.P.W.*, ¶ 16. This Court considers both orders together. *Id.*

¶ 26 "At any permanency planning hearing pursuant to [N.C.]G.S. [§] 7B-906.1, the court shall adopt one or more . . . permanent plans the court finds is in the juvenile's best interest." N.C.G.S. § 7B-906.2(a) (2021). "Reunification shall be a primary or secondary plan unless the court made written findings under . . . [N.C.]G.S. [§] 7B-906.1(d)(3) . . . or 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). Pursuant to N.C.G.S. § 7B-906.1(d), the trial court must "make written findings regarding . . . [w]hether efforts to reunite the juvenile with either parent clearly would be unsuccessful or inconsistent with the juvenile's health or safety and need for a

safe, permanent home within a reasonable period of time." N.C.G.S. § 7B-906.1(d) (2021).

¶ 27 To assess reunification as part of the child's permanent plan, the trial court must do the following:

> make written findings as to each of the following, which shall demonstrate the degree of success or failure toward reunification:
>
> (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.

N.C.G.S. § 7B-906.2(d).

¶ 28 As this Court recognized in *In re L.E.W.*,

> [a]lthough "use of the actual statutory language [is] the best practice, the statute does not demand a verbatim recitation of its language." Instead, "the order must make clear that the trial court considered the evidence in light of whether reunification would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time."

375 N.C. 124, 129–30, 846 S.E.2d 460, 465 (2020) (citations omitted). The trial court need only use language "sufficient to invoke th[e] statutory provision." *See In re L.N.H.*, 2022-NCSC-109, ¶ 31 (citing *In re A.P.W.*, ¶ 20). Thus, in making these findings, the trial court "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).

¶ 29 Respondent-father does not contest the trial court's findings of fact related to elimination of reunification as a permanent plan, and therefore, the findings are binding on appeal. The only question for consideration

on this issue is whether the trial court's findings of fact support the conclusions of law. Here, the trial court made the following relevant findings of fact in the September 22, 2020 permanency planning order:

> 7. [Respondent-father] is the biological father of the minor child. His last known address is c/o Columbus County Correctional facility, however, he was released on December 21, 2019, and his current address is unknown . . . . Upon information and belief, [respondent-father] is residing in the State of Virginia. [Respondent-father] was served with the juvenile petition by personal service by the Columbus County Sheriff Department on June 24, 2019.
>
> . . . .
>
> 42. Upon his release, [respondent-father] did not contact the Department or provide the Department with a current address. The Department has made numerous attempts to establish contact [with respondent-father] and, in an effort to talk with him, has also spoken with his father, who advised that [respondent-father] is not residing with him. . . . [T]he Department also spoke with [respondent-father] via Facebook. On February 10, 2020, the Department spoke with him to remind him of CFT. [Respondent-father] continued to be unable to provide the Department with his address but asserted that he would attend the upcoming meeting. He did not engage further with staff and hung up. To date, [respondent-father] has still not provided the Department with a current address.
>
> 43. The Department has made repeated attempts to contact [respondent-father] in reference to a home study and Out-of-Home service agreement being completed. On April 28, 2020, the Department spoke with [respondent-father] to inform him of the upcoming CFT on May 6, 2020, which he attended via phone call. During the CFT, [respondent-father] expressed that he wants his son back and he feels that if he was out of jail, none of this would have happened. [Respondent-father] informed the Department that he has been working for a construction company in Virginia, but due to COVID he does not work as much

. . . . When asked if he provides anything for [Leon] he responded “no.” [Respondent-father] became very upset with the facilitator saying “don’t disrespect me” and “I’m grown just like you;” and then hung up. No further information regarding employment for [respondent-father] has been received.

44. After the CFT on May 6, 2020, the Department followed up with [respondent-father] to discuss being a placement provider for [Leon]. [Respondent-father] maintained that he would have to check with his grandmother. He did not provide an address and indicated he would call back after he spoke with his grandmother. On June 1, 2020, the Department again followed up with [respondent-father] in regards to his involvement with the Department and [Leon]. [Respondent-father] advised that he was in the process of moving again and trying to find his own place. He continues to not provide his address to the Department.

. . . .

48. With regard to the criminal history of [respondent-father], he was convicted of possession of [a firearm] by a felon and incarcerated in Columbus County Correctional Institute. [Respondent-father] has previous convictions of discharge of [a firearm], trespassing, and resisting officer. His scheduled release date was postponed due to pending infractions and the North Carolina Department of Public Safety website reflects he was released on December 21, 2019.

. . . .

60. That the [trial c]ourt finds that conditions which led to the filing of the petition continue to exist; and that the return of the child . . . to the custody of either parent would be contrary to the welfare of said child at this time.

. . . .

61: Pursuant to [N.C.G.S. § 7B-507]:

. . . .

> 2. The Chowan County Department of Social Services should no longer be required to make reasonable efforts in this matter to reunify the child . . . with [respondent-]father . . . as those efforts would clearly be futile or would be inconsistent with the child's health and safety, and need for a safe, permanent home within a reasonable period of time.

¶ 30 As noted above, this Court takes the findings from the permanency planning orders together with those from the termination of parental rights orders. In the termination of parental rights pre-trial and adjudication order from March 26, 2021, the court made the following relevant findings of fact:

> 30. On December 20, 2019, [respondent-father] was released from Columbus County Correctional facility. Upon his release, he did not contact the Department to provide an[ ] updated address[ ] and phone number. The Department made contact with the prison to obtain his reported address and phone number upon his release.
>
> . . . .
>
> 34. [Respondent-father] is and was aware that his child was and is in the custody of the Chowan County Department of Social Services, of his current placement, and has failed to participate in this case, has not made inquiry as to [Leon]'s health/welfare, nor sent any letters/cards/gifts for [Leon], has not attended one court date prior to this termination proceeding; engaged in child support in January 2021 after this matter was filed and set for hearing.
>
> . . . .
>
> 36. [Respondent-father] refused to engage and participate with the Department. He did not provide an address to the Department . . . . He did not request the Department assess his residence for placement. All the contact [respondent-father] had with the Department was initiated by the Department.
>
> 37. [Respondent-father] only attended one PPAT meeting after being released from prison in December

2019 although he could have continued to do so virtually or in person.

38. [Respondent-father] expressed a desire to visit his son and arrange for a placement for his son, but he never submitted to a case plan, service plan, a visitation plan or requested the Department to assess his residence for placement.

39. [Respondent-father] has provided no love, nurturance, or care for the minor child and has failed to exhibit any interest in the welfare of the minor child.

40. Though duly notified of [c]ourt proceedings, [respondent-father], has provided no love, nurturance, or care for the minor child and has failed to exhibit any interest in the welfare of the minor child; has failed to engage with the Department and work toward reunification; has failed to participate in the [c]ourt process, all of which reflect a pattern consistent with willful or intentional conduct that evinces a settled purpose to forego all parental duties with regard to the minor child. In light of the evidence of the child being in custody for 16 months and based on the pattern of willful or intentional conduct that evinces a settled purpose to forego all parental duties with regard to the minor child regarding [respondent-father], the [c]ourt finds this is sufficient to establish the abandonment ground exists at the time of hearing.

41. There is a substantial risk of physical, mental, or emotional impairment of the juvenile as a consequence of the actions of [respondent-]father and the failure by [respondent-]father to provide proper care, supervision or discipline.

42. [Respondent-father] has made insufficient progress as to a change in condition in that he has failed to fully engage with the Department and work toward reunification; and he has failed to engage in contact/visits with his child, all of which reflect a pattern consistent with the neglect of the child. Thus, there is a strong probability of repetition of neglect if the child were returned to his care. In light of the evidence of the child being in custody for sixteen

months, and [respondent-]father's conduct and failure to make any progress in a reasonable amount of time; and based on the high probability of repetition of neglect and pattern of neglect regarding [respondent-father], the [c]ourt finds this is sufficient to establish the neglect ground exists at the time of hearing.

43. In October 2019, a referral was made by Chowan County Department of Social Services to Child Support Enforcement (CSE) for [respondent-father] to pay monthly child support [for Leon]. Although [respondent-father] asserts that he has been employed for periods of time since his release from prison in December 2019, he did not engage in child support until January 2021.

44. In October 2020, CSE filed a complaint for child support and made multiple service attempts on [respondent-father]. CSE had made several calls and left messages with [respondent-father] where he promised to come to the office but never appeared at the agreed upon times. During the contacts with CSE [respondent-father] did not provide an updated address for service or further contact.

45. On November 4, 2020, CSE sent a letter to [respondent-father] at his last known address . . . and advised him to contact the agency. CSE was unable to serve [respondent-father] until after [respondent-father] finally provided his Elizabeth City address to the Department in December 2020.

46. Prior to the filing of the petition for termination of parent[al] rights [respondent-father] had paid $0.00 towards the cost of care for [Leon].

47. On January 8, 2021 [respondent-father] signed a Voluntary Support Agreement stating that he will pay $50.00 a month and $10.00 towards his arrears beginning on February 1, 2021. To date [respondent-father] has paid $120.00, on February 10, 2021.

. . . .

49. [Respondent-father] is healthy; has been under no disability that would prevent him from

> working; has a duty of care and support of his child; and has had the ability to pay support for [Leon] in an amount greater than $0.00.

¶ 31 While the exact statutory language was not used, these findings satisfy the statutory requirements of N.C.G.S. § 7B-906.2(b) and (d)(1) through (4). *See In re L.M.T.*, 367 N.C. at 168, 752 S.E.2d at 455 (explaining that the trial court "must address the statute's concerns[ ] but need not quote its exact language"). The findings satisfied N.C.G.S. § 7B-906.2(b) as they clearly demonstrate that "reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety," and, as determined by the trial court in the permanency planning order, that efforts to reunify the child with respondent-father "would clearly be futile or would be inconsistent with the child's health and safety."

¶ 32 Turning next to the required findings under subsection 7B-906.2(d)(1), which requires the trial court to make written findings on "[w]hether the parent is making adequate progress within a reasonable period of time under the plan," the trial court detailed the department's attempts to contact respondent-father to no avail in its findings in the permanency planning order and found that "conditions which led to the filing of the petition continue to exist," further indicating a lack of progress. In addition, the trial court specifically found in the termination of parental rights order that "[respondent-father] has made insufficient progress as to a change in condition" and noted that the child had been in custody for sixteen months and respondent-father had "fail[ed] to make any progress in a reasonable amount of time."

¶ 33 In making the required findings under subsection 7B-906.2(d)(2) on "[w]hether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile," the trial court found in the permanency planning order that despite the repeated attempts of the department to contact respondent-father, respondent-father often could not be reached, displaying a lack of participation. Further, the trial court cited numerous examples in the termination of parental rights order that respondent-father had failed to participate with the plan and the department, finding that "[respondent-father] refused to engage and participate with the Department[,] [h]e did not provide an address to the Department," and "he never submitted to a case plan, service plan, . . . visitation plan[,] or requested the Department to assess his residence for placement."

¶ 34 Additionally, with regard to the required findings under subsection 7B-906.2(d)(3) concerning "[w]hether the parent remains available to the

court, the department, and the guardian ad litem for the juvenile," the trial court found in the permanency planning order that the department was unable to establish contact with respondent-father despite "numerous attempts" and that respondent-father "continued to be unable to provide the Department with his address."

¶ 35 Finally, pursuant to subsection 7B-906.2(d)(4), the trial court found in its permanency planning order that efforts to reunify Leon with respondent-father "would clearly be futile or would be inconsistent with the child's health and safety." The trial court included in its findings that respondent-father had a criminal history and found that the conditions which led to the filing of the petition to adjudicate Leon as a neglected juvenile "continue to exist."

¶ 36 The trial court also found in its termination of parental rights order that respondent-father had provided "no love, nurturance, or care . . . and has failed to exhibit any interest in the welfare of the minor child." Further, the trial court found that respondent-father exhibited "a pattern consistent with willful or intentional conduct that evinces a settled purpose to forego all parental duties with regard to the minor child" and that "[t]here is a substantial risk of physical, mental, or emotional impairment of the juvenile as a consequence of the actions of [respondent-]father." The trial court also found that respondent-father failed to maintain his child support obligations.

¶ 37 Even though the findings did not use the exact statutory language, these were sufficient to satisfy N.C.G.S. § 7B-906.2(b) and (d)(1) through (4), and the trial court's findings supported its conclusion that elimination of reunification was appropriate.

¶ 38 For the reasons stated herein, I would affirm the trial court's order allowing withdrawal of counsel and its order eliminating reunification as the permanent plan.

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

IN THE MATTER OF Q.J.

No. 309A21

Filed 16 December 2022

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 278 N.C. App. 452, 2021-NCCOA-346, affirming an involuntary commitment order entered on 17 January 2020 by Judge Pat Evans in District Court, Durham County. Heard in the Supreme Court on 20 September 2022.

Glenn Gerding, Appellate Defender, by Katy Dickinson-Schultz, Assistant Appellate Defender, for respondent-appellant.

Joshua H. Stein, Attorney General, by South A. Moore, General Counsel Fellow and James W. Doggett, Deputy Solicitor General, for the State-appellee.

Disability Rights North Carolina by Lisa Grafstein, Holly Stiles, and Elizabeth Myerholtz, for Disability Rights North Carolina, National Association of Social Workers,[1] Promise Resource Network, and Peer Voice NC, amici curiae.

PER CURIAM.

¶ 1 For the reasons stated in *In re J.R.*, 2022-NCSC-127, the decision of the Court of Appeals is affirmed.

AFFIRMED.

Justices HUDSON, MORGAN, and EARLS dissent for the reasons stated in Justice Earls' dissenting opinion in *In re J.R.*, 2022-NCSC-127.

1. This listing includes the North Carolina Chapter of this organization.

IN THE MATTER OF R.S.H.

No. 317A21

Filed 16 December 2022

1. Mental Illness—involuntary commitment—private facility —no counsel for petitioner—trial court questioning witnesses—due process

In a bench trial on an involuntary commitment petition filed by a private medical facility, for the reasons stated in *In re J.R.*, 383 N.C. 273 (2022), respondent's due process right to an impartial tribunal was not violated when the trial court proceeded with the hearing even though the petitioning physician was not represented by counsel.

2. Appeal and Error—preservation of issues—no opportunity to object—trial court acting on own motion—incorporation of report into findings

Respondent's challenge to the trial court's incorporation of a non-testifying physician's examination report into the findings of facts in its involuntary commitment order was preserved for appeal because the trial court acted on its own motion without informing the parties and respondent had no opportunity to object.

3. Mental Illness—involuntary commitment—right to confront witnesses—non-testifying physician's report—prejudice analysis

In an involuntary commitment matter, although the trial court violated respondent's right to confront witnesses by incorporating a non-testifying physician's report into its findings of fact after the hearing concluded, the error was not prejudicial because the trial court's remaining findings were supported by a testifying physician's testimony, and those findings supported the trial court's conclusion that respondent was dangerous to herself.

Justice EARLS concurring in part and dissenting in part.

Justices HUDSON and MORGAN join in this opinion concurring in part and dissenting in part.

Appeal pursuant to N.C.G.S. § 7A-30(2) from an unpublished decision of a divided panel of the Court of Appeals, 278 N.C. App. 605, 2021-NCCOA-369, affirming an involuntary commitment order entered

on 19 June 2020 by Judge Pat Evans in District Court, Durham County. On 29 October 2021, the Supreme Court allowed respondent's petition for discretionary review as to additional issues. On 21 July 2022, this Court allowed the motion of respondent in *In re J.R.*, 2022-NCSC-127, to consolidate these cases for oral argument. Heard in the Supreme Court on 20 September 2022.

Glenn Gerding, Appellate Defender, by Candace Washington, Assistant Appellate Defender, for respondent-appellant.

Joshua H. Stein, Attorney General, by South A. Moore, General Counsel Fellow, and James W. Doggett, Deputy Solicitor General, for the State.

Disability Rights North Carolina, by Lisa Grafstein, Holly Stiles, and Elizabeth Myerholtz for Disability Rights North Carolina, National Association of Social Workers, Promise Resource Network, and Peer Voice North Carolina, amicus curiae.

NEWBY, Chief Justice.

¶ 1 **[1]** In this case we first consider whether the trial court violated respondent's due process rights by proceeding with respondent's involuntary commitment hearing when petitioner was not represented by counsel. For the reasons stated in the majority opinion in *In re J.R.*, 2022-NCSC-127, we conclude the trial court did not violate respondent's due process rights.[1]

¶ 2 Next respondent asks us to consider whether she preserved her right to challenge the trial court's incorporation of a non-testifying physician's examination report into its findings of fact and whether, by doing so, the trial court violated respondent's confrontation rights. If we hold that respondent's challenge is preserved and that the trial court

1. On 15 November 2021, *In re J.R.*, 313A21, was designated as the lead case in six overlapping appeals. *See In re E.M.D.Y.*, 279A21; *In re C.G.*, 308A21; *In re Q.J.*, 309A21; *In re C.G.F.*, 312A21; *In re J.R.*, 313A21; *In re R.S.H.*, 317A21. The question presented to this Court in all six appeals was whether the trial court violated respondents' due process right to an impartial tribunal. The due process issue in each of these cases came to this Court by right of appeal based upon a dissent. On 21 July 2022, the cases were consolidated for oral argument on this issue and heard in the Supreme Court on 20 September 2022. Because we resolve the due process issue based upon our holding in the lead case, that issue is not further discussed herein.

committed error by incorporating the report, we also consider whether the trial court's remaining findings of fact, absent those derived from the non-testifying physician's report, were sufficient to support the trial court's involuntary commitment order. Upon considering the testimony of respondent's treating physician and incorporating an examination report from a non-testifying physician, the trial court ordered that respondent be involuntarily committed for up to thirty days. Because respondent preserved her confrontation argument and was not afforded an opportunity to challenge the inclusion of the non-testifying physician's report, the trial court erred in incorporating the report into its findings of fact. The trial court's recorded factual findings, however, are based on competent evidence from the testifying physician and are sufficient to support the trial court's conclusion that respondent is dangerous to herself. As such, the error is not prejudicial, and the commitment order is affirmed.

¶ 3 On 21 May 2020, respondent was taken to Duke University Hospital "for evaluation of command auditory hallucinations to commit suicide." Carolyn Usanis, M.D. examined respondent and observed her "laughing and talking to herself . . . [and] crying uncontrollably." Dr. Usanis also reported that respondent informed her that "voices [were] saying mean things to her." Dr. Usanis completed a commitment report and petitioned for respondent's involuntary commitment. The next day, Sarah Kirk, M.D. examined respondent, completed a second commitment report, and also recommended that respondent be involuntarily committed.

¶ 4 On 19 June 2020, the trial court held an involuntary commitment hearing. Sandra Brown, M.D., respondent's treating psychiatrist at Duke University Hospital, testified at the hearing. Dr. Brown explained that respondent "has a long[-]standing history of schizoaffective disorder" and has "spent a lot of time in these psychotic states." Based on respondent's previous admissions to Duke, Dr. Brown noted that respondent generally "takes a long time to recover" and to "respond to medication." Dr. Brown testified that in her current psychotic state, respondent was "talking about hearing voices telling her to kill herself," could be "seen running around the unit screaming," told doctors "that she does not think she needs any more treatment," and "ha[d] not really gotten better as quickly as we had hoped." Dr. Brown testified that this behavior "is a pretty typical presentation from [respondent]." As such, Dr. Brown recommended that respondent be committed for thirty days.

¶ 5 At the close of the hearing, the trial court concluded that respondent was mentally ill and dangerous to herself. The trial court made the following findings of fact:

> Respondent has told staff (Dr.) she does not need medication
>
> [Respondent] continues to hear voices and states she wants to kill herself
>
> [Respondent] has been diagnosed since age 18 with affective schizodisorder
>
> [Respondent] has history of non-compliance with meds
>
> [Respondent] is unable to have rational discussions w[ith] team about treatment/discharge
>
> [Respondent] runs on Unit screaming constantly
>
> [Respondent] shows no sign of improvement; meds are being changed (adjusted)/requires supervision

¶ 6 After the hearing concluded, the trial court incorporated the findings from Dr. Kirk's second examination report into the commitment order. Dr. Kirk did not testify, however, and her report was not offered or admitted into evidence during the hearing. Dr. Kirk's report included the following findings:

> [Respondent] presents with auditory hallucinations that are commanding her to kill herself. She has several plans for how she could kill herself including electrocution in a bath tub with a hair dryer and cutting her wrists with a knife and has access to these means at home. Her symptoms are consistent with acute psychosis[.] [S]he is currently too disorganized in her mental illness to care for herself and her command auditory hallucinations put her at serious, imminent risk of harm to self outside of the secure environment of the hospital.

¶ 7 The trial court ordered that respondent be involuntarily committed for up to thirty days. Respondent appealed.

¶ 8 On appeal, respondent argued, in relevant part, that (1) the trial court violated her right to confrontation by incorporating the report of a non-testifying commitment physician and (2) the remaining findings of fact were insufficient to support the conclusion that she is dangerous to herself.[2] The Court of Appeals affirmed the commitment order.

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2. As previously discussed, the due process issue arising from an appeal of right is resolved based on our decision in *In re J.R.*, 2022-NCSC-127. Thus, for purposes of this opinion, we discuss only the additional issues.

The Court of Appeals recognized that respondent's "right to confront and cross-examine witnesses may not be denied" but held that respondent did not preserve her confrontation argument because she "failed to object appropriately at the hearing" to the incorporation of Dr. Kirk's report. *In re R.S.H.*, 278 N.C. App. 605, 2021-NCCOA-369, ¶ 9 (unpublished). Nevertheless, even if respondent's confrontation argument had been preserved and it were error, the Court of Appeals concluded that the unchallenged findings, based on the testimony of the witness at the hearing, were sufficient to support the commitment order. *Id.* ¶ 10.

¶ 9 Respondent petitioned this Court to consider (1) whether respondent failed to preserve her argument that incorporating the report of a non-testifying physician violated her confrontation right and (2) whether the trial court's remaining findings were sufficient to support its commitment order. This Court granted respondent's petition.

¶ 10 **[2]** We first determine whether respondent failed to preserve her confrontation argument by not objecting to incorporation of Dr. Kirk's report into the trial court's commitment order. "[T]o preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make . . . ." N.C. R. App. P. 10(a)(1). A party does not fail to preserve an issue for appellate review, however, where the trial court acts on its own motion without prior notice and thereby denies the party the opportunity to object. *Cf. State v. Lachat*, 317 N.C. 73, 86, 343 S.E.2d 872, 879 (1986) (concluding that the defendant was not required to go through the formality of objecting when declarations of mistrials were entered on the trial court's own motion and without prior notice or warning to the defendant).

¶ 11 Here respondent did not fail to preserve her confrontation argument. The trial court acted on its own motion without informing the parties of its intention to incorporate Dr. Kirk's report into the commitment order. After the close of the hearing, the trial court incorporated Dr. Kirk's report by merely checking a box on the Involuntary Commitment Order form. Accordingly, respondent did not have an opportunity to preserve the issue for appellate review.

¶ 12 **[3]** Relatedly, we next consider whether the trial court violated respondent's confrontation right by incorporating Dr. Kirk's report into its findings of fact. This Court reviews decisions of the Court of Appeals for legal error. *State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994). Questions of law are reviewed de novo. *See State v. Thomsen*, 369 N.C. 22, 24, 789 S.E.2d 639, 641 (2016).

¶ 13 Subsection 122C-268(f) provides that "[c]ertified copies of reports and findings of commitment examiners and previous and current medical records are admissible in evidence, but the *respondent's right to confront and cross-examine witnesses may not be denied.*" N.C.G.S. § 122C-268(f) (2021) (emphasis added). As such, a respondent must "be apprised of all the evidence received by the court and given an opportunity to test, explain, or rebut it." *In re Gupton*, 238 N.C. 303, 304, 77 S.E.2d 716, 717–18 (1953); *see In re Wilson*, 257 N.C. 593, 596–97, 126 S.E.2d 489, 492 (1962) (reversing a commitment order when the respondent was denied notice of a hearing on and the opportunity to challenge findings from her medical records that were used as the basis for her commitment).

¶ 14 Here the trial court incorporated Dr. Kirk's report after the hearing concluded. Dr. Kirk did not testify at the hearing; the report was not formally offered or admitted into evidence; and the trial court did not inform respondent that it was incorporating the report into its findings of fact. Accordingly, respondent could not cross-examine Dr. Kirk, challenge the findings in the report, or otherwise assert her confrontation right. The trial court thus violated respondent's confrontation right by incorporating Dr. Kirk's report into its findings of fact.

¶ 15 Incorporation of Dr. Kirk's report was not prejudicial, however, because the trial court's written findings of fact are supported by Dr. Brown's testimony and are sufficient to support the trial court's conclusion that respondent is a danger to herself. An error is not prejudicial unless a respondent demonstrates "that a different result would have likely ensued had the error not occurred." *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 271, 302 S.E.2d 204, 214 (1983). For involuntary commitment orders, the erroneous incorporation of an examination report is not prejudicial if the trial court's remaining factual findings, based on competent evidence, support its ultimate finding that the statutory criteria for commitment have been met. *See generally In re Moore*, 234 N.C. App. 37, 42–45, 758 S.E.2d 33, 37–38 (citing *In re Hogan*, 32 N.C. App. 429, 433, 232 S.E.2d 492, 494 (1977)), *disc. rev. denied*, 367 N.C. 527, 762 S.E.2d 202 (2014).

¶ 16 "To support an inpatient commitment order, the court shall find by clear, cogent, and convincing evidence that the respondent is mentally ill and dangerous to self . . . ." N.C.G.S. § 122C-268(j) (2021). An individual is a danger to herself if she has acted in a way that shows all of the following:

> I. The individual would be unable, without care, supervision, and the continued assistance of others

> not otherwise available, to exercise self-control, judgment, and discretion in the conduct of the individual's daily responsibilities and social relations, or to satisfy the individual's need for nourishment, personal or medical care, shelter, or self-protection and safety.
>
> II. There is a reasonable probability of the individual's suffering serious physical debilitation within the near future unless adequate treatment is given pursuant to this Chapter. A showing of behavior that is grossly irrational[or] of actions that the individual is unable to control . . . shall create a prima facie inference that the individual is unable to care for himself or herself.

N.C.G.S. § 122C-3(11)(a)(1) (2021).

¶ 17 Thus, the trial court must make findings that address both respondent's current inability to care for herself and the probability that respondent would suffer serious physical debilitation in the future without treatment. To satisfy the second prong, the trial court's findings must simply "*indicate* that respondent is a danger to [her]self in the future." *See In re Moore*, 234 N.C. App. at 44–45, 758 S.E.2d at 38 (emphasis added). While the trial court "must draw a nexus between past conduct and future danger" it "need not say the magic words 'reasonable probability of future harm.' " *In re J.P.S.*, 264 N.C. App. 58, 63, 823 S.E.2d 917, 921 (2019) (citing *In re Whatley*, 224 N.C. App. 267, 273, 736 S.E.2d 527, 531 (2012)).

¶ 18 Respondent contends that the trial court's factual findings, absent Dr. Kirk's report, were insufficient to support its conclusion that respondent is a danger to herself. According to respondent, the trial court failed to make forward-looking findings demonstrating a reasonable probability that respondent would suffer serious physical debilitation in the near future under N.C.G.S. § 122C-3(11)(a)(1)(II).[3]

¶ 19 Appellate review of a commitment order "is limited to determining '(1) whether the court's ultimate findings are indeed supported by the "facts" which the court recorded in its order as supporting its findings,

3. Respondent does not challenge the trial court's finding that she is unable to care for herself under sub-subdivision I. Accordingly, that finding is binding on appeal. *See In re Moore*, 234 N.C. App. at 43, 758 S.E.2d at 37 (citing *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984)).

and (2) whether in any event there was competent evidence to support the court's findings.' " *In re Moore*, 234 N.C. App. at 42–43, 758 S.E.2d at 37 (quoting *In re Hogan*, 32 N.C. App. at 433, 232 S.E.2d at 494).

¶ 20 The trial court's findings of fact, based on Dr. Brown's testimony, indicate that respondent is a danger to herself in the near future. The trial court found that respondent was suicidal, "continues to hear voices," "shows no signs of improvement," and "requires supervision." Such findings are supported by competent evidence. Dr. Brown testified that respondent was "talking about hearing voices telling her to kill herself" and was "feeling like she can't take it anymore and . . . wants to die." Moreover, according to Dr. Brown, respondent had "not really gotten better" yet and thus needed further supervision and adjustments to her medication. Dr. Brown explained that respondent generally "takes a long time to recover" and adjust to changes in medication "probably because she has spent a lot of time in these psychotic states." The trial court's findings, supported by Dr. Brown's testimony, reflect the future risk that, without further inpatient treatment and supervision, respondent's symptoms and suicidal thoughts would persist, and she would likely harm herself.

¶ 21 The trial court also found that respondent "told staff . . . she does not need medication" and was "unable to have rational discussions w[ith her] team about treatment/discharge." These findings are supported by Dr. Brown's testimony that respondent "does not think that she needs any more treatment," but that to improve, respondent needs further inpatient treatment and medication adjustments that require close monitoring. The trial court's findings indicate a reasonable probability of respondent suffering future harm to herself without continued care. Respondent did not believe she needed medication and could not communicate with her doctors about a treatment plan; yet, respondent's symptoms and suicidal thoughts necessitated further inpatient care and supervision. *See In re Zollicoffer*, 165 N.C. App. 462, 469, 598 S.E.2d 696, 700 (2004) (affirming the trial court's finding that the respondent was a danger to himself because he was not taking his medication or cooperating with his medical team despite needing ongoing treatment and supervision).

¶ 22 Although the trial court erred by incorporating Dr. Kirk's report, the trial court's written findings, supported by Dr. Brown's testimony in turn, support the trial court's conclusion that respondent is dangerous to herself. As such, respondent cannot show "that a different result would have likely ensued had the error not occurred." *Responsible Citizens*, 308 N.C. at 271, 302 S.E.2d at 214. The Court of Appeals thus correctly concluded that incorporation of the report was not prejudicial

because the "findings support the conclusions and order." *In re R.S.H.*, 2021-NCCOA-369, ¶ 10.

¶ 23 In summary, regarding the due process issue, we affirm the Court of Appeals based on our decision in *In re J.R.*, 2022-NCSC-127. The Court of Appeals, however, erred in deciding that respondent failed to preserve the objection to the trial court's incorporation of the non-testifying physician's examination report. While incorporation of the report was error, nonetheless, the Court of Appeals correctly held that the trial court made sufficient findings of fact based on the evidence presented by the testifying witness to support its involuntary commitment decision. Therefore, the decision of the Court of Appeals is modified and affirmed.

MODIFIED AND AFFIRMED.

Justices HUDSON, MORGAN, and EARLS dissent from the holding on the due process issue in this case for the reasons stated in Justice Earls' dissenting opinion in *In re J.R.*, 2022-NCSC-127.

Justice EARLS concurring in part and dissenting in part.

¶ 24 I dissent from the majority's holding on the due process issue in this case for the reasons stated in my dissenting opinion in *In re J.R.*, 2022-NCSC-127.

Justices HUDSON and MORGAN join in this opinion concurring in part and dissenting in part.

ANGELA McAULEY, Widow of STEVEN L. McAULEY, Deceased Employee
v.
NORTH CAROLINA A&T STATE UNIVERSITY, Employer
and
SELF-INSURED (CORVEL CORPORATION, Third-Party Administrator)

No. 9A22

Filed 16 December 2022

Workers' Compensation—death benefits—timeliness of claim—jurisdiction established by prior workers' compensation claim

The Industrial Commission had jurisdiction to hear a widow's claim for death benefits that she filed nearly three years after the death of her husband (a state university employee) because her husband had timely filed a workers' compensation claim regarding his workplace injury ten days before his death. The husband's filing constituted "a claim" for purposes of meeting the two-year filing deadline set forth in N.C.G.S. § 97-24(a) and, therefore, sufficiently met the statute's condition precedent to invoke the Commission's jurisdiction over that claim and the subsequent death benefits claim related to the same injury. Based on the statute's plain language and legislative history, separate and distinct filings for workers' compensation and death benefits were not required to establish the Commission's jurisdiction.

Justice BARRINGER dissenting.

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

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 280 N.C. App. 473, 2021-NCCOA-657, affirming an Opinion and Award filed by the North Carolina Industrial Commission on 28 August 2020. Heard in the Supreme Court on 19 September 2022.

Daggett Shuler, Attorneys at Law, by Griffis C. Shuler, for plaintiff-appellant.

Joshua H. Stein, Attorney General, by Matthew E. Buckner, Assistant Attorney General, for defendant-appellee.

HUDSON, Justice.

¶ 1 This case considers whether a deceased employee's prior timely filing of a workers' compensation claim for an injury is sufficient to establish the Industrial Commission's jurisdiction over a dependent's subsequent claim for death benefits allegedly resulting from that injury. In accordance with the relevant statutory language, pertinent legislative history, and principle of liberal construction, we answer this question affirmatively: an injured employee's timely workers' compensation claim establishes the Industrial Commission's jurisdiction over that case, including over a dependent's subsequent claim for death benefits. We therefore reverse the Court of Appeals' ruling below and remand this case to the Industrial Commission.

I. Factual and Procedural Background

¶ 2 On 30 January 2015, Mr. Steven McAuley (decedent) suffered an injury to his back while employed by North Carolina A&T State University (defendant).[1] On 11 February 2015, decedent filed a Form 18, Notice of Accident to Employer and Claim of Employee. On 21 February 2015, decedent passed away, leaving behind his dependent widow, Mrs. Angela McAuley (plaintiff), who now contends that decedent's death was the proximate result of decedent's prior workplace injury. On 16 March 2015, defendant filed a Form 63 and thereafter paid medical compensation through September 2015 while the claim was under investigation.[2]

¶ 3 Within two weeks after decedent's death, plaintiff attended a meeting with representatives from defendant's human resources department to sign papers related to decedent's life and accidental death insurance policies. Plaintiff testified that at the time, she believed she was signing all the paperwork related to decedent's death and the benefits to which she was entitled. Defendant's last payment for decedent's medical expenses was made on 21 September 2015.

¶ 4 On 18 January 2018, almost three years after decedent's death, plaintiff sought death benefits by filing a Form 33 Request that Claim be Assigned for Hearing with the Industrial Commission. On 15 May 2018, defendant filed a Form 33R Response to Request that Claim be Assigned

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1. Because the Industrial Commission dismissed plaintiff's claim before any adjudication of the merits, we do not consider the merits of plaintiff's claim here.

2. According to Industrial Commission procedure, an employer may respond to a claim by filing a Form 63 to pay compensation "without prejudice" while investigating the claim. *See* N.C.G.S. § 97-18(d) (2021).

for Hearing asserting that the Industrial Commission lacks jurisdiction to hear plaintiff's death benefits claim because the claim was filed more than two years after decedent's death. Defendant also filed a motion to dismiss plaintiff's death claim as time-barred under N.C.G.S. § 97-22 and § 97-24.

¶ 5 On 31 October 2018, Deputy Commissioner Tyler Younts filed an Opinion and Award denying and dismissing plaintiff's claim with prejudice. The Opinion and Award concluded that the Industrial Commission did not acquire jurisdiction of plaintiff's death benefits claim because, as required by N.C.G.S. § 97-24(a), the claim had not been filed within two years of either decedent's accident or the last payment of medical compensation by defendant on 21 September 2015. On 13 November 2018, plaintiff appealed this Opinion and Award to the Full Commission.

¶ 6 On 28 August 2020, the Full Commission filed its Opinion and Award denying plaintiff's claim and dismissing the claim with prejudice on the grounds that plaintiff's untimely filing could not grant the Commission jurisdiction over plaintiff's claim. The Full Commission reasoned that because death benefits claims made by a dependent are distinct from workers' compensation claims made by an injured employee who is still alive, "any claims made by [decedent] for workers' compensation benefits cannot serve as [plaintiff]'s 'filing of a claim' for death and funeral benefits."

¶ 7 Industrial Commission Chair Philip A. Baddour III dissented. Relying on the plain language of subsection 97-24(a), which merely requires that "a claim" be filed within the time limitation and does not distinguish between workers' compensation claims and death benefits claims, the dissent would have found and concluded that where a deceased employee filed a Form 18 within two years of his accident at issue, the statute does not require his widow to file a separate death claim within two years of his death as a condition precedent to the widow's right to compensation under section 97-38.

¶ 8 On 23 September 2020, plaintiff appealed the Full Commission's ruling to the North Carolina Court of Appeals. Before the Court of Appeals, plaintiff argued that the Industrial Commission obtained jurisdiction over the case when decedent filed his Form 18 for workers' compensation benefits, which met the two-year requirement under N.C.G.S. § 97-24, and that therefore the Commission's ruling should be reversed. Defendant contended that the Commission correctly concluded that it lacked jurisdiction and that its decision should therefore be affirmed.

¶ 9 On 7 December 2021, the Court of Appeals issued a divided opinion in which the majority affirmed the Full Commission's ruling. *McAuley v. N.C. A&T State Univ.*, 280 N.C. App. 473, 2021-NCCOA-657. The majority disagreed with plaintiff's contention that the Industrial Commission obtained jurisdiction over her claim via decedent's Form 18 filing in 2015. *Id.* ¶ 12. Rather, the majority held that plaintiff did not assert a claim until the filing of her Form 33 in 2018, after the expiration of the two-year limitation under N.C.G.S. § 97-24. *Id.* The majority reasoned that plaintiff's claim for death and funeral benefits arose only after decedent's death, not when decedent filed the Form 18. *Id.* ¶ 13. Therefore, the majority reasoned, the two claims are separate and distinct, and the filing of the former could not establish the Commission's jurisdiction over the latter. *Id.* The majority rejected plaintiff's assertion that N.C.G.S. § 97-38 does not require a dependent to file a separate claim within two years. *Id.* ¶ 17. Because timely filing is a condition precedent under N.C.G.S. § 97-24, the majority reasoned that the two sections cannot be read as mutually exclusive provisions. *Id.*

¶ 10 Judge Arrowood authored a dissenting opinion in which he stated that he would have held that a dependent is *not* required to file a separate claim within a two-year period if a decedent's initial claim satisfies that condition. *Id.* ¶ 19 (Arrowood, J., dissenting). Here, the dissent reasoned, decedent complied with the statute's requirement by filing his Form 18 within two years of his injury, thereby invoking the jurisdiction of the Industrial Commission; accordingly, the Full Commission erred in dismissing plaintiff's claim for death benefits. *Id.* ¶ 23. The dissent further noted that the legislative history of N.C.G.S. § 97-24 reveals the legislature's specific intent not to require "a separate claim for death benefits," and that "an employee's filing of 'a claim' within two years after the accident is sufficient" to give the Commission jurisdiction over a subsequent death benefits claim. *Id.* ¶ 27.

¶ 11 On 10 January 2022, plaintiff appealed the Court of Appeals' ruling to this Court on the basis of Judge Arrowood's dissenting opinion. Plaintiff again contends—consistent with the two dissents below—that the Commission erred in dismissing her claim for death benefits because the Commission's jurisdiction was established by decedent's timely filing of his workers' compensation claim after the injury. Defendant again contends that the Court of Appeals and the Commission properly concluded that the Commission lacks jurisdiction because the statute requires separate and distinct claims for workers' compensation and death benefits, and that plaintiff's death benefits claim was untimely.

II. Analysis

¶ 12 Now, this Court must determine whether decedent's timely workers' compensation claim adequately invokes the Industrial Commission's jurisdiction over Plaintiff's subsequent death benefits claim. This Court reviews the Industrial Commission's conclusions of law de novo. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496 (2004).

¶ 13 When a court engages in statutory interpretation, the principal goal

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

Lenox, Inc. v. Tolson, 353 N.C. 659, 664 (2001) (quoting *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297 (1998)). In workers' compensation cases, "the Industrial Commission and the courts [must] construe the [Workers' Compensation Act] liberally in favor of the injured work[er]. The Act should be liberally construed to the end that the benefits thereof shall not be denied upon technical, narrow, and strict interpretation." *Cates v. Hunt Constr. Co.*, 267 N.C. 560, 563 (1966) (cleaned up).

¶ 14 North Carolina's Workers' Compensation Act governs claims for benefits by injured employees against their employers. N.C.G.S. § 97-1 to -101.1 (2021). The Act gives the Industrial Commission jurisdiction over workers' compensation claims subject to certain prerequisites. Specifically, subsection 97-24(a) establishes a time within which an injured employee must file a claim in order to establish the Industrial Commission's jurisdiction over his or her injury. That provision, in pertinent part, states:

> [t]he right to compensation under this Article shall be forever barred unless (i) a claim . . . is filed with the Commission or the employee is paid compensation as provided under this Article within two years after the accident or (ii) a claim . . . is filed with the Commission within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article.

N.C.G.S. § 97-24(a) (2021). This requirement does not constitute a statute of limitations, but is rather a condition precedent to the right of the employee to establish the Industrial Commission's jurisdiction over the case and thereby proceed with his claim to receive workers' compensation. *Montgomery v. Horneytown Fire Dep't*, 265 N.C. 553, 555 (1965) (per curiam).

¶ 15 Section 97-38 governs claims for death benefits upon the resulting death of an injured employee and states, in pertinent part:

> [i]f death results proximately from a compensable injury or occupational disease and within six years thereafter, or within two years of the final determination of disability, whichever is later, the employer shall pay or cause to be paid, subject to the provisions of other sections of this Article, weekly payments of compensation equal to sixty-six and two-thirds percent . . . of the average weekly wages of the deceased employee at the time of the accident. . . .

N.C.G.S. § 97-38 (2021). As properly noted by the Industrial Commission and the Court of Appeals, N.C.G.S. §§ 97-24 and 97-38 are not mutually exclusive. *See McAuley*, 2021-NCCOA-657, ¶ 17. In order to seek benefits under N.C.G.S. § 97-38 from an employer after a death that results proximately from a compensable injury, a claim must first be timely filed under N.C.G.S. § 97-24 to establish the Commission's jurisdiction over the case.

¶ 16 Here, it is undisputed that decedent's workers' compensation claim was filed within the applicable two-year period, while plaintiff's subsequent request for hearing on death benefits was not. Accordingly, the dispositive question facing this Court is whether N.C.G.S. § 97-24(a): (1) requires a *separate and distinct* death benefits claim to be filed within the applicable two-year time period to establish the Industrial Commission's jurisdiction over the matter; or (2) allows a prior timely workers' compensation claim to establish the Industrial Commission's jurisdiction over a subsequent related death benefits claim. In accordance with the plain statutory language at issue, the relevant legislative history, and the principle of liberal construction, we hold the latter: an injured employee's timely workers' compensation claim establishes the Industrial Commission's jurisdiction over that injury, including over a dependent's subsequent claim for death benefits allegedly resulting from that same injury.

¶ 17 This holding is first dictated by the plain language of N.C.G.S. § 97-24(a), which states, in applicable part: "[t]he right to compensation under this Article shall be forever barred unless (i) a claim . . . is filed with the Commission . . . within two years after the accident. . . ." As noted by both the Full Commission and the Court of Appeals majority below, the statutory definition of "compensation" encompasses "the money allowance payable *to an employee or to his dependents* as provided for in this Article." *McAuley*, 2021-NCCOA-657, ¶ 11 (emphasis added) (quoting N.C.G.S. § 97-2(11) (2019)). As such, the statute's reference to "compensation" does not distinguish between a claim made by an employee and a claim made by a dependent. Likewise, the words "*a claim*" do not distinguish between a workers' compensation claim made by an injured employee and death benefit claim made by a dependent. Rather, the plain language of subsection 97-24(a) establishes that the Commission may obtain jurisdiction where "a claim . . . is filed with the Commission within two years after an accident." *See id.* ¶ 22 (Arrowood, J., dissenting). If the General Assembly had intended this statute to distinguish between different types of claims, it could have done so; indeed, as noted further below, it *did* do so in earlier versions of this statute before removing the distinction through the amendment process.

¶ 18 The dissenting opinions at the Commission and the Court of Appeals aptly note this lack of distinction. In his dissent from the Full Commission's Opinion and Award, Chair Baddour observed:

> N.C.G.S. § 97-24(a) does not require that a separate death benefits claim be filed within two years of the death of an employee. It only requires that a claim be filed within two years after "the accident." N.C.G.S. § 97-24(a) works in conjunction with [N.C.G.S.] § 97-38, which requires that the death be proximately caused by the original injury and that the death occur within two years of a final determination of disability or within six years of the injury, whichever is later. Given the specificity of the overall statutory framework governing entitlement to death benefits, if the General Assembly desired for there to be an additional filing requirement for death benefit claims, the requirement would be included in the language of [N.C.G.S.] § 97-24(a). Accordingly, based upon the plain language of [N.C.G.S.] § 97-24(a), . . . there is no

> separate filing requirement to seek an award of death benefits under the Workers' Compensation Act.

Likewise, Judge Arrowood noted in his dissenting opinion at the Court of Appeals that "[t]he plain language of the statute does not require plaintiff to file a separate claim for benefits." *McAuley*, 2021-NCCOA-657, ¶ 23. We agree.

¶ 19 Of course, this is not to say that a workers' compensation claim by an injured employee and a death benefits claim by a dependent are the same thing. As noted by the Full Commission and the Court of Appeals majority, a claim for death benefits is a distinct claim with a distinct claimant that—by definition—cannot be brought by the employee who suffered the injury. It is true, therefore, that a dependent's right to death benefits does not arise until the employee's death. *See Booker v. Duke Med. Ctr.*, 297 N.C. 458, 466 (1979) ("[A] dependent['s] right to compensation is an original right enforceable only after the employee's death." (cleaned up)). The distinction between these two types of benefits, though, does not change the fact that the statutory language simply refers to "*a claim*," without distinguishing between the two. Under the plain language of the statute, once "a claim" is timely filed, the condition precedent has been satisfied and the Industrial Commission's jurisdiction has been invoked over the matter. An injured employee's timely workers' compensation claim for an injury thus establishes the Industrial Commission's jurisdiction over a subsequent death benefits claim arising from the same injury.

¶ 20 Here, it is undisputed that "a claim" was filed with the Commission within two years after the accident; namely, decedent's Form 18 claim for workers' compensation was filed within two weeks of his accident. Accordingly, decedent's claim timely met the condition precedent and thus invoked the Industrial Commission's jurisdiction over the injury under N.C.G.S. § 97-24(a), including over plaintiff's subsequent claim for death benefits arising from the same matter. This continuity of jurisdiction is illustrated by the Industrial Commission's use of the same file number (I.C. No. 15-006996) throughout its handling of this matter, whether it was considering a filing regarding decedent, decedent's estate, or plaintiff. Again, this is not to say that plaintiff's claim for death benefits was functionally the same as decedent's claim for workers' compensation benefits during his life. Rather, it is to say that both constitute "a claim" sufficient to establish the Commission's jurisdiction over the matter in accordance with the plain language of N.C.G.S. § 97-24(a).

¶ 21 Second, the legislative history of N.C.G.S. § 97-24 likewise supports this holding. "In construing a statute with reference to an amendment, it is

presumed that the Legislature intended either (a) to change the substance of the original act, or (b) to clarify the meaning of it." *Childers v. Parker's Inc.*, 274 N.C. 256, 260 (1968); *accord Colonial Pipeline Co. v. Neill*, 296 N.C. 503, 509 (1979). "The presumption is that the legislature 'intended to change the original act by creating a new right or withdrawing any existing one.' " *Childers*, 274 N.C. at 260 (quoting 1 Sutherland, *Statutory Construction* § 1930 (Horack, 3d ed. 1943)).“[I]f the legislature deletes specific words or phrases from a statute, it is presumed that the legislature intended that the deleted portion should no longer be the law." *Nello L. Teer Co. v. N.C. DOT*, 175 N.C. App. 705, 710 (2006).

¶ 22 Here, the legislative history includes instructive amendments. The statute originally established two distinct filing requirements, one for an injury and one for a death: "[t]he right to compensation under this act shall be forever barred unless a claim be filed with the Industrial Commission within one year after the accident, *and if death results from the accident, unless a claim be filed with the Commission within one year thereafter*." The North Carolina Workmen's Compensation Act, ch. 120, § 24, 1929 N.C. Pub. [Sess.] Laws 117, 127 (emphasis added). Then, as noted in Chair Baddour's dissenting opinion below,

> [i]n 1955, the statute was modified to allow two years (instead of one) to file a claim following an accident, however the requirement to file a separate claim for death benefits within one year of the date of death was maintained. In 1973, the General Assembly again amended [N.C.G.S.] § 97-24(a), *but on this occasion, it removed the language requiring that a separate claim be filed for death benefits*. . . . In deleting the words "if death results from the accident, unless a claim be filed with the Commission within one year thereafter," the General Assembly expressed its clear intent that a separate claim for death benefits is not required and that an employee's filing of a claim within two years after the accident satisfies any condition precedent to the Industrial Commission acquiring jurisdiction with regard to a subsequent claim for death benefits . . . . Based upon the principles of statutory construction, . . . the deletion of the requirement to file a death claim within a specified period may only be reasonably interpreted as the General Assembly's intent to remove this requirement.

(emphasis added) (citations omitted).

¶ 23 We agree: this legislative history reveals a *removal* of the statute's distinction between the conditions precedent for a workers' compensation claim for an injury and one for death benefits, thus indicating legislative intent to no longer distinguish between the two types of claims within the statutory requirements. This amendment chronology can only support the above interpretation of the statute's plain language indicating that decedent's Form 18 filing met the condition precedent for the Industrial Commission to exercise jurisdiction over plaintiff's subsequent death benefits claim.

¶ 24 Third and finally, our holding is supported by the long-standing and oft-reaffirmed principle of liberal construction of the provisions of the Workers' Compensation Act. As noted above, it is well established that the Act "should be liberally construed to the end that the benefits thereof [shall] not be denied upon technical, narrow[,] and strict interpretation." *Cates*, 267 N.C. at 553; *see, e.g.*, *Adams v. AVX Corp.*, 349 N.C. 676, 680 (1998) (noting the same). Here, that principle definitively supports interpreting N.C.G.S. § 97-24(a)—consistent with its plain language and legislative history—as not requiring a separate and distinct claim for death benefits after a previous claim has already met the condition precedent to invoke the Industrial Commission's jurisdiction over the matter. Rather, interpreting the statute in accordance with the principle of liberal construction leads us to conclude that decedent's timely filing of "a claim" was sufficient to invoke the Industrial Commission's jurisdiction over the matter, including plaintiff's related claim for death benefits.

III. Conclusion

¶ 25 Section 97-24(a) establishes that the right to compensation under the Workers' Compensation Act "shall be forever barred" unless "a claim . . . is filed with the Commission . . . within two years after the accident." Once such a claim is timely filed, this condition precedent has been satisfied, and the Industrial Commission has jurisdiction over the matter.

¶ 26 Here, decedent's timely claim satisfied this condition precedent and established the Industrial Commission's jurisdiction over this matter. Plaintiff was therefore not required to file a separate claim for death benefits within the two-year period in order to establish the Industrial Commission's jurisdiction over the case, in which the Commission's jurisdiction had already been invoked. Accordingly, the Industrial Commission and Court of Appeals majority erred in interpreting N.C.G.S. § 97-24(a) as requiring a separate and distinct claim for death benefits to invoke the Commission's jurisdiction over plaintiff's filing. The statute's plain language, legislative history, and the principle of liberal

construction all establish otherwise. Therefore, we reverse the ruling of the Court of Appeals and remand this case to the Court of Appeals for further remand to the Industrial Commission for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Justice BARRINGER dissenting.

¶ 27 At issue in this case is whether the Industrial Commission has jurisdiction under the Workers' Compensation Act for a determination of death benefits when the dependent had not asserted a claim for compensation within two years of decedent's death but the decedent had timely filed a workers' compensation claim. In this case, plaintiff asserted a claim for compensation nearly three years after her husband's death. Pursuant to N.C.G.S. § 97-24(a), the Industrial Commission does not have jurisdiction. Accordingly, I respectfully dissent.

¶ 28 On 30 January 2015, Steven McAuley suffered an injury to his back while working at North Carolina A&T State University. He timely filed a workers' compensation claim on 11 February 2015, later dying and leaving behind his wife, plaintiff Angela McAuley. On 18 January 2018, nearly three years after Steven McAuley's death, plaintiff asserted a claim for death benefits with the Industrial Commission. The Industrial Commission determined that it lacked jurisdiction because the claim for death benefits was not timely pursuant to N.C.G.S. § 97-24(a). On appeal to the Court of Appeals, the Industrial Commission's opinion and award was affirmed. *McAuley v. N.C. A&T State Univ.*, 280 N.C. App. 473, 2021-NCCOA-657, ¶ 18. Plaintiff now appeals to this Court.

I. Analysis

¶ 29 Subsection 97-24(a) states, in relevant part:

> The right to compensation under this Article shall be forever barred unless (i) a claim or memorandum of agreement as provided in [N.C.]G.S. [§] 97-82 is filed with the Commission or the employee is paid compensation as provided under this Article *within two years after the accident* or (ii) a claim or memorandum of agreement as provided in [N.C.]G.S. [§] 97-82 is filed with the Commission *within two years after the last payment of medical compensation* when no other compensation has been paid and when the

> employer's liability has not otherwise been established under this Article.

N.C.G.S. § 97-24(a) (2021) (emphases added). Subsection 97-24(a) is not a statute of limitations. *See Montgomery v. Horneytown Fire Dep't*, 265 N.C. 553, 555 (1965). Rather, "satisfaction of the timely-filing requirement is a condition precedent to the exercise of the Commission's jurisdiction." *See Cunningham v. Goodyear Tire & Rubber Co.*, 381 N.C. 10, 2022-NCSC-46, ¶ 25.

¶ 30 As the Court of Appeals noted, "[w]hile death benefits are not specifically mentioned in [N.C.G.S. § 97-24(a)], the text of the statute refers to 'compensation,' a term defined in [N.C.G.S. § 97-2(11)] as encompassing 'the money allowance payable to an employee or to his dependents as provided for in this Article, and includes funeral benefits provided herein.' " *McAuley*, ¶ 11 (first quoting N.C.G.S. § 97-24(a) (2017); and then quoting N.C.G.S. § 97-2(11) (2019)). Accordingly, N.C.G.S. § 97-24(a) contemplates "the timeliness of death claims." *Id.*

¶ 31 Furthermore, subsection 97-24(a) broadly states that "[t]he right to compensation *under this Article* shall be forever barred" unless a claim is filed within two years. N.C.G.S. § 97-24(a) (emphasis added). Because N.C.G.S. § 97-38 is "under [Article 1]," the time limitation for filing a claim for death benefits under the Workers' Compensation Act is governed by N.C.G.S. § 97-24(a). N.C.G.S. §§ 97-24(a), -38 (2021). Plaintiff did not assert a claim for death benefits within the time frame prescribed by N.C.G.S. § 97-24(a). Therefore, she did not satisfy the condition precedent required by statute. Thus, the Industrial Commission does not have jurisdiction under the Workers' Compensation Act.

¶ 32 This Court has previously treated death benefits as separate and distinct from an employee's workers' compensation claim. In *Wray v. Carolina Cotton & Woolen Mills Company*, an employee failed to timely file a claim for workers' compensation. 205 N.C. 782, 783 (1934). The Industrial Commission dismissed the employee's claim. *Id.* However, within one month of the employee's death, his dependents filed a death benefits claim. *Id.* This Court held that a dependent's claim for death benefits is "an original right which [is] enforceable only after [the decedent's] death." *Id.* at 784. Several decades later, this Court reaffirmed *Wray* in *Booker v. Duke Medical Center*. 297 N.C. 458, 466–67 (1979) (holding that a "dependents' claim for compensation [does] not arise until the employee's death . . . North Carolina[ ] treat[s] the dependents' right to compensation as separate and distinct from the rights of

the injured employee”). In reaching its decision, the majority refuses to follow, indeed ignores, 90 years of this Court’s precedent.

¶ 33 Since “the dependents’ right to compensation [is] separate and distinct from the rights of the injured employee,” *id.* at 467, the dependent must file “a claim or memorandum of agreement” with the Industrial Commission to receive death benefits, N.C.G.S. § 97-24(a); *see* N.C.G.S. § 97-38. A dependent’s right to death benefits is barred unless a claim for death benefits is filed within two years of the employee’s death. N.C.G.S. §§ 97-24(a), -38; *Booker*, 297 N.C. at 467.

II. Conclusion

¶ 34 Since plaintiff in this case filed her claim for death benefits nearly three years after her husband’s death, her claim for death benefits is untimely pursuant to N.C.G.S. § 97-24(a). Therefore, the Industrial Commission does not have jurisdiction to hear this case and the Court of Appeals’ decision should be affirmed. Despite our sympathy for plaintiff, we are bound by the statutes of North Carolina and our Court’s long-standing precedent. Any change in the jurisdictional requirements of the Industrial Commission must come from the legislature. *See State v. Bell*, 184 N.C. 701, 705 (1922) (“Scrupulously observing the constitutional separation of the legislative and the supreme judicial powers of the government, we adhere to the fundamental principle that it is the duty of the Court, not to make the law, but to expound it, and to that end to ascertain and give effect to the intention of the Legislature . . . .”).

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

QUAD GRAPHICS, INC.
v.
N.C. DEPARTMENT OF REVENUE

No. 407A21

Filed 16 December 2022

Taxation—sales tax—imposed on purchase of out-of-state goods —goods received by North Carolina purchasers

The assessment of a sales tax by the Department of Revenue on the sales of printed materials that were produced by plaintiff, an out-of-state company—and that were purchased by and shipped to North Carolina customers—did not violate the Commerce Clause or the Due Process Clause of the U.S. Constitution. The factual circumstances were not governed by *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944), but by subsequent decisions *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), which implicitly overruled *Dilworth* in relevant aspects. Plaintiff's sales were subject to taxation because its activities had a substantial nexus with North Carolina; the sales tax was imposed in accordance with North Carolina's sourcing statute; and the tax was fairly apportioned, nondiscriminatory, and sufficiently related to state-provided taxpayer services.

Justice BERGER dissenting.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from the order and opinion entered on 23 June 2021 by Judge Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases, in Superior Court, Wake County, granting summary judgment in favor of petitioner after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 30 August 2022.

Akerman, LLP, by Michael J. Bowen, pro hac vice; and Douglas W. Hanna for petitioner-appellee.

Joshua H. Stein, Attorney General, by Ryan Y. Park, Solicitor General, and Ashley Hodges Morgan, Special Deputy Attorney General, for respondent-appellant.

Poyner Spruill LLP, by Caroline P. Mackie; and Caroline S. Van Zile, Principal Deputy Solicitor General for the District of Columbia, for Steve Marshall, Attorney General for the State of Alabama, Treg R. Taylor, Attorney General for the State of Alaska, Philip J. Weiser, Attorney General for the State of Colorado, Karl A. Racine, Attorney General for the District of Columbia, William Tong, Attorney General for the State of Connecticut, Lawrence G. Wasden, Attorney General for the State of Idaho, Kwame Raoul, Attorney General for the State of Illinois, Theodore E. Rokita, Attorney General for the State of Indiana, Thomas J. Miller, Attorney General for the State of Iowa, Brian E. Frosh, Attorney General for the State of Maryland, Maura Healey, Attorney General for the Commonwealth of Massachusetts, Keith Ellison, Attorney General for the State of Minnesota, Aaron D. Ford, Attorney General for the State of Nevada, Andrew J. Bruck, Acting Attorney General for the State of New Jersey, Hector Balderas, Attorney General for the State of New Mexico, Letitia James, Attorney General for the State of New York, Wayne Stenehjem, Attorney General for the State of North Dakota, Josh Shapiro, Attorney General for the Commonwealth of Pennsylvania, Peter F. Neronha, Attorney General for the State of Rhode Island, Thomas J. Donovan Jr., Attorney General for the State of Vermont, and Robert W. Ferguson, Attorney General for the State of Washington, amici curiae.

Q Byrd Law, by Quintin D. Byrd; and Richard Cram, pro hac vice, for Multistate Tax Commission, amicus curiae.

William W. Nelson for North Carolina Chamber Legal Institute, amicus curiae.

MORGAN, Justice.

¶ 1 Respondent appeals from the Business Court's decision, in which the tribunal had concluded that the sales of printed materials produced by Wisconsin-based petitioner out of state and shipped to its customers and their designees located within North Carolina lacked a sufficient nexus to North Carolina for the imposition of state sales tax under the Commerce Clause of the Constitution of the United States in light of the Supreme Court of the United States' decision in *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944). The question we are tasked with answering on appeal is whether *Dilworth* remains controlling precedent in this case or if subsequent Supreme Court decisions supersede *Dilworth*'s

holding and provide an alternative method for determining the constitutionality of North Carolina's sales tax regime. Because *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274 (1977), provides the relevant modern test for the imposition of a state tax on interstate commerce and because *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), applies this test to a tax regime materially identical to that of North Carolina without regard for *Dilworth*'s holding, we hold in favor of respondent and reverse the Business Court's decision below.

I. Factual and Procedural Background

¶ 2 The facts of this case are neither particularly complicated nor in dispute. Petitioner is an S-Corporation headquartered in Sussex, Wisconsin. Petitioner is engaged in the production and sale of printed materials, including books, magazines, catalogs, and other items, for distribution across the United States. Between 2009 and 2011, petitioner processed approximately $20 million worth of orders for delivery to customers or third-party recipients located in North Carolina. Petitioner's materials are printed at commercial printing facilities throughout the United States, but no such facility was located in North Carolina during the time period at issue. After producing the purchased materials at a facility located out of state, petitioner would deliver customers' orders to the United States Postal Service or another common carrier located outside of North Carolina for delivery to in-state customers or their third-party representatives. According to its sales contracts, possession, legal title, and risk of loss for any ordered materials passed from petitioner to its customers when those materials were delivered to carriers outside of North Carolina. Petitioner employs sales representatives throughout the United States. Beginning in September 2009, petitioner employed a sales representative in North Carolina who solicited sales to customers both inside and outside of the state.

¶ 3 Respondent North Carolina Department of Revenue is an agency of the State of North Carolina which administers the state's tax collection system. In 2011, respondent conducted an audit related to petitioner's collection of sales and use tax within North Carolina for the period between 1 January 2007 and 31 December 2011. On 12 November 2015, respondent issued a Notice of Proposed Sales and Use Tax Assessment finding petitioner liable for uncollected and unremitted sales tax for sales to North Carolina customers between 1 January 2007 and 31 December 2011. Petitioner appealed respondent's Notice of Assessment through respondent's departmental review process. Upon review, respondent found that petitioner was a retailer engaged in business in North Carolina as it maintained a resident employee to solicit

sales and service customer accounts within the state. Respondent also found that petitioner had failed to establish that its customers took possession of purchased materials outside of North Carolina and, as such, concluded that the sales were properly sourced to the state under North Carolina's sourcing statute N.C.G.S. § 105-164.4B, since the materials were received by petitioner's customers or their designees within the state.[1] However, respondent found that the Department had been unable to establish that petitioner had sufficient business activity in North Carolina to create the nexus for the imposition of sales and use tax prior to September 2009 based on petitioner's lack of physical presence in the state until that time. On 30 November 2018, after removing sales predating September 2009 as well as other exempt transactions and adjusting the assessment accordingly, respondent issued a Notice of Final Determination upholding the imposition of uncollected and unremitted sales tax in the amount of $3,238,022.52 from sales made between 1 September 2009 and 31 December 2011.

¶ 4 On 28 January 2019, petitioner appealed respondent's Notice of Final Determination and filed a petition with the Office of Administrative Hearings (OAH) advancing the following arguments: (I) that the disputed transactions were not subject to North Carolina retail sales or use tax because all relevant aspects of the transactions took place outside of the state, (II) that the assessment of North Carolina sales and use tax on these transactions violated the Due Process Clause and Commerce Clause of the Constitution of the United States, and (III) that the specific transactions included in respondent's assessment should have been excluded or were otherwise exempt from North Carolina sales and use tax. Petitioner removed Claim III from its petition but pursued Claims I and II before the OAH. On 24 June 2020, after petitioner and respondent filed cross-motions for summary judgment, Administrative Law Judge Melissa Owens Lassiter entered a Final Decision granting respondent's motion for summary judgment and dismissing petitioner's case with prejudice.

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1. Section 105-164.4B of the North Carolina General Statutes provides sourcing principles for the imposition of sales tax on sellers of goods delivered to in-state purchasers or their designees. In relevant part, the statute provides that "[w]hen a purchaser receives a product at a location specified by the purchaser . . . , the sale is sourced to the location where the purchaser receives the product[,]" N.C.G.S. § 105-164.4B(a)(2) (2009), and that "[d]irect mail . . . is sourced to the location where the property is delivered" when "the purchaser provides the seller with information to show the jurisdictions to which the direct mail is to be delivered[,]" N.C.G.S. § 105-164.4B(d)(2) (2009). This is known as "destination-based" sourcing, which defines the site of a sale of tangible property based on the item's destination and has been adopted by a majority of the states.

¶ 5 The OAH's Final Decision held that petitioner was a "retailer" as defined by N.C.G.S. § 105-164.3(35)(a) and was therefore obligated to collect and remit sales tax pursuant to N.C.G.S. §§ 105-164.8 and 105-164.4B. Furthermore, although the OAH acknowledged that it "has not been given jurisdiction to determine the constitutionality of legislative enactments[,]" quoting *In re Redmond*, 369 N.C. 490, 493 (2017), it opined that petitioner had sufficient nexus with North Carolina for respondent to impose sales tax on the sales in question. Finally, the Final Decision announced that the sales at issue were properly sourced to North Carolina as set forth in the state's sourcing statute. *See* N.C.G.S. § 105-164.4B(a)(2), (d)(2) (2009).

¶ 6 On 24 July 2020, petitioner petitioned for judicial review of the OAH's Final Decision to the Business Court pursuant to N.C.G.S. § 105-241.16, designating the case as a mandatory complex business case pursuant to N.C.G.S. § 7A-45.4. The matter was assigned to the Honorable Louis A. Bledsoe III, Chief Business Court Judge, on the same day. On 20 August 2020, petitioner filed an Amended Petition for Judicial Review. On 24 September 2020, the parties stipulated to the official record of the proceedings at the OAH. On 2 October 2020, the Business Court issued an Order and Opinion on various motions filed by the parties, including a denial of respondent's motion to dismiss petitioner's amended petition for judicial review. Between 26 October 2020 and 10 December 2020, the parties filed their briefs, responses, and replies with the Business Court. On 6 January 2021, the case was reassigned to the Honorable Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases. The parties appeared for a hearing on 2 February 2021. On 27 May 2021, the Business Court issued a Notice to Provide Supplemental Briefing; in response, the parties filed supplemental briefs on 11 June 2021.

¶ 7 On appeal before the Business Court, petitioner argued that (1) the OAH erred in holding that petitioner was a "retailer" under the provisions of N.C.G.S. § 105-164.3(35)(a) that was required to pay sales tax to North Carolina on the sales at issue under the provisions of the Act, and (2) respondent's assessment of sales tax on the sales at issue was unconstitutional under the Due Process Clause and Commerce Clause of the Constitution of the United States. On 23 June 2021, the Business Court held in favor of petitioner, reversing the OAH's Final Decision and granting summary judgment in favor of petitioner. The Business Court first considered petitioner's argument that it was misclassified as a "retailer" under N.C.G.S. § 105-164.3(35) because the transfer of title and possession to the printed materials took place outside of North Carolina and a person must make sales "in this State" to be classified as a retailer

under the statute. *See* N.C.G.S. § 105-164.3(35) (2009). The Business Court rejected this argument, concluding that the OAH had correctly held that petitioner was a "retailer" within the meaning of N.C.G.S. § 105-164.3(35). This issue has not been briefed to this Court and is not the subject of our review.

¶ 8 The Business Court next considered petitioner's contention that North Carolina's imposition of sales tax on the sales at issue—where title and possession of the printed materials arguably transferred to purchasers and third-party recipients located in North Carolina before the materials entered the state—was unconstitutional under the Commerce Clause of the Constitution of the United States in light of the Supreme Court's decision in *Dilworth*. The Business Court discredited respondent's assertion that the decisions of the Supreme Court of the United States in *Complete Auto* and *Wayfair* overruled *Dilworth* formalism, and therefore concluded that *Dilworth* remains controlling precedent in this case. The Business Court accordingly granted summary judgment to petitioner on the basis that North Carolina did not have a sufficient nexus with the sales at issue under the Commerce Clause to impose sales tax on them, reversing the OAH's Final Decision. On 1 July 2021, the matter was reassigned to the Honorable Mark A. Davis, Special Superior Court Judge for Complex Business Cases. On 22 July 2021, respondent filed a notice of appeal directly to this Court pursuant to N.C.G.S. § 7A-27(a)(2). On the same day, respondent filed a motion to stay execution of the Business Court's 23 June 2021 Order and Opinion with the Superior Court pending the outcome of this appeal. The trial court granted this motion on 5 October 2021.

II. Analysis

¶ 9 Appeals arising from orders granting summary judgment are decided under a de novo standard of review. *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367 (2014). Under this standard, the Court considers the matter anew and freely substitutes its judgment for that of the lower court or administrative agency. *Midrex Techs. v. N.C. Dep't of Revenue*, 369 N.C. 250, 257 (2016); *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 660 (2004). Since the Business Court granted summary judgment to petitioner, we shall consider the questions of law underlying the decision anew and freely substitute our own judgment for the conclusion of the Business Court. The sole question before this Court is whether the holding of the Supreme Court of the United States in *Dilworth* controls the outcome of the case at bar. Based on the high court's subsequent decisions in *Complete Auto* and *Wayfair*, we hold that *Dilworth* does not govern the present case. We further conclude that North Carolina's

imposition of sales tax on the purchases at issue in this case does not violate either the Commerce Clause or the Due Process Clause of the Constitution of the United States under the relevant modern test provided by *Complete Auto*.

A. *Dilworth*'s status in modern Commerce Clause jurisprudence

¶ 10 On 15 May 1944, the Supreme Court of the United States issued its opinions in both *Dilworth* and *Dilworth*'s companion case *General Trading Co. v. State Tax Comm'n*, 322 U.S. 335 (1944). In *Dilworth*, the Supreme Court determined that the state of Arkansas had no authority under the Commerce Clause of the Constitution of the United States to impose a tax on the sale of machinery or mill supplies purchased from Tennessee corporations which did not have any offices, branches, or other places of business located within Arkansas, where title passed upon delivery to a common carrier within Tennessee before the goods were ultimately brought into Arkansas for delivery to Arkansas customers. *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). Since these sales were, in the high court's view, "consummated in Tennessee for the delivery of goods in Arkansas[,]" Arkansas could not tax them without "project[ing] its powers beyond its boundaries and . . . tax[ing] an interstate transaction." *Id.* at 328, 330. As such, the Supreme Court determined that Arkansas was prohibited from doing so under the then-prevailing interpretation of the Commerce Clause as categorically barring states from taxing interstate commerce, which was seen as residing within the exclusive province of Congress. *Id.* at 330.

¶ 11 Meanwhile, in *General Trading*, the Supreme Court of the United States upheld the imposition of an Iowa use tax levied against property brought into Iowa from the state of Minnesota for customers located within Iowa's boundaries even though the Minnesota company whose goods were subject to the tax and which was required to collect and then to remit the tax back to Iowa maintained no offices or other places of business within the state. *General Trading*, 322 U.S. at 336. According to the Supreme Court in its opinion in *General Trading*, Iowa's imposition of a *use* tax did not tax the "privilege of doing interstate business," but rather the privilege of enjoying one's property within the state, regardless of its origin. *Id.* at 338. Requiring the Minnesota seller to collect the tax was, in the Supreme Court's view, simply a "familiar and sanctioned device" to implement a use tax against the ultimate consumer, an Iowa resident. *Id.* The high court thus justified Iowa's imposition of the tax on the grounds that:

> Of course, no State can tax the privilege of doing interstate business. That is within the protection of

> the Commerce Clause and subject to the power of Congress. On the other hand, the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which he may draw from a State to the upkeep of which he may be asked to bear his fair share.

Id. (citation omitted). As Justice Douglas noted in his dissent in *Dilworth*, however, the Supreme Court's categorical rejection of the imposition of state sales tax and its simultaneous countenance of a complementary use tax on the same transactions had no practical effect on the ability of states to tax the receipt of goods from out of state. *Dilworth*, 322 U.S. at 333–34 (Douglas, J., dissenting) ("But a use tax and a sales tax applied at the very end of an interstate transaction have precisely the same economic incidence. Their effect on interstate commerce is identical . . . there should be no difference in result under the Commerce Clause where, as here, the practical impact on the interstate transaction is the same.").

¶ 12 The *Dilworth* majority addressed this apparent contradiction by acknowledging that, although a "sale[s] tax and a use tax in many instances may bring about the same result[,]" the two forms of tax "are different in conception, are assessments upon different transactions, and . . . may have to justify themselves on different constitutional grounds." *Id.* at 330. In particular, the high court's majority emphasized that a "sales tax is a tax on the freedom to purchase" whereas a "use tax is a tax on the enjoyment of that which was purchased." *Id.* A use tax, according to the Supreme Court, was imposed only after the sale "had spent its interstate character" and therefore did not amount to a taxation of interstate commerce itself. *Id.* at 331. The Supreme Court thus reasoned that only the imposition of interstate sales tax by the states was prohibited by the Commerce Clause:

> In view of the differences in the basis of these two taxes and the differences in the relation of the taxing state to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold, involves an assumption of power by a State which the Commerce Clause was meant to end. The very purpose of the Commerce Clause was to create an area of free trade among the several States.

Id. at 330. This "free trade" philosophy laid the groundwork for the subsequent decisions of the Supreme Court of the United States in cases

such as *Freeman v. Hewit*, 329 U.S. 249, 252 (1946) (holding that the Commerce Clause does not "merely forbid a State to single out interstate commerce for hostile action" but precludes it from "taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States"), and *Spector Motor Serv. v. O'Connor*, 340 U.S. 602, 603–10 (1951) (striking down a nondiscriminatory "privilege of doing business" franchise tax as imposed by Connecticut against a foreign corporation only engaged in interstate commerce on the basis that Congress has the exclusive power to tax the privilege of engaging in interstate commerce).

¶ 13 Nearly thirty years later, the Supreme Court began to disassociate its approach in this legal arena from the strict formalism that had characterized *Dilworth* and the *Dilworth* progeny. In 1977, the high court chose to expressly overrule *Freeman* and *Spector*, utilizing its opinion in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) to disavow the "free trade" theory which was articulated in *Dilworth*. Complete Auto Transit, Inc. was a Michigan corporation contracted for the purpose of transporting motor vehicles manufactured by General Motors Corporation outside of the state of Mississippi from a railhead in Jackson, Mississippi to dealers throughout the state. *Id.* at 276. Complete Auto argued that Mississippi did not have authority to impose a sales tax upon its transportation services since the company was "but one part of an interstate movement" and therefore immune to state taxation under the precedent set by cases such as *Freeman* and *Spector*. *Id.* at 277–78. In *Complete Auto*, the Supreme Court acknowledged that *Freeman* and *Spector* had "reflect[ed] an underlying philosophy that interstate commerce should enjoy a sort of 'free trade' immunity from state taxation[,]" but the high court opted to follow the path paved by more recent decisions considering "not the formal language of the tax statute, but rather its practical effect." *Id.* at 278–79. The Supreme Court criticized the *Spector* rule's "holding that a tax on the 'privilege' of engaging in an activity in the State may not be applied to an activity that is part of interstate commerce" as having "no relationship to economic realities[,]" and rejected its blanket prohibition against the imposition of a direct tax on interstate sales regardless of whether it was fairly apportioned or nondiscriminatory. *Id.*

¶ 14 The Supreme Court in *Complete Auto* "abandoned the abstract notion that interstate commerce 'itself' cannot be taxed by the States[,]" recognizing, in its place, that "interstate commerce may be required to pay its fair share of state taxes." *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 30–31 (1988). Alternatively, the high court elected to follow

the line of cases sustaining taxes against Commerce Clause challenges where they "applied to an activity with a substantial nexus with the taxing State, [were] fairly apportioned, [did] not discriminate against interstate commerce, and [were] fairly related to the services provided by the State." *Complete Auto*, 430 U.S. at 279. This has become known as *Complete Auto*'s "four-part formulation" and provides the modern test for determining the constitutionality of a state tax imposed on interstate commerce regardless of its formal designation.

¶ 15 The *Complete Auto* test has since been applied to determine the constitutionality of various taxes levied against interstate commerce. *D.H. Holmes*, 486 U.S. at 30; *see*, *e.g.*, *Okla. Tax Comm'n v. Jefferson Lines*, *Inc.*, 514 U.S. 175 (1995), *superseded by statute on other grounds*. These cases have made clear that *Complete Auto*'s declaration required the rejection of outdated precedent that "proscribed all taxation formally levied upon interstate commerce" or encouraged legal gamesmanship by drawing artificial boundaries around taxes that differed in form but not substance. *Id.* at 183 ("[W]e categorically abandoned . . . [such] formalism when [*Complete Auto* . . .] overruled *Spector* and *Freeman*."); *see also Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 745 (1978) ("Because the tax in the present case is indistinguishable from the taxes at issue in *Puget Sound* and in *Carter & Weekes* [prohibiting state taxation of the gross receipts of businesses involved in the unloading of interstate cargo vessels on the grounds that such taxes were prohibited by the Commerce Clause], the *Stevedoring Cases* control today's decision on the Commerce Clause issue *unless more recent precedent and a new analysis require rejection of their reasoning*. We conclude that *Complete Auto* . . . requires such rejection.") (emphasis added). *Cf. Quill Corp. v. North Dakota*, 504 U.S. 298, 310–11 (1992) ("*Complete Auto* rejected *Freeman* and *Spector*'s formal distinction between 'direct' and 'indirect' taxes on interstate commerce because that formalism allowed the validity of statutes to hinge on 'legal terminology,' 'draftsmanship and phraseology.' " (citation omitted)), *overruled on other grounds by South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

¶ 16 The *Dilworth/General Trading* dichotomy was exactly such a formalistic distinction that turned upon legal draftsmanship as opposed to differences in the practical effect of a use tax as compared to a sales tax. It would further appear that the Supreme Court of the United States has wholly abandoned the free trade theory which had provided for the distinction's unsteady foundation. *See Complete Auto*, 430 U.S. at 278–79. In the instant case, however, petitioner and its amicus curiae caution that this Court is not authorized to engage in an "anticipatory overruling" of

Supreme Court precedent interpreting federal law, regardless of how "moth-eaten" its underlying logic has become. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of [the U.S. Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Nonetheless, there is no "magic words" requirement that must be used for the nation's premier legal forum to overrule its own precedent; indeed, it may implicitly overrule precedent by issuing a decision in direct contradiction with its prior holdings. *See Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344 (1954) ("Our decisions are not always clear as to the grounds on which a tax is supported, especially where more than one exists; nor are all of our pronouncements . . . consistent or reconcilable. A few have been specifically overruled, while others no longer fully represent the present state of the law."). Where two precedents are flatly irreconcilable, the latter in time controls.

B. *Wayfair*'s application of *Complete Auto* to North Dakota's sales tax regime

¶ 17 We are in the fortuitous position of not having to discern whether *Dilworth* was automatically retained within the Supreme Court's decision in *Complete Auto* or whether we were compelled to engage in an anticipatory overruling of a federal precedent whose underlying logic has been abandoned but whose direct holding has never been specifically readdressed. Instead, we can confidently look to the application by the Supreme Court of the United States of the *Complete Auto* test to a materially identical tax regime in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) to guide our analysis. Since *Wayfair* is directly applicable to the case before us, its holding supersedes *Dilworth* to the extent that the two precedents are in conflict with one another and guide our own path forward.

¶ 18 *Wayfair* overruled a line of precedent which prohibited states from requiring sellers to collect and to remit state sales or use tax unless they maintained a physical presence within the state. *See Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753 (1967); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). In 2016, the state of South Dakota enacted "An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency" and invited the Supreme Court to reconsider this precedent in light of the fact that the modern proliferation of remote e-commerce vendors like Wayfair was "seriously eroding the sales tax base" and

"causing revenue losses and imminent harm . . . through the loss of critical funding for state and local services." *Wayfair*, 138 S. Ct. at 2088 (alteration in original) (quoting S.B. 106, 2016 Leg. Assembly, 91st Sess. § 8(1) (S.D. 2016) (S.B. 106)). The Act required sellers who delivered more than $100,000 worth of goods to South Dakota customers or made more than 200 individual transactions for the delivery of goods into the state to collect and remit sales tax "as if [they] had a physical presence in the State." *Id.* at 2089 (quoting S.B. 106, § 1).

¶ 19 Wayfair challenged the South Dakota law under the Supreme Court's precedent in *Quill*, which affirmed the rule articulated in *Bellas Hess* that a state may not require a seller without any physical presence within the state to collect and remit sales or use tax for the sale of goods for delivery into the state. *Quill*, 504 U.S. 298. *Bellas Hess*, which was decided prior to the Supreme Court's decision in *Complete Auto*, held that requiring sellers "whose only connection with customers in the State [was] by common carrier or . . . mail" to collect and remit state use tax both "violate[d] the Due Process Clause of the Fourteenth Amendment and create[d] an unconstitutional burden upon interstate commerce[,]" in violation of the Commerce Clause. *Bellas Hess*, 386 U.S. at 756, 758. In *Quill*, the high court overturned the due process holding in *Bellas Hess* on the grounds that its "due process jurisprudence ha[d] evolved substantially in the 25 years since *Bellas Hess*," abandoning "formalistic tests" concerning a defendant's presence within the forum state for a "more flexible inquiry into whether a defendant's contacts with the forum made it reasonable . . . to require it to defend the suit in that State." *Quill*, 504 U.S. at 307. The high court went on to say that:

> Comparable reasoning justifies the imposition of the collection duty on a mail-order house that is engaged in continuous and widespread solicitation of business within a State. Such a corporation clearly has "fair warning that [its] activity may subject [it] to the jurisdiction of a foreign sovereign." In "modern commercial life" it matters little that such solicitation is accomplished by a deluge of catalogs rather than a phalanx of drummers: The requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State. Thus, to the extent that our decisions have indicated that the Due Process Clause requires physical presence in a State for the imposition of duty to collect a use tax, we overrule those holdings as superseded by developments in the law of due process.

> In this case, there is no question that Quill has purposefully directed its activities at North Dakota residents, that the magnitude of those contacts is more than sufficient for due process purposes, and that the use tax is related to the benefits Quill receives from access to the State. We therefore agree with the North Dakota Supreme Court's conclusion that the Due Process Clause does not bar enforcement of that State's use tax against Quill.

Id. at 308 (alterations in original) (citation omitted). The Supreme Court did not, however, overrule the holding in *Bellas Hess* that such an imposition was in violation of the Commerce Clause. The high court distinguished the physical presence requirement in *Bellas Hess* from those distinctions articulated in other cases that had been overturned by its decision in *Complete Auto* by explaining that:

> *Complete Auto*, it is true, renounced *Freeman* and its progeny as "formalistic." But not all formalism is alike. *Spector*'s formal distinction between taxes on the "privilege of doing business" and all other taxes served no purpose within our Commerce Clause jurisprudence, but stood "only as a trap for the unwary draftsman." In contrast, the bright-line rule of *Bellas Hess* furthers the ends of the dormant Commerce Clause. Undue burdens on interstate commerce may be avoided not only by a case-by-case evaluation of the actual burdens imposed by particular regulations or taxes, but also, in some situations, by the demarcation of a discrete realm of commercial activity that is free from interstate taxation. *Bellas Hess* followed the latter approach and created a safe harbor for vendors "whose only connection with customers in the [taxing] State is by common carrier or the United States mail." Under *Bellas Hess*, such vendors are free from state-imposed duties to collect sales and use taxes.

Id. at 314–15 (alteration in original) (citations omitted). Instead, the Court in *Quill* held that *Complete Auto* had incorporated *Bellas Hess*'s physical presence rule into the first prong of its four-part test. *Id.* at 311 ("*Bellas Hess* . . . stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause.").

¶ 20 Citing these cases as binding precedent, Wayfair moved for, and was granted, summary judgment in its favor at the state trial court level on the grounds that it did not have substantial nexus with South Dakota due to the lack of physical presence within the state. The South Dakota Supreme Court affirmed the lower court's decision pursuant to *Quill* and South Dakota petitioned the Supreme Court of the United States for a writ of certiorari.

¶ 21 After South Dakota had petitioned for a writ of certiorari, but before the Supreme Court agreed to hear the case, contemporary tax commentators faulted the state for drafting its Act to "attack the physical presence rule only in the context of sales taxes[,]" thereby raising the specter not only of *Bellas Hess* and *Quill*, but of *Dilworth* and its progeny. Hayes R. Holderness & Matthew C. Boch, *Did South Dakota Neglect Transactional Nexus in Its Bill to Kill Quill?*, Bloomberg BNA (Dec. 6, 2017) [hereinafter Holderness & Boch, *Did South Dakota Neglect Transactional Nexus*]. Specifically, despite a dearth of cases explicitly acknowledging such a distinction, academics had begun to identify that *Complete Auto*'s "substantial nexus" requirement could be broken down into two, separate inquiries: first, so-called "personal" or "entity nexus" which requires each taxed *entity* to have a substantial connection to the taxing state (and, under the precedent set by *Bellas Hess* and *Quill*, to maintain a physical presence within the state), and second, so-called "transactional nexus," which requires each taxed *transaction* to have a substantial connection to the taxing state. *See* Jeffrey A. Friedman & Kendall L. Houghton, *The Other Nexus: Transactional Nexus and the Commerce Clause*, 4 St. & Local Tax Law., 19, 22–33 (1999). According to some legal scholars, *Dilworth* had been incorporated in part into *Complete Auto* through the concept of transactional nexus, and therefore states remained prohibited from imposing sales tax on transactions for goods delivered into the state by common carrier where title and possession transferred outside of the taxing state for lack of sufficient nexus even where a complementary use tax would be upheld. *See id.*; Breen M. Schiller & Daniel L. Stanley, *Nexus News: The Reemergence of Transactional Nexus*, J. St. Taxation 9, 11–12 (Winter 2021).

¶ 22 These commentators theorized that South Dakota's "oversight" in drafting its Act to require remote sellers shipping their goods into the state to collect sales tax but not use tax might impact the *Wayfair* case in one of four ways: (1) the Court might deny certiorari on the grounds that the Act addressed only sales tax; (2) the Court might grant certiorari and revisit not only *Quill*, but also *Dilworth*; (3) the Court might grant certiorari and note that South Dakota would have to extend its statute to cover use tax before it could require such tax to be collected pursuant

to *Dilworth*; or (4) the Court might grant certiorari and overrule *Quill* without addressing *Dilworth* or its progeny, thereby "implicitly suggesting that the transactional nexus distinction between sales and use taxes is of little or no importance." Holderness & Boch, *Did South Dakota Neglect Transactional Nexus*. Indeed, the Court, without ever addressing *Dilworth*, overruled *Quill* and held that there was sufficient nexus between Wayfair and South Dakota for the imposition of sales tax.

¶ 23 The Supreme Court accepted South Dakota's invitation to reconsider the physical presence requirement established in *Bellas Hess* and held to have been incorporated into the *Complete Auto* test in *Quill*. The high court decided to overrule both *Bellas Hess* and *Quill* on the grounds that the "physical presence rule . . . [was] unsound and incorrect." *Wayfair*, 138 S. Ct. at 2099. The Supreme Court held that the physical presence rule was "not a necessary interpretation of *Complete Auto*'s nexus requirement" but, rather, was closely related to the minimum contacts required under the Due Process Clause of the Fourteenth Amendment. *Id.* at 2085. However, as *Quill* itself had ceded, "a business need not have a physical presence in a State to satisfy the demands of due process." *Id.* at 2093.

¶ 24 Further, the *Wayfair* Court explicitly repudiated the formalistic Commerce Clause jurisprudence of eras past as incompatible with modern legal precedents and economic realities. *Id.* at 2094. The high court pointed out the recognition that *Complete Auto* and its progeny had "eschewed formalism for a sensitive, case-by-case analysis of purposes and effects." *Id.* (quoting *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994)). The Supreme Court instead held that:

> So long as a state law avoids "any effect forbidden by the Commerce Clause," courts should not rely on anachronistic formalisms to invalidate it. The basic principles of the Court's Commerce Clause jurisprudence are grounded in functional, marketplace dynamics; and States can and should consider those realities in enacting and enforcing their tax laws.

Id. at 2094–95 (citation omitted). Even though the *Wayfair* Court clearly understood that South Dakota's statute at issue involved the imposition of sales tax and not use tax, nonetheless the highest tribunal did not draw any legal distinction between the two. *See Wayfair*, 138 S. Ct. at 2089 ("[T]he Act requires out-of-state sellers to collect and remit *sales tax* 'as if the seller had a physical presence in the state.' " (emphasis added) (quoting S.B. 106, § 1)). The Court did not discuss *Dilworth* or "transactional nexus" as a concept separate and apart from "substantial

nexus" at all. Conversely, the Supreme Court held that, "[i]n the absence of *Quill* and *Bellas Hess*, the first prong of the *Complete Auto* test simply asks whether the tax applies to an activity with a substantial nexus with the taxing State." *Id.* at 2099. There, the high court held that the nexus between Wayfair and South Dakota was "clearly sufficient based on both the economic and virtual contacts respondents have with the State." *Id.* The Supreme Court went on to conclude that "the substantial nexus requirement of *Complete Auto* [was] satisfied in [that] case[,]" *id.* at 2099, and remanded for further proceedings not inconsistent with its decision, *id.* at 2100.

¶ 25 The significance of the *Wayfair* decision was not lost on either the states or on interstate businesses in their capacity as the states' impending taxpayers. In its wake, South Dakota and Wayfair entered into a settlement agreement by which Wayfair would collect state sales tax beginning on 1 January 2019, and many states began using South Dakota's law as a model as they adopted statutes requiring the collection of sales tax by remote sellers. *See* Richard D. Pomp, Wayfair: *Its Implications and Missed Opportunities*, 58 J. L. & Pol'y 1, 9–10 n.55 (2019); Jennifer Karpchuk, *States Could Use Wayfair Laws To Fix Depleted Budgets*, Law360 (July 15, 2020) [hereinafter Karpchuk, *States Could Use Wayfair Laws*]. This revenue had become particularly vital as online retail transactions proliferated while states continued to contend with a public health crisis. *See* Karpchuk, *States Could Use Wayfair Laws*; *see also Wayfair*, 138 S. Ct. at 2097 ("Though *Quill* was wrong on its own terms when it was decided in 1992, since then the Internet revolution has made its earlier error all the more egregious and harmful."). In order to remain under the auspices of the *Wayfair* decision, many such states intentionally adopted those aspects of South Dakota's law that were mentioned most favorably by the Court. *See, e.g.*, Jay Hancock, *The Wayfair Sales Tax Case: Companies Without a Physical Presence Required to Collect Sales Tax*, LBMC (Mar. 1, 2022) (detailing which states adopted "economic nexus" thresholds of $100,000 or more for the imposition of sales tax on remote sellers after *Wayfair)*.

¶ 26 On 7 August 2018, the North Carolina Department of Revenue issued a directive requiring remote sellers making gross sales in excess of $100,000 or conducting 200 or more separate transactions to North Carolina customers to begin collecting state sales tax in accordance with *Wayfair*. N.C. Dep't Rev., SD-18-6 (Aug. 7, 2018). This rule was limited to prospective application, which brought about respondent's exclusion of those sales which were made by petitioner before the corporation first established a physical presence in North Carolina by hiring an in-state sales representative in September 2009. Prior to *Wayfair*, however,

North Carolina's sales tax regime already paralleled South Dakota's in several key respects, given each state's membership in the Streamlined Sales and Use Tax Agreement (SSUTA). *See* An Act to Enable North Carolina to Enter the Streamlined Sales and Use Tax Agreement, S.L. 2001-347, §§ 1.1–3.3, 2001 N.C. Sess. Laws 1041, 1041–60; S.D. Codified Laws § 10-45C-3 (2010). As member-states, North Carolina's and South Dakota's tax regimes are largely governed by the same definitions and sourcing principles. As such, many aspects of their respective tax laws are nearly identical, including, *inter alia*:

South Dakota	**North Carolina**
Sales tax is assessed against goods or services to be delivered into South Dakota for receipt by in-state customers. S.B. 106, § 1 (2016).	Sales are sourced to the state in which the product or service was received for the purposes of assessing sales tax. N.C.G.S. § 105-164.4B(a)(2) (2009).
South Dakota defines to "receive" as "(a) the taking possession of tangible personal property; (b) making first use of services; or (c) taking possession of or making first use of any product transferred electronically, whichever comes first" excluding possession by a shipping company on behalf of the purchaser. S.D. Admin. R. 64:06:01:62 (2015).	"Receipt" is defined as "taking possession of tangible personal property, making first use of services, or taking possession or making first use of digital goods, whichever comes first" but does not include possession by a shipping company on behalf of the purchaser. Sales and Use Tax Bulletin 4-1A.
Sales or use tax is due based on the locations to which the advertising and promotional direct mail is delivered. Other direct mail is sourced to the address for the purchaser contained within the seller's records. S.D. Admin. R. 64:06:01:68 (2010).	Direct mail is sourced to the location where it is delivered if the purchaser provides the seller with information to show the jurisdictions to which the direct mail is to be delivered. N.C.G.S. § 105-164.4B(d)(2) (2009).
A use tax is imposed for the in-state use, storage, or consumption of tangible goods at the same rate as would have been applied had the goods been purchased in South Dakota. S.D. Codified Laws § 10-46-2 (2010).	A complementary use tax applies when goods that are purchased out of state are brought into the state for their use, storage, or consumption. N.C.G.S. § 105-164.6(a)(1) (2009).

The imposition of state use tax is reduced by the amount of sales or use tax previously paid in another state for the same property. S.D. Codified Laws § 10-46-6.1 (2010).	North Carolina allows sellers to credit the amount of sales or use tax paid on an item in another state against the tax imposed under North Carolina law. N.C.G.S. § 105-164.6(c)(2) (2009).
Remote sellers are required to collect and remit sales tax as if they had a physical presence within the state if they make sales exceeding $100,000 or 200 or more separate transactions to South Dakota customers over the course of a year. S.D. Codified Laws § 10-64-2 (2016). This applies only prospectively following the passage of the Act. S.B. 106, §§ 5, 3, 8(10) (2016).	Remote sellers are only obligated to collect state sales tax if they conduct significant in-state activity such as making at least 200 separate sales or $100,000 worth of sales to in-state customers over the course of a year. This applies only prospectively beginning 1 November 2018. N.C. Dep't Rev., SD-18-6 (Aug. 7, 2018).
South Dakota can extract sellers' registration information from the central registration system. The state further allows sellers to register without a signature and permits agents to register on behalf of sellers. S.D. Codified Laws §§ 10-45C-3, 10-45C-5, 10-45-24 (2010).	North Carolina can extract a seller's information from the central registration system, allows sellers to register without a signature, and permits agents to register on behalf of sellers. N.C.G.S. §§ 105-164.29, 105-164.42E(4), 105-164.42I (2009).
South Dakota provides state-level administration of state and local sales and use taxes. Sellers are required to register, file returns, and remit funds at the state level. South Dakota requires sellers to file only one return each tax period for the state and all of its local jurisdictions. S.D. Codified Laws § 10-45C-5 (2010).	North Carolina provides state-level administration of state and local sales and use taxes. Sellers are required to register with, file returns with, and remit funds to a state-level authority. The state requires sellers to file only one tax return each period for the state and all local jurisdictions. N.C.G.S. §§ 105-164.16, 105-469, 105-471, 105-483, 105-498, 105-507.2, 105-509.1, 105-510.1, 105-511.3 (2009).

South Dakota uses the definitions provided by the SSUTA to define the following terms, *inter alia*: "bundled transaction," "delivery charges," "direct mail," "lease or rental," "purchase price," "retail sale or sale at retail," "sales price," and "tangible personal property." S.D. Codified Laws §§ 10-45-1, 10-45-1.5, 10-45-1.9, 10-45-1.12, 10-45-1.13, 10-45-1.14, 10-45-1(4), 10-45-1(10), 10-45-94.1 (2010).	North Carolina uses the SSUTA definitions to define the following terms, *inter alia*: "bundled transaction," "delivery charges," "direct mail," "lease or rental," "purchase price," "retail sale or sale at retail," "sales price," and "tangible personal property." N.C.G.S. §§ 105-164.3, 164.4D (2009).
South Dakota reviews sales tax software submitted for certification as Certified Automated Software (CAS) and provides liability relief to sellers for their reliance on such software. S.D. Codified Laws § 10-45C-7 (2010).	North Carolina reviews sales tax software submitted for certification as CAS and provides liability relief for reliance on such software. N.C.G.S. §§ 105-164.42H, 105-164.42I (2009).

C. Applying *Complete Auto*'s four-part formulation to North Carolina's tax

¶ 27 Because North Carolina's imposition of sales tax under the circumstances presented in this case does not differ from South Dakota's in any respect that is legally significant to this matter, and because both states have incorporated the SSUTA's uniform rules and definitions into their sales tax and use tax regimes, we follow the Supreme Court's precedent in *Wayfair* and apply the four-part test in *Complete Auto* to determine its constitutionality. Under the "now-accepted framework for state taxation" provided by *Complete Auto*, courts will sustain a tax imposed on interstate commerce as long as it: "(1) applies to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services the State provides." *Wayfair*, 138 S. Ct. at 2091. We uphold North Carolina's tax against petitioner's Commerce Clause challenge because petitioner's activities have a substantial nexus with North Carolina and the imposition of sales tax on petitioner's sales to North Carolina customers is fairly apportioned, nondiscriminatory, and fairly related to the services provided by the state. We further hold that North Carolina's assessment of sales tax on the sales at issue does not offend petitioner's right to due process under the Due Process Clause of the Constitution of the United States.

1. Substantial Nexus

¶ 28 Despite petitioner's contention otherwise, the *Wayfair* Court addressed the first requirement of *Complete Auto*'s four-part test—substantial nexus—in its entirety by holding that, "[i]n the absence of *Quill* and *Bellas Hess*, the first prong of the *Complete Auto* test simply asks whether the tax applies to an activity with a substantial nexus with the taxing State." *Id.* at 2099. Specifically, the Supreme Court held that Wayfair's "economic and virtual contacts" provided a "clearly sufficient" nexus for the imposition of sales tax in light of the fact that South Dakota's act only applied to sellers delivering more than $100,000 worth of goods or services into the state or making 200 or more separate transactions for the delivery of goods or services into the state on an annual basis. *Id.* According to the high court, this "quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota." *Id.* Since a nexus is established whenever a taxpayer "avails itself of the substantial privilege of carrying on business in that jurisdiction," *Polar Tankers, Inc. v. City of Valdez*, 557 U. S. 1, 11 (2009) (quotation marks omitted), the *Wayfair* Court held that the substantial nexus requirement of *Complete Auto* had been clearly satisfied. *Wayfair*, 138 S. Ct. at 2099.

¶ 29 Although the Supreme Court of the United States in *Wayfair* did not specifically disaggregate substantial nexus into its component parts of transactional and personal nexus, it did begin its discussion by dispensing with the subject properly considered as constituting the transactional nexus issue before proceeding to the physical presence requirement as an aspect of personal nexus. The high court stated:

> All agree that South Dakota has the authority to tax these transactions. S.B. 106 applies to sales of "tangible personal property, products transferred electronically, or services *for delivery into South Dakota*." § 1 (emphasis added). "It has long been settled" that the sale of goods or services "has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State." [*Jefferson Lines*, 514 U.S. at 184]; *see also* 2 C. Trost & P. Hartman, Federal Limitations on State and Local Taxation 2d § 11:1, p. 471 (2003) ("Generally speaking, a sale is attributable to its destination").

Id. at 2092–93. By citing its decision in *Jefferson Lines*, South Dakota's sourcing statute, and a treatise on federal regulation of state and local

taxation, the Supreme Court did not so much neglect transactional nexus as it summarily dismissed any notion that South Dakota might not have authority to tax the sales at issue on the grounds of both general taxing principles and the state's specific destination-based sourcing statute.

¶ 30 The facts presented in the case at bar provide equal, if not greater, support for a finding of substantial nexus. Petitioner has clearly availed itself of the substantial privilege of carrying on its own business in North Carolina through both its economic and physical contacts with the state. Petitioner processed approximately $20 million worth of orders for delivery into the state between 2009 and 2011. This is well above the annual threshold of $100,000 cited favorably in *Wayfair*. Further, unlike the remote sellers implicated in *Wayfair*, petitioner has maintained a physical presence within North Carolina for the relevant time period by employing a sales representative to solicit sales both within and from outside of the state. Finally, as a member of the SSUTA, North Carolina employs the same destination-based sourcing principles as South Dakota, which attribute a sale to the state in which the goods or services were received for the purpose of assessing state sales tax. *Compare* S.B. 106 § 1, *with* N.C.G.S. § 105-164.4B(a)(2). We therefore hold that there is also substantial nexus here.[2]

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2. Although the Court only reached and ruled on the issue of nexus in *Wayfair*, we note that it also looked favorably to several features of South Dakota's statute in anticipating how the Act may be further evaluated on remand:

> The question remains whether some other principle in the Court's Commerce Clause doctrine might invalidate the Act. Because the *Quill* physical presence rule was an obvious barrier to the Act's validity, these issues have not yet been litigated or briefed, and so the Court need not resolve them here. That said, South Dakota's tax system includes several features that appear designed to prevent discrimination against or undue burdens upon interstate commerce. First, the Act applies a safe harbor to those who transact only limited business in South Dakota. Second, the Act ensures that no obligation to remit the sales tax may be applied retroactively. S.B. 106, § 5. Third, South Dakota is one of more than 20 States that have adopted the Streamlined Sales and Use Tax Agreement. This system standardizes taxes to reduce administrative and compliance costs: It requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules. It also provides sellers access to sales tax administration software paid for by the State. Sellers who choose to use such software are immune from audit liability.

Wayfair, 138 S. Ct. at 2099–2100. Each of these features is reflected in North Carolina's own laws, as detailed in the table above.

2. Fair Apportionment

¶ 31 The second requirement of the *Complete Auto* test serves "to ensure that each State taxes only its fair share of an interstate transaction" and to prevent "multiple taxation" of the same transaction by more than one state. *Jefferson Lines*, 514 U.S. at 184–85. The Supreme Court addressed the issue of malapportionment in *Jefferson Lines* in the context of the state of Oklahoma's imposition of a state sales tax on the sale of bus tickets sold within the state for travel into other states. *Id.* at 177–78. In *Jefferson Lines*, the Court began by stating that:

> For over a decade now, we have assessed any threat of malapportionment by asking whether the tax is "internally consistent" and, if so, whether it is "externally consistent" as well. Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax . . . .
>
> External consistency, on the other hand, looks not to the logical consequences of cloning, but to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State. Here, the threat of real multiple taxation (though not by literally identical statutes) may indicate a State's impermissible overreaching.

Id. at 185 (citations omitted).

¶ 32 The Supreme Court of the United States held in *Jefferson Lines* that Oklahoma's tax was both internally and externally consistent. *Id.*

at 185–96. First, the high court determined that the tax was internally consistent because if every state were to impose an identical tax (i.e. a tax on ticket sales within the state for travel originating in that state), no sale would be subject to more than one such tax because each would be attributable to only one lone state. *Id.* at 185. And second, the Supreme Court concluded that the tax was externally consistent because "[a] sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale," and thus the high court had "consistently approved taxation of sales without any division of the tax base among different States" by permitting the state in which the sale is deemed to have taken place to tax the entire purchase price. *Id.* at 186. In *Jefferson Lines*, the Supreme Court declared that the sale of a bus ticket within Oklahoma for transit out of the state was properly deemed a local event because the taxable event was comprised of the "agreement, payment, and delivery of some of the services in the taxing State" and "no other State [could] claim to be the site of the same combination." *Id.* at 190. Further, "the combined events of payment for a ticket and its delivery for present commencement of a trip [were] commonly understood to suffice for a sale." *Id.* at 191. The high court therefore decided that Oklahoma could levy a sales tax upon the entire purchase price of the ticket even though the service it entailed included travel across other states. *Id.* at 186–96.

¶ 33 North Carolina's imposition of sales tax on the sales at issue in this case is likewise both internally and externally consistent. First, the tax is internally consistent because, as in *Jefferson Lines*, every state could impose an identical destination-based sales tax without any duplicative effect since each sale would only be attributable to a single state. Indeed, most states—including but not limited to, SSUTA member-states—have destination-based sourcing statutes that attribute sales to the state in which the goods or services are to be received and impose state sales taxes accordingly. And second, the tax is externally consistent because, as the Court recognized in *Wayfair*, a sale of goods is generally attributable to its destination. *Wayfair*, 138 S. Ct. at 2092–93. Unlike Arkansas in *Dilworth*, North Carolina has state law addressing where a sale is deemed to have taken place for the purpose of assessing state sales tax. North Carolina's sourcing statute traces the sale of goods to their location of receipt and printed materials to the mailing address provided by purchasers, notwithstanding delivery to a common carrier f.o.b.[3] in another state. N.C.G.S. § 105-164.4B(a)(2), (d)(2)(b); N.C.G.S § 105-164.4E

3. "F.o.b." is an abbreviation for "free on board."

(2009). As in *Jefferson Lines*, "no other State [could] claim to be the site of the same" since each purchase of goods or materials is delivered to only one mailing address located within one destination state. North Carolina has joined a number of states which have adopted destination-based sourcing principles; beyond the twenty-three states which are members of the SSUTA, thirty-five of the fifty states in the nation, along with the District of Columbia, currently define the sale of goods according to their ultimate destination. Jennifer Faubion, Tax Burden Analysis and Review of Recent Significant Changes: Presentation to the Legislative Finance Committee (July 20, 2022), https://www.nmlegis.gov/handouts/ALFC%2007202022%20Item%205%20Tax%20Burden%20Analysis%20and%20Review%20of%20Recent%20Significant%20Changes.pdf. This list of states includes Wisconsin—the state in which petitioner maintains its headquarters and from which petitioner ships many of its orders—whose sourcing rules are materially identical to North Carolina's sourcing rules as a fellow SSUTA member. Wis. Stat. § 77.522(1)(b), (1)(c) (2010). Consequently, none of these states will assess duplicate sales tax, since they all define a sale as occurring at the point of destination: one address located within one state. Finally, North Carolina and other states provide an additional safeguard against multiple taxation by providing a credit to sellers in the amount of any sales tax or use tax already paid on a particular purchase. N.C.G.S. § 105-164.6(c)(2) (2009).

¶ 34 For these reasons, we hold that North Carolina's assessment of sales tax on the sales at issue is as externally consistent as it is internally consistent.

3. Nondiscrimination

¶ 35 The requirement that a tax imposed on interstate commerce be nondiscriminatory serves to avoid the "multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause," *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951), by preventing states from "providing a direct commercial advantage to local business," *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959); *see also Maryland v. Louisiana*, 451 U.S. 725, 754 (1981). A law is therefore discriminatory if it "tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984). On the other hand, a tax structure that applies the same rate to in-state and out-of-state transactions and provides a credit for those taxes paid in another state is nondiscriminatory as a matter of law. *See D.H. Holmes*, 486 U.S. at 32 ("The Louisiana tax structure likewise does not discriminate against interstate commerce. The use tax is designed to compensate the State for

revenue lost when residents purchase out of state goods for use within the State. It is equal to the sales tax applicable to the same tangible personal property purchased in-state . . . .").

¶ 36 Here, North Carolina imposes the same sales tax on all purchases made for delivery to North Carolina customers regardless of the origin of the goods or the location of the seller. Further, the state maintains a complementary tax structure that imposes sales tax and use tax at an equal rate and provides a credit against the assessment of use tax for sales tax paid to another state. N.C.G.S. § 105-164.6(a), (c)(2). As such, North Carolina does not impose any greater burden on the purchase of goods from out of state than it does on transactions which are entirely intrastate. Therefore, the tax is nondiscriminatory as a matter of law.

4. Fair Relation

¶ 37 The fourth and final prong of the *Complete Auto* test requires that the assessment of tax be fairly related to services provided by the state to its taxpayers. However, the state does not need to provide a "detailed accounting" of the services provided to each taxpayer based on the taxpayer's in-state activities; instead, the state may simply demonstrate the provision of ordinary public services which are advantageous to the execution of the taxpayer's business within the state. In *D.H. Holmes*, for instance, the Supreme Court found that:

> *Complete Auto* requires that the tax be fairly related to benefits provided by the State, but that condition is also met here. Louisiana provides a number of services that facilitate Holmes' sale of merchandise within the State: It provides fire and police protection for Holmes' stores, runs mass transit and maintains public roads which benefit Holmes' customers, and supplies a number of other civic services from which Holmes profits. To be sure, many others in the State benefit from the same services; but that does not alter the fact that the use tax paid by Holmes, on catalogs designed to increase sales, is related to the advantages provided by the State which aid Holmes' business.

D.H. Holmes, 486 U.S. at 32. Similarly, in *Jefferson Lines*, the high court found that:

> The fair relation prong of *Complete Auto* requires no detailed accounting of the services provided to the

> taxpayer on account of the activity being taxed, nor, indeed, is a State limited to offsetting the public costs created by the taxed activity. If the event is taxable, the proceeds from the tax may ordinarily be used for purposes unrelated to the taxable event. Interstate commerce may thus be made to pay its fair share of state expenses and " 'contribute to the cost of providing all governmental services, including those services from which it arguably receives no direct 'benefit.' " The bus terminal may not catch fire during the sale, and no robbery there may be foiled while the buyer is getting his ticket, but police and fire protection, along with the usual and usually forgotten advantages conferred by the State's maintenance of a civilized society, are justifications enough for the imposition of a tax.

Jefferson Lines, 514 U.S. at 199–200 (quoting *Goldberg v. Sweet*, 488 U.S. 252, 267 (1989)). As with Louisiana in *D.H. Holmes* and Oklahoma in *Jefferson Lines*, North Carolina requires interstate taxpayers like petitioner to pay their "fair share" of those ordinary public services that aid their in-state business activities, including police and fire protection, mass transit and public roads, and those other "forgotten advantages conferred by the State's maintenance of a civilized society." *See Jefferson Lines*, 514 U.S. at 200. For this reason, we hold that the assessment of sales tax upon the sales at issue in this case is fairly related to North Carolina's provision of public services to its taxpayers, including petitioner.

5. Due Process

¶ 38 Finally, we hold that petitioner has been afforded due process of law. The Due Process Clause "limits States to imposing only taxes that 'bear[] fiscal relation to protection, opportunities and benefits given by the state.' " *N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Fam. Tr.*, 139 S. Ct. 2213, 2219 (2019) (alteration in original) (quoting *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940)). "The [U.S. Supreme] Court applies a two-step analysis to decide if a state tax abides by the Due Process Clause." *Id.* at 2220. First, there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Quill*, 504 U.S. at 306 (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344–45 (1954)). Second, "income attributed to the State for tax purposes must be rationally related to 'values

connected with the taxing State.' " *Id.* at 306 (quoting *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978)).

¶ 39 Petitioner and its sales have a definite connection to North Carolina. As in *Quill* and *Wayfair*, petitioner in the present case is engaged in "continuous and widespread solicitation of business" within North Carolina, amounting to millions of dollars' worth of sales for delivery into the state. *See Quill*, 504 U.S. at 308. This level of activity suffices to give petitioner "fair warning" that its activities may be subject to the state's jurisdiction. *See id.* Further, this activity is rationally related to values connected with North Carolina since, as discussed above, the sales at issue can be properly traced to the state through the application of North Carolina's sourcing statute.

¶ 40 Additionally, the Supreme Court has held that the "*Complete Auto* test, while responsive to Commerce Clause dictates, encompasses as well . . . due process requirement[s]." *Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 373 (1991). As such, the high court acknowledged the possibility that "every tax that passes contemporary Commerce Clause analysis [may also be] valid under the Due Process Clause," even though the converse is not necessarily true. *Quill*, 504 U.S. at 313 n.7. Although we do not presume to conclusively decide that this will hold true in all circumstances, nonetheless the above analysis demonstrating the satisfaction of *Complete Auto*'s four factors provides significant additional support for our conclusion in the case at bar that North Carolina's assessment of the sales tax at issue comports with the Due Process Clause. We therefore hold that North Carolina's imposition of sales tax on the sales involved in this case does not offend the Due Process Clause of the Constitution of the United States.

III. Conclusion

¶ 41 Based upon the reasons discussed above, we hold that the formalism doctrine established in *Dilworth* has not survived the subsequent decisions of the Supreme Court of the United States in *Complete Auto* and *Wayfair* so as to render the sales tax regime of North Carolina violative of the Commerce Clause and the Due Process Clause of the Constitution of the United States. Further, North Carolina's imposition of sales tax on the transactions at issue in this case is constitutional under the relevant test provided by *Complete Auto*. Accordingly, we reverse the Business Court's order and opinion and hold in favor of respondent.

REVERSED.

Justice BERGER dissenting.

¶ 42 As the trial court correctly noted, resolution of this case is determined by response to one question: "is the holding in *Dilworth* the controlling law." In answering in the affirmative, the trial court invalidated assessment of the sales tax against Quad Graphics by the North Carolina Department of Revenue because the Supreme Court of the United States has not overruled *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 64 S. Ct. 1023, 88 L. Ed. 1304 (1944). The trial court's decision should be affirmed because this Court is not permitted to disregard the Supreme Court's interpretation of the Commerce Clause and the federal Constitution. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921–22, 104 L. Ed. 2d 526 (1989) (holding that when United States Supreme Court precedent "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [a lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions"). Therefore, I respectfully dissent.

¶ 43 The transaction at issue in the present case is strikingly similar to the one addressed in *Dilworth*. There, Arkansas sought to impose a sales tax upon Tennessee companies for the sale of machinery and mill supplies out of offices located in Memphis, Tennessee, which utilized a Tennessee salesman to solicit sales in Arkansas. *Dilworth*, 322 U.S. at 328, 64 S. Ct. at 1024. Orders for goods were required to be approved by the Memphis office and would come to Tennessee by mail or phone. *Id.* at 328, 64 S. Ct. at 1024. Further, title of the goods passed upon delivery to the carrier in Tennessee, and payment of the sales price was not made in Arkansas. *Id.* at 328, 64 S. Ct. at 1024–25. Simply, *Dilworth* involved "sales made by Tennessee vendors that are consummated in Tennessee for the delivery of goods in Arkansas." *Id.* at 328, 64 S. Ct. at 1025. The U.S. Supreme Court observed that it "would have to destroy both business and legal notions to deny that under these circumstances the sale—the transfer of ownership—was made in Tennessee." *Id.* at 330, 64 S. Ct. at 1025. Thus, the Supreme Court held that an Arkansas sales tax on transactions completed by Tennessee companies and consummated in Tennessee violated the Commerce Clause of the U.S. Constitution. *Id.* at 329–30, 64 S. Ct. at 1025.

¶ 44 Here, Quad Graphics received orders and produced printed materials outside of the State of North Carolina. Once the printed materials were produced, they were delivered to the United States Postal Service or another common carrier—all outside of North Carolina. Then, the

common carrier would deliver the materials to customers or direct mail recipients within North Carolina. In accordance with the contracts between the parties, title to the printed material and risk of loss passed when the materials were provided to the common carrier for shipping. As in *Dilworth*, the sale—"transfer of ownership"—was completed outside of North Carolina such that petitioner was "through selling" before the materials reached the state. *See Dilworth*, 322 U.S. at 330, 64 S. Ct. at 1025. Quad Graphics later hired a North Carolina-based sales representative to solicit orders in North Carolina; however, all orders had to be approved and accepted through the company's Wisconsin headquarters.

¶ 45 In 2011, the North Carolina Department of Revenue attempted to assess a sales tax against Quad Graphics for transactions which occurred from 2007 through 2011, even though transfer of title and possession of the printed material to its customers occurred outside of North Carolina. Quad Graphics contends that under these circumstances, and pursuant to *Dilworth*, imposition of the sales tax is suspect under the Commerce Clause of the federal Constitution because the sale did not occur in North Carolina.

¶ 46 Citing to *Dilworth*, the Supreme Court of the United States has stated that

> where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable.

Norton Co. v. Dep't of Revenue of State of Ill., 340 U.S. 534, 537, 71 S. Ct. 377, 380, 95 L. Ed. 517 (1951).

¶ 47 To determine whether the tax at issue comports with the Commerce Clause, we must examine whether the tax is "applied to *an activity* with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State." *Complete Auto Transit*, *Inc. v. Brady*, 430 U.S 274, 279, 97 S. Ct. 1076, 1079, 51 L. Ed. 2d 326 (1977) (emphasis added). Thus, one focus of the first prong in the *Complete Auto* test is the link between the transaction and the state, which some legal observers have termed a transactional nexus. *See* Hayes R. Holderness, *Navigating 21st Century Tax Jurisdiction*, 79 Md. L. Rev. 1, 9 (2019).

¶ 48 Another focus of the first prong is what has come to be known as personal nexus as discussed in *Wayfair*. Personal nexus is the link between the taxpayer and the state. *Id.* The majority devotes much of its analysis to this issue. Notably, the Supreme Court in *Wayfair* only addressed personal nexus. The Court did not address the transactional nexus—leaving that aspect of *Dilworth* undisturbed. *See South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 201 L. Ed. 2d 403 (2018) (discussing only the business's connection with the taxing state—personal nexus—rather than the transaction's connection to the taxing state—transactional nexus). The Court left open the possibility that the tax at issue in *Wayfair* could have been subject to other Commerce Clause challenges which were not reached in the opinion. *Id.* at 2099–2100. Therefore, *Wayfair* speaks only to the personal nexus aspect of the substantial nexus test and does not apply to the issue in this case—an issue of transactional nexus.

¶ 49 It should be noted that just because the Department could not levy a *sales* tax on the transaction at issue, it does not follow that the State was without options. The Department could have applied a use tax without running afoul of the Commerce Clause. The Court in *Dilworth* addressed whether Arkansas could have levied a *use* tax rather than a *sales* tax and determined that such a tax was not chosen by Arkansas and was therefore not before the Court. *Dilworth*, 322 U.S. at 330, 64 S. Ct. at 1025. But the Court went on to note that there was a real difference in the transactions permitting levy of sales or use taxes:

> A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. A sales tax is a tax on the freedom of purchase . . . . A use tax is a tax on the enjoyment of that which was purchased. In view of the differences in the relation of the taxing state to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold, involves an assumption of power by a State which the Commerce Clause was meant to end.

Id. at 330, 64 S. Ct. at 1025–26.

¶ 50 The Court further concluded that "[t]hough sales and use taxes may secure the same revenues and serve complementary purposes, they are . . . taxes on different transactions and for different opportunities

afforded by a State." *Id.* at 331, 64 S. Ct. at 1026. A use tax would likely pose no constitutional issue if it had been chosen by the Department of Revenue. *See Gen. Trading Co. v. State Tax Comm'n of Iowa*, 322 U.S. 335, 337–38, 64 S. Ct. 1028, 1029, 88 L. Ed. 1309 (1944).

¶ 51 While the Department and the majority express concern that Quad Graphics may not be paying its fair share in state taxes, any loss of revenue here is a direct result of the Department's decision to levy a sales tax. While a taxpayer certainly has an obligation to pay taxes owed, it is not a charity, and the government is required to assess the appropriate tax. While some may deem this a "formalistic" requirement, such a requirement touches on fundamental fairness for taxpayers.

¶ 52 In this case, the Department of Revenue chose to levy a *sales* tax on a transaction which concluded outside of the state. Under *Dilworth* and the facts of this case, that violates the Commerce Clause. Had the Department chosen a *use* tax, the result here might be different. Contrary to the facts in *Wayfair*, it is the Department's choice of a tax, and not Quad Graphics's effort to avoid taxes, that brings this constitutional quandary before this Court.

¶ 53 Because *Dilworth* applies in this case and defines the location of a sale based upon "practical notions of what constitutes a sale," *Dilworth*, 322 U.S. at 329, 64 S. Ct. at 1025, and the transaction here occurred outside of North Carolina, I would conclude that the tax violates the Commerce Clause as applied to Quad Graphics and affirm the Business Court's order.

RADIATOR SPECIALTY COMPANY
v.
ARROWOOD INDEMNITY COMPANY (as successor to GUARANTY NATIONAL INSURANCE COMPANY, ROYAL INDEMNITY COMPANY, and ROYAL INDEMNITY COMPANY OF AMERICA); COLUMBIA CASUALTY COMPANY; CONTINENTAL CASUALTY COMPANY; FIREMAN'S FUND INSURANCE COMPANY; INSURANCE COMPANY OF NORTH AMERICA; LANDMARK AMERICAN INSURANCE COMPANY; MUNICH REINSURANCE AMERICA, INC. (as successor to AMERICAN REINSURANCE COMPANY); MUTUAL FIRE, MARINE AND INLAND INSURANCE COMPANY; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; PACIFIC EMPLOYERS INSURANCE COMPANY; ST. PAUL SURPLUS LINES INSURANCE COMPANY; SIRIUS AMERICA INSURANCE COMPANY (as successor to IMPERIAL CASUALTY AND INDEMNITY COMPANY); UNITED NATIONAL INSURANCE COMPANY; WESTCHESTER FIRE INSURANCE COMPANY; ZURICH AMERICAN INSURANCE COMPANY OF ILLINOIS

No. 20PA21

Filed 16 December 2022

1. **Insurance—product liability—multiple insurers—trigger of coverage—"bodily injury"—period of benzene exposure**

    In a declaratory judgment action to determine the duties and obligations of multiple insurers—from whom a chemical company purchased standard-form product liability policies—for product liability claims related to benzene-containing products, claimants experienced "bodily injury" caused by an "occurrence" pursuant to the insurance policies, thereby triggering insurance coverage, during their period of actual exposure to the defective product and not when a cognizable injury-in-fact became known.

2. **Insurance—product liability—multiple insurers—defense and indemnification costs—allocation—pro rata**

    In a declaratory judgment action to determine the duties and obligations of multiple insurers—from whom a chemical company purchased standard-form product liability policies—for product liability claims related to benzene-containing products, the proper allocation of the costs of defense and indemnification was pro rata rather than an "all sums" approach where the policies at issue limited coverage to injuries resulting from occurrences that took place during the policy period—in this case, actual exposure to the defective product—and this determination was not affected by the policies that contained non-cumulation and continuing coverage provisions.

3. Insurance—product liability—multiple insurers—umbrella policy—duty to defend—exhaustion of limits—horizontal versus vertical exhaustion

In a declaratory judgment action to determine the duties and obligations of multiple insurers—from whom a chemical company purchased standard-form product liability policies—for product liability claims related to benzene-containing products, one insurer's duty to defend another insurer under an umbrella policy was triggered by vertical and not horizontal exhaustion according to the terms of the policy, such that the duty to defend arose when there was no other valid and collectible policy available to cover damages from benzene exposure during a concurrent policy period.

Justice BARRINGER concurring in part and dissenting in part.

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

On discretionary view pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, No. COA19-507, 2020 WL 7039144 (N.C. Ct. App. Dec. 1, 2020), reversing in part and affirming in part a judgment entered on 27 February 2019 by Judge W. David Lee in Superior Court, Mecklenburg County. On 10 August 2021, the Supreme Court allowed defendant Fireman's Fund Insurance Company's cross-petition for discretionary review and Landmark American Insurance Company and National Union Fire Insurance Company of Pittsburgh, PA's conditional petition for discretionary review. Heard in the Supreme Court on 30 August 2022.

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Fox Rothschild LLP, by Matthew Nis Leerberg and Troy D. Shelton; and Rivkin Radler LLP, by Michael A. Kotula, for defendant-appellant Fireman's Fund Insurance Company.

Goldberg Segalla LLP, by David L. Brown and Allegra A. Sinclair; and Nicolaides Fink Thorpe Michaelides Sullivan LLP, by Matthew J. Fink, pro hac vice, and Mark J. Sobczak, pro hac vice, for defendant-appellee National Union Fire Insurance Company of Pittsburgh, PA.

Hedrick Gardner Kincheloe & Garofalo, LLP, by M. Duane Jones and Paul C. Lawrence; and Musick, Peeler & Garrett LLP, by David A. Tartaglio, Stephen M. Green, and Steven T. Adams, for defendant-appellee Landmark American Insurance Company.

Robinson, Bradshaw & Hinson, P.A., by R. Steven DeGeorge, for United Policyholders, amicus curiae.

Cranfill Sumner LLP, by Jennifer A. Welch; and Crowell & Moring, by Laura Foggan for Complex Insurance Claims Litigation Association and American Property Casualty Insurance Association, amici curiae.

EARLS, Justice.

¶ 1 Radiator Specialty Company (RSC) is a North Carolina-based manufacturer of automotive, hardware, and plumbing products, including cleaners, degreasers, and lubricants. Some of the products RSC has manufactured contained benzene. Over the past twenty years, RSC has been named in hundreds of personal injury lawsuits seeking damages for bodily injury allegedly caused by repeated exposure to benzene over time. During that same period, RSC purchased more than one-hundred standard-form product liability policies from twenty-five insurers, including the three insurers remaining in this action: Fireman's Fund Insurance Company (Fireman's Fund), Landmark American Insurance Company (Landmark), and National Union Fire Insurance Company of Pittsburgh, PA (National Union) [collectively, the insurers]. RSC now seeks compensation from those insurers for liabilities it has incurred as a result of its benzene litigation.

¶ 2 This case presents a challenge that is unique from personal injury cases in which the injury occurs at a definite time and place. Unlike a car crash, for example, where the injury takes place on a clearly discernable date, benzene exposure may take place over the course of several years, spanning multiple insurance-policy periods and implicating different providers. More complicated still, the consequences of that exposure may not become apparent for even longer. As a result, as the courts of New York have stated,

> [c]ourts across the country have grappled with so-called "long-tail" claims—such as those seeking to recover for personal injuries due to toxic exposure and property damage resulting from gradual or

> continuing environmental contaminations—in the insurance context. These types of claims present unique complications because they often involve exposure to an injury-inducing harm over the course of multiple policy periods, spawning litigation over which policies are triggered in the first instance, how liability should be allocated among triggered policies and the respective insurers, and at what point insureds may turn to excess insurance for coverage.

In re Viking Pump, Inc., 27 N.Y.3d 244, 255 (2016).

¶ 3 This dispute concerns which insurers are obligated to pay which costs arising from RSC's benzene liabilities pursuant to the terms of the insurers' liability insurance policies. To answer this question, we must decide as a matter of law (1) when each insurer's coverage is triggered in these circumstances—that is, whether coverage is triggered when a claimant is exposed to benzene, or instead, when the claimant develops observable bodily injury, such as sickness or disease (exposure vs. injury-in-fact); (2) how defense and indemnification costs are allocated among insurers when multiple policies in multiple years are triggered by the same claim (all sums vs. pro rata); and (3) what underlying limits RSC must exhaust before seeking defense coverage from umbrella or excess policies (vertical vs. horizontal exhaustion).

I. Background

A. Factual Background

¶ 4 For over forty years, RSC produced and sold benzene-containing products, including a penetrating oil called Liquid Wrench. In the early 2000s, RSC became the subject of hundreds of personal injury lawsuits arising from its use of benzene in its products. Claimants sought damages for consequences they have suffered as a result of benzene exposure, including cancer and death. Their claims represent what are known as long-tail claims: allegations of injury spanning over the course of years. In other words, many of the claimants assert that they were exposed to RSC's benzene-containing products for years or decades, eventually developing progressive diseases. As a result of this litigation, RSC has faced approximately $45 million in defense and settlement costs. RSC has sought to have some of those costs covered by a multitude of insurance policies it purchased over several decades from different providers. Fireman's Fund, Landmark, and National Union are the only such insurers that are parties to this appeal.

¶ 5 From 1971 to 2014, RSC purchased over one-hundred standard-form product liability policies from more than a dozen insurers. Most of these policies provided coverage for one year. In 2013, RSC brought suit against its insurance providers seeking coverage for the damages it has paid out of pocket related to its benzene litigation. Though RSC argues that the trial court erroneously "awarded [it] only a tiny fraction of the insurance for which RSC paid more than $7.1 million in premiums," the insurers reject the notion that RSC has not been awarded the amount it is due under the policies they issued, including because "[RSC] settled with certain insurers, purchased policies with high per claim self-insured retentions or deductibles, lost some policies it bought, or bought no applicable coverage at all." To cover for those "gaps in its insurance program," the insurers argue that RSC now seeks to hold them responsible for liabilities they were never obligated to cover.

B. Procedural History

¶ 6 On 6 February 2013, RSC filed a declaratory judgment action pursuant to N.C.G.S. § 1-253 *et seq.* seeking a declaration of the duties and obligations of fifteen different defendant-insurers under policies they sold to RSC between 1971 and 2012.

¶ 7 An amended complaint filed with leave of the trial court on 5 July 2015 named nine of the original defendant insurance companies or successors in interest to the insurance companies that sold RSC primary and excess liability policies for the same period. The amended complaint raised additional claims for bad faith refusal to settle or pay and unfair or deceptive trade practices against National Union. Shortly thereafter, defendants filed both answers and motions for summary judgment on various issues of insurance contract interpretation.

¶ 8 On 28 and 29 January 2016, Judge W. David Lee issued orders addressing the issues raised in the summary judgment motions. In its Order on Trigger of Coverage, the trial court determined that "the exposure trigger is appropriate in the context of long tail bodily injury claims," meaning that "[t]he beginning of the triggered policy period is the date on which the claimant was first exposed to benzene" and "[t]he end of the triggered policy period is the date on which the claimant was last exposed to benzene."

¶ 9 In its Order Regarding Allocation, the trial court determined that "pro rata allocation applies to both defense and indemnity payments based on each insurer's 'time on the risk' over the RSC coverage block," rejecting the "all sums" approach and making RSC "responsible for its pro rata share of defense and indemnity costs where there has been

settled, insolvent or lost policies, as well as periods where RSC was uninsured, underinsured or self-insured."

¶ 10 In its Order on Landmark's Motion for Summary Judgment [Order on Exhaustion], the trial court determined that vertical exhaustion applies to the duty to indemnify under Landmark's umbrella policy but horizontal exhaustion applies to Landmark's duty to defend.

¶ 11 After issuing the summary judgment orders, the case proceeded to a bench trial in June 2018 for determination of the date of exposure for any claimants for whom the exposure date was disputed.

¶ 12 After a bench trial, the trial court entered an order of final judgment, determining that the insurers were obligated to defend and indemnify RSC under their policies "subject to their respective policy limits and the following rulings of this [c]ourt," including the "Order Regarding Allocation." The court incorporated by reference a Sealed Order for Declaratory Relief entered on 22 February 2019 assigning past defense and indemnity costs to the insurers by applying pro rata allocation. As a result, the insurers were required to reimburse $1.8 million of RSC's past costs.

¶ 13 In an unpublished opinion, a unanimous panel of the Court of Appeals affirmed the judgment of the trial court and dismissed in part. *Radiator Specialty Co. v. Arrowood Indem. Co.*, No. COA19-507, 2020 WL 7039144 (N.C. Ct. App. Dec. 1, 2020).

¶ 14 First, the Court of Appeals held that the trial court appropriately applied an exposure theory for when coverage was triggered as opposed to an injury-in-fact theory. *Radiator Specialty Co.*, 2020 WL 7039144, at *3. According to the court, it was undisputed that

> the policies issued by defendants were standard-form policies with materially identical language on the issue of when coverage triggers. These policies provided that the insurer would pay "all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . caused by an occurrence[.]" The policies generally define "bodily injury" as injury, sickness, or disease sustained by a person, and "occurrence" as an accident including exposure.

Id. (alterations in original). The court rejected RSC's argument that this Court's decision in *Gaston County Dyeing Machine Co. v. Northfield Insurance Co.*, 351 N.C. 293 (2000), established that an injury-in-fact trigger applied to all standard-form policies. *Radiator Specialty Co.*,

2020 WL 7039144, at *3. Instead, the court noted that application of an injury-in-fact trigger in *Gaston*, a case involving property damage caused by a ruptured pressure vessel, "was premised upon the notion that a court could determine that 'an injury-in-fact occurs on a date certain and all subsequent damages flow from the single event.' " *Id.* (quoting *Gaston*, 351 N.C. at 304). By contrast, the court took "judicial notice of the innumerable cases concerning asbestos and benzene exposure and recognize[d] how difficult it is to ascribe a 'date certain' or 'single event' to such harm." *Id.* Accordingly, the court concluded that because "[i]njury resulting from benzene or asbestos exposure is neither discrete nor so certain . . . [r]eading the contract language and interpreting it by its terms, it seems clear that a 'bodily injury' is something caused by an 'occurrence,' which can include exposure," and thus that "the trial court did not err in applying an exposure theory of coverage instead of injury-in-fact." *Radiator Specialty Co.*, 2020 WL 7039144, at *4 (citing *Imperial Cas. & Indem. Co. v. Radiator Specialty Co.*, 862 F. Supp. 1437 (E.D.N.C. 1994), *aff'd*, 67 F.3d 534 (4th Cir. 1995)).

¶ 15 Second, the Court of Appeals held that the trial court "erred in applying pro rata allocation of liability instead of an 'all sums' allocation" in its intermediate Order Regarding Allocation but concluded that "this error was rendered moot by the entry of the final judgment." *Id.* According to the court,

> [t]he policies, by their language, are clear—any claims covered by a particular policy must be defended and indemnified by the insurer under that policy. By prorating plaintiff's costs and damages based upon "time on the risk," the trial court reallocated those damages, potentially imposing more costs on one party, and removing them from another, who might be differently obligated. We recognize that these policies represent multiple years of coverage, but judicial expediency is no excuse. We hold that it was indeed error to prorate these costs where the contracts explicitly imposed those obligations otherwise.

Id. The court concluded, however, that the trial court's error was corrected by the trial court's final judgment which "assigned costs—both in terms of defense and indemnification—to specific parties based upon their contractual obligations." *Radiator Specialty Co.*, 2020 WL 7039144, at *5. In the court's view, by entering a judgment requiring each insurer to "defend and indemnify plaintiff on the . . . claims . . . 'subject to its respective policy limits,' " the trial court "specifie[d] that the allocation

is not pro rata, but is instead subject to the contractual limitations established in the policies," which the court interpreted to require all sums allocation. *Id.* Therefore, although the court "recognize[d] the error in the intermediate order," it held that the error "was rendered moot by entry of the final judgment." *Id.*

¶ 16 Third, the Court of Appeals held that the trial court did not err in applying horizontal exhaustion to Landmark's duty to defend. *Id.* According to the court, Landmark's insurance policy "stated that it had the duty to defend suits when (1) the applicable limits of underlying insurance were used up in the payment of judgments or settlements, or (2) no other valid and collectible insurance was available." *Id.* Because the policy specifically used the phrase "other insurance," the court agreed with Landmark that "this language suggests that the policy was only triggered when any other policies held by plaintiff were exhausted." *Id.* Therefore, the court held that "a proper interpretation of the contract reveals that Landmark offered an excess policy, to be available when all other policies were exhausted." *Id.*

¶ 17 Finally, the Court of Appeals dismissed as moot RSC's challenge to the trial court's intermediate order concluding that the defendant-insurers "were not estopped from denying coverage of claims" because the trial court in its final judgment held that the defendant-insurers "owed both a duty to defend *and* a duty to indemnify" and dismissed one defendant-insurer's challenge to a summary judgment motion addressing cessation of coverage under its own policy. *Radiator Specialty Co.*, 2020 WL 7039144, at *5–6.[1]

¶ 18 On 10 August 2021, this Court allowed RSC's petition for discretionary review, Fireman's Fund's cross-petition for discretionary review, and Landmark and National Union's conditional petition for discretionary review.

C. Policies in Dispute

¶ 19 National Union issued six annual policies to RSC that were effective from 27 November 1987 through 1 May 1992. Five of the policies provide primary liability coverage, and the sixth policy provides excess coverage over the primary policy in effect from 1 May 1991 through 1 May 1992. The primary policies in effect from 27 November 1987 to 1 May 1990 state the following:

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1. After the Court of Appeals issued its decision, RSC moved for rehearing on the determination that the allocation issue had been rendered moot by the trial court's final judgment. The Court of Appeals denied the motion.

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" . . . included within the "products-completed operations hazard" to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS. This insurance applies only to bodily injury . . . which occurs during the policy period. The "bodily injury" must be caused by an "occurrence." The "occurrence" must take place in the "coverage territory". We will have the right and duty to defend any "suit" seeking those damages . . . .

¶ 20 The primary policies in effect from 1 May 1990 to 1 May 1992 state the following:

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" . . . to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages . . . .
>
> * * *
>
> No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS.
>
> b. This insurance applies to "bodily injury" . . . only if:
>
> > (1) The "bodily injury" is caused by an "occurrence" that takes place in the "coverage territory," and
> >
> > (2) The "bodily injury" . . . occurs during the policy period.

The sixth policy provides excess coverage and incorporates and adopts the terms of the primary policy from the period of 1 May 1991 to 1 May 1992. All six policies define "bodily injury" as "bodily injury, sickness, or disease sustained by a person, including death resulting from any of these at any time." The policies define the term "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

¶ 21 Fireman's Fund issued three excess liability insurance policies to RSC that were effective during three periods of time: from 10 December 1976 to 17 October 1977; from 17 October 1977 to 17 October 1978; and from 1 May 1979 to 1 May 1980. Each excess policy incorporated language from certain underlying policies providing primary liability insurance.

> Agreement #1:
>
> I. COVERAGE —
>
> Underwriters hereby agree, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of liability:
>
> (a) Imposed upon the Assured by law, or
>
> (b) assumed under contract or agreement by the Named Assured and/or any officer, director, stockholder, partner or employee of the Named Assured, while acting in his capacity as such,
>
> for damages on account of —
>
> (i) Personal Injuries
>
> (ii) Property Damage
>
> . . . .
>
> caused by or arising out of each occurrence happening anywhere in the world,
>
> . . . .
>
> THIS POLICY IS SUBJECT TO THE FOLLOWING DEFINITIONS:
>
> . . . .
>
> 2. PERSONAL INJURIES —
>
> The term "Personal Injuries" wherever used herein means bodily injury (including death at any time resulting therefrom), . . . sickness, disease, disability, ...
>
> . . . .

5. OCURRENCE —

The term "Occurrence" wherever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, [or] property damage . . . during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence.

Agreement #2:

INSURING AGREEMENTS:

I. Coverage. To pay on behalf of the insured the ultimate net loss in excess of the applicable underlying (or retained) limit hereinafter stated, which the insured shall become obligated to pay by reason of the liability imposed upon the insured by law or assumed by the insured under contract:

(a) PERSONAL INJURY LIABILITY. For damages, including damages for care and loss of services, because of personal injury, including death at any time resulting therefrom, sustained by any person or persons,

(b) PROPERTY DAMAGE LIABILITY. For damages because of injury to or destruction of tangible property including consequential loss resulting therefrom[.]

. . . caused by an occurrence.

. . . .

IV. Other Definitions. When used in this policy . . . .

(a) "Personal Injury" means (1) bodily injury, sickness, disease, disability . . . .

(e) "Occurrence." With respect to Coverage 1(a) and 1(b) occurrence shall mean an accident, including injurious exposure to conditions, which results, during the policy period, in personal

> injury or property damage neither expected nor intended from the standpoint of the insured. . . .

V. Policy Period, Territory. This policy applies only to personal injury, [or] property damage . . . occurrences which happen anywhere during the policy period.

Agreement #3:

I. COVERAGE

To indemnify the INSURED for ULTIMATE NET LOSS, as defined hereinafter, in excess of RETAINED LIMIT, as herein stated, all sums which the INSURED shall be obligated to pay by reason of liability imposed upon the INSURED by law or liability assumed by the INSURED under contract or agreement for damages and expenses, because of:

> A. PERSONAL INJURY, as hereinafter defined;
>
> B. PROPERTY DAMAGE, as hereinafter defined;
>
> . . . .

to which this policy applies, caused by an OCCURRENCE, as hereinafter defined, happening anywhere in the world.

. . . .

DEFINITIONS

. . . .

H. OCCURRENCE:

With respect to Coverage 1(A) and 1(B) "OCCURRENCE" shall mean an accident or event including continuous repeated exposure to conditions, which results, during the policy period, in PERSONAL INJURY or PROPERTY DAMAGE neither expected nor intended from the standpoint of the INSURED. For the purpose of determining the limit of the Company's liability, all personal injury and property damage arising out of continuous or repeated exposure to substantially the same general

> conditions shall be considered as arising out of one OCCURRENCE.
>
> . . . .
>
> I. PERSONAL INJURY:
>
> The term PERSONAL INJURY wherever used herein means:
>
> (1) bodily injury, sickness, disease, disability or shock, including death at any time resulting therefrom . . . .
>
> which occurs during the policy period.

¶ 22 Finally, Landmark issued umbrella/excess liability policies to RSC, which were effective from 8 October 2003 to 1 May 2014. Each policy contains the same provisions, including:

> A. <u>Coverage For "Bodily Injury" Liability</u>
>
> The policies afford coverage for "bodily injury" liability:
>
> I. INSURING AGREEMENT
>
> 1. We will pay on behalf of the insured those sums in excess of the "retained limit" which the insured becomes legally obligated to pay as damages to which this insurance applies because of "bodily injury" . . . .
>
> 3. This insurance applies to "bodily injury" [ ] only if:
>
> a. The "bodily injury" [ ] is caused by an occurrence;
>
> b. The "bodily injury" [ ] occurs during the policy period . . . .

II. Standard of Review

¶ 23 Summary judgment is reviewed de novo. *In re Will of Jones*, 362 N.C. 569, 573 (2008). Summary judgment is appropriate where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56(c) (2021); *Meadows v. Cigar Supply Co.*, 91 N.C. App. 404, 406 (1988). Insurance contract interpretation is a

question of law. *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354 (1970).

III. Analysis

A. Trigger of Coverage – Exposure vs. Injury-in-Fact

¶ 24 **[1]** The parties dispute at what point each insurer's coverage was triggered. All of the relevant policies provide coverage for "bodily injur[ies]" caused by an "occurrence." The policies tend to define "bodily injury" or "personal injury" as injury, sickness, or disease sustained by a person, and "occurrence" as an accident including exposure. The issue this Court must decide, then, is the point at which the various benzene claimants experienced bodily injury such that RSC's coverage under the policies was activated. Put differently, we must decide which policies apply to which claims by determining the relevant event that activates an insurer's coverage.

¶ 25 Landmark and National Union argue that this activating or triggering event is a claimant's actual exposure to benzene. Fireman's Fund and RSC contend that the policies do not provide coverage until there is a cognizable injury. As discussed below, we agree with the trial court and the Court of Appeals that a claimant's period of exposure to benzene is the appropriate reference point in determining which policies provide coverage for a given benzene-related injury.

1. Injury-in-fact Trigger Theory

¶ 26 Fireman's Fund's primary argument in support of an injury-in-fact trigger is that the terms of the policies it offered RSC "provide coverage for 'Personal Injuries' . . . which they define as 'bodily injury,' 'sickness' and 'disease,' which results 'during the policy period.' " According to Fireman's Fund, these terms require an injury-in-fact trigger because the policies only "afford[ ] coverage for *actual injury* which occurs *during the policy period*." Fireman's Fund claims that the policies it offered RSC cannot be triggered by benzene exposure alone because benzene exposure is not itself an injury-causing occurrence.[2]

¶ 27 Next, Fireman's Fund argues that case law supports an injury-in-fact trigger. Fireman's Fund points to this Court's decision in *Gaston County Dyeing Machine Co. v. Northfield Insurance Co.*, which held that coverage for property damage was triggered by an "injury-in-fact." 351 N.C. 293, 302–03 (2000). *Gaston* concerned the point at which insurance

2. Medical and scientific evidence presented at the trial was filed under seal. This opinion therefore discusses sealed information only in general terms.

coverage for property damage caused by a ruptured pressure vessel was triggered. *Id.* at 295. We explained that when "the accident that causes an injury-in-fact occurs on a date certain and all subsequent damages flow from the single event, there is but a single occurrence; and only the policies on the risk on the date of the injury-causing event are triggered." *Id.* at 304.

¶ 28 According to Fireman's Fund, the same logic applies here. Fireman's Fund argues that, even though benzene exposure is the cause of the claimants' injuries, it is the actual injury—the resulting cancers or other physical ailments—that allows claimants to "present claims and file suits against [RSC] in the underlying benzene actions . . . Stated differently, the benzene claimants each allege that [RSC] is liable to them for their cancers—not for the exposure itself." Although Fireman's Fund acknowledges that "unlike the property damage in *Gaston*, the 'bodily injury' here is not a single state confined to a narrow period of time," Fireman's Fund contends that "the key question is the same. Whatever acts prompted the accident in *Gaston*, it was not until the pressure vessel ruptured that damage occurred. If it hadn't ruptured, there would not have been any property damage." Likewise, with respect to benzene exposure, Fireman's Fund argues that "[w]hatever exposures prompted the various mutations, it was not until a malignancy developed that injury occurred."

¶ 29 Fireman's Fund further argues that the injury-in-fact approach is "widely accepted" and recognizes that "multiple policy periods can be triggered in connection with progressive disease claims." In support of this assertion, Fireman's Fund cites numerous cases applying an injury-in-fact trigger of coverage while still allowing for the "application of a multiple trigger[3] in the context of bodily injury coverage for the progressive disease claims at issue." *See, e.g.*, *Dow Chem. Co. v. Associated Indem. Corp.*, 724 F. Supp. 474, *as supplemented*, 727 F. Supp. 1524 (E.D. Mich. 1989); *Am. Home Prods. Corp. v. Lib. Mut. Ins. Co.*, 565 F. Supp. 1485 (S.D.N.Y. 1983), *as modified*, 748 F.2d 760 (2d Cir. 1984); *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178 (2d Cir. 1995). Relying on these cases, Fireman's Fund argues that

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3. The multiple trigger approach recognizes that multiple events may trigger an insurer's coverage such that an insurer may be held liable from the date of the injury-causing occurrence until manifestation of the injury. *See J.H. France Refractories Co. v. Allstate Ins. Co.*, 534 Pa. 29 (1993). Courts that have adopted this approach in the asbestos context, for example, have recognized that "exposure to asbestos or silica, progression of the pathology, or manifestation of the disease" may all trigger an insurer's liability if the insurer was on the risk at the time of any one of these relevant events. *Id.* at 37.

the appropriate question in applying the injury-in-fact framework is "at which points in time are there identifiable or actual 'personal injuries' . . . proven to have occurred to a reasonable degree of medical certainty?"

¶ 30 Finally, Fireman's Fund argues that benzene exposure causes identifiable injuries-in-fact at various points in time from malignancy until diagnosis or death. Quoting *Wilder v. Amatex Corp.*, 314 N.C. 550, 560 (1985), Fireman's Fund argues that this Court has already established that "[e]xposure to disease-causing agents is not itself an injury" and that "in the context of disease claims," the point in time when "the immune system fails and disease occurs . . . constitutes the first injury." Though recognizing that benzene is a cancer-causing agent, Fireman's Fund argues that exposure does not *necessarily* have such consequences, and "[t]hus, to describe a mutation or series of mutations that has not developed into a malignancy as 'bodily injury' is not reasonable." In Fireman's Fund's view, a cognizable injury only arises when a malignancy develops into "an 'evolving cancer,' and actual impairment, injuries, sickness, and disease" result, thereby triggering coverage.

¶ 31 RSC similarly argues that a policy's coverage is triggered if and when a claimant suffers bodily injury, sickness, disease, or death during the policy period. According to RSC, both the trial court and the Court of Appeals "erred in holding that coverage is triggered *only* if a claimant experienced *exposure* to benzene during the policy period." Rather, RSC argues that both *Gaston* and the plain language of the policies at issue compel application of the injury-in-fact approach. However, RSC contends that "there is a factual dispute among the parties about how an injury-in-fact trigger applies to the facts of this case." Specifically, because an injury-in-fact trigger has not yet been applied in this litigation, RSC urges that this Court should not be the first to determine "during which policy periods . . . each benzene claimant's alleged injuries in fact occur[ed]." RSC contends that there is "[c]onflicting medical expert testimony" creating factual and evidentiary disputes that the trial court did not resolve, and which this Court cannot resolve. Accordingly, RSC asks this Court to remand the case to the trial court to allow it "to apply an injury-in-fact trigger of coverage in the first instance."

2. The Exposure Trigger

¶ 32 By contrast, Landmark and National Union ask this Court to hold that the policies providing coverage for benzene exposure were triggered during the exposure period. As National Union puts it, the lower courts "correctly held that coverage is triggered under those policies in effect during a given claimant's exposure to Benzene." This means that "coverage is triggered if, and only if, the underlying claimant was

exposed to benzene during that policy's effective dates because a claimant only experiences 'bodily injury' during exposure to benzene." Landmark and National Union agree that both North Carolina law and medical evidence require this conclusion.

¶ 33 Central to their position is the argument that "a claimant only experiences 'bodily injury' during exposure to benzene." According to National Union, Fireman's Fund's argument "requiring malignancy and/or diagnosable illness" as opposed to DNA damage "functionally reads the term 'bodily injury' out of the definition of 'bodily injury' by equating it with 'sickness' or 'disease.' " In addition to medical evidence presented at trial, both Landmark and National Union rely on the United States District Court for the Eastern District of North Carolina's decision in *Imperial Cas. & Indem. Co. v. Radiator Specialty Co.*, 862 F. Supp. 1437 (E.D.N.C. 1994), in support of their position.

¶ 34 In that case, the court expressly rejected the manifestation trigger theory for progressive bodily injury and applied the exposure trigger theory based on the "view that exposure to the dangerous substance at issue during the policy period caused immediate, albeit undetectable, physical harm which ultimately led to disease or physical impairment after the expiration of the policy period."[4] *Id.* at 1442. (quoting *Cont'l Ins. Cos. v. Ne. Pharm. & Chem. Co.*, 811 F.2d 1180, 1190 (8th Cir. 1987)). Both National Union and Landmark argue that this holding is consistent with evidence that the actual bodily injuries caused by benzene exposure happen in the days following exposure, whereas the consequences of the injury may take much longer to become detectable.

¶ 35 Despite its relevance, Fireman's Fund contends that *Gaston*'s adoption of an injury-in-fact trigger renders *Imperial Casualty* irrelevant because, although the federal court in that case predicted that this Court would adopt an exposure theory, this Court opted for the injury-in-fact approach in *Gaston*. Landmark and National Union reject this assertion. For example, National Union responds that *Gaston* "differs from [*Imperial Casualty* and] this case because it assessed trigger of coverage for property damage occurring on a date certain, not claims for bodily injury caused by long-term benzene exposure." According to National Union, *Gaston* actually confirms that courts must "look[ ] to the evidence to determine when the damage took place and not when

4. Citing *Imperial Casualty*, National Union points out that "the majority of federal cases on this issue [progressive diseases] have found coverage by adopting the 'exposure' or the 'continuous exposure,' theory of when injury occurs." 862 F. Supp. at 1442 (citing *Cont'l Ins. Companies v. Ne. Pharm. And Chem. Co.*, 811 F.2d 1180, 1190 (8th Cir. 1987).

the consequences of the damage became evident." Likewise, Landmark takes the position that *Gaston* did not adopt an injury-in-fact trigger in the bodily-injury context, noting that *Gaston* considered property damage occurring on a date certain, rather than progressive bodily injury resulting from exposure to a harmful substance.

¶ 36 Finally, National Union argues that this Court should not adopt Fireman's Fund's "continuous trigger" theory that would allow coverage from "all policies in effect from the time a claimant is exposed to benzene until diagnosis or death." Though National Union acknowledges that other courts have applied a continuous trigger theory in the context of asbestos claims, National Union argues that "benzene is different than asbestos" because "[u]nlike benzene, asbestos stays in the body permanently and may continue to cause *new* injuries after exposure." By contrast, benzene "causes injury only during the time periods in which a claimant is exposed to it and then is flushed from the body within hours or days." National Union notes that other jurisdictions have rejected the continuous trigger theory in cases involving exposure to "substances that cease causing injury once exposure stops" and cause illnesses that do not manifest until years later. *See, e.g.*, *In re Silicone Implant Ins. Coverage Litig.*, 667 N.W.2d 405 (Minn. 2003); *Hancock Lab'ys, Inc. v. Admiral Ins. Co.*, 777 F.2d 520 (9th Cir. 1985).

3. Analysis

¶ 37 The unambiguous language of each of the relevant policies requires the insurers to indemnify RSC for claims raised by claimants who suffered some form of personal or bodily injury caused by an occurrence and specifies that either the occurrence or the resulting injury must take place during the effective period of the insurer's policy. But, as Landmark and National Union argue, the policies do not define personal or bodily injury to require some diagnosable sickness or disease for coverage to be triggered. For example, the term "personal injury" as used in Fireman's Fund's policies includes a "bodily injury," such as that caused by "exposure."

¶ 38 As Landmark and National Union argue, benzene causes bodily injury upon exposure. Fireman's Fund's and RSC's attempt to redefine "injury-in-fact" as death, disease, or some other physical manifestation of the harm confuses the injury with its consequences. Assuming there is no intervening cause, cancer is a manifestation of the injury that occurs upon benzene exposure that creates a compensable claim. It is not the injury itself. Even though we hold that exposure to benzene is synonymous with the coverage-triggering injury, that injury is only

compensable if it results in damages. In other words, if a person is exposed to benzene but suffers no consequences as a result, the individual has sustained no *compensable* harm.

¶ 39 We are persuaded by the reasoning of *Imperial Casualty*. Quoting the Sixth Circuit's decision in a similar asbestos exposure case, the United States District Court for the Eastern District of North Carolina noted that "[c]umulative disease cases are different from the ordinary accident or disease situation" in part because, if the injury-in-fact theory were adopted, "the manufacturer's coverage becomes illusory since the manufacturer will likely be unable to secure any insurance coverage in later years when the disease manifests itself." *Imperial Casualty*, 862 F. Supp. at 1443 (quoting *Ins. Co. of North Am. v. Forty-Eight Insulations*, 633 F.2d 1212, 1219 (6th Cir. 1980)). This makes good sense: If coverage is triggered only upon disease manifestation, then a company that obtained coverage during a period that it manufactured products with benzene could not invoke its coverage if the individuals who were exposed to benzene during the coverage period did not develop a disease or die until after the policy expired. That would make the availability of coverage to RSC predicated on its maintenance of coverage in perpetuity, even if RSC had stopped manufacturing benzene-containing products.

¶ 40 *Gaston* does not overrule or otherwise displace *Imperial Casualty*. In *Gaston*, this Court was selecting between "an 'injury-in-fact' or a 'date-of-discovery' trigger of coverage . . . where the date of property damage [was] known and undisputed." *Gaston*, 351 N.C. at 299. The Court of Appeals is correct that, in dealing with coverage for property damage, *Gaston* involved distinct factual circumstances. But at their core, the factual distinctions between this case and *Gaston* relate to how to properly define the injury, which in turn controls when coverage is triggered under the relevant policies.

¶ 41 *Gaston* explicitly rejected the notion that coverage-triggering damage "occurs 'for insurance purposes' at the time of manifestation or on the date of discovery." *Id.* at 303 (overruling *W. Am. Ins. Co. v. Tufco Flooring E.*, 104 N.C. App. 312 (1991)). Instead, "the accident that causes an injury-in-fact occurs on a date certain and all subsequent damages flow from the single event, there is but a single occurrence; and only policies on the risk on the date of the injury-causing event are triggered." *Id.* at 304. Nothing in *Gaston* suggests either that exposure to a substance causing alterations to a person's DNA is not an "injury-in-fact" or that an insurer offering coverage when a claimant is exposed to benzene is not liable for all the damages arising from that injury.

¶ 42 Finally, Fireman's Fund argues that, if we apply the exposure theory to this case, we "should also hold that . . . policies in place throughout the development of a claimant's malignancy and the 'evolving cancer,' and the resulting bodily injury, sickness, and disease should be triggered too." According to Fireman's Fund, "it would be anomalous to hold that coverage is triggered by exposure alone, when the claimant is healthy, but that there is no coverage triggered during the times when a claimant" is ill. This application of a continuous trigger would be at odds with our holding that, in benzene cases, the injury that triggers coverage occurs at the time of exposure.

¶ 43 Consistent with other courts that have decided the issue, National Union and Landmark have established that an injury occurs at the time of benzene exposure. To apply a continuous trigger approach in this context would be to adopt Fireman's Fund's and RSC's mischaracterization of the relevant injury: In order for the policies to provide coverage, we would be required to label the injury's consequences (*e.g.*, cancer) as the bodily injury itself. Thus, under these circumstances, a continuous trigger is necessarily inconsistent with an exposure trigger.[5]

B. Allocation

¶ 44 **[2]** Next, the parties ask this Court to determine how to properly allocate RSC's benzene liabilities among the providers. As discussed, while some injuries occur at a definite time and place, other injuries, such as those resulting from benzene exposure, are not so definite and could have resulted from any one exposure over a period of years. In these circumstances, the injury may implicate numerous insurance policies provided by different insurers over the course of the period during which the damage *could* have occurred. In such cases, it is necessary to determine how to apportion costs arising during the various policy years to the appropriate insurers.

¶ 45 The period during which a particular policy's coverage is triggered is referred to as "time on the risk." Under a pro rata, or time-on-the-risk, allocation approach, "each triggered policy bears a share of the total

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5. Whether the multiple-trigger theory should apply in a given case requires a fact-intensive analysis regarding the nature of the injury in question. In the context of benzene exposure where DNA mutations occur upon exposure, benzene is expelled from the body within a matter of days, and the injury ceases shortly after exposure ceases, the cancer that may later result is not itself a new injury that would trigger additional policies. But where the injury-inducing condition persists over time, such as in the context of asbestos exposure or environmental contamination, or later results in new, distinct injuries, the multiple-trigger theory may be appropriate.

damages proportionate to the number of years it was on the risk, relative to the total number of years of triggered coverage." Thomas M. Jones & Jon D. Hurwitz, *An Introduction to Insurance Allocation Issues in Multiple-Trigger Cases*, 10 Vill. Envtl. L.J. 25, 42 (1999). As Fireman's Fund explains, "costs are allocated among the policies according to their respective time on the risk." By contrast, all sums, or joint and several, liability "allows recovery in *full* under any triggered policy of the policyholders' choosing and leaves the selected insurer to pursue cross-claims against other carriers whose policies were also available." *Id.* at 37. This means that "any policy on the risk for any portion of the period in which the insured sustained property damage or bodily injury is jointly and severally obligated to respond in full, up to its policy limits, for the loss." *Id.* at 37–38.

¶ 46 All three insurers argue that pro rata allocation is appropriate based on the terms of their policies, whereas RSC advocates for adopting an all sums approach. The trial court applied the pro rata method, but the Court of Appeals held that all sums allocation was warranted.

1. Mootness

¶ 47 Although the Court of Appeals held that the trial court erroneously applied pro rata allocation in its intermediate order, it further held that this error was rendered moot because the trial court entered a final judgment "specif[ing] that the allocation is not pro rata, but is instead subject to the contractual limitations established in the policies," which the Court of Appeals interpreted to require all sums allocation. *Radiator Specialty Co.*, 2020 WL 7039144, at *5.

¶ 48 RSC contends that the Court of Appeals reached the correct ultimate substantive conclusion—that the standard-form policy language compels an all sums rather than pro rata allocation of costs—but "muddled its correct legal ruling by mistakenly failing to apply it to the trial court's Final Judgment."

¶ 49 RSC argues that the trial court's final judgment incorporated the intermediate Order Regarding Allocation, which interpreted the disputed policy language to compel pro rata allocation. When the trial court's final judgment ordered the insurers to defend and indemnify RSC "subject to their respective policy limits," it meant "subject to their respective policy limits" *as interpreted by the trial court* (*e.g.*, subject to their respective policy limits under a pro rata allocation method). RSC asks this Court to correct the Court of Appeals' error and ensure that it is paid in accordance with the all sums allocation method the Court of Appeals held to be required by the insurance policies.

¶ 50 The insurers do not appear to contest RSC's assertion that the Court of Appeals erred in holding that the trial court's final judgment order rendered its intermediate order moot. Instead, they ask that "[i]f this Court reverses the Court of Appeals' mootness determination, it should also reverse the Court of Appeals' unsupported endorsement of all-sums allocation because all-sums allocation is incompatible with the terms of the National Union policies, inequitable, and bad public policy."

¶ 51 Though RSC is correct that the Court of Appeals misconstrued the trial court's final judgment as calling for all sums allocation, our resolution of the substantive question—that pro rata allocation is appropriate—overrules the Court of Appeals' suggestion to the contrary. For the sake of clarity, the trial court's final judgment should be read to require costs to be assigned pro rata.

2. Pro Rata versus All Sums Allocation

a. The insurers' pro rata allocation position.

¶ 52 The insurers' central argument is that the express language of the contracts contemplates pro rata rather than all sums allocation. For example, as National Union explains, its policies with RSC contain one of two substantively identical insuring provisions stating, in effect, that National Union "will pay *those* sums that [RSC] becomes legally obligated to pay as damages because of 'bodily injury' . . . . This insurance applies only to bodily injury . . . which occurs during the policy period." According to National Union, this "express and plain language require[s] pro-rata allocation, and the Court of Appeals erred in stating otherwise." National Union argues that all sums allocation is only appropriate when an insurance policy specifically contemplates paying "all sums" arising from relevant injuries. "The thinking goes that the promise to pay '*all* sums' renders the insurer responsible for the entirety of the insured's liability, even if only a portion of that liability stems from damage during the policy period." Thus, National Union emphasizes that its policies intentionally use the term "*those* sums" in describing which of RSC's liabilities National Union will become obligated to pay from the policy periods.

¶ 53 In support of this argument, National Union notes that multiple jurisdictions—including jurisdictions that generally apply an all sums allocation approach—have recognized that the phrase "those sums" has a distinct meaning when included in an insurance agreement. *See, e.g., Thomson Inc. v. Ins. Co. of N. Am.*, 11 N.E.3d 982 (Ind. Ct. App. 2014); *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40 (2011).

¶ 54 Even aside from the "all sums" versus "those sums" distinction, National Union contends that pro rata allocation is appropriate because it "is the only allocation method that gives effect to the National Union Policies' 'during the policy period' language." Relying on many cases that have adopted this interpretation, National Union argues that this term "unambiguously limits coverage to damages for injuries taking place during the policy's annual term." National Union argues that, "[i]n contrast, the all-sums method ignores the 'during the policy period' language and reads it out of the contract, because it makes an insurer liable for damages attributable to bodily injury happening *outside* the bargained-for policy period." National Union asserts this would "conflict[ ] with fundamental North Carolina law that unambiguous terms in a contract must be enforced as written."

¶ 55 Similarly, Fireman's Fund argues that "[p]ro rata allocation is required by the language of the policies before this Court, which limits coverage for personal injury to those that result 'during the policy period.' " According to Fireman's Fund, pro rata allocation is consistent with the design of " '[o]ccurrence-based' insurance policies . . . [which] provide coverage for a discrete and finite policy period: insurers assume risks only for injuries that occur 'during the policy period.' " By design, occurrence-based provisions "serve[ ] to limit the risks for which insurers accept responsibility."

¶ 56 In effect, the insurers argue that, pursuant to the policies' language, they assumed the risk of certain RSC liabilities "during the policy period." In this way, "the 'policy period' of an insurance policy acts as a substantive limitation on the coverage afforded." In Fireman's Fund's view, pro rata allocation gives effect to these contractual choices because the insurance agreements "afford coverage for personal injury *to which the policies apply*, which is injury that occurs during their respective policy periods." By contrast, an all sums approach effectively puts one insurer on the hook for injuries occurring in policy periods that its policies do not cover.

¶ 57 According to Fireman's Fund, the modern trend has decisively moved towards pro rata allocation over the all sums approach.[6] In Fireman's Fund's telling, these cases accord with the language of

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6. *See, e.g.*, *Pa. Nat'l Mut. Cas. Ins. Co. v. Roberts*, 668 F.3d 106 (4th Cir. 2012); *Arceneaux v. Amstar Corp.*, 200 So.3d 277 (La. 2016); *S. Silica of La., Inc. v. La. Ins. Guar. Ass'n*, 979 So.2d 460 (La. 2008); *Rossello v. Zurich Am. Ins. Co.*, 468 Md. 92 (2020); *Bos. Gas Co. v. Century Indem. Co.*, 454 Mass. 337 (2009); *Dutton-Lainson Co. v. Cont'l Ins. Co.*, 279 Neb. 365 (2010); *Crossmann Cmtys. of N.C. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40 (2011).

insurance contracts limiting coverage to injuries occurring during the years the coverage is active, giving effect to the bargained-for choices of RSC and the insurers to limit coverage "for all sums attributable to injury occurring during the policy period—not all injury occurring at any time (including injury occurring outside the policy period)."

¶ 58 Fireman's Fund also asserts that "principles of equity and commonsense support pro rata allocation." According to Fireman's Fund, "[i]mposing liability on an all sums basis would create a windfall for policyholders" because "[u]nder an all sums approach, policyholders who bought insurance *for a single year* may obtain exactly the same coverage for loss as those who bought insurance continuously for decades." Fireman's Fund contends that the insured's choices should dictate the level of risk the insured is susceptible to: An insured who chooses to purchase broad coverage from a financially-secure insurer every year over a ten-year period should not be treated the same as an insured who chooses to purchase narrow coverage for a single year from a risky provider.[7]

¶ 59 Landmark "joins in Fireman's Fund's Appellant Brief concerning the allocation issue" and notes that "the arguments in Fireman's Fund's Appellant Brief concerning why its policy language requires pro-rata allocation instead of all sums allocation apply equally to the Landmark policies." In addition, Landmark notes that its policies "do not contain 'all sums' language," and instead require Landmark only to pay "*those sums* in excess of the 'retained limit' which the insured becomes legally obligated to pay." Thus, Landmark also joins the section of National Union's brief "addressing why 'those sums' policy language further requires pro-rata allocation, instead of all sums allocation, for defense expenses and indemnity sums related to any benzene bodily injury lawsuit that triggers a Landmark policy."

b. RSC's all sums allocation position.

¶ 60 In response, RSC argues that the plain language of the policies "require[s] a triggered Insurer to indemnify RSC for 'all sums' or 'those sums' it becomes legally obligated to pay—not a lesser, prorated sum."

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7. National Union also makes a similar public policy argument as Fireman's Fund, explaining that "[a]n all-sums approach unfairly foists upon insurers the cost for periods in which a policyholder chose not to obtain" adequate insurance. Meanwhile, pro rata allocation "forces companies to internalize part of the costs of long-tail liability and creates incentives for companies to minimize environmental carelessness by not permitting a policyholder who chooses not to be insured . . . to recover as if the policyholder had been fully covered" *EnergyNorth Nat. Gas, Inc. v. Certain Underwriters at Lloyd's*, 156 N.H. 333, 344 (2007).

According to RSC, cases from other jurisdictions demonstrate that "the phrase 'all sums' or 'those sums' means . . . a triggered insurer is obligated to pay *all the sums* the insured becomes legally obligated to pay as damages." *See*, *e.g.*, *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981); *J.H. France Refractories Co.*, 534 Pa. 29 (1993); *California v. Cont'l Ins. Co.*, 55 Cal. 4th. 186, *as modified* (Sept. 19, 2012).

¶ 61 RSC contends that language in the relevant policies defining occurrence as "continuous or repeated exposure" and requiring the insurers to pay all " '*damages* because of' bodily injury" indicates that the insurers knew they would be responsible for paying "compensation for ongoing harm suffered *after* the policy period." Similarly, RSC argues that there is language in the policies that is "antithetical to *pro rata* allocation, including continuing coverage, non-cumulation, and prior-insurance provisions," which all presuppose that (1) multiple policies may be called upon to indemnify RSC for a single loss or occurrence, and (2) insurers may be required to indemnify the insured for losses arising outside of the policy period. For example, RSC notes that all three of the insurers' policies "extend coverage beyond the policy period to liability for 'death resulting *at any time* from the bodily injury," provisions which other courts "have found incompatible with *pro rata* allocation." At the same time, RSC emphasizes "the glaring *absence* of any express *pro rata* limitation[,]" an omission that is "particularly notable given that the Insurers have been aware of the hotly contested issue of 'all sums' vs. *pro rata* allocation *for decades*."

¶ 62 RSC contends that the various arguments raised by the insurers in support of pro rata allocation are meritless. First, RSC argues that the phrase " 'during the policy period' . . . does not limit the *extent of coverage*; it merely specifies the *trigger of coverage*." Second RSC argues that the use of the phrase "those sums" rather than "all sums" does not "clearly and unambiguously require[ ] *pro rata* allocation" because there is "no substantive difference between the promise to pay 'all,' 'those,' or 'the' sums—each phrase promises indemnification for the full amount RSC becomes legally obligated to pay." Third, RSC argues that the insurers have mischaracterized the state of the law on this issue and ignored "older, well-established cases" applying an all sums allocation method, as well as a recent North Carolina trial court decision, *Duke Energy Carolinas, LLC v. AG Insurance SA/NV*, No. 17 CVS 5594, 2020 WL 3042168 (N.C. Super. Ct. June 5, 2020). And fourth, RSC argues that the insurers' appeals to equity are misplaced, both because "[e]quitable considerations cannot trump contractual language" and because regardless, "[e]quity strongly favors RSC." Specifically, RSC emphasizes that

under an all sums allocation method, "[n]one of the Insurers are being asked to pay more than its policy limit; no primary insurer is being asked to respond until RSC satisfies the deductible or retention; . . . no excess insurer is being asked to respond until the full amount of the directly underlying policy's limit has been exhausted," and RSC will still be responsible for its decisions not to obtain adequate insurance for a given year. RSC notes that any insurer who bears the costs based on RSC's selection of a triggered policy may seek contribution from other insurers who were "on the risk" at the time an injury occurred.

c. Analysis

¶ 63 It is a "well-settled principle that an insurance policy is a contract[,] and its provisions govern the rights and duties of the parties thereto." *Fid. Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380 (1986). "As with all contracts, the object of construing an insurance policy 'is to arrive at the insurance coverage intended by the parties when the policy is issued.' " *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield L.L.C.*, 364 N.C. 1, 9 (2010) (quoting *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354 (1970)). That principle is true here. Key to determining whether all sums allocation is appropriate is whether the policy language provides for such an approach.

¶ 64 Language indicating that an insurer will cover "all sums" must be present in the policy to warrant application of all sums allocation.[8] *See, e.g.*, *Rossello v. Zurich Am. Ins. Co.*, 468 Md. 92, 119 (2020); *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St. 3d 512, 516 (2002); *Keene Corp.*, 667 F.2d at 1047–50; *see also* Thomas M. Jones & Jon D. Hurwitz, *An Introduction to Insurance Allocation Issues in Multiple-Trigger Cases*, 10 Vill. Envtl. L.J. 25, 37 (1999) (explaining that, when implementing the "all sums" approach, courts "usually focus on a policy's 'all sums' language, which commonly states: '[t]he Company will pay on behalf of all the insured all sums which the insured shall become legally obligated to pay' " (alteration in original)).

¶ 65 Though the insurers' policies contain language agreeing to pay "all sums" arising from certain liabilities (or what RSC contends is

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8. The dissent argues that this statement "erroneously suggests that cases from other jurisdictions . . . require an insurance policy to contain the terminology 'all sums' for an insurer to have complete indemnity obligations." Though the dissent claims this statement is a mischaracterization, in fact, the dispositive language meriting all sums allocation in these cases was the presence of the term 'all sums' (or its equivalent) in the policies. The dissent fails to point to any case in which a court has applied all sums allocation in the absence of "all sums" language or similar terminology.

equivalent language), Fireman's Fund, Landmark, and National Union each point to other language in their policies with RSC that, in their view, expressly limits the policies to bodily injury sustained "during the [respective] policy period[s]." Specifically, Fireman's Fund's agreements generally provide coverage for personal injuries caused by an "occurrence," which is defined as "an accident or a happening or event . . . which unexpectedly and unintentionally *results in personal injury . . . during the policy period*."[9] Landmark's policies provide coverage for "bodily injury" but "only if" the injury "occurs during the policy period." Likewise, National Union's primary policies from 1987 to 1990 "appl[y] only to bodily injury . . . which occurs during the policy period." Its primary policies from 1990 to 1992 state that it will cover "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury[,]' " but "only if . . . [t]he 'bodily injury' . . . occurs during the policy period."[10]

¶ 66 As the insurers argue, the modern trend is to apply pro rata allocation when limiting language like "during the policy period" exists, even when the policy contains a reference to paying "all sums" arising out of certain liabilities. *See, e.g.*, *Rossello*, 468 Md. at 119 (holding that, where "during the policy period" language was present, "the pro rata approach [was] unmistakably consistent with the language of standard . . . policies"); *Crossmann Cmtys. of N.C.*, 395 S.C. at 62 (applying pro rata allocation where "during the policy period" limiting language was present and explaining that this interpretation "give[s] effect to each part of the insuring agreement (rather than focusing solely on the terms 'all sums' or 'those sums'), [and] . . . is consistent with the objectively reasonable expectations of the contracting parties"). For example, in *Rossello*, an insurance policy stated that the insurer would "pay on behalf of the Insured *all sums* which the Insured shall become legally obligated to pay." 468 Md. at 118. The Court of Appeals of Maryland, the state's highest court, held that even in the face of this provision, pro rata allocation was appropriate. *Id.* at 119. The court explained that reading the policy to require all sums allocation would be "inconsistent with the remainder of the agreement because each policy provides coverage only for 'bodily injury . . . which occurs during *the policy period*.' " *Id.* at 118. The reasoning in *Rossello* similarly applies to the policies at issue here.

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9. Though there are slight variations in language between Fireman's Fund's various policies, all three of the policies state that the occurrences for which coverage is provided are events that happen "during the policy period."

10. National Union's sixth policy providing excess coverage incorporates and adopts the terms of the primary policy from 1991 to 1992 and therefore uses the same language.

¶ 67 This case does involve a slight distinction in that the policy in *Rosello* defined bodily injury as *injuries* that occur during the policy period. Here, Fireman's Fund's policies provide coverage for bodily or personal injuries that result from *occurrences* that happen during the policy period. This distinction is inapposite. As discussed above, exposure to benzene constitutes an "occurrence" that may trigger coverage if the exposure leads to "bodily injury." Because there is very little daylight between exposure and injury in the context of benzene exposure, there is virtually no practical purpose in distinguishing between a clause limiting coverage to injuries that occur during the policy period and those limiting coverage to occurrences during this period. Pursuant to the limiting language of Fireman's Fund's policies then, Fireman's Fund will only indemnify RSC for the costs of such occurrences that take place "during the policy period." *See, e.g.*, *Bos. Gas Co. v. Century Indem. Co.*, 454 Mass. 337, 360, 910 N.E.2d 290, 307–08 (2009). Thus, even if a policy contains language promising to pay for "all sums" that RSC "shall be obligated to pay . . . because of" personal or bodily injury, contractual language that limits this phrase to *either* bodily injuries that occur during the policy period or occurrences that take place during the policy period makes clear that the insurer's obligation is not without limits.

¶ 68 Rather, using Fireman's Fund's policies as an example, the insurer agreed to pay for all of the sums (1) arising from bodily injuries; (2) resulting from occurrences; and (3) that took place during the policy periods. The language "during the policy period" therefore cabins the phrase "all sums" to a finite period of time. It follows that the insurers did not agree to cover all sums arising out of benzene exposure without regard to the policy periods during which incidents of exposure took place.[11] Instead, "[c]onsistent with the policy language limiting coverage to that which occurs 'during the policy period,' the timing of the [occurrence/injury] dictates . . . the portion of damages for which each policy is responsible." *See Rossello*, 468 Md. at 119.[12]

¶ 69 RSC points to a North Carolina Business Court decision that applied all sums allocation based on the appearance of that phrase in an

11. Because we hold that language limiting the insurers' liability to occurrences that happened "during the policy period," we do not decide whether National Union's and Landmark's use of the term "those sums" in their policies rather than "all sums" provides an additional ground for protection.

12. To be sure, some courts have applied the all sums approach, even where the limiting language of "during the policy period" appears. *See, e.g.*, *California v. Cont'l Ins.*, 55 Cal. 4th 186, 199–200 (Sept. 19, 2012); *Goodyear Tire & Rubber Co.*, 95 Ohio St. 3d at 515–16; *J.H. France Refractories Co.*, 534 Pa. 29, 41–42 (1993); *Keene Corp. v. Ins. Co. of*

insurance policy. *See Duke Energy Carolinas, LLC v. AG Ins. SA/NV*, No. 17 CVS 5594, 2020 WL 3042168, at *7 (N.C. Super. Ct. June 5, 2020). The business court's application of all sums allocation was based on the presence of non-cumulation provisions in the policy at issue, which "recognize[d] that damage may extend beyond the policy period in which the triggering property damage first occurs and reflect the parties' agreement that such damage shall be treated as if all damage occurred in a single premium period, subject to a single policy limit." *Duke Energy*, 2020 WL 3042168, at *8. Indeed, the business court "conclude[d] that the non-cumulation provisions make plain that the parties' Insuring Agreement in the Policies . . . obligates the insurer to pay all sums which Duke becomes legally obligated to pay because of 'property damage.' " *Id.*

¶ 70 The Business Court's decision in *Duke Energy* is consistent with cases from some jurisdictions that have similarly used the "all sums" approach when non-cumulation or continuing coverage provisions were present in a policy, even when "during the policy period" limiting language was also present. In *In re Viking Pump*, for example, the New York Court of Appeals recently held that "all sums" allocation applied where an insurer's excess policies contained non-cumulation policies with continuing coverage provisions. *In re Viking Pump*, 27 N.Y.3d 244, 264 (2016). There, the court distinguished one of its earlier cases applying pro rata allocation because that case did not consider the effect of non-cumulation provisions on policy language. *Id.* at 259. In short, the court reasoned that, in some contracts, "it would be inconsistent with the language of the non-cumulation clauses to use pro rata allocation" because "[s]uch policy provisions plainly contemplate that multiple successive insurance policies can indemnify the insured for the same loss or occurrence." *Id.* at 261. It is important to note that both *Duke Energy* and *In re Viking Pump* are distinguishable from this case because, unlike asbestos exposure, for instance, which was at issue in *In re Viking Pump*, we have explained that benzene exposure causes injury at the time of exposure, rather than a continuous injury. *See id.* at 251. Further, its interpretation and application of the non-cumulation provisions do not apply in this case.

¶ 71 National Union's policies do not contain any such provisions, and the reasoning from *In re Viking Pump* and *Duke Energy* is therefore

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N. Am., 667 F.2d 1034, 1044–49 (D.C. Cir. 1981). These cases, however, tend to represent an outdated view of the proper interpretation of "pro rata" language. *See Rossello*, 468 Md. at 117. The truncated contractual interpretation they apply fails to full consider the limiting effect of the phrase "during the policy period."

inapplicable.[13] However, RSC characterizes provisions in Fireman's Fund's and Landmark's policies as non-cumulation and continuing coverage provisions. After reviewing the language of these agreements, however, we are not convinced that Fireman's Fund or Landmark contemplated the possibility that they would be liable for "all sums" arising from liabilities that occurred during any policy period.

¶ 72 With respect to Fireman's Fund, RSC argues that Fireman's Fund's umbrella policies "follow form" to the underlying policies, thereby incorporating the underlying policies' terms. These underlying policies, in turn, contain non-cumulation provisions. Thus, RSC contends that the non-cumulation provisions are included within the umbrella policies.[14] RSC recognizes that "non-cumulation and prior insurance provisions have a well-recognized purpose: *to limit an insurer's liability* to a single policy limit when an occurrence triggers multiple policies issued by that insurer." But Fireman's Fund's excess policies at issue "expressly *do not* incorporate underlying provisions that relate to the amount and limits of liability" like the non-cumulation provisions. *See, e.g., Deere & Co. v. Allstate Ins. Co.*, 32 Cal. App. 5th 499, 517 (2019), *as modified on denial of reh'g* (Mar. 26, 2019) (recognizing that follow form provisions in excess insurance policies excluded underlying terms related to "the amounts and limits of liability," and holding that the excess policies' follow form clauses incorporated "the scope (*i.e.* products-liability

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13. RSC argues that all three insurer's policies contain continuing coverage provisions stating that the policies "extend coverage beyond the policy period to liability for 'death resulting *at any time* from the bodily injury.' " In the context of benzene exposure, this provision does not suggest an insurer contemplated all sums allocation. Because the *injury* occurs at the time of exposure whereas the consequences of that injury, such as death, occur long after, it is not just logical, but necessary, that the insurers would remain liable for the injuries' consequences, but not for injuries that occur outside of their respective policy periods.

14. RSC points to two non-cumulation provisions that it believes have been incorporated into Fireman's Fund's excess policies:

> It is agreed that if any loss covered hereunder is also covered in whole or in part under any other excess policy issued to the Assured prior to the inception date hereof the limit of liability . . . shall be reduced by any amounts due to the Assured on account of such loss under such prior insurance.
>
> If collectible insurance under any other policy(ies) of the COMPANY is available to the INSURED, covering a loss also covered hereunder . . . the COMPANY'S total liability shall in no event exceed the greater or greatest limit of liability applicable to such loss under this or any other such policy(ies).

coverage) of the first-layer policies but not the monetary caps on liability"); *Int'l. Paper Co. v. Affiliated FM Ins. Co.*, No. 974 350, 2005 WL 7872235, at *5-6 (Cal. Super. Mar. 17, 2005) (concluding that umbrella policy followed form to underlying policy, except with respect to non-cumulation provision based on umbrella policy's exception excluding incorporation of underlying policy terms pertaining to "the amount and limits of liability"). Thus, the non-cumulation provisions are not incorporated into the umbrella policies in the first instance.

¶ 73 Further, RSC "misconstrues" Fireman's Fund's non-cumulation provisions. *See Cont'l Cas. Co. v. Hennessy Indus., Inc.*, No. 1-18-0209, 2019 Ill. App. Unpub. LEXIS 218, at *44 (Ill. Ct. App. Feb. 13, 2019). Importantly, "the language of the clauses provides for their application where more than one policy is required to indemnify for the same loss, *not* where the policy is required to indemnify for a loss that occurred outside its policy period." *Id.* In other words, the policies simply impose coverage limits on the amount RSC may claim if other policies provide coverage for a single injury.

¶ 74 RSC similarly misinterprets the "continuing coverage" provisions it points to in Landmark's policies.[15] The language RSC emphasizes describes Landmark's obligations for a continuous injury. Even assuming the health effects of benzene exposure can be described in this manner, which Landmark disputes, the provision does not suggest that Landmark agrees to assume responsibility for all liabilities from any policy period. This language "simply sets forth the unremarkable proposition . . . [that] the policy in place when the injury occurs will cover all consequential damages, even those taking place after the policy period." *New England Insulation Co. v. Liberty Mut. Ins. Co.*, 83 Mass. App. Ct. 631, 637 (2013). As such, the non-cumulation and continuing coverage provisions that RSC points to do not counsel against pro rata allocation in the context of this case.[16]

C. Exhaustion

¶ 75 **[3]** Finally, we must decide whether horizontal or vertical exhaustion applies to Landmark's duty to defend RSC under the umbrella policies Landmark issued. While an insurer's duty to indemnify an insured arises

15. RSC points to a provision in Landmark's policies which states the following: " 'Bodily injury' . . . which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured . . . includes any continuation, change or resumption of that 'bodily injury' . . . after the end of the policy period."

16. Because our holding is specific to the nature of benzene-related injury, it does not conflict with the holdings of *Duke Energy* and *In re Viking Pump*.

from policy language agreeing to pay “all sums” or “those sums” arising from certain liabilities that the insured becomes legally obligated to pay, some policies also contain the duty to defend lawsuits, claims, proceedings, etc. related to various forms of injury. RSC contends that its policies with both Landmark and National Union contain such a duty. It is Landmark’s duty to defend that is at issue in this appeal, as the trial court found, and the Court of Appeals affirmed, that only horizontal exhaustion of all other available policies triggers its duty. *See Radiator Specialty Co.*, 2020 WL 7039144, at *5.

¶ 76 Vertical exhaustion allows a policyholder to obtain coverage from an excess policy once the primary policies beneath it within the same policy period are exhausted. *See Cmty. Redevelopment Agency v. Aetna Cas. & Sur. Co.*, 50 Cal. App. 4th 329, 339–40 (1996). Horizontal exhaustion, on the other hand, requires a policyholder to exhaust all primary policies from other policy periods in order to access excess coverage. *See Kajima Constr. Serv., Inc. v. St. Paul Fire & Marine Ins. Co.*, 227 Ill.2d 102, 105 (2007). The trial court adopted a mixed approach, applying horizontal exhaustion to Landmark’s duty to defend but vertical exhaustion to its duty to indemnify. In other words, with respect to Landmark’s duty to defend, the trial court held that the duty only exists when all other policies have been exhausted. The Court of Appeals affirmed, holding that Landmark’s duty to defend was triggered by horizontal exhaustion.

1. RSC’s and Landmark’s Competing Contractual Interpretations

¶ 77 The provision relevant to this dispute states:

> 2. [Landmark] will have the right and duty to defend any “suit” seeking those [i.e., covered] damages when:
>
> a. The applicable limits of insurance of the “underlying insurance” and other insurance have been used up in the payment of judgments or settlements; or
>
> b. No other valid and collectible insurance is available to the insured for damages covered by this policy.

¶ 78 According to Landmark, Sections 2(a) and 2(b) are properly read in conjunction to mean that “a duty to defend may arise under a Landmark policy for a given Benzene Action seeking covered damages when all of RSC’s . . . primary policies are exhausted, and there is no *other* valid, solvent policy available to cover the Benzene Action.” Landmark policies define the phrase “underlying insurance” in the first prong as “the policies [ ] listed in the Schedule of Underlying Insurance.” While this

term is specifically defined, the term “other insurance” in Section 2(a) is not. Thus, Landmark argues that “other insurance” must be given a separate, ordinary meaning. Because the phrase “underlying insurance” encompasses exactly what it suggests—the underlying, primary policies in a given policy period—Landmark argues that “other insurance” necessarily encompasses “any other policies held by [RSC]” that were unexhausted, including those outside of the policy year. This reading exemplifies horizontal exhaustion. Landmark then reads the second prong as “simply meaning a valid policy issued by a solvent insurer.” According to Landmark, absent the second prong, “the existence of an unexhausted primary policy, *which is invalid or issued by an insolvent insurer*, would preclude a duty to defend because of the first prong.”

¶ 79 Applying its vertical exhaustion approach, RSC interprets the provision differently and believes that Section 2(b) is properly read in isolation—a reading which would make Landmark’s policies “the only available insurance for Benzene Claims *during the Landmark Policy Period*s” and trigger Landmark’s duty to defend under Section 2(b).

¶ 80 Based on this interpretation, RSC argues that the trial court correctly applied vertical exhaustion to the *duty to indemnify* under Landmark’s umbrella policies but erred in applying horizontal exhaustion to the *duty to defend* under those same policies. According to RSC, “[n]early all jurisdictions have rejected horizontal exhaustion altogether, and no court has *ever* adopted the trial court’s mixed approach of horizontal exhaustion for defense but vertical exhaustion for indemnity.”

¶ 81 RSC further argues that horizontal exhaustion is inapplicable “because Landmark is functioning as a *primary* insurer.” According to RSC, the “directly underlying primary policies”—*i.e.*, the primary policies issued during the same years Landmark’s umbrella policies applied—included “pre-existing damages exclusions” that expressly precluded the primary insurer from paying benzene-related claims. RSC’s argument that horizontal exhaustion does not apply is based on the idea that “Landmark’s umbrella policies ‘drop down’ and provide primary (*i.e.*, first-dollar) coverage because there is no benzene coverage ‘underlying’ Landmark’s policies.”

¶ 82 RSC also contends that horizontal exhaustion “contradicts North Carolina Law.” According to RSC, Landmark’s contention that the phrase “any other insurance” appearing in its policies “requires exhausting primary policies in previous and subsequent policy years before any excess policy must respond” is in conflict with North Carolina cases that “consistently interpret ‘other insurance’ language as referencing only

concurrent coverage available within the same policy period." RSC argues that the cases Landmark relies upon—including *Gaston*—"are inapposite because they involved concurrent policies in effect during the *same* policy year—*i.e.*, vertical exhaustion scenarios." In addition, RSC notes that a leading insurance treatise defines "other insurance" as referring to "only to two or more concurrent policies, which insure the same risk and the same interest, for the benefit of the same person, *during the same period*."

¶ 83 Finally, RSC argues that requiring horizontal exhaustion would (1) "effectively increase the operative attachment point" (*e.g.*, the point at which umbrella coverage becomes available) "for each excess insurance policy many times over," (2) be difficult to apply, and (3) impose a significant burden on insureds to prove eligibility for coverage.

¶ 84 Landmark, on the other hand, argues that the lower courts "correctly ruled that the Landmark policies require 'horizontal exhaustion' before Landmark's duty to defend may arise." As explained previously, Landmark first argues that RSC's position that vertical exhaustion applies ignores and contradicts the language of the relevant policy agreement.

¶ 85 Next, Landmark argues that application of a horizontal exhaustion requirement is consistent with prior cases that "have given effect to umbrella policy provisions requiring exhaustion of unscheduled primary policies." In particular, Landmark points to *Reliance Insurance. Co. v. Lexington Insurance Co.*, 87 N.C. App. 428 (1987), a case in which Landmark contends the Court of Appeals "did not require the [umbrella insurer] to pay upon exhaustion of the scheduled underlying [primary insurance policy]," but instead required the umbrella insurer to pay only once the "*unscheduled* primary insurance" was also exhausted. Similarly, Landmark points to *Harleysville Mutual Insurance Co. v. Zurich-American Insurance Co.*, 157 N.C. App. 317, *disc. rev. denied*, 357 N.C. 250 (2003), another case where Landmark contends that "[b]ecause there was an unexhausted, unscheduled primary policy, [the] court held [the] umbrella policy did not apply." Although Landmark acknowledges that *Reliance* and *Harleysville* "involved unscheduled primary policies effective *during the same period* as the umbrella/excess policy," Landmark contends that these decisions are "instructive because they required exhaustion of all scheduled *and unscheduled primary policies* before the umbrella/excess policy responded."

¶ 86 Landmark disputes RSC's argument that Landmark's umbrella policy was operating as a primary policy because the underlying policy excluded benzene claims from coverage. According to Landmark,

this argument "is not really an argument at all" because it ignores "the policy language to the contrary" contained in the insurance agreement. Landmark contends that the fact that "the scheduled underlying policies may exclude coverage [for benzene claims] does not change [the] result, because both scheduled *and unscheduled* primary policies must be exhausted and unavailable before Landmark's attachment point is reached."

2. Analysis

¶ 87 We agree that the most logical reading of the agreement between Landmark and RSC requires vertical exhaustion. Landmark's interpretation ignores basic terms within the agreement, contrary to its insistence that contractual language be given "its ordinary meaning."

¶ 88 Most fundamentally, Landmark's interpretation fails to acknowledge the agreement's use of the disjunctive "or." "Where a [contract] contains two clauses which prescribe its applicability, and the clauses are connected by a disjunctive (*e.g.* 'or'), the application of the [contract] is not limited to cases falling within both clauses, but will apply to cases falling within either of them." *Davis v. N.C. Granite Corp.*, 259 N.C. 672, 675 (1963) (cleaned up); *see also* 73 Am. Jur. 2d, *Statutes* § 147 (2022) ("In its elementary sense the word 'or' . . . is a disjunctive particle indicating that the various members of the sentence are to be taken separately."). This word, though simple, gives a contractual provision a very different meaning than a contractual provision with otherwise identical language but instead using a conjunctive phrase, as the latter provision requires the connecting sentences to be read in tandem. *See Wells Fargo Ins. Servs. USA v. Link*, 372 N.C. 260, 272–73 (2019). Landmark's reading of Section 2 would have us ignore this basic principle of contractual interpretation.

¶ 89 From Landmark's perspective, its duty to defend RSC does not arise unless (1) all other scheduled and nonscheduled policies have been exhausted; *and* (2) no other valid and collectible policy is available to cover this action. This interpretation disregards that the agreement's use of the term "or" requires us to read these circumstances as alternative options that trigger Landmark's duty to defend. Thus, taking Section 2(b) on its own, Landmark's duty to defend was triggered so long as "[n]o other valid and collectible insurance [was] available to [RSC] for damages covered by th[e] policy." According to RSC, its underlying insurance policies covering the same periods as its Landmark policies do not provide coverage for benzene actions, whereas the Landmark policies do. There was therefore no other "valid and collectible insurance"

for damages from the benzene actions other than the Landmark policies themselves.

¶ 90 Moreover, as the New York Court of Appeals recently explained, " 'other insurance' clauses 'apply when two or more policies provide coverage during the *same* period, and they serve to prevent multiple recoveries from such policies.' " *In re Viking Pump*, 27 N.Y.3d at 266 (quoting *Consol. Edison Co. v Allstate Ins. Co.*, 98 N.Y.2d 208, 223 (2002)). Contrary to Landmark's assertion that "other insurance" implicates policies from other periods, "such clauses 'have nothing to do' with 'whether any coverage potentially exist[s] at all among certain high-level policies that were in force during *successive years*.' " *Id.* (alteration in original) (quoting *Consol. Edison*, 98 N.Y.2d at 223). This interpretation of "other insurance" is consistent with decisions from North Carolina's courts. *See, e.g.*, *St. Paul Fire & Marine Ins. Co. v. Vigilant Ins. Co.*, 919 F.2d 235, 241 (4th Cir. 1990) (explaining that "other insurance" clauses "apply only when the coverage is concurrent[, and] [w]here . . . the polic[y] periods did not overlap at all, such clauses are not applicable"); *City of Greensboro v. Rsrv. Ins. Co.*, 70 N.C. App. 651, 660 (1984) (explaining that "other insurance" language is implicated only where "policies provide overlapping or concurrent coverage"); *see also Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 315 Wis.2d 556, 580 (2009) ("The accepted meaning of 'other insurance' provisions does not include application to successive insurance policies.").

¶ 91 Because RSC is not "seeking multiple recoveries from different insurers under concurrent policies for the same loss, and the other insurance clause does not apply to successive insurance policies," Section 2(a) does not indicate Landmark intended that its duty to indemnify be subject to horizonal exhaustion. *See In re Viking Pump*, 27 N.Y.3d at 266. We therefore conclude that Landmark's excess policies are triggered when vertical exhaustion has been achieved, such that there is no other "valid and collectible" policy available to cover a benzene action during a concurrent policy period.

IV. Conclusion

¶ 92 We affirm in part and reverse in part the Court of Appeals' decision below. We affirm its holding that the trial court correctly applied an exposure-based approach in determining at what point the insurers' coverage was triggered. However, we reverse its holding that the trial court's final judgment rendered the trial court's decision regarding allocation moot, and we further hold that the trial court properly applied pro rata allocation based on the policies at issue. Finally, we reverse the

Court of Appeals' decision to uphold the trial court's finding that horizontal exhaustion applies to Landmark's duty to defend, and we hold that this duty is instead triggered by vertical exhaustion. Accordingly, we remand this case to the trial court to apply vertical exhaustion and to conduct other proceedings consistent with this opinion.

AFFIRMED IN PART AND REVERSED IN PART; REMANDED.

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

Justice BARRINGER concurring in part and dissenting in part.

¶ 93 While I agree with the majority on several points, the majority neglects to follow this Court's well-established rules of construction for insurance policies.

> A contract of insurance should be given that construction which a reasonable person in the position of the insured would have understood it to mean and, if the language is reasonably susceptible of different constructions, it must be given the construction most favorable to the insured. Indeed, we have stated that probably the most important general rule guiding the courts in the construction of insurance policies is that all doubt or uncertainty, as to the meaning of the contract, shall be resolved in favor of the insured.

Register v. White, 358 N.C. 691, 699–700 (2004) (cleaned up); *see, e.g.*, *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 364 N.C. 1, 9–10 (2010); *Grant v. Emmco Ins. Co.*, 295 N.C. 39, 43 (1978). These rules of construction apply to all types of insurance and to all insureds, whether an individual or an entity.

¶ 94 Nevertheless, the majority reads into the policies limiting language that is not there. Specifically, none of the policies before us require (a) the occurrence to occur in the policy period or (b) the damages to occur in the policy period. Rather, the limiting language of "during the policy period" only modifies the defined term "Bodily injury" (or "Personal injury"). While it may be tempting for this Court to rule without analyzing the policy language, shirking our duty for a simple solution should concern all. Any business or individual who has purchased insurance could be in a similar situation to the plaintiff before us now. Radiator Specialty

Company (Radiator) has for almost a decade had to litigate against their insurers to compel them to provide them the coverage they purchased. Therefore, I respectfully concur in part and dissent in part.

I. Background and Policies

¶ 95 In the course of its business, Radiator purchased standard-form product liability policies from various insurers, including defendants Fireman's Fund Insurance Company (Fireman), Landmark American Insurance Company (Landmark), and National Union Fire Insurance Company of Pittsburgh, PA (National). In 1994, claimants nationwide began filing lawsuits, alleging that exposure to Radiator's products caused them to develop cancer.

¶ 96 In 2013, Radiator filed this action seeking a declaration of the duties and obligations of the defendant insurers regarding fifty-five policies. Radiator alleged that it had incurred and paid defense and indemnity amounts for products liability claims related to alleged benzene in its products and that the defendant insurers had not indemnified Radiator for defense costs or liabilities for these claims.

¶ 97 In 2015, the parties moved for summary judgment on various issues of insurance contract interpretation, which are addressed herein as pertinent to the appeal before us. In 2018, the case proceeded to a bench trial. The trial court addressed the following factual question: "For purposes of triggering the duty to indemnify, what is the date the claimant was first exposed and last exposed to any [Radiator] benzene-containing product with respect to each settled Benzene Claim?" The trial court then entered a final judgment. Some of the parties appealed the summary judgment orders.

¶ 98 The policies issued by Landmark to Radiator state:

> **I. INSURING AGREEMENT**
>
> 1. We will pay on behalf of the insured those sums in excess of the "retained limit" which the insured becomes legally obligated to pay as damages to which this insurance applies because of "bodily injury", "property damage" or "personal and advertising injury".
>
> . . . .
>
> **3.** This insurance applies to "bodily injury" and "property damage" only if:

a. The "bodily injury" or "property damage" is caused by an occurrence;

b. The "*bodily injury*" or "property damage" occurs *during the policy period*; . . .

. . . .

V. DEFINITIONS

. . . .

3. "Bodily injury" means bodily injury, sickness, disease, disability, shock, mental anguish, mental injury and humiliation of a person, including death resulting from any of these at any time.

. . . .

14. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

(Italic emphases added.)

¶ 99 The policies issued by National to Radiator state:

1. Insuring Agreement.

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" included within the "products-completed operations hazard" to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS. This insurance applies only to "*bodily injury*" and "property damage" *which occurs during the policy period*. The "bodily injury" and "property damage" must be caused by an "occurrence." The "occurrence" must take place in the "coverage territory". . . .

. . . .

b. Damages because of “bodily injury” include damages claimed by any person or organization for care, loss of services or death resulting at any time from the “bodily injury.”

. . . .

SECTION V - DEFINITIONS

. . . .

2. “Bodily injury” means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

. . . .

8. “Occurrence” means an accident including continuous or repeated exposure to substantially the same general harmful conditions.

(Italic emphases added.)

¶ 100 The first policy issued by Fireman follows form[1] to the underlying insurance with the following policy language:

INSURING AGREEMENTS

I. COVERAGE –

Underwriters hereby agree, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of liability

(a) Imposed upon the Assured by law,

. . . .

1. Excess policies are often described as either a “stand-alone policy” or a “follow form” policy. *New Appleman on Insurance Law Library Edition, Essentials of Insurance Law* § 1.06[7], at 1-61 (Jeffrey E. Thomas & Francis J. Mootz III eds., 2010). “An ‘excess policy’ provides coverage above the underlying limit of primary insurance . . . .” *Id.* An excess policy, thus, “expands the dollar amount of coverage available to compensate for a loss.” *Id.* A stand-alone policy “relies on its own insuring agreement, conditions, terms, and definitions to describe the coverage.” *Id.* A follow form policy “incorporates by reference the terms, conditions, exclusions, etc. of the primary policy.” *Id.*

for damages on account of: –

(i) Personal Injuries
(ii) Property Damage
(iii) Advertising liability,

caused by or arising out of each occurrence happening anywhere in the world.

. . . .

THIS POLICY IS SUBJECT TO THE FOLLOWING DEFINITIONS:

. . . .

2. PERSONAL INJURIES –

The term "Personal Injuries" wherever used herein means bodily injury (including death at any time resulting therefrom), mental injury, mental anguish, shock, sickness, disease, disability, false arrest, false imprisonment, wrongful eviction, detention, malicious prosecution, discrimination, humiliation; also libel, slander or defamation of character or invasion of rights of privacy, except that which arises out of any Advertising activities.

. . . .

5. OCCURRENCE –

The term "Occurrence" wherever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally *results in personal injury*, property damage or advertising liability *during the policy period*. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence.

6. DAMAGES –

The term "Damages" includes damages for death and for care and loss of services resulting from personal injury.

(Italic emphases added.)

¶ 101 The second policy issued by Fireman follows form to the underlying insurance with the following policy language:

INSURING AGREEMENTS

> **I Coverage.** To pay on behalf of the insured the ultimate net loss in excess of the applicable underlying (or retained) limit hereinafter stated, which the insured shall become obligated to pay by reason of the liability imposed upon the insured by law or assumed by the insured under contract:
>
> > (a) PERSONAL INJURY LIABILITY. For damages, including damages for care and loss of services, because of personal injury, including death at any time resulting therefrom, sustained by any person or persons,
> >
> > . . . .
>
> to which this insurance applies under Coverages I(a) . . . above, caused by an occurrence.
>
> . . . .
>
> **IV Other Definitions.** When used in this policy (including endorsements forming a part hereof):
>
> (a) **"Personal injury"** means (1) bodily injury, sickness, disease, disability, shock, fright, mental anguish and mental injury; (2) false arrest, false imprisonment, wrongful eviction, wrongful detention, malicious prosecution or humiliation; (3) libel, slander, defamation of character or invasion of right of privacy, unless arising out of any advertising activities; and (4) assault and battery not committed by or at the direction of the insured, unless committed for the purpose of preventing or eliminating danger in the operation of aircraft or for the purpose of protecting the property of the insured or the person or property of others;
>
> . . . .
>
> (e) **"Occurrence."** With respect to Coverage I(a) . . . occurrence shall mean an accident, including injurious exposure to conditions, which results, *during the policy period*, *in personal injury* or

> property damage neither expected nor intended from the standpoint of the insured. For the purpose of determining the limit of the company's liability, all personal injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence.
>
> . . . .
>
> **V Policy Period, Territory.** This policy applies only to *personal injury*, property damage or advertising occurrences *which happen* anywhere *during the policy period*.

(Italic emphases added.)

¶ 102 The third policy issued by Fireman follows form to the underlying insurance with the following policy language:

> **INSURING AGREEMENTS**
>
> **I. COVERAGE**
>
> To indemnify the INSURED for ULTIMATE NET LOSS, as defined hereinafter, in excess of RETAINED LIMIT, as herein stated, all sums which the INSURED shall be obligated to pay by reason of the liability imposed upon the INSURED by law . . . because of:
>
> A. PERSONAL INJURY, as hereinafter defined;
>
> . . . .
>
> to which this policy applies, caused by an OCCURRENCE, as hereinafter defined, happening anywhere in the world.
>
> . . . .
>
> **DEFINITIONS**
>
> . . . .
>
> **H. OCCURRENCE:**
>
> With respect to Coverage I(A) and I(B) "OCCURRENCE" shall mean an accident or event including continuous repeated exposure to conditions, which results, *during the policy period*, *in PERSONAL INJURY* or PROPERTY

> DAMAGE neither expected nor intended from the standpoint of the INSURED. For the purpose of determining the limit of the Company's liability, all personal injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one OCCURRENCE.
>
> **I. PERSONAL INJURY:**
>
> The term PERSONAL INJURY wherever used herein means:
>
> (1) bodily injury, sickness, disease, disability or shock, including death at any time resulting therefrom, mental anguish and mental injury,
>
> (2) false arrest, false imprisonment, wrongful eviction, wrongful entry, wrongful detention or malicious prosecution,
>
> (3) Libel, slander, defamation of character, humiliation or invasion of the rights of privacy, unless arising out of advertising activities,
>
> which occurs *during the policy period.*

(Italic emphases added.)

II. Analysis

A. Trigger for Coverage

¶ 103 As to the first issue, the trigger for coverage, the majority correctly holds that there is no material question of fact that benzene exposure caused "bodily injury" in the form of alterations[2] to DNA at the time of exposure. On the record before this Court, the evidence indisputably supports that a "bodily injury" in fact occurred upon exposure to benzene for the individuals that later developed benzene related diseases and sued Radiator.

¶ 104 However, the term "Bodily injury" (or "Personal injury" as used in Fireman's policies) is defined to include not only "bodily injury" but also

2. Experts also used the terminology of DNA damage and mutation.

"sickness or disease sustained by a person, including death resulting from any of these at any time." Hence, in accordance with the policy language, a "Bodily injury" (or "Personal injury") will also occur upon a person sustaining sickness or disease from an occurrence.

¶ 105 Here, that occurrence is benzene exposure. While a few of the policies do contain other limiting language, such as "all personal injury . . . arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence," which could prevent the stacking of policy limits for continuous and repeated exposures, there is no language in any policy before this Court limiting or precluding the triggering of the policy upon sickness or disease because a bodily injury previously occurred. Thus, Radiator could establish that multiple policies are triggered for the same occurrence, here, exposure to benzene. *See Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 73 F.3d 1178, 1195 (2d Cir. 1995) ("[T]here can be triggering at more than one point in time when a claimant asserts injury-in-fact due to . . . cancer."), *opinion modified on denial of reh'g*, 85 F.3d 49 (2d Cir. 1996). Even if the policy language was ambiguous, "[t]his Court resolves any ambiguity in the words of an insurance policy against the insurance company." *Harleysville*, 364 N.C. at 9.

¶ 106 In contrast, the majority, without analyzing the policies or citations, merely concludes that an "application of a continuous trigger would be at odds with our holding that, in benzene cases, *the* injury that triggers coverage occurs at the time of exposure." (Emphasis added.) However, we should not and cannot ignore the policy language in this case. The policy language dictates the triggers for indemnity as bodily injury during the policy period, with bodily injury meaning bodily injury, sickness, or disease (among other things in some policies) without additional limiting language. Thus, the policy language clearly contemplates and provides for the possibility of multiple triggers.

¶ 107 Further, this Court is reviewing a summary judgment order. This Court reviews a summary judgment order de novo to assess the policy language and the evidence to determine if there is a genuine issue as to any material fact and whether any party is entitled to judgment as a matter of law. *See* N.C.G.S. § 1A-1, Rule 56(c) (2021); *N.C. Farm Bureau Mut. Ins. Co., Inc. v. Martin*, 376 N.C. 280, 285–86 (2020). In this case, there is no material question of fact that a bodily injury in fact occurs upon exposure to benzene. However, in future cases, the policy language and expert testimony may vary.

B. Indemnity Obligation

¶ 108 As to the second issue concerning the insurers' indemnity obligation, the majority inverts the rules of construction for insurance policies by creating a rebuttable presumption in favor of an insur*er*. The majority also erroneously suggests that cases from other jurisdictions *require* an insurance policy to contain the terminology "all sums" for an insurer to have complete indemnity obligations.

¶ 109 To the contrary, the cases cited by the majority that apply all sums allocation recognize the absence of language limiting the insurer's liability once triggered. *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1048 (D.C. Cir. 1981) ("Once triggered, each policy covers [the insured]'s liability. There is *nothing* in the policies that provides for a reduction of the insurer's liability if an injury occurs only in part during a policy period."); *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St. 3d 512, 2002-Ohio-2842, 769 N.E.2d 835, at ¶ 9 ("There is no language in the triggered policies that would serve to reduce an insurer's liability if an injury occurs only in part during a given policy period. The policies covered [the insured] for 'all sums' incurred as damages for an injury to property occurring during the policy period. The plain language of this provision is inclusive of all damages resulting from a qualifying occurrence. Therefore, we find that the 'all sums' allocation approach is the correct method to apply here."). Other courts have also stated, "The majority of courts have held that without a *pro rata* clause in the policies, the insurance companies cannot limit their obligations to a *pro rata* share or portion of [the insured]'s liabilities." *Monsanto Co. v. C.E. Heath Comp. & Liab. Ins. Co.*, 652 A.2d 30, 35 (Del. 1994).

¶ 110 But regardless, this Court's binding precedent directs us to the policy language and requires us to consider what the reasonable insured would understand the policy to mean. *See Register*, 358 N.C. at 699–700. Moreover,

> [i]n the construction of contracts, even more than in the construction of statutes, words which are used in common, daily, nontechnical speech, should, in the absence of evidence of a contrary intent, be given the meaning which they have for laymen in such daily usage, rather than a restrictive meaning which they may have acquired in legal usage.

Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co., 266 N.C. 430, 438 (1966).

¶ 111 As reflected in previous quotes of the policy language, each policy essentially states:

> We will pay on behalf of the insured those sums in excess of the "retained limit" which the insured becomes legally obligated to pay as damages to which this insurance applies because of "bodily injury", "property damage" or "personal and advertising injury"

¶ 112 Stripped down to the relevant portion, it says: We will pay those sums which the insured becomes legally obligated to pay as damages to which this insurance applies. In other words, if Radiator becomes legally obligated to pay damages for an occurrence to which a policy issued by Landmark applies, Landmark will pay those sums. Those sums are the damages Radiator becomes legally obligated to pay as damages for an occurrence resulting in bodily injury *during the policy period.*

¶ 113 As correctly recognized by the Court of Appeals, nothing in the policy language drafted by the insurers (Landmark, National, or Fireman) modifies the insurer's indemnity obligation to be proportional to their policies' "time on the risk" when damages arise from multiple occurrences and multiple bodily injuries, thus triggering multiple policies. *Radiator Specialty Co. v. Arrowood Indem. Co.*, No. COA19-507, 2020 WL 7039144, at *4 (N.C. Ct. App. Dec. 1, 2020) (Bryant, J. with Chief Judge McGee concurring and Judge Berger concurring in result only); *see generally Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 2009 WI 13, ¶ 55, 315 Wis. 2d 556, 759 N.W.2d 613 ("[The insurer's] policy contains no language that limits its obligation to a pro rata share."); *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049, 1058 (Ind. 2001) ("[T]here is no language in the coverage grant, including the definitions of 'property damage,' 'personal injury,' or 'occurrence,' that limits [the insurer's] responsibility to indemnification for liability derived solely for that portion of damages taking place within the policy period.").

> [T]he very essence of pro rata allocation is that the insurance policy language limits indemnification to losses and occurrences during the policy period—meaning that no two insurance policies, unless containing overlapping or concurrent policy periods, would indemnify the same loss or occurrence. Pro rata allocation is a legal fiction designed to treat continuous and indivisible injuries as distinct in each policy period as a result of the "during the policy period"

> limitation, despite the fact that the injuries may not actually be capable of being confined to specific time periods.

In re Viking Pump, Inc., 52 N.E.3d 1144, 1153–54 (N.Y. 2016), *opinion after certified question answered*, 148 A.3d 633 (Del. 2016).

¶ 114 In these policies, the language "during the policy period," as previously discussed only modifies the defined term "bodily injury." In other words, indemnification *is not limited* to damages during the policy period or occurrences during the policy period. Thus, "[t]he average person purchasing insurance would construe the policy language to provide indemnity for an injury once the policy was triggered." *Am. Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co.*, 951 P.2d 250, 256 (Wash. 1998). "[B]odily injury during the policy period is what triggers the policy; the definition of 'bodily injury' is not a limitation of liability clause." *Plastics Eng'g*, ¶ 57. There is no exclusion of damages occurring outside the policy period. *See generally Mazza v. Med. Mut. Ins. Co. of N.C.*, 311 N.C. 621, 630 (1984) ("We place great emphasis on the fact that there is no specific exclusion in the insurance contract for punitive damages. If the insurance carrier to this insurance contract intended to eliminate coverage for punitive damages it could and should have inserted a single provision stating 'this policy does not include recovery for punitive damages.' ").

¶ 115 Further, each of the policies used the plural noun "sums." "Sum" is defined as "[a]n amount obtained as a result of adding numbers," "[t]he whole amount, quantity, or number; an aggregate," and "[a]n amount of money." *Sum*, *The American Heritage Dictionary* (5th ed. 2018); *see also Sum*, *New Oxford American Dictionary* (3rd ed. 2010) (defining "sum" as "a particular amount of money," "the total amount resulting from the addition of two or more numbers, amounts, or items," "the total amount of something that exists," and "an arithmetical problem, esp. at an elementary level"). Given these definitions, the plain meaning of the term "sum" or "sums" alone does not contemplate a fractional or proportional share. Simply put, "sums" may entail addition—but not addition followed by division. The adjectives qualifying "sums," "all" and "those," also confirm a meaning antithetical to fractional or proportional. *See*, *e.g.*, *All*, *The American Heritage Dictionary* (5th ed. 2018) (defining the adjective "all" as "[b]eing or representing the entire or total number, amount, or quantity" among other definitions); *That*, *The American Heritage Dictionary* (5th ed. 2018) (defining the adjective "that," which in the plural is "those," as "[b]eing the one singled out, implied, or

understood”). Thus, applying pro-rata allocation to the policies before us requires the Court to ignore the plain language of the term “sums.”

¶ 116 While insurers could draft a proportional limitation, Radiator purchased policies with the language previously quoted, and the policy language does not contain such a limitation. *See Nat’l Indem. Co. v. State*, 2021 MT 300, ¶ 78, 406 Mont. 288, 499 P.3d 516 (“Pro rata allocation is a significant limitation on coverage, but is not expressly provided in the Policy, though it clearly could have been.”). Given the policy language, if the insurers were “obligated to pay only a pro-rata share of [Radiator]’s liability, . . . [Radiator’s] reasonable expectations would be violated.” *See Keene*, 667 F.2d at 1047–48.

¶ 117 Additionally, all of the policies at issue extend coverage to “death resulting at any time.” Such a provision reflects that the insurer agreed to and knew that it indemnified the insured’s liability for death even if death did not occur during the policy period. This agreement is contrary to pro rata allocation, which spreads out liability for an insured’s damages among multiple policies based on “time on the risk.”

¶ 118 Nevertheless, the majority dismisses this as irrelevant because of the Court’s holding that benzene exposure causes injury at the time of exposure, rather than a continuous injury. Yet, this Court’s erroneous holding in this case as to the first issue should not necessitate an outcome on the second issue.

¶ 119 This Court should construe the policy language in accordance with the rules of contract interpretation and not read into the policies a pro rata allocation of coverage to which the parties did not agree contractually. To do so results in this Court redistributing the risk, taking from the insured for the benefit of the insurer and taking from some insurers for the benefit of other insurers. After all, insurers have the national and international re-insurance markets available to them to restructure their risks dynamics and cost-benefit analysis.

C. Landmark’s Duty to Defend

¶ 120 The final issue only involves Landmark’s policies, which in pertinent part state:

> **2.** We will have the right and duty to defend any “suit” seeking those damages when:
>
> > **a.** The applicable limits of insurance of the “underlying insurance” and other insurance have been used up in the payment of judgments or settlements; or

> **b.** No other valid and collectible insurance is available to the insured for damages covered by this policy.

¶ 121 "Underlying insurance" is a defined term, meaning "the policies or self[-]insurance listed in the Schedule of Underlying Insurance." It is undisputed that the "underlying insurance" for Landmark's policies do not cover liability for the benzene claims. Thus, the applicable limits for the underlying insurance have *not* been used up in the payment of judgments or settlements. Since subparagraph (a) requires limits of underlying insurance to be used up to trigger the duty to defend, Landmark does not have a duty to defend pursuant to subparagraph (a).

¶ 122 Therefore, subparagraph (b) must be considered. To determine what encompasses "[n]o *other* valid and collectible insurance" as used in subparagraph (b), the meaning of "other insurance" as used in subparagraph (a) must be discerned. It is not a defined term. "Other insurance" could be interpreted to be insurance policies in effect for that policy year other than the "underlying insurance" or insurance policies for damages covered by Landmark's policy other than the "underlying insurance." Because the phrase "other insurance" in subparagraph (a) is not modified by the phrase "for damages covered by this policy" (unlike subparagraph (b)), "other insurance" is limited to policies in effect for that policy year.

¶ 123 "No *other* valid and collectible insurance" in subparagraph (b) must therefore refer to policies other than those in effect for that policy year.[3] Thus, subparagraph (b) requires exhaustion of all policies covering damages also covered by Landmark's policy, but exhaustion is only required if such policy is valid and collectible. *See AAA Disposal Sys., Inc. v. Aetna Cas. & Sur. Co.*, 821 N.E.2d 1278, 1288–89 (Ill. App. Ct. 2005) (recognizing that a clause required horizontal exhaustion when any other valid and collectible insurance lacked language limiting it to certain policy periods). Thus, subparagraph (b) could apply even if the applicable limit of the "underlying insurance" or "other insurance" was not used up in the payment of judgments or settlements. Because the trial court did not determine whether "[n]o other valid and collectible insurance is available to the insured for damages covered by this policy," this Court should remand to the trial court.

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3. "The clause 'valid and collectible insurance' has widespread use in the insurance industry of the United States and has a well[-]established meaning. Generally, the clause refers to insurance which is legally valid and is underwritten by a solvent carrier." *Hellman v. Great Am. Ins. Co.*, 136 Cal. Rptr. 24, 27 (Cal. Ct. App. 1977).

III. Conclusion

¶ 124 "[B]ecause the insurance company is the party that selected the words used [in the policy]," "[t]his Court resolves any ambiguity in the words of an insurance policy against the insurance company." *Harleysville*, 364 N.C. at 9. It is not inequitable to hold an insurer to the words it selected; the words—the promise of indemnity—is what an insured purchased. The majority in this matter, for unclear reasons, construes language in the policy in favor of the insurers, regardless of the policy language. The holding in this case will deter entities and individuals who can self-insure from purchasing insurance (thus reducing the pool of insurance) and apparently requires the insured to sue and litigate with all their insurance providers to receive the indemnity they purchased (or until forced to declare bankruptcy). Therefore, I respectfully concur in part and dissent in part.

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

STATE OF NORTH CAROLINA
v.
AMY REGINA ATWELL

No. 248A21

Filed 16 December 2022

Criminal Law—right to appointed counsel—forfeiture—egregious misconduct—relinquishing attorneys—support in record

In defendant's prosecution for attempting to purchase a firearm in violation of a domestic violence protective order, the trial court erred by concluding that defendant had forfeited her right to appointed counsel by engaging in egregious misconduct intended to delay her criminal proceedings. Although the trial court found that defendant had filed four waiver of counsel forms, relinquished five different court-appointed attorneys, filed multiple pro se motions to continue to obtain private counsel, and finally sought to have counsel appointed for her for the sixth time, nothing in the record permitted the conclusion that defendant was engaging in egregious misconduct intended to delay her case; rather, the delays in moving the case to trial appeared attributable to the State or to the usual occurrences that are common in criminal proceedings.

Chief Justice NEWBY dissenting.

Justices BERGER and BARRINGER join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 278 N.C. App. 84, 2021-NCCOA-271, affirming a judgment entered on 29 January 2020 by Judge Jeffery K. Carpenter in Superior Court, Union County. Heard in the Supreme Court on 31 August 2022.

W. Michael Spivey for defendant-appellant.

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

MORGAN, Justice.

¶ 1 In this appeal, we revisit the question of what actions or omissions by a defendant may properly be determined by a trial court to be so egregious as to constitute a forfeiture of the constitutional right to counsel and how the jurisprudence of forfeiture is distinct from that concerning a criminal defendant's waiver of the right to counsel. We conclude that the issue of waiver of counsel is inapposite in this case because defendant expressly requested the appointment of counsel to assist her, and that the trial court's alternate determination that defendant's behavior was sufficiently egregious to warrant the forfeiture of the right to counsel was erroneous. Accordingly, we reverse the decision of the Court of Appeals affirming the trial court and remand to the lower appellate court for further remand to the trial court for defendant to receive a new trial.

I. Factual Background and Procedural History

¶ 2 Defendant was the subject of an ex parte Domestic Violence Protection Order (DVPO) entered on 9 August 2013 in District Court, Union County. The ex parte order required that defendant "surrender to the Sheriff . . . [any] firearms, ammunition, and gun permits . . . in [her] . . . ownership or control." The order further provided that "possessing, purchasing, or receiving a firearm, ammunition or permits to purchase or carry concealed firearms after being ordered not to possess firearms, ammunition or permits is a crime," noting that a violation of the order's prohibition on possessing a firearm could result in "a Class H felony pursuant to North Carolina G.S. 14-269.8" and could cause defendant

to "be imprisoned for up to 30 months." The ex parte DVPO was sought by defendant's mother on behalf of herself and defendant's stepfather and two of defendant's minor children who were then residing with defendant's mother and stepfather, and a third minor child. Defendant's mother alleged that defendant had harassed, stalked, and threatened defendant's mother and stepfather, and had also exposed defendant's minor children, who were in the custody of defendant's mother, to "emotional abuse." A DVPO was entered on 25 September 2013.

¶ 3 The 2013 DVPO was renewed each year thereafter and remained in effect on 9 August 2017 when defendant attempted to purchase a .22 caliber rifle at a pawn shop in Tennessee. A warrant was issued on 10 August 2017, and defendant was arrested on 4 September 2017. Attorney Vernon Cloud was assigned to represent defendant on the following day of 5 September 2017, but it was not until 5 February 2018 that a grand jury in Union County returned an indictment on the charge of attempting to possess a firearm while subject to a DVPO prohibiting the same. The case was continued twice—apparently based upon two handwritten pro se requests filed by defendant—and defendant also sought to have Cloud removed as her attorney, although it does not appear that defendant's first motion for removal of Cloud was ever resolved. Defendant filed a second pro se motion to remove Cloud on 12 February 2018 and that motion was allowed on 17 April 2018. On the same date of 17 April 2018, defendant also filed a waiver of counsel form. On 8 May 2018 defendant, pro se, filed a "Motion to Dismiss" in which she raised various issues, such as jurisdictional objections, including an allegation that defendant was "a Tuscarora Native American with her sealed tribal card." The record on appeal also includes a second waiver of counsel form signed by defendant on 15 May 2018.

¶ 4 Defendant, pro se, filed a motion for a continuance on 12 June 2018, noting that she was experiencing health problems and lacked an attorney; the trial court appointed Peter Dwyer to represent defendant that same day. However, on 24 July 2018 and again on 13 August 2018, defendant filed additional handwritten pro se motions to dismiss the charge against her which also requested a change of venue to Stanly County. On 11 September 2018, Attorney Dwyer withdrew for reasons not specified in the record and the trial court appointed defendant's third attorney, Tracy Regan, although Regan was allowed to withdraw on 11 October 2018, at which point defendant completed a third waiver of counsel form. At a hearing on 13 December 2018, defendant had been unsuccessful in obtaining private counsel and a fourth appointed attorney, Tiffany Porter, was named to represent defendant. On 31 January 2019, Porter

was permitted to withdraw from defendant's representation, again for reasons not disclosed in the record on appeal, and Courtney Ballard was named as defendant's new counsel. By 26 June 2019, defendant had filed a motion to remove Ballard, and in August 2019, defendant sought another continuance. On 21 August 2019, the trial court allowed Ballard's withdrawal and defendant signed a waiver of counsel form. During the almost eight months of Ballard's representation of defendant, the State never set the case for trial.

¶ 5 Defendant's case next came on for hearing on 18 September 2019 in Superior Court, Union County, the Honorable William A. Wood presiding. The prosecutor stated to the trial court that defendant's case had been continued the previous month to allow time for defendant to hire an attorney and that the State hoped to move the case forward. When the trial court asked defendant what she was "going to do about a lawyer," defendant explained that while she had made payments to a private attorney, she could not afford to continue to do so and wanted another court-appointed attorney. Judge Wood responded:

> THE COURT: Well, quite frankly I've never seen a file like this as far as your attorney situation goes. This all started back in August 19, 2017, which is the date of offense in these charges. And it looks like you got indicted in February of 2018, a year and a half ago, and were appointed an attorney who you promptly fired on February 12th, 2018. Then you waived your right to a court appointed lawyer. I believe you signed another waiver of your right to a court appointed lawyer. Those were on April 17th, 2018 and May 15th, 2018. You were given a continuance on June the 12th at your own request and then you were appointed another attorney on September the 11th, 2018 who withdrew from your case, it doesn't really say why in the file. You filed another waiver on October 11th, 2018. You were appointed another attorney on December the 13th, 2018 who you promptly fired in June of 2019. And then you signed another waiver and asked for a continuance to hire your own lawyer. Don't you think it's gone on long enough?

Defendant reiterated that she could not afford a lawyer and had asked for a continuance due to her disability and low income. When Judge Wood asked defendant why she had "fired" her prior attorneys, defendant explained that one appointed counsel had withdrawn due to a

conflict of interest, and "two other attorneys were totally going in two different ways of defense," such that defendant did not feel that the attorneys represented her interests.

¶ 6 After the State informed the trial court that it was prepared to move forward and set the matter for the trial calendar as soon as defendant was arraigned and her counsel circumstance was resolved, the following colloquy then transpired:

> THE COURT: Well, *what I'm going to do is I'm going to put an order in the file basically saying you waived your right to have an attorney*. If you would like to hire your own attorney, that will be fine, but based on these — *the history of this file, it appears to me that your process in moving this case along has been nothing more than to see how long you can delay it until it goes away*. The way you've behaved appears to be nothing more than a delay tactic and that's what I'm going to put an order in the file and I'm going to make specific findings as to everything I just told you and to some other things that are in the file. I'm going to let the prosecutor arraign you and set this case for trial. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Now, that doesn't preclude you from hiring your own attorney. *You can hire your own attorney but you're going to have to do that and have your attorney ready by the time the prosecutor has this case on the trial calendar. Additionally, if you don't hire an attorney, you're going to be responsible for representing yourself. Do you know what that means?*
>
> THE DEFENDANT: Representing myself.
>
> THE COURT: Yes.
>
> THE DEFENDANT: It means representing myself.
>
> THE COURT: It does. It means you're going to have to negotiate any plea deal if there is one with the prosecutor. You're going to have to handle all the [d]iscovery in this case. If there is a jury trial you're going to have to select a jury and keep up with any motions

and try the case just as if you were an attorney and be held to the same standard as an attorney. You're not going to get legal advice from me or whoever the judge is. Do you understand that?

THE DEFENDANT: No, because I've already requested a jury trial.

THE COURT: Well what is it about that that you don't understand?

THE DEFENDANT: You said if I get a jury trial.

THE COURT: You're welcome — I mean, nobody's going to make you plead guilty. You can have a jury trial.

THE DEFENDANT: Thank you.

THE COURT: There's other ways for a case to go away. Do you understand that?

THE DEFENDANT: Okay.

THE COURT: I don't know what's ultimately going to have [to] happen to this case but you are entitled to a jury trial most definitely. *What I want you to understand is that if you represent yourself, you're going to be held to the same standards of an attorney. Do you understand that?*

THE DEFENDANT: *You're giving me no choice. I mean, I asked for another court appointed attorney and you said no*, so—

THE COURT: You've had choice after choice after choice. *You've been given a court appointed attorney on three occasions,*[1] *which is two more than you usually get.*

THE DEFENDANT: I've got the e-mails from one of the lawyers that was actually giving me wrong court dates to be in court.

THE COURT: Well, one of the attorneys there is no indication as to why that attorney withdrew, the

1. This appears to be a *lapsus linguae* by the trial court as the record reflects that defendant had been appointed a total of five attorneys over the course of her case.

> other took—you took them off the case, basically. So do you understand what's going on here, ma'am?
>
> THE DEFENDANT: *You've denied me a court appointed attorney. Yes, I understand that.*
>
> THE COURT: I've denied you a fourth court appointed attorney.
>
> THE DEFENDANT: I understand that, yes.

(Emphasis added). Defendant was then arraigned and her trial was set for the week of 2 December 2019.

¶ 7 On 20 September 2019, the trial court entered an order on "defendant's pro se, oral motion for a continuance . . . to give her additional time to hire an attorney," in which it recounted much of the above-stated procedural history of defendant's cycle of obtaining and dismissing court-appointed counsel, as well as her numerous waivers of counsel. The order included findings of fact that defendant had received five court-appointed attorneys, at least two of whom defendant had caused to be removed "because of her own conduct or a generally unreasonable expectation that she has for her case"; had "been put on notice . . . as to what it means to represent herself and all that that entails"; and "obviously understands the proceedings in this matter and intends to ultimately act as her own attorney as she has filed numerous pro se motions . . . without regard to whether or not she was represented by counsel at the time." The trial court further found that "[i]t is obvious . . . that [defendant's] conduct in this matter is nothing more than a delay tactic and an attempt to do whatever she can to avoid bringing this matter to a conclusion." The trial court then decreed that "defendant, by her own flagrant, dilatory conduct has forfeited or effectively waived her right to be represented by counsel in this matter and at this time proceeds pro se." The trial court did note that defendant could still retain private counsel to represent her but emphasized that the matter was set for trial on 2 December 2019 and stated that "defendant shall proceed at that time with or without retained counsel."

¶ 8 Defendant's case did not actually come on for trial until 13 January 2020. Defendant was present during the first day, which was largely occupied with jury selection, and she expressed confusion about trying to have a witness and certain evidence subpoenaed for the trial. On the second day of trial, jury selection was completed and the State gave its opening statement. At 12:16 p.m. court recessed for lunch, and defendant failed to return to court after the meal break. The trial court

recessed the trial for the day and issued an order for defendant's arrest. The following morning, defendant again failed to appear, and the trial court decided, in light of defendant's apparent choice to voluntarily absent herself from trial, to proceed with trial in defendant's absence.

¶ 9 Defendant was not present for the remainder of her trial, which took place over the course of the third day. At the conclusion of the trial, the jury found defendant guilty of attempting to possess a firearm while subject to a DVPO. Defendant was located about two weeks later, and on 28 January 2020, the trial court sentenced her to a term of 5 to 15 months in prison. Defendant gave notice of appeal in open court.

II. Appellate Proceedings

¶ 10 In the Court of Appeals, defendant made two arguments: that the indictment charging her was fatally defective and that the trial court erred in concluding that defendant had forfeited her right to counsel. Defendant did not assert any argument regarding waiver of counsel. The entire panel of the lower appellate court agreed that the indictment was valid because it "adequately expressed the charge against defendant within a reasonable certainty to enable defendant to prepare for trial and for the court to pronounce the sentence." *State v. Atwell*, 278 N.C. App. 84, 2021-NCCOA-271, ¶ 15.

¶ 11 With regard to the issue of counsel, the majority of the panel was inconsistent in its framing and analysis of this issue as presented by defendant's appeal, stating in an introductory paragraph and in a discussion subsection heading that the legal issue presented was *forfeiture* of counsel, while beginning its analysis of the question with a statement of the law regarding *waiver* of counsel and resolving defendant's appellate argument on that basis. *See id.* ¶¶ 1, 15–16, 18, 20–23. The Court of Appeals majority relied heavily on *State v. Curlee*, 251 N.C. App. 249 (2016), a case about waiver of counsel, and focused on whether the trial court complied with the colloquy mandated by N.C.G.S. § 15A-1242 (2021), the statute setting forth the inquiry necessary to permit a criminal defendant to waive the right to counsel without violating the state and federal constitutions, during the 18 September 2019 hearing. *Atwell*, ¶¶ 16–23. The majority then stated:

> Assuming *arguendo* that the trial court's colloquy was insufficient for the purposes of N.C.[G.S.] § 15A-1242 and that an effective waiver did not occur, we hold that defendant forfeited the right to counsel. Although there is no bright-line definition on the degree of misconduct to justify forfeiture, several of the types of

> conduct contemplated in [*State v. Blakeney*, 245 N.C. App. 452 (2016)] and [*State v. Simpkins*, 373 N.C. 530 (2020)] occurred in this case. Defendant repeatedly fired appointed counsel, often within several days of their appointment. Defendant continued to alternatively seek appointed counsel or additional time to hire an attorney while filing and withdrawing multiple waivers of the right to appointed counsel. Under these circumstances, *defendant's actions completely frustrated the purpose of the right to counsel and prevented the trial court from moving the case forward.* Accordingly, we hold that the trial court's finding that defendant forfeited the right to appointed counsel was warranted.

Id. ¶ 24 (second emphasis added).

¶ 12 One member of the Court of Appeals panel dissented from the portion of the majority's opinion which addressed defendant's right to counsel. *Id.* ¶ 26 (Jackson, J., dissenting). The dissenting judge began by addressing the issue of waiver of counsel, noting that "[n]either the trial court, nor Judge William A. Wood—who presided over a pretrial hearing on 18 September 2019—completed the colloquy required by [N.C.G.S.] § 15A-1242. Instead, Judge Wood concluded in a 20 September 2019 order that [d]efendant had forfeited the right to counsel." *Id.* ¶ 28 (Jackson, J., dissenting). The dissenting judge went on to opine that the majority of the Court of Appeals had erred in relying on *Curlee*, not only because the statutory waiver colloquy was not completed, but also because defendant had not expressed a desire to proceed without appointed counsel. *Id.* ¶ 34 (Jackson, J., dissenting).

¶ 13 As to forfeiture, the dissent stated:

> The forfeiture conclusion in Judge Wood's order does not meet the *Simpkins* standard. Defendant's conduct, like Mr. Simpkins's conduct, "while probably highly frustrating, was not so egregious that it frustrated the purposes of the right to counsel itself." *Simpkins*, 373 N.C. at 539 . . . . Nothing in the record indicates how many times the State continued the case or was not ready to proceed. In fact, the State waited almost six months from charging [d]efendant to secure an indictment. Further, nothing in the record indicates that any of the lawyers who had previously represented [d]efendant withdrew

> because [d]efendant was refusing to *participate* in preparing a defense. We also do not know why several of the attorneys withdrew, other than one having a conflict with another client according to [d]efendant. Instead, to the extent it discloses any information on the subject, the record tends to show that [d]efendant had differences with her prior lawyers related to the preparation of her defense and defense strategy. For example, her differences with her first lawyer appear to have been related to a jurisdictional argument she raised in a pro se motion filed on 8 May 2018 regarding the subject matter jurisdiction of Union County Superior Court over a crime she committed in Tennessee while residing in Tennessee—an argument that does not appear to have ever been addressed below and is not patently frivolous.

Id. ¶ 37 (Jackson, J., dissenting).

¶ 14 On 15 July 2021, defendant filed a notice of appeal based upon the dissent pursuant to N.C.G.S. § 7A-30(2) (2021). In her arguments to this Court, defendant contended that the Court of Appeals erred in holding that defendant waived her right to counsel or alternatively forfeited her right to counsel. We agree, and thus we reverse in part the decision of the Court of Appeals.

III. Analysis

¶ 15 This Court has stated:

> "The right to assistance of counsel is guaranteed by the Sixth Amendment to the Federal Constitution and by Article I, Sections 19 and 23 of the Constitution of North Carolina." *State v. McNeill*, 371 N.C. 198, 217 (2018) (quoting *State v. Sneed*, 284 N.C. 606, 611 (1974)). The right to counsel in criminal proceedings is not only guaranteed but is considered to be "fundamental in character." *Powell v. Alabama*, 287 U.S. 45, 70 (1932) (citations omitted).

State v. Harvin, 2022-NCSC-111, ¶ 29 (extraneity omitted). This fundamental constitutional right may, however, be surrendered at the choice of a defendant or lost as a result of serious obstruction or misconduct of the defendant. *Id.* ¶¶ 29–32.

A. Waiver of Counsel

¶ 16 "One of the methods by which a criminal defendant may *surrender* the right to assistance of counsel is through *voluntary* waiver." *Id.* ¶ 30 (emphases added); *see also* N.C.G.S. § 15A-1242 (2021) ("A defendant may be permitted *at his election* to proceed in the trial of his case without the assistance of counsel . . . .") (emphasis added)); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("A waiver is ordinarily an *intentional* relinquishment or abandonment of a known right or privilege.") (emphasis added)), *overruled on other grounds by Edwards v. Arizona*, 451 U.S. 477 (1981). Thus, for a waiver of counsel to be constitutional and comply with our state's statutory requirements, a defendant must, as an initial point, *seek to proceed pro se*.

¶ 17 Here, it is plain that defendant did not seek to proceed pro se, as reflected by defendant's statements that she had been unsuccessful in obtaining private counsel, lacked the money to obtain private counsel, wanted court-appointed counsel, and understood that the trial court was denying her request and right to court-appointed counsel. First, the triggering act for invoking waiver of counsel is not present. While it is undisputed that defendant signed at least four waiver of counsel forms between April 2018 and August 2019,[2] at the start of the 18 September 2019 hearing when Judge Wood asked defendant what she was "going to do about a lawyer," defendant clearly expressed her desire to be appointed counsel, stating "I can't afford to get a lawyer and still pay my rent and the living expenses. I thought [a private lawyer] would take payments from me, but they won't. So at this time I would like to get another court appointed attorney." The trial court then reviewed defendant's history of being appointed counsel and waiving counsel at which point defendant attempted to explain the reasons why she had parted ways with some court-appointed attorneys and at least one private lawyer. Despite defendant's express request for appointment of counsel, after the State expressed a desire to "get the case moving," the trial court informed defendant, "I'm going to put an order in the file basically saying you waived your right to have an attorney. If you would like to hire your own attorney, that would be fine . . . ." The trial court went on to discuss its belief that defendant was employing delay tactics in regard to her legal representation. Despite the trial court's use of the concept of waiver, it is plain that defendant did not wish to waive counsel, and the trial court's failure to conduct the statutory colloquy, along with the

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2. Presumably prior to each waiver of counsel form being signed, the trial court engaged in the colloquy required by N.C.G.S. § 15A-1242 (2021), but the transcripts of those pretrial hearings are not part of the record on appeal.

trial court's reference to "a delay tactic," suggests that the trial court was either confused about the distinction between waiver and forfeiture of counsel or that the trial court suffered a *lapsus linguae* in stating it would enter an order regarding waiver of counsel. Defendant stated that she understood that the trial court "said no" to appointing counsel to her and had "denied [her] a court appointed attorney."

¶ 18 We emphasize again that waiver of counsel is a *voluntary decision* by a defendant and that where a defendant seeks but is denied appointed counsel, a waiver analysis upon appeal is both unnecessary and inappropriate. In its order filed on 20 September 2019, the trial court decreed that "defendant, by her own flagrant, dilatory conduct has forfeited or *effectively waived* her right to be represented by counsel in this matter and at this time proceeds pro se." (Emphasis added.) Given the requirements set forth by the General Assembly, there is no "effective" waiver of this constitutional right. If a criminal defendant expresses the desire to proceed pro se, the trial court must engage in the statutory colloquy. Here, the trial court stated that defendant could still retain private counsel to represent her but emphasized that the matter was set for trial on 2 December 2019 and that "defendant shall proceed at that time with or without counsel." No waiver of counsel form from the 18 September 2019 hearing appears in the record on appeal and nothing in the hearing transcript indicates that the trial court completed the colloquy required by N.C.G.S. § 15A-1242.

¶ 19 Given that in this case defendant expressly stated that she wanted court-appointed counsel and did not want to proceed pro se, the Court of Appeals' discussion of the trial court's failure to complete the statutory colloquy regarding waiver of counsel was not a relevant point of analysis. The assumption of the Court of Appeals majority that defendant had waived her right to counsel is thus clearly erroneous, and the analysis of the dissenting member of the lower appellate court panel regarding whether the trial court completed the required colloquy is likewise inapposite. We encourage both trial and appellate courts to begin any waiver analysis by carefully considering whether the defendant in question has expressed a clear desire to forgo the constitutional right to counsel and proceed pro se.

B. Forfeiture of Counsel

¶ 20 Turning to the issue which is appropriately set for appellate review—whether defendant *forfeited* her right to counsel, we conclude that defendant did not engage in the level of misconduct which may permit a trial court to compel a criminal defendant to proceed to

trial without counsel, and the Court of Appeals majority erred in concluding otherwise.

¶ 21 Forfeiture of the right to counsel is not an express choice to proceed pro se, but rather is a loss of the right to counsel which is imposed as a result of a defendant's "egregious misconduct." *Harvin*, ¶¶ 32–33 (quoting *State v. Simpkins*, 373 N.C. 530, 535 (2020)). Such misconduct may take the form of "a criminal defendant's display of aggressive, profane, or threatening behavior," *id.* ¶ 34, but a forfeiture of the right to counsel can also result where a defendant remains polite and apparently cooperative if the defendant's "obstreperous actions" are so severe as to impair the vindication of the goals of according criminal defendants a right to counsel or which operate to completely prevent a trial court from proceeding in the case, *id.* ¶ 35; *see also Simpkins*, 373 N.C. at 536 (holding that a determination of forfeiture is appropriate where a "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"). Examples of such obstreperous actions include, *inter alia*, a defendant's " 'refus[al] to obtain counsel after multiple opportunities to do so . . . or [the] continual hir[ing] and fir[ing of] counsel and significantly delay[ing] the proceedings.' " *Harvin*, ¶ 35 (alterations in original) (quoting *Simpkins*, 373 N.C. at 538). Yet, even if a "[defendant]'s conduct [is] highly frustrating," forfeiture is not constitutional where any difficulties or delays are "not so egregious that [they] frustrated the purposes of the right to counsel itself." *Simpkins*, 373 N.C. at 539; *see also Harvin*, ¶ 38.

¶ 22 Here, the record on appeal does not reveal that defendant's behavior rose to the level of egregious misconduct which could justify the trial court's determination that she had involuntarily surrendered her constitutional right to the assistance of counsel as she proceeded to trial. Defendant never engaged in "aggressive, profane, or threatening behavior," *Harvin*, ¶ 34, or "show[ed] any contempt for the trial court's authority," *id.* ¶ 39. Instead, the transcript of the 18 September 2019 pretrial hearing reveals that the trial court was focused upon its perception that defendant had been appointed and had dismissed multiple attorneys to the effect that defendant was delaying the proceedings, as exemplified by its statements identifying defendant's "attorney situation" as the primary basis for its concern at the start of the inquiry which ultimately resulted in the trial court's forfeiture decision, and by its question to defendant regarding her legal representation: "Don't you think it's gone on long enough?" After defendant explained that she could not afford an attorney at that time, the trial court stated: "I'm going to put an order in the file basically saying you waived your right to have an attorney. If you

would like to hire your own attorney, that will be fine, but . . . *it appears to me that your process in moving this case along has been nothing more than to see how long you can delay it until it goes away*. The way you've behaved appears to be nothing more than a delay tactic." (Emphasis added.) In our view, however, it is unclear whether defendant bore *any* responsibility for the lapse of time between defendant's alleged offense and the 18 September 2019 hearing or indeed whether there had actually been any "delay" in bringing defendant's case to trial.

¶ 23 A careful review of the course of the proceedings in the case at bar plainly demonstrates the trial court's misunderstanding of defendant's "attorney situation" and its erroneous attribution of blame for "delay" on defendant. In considering the history of defendant's case, the trial court identified "the date of offense,"—19 August 2017—as the beginning of defendant's "attorney situation." But although defendant was arrested on 4 September 2017 and Attorney Cloud was appointed to represent her the next day, she was not indicted until 5 February 2018. Plainly then, to the extent that this five-month period in the course of defendant's case was a "delay," it is wholly attributable to the State, and not to defendant.

¶ 24 Defendant's first motion to remove Cloud, filed in November 2017, was never addressed by the State or in the trial court, and when she filed her second motion to remove Cloud on 12 February 2018—alleging a conflict of interest—the issue still was not resolved until an administrative session of court on 17 April 2018, when defendant signed a waiver of assigned counsel. The record on appeal does not include an order removing Cloud or any findings of fact about the alleged conflict of interest between Cloud and defendant or any other potential reason for Cloud's withdrawal. Thus, defendant cannot be said to have caused this two-month "delay."

¶ 25 On 12 June 2018, defendant filed a motion to continue, alleging that she had medical problems, that she did not have an attorney, and that a pending motion had not been heard. While this two-month time period and defendant's request for a continuance could potentially be viewed as prolonging her case, it is difficult to characterize it as having delayed the matter given that the State had not yet sought to calendar defendant's case for trial. Further, while the order appointing attorney Dwyer to represent defendant indicates that the next court date in the case was to be 17 July 2018, nothing appearing in the record suggests that any action was taken in the case until 11 September 2018 when Dwyer was allowed to withdraw from his representation of defendant. The order removing Dwyer does not contain any findings of fact about the reasons for Dwyer's withdrawal or even whether defendant had requested Dwyer's

removal. Similarly, the 11 October 2018 order permitting attorney Regan to withdraw includes no findings about the reason her withdrawal was allowed. In light of the lack of information about these withdrawals, the four months between 12 June 2018 and 11 October 2018 cannot be fairly characterized as a "delay" caused by defendant, to the extent that it even constituted a delay, given that the State had still not attempted to set the case for trial.

¶ 26 Nothing in the record suggests that defendant was seeking to delay her case during the following two months after she waived court-appointed counsel. After attorney Porter was appointed to represent defendant on 13 December 2018 and then withdrew on 31 January 2019, the trial court again made no factual findings about the circumstances which led to the withdrawal, and thus no inference that defendant was attempting to delay her case during this period is warranted. Once attorney Ballard was appointed on 31 January 2019, the State did not attempt to bring defendant to trial at any of the next eleven scheduled superior court sessions up to the date of the 19 August 2019 hearing. This nearly eight-month delay in the case is therefore plainly attributable to the State alone.

¶ 27 In defendant's 26 June 2019 motion asking that Ballard be removed, defendant avers, *inter alia*, that Ballard was unwilling to pursue a jurisdictional issue which defendant believed had merit—namely, that any crime which had occurred took place in Tennessee and not in North Carolina—or whether defendant had notice of the trial court order prohibiting her from attempting to purchase a firearm. The record reveals that, while the ex parte DVPO and a civil summons in the matter were served upon defendant, defendant was not present at the hearing during which the trial court determined that a DVPO against defendant was warranted, and it does not appear that the subsequently filed DVPO prohibiting her from purchasing a firearm was ever served on defendant. As the protective order was later renewed, the renewed orders did not expressly contain the firearm prohibition, but only incorporated by reference the terms of the original order. Whether or not defendant's jurisdictional and notice issues would have been determined to have merit, as the dissenting judge in the Court of Appeals well noted, *Atwell*, ¶ 37 (Jackson, J., dissenting), they cannot be characterized as frivolous. Therefore, defendant's desire to have Ballard removed from her case does not appear to be obstructive or merely an attempt to delay trial, which in any event had not been calendared at the time of defendant's 26 June 2019 motion asking that Ballard be removed. Further, after defendant filed her motion to remove Ballard, neither the State nor Ballard moved to resolve the motion for almost two months, until 21 August

2019. In addition, on 21 August 2019, when defendant filed a motion to continue and alleged that she would need time to retain counsel, defendant's case was not, and never had been, calendared for trial such that defendant's motion to continue cannot be said to have delayed her trial.

¶ 28 In sum, a close reading of the history of defendant's case reveals that over the roughly eighteen months between defendant's indictment on 5 February 2018 and the 18 September 2019 hearing during which the trial court concluded that defendant had forfeited her right to counsel, the State repeatedly allowed defendant's pending pro se motions to languish for several months before bringing them before the trial court for resolution and *did not attempt to have defendant's case calendared for trial during the eight months when defendant was represented* by Ballard, her final court-appointed attorney. Yet less than a month after Ballard was allowed to withdraw, the prosecutor represented to the trial court that

> since this case has been pending [defendant] had five different attorneys and each one had to withdraw for various reasons. So as of right now [defendant] does not have an attorney. Last time we were here last month the judge gave her until today. *We* [the State] *want to get the case moving*, *get it arraigned or do whatever we're going to do*, *but the hold up is the attorney.*

(Emphasis added.) In fact, the State had not, up until the 18 September 2019 hearing, attempted to set defendant's matter for trial.

¶ 29 After the State's above-quoted introduction of the matter, the trial court asked for defendant's "file" and took some period of time to review it. The trial court then characterized defendant as having "fired" her court-appointed attorneys and asked defendant to explain her reasons for asking that appointed counsel be removed. Defendant explained that one, apparently private, attorney had taken four months of payments from defendant but then had "a conflict with another client"; that two unnamed attorneys "were totally going in two different ways of defense"; and that attorney Dwyer "seemed to do the best work," noting that he had "file[d] for an arraignment back in June of 2018 . . . [and] did file a motion for [d]iscovery." When the trial court asked the State about its "pleasure with this case," the State replied:

> We're ready to move forward with the case at this point. I've been ready to arraign the case. We've given her an offer previously to plead as charged and

> offered probation but I can't remember which attorney but they—she refused or did not want to do that. And that's fine, that's her right. *So we're at a point where I believe it just needs to be arraigned and we'll move it to a trial calendar*. And that does not stop her from still possibly retaining counsel if she chooses to do so. And where that counsel is obviously will talk to me or talk to us, our office, and just kind of take it from there. We need to get the ball rolling, get the case moving.

(Emphasis added.) The State does not appear to have been arguing that defendant had forfeited her right to counsel or asking the trial court to so hold but rather simply wanted "to get the ball rolling, get the case moving" by arraigning defendant so the matter could be moved "to a trial calendar." Nonetheless, the trial court stated to defendant that it would "put an order in the file basically saying you waived your right to have an attorney" because "with regard to the history of this case, . . . it's my opinion that you've done nothing more than try to delay this case over a period." Ironically, although the trial court then calendared defendant's trial for the week of 2 December 2019, defendant was not tried until 13 January 2020.

¶ 30 In *Harvin*, this Court considered the case of a defendant who had two court-appointed attorneys withdraw for reasons unrelated to the defendant during the first two-and-one-half years of his proceeding; later requested the withdrawal of two additional appointed counsel in a two-and-one-half month period; and then, after acting pro se for approximately four months and realizing that he could not adequately manage his first-degree murder trial, requested to be appointed counsel once again. *Harvin*, ¶¶ 43–44. Upon review, the Court opined that the defendant's behavior in requesting the removal of two counsel, seeking to proceed pro se, and then deciding that he needed the help of counsel to vindicate his rights at trial—while remaining polite, cooperative, and constructively engaged in the proceedings—was not "the type or level of obstructive and dilatory behavior which [would] allow[ ] the trial court . . . to permissibly conclude that [the] defendant had forfeited the right to counsel." *Id.* ¶ 44.

¶ 31 Here, the record likewise does not permit an inference, much less a legal conclusion, by the trial court or a reviewing court that defendant "engage[d] in the type of egregious misconduct that would permit the trial court to deprive defendant of [her] constitutional right to counsel." *See id.* ¶ 45. The majority of the time which passed between the date of

defendant's indictment and the date upon which the trial court determined that defendant had forfeited her right to counsel is attributable either to the State's actions and omissions, or to the common temporal friction which occurs in most criminal matters prior to trial. Defendant's pro se filings, along with her comments during the 18 September 2019 hearing, indicate that defendant had ongoing, nonfrivolous concerns about her case which she wished her court-appointed attorney to pursue; that she attempted to hire a private attorney to pursue her concerns when her last court-appointed counsel declined to do so; and that she wanted, but was denied, court-appointed counsel during the 18 September 2019 hearing.

¶ 32 Additionally, we emphasize again that waiver of counsel is a choice which may be elected by a defendant and where a defendant has requested the assistance of appointed counsel, the statutory waiver colloquy has no place and, upon appeal, a waiver analysis is inapposite. Further, a criminal defendant cannot "effectively waive" the constitutional right to the assistance of counsel; *where a defendant expresses the desire to proceed without counsel*, the statutory colloquy set forth by the General Assembly in N.C.G.S. § 15A-1242 *must* be completed to sustain a waiver of counsel.

IV. Conclusion

¶ 33 The trial court erred in determining that defendant either waived or forfeited her right to counsel, and the Court of Appeals majority erred in affirming the trial court's decision to that effect. Accordingly, the decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals for further remand to the trial court for defendant to receive a new trial.

REVERSED AND REMANDED.

Chief Justice NEWBY dissenting.

¶ 34 This case concerns the trial court's authority to maintain the dignity of trial court proceedings and administer justice without delay. Though a criminal defendant has a constitutional right to counsel, that right may be lost. Here, on four separate occasions, defendant expressly declared in writing that she "freely, voluntarily and knowingly" waived her right to appointed counsel. Additionally, she relinquished five different appointed attorneys and moved to continue her case four times to obtain private counsel, which she failed to do. The trial court had adequate evidence to support its findings that, by her actions, defendant

demonstrated her intent to delay trial proceedings, thus forfeiting her right to counsel. Nonetheless, the majority improperly discounts facts found by the trial court, assumes facts from an undeveloped record, makes its own findings, and ultimately substitutes its judgment for that of the trial court. Moreover, the majority ignores defendant's delay tactics and instead places blame on the State. Because the trial court did not err in determining that defendant acted with the intent to delay the trial, ruling that the matter should not be further delayed, its decision should be upheld. I respectfully dissent.

¶ 35 On 4 September 2017, defendant was arrested for Possessing or Attempting to Possess a Firearm in Violation of a Domestic Protective Order. The next day, defendant completed an affidavit of indigency and requested court-appointed counsel. The trial court appointed Vernon Cloud to represent her on the same day.

¶ 36 On 6 November 2017, only two months after the trial court appointed Cloud, defendant filed a pro se motion to have the court remove Cloud as counsel and allow a three-to-six-month continuance for defendant to hire her own attorney. The trial court never ruled on this motion.

¶ 37 Defendant was indicted on 5 February 2018. On 12 February 2018, defendant filed a second pro se motion requesting the court to "immediately" remove Cloud as court-appointed counsel due to a "serious conflict" with him under the Americans with Disabilities Act. She again requested a continuance to obtain legal counsel. The trial court apparently never heard or ruled on this motion.

¶ 38 On 17 April 2018, defendant signed a waiver of counsel form expressly waiving her right to appointed counsel. The waiver of counsel form specifically affirmed defendant "freely, voluntarily and knowingly" waived her right to appointed counsel. By signing the form, defendant acknowledged the following:

> I freely and voluntarily declare that I have been fully informed of the charges against me, the nature of and the statutory punishment for each such charge, and the nature of the proceedings against me; that I have been advised of my right to have counsel assigned to assist me and my right to have the assistance of counsel in defending against these charges or in handling these proceedings, and that I fully understand and appreciate the consequences of my decision to waive the right to assigned counsel and the right to assistance of counsel.

¶ 39 The next month, on 8 May 2018, defendant filed a pro se motion to dismiss the case for lack of subject matter jurisdiction and alleged she was a "disabled Tuscarora Native American." The trial court never heard or ruled on this motion. On 15 May 2018, seven days after filing her motion to dismiss, defendant signed a second waiver of counsel form again declaring that she "freely, voluntarily and knowingly" waived her right to appointed counsel.

¶ 40 Less than one month later, on 12 June 2018, defendant filed a pro se motion requesting another continuance because she still did not have an attorney and claimed she was experiencing medical issues. The same day, the trial court appointed Peter Dwyer as defendant's second court-appointed counsel.

¶ 41 On 24 July 2018, defendant filed a pro se motion requesting a change of venue. Less than one month later, on 13 August 2018, defendant filed a pro se motion to dismiss for improper venue due to "pretrial publication, interest[s] of justice, improper venue, [and] previous problems with judges, lawyers, authorities."

¶ 42 On 11 September 2018, Dwyer withdrew as appointed counsel for reasons not specified in the record. The court appointed Tracy Regan as defendant's third court-appointed counsel. On 11 October 2018, only one month after the trial court appointed Regan as counsel, Regan withdrew for reasons not specified in the record. The same day, defendant signed a third waiver of counsel form declaring she "freely, voluntarily and knowingly" waived her right to appointed counsel and acknowledging that she understood and appreciated the consequences of waiver.

¶ 43 On 13 December 2018, defendant filed another affidavit of indigency and requested court-appointed counsel. The court appointed Tiffany Porter to serve as defendant's fourth court-appointed counsel. The next month, on 31 January 2019, Porter withdrew for reasons not specified in the record, and the court appointed Courtney Ballard to serve as defendant's fifth and final court-appointed counsel.

¶ 44 Five months after the court appointed Ballard as defendant's counsel, defendant filed a pro se motion on 26 June 2019 requesting that the court "immediately remove Courtney Ballard from [her] case" and hand the case file over to defendant. In her motion, defendant alleged "serious judicial misconduct" because "Courtney Ballard knows I was not served [with] notice of hearing . . . yet [the trial court] held [a] hearing anyway[.]"

¶ 45 Less than two months later, on 21 August 2019, defendant filed another pro se motion requesting a six-month continuance to "obtain

competent legal counsel after removal of [ ] Courtney Ballard." On the same day, the court granted defendant's motion to remove Ballard as counsel, and defendant signed a fourth waiver of counsel form expressly affirming that she "freely, voluntarily and knowingly" waived her right to appointed counsel.

¶ 46 On 18 September 2019, the trial court held a hearing to determine the status of defendant's case. The prosecutor explained that defendant already had five different appointed attorneys in the past two years, and the previous judge had recently given defendant one month to obtain private counsel. When asked if she planned to hire counsel, defendant claimed she could not afford it. The State, concerned with the delay of the case, noted that it was ready to move forward with trial. The trial court concluded as follows:

> The Court: Well, what I'm going to do is I'm going to put an order in the file basically saying you waived your right to have an attorney. If you would like to hire your own attorney, that will be fine, but based on these – the history of this file, it appears to me that your process in moving this case along has been nothing more than to see how long you can delay it until it goes away. The way you've behaved appears to be nothing more than a delay tactic and that's what I'm going to put an order in the file and I'm going to make specific findings as to everything I just told you and to some other things that are in the file. I'm going to let the prosecutor arraign you and set this case for trial. Do you understand that?
>
> [Defendant]: Yes.
>
> The Court: Now, that doesn't preclude you from hiring your own attorney. You can hire your own attorney but you're going to have to do that and have your attorney ready by the time the prosecutor has this case on the trial calendar. Additionally, if you don't hire an attorney, you're going to be responsible for representing yourself. Do you know what that means?
>
> [Defendant]: Representing myself.
>
> The Court: Yes.
>
> [Defendant]: It means representing myself.

> The Court: It does. It means you're going to have to negotiate any plea deal if there is one with the prosecutor. You're going to have to handle all the [d]iscovery in this case. If there is a jury trial you're going to have to select a jury and keep up with any motions and try the case just as if you were an attorney and be held to the same standard as an attorney. You're not going to get legal advice from me or whoever the judge is. Do you understand that?
>
> . . . .
>
> [Defendant]: You're giving me no choice. I mean, I asked for another court[-]appointed attorney and you said no, so
>
> The Court: You've had choice after choice after choice. You've been given a court[-]appointed attorney on three occasions, which is two more than you usually get.

¶ 47 In its order, the trial court found that "[defendant's] conduct in this matter is nothing more than a delay tactic and an attempt to do whatever she can to avoid bringing this matter to a conclusion." The trial court also found that defendant "has caused at least [two] of her appointed attorneys to be removed from her case because of her of [sic] own conduct or a generally unreasonable expectation that she has for her case." The trial court then ordered that defendant "forfeited or effectively waived her right to be represented by counsel in this matter and at this time proceeds pro se" as a result of "her own flagrant, dilatory conduct."

¶ 48 Four months later, defendant's trial began on 13 January 2020. After the jury was impaneled, defendant left and did not return for the remainder of the trial, alleging medical issues and car problems. The jury subsequently found defendant guilty. Defendant was present for her sentencing hearing, at which the trial court sentenced her to five to fifteen months in prison. She gave notice of appeal in open court.

¶ 49 On appeal defendant challenged the trial court's order finding that she had waived or forfeited her right to counsel. A divided panel of the Court of Appeals affirmed, holding that the trial court complied with the requirements for an effective waiver. *State v. Atwell*, 278 N.C. App. 84, 2021-NCCOA-271, ¶ 23. Relying on its decision in *State v. Curlee*, 251 N.C. App. 249, 795 S.E.2d 266 (2016), the Court of Appeals determined that the trial court's colloquy with defendant was sufficient to inform her

of the consequences of proceeding pro se and met the requirements under N.C.G.S. § 15A-1242. *Atwell*, ¶¶ 22–23 (citing *Curlee*, 251 N.C. App. at 253, 795 S.E.2d at 270 (determining that when a defendant waives the right to counsel and the case is continued to obtain private counsel, the trial court may inform the defendant that he or she "will be required to proceed to trial without the assistance of counsel, *provided that* the trial court informs the defendant of the consequences of proceeding *pro se* and conducts the inquiry required by N.C.[G.S.] § 15A-1242.")).

¶ 50 Moreover, the Court of Appeals held that, even if there was not a valid waiver of appointed counsel, defendant still forfeited the right under this Court's standard in *State v. Simpkins*, 373 N.C. 530, 838 S.E.2d 439 (2020). *Atwell*, ¶ 23; *see Simpkins*, 373 N.C. at 541, 838 S.E.2d at 449 (holding a defendant forfeits the right to counsel when he or she engages in "egregious dilatory or abusive conduct . . . which undermines the purposes of the right to counsel"). The Court of Appeals concluded that defendant's conduct in removing court-appointed attorneys, filing waiver of counsel forms, and seeking continuances to hire private counsel amounted to egregious misconduct intended to delay proceedings. *Atwell*, ¶ 24.

¶ 51 The dissent would have held that, despite numerous written waivers of court-appointed counsel, because defendant explicitly requested court-appointed counsel at her hearing on 18 September 2019, she did not voluntarily waive the right to appointed counsel. *Id.* ¶¶ 32–35 (Jackson, J., concurring in part and dissenting in part). Further, the dissent disagreed with the majority that defendant's conduct was so egregious to warrant forfeiture under the *Simpkins* standard because, *inter alia*, the record lacked evidence of three attorneys' reasoning for withdrawal. *Id.* ¶ 37. Defendant gave notice of appeal to this Court.

¶ 52 This Court reviews a trial court's findings of fact to determine whether they are "supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). 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. Only the trial court could truly understand the defendant's actions to know when to protect the court proceedings from undue disruption and delay. Moreover, trial courts have a "legitimate interest in guarding against manipulation and delay." *United States v. Goldberg*, 67 F.3d 1092, 1098 (3d

Cir. 1995). Given this legitimate interest, a trial court must be afforded discretion to ensure legal proceedings are respected by all, which in turn enables the court to preside over orderly and just proceedings.

¶ 53 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), however, a defendant may expressly waive the right to counsel or forfeit it by his or her conduct. *See State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992); *Simpkins*, 373 N.C. at 541, 838 S.E.2d at 449. The majority unduly chastises the trial court for blurring the distinction between waiver and forfeiture. Several waivers of counsel, however, can be an important consideration in finding forfeiture. A defendant who causes undue delay by filing multiple waiver of counsel forms, and then later changing his or her mind, can support a finding of forfeiture.

¶ 54 A valid waiver of the right to counsel must meet constitutional and statutory standards. *Thomas*, 331 N.C. at 673, 417 S.E.2d at 475. First, a defendant must expressly waive the right to counsel "clearly and unequivocally." *Id.* at 673–74, 417 S.E.2d at 475 (quoting *State v. McGuire*, 297 N.C. 69, 81, 254 S.E.2d 165, 173, *cert. denied*, 444 U.S. 943, 100 S. Ct. 300 (1979)). Second, once waiver is clearly expressed, the trial court "must determine whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel." *Id.* at 674, 417 S.E.2d at 476 (citing *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2540 (1975)). To do so, the trial court must meet the requirements of N.C.G.S. § 15A-1242, which states:

> 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.

N.C.G.S. § 15A-1242 (2021). As a further precaution, a "trial court must obtain a written waiver of the right to counsel." *Thomas*, 331 N.C. at 675, 417 S.E.2d at 476 (citing N.C.G.S. § 7A-457 (1989)).

¶ 55 A defendant may also forfeit the right to appointed counsel "in situations evincing egregious misconduct." *Simpkins*, 373 N.C. at 535, 838 S.E.2d at 446. This Court stated in *Simpkins* that a defendant may forfeit the right to counsel when he frustrates the purpose of the right to appointed counsel and obstructs or delays proceedings. *Id.* at 536, 838 S.E.2d at 446. Notably, a defendant obstructs proceedings if he "refuses to obtain counsel after multiple opportunities to do so . . . or continually hires and fires counsel and significantly delays the proceedings." *Id.* at 538, 838 S.E.2d at 447.

¶ 56 Here defendant clearly and unequivocally expressed her desire to waive her right to appointed counsel when she signed four separate waiver of counsel forms. Defendant signed the fourth waiver form less than one month before the hearing during which the trial court found she had waived or forfeited her right to counsel. Moreover, the trial court complied with the requirements of N.C.G.S. § 15A-1242 to ensure defendant understood the consequences of continuing to trial without appointed counsel. The trial court specifically advised defendant that she could still hire her own attorney and explained that defendant would have to handle discovery, select a jury, "and try the case just as if [she] were an attorney." This colloquy satisfied the requirements under N.C.G.S. § 15A-1242. Thus, defendant knowingly and voluntarily waived her right to court-appointed counsel. Further, the trial court was aware that even during the time defendant was represented by her five different appointed attorneys, defendant made multiple pro se filings. Her filings clearly indicate that she was familiar with her legal proceeding and that she knew the difference between proceeding with or without counsel. The trial court rightly found that defendant's pro se filings were generally designed to delay the court proceedings.

¶ 57 In addition to affirmatively waiving her right to counsel, defendant also forfeited that right by her conduct. In *Simpkins*, the trial court found that the defendant waived his right to counsel when he objected to the trial court's jurisdiction and "stated that he 'would like counsel that's not paid for by the State of North Carolina.' " 373 N.C. at 532, 838 S.E.2d at 444. The defendant appealed, arguing that the trial court failed to inquire into the defendant's decision to proceed pro se. *Id.* at 533, 838 S.E.2d at 444. The State argued at the Court of Appeals that the defendant forfeited, rather than waived, his right to counsel by his own conduct. *Id.* The Court of Appeals reversed the trial court, holding that the defendant's conduct was not serious enough to result in forfeiture. *Id.* This Court affirmed and agreed that the standard for forfeiture required "egregious misconduct." *Id.* at 535, 838 S.E.2d at 446. The majority

reasoned that while the defendant's conduct was "highly frustrating," the record did not show that his conduct was rude or disrespectful to constitute egregious misconduct. *Id.* at 539, 838 S.E.2d at 448. This Court noted, however, that the trial court did not make specific findings of fact supporting a conclusion that the defendant forfeited or waived his right to counsel. *Id.* at 533–34 n.3, 838 S.E.2d at 444–45 n.3. If it had done so, "then those findings would be entitled to deference." *Id.*

¶ 58 Here, unlike in *Simpkins*, the trial court made specific findings of fact in its order that defendant waived or forfeited her right to counsel. The trial court found that defendant filed four waiver of counsel forms, relinquished five different attorneys within two years, and filed four pro se motions to continue to obtain private counsel. When defendant failed to obtain private counsel, she sought to have counsel appointed for her for the sixth time. Defendant made multiple pro se filings, regardless of whether she was represented by counsel. After reviewing defendant's conduct, the trial court found she had effectively forfeited her right to appointed counsel. These findings are supported by competent evidence, and this Court should defer to them.

¶ 59 As in this case, this Court recently failed to afford deference to the trial court's findings of fact in *State v. Harvin*, 2022-NCSC-111. There the defendant was appointed four attorneys in less than three years, two of whom withdrew at the defendant's request. *Harvin*, ¶¶ 4–7. Three weeks before his trial date, the defendant requested a continuance to have more time to prepare for his case, but the trial court denied his request. *Id.* ¶¶ 13–14. On the day of trial, the defendant asserted an ineffective assistance of counsel claim against his standby counsel. *Id.* ¶ 15. After informing the defendant that he could not assert an ineffective assistance of counsel claim because he had no counsel, the trial court conducted the colloquy under N.C.G.S. § 15A-1242. *Id.* ¶ 16. The defendant indicated he wished to have an attorney appointed for him. *Id.* The trial court concluded, however, that the defendant forfeited his right to counsel because he "had no good cause" to ask for an attorney on the day of his trial, and his willful actions "obstructed and delayed these court proceedings." *Id.* ¶ 20.

¶ 60 Although this Court acknowledged "the binding nature on appeal of findings of fact if they are supported by competent evidence," the Court failed to afford deference to the trial court's findings of fact and determined that the issue of forfeiture "must be evaluated de novo." *Id.* ¶ 42. Under the de novo standard, the Court concluded the defendant's conduct was not sufficiently egregious to meet the *Simpkins* standard. *Id.* ¶ 39. In reaching this conclusion, however, the Court determined

the attorneys did not withdraw because of the defendant's delay tactics "as the trial court found," rather, "in the determination of the Court of Appeals," they withdrew because of issues regarding the defendant's defense preparation. *Id.* ¶ 41. In other words, this Court substituted its own judgment for that of the trial court rather than affording deference to the trial court's findings of fact.

¶ 61 Here, as in *Harvin*, the majority reweighs the evidence and mistakenly concludes defendant bears no responsibility for the significant delay in trial court proceedings. Instead, the majority places blame solely on the State because it never calendared the case for trial. The majority fails to consider, however, that the State did not calendar the case for trial because it had to wait for defendant to hire private counsel after she requested three-to-sixth month continuances to do so on four separate occasions. Moreover, the majority renders meaningless defendant's four waiver of counsel forms. According to the majority, defendant did not waive her right to appointed counsel because she did not file a waiver of counsel form at the 18 September 2019 hearing. By the majority's reasoning, an effective withdrawal of waiver occurs when, despite waiving the right to appointed counsel four separate times, defendant changes her mind at the last minute and requests appointed counsel.

¶ 62 Affording the deference due to the trial court's findings of fact, the trial court's determination that defendant waived or, in the alternative, forfeited her right to counsel is supported by competent evidence in the record. The majority here, however, substitutes its own judgment for that of the trial court and instead shifts responsibility to the State. In doing so, the majority effectively requires a separate hearing to determine the reasons for each court-appointed attorney's withdrawal. Ultimately, the decision today infringes upon the trial court's authority to manage its docket and administer justice without delay. Because defendant waived and forfeited her right to counsel by delaying court proceedings, I respectfully dissent.

Justices BERGER and BARRINGER join in this dissenting opinion.

STATE v. CABALLERO

[383 N.C. 464, 2022-NCSC-136]

STATE OF NORTH CAROLINA
v.
EFREN ERNESTO CABALLERO

No. 29PA22

Filed 16 December 2022

Evidence—vouching for credibility of witness—description of police questioning technique—plain error analysis

In defendant's prosecution for the murder of his next-door neighbor, the challenged portion of a police officer's testimony was inadmissible where the officer described statements made by the victim's wife and engaged in an extensive discussion of a questioning technique that he utilized to determine whether the wife was telling the truth, thereby impermissibly vouching for the wife's credibility. The unobjected-to error did not rise to the level of plain error, however, given the strength of the State's case against defendant.

Justice BARRINGER dissenting in part and concurring in result.

Chief Justice NEWBY and Justice BERGER join in this dissenting in part and concurring in result opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 281 N.C. App. 215, 2021-NCCOA-718, finding no error after appeal from a judgment entered on 23 January 2020 by Judge Michael O'Foghludha in Superior Court, Durham County. Heard in the Supreme Court on 20 September 2022.

Joshua H. Stein, Attorney General, by Ryan Y. Park, Solicitor General, for the State-appellee.

James R. Glover for defendant-appellant.

ERVIN, Justice.

¶ 1 The issue before the Court in this case is whether the trial court's failure to preclude the admission of testimony describing certain information provided by the State's principal witness as "rock solid" constituted plain error. On appeal, the Court of Appeals held that the trial court did not commit plain error by allowing the admission of the challenged

testimony. After careful consideration of defendant's challenge to the trial court's judgment in light of the applicable law, we modify and affirm the Court of Appeals' decision.

I. Background

A. Substantive Facts

1. State's Evidence

¶ 2 Beginning in 2016, Liliana Pichardo; her husband Jose Luis Yanez Guerrero; and their fifteen-month-old son lived at 3409 Glenn Road in Durham. Defendant Efren Ernesto Caballero lived next door at 3411 Glenn Road. Defendant's stepfather, Jorge Huerta, was the pastor of a nearby church that Ms. Pichardo and Mr. Guerrero frequently attended, with Mr. Huerta having assisted Ms. Pichardo and Mr. Guerrero by providing them with a place to live and helping them find work.

¶ 3 Ms. Pichardo claimed to have seen defendant almost every day for two years. After the three of them became acquainted, defendant used a demeaning term in talking with Ms. Pichardo and Mr. Guerrero, demanded that Mr. Guerrero drive him places at night, and insisted that Ms. Pichardo and Mr. Guerrero provide him with food, particularly eggs. As a result of this behavior, Ms. Pichardo claimed that she was "afraid" to reject defendant's requests.

¶ 4 About two weeks prior to the date upon which Mr. Guerrero died, someone broke into the residence occupied by Ms. Pichardo, Mr. Guerrero, and their son while the family was attending church. Upon returning home, Ms. Pichardo and Mr. Guerrero noticed that the door facing defendant's house had been propped open, that the lock to that door had been damaged, and that a trail of footprints led from defendant's residence to their home and back, with a carton of eggs and a loaf of bread being missing from their residence. After Mr. Guerrero had a confidential conversation with Mr. Huerta about the break-in, Mr. Huerta told defendant and his other neighbors about it so that they could take appropriate precautions. Ms. Pichardo stated that defendant's attitude became "more aggressive" after the break-in, with defendant having begun to watch her family, a development that Ms. Pichardo found to be frightening.

¶ 5 At approximately 8:45 p.m. on 13 February 2016, Ms. Pichardo, Mr. Guerrero, and their infant son were in their residence when Ms. Pichardo and Mr. Guerrero heard a "loud noise" outside. Upon looking through the window blinds, Mr. Guerrero observed that defendant was knocking on the door. After defendant repeatedly "insisted" that Mr. Guerrero

come outside to assist defendant with his car, Mr. Guerrero agreed to provide the needed help. Although Ms. Pichardo proposed that she should accompany him, Mr. Guerrero told Ms. Pichardo to stay inside with their baby because it was "too cold." At the time that Ms. Pichardo observed defendant at the door to the family residence, he was wearing a black sweatshirt.

¶ 6 After her husband went outside with defendant, Ms. Pichardo heard Mr. Guerrero shouting for help "in a painful way." Upon going outside herself, Ms. Pichardo "saw [defendant] on top of [Mr. Guerrero]" making a repeated motion with his arm in the direction of Mr. Guerrero's body. At that point, Ms. Pichardo ran over to the two men and shoved defendant off Mr. Guerrero. As she did so, Ms. Pichardo could see defendant's face and noticed that defendant was wearing "[a] black sweatshirt and some light-colored pants."

¶ 7 As soon as Ms. Pichardo began attempting to assist her husband, defendant made the same arm motion that he had been making toward Mr. Guerrero in her direction, a development that caused Ms. Pichardo to reenter her home and grab her child. Although defendant kicked the outermost door to the house and managed, at one point, to put his foot inside the structure, Ms. Pichardo was able to lock the inner door to the residence. After Ms. Pichardo locked the inner door, defendant hit the glass portion of that door and struck Ms. Pichardo's face, causing her to sustain bruising and inflicting lacerations and scratches to both Ms. Pichardo and her child as the result of flying glass.

¶ 8 At that point, Ms. Pichardo fled to a different portion of the house and phoned Mr. Huerta for the purpose of telling him that she and her husband were being attacked by defendant. After Mr. Huerta told Ms. Pichardo how to seek emergency assistance, Ms. Pichardo contacted the emergency services dispatcher and reported that she and her husband were being attacked by their neighbor. More specifically, Ms. Pichardo told the dispatcher that her neighbor's name was Ernesto Caballero and that he was a twenty-two-year-old Hispanic who was wearing a black sweatshirt.

¶ 9 After Ms. Pichardo spoke with the dispatcher, defendant made a call for emergency assistance as well. In the course of his conversation with the dispatcher, defendant stated that he had heard screaming emanating from his neighbors' property, said that he had become concerned that his neighbors might be in trouble, and claimed to have seen two men running from the residence occupied by Ms. Pichardo, Mr. Guerrero, and their son. According to defendant, he had been inside his own residence when he heard the noises in question.

¶ 10 Deputies Amanda Andrews and Bobby Bradford of the Durham County Sheriff's Office were the first law enforcement officers to reach the Glenn Road area. After their arrival, the officers approached defendant's residence and spoke with him. According to Deputy Andrews, defendant "was wearing a blue and white . . . horizontal striped hoodie," jeans, and leather dress shoes, with both his shoes and his jeans being visibly muddy. In addition, Deputy Bradford testified that there was "fresh" "dirt on [defendant's] pants." In response to the officers' request that he provide an explanation for the condition of his pants and shoes, defendant responded by stating that he had been at work and that these items of apparel had been in their present condition all day.[1] Defendant told Deputies Andrews and Bradford that he had heard screaming from his neighbors' house and that he had seen two Black males wearing black clothing running from the scene.

¶ 11 Subsequently, Reserve Deputy John Teer of the Durham County Sheriff's Office arrived at the scene and saw Deputies Andrews and Bradford speaking with defendant. As the other officers spoke with defendant, Deputy Teer approached the residence occupied by Ms. Pichardo, Mr. Guerrero, and their son to see if anyone had been injured. As he approached the structure, Ms. Pichardo, who was holding the couple's son, came to the door. At that time, Deputy Teer observed that there was blood on Ms. Pichardo's face, that Ms. Pichardo appeared to be "terrified and upset," that there was "glass all around the doorstep," and that "a window had been broken out" of the door.

¶ 12 In view of the fact that Ms. Pichardo did not speak anything other than Spanish, Deputy Teer and the other officers could not communicate with her. After the officers had made contact with an interpreter service, Ms. Pichardo stated that "the neighbor attacked her and then that her husband was in the backyard." Once Ms. Pichardo had made these statements, other officers brought defendant to the residence occupied by Ms. Pichardo, Mr. Guerrero, and their son so that he could help them by translating what Ms. Pichardo was saying. According to Deputy Andrews, Ms. Pichardo immediately "became very frightened" as soon as she saw defendant, "frantically point[ed] . . . directly at [defendant]," and identified defendant as "the one" who attacked her and her husband. Similarly, Deputy Teer indicated that Ms. Pichardo

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1. One of defendant's friends, Carlos Cruz, testified that defendant did not work that day; that he and defendant had spent the day drinking alcohol and smoking marijuana; and that defendant's clothes had not been muddy prior to his departure from defendant's residence at approximately 7:00 p.m.

"began excitedly exclaiming . . . 'He's the one that did it, it's him,' and pointing directly at [defendant]" as soon as she saw him.

¶ 13 At this point, defendant was placed in handcuffs and detained in the carport of the residence occupied by Ms. Pichardo, Mr. Guerrero, and their son. After defendant's sister arrived and saw her brother in handcuffs, she approached defendant without paying any heed to the officers who were trying to get her to refrain from attempting to get near her brother and asked, "What did you do? What did you do?" The blue jeans, tee-shirt, and shoes that defendant had been wearing at the time that he was admitted into the Durham County detention facility tested positive for the presence of blood, with a subsequent DNA analysis performed upon defendant's jeans indicating the presence of Mr. Guerrero's DNA.

¶ 14 After determining that further conversations with defendant would be pointless, Deputy Teer returned to the residence occupied by Ms. Pichardo, Mr. Guerrero, and their son for the purpose of having a further conversation with Ms. Pichardo. During that conversation, which was conducted with the assistance of the interpreter service, Ms. Pichardo stated that defendant had come to her door and asked for Mr. Guerrero's assistance in starting his automobile, that she had heard Mr. Guerrero screaming shortly thereafter, that she had seen defendant assaulting Mr. Guerrero in the back yard of the residence, and that defendant had punched her through the window while attempting to make a forcible entry into the residence. As she talked with Deputy Teer, Ms. Pichardo identified defendant as her assailant multiple times and in multiple ways and stated that defendant had been wearing a dark hoodie during the attack. After Deputy Teer said that defendant had been wearing a white striped sweatshirt at the time of Deputy Teer's arrival, Ms. Pichardo "immediately said [without hesitation that defendant had] changed his clothes, or he changed out of it." When Deputy Teer asked Ms. Pichardo if she had seen a weapon and suggested that defendant might have had a knife that she could barely see, Ms. Pichardo persisted in saying that she had never seen a weapon.

¶ 15 Investigating officers found Mr. Guerrero's body lying face down in the grass on the side of the residence that was closest to defendant's home. At that time, the officers noted that Mr. Guerrero's clothing was "soaked" in blood, that blood was coming from Mr. Guerrero's mouth, and that there was blood on the leaves around Mr. Guerrero's body. An autopsy performed upon Mr. Guerrero's body established that Mr. Guerrero had suffered twenty stab wounds and six incised wounds; that a sharp object had penetrated Mr. Guerrero's carotid artery and his lungs, liver, and diaphragm; that the wounds that Mr. Guerrero had

sustained would have caused him to lose consciousness and the ability to breathe; that Mr. Guerrero would have ultimately bled to death; and that Mr. Guerrero had died as the result of "multiple strike force injuries."

¶ 16 After having been arrested and placed in jail, defendant placed a call to his mother, resulting in a lengthy discussion between the two of them concerning the cleaning of defendant's clothes. According to defendant's mother, the whole house had been cleaned, the trash had been removed, and she had "got[ten] everything . . . out that was no good." After defendant made inquiry about his clothes and requested that his mother get his clothes and everything else that he had in "[his] other room" and put them in a black bag, defendant's mother responded by stating that she had "brought all [his] dirty clothes" and had "already washed them." At the conclusion of this conversation, defendant reassured his mother that "everything is going to turn out fine."

2. Defendant's Evidence

¶ 17 3409 Glenn Road was one of five houses located on Glenn Road that were owned by a woman who used to live in another one of the houses, which was located at 3417 Glenn Road. Mr. Huerta, who was the pastor of a church and maintained and collected the rents associated with all five houses, and his wife lived in the second residence, which was located at 3415 Glenn Road. Melissa Caballero Martinez, defendant's older sister and Mr. Huerta's stepdaughter, lived in the third house, which was located at 3413 Glenn Road. Defendant lived in the fourth house, which was located at 3411 Glenn Road, along with a previously homeless man named Jonathan Martinez, who had been staying with defendant for about four weeks as of the date of Mr. Guerrero's death.

¶ 18 At approximately 9:00 p.m. on 13 February 2016, Mr. Huerta received a call from Ms. Pichardo, who was yelling and who could not be understood to be saying anything other than that something had happened to Mr. Guerrero. Mr. Huerta informed Ms. Pichardo that he and his wife were out of town and advised Ms. Pichardo to call for emergency assistance. After Mr. Pichardo hung up for the purpose of making the recommended call, Mr. Huerta and his wife immediately drove back to Durham. At the time that Mr. Huerta and his wife arrived at Ms. Pichardo's house, they observed that law enforcement officers and vehicles were present.

¶ 19 Ms. Martinez received a call from her mother at about the time that she finished work for the day, with her mother having informed her that something had occurred at the residence occupied by Ms. Pichardo, Mr. Guerrero, and their son and requested that Ms. Martinez check on

Ms. Pichardo. Ms. Martinez arrived at the residence occupied by Ms. Pichardo, Mr. Guerrero, and their son between 9:45 p.m. and 10:15 p.m., at which point she observed that a number of law enforcement officers were present.

¶ 20 Defendant indicated that he did not go to work on 13 February 2022. Instead, defendant was visited by two friends and ate breakfast with them at approximately 11:00 a.m., with defendant having worn a black dress shirt that did not have a hood and the jeans and brown dress shoes that he ordinarily wore to work at that time. As a result of the fact that his shirt got dirty while he was eating, defendant replaced the black dress shirt with a black and white striped sweater and wore this attire for the remainder of the day.

¶ 21 Between approximately 7:00 p.m. and 8:00 p.m., defendant and his friends went to pick up another friend and his girlfriend because "they had a joint" to smoke. After stopping by a convenience store to purchase snacks and a couple of beers, the group returned to defendant's residence, where they smoked marijuana and drank beer. At the time that one of defendant's friends said that it was time for him to leave, the entire group left defendant's residence except for defendant and his housemate, Mr. Martinez.

¶ 22 At approximately 8:00 p.m., a friend of Mr. Martinez's named Nino and two other people that defendant had never met before arrived at defendant's residence. Although defendant claimed that he had previously told Mr. Martinez that he did not want Mr. Martinez using cocaine in his house, Nino and the other two men entered defendant's residence over defendant's objection and began using cocaine along with Mr. Martinez despite the fact that defendant declined to join in their drug use.

¶ 23 At some point defendant told Mr. Martinez that Nino and the two men had to leave, an instruction that Mr. Martinez conveyed to the other people who were there. After Nino and the two men left defendant's residence at approximately 8:30 p.m., defendant entered his carport for the purpose of smoking a cigarette and heard someone screaming for help.

¶ 24 Upon hearing these screams, defendant ran behind his house, where he observed two men punching someone lying on the ground in his neighbor's back yard. In light of the fact that it was very dark, defendant could not tell if the assailants had a weapon or if the person being assaulted was male or female. As defendant watched, one of the assailants got up and ran, having been followed by the other assailant a few seconds later. According to information that defendant provided to

investigating officers, both assailants entered the woods leading toward East Club Boulevard.

¶ 25 After the two men fled, defendant approached the person on the ground, whom he recognized at that point to be Mr. Guerrero, and knelt down beside him. Although defendant did not see any blood or other sign of a visible injury on Mr. Guerrero's person, Mr. Guerrero was shaking and trying to catch his breath. When defendant asked Mr. Guerrero how he was feeling, Mr. Guerrero was unable to answer. After Mr. Guerrero failed to respond, defendant returned to his house in order to call for emergency assistance.

¶ 26 As a result of the fact that he had lost his cell phone several days earlier, defendant had to use Mr. Martinez's phone to make the call. After Mr. Martinez activated his phone, defendant contacted emergency services personnel. As he spoke with the dispatcher, defendant called out to Ms. Pichardo for the purpose of letting her know that law enforcement officers were on their way.

¶ 27 The first officer to reach the scene arrived while defendant was still speaking with the dispatcher. At the time that the officer arrived, defendant suggested that the officer should go to the residence occupied by Ms. Pichardo, Mr. Guerrero, and their son for the purpose of checking on Mr. Guerrero.

¶ 28 After the officer had done as defendant suggested, other officers told defendant that they needed him to come to the residence occupied by Ms. Pichardo, Mr. Guerrero, and their son to serve as a translator. At the time that defendant arrived at her residence, Ms. Pichardo pointed to defendant and claimed that he had perpetrated the assault upon Mr. Guerrero, her child, and herself. As a result, defendant was placed in handcuffs.

¶ 29 After parking her vehicle in the driveway of the residence occupied by Ms. Pichardo, Mr. Guerrero, and their son and approaching the residence, Ms. Martinez saw defendant, who had been placed in handcuffs. After Ms. Martinez asked her brother what he had done, defendant responded that he had not done anything and that he had, in fact, been the person who had called for emergency assistance. However, Ms. Pichardo told Ms. Martinez that defendant "did it" and "that it was him."

B. Procedural History

¶ 30 On 22 February 2016, the Durham County grand jury returned bills of indictment charging defendant with murder, attempted murder,

first-degree burglary, assault on a female, and assault on a child under the age of twelve. The charges against defendant came on for trial before the trial court and a jury at the 13 January 2020 criminal session of Superior Court, Durham County, at which point the State elected not to proceed on the assault on a female and assault upon a child under the age of twelve charges. At defendant's trial, Deputy Teer testified on direct examination, without objection, that:

> Q. So why did -- so why did that stick in your head? Why did you push her on that?
>
> A. I pushed her on that because frequently, based on my training and experience, I know that if you're talking to a witness and they will change [their] story as you suggest things. I mean, it reduces their credibility if you say, well, this -- how about this; and they go with that. Oh yeah, it could have been that, yeah, I think he was wearing that. That's a red flag right there for the credibility of that person.
>
> But this stuck out because she stuck to her story. She was resolute and rock solid, never wavered, never changed what she was saying. She knew who her attacker was. She knew what he was wearing. And when I tried to say, hey, it couldn't be that, he's not wearing what you just told me, she said, well, obvious, he changed. He changed his clothing.
>
> The same thing, I also pressed her did you see a weapon; did you see a gun; did you see a knife; was he maybe holding it and you can barely see it. I was trying to give her an opportunity to say, yeah, yeah, I think I saw a knife, I think I saw a gun. She didn't. She said she never saw a weapon. At one point she said, well, his hand was in his pocket, but there -- she did not say that she saw a gun or a knife when I was talking with her.
>
> Despite multiple attempts to give her the opportunity to expand her story, she didn't. Her story stayed entirely 100 percent consistent, resolute and solid.

On 23 January 2020, the jury returned verdicts convicting defendant of first-degree murder on the basis of both malice, premeditation, and deliberation and on the basis of the felony murder rule using the

commission of a felonious assault upon Ms. Pichardo as the predicate felony; attempted first-degree murder; and first-degree burglary. Based upon the jury's verdicts, the trial court arrested judgment with respect to defendant's conviction for first-degree murder based upon the felony murder rule, consolidated defendant's remaining convictions for judgment, and sentenced defendant to a term of life imprisonment without parole. Defendant noted an appeal to the Court of Appeals from the trial court's judgment.

C. Court of Appeals Decision

¶ 31 In seeking relief from the trial court's judgment before the Court of Appeals, defendant argued that the admission of Deputy Teer's description of Ms. Pichardo's account of the events that occurred at the time of Mr. Guerrero's death as "rock solid" constituted plain error. *State v. Caballero*, 281 N.C. App. 215, 2021-NCCOA-718, ¶ 13 (unpublished). In rejecting defendant's challenge to the admission of the challenged portion of Deputy Teer's testimony, the Court of Appeals concluded that "the transcript reflects that Deputy Teer testified regarding the consistency of [Ms.] Pichardo's account and recollection, not the credibility or truthfulness of her statements," *id.* ¶ 17, and held that, "[b]ecause Deputy Teer's testimony was limited to corroborating [Ms.] Pichardo's statements and testimony, defendant has failed to show that he was prejudiced" and that "the trial court did not commit plain error in admitting Deputy Teer's testimony," *id.* ¶ 18. On 9 March 2022, this Court allowed defendant's petition for discretionary review of the Court of Appeals' decision.

II. Analysis

A. Standard of Review

¶ 32 An issue that was neither preserved by an objection lodged at trial nor deemed to have been preserved by rule or law despite the absence of such an objection can be made the basis of an issue on appeal if the judicial action in question amounts to plain error. N.C. R. App. P. 10(a)(4). Since defendant did not object to the admission of the challenged portion of Deputy Teer's testimony at trial, defendant is only entitled to have this issue reviewed on appeal for plain error. *Id.* Plain error is error that "seriously affect[s] the fairness, integrity[,] or public reputation of judicial proceedings" and is to be "applied cautiously and only in the exceptional case." *State v. Odom*, 307 N.C. 655, 660 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial," *State v. Lawrence*, 365 N.C. 506, 518 (2012) (citing *Odom*, 307 N.C. at 660), with the defendant being required to show

"prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty," *id.* (cleaned up). This Court reviews decisions of the Court of Appeals for the purpose of determining whether they contain any error of law. N.C. R. App. P. 16(a).

B. Admissibility of the Challenged Portion of Deputy Teer's Testimony

¶ 33 In seeking to persuade us that the admission of the challenged portion of Deputy Teer's testimony constituted plain error, defendant begins by arguing that the issue of whether a witness' testimony is true "is a question of credibility and is a matter for the jury alone." *State v. Solomon*, 340 N.C. 212, 221 (1995). In defendant's view, "[o]pinion testimony about the credibility or the believability" of a witness' testimony "is not admissible even when offered by an expert witness," citing *State v. Hannon*, 118 N.C. App. 448, 451 (1995). According to defendant, the Court of Appeals erred by holding that Deputy Teer's description of Ms. Pichardo's account of the events that occurred at the time of Mr. Guerrero's death as "rock solid" amounted to a characterization of her testimony as consistent with her prior statements rather than the expression of an opinion about the credibility of her testimony, given that Deputy "Teer's testimony about subjecting [Ms. Pichardo's] narrative account of the events to a 'test of credibility' " could not be properly understood as anything other than the expression of an opinion that she was telling the truth.

¶ 34 After noting that no witness is entitled to express an opinion concerning the defendant's guilt either directly or indirectly, citing *State v. Kim*, 318 N.C. 614, 621 (1986), *State v. Heath*, 316 N.C. 337, 341–42 (1986), and *State v. Galloway*, 304 N.C. 485, 489 (1981), defendant contends that Deputy Teer's description of Ms. Pichardo's account of the events on the night of Mr. Guerrero's death as "rock solid" was nothing more than a backhanded expression of Deputy Teer's opinion that Ms. Pichardo's testimony was credible, with such testimony by a law enforcement officer being particularly harmful to a defendant's chances for a more favorable outcome at trial given that jurors tend to give great weight to testimony given by law enforcement officers, citing *Tyndall v. Harvey C. Hines Co.*, 226 N.C. 620, 623 (1946).

¶ 35 The State, on the other hand, argues that the admission of the challenged portion of Deputy Teer's testimony did not constitute error, much less plain error. According to the State, this Court has repeatedly allowed law enforcement officers to testify concerning prior consistent

statements made by other witnesses and has held that an expert witness is entitled "to testify that the victim's allegations did not vary," quoting *State v. Stancil*, 146 N.C. App. 234, 241 (2001), *aff'd per curiam as modified on other grounds*, 355 N.C. 266 (2002). In the State's view, Deputy Teer did not express an opinion concerning Ms. Pichardo's truthfulness and, instead, simply described the consistency of the statements that Ms. Pichardo had made to him on the night of Mr. Guerrero's death. In the course of analogizing this case to our decision in *State v. Betts*, 377 N.C. 519, 2021-NCSC-68, the State asserts that Deputy Teer said "nothing more than that a particular statement [had been] made" and that Ms. Pichardo's accounts of the event on the night of Mr. Guerrero's death were consistent. *Id.* ¶ 20.

¶ 36 The State further contends that, even if the challenged portion of Deputy Teer's testimony had been improperly admitted, "defendant [had] opened the door to such evidence by putting [Ms. Pichardo's] credibility at issue" and that a party is entitled to elicit evidence concerning a witness' truthfulness after that witness' character for truthfulness has been attacked, citing North Carolina Rule of Evidence 608(a). In the State's view, once a defendant has attempted to discredit a witness' testimony on cross-examination, it is "appropriate and competent to show by the officers that [the witness] had made similar consistent statements to them," quoting *State v. Bennett*, 226 N.C. 82, 85 (1946). According to the State, since defendant's trial counsel "challenged [Ms. Pichardo's] credibility by questioning her about prior, allegedly inconsistent statements," evidence concerning the truthfulness of her testimony became admissible.

¶ 37 A careful review of the record in light of the applicable law persuades us that the challenged portion of Deputy Teer's testimony was inadmissible. As we have already noted, "it is typically improper for a party to seek to have [ ] witnesses vouch for the veracity of another witness," *State v. Warden*, 376 N.C. 503, 507 (2020) (cleaned up), given that the truthfulness of a particular witness should be determined by the jury rather than by a witness for one party or the other, as the "jury is the lie detector in the courtroom" and "is the only proper entity to perform the ultimate function of every trial—determination of the truth," *Kim*, 318 N.C. at 621 (citations omitted). In order to enable the jury to evaluate a particular witness' credibility, "[p]rior consistent statements made by a witness are admissible for purposes of corroborating the testimony of that witness, if it does in fact corroborate [that witness'] testimony," *State v. Holden*, 321 N.C. 125, 143 (1987), with "wide latitude" being "grant[ed] to the admission of this type of evidence," *State v. Martin*,

309 N.C. 465, 476 (1983), and with law enforcement officers having been allowed to testify to prior statements that a witness had made for the purpose of enhancing the credibility of that witness, *State v. Walters*, 357 N.C. 68, 88–89 (2003); *State v. Williamson*, 333 N.C. 128, 135–37 (1992); *State v. Lawson*, 310 N.C. 632, 639 (1984); and *State v. Elkerson*, 304 N.C. 658, 666–67 (1982). In addition, the Court of Appeals has allowed the admission of testimony expressing an opinion that the statements that the victim had made at different points in time did not differ, *see Stancil*, 146 N.C. App. at 241 (stating that an expert may "testify that the victim's allegations did not vary" after describing the statements that the witness actually made).[2] As a result, the ultimate issue raised by defendant's challenge to the admission of the relevant portion of Deputy Teer's testimony is whether that testimony constituted an expression of Deputy Teer's belief that Ms. Pichardo was telling the truth or whether it constituted either a recitation of Ms. Pichardo's prior statements or an expression of opinion that the statements that Ms. Pichardo had made were consistent with each other.[3]

¶ 38 As an initial matter, we cannot accept the assertion that the challenged portion of Deputy Teer's testimony is nothing more than evidence that corroborates Ms. Pichardo's account of the events that occurred at the time of Mr. Guerrero's death. According to well-established North Carolina law, "[a] prior consistent statement of a witness is admissible to corroborate the testimony of the witness whether or not the testimony of the witness has been impeached." *State v. Jones*, 329 N.C. 254, 257 (1991). As is reflected in numerous decisions of this Court, the evidence that is rendered admissible by means of this principle of the law of evidence is evidence concerning the actual statement made by the witness, *Walters*, 357 N.C. at 89 (upholding the admission of a "911 tape and Ione Black's statement to Detective Autry" for the purpose of corroborating Ms. Black's trial testimony); *Farmer*, 333 N.C. at 192 (noting that, "to be admissible as corroborative evidence, a witness's prior consistent statements merely must tend to add weight or credibility to the witness's testimony" and holding that any error that the trial court might have

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2. As a result of the fact that this Court did not address the correctness of this aspect of the Court of Appeals' decision, *Stancil*, 355 N.C. at 266, we express no opinion concerning the admissibility of such evidence given that, in our view, there is no need to do so in order to decide this case.

3. Although, as we have already noted, the extent to which one witness is entitled to testify that statements made by another witness were, in the opinion of the first witness, consistent is an open question before this Court, we will assume, without deciding, that such evidence is admissible for the purpose of deciding this case.

committed in admitting “Shields’ written statement to Washburn” was harmless”); *Williamson*, 333 N.C. at 135–37 (upholding the admission of “those portions of Agent White’s testimony regarding Logan’s statements that were objected to” for the purpose of corroborating the trial testimony of Tyrone Logan); *Jones*, 329 N.C. at 256–58 (upholding the admission of testimony by an investigating officer concerning “a written verbatim account of the statement Mr. Sanders had made to him” for the purpose of corroborating Mr. Sanders’ trial testimony); *Lawson*, 310 N.C. at 639 (upholding the admission of the testimony “of police investigators relating to Ms. Soden’s prior statements to them made before and after defendant’s arrest” to “corroborate her in-court testimony”); *Martin*, 309 N.C. at 477 (upholding the admission of an extrajudicial statement by Mark Anthony Owens on the grounds that “the prior statement does corroborate his in-court testimony” after “carefully compar[ing] Owens’ in-court testimony with his prior written statement,”); *Elkerson*, 304 N.C. at 666–67 (upholding the admission of testimony by “Deputy Sheriff David Smith and S.B.I. Agent Joe Momier . . . concerning statements made to them by James Smith which tended to corroborate Smith’s trial testimony”); *State v. Medley*, 295 N.C. 75, 77–79 (1978) (upholding the admission of “the prior written statements of Willie James Meaders and Glossie Lee Carter for corroborative purposes”). As a result, what these decisions, and others like them, make admissible is evidence concerning what the witness actually said on a prior occasion without authorizing the admission of what is, in essence, extensive editorial commentary about the relationship between the witness’s trial testimony and the extrajudicial statement given that “whether [the extrajudicial statement] in fact corroborated the [witness’] testimony [is,] of course, a jury question. *State v. Ramey*, 318 N.C. 457, 470 (1986); *see also Medley*, 295 N.C. at 79 (stating that “[t]he minor variances complained of do not impair the admissibility of the prior statements for corroborative purposes, but affect only the weight and credibility, which is always for the jury”).

¶ 39 The challenged portion of Deputy Teer’s testimony, which is that, “[d]espite multiple attempts to give [Ms. Pichardo] the opportunity to expand her story, she didn’t,” with her “story [having] stayed entirely 100 percent consistent, resolute, and rock solid,” bears no resemblance to any evidence that this Court has previously allowed to be admitted for corroborative purposes. Instead of simply reciting the statements that Ms. Pichardo made to him and allowing the jury to determine whether that evidence did or did not corroborate Ms. Pichardo’s trial testimony or even stating that the statements that Ms. Pichardo made to him were consistent with her trial testimony, Deputy Teer engaged in an extensive discussion of a questioning technique that he utilized for the purpose

of determining Ms. Pichardo's credibility, which rested upon the theory that a particular witness' tendency to latch on to additional facts suggested by the questioner would be "a red flag [ ] for the credibility of that person." In the context of this discussion of witness credibility, a reasonable juror could have only understood Deputy Teer's description of Ms. Pichardo's performance on the test of credibility that he administered to her as "rock solid" or "unlikely to change, fail, or collapse," *Rock solid*, *New Oxford American Dictionary* (3d ed. 2010), to be an assertion that, since Ms. Pichardo's statements remained consistent in the face of Deputy Teer's repeated attempts to suggest the presence of additional details to her, her account of what had happened on the night of Mr. Guerrero's death should be deemed credible.

¶ 40 The challenged portion of Deputy Teer's testimony at issue in this case is fundamentally different from the evidence at issue in *Betts*, in which we opined that "[a]n expert witness's use of the word 'disclose,' standing alone, does not constitute impermissible vouching as to the credibility of a victim of child sex abuse, regardless of how frequently used, and indicates nothing more than that a particular statement was made." *Betts*, 2021-NCSC-68, ¶ 20. In other words, we concluded in *Betts* that the word "disclose" was nothing more than a term used by the witness to describe the communications that the alleged victim of an act of child sexual abuse made concerning the defendant's allegedly unlawful conduct and did not have the connotation that the account that the child provided on the occasion in question was an inherently truthful one. *Id.* ¶¶ 18–21. The challenged portion of Deputy Teer's testimony, on the other hand, did, for the reasons set out above, go beyond a recitation of what Ms. Pichardo told him or even an expression of opinion that the statements that she had made to him were consistent with her trial testimony and constituted an expression of Deputy Teer's confidence that the information that Ms. Pichardo had communicated in the statements that she had made to him was credible. As a result, our decision in *Betts* does not support a decision to uphold the admission of the challenged portion of Deputy Teer's testimony.

¶ 41 Similarly, the admission of the challenged portion of Deputy Teer's testimony cannot be upheld as an appropriate response to the fact that defendant had challenged the credibility of Ms. Pichardo's testimony in the course of cross-examining her. Rule 608(a) of the North Carolina Rules of Evidence provides that:

> [t]he credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a), but subject

> to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

N.C.G.S. § 8C-1, Rule 608(a) (2021). Put another way, Rule 608(a) allows the party that called a witness to bolster the credibility of that witness by eliciting evidence concerning that witness' "character for truthfulness" in the event that the credibility of that witness has been attacked "by evidence in the form of reputation or opinion." In this case, however, defendant did not attack Ms. Pichardo's credibility "by opinion or reputation evidence or otherwise." Instead, defendant attempted to challenge Ms. Pichardo's credibility by pointing out what he believed to be inconsistencies between the information contained in her trial testimony and the statements that she gave to investigating officers.[4] In addition, the challenged portion of Deputy Teer's testimony constituted a direct assertion that Ms. Pichardo had passed the credibility test that he had administered to her rather than "evidence of truthful character." Thus, the admission of the challenged portion of Deputy Teer's testimony cannot be upheld on the basis of N.C.G.S. § 8C-1, Rule 608(a). As a result, for all of these reasons, the challenged portion of Deputy Teer's testimony did not constitute admissible evidence, resulting in the necessity for us to conduct the prejudice inquiry required by our plain error jurisprudence.

C. Plain Error

¶ 42 In seeking to persuade us that the admission of the challenged portion of Deputy Teer's testimony was sufficiently prejudicial to constitute plain error, defendant argues that this Court has tended to find that the admission of testimony that improperly vouches for the credibility

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4. For example, defendant's trial counsel sought to impeach Ms. Pichardo's testimony that defendant had punched her through the glass door of her residence by pointing out that, according to the transcript of her call for emergency assistance, she "had gone outside and a person punched her in the eye." Similarly, defendant's trial counsel elicited evidence that Ms. Pichardo had failed to tell investigating officers that she had had to run around a car in the driveway while being chased by defendant despite having made such an assertion in her trial testimony. Finally, defendant's trial counsel elicited evidence tending to show, on the one hand, that Ms. Pichardo had a good relationship with Mr. Huerta and had stated to investigating officers that she had no problem traveling to the Durham County Sheriff's Office with Mr. Huerta before asking, on the other hand, how such statements could be consistent with her testimony that Mr. Huerta had been "bothering [her]."

of a prosecution witness rises to the level of plain error in the event that the jury's decision to convict the defendant rested almost entirely upon the credibility of that witness, citing *Warden*, 376 N.C. at 507–10, *State v. Hannon*, 118 N.C. App. 448, 451 (1995), and *State v. Holloway*, 82 N.C. App. 586, 587 (1986). According to defendant, the jury's decision in this case hinged upon the manner in which it resolved "the issue of whether to believe the testimony of [Ms. Pichardo] or of [defendant]," with the accounts provided by Ms. Pichardo and defendant being absolutely contradictory. In addition, defendant asserts that the record does not contain any physical evidence tending to connect him to the assault upon Mr. Guerrero, that there were inconsistencies between Ms. Pichardo's trial testimony and the initial statement that she provided to Deputy Teer that served to cast doubt upon the credibility of her identification of defendant as the person who attacked Mr. Guerrero and herself, and that "[t]he State [had] not [been] able to provide any evidence for why [defendant] would want to assault [Mr. Guerrero]." As a result, defendant contends that it was reasonably probable that he would have been acquitted in the event that Deputy Teer had not been allowed to describe Ms. Pichardo's statements as "rock solid."

¶ 43 The State asserts, on the other hand, that defendant has failed to show that the admission of the challenged portion of Deputy Teer's testimony constituted a "fundamental error" that had a "probable impact" on the jury's verdict, quoting *Lawrence*, 365 N.C. at 518. In support of this assertion, the State claims to have presented overwhelming evidence of defendant's guilt, including Ms. Pichardo's testimony identifying defendant as the perpetrator of the attack upon Mr. Guerrero and herself, the fact that defendant admitted having been present at the time of the assault upon Mr. Guerrero and that Mr. Guerrero's blood was on his pants, and the "bizarre and conflicting accounts [that defendant provided] to police of that night's events," which "[n]o reasonable jury [was likely to] credit." Although the State concedes that the admission of evidence vouching for the credibility of another witness is generally prejudicial in the absence of physical evidence tending to support a finding of guilt, citing *Warden*, 376 N.C. at 504, the State asserts that this principle has no application in this instance given the undisputed evidence that someone knocked on Ms. Pichardo's door that night, that someone stabbed Mr. Guerrero to death, that someone punched Ms. Pichardo through the glass door to her residence; and that Mr. Guerrero's blood had been detected on defendant's muddy pants. Finally, the State contends that, even if any improper bolstering might have caused prejudice, "that prejudice was cured by the trial court's instructions to the jury."

¶ 44 A careful review of the record satisfies us that it is not reasonably probable that defendant would have been acquitted had the challenged portion of Deputy Teer's testimony not been admitted. Although this Court has held that the opinions of law enforcement officers can carry great weight with the members of a jury, *Tyndall*, 226 N.C. at 623 (stating that "[t]he witness was a State [highway patrolman] whose duty it was to make a disinterested and impartial investigation" and whose "testimony should, and no doubt did, carry great weight with the jury"), that fact alone does not suffice to necessitate a finding of plain error in this case given the strength of the State's case against defendant. Among other things, the record reflects that Ms. Pichardo had had ample previous opportunities to observe defendant, so there can be little room to doubt that she knew who he was. In addition, the record reflects that Ms. Pichardo consistently identified defendant as the person who attacked Mr. Guerrero and herself on the evening in question during her call for emergency assistance, her statements to investigating officers, and her trial testimony. Furthermore, the DNA test results admitted into evidence provided near conclusive proof that, contrary to some of his initial statements to the emergency assistance dispatcher and investigating officers, defendant had been present at the time of Mr. Guerrero's murder and had Mr. Guerrero's blood on his muddy jeans. Similarly, defendant provided conflicting accounts to police concerning what had allegedly happened on the night of Mr. Guerrero's death that included differing descriptions of the race or ethnicity of the two men that he claimed to have attacked Mr. Guerrero and both an admission and a denial that he had approached Mr. Guerrero in the immediate aftermath of the stabbing. Finally, the record contains physical evidence tending to show that a criminal assault had been committed upon both Ms. Pichardo and Mr. Guerrero on the night of Mr. Guerrero's death, including the injuries that Ms. Pichardo, Mr. Guerrero, and their son sustained; the broken glass associated with the door to the residence that Ms. Pichardo, Mr. Guerrero, and their son occupied; and the presence of defendant's blood on Mr. Guerrero's muddy pants. Thus, given the strength of the State's evidence of defendant's guilt and the dubious credibility of defendant's denial of any involvement in the attacks that were perpetrated against Ms. Pichardo and Mr. Guerrero, we are unable to say that there is a reasonable probability that defendant would have been acquitted in the event that Deputy Teer had not been allowed to testify that Ms. Pichardo's account of the events that occurred at that time was "rock solid." As a result, we hold that the trial court did not commit plain error by allowing the admission of the challenged portion of Deputy Teer's testimony.

III. Conclusion

¶ 45 Thus, for the reasons set forth above, we hold that, while Deputy Teer should not have been allowed to testify that Ms. Pichardo's account of the events that occurred on the evening of Mr. Guerrero's death was "rock solid," the admission of the challenged portion of Deputy Teer's testimony did not constitute plain error. As a result, we modify and affirm the Court of Appeals' decision in this case.

MODIFIED AND AFFIRMED.

Justice BARRINGER dissenting in part, concurring in result.

¶ 46 I agree with the majority that there is no plain error. The majority opined that Deputy John Teer's testimony would have been inadmissible if the objection had been raised. Further, Deputy Teer's testimony was admissible because it merely corroborated Liliana Pichardo's ("Ms. Pichardo") testimony. For that reason, I respectfully dissent in part and concur in result.

¶ 47 At trial, Ms. Pichardo testified that she saw defendant Efren Ernesto Caballero, who was wearing a black sweatshirt with a zipper, attack her husband. He then attacked her. After Ms. Pichardo gave her testimony, Deputy Teer testified that Ms. Pichardo gave him a description of her attacker. Deputy Teer testified further that she told him that her attacker was "her neighbor, Mr. Caballero," and he was wearing "a dark jacket or a dark hoodie with a zipper." However, when Deputy Teer saw defendant at the scene of the incident, defendant was wearing a white hoodie with stripes. Deputy Teer testified that after he informed Ms. Pichardo that defendant, Mr. Caballero, "was wearing a white hoodie with stripes on it," Ms. Pichardo, with "no hesitation," responded that defendant must have changed his clothes. Deputy Teer testified that Ms. Pichardo's "instant" response "stuck in [his] head" because "she knew who [the attacker] was."

¶ 48 The State then asked Deputy Teer why that stuck in his head and why he pushed Ms. Pichardo to be certain about defendant's clothing. Deputy Teer responded,

> I pushed her on that because frequently, based on my training and experience, I know that if you're talking to a witness and they will change [their] story as you suggest things. I mean, it reduces their credibility if you say, well, this -- how about this; and they

> go with that. Oh, yeah, it could have been that, yeah, I think he was wearing that. That's a red flag right there for the credibility of that person.
>
> But this stuck out because she stuck to her story. She was resolute and rock solid, never wavered, never changed what she was saying. She knew who her attacker was. She knew what he was wearing. And when I tried to say, hey, it couldn't be that, he's not wearing what you just told me, she said, well, obvious[ly], he changed. He changed his clothing.
>
> The same thing, I also pressed her did you see a weapon; did you see a gun; did you see a knife; was he maybe holding it and you can barely see it. I was trying to give her an opportunity to say, yeah, yeah, I think I saw a knife, I think I saw a gun. She didn't. She said she never saw a weapon. At one point she said, well, his hand was in his pocket, but there – she did not say that she saw a gun or a knife when I was talking with her.
>
> Despite multiple attempts to give her the opportunity to expand her story, she didn't. Her story stayed entirely 100 percent consistent, resolute[,] and solid.

¶ 49 This Court has established that a witness's prior consistent statements are admissible as corroborative evidence. *State v. Walters*, 357 N.C. 68, 88–89 (2003) ("It has been well established in this state that '[a] prior consistent statement of a witness is admissible to corroborate the testimony of the witness whether or not the witness has been impeached,' even though the statement was hearsay.") (alteration in original) (quoting *State v. Jones*, 329 N.C. 254, 257 (1991)). Such statements are admissible as long they "merely . . . tend to add weight or credibility to the witness'[s] testimony." *Id.* at 89 (quoting *State v. Farmer*, 333 N.C. 172, 192, (1993)). However, a witness typically cannot vouch for the credibility of another witness. *See, e.g.*, *State v. Robinson*, 355 N.C. 320, 334–35 (2002) (stating that it is improper for a witness to "vouch for the veracity of another witness"). "[I]t is the province of the jury . . . to assess and determine witness credibility." *State v. Hyatt*, 355 N.C. 642, 666 (2002).

¶ 50 Here, Deputy Teer's testimony when read in context—that Ms. Pichardo "never wavered and was rock solid"—merely established that Ms. Pichardo's trial testimony was consistent with her numerous prior

statements. Surrounding the statement that Ms. Pichardo was "rock solid," Deputy Teer made the point that she "stuck to her story;" she "stayed entirely 100 percent consistent, resolute and solid;" she "never changed what she was saying;" and "she was sure and never deviated." Deputy Teer was not vouching for her credibility because he did not testify that Ms. Pichardo was telling the truth, simply that she did not vary her account. Since Ms. Pichardo's statements remained consistent in the face of his repeated attempts to suggest additional details, this "stuck in his head." His testimony did nothing more than corroborate Ms. Pichardo's testimony with her prior statements. His testimony in no way impeded the jury's ability to make a credibility determination about Ms. Pichardo's testimony. Thus, Deputy Teer's testimony was not vouching for Ms. Pichardo's testimony and therefore was proper.

¶ 51 Accordingly, I respectfully dissent in part and concur in result.

Chief Justice NEWBY and Justice BERGER join in this dissenting in part and concurring in result opinion.

STATE OF NORTH CAROLINA
v.
JAQUAN STEPHON GETER

No. 182PA21

Filed 16 December 2022

Probation and Parole—revocation—probationary period expired—required finding of good cause—jurisdiction

The trial court had jurisdiction to revoke defendant's probation where it complied with N.C.G.S. § 15A-1344(f)(3) by making an oral and written finding that good cause existed to do so. Further, the court did not abuse its discretion in finding good cause to revoke defendant's probation over a year after the probationary period had expired, where the court also found that defendant had incurred new criminal charges during his probation and that the State had intentionally delayed his probation violation hearing to allow defendant's pending charges to be resolved first (the violation reports alleged that defendant had committed new criminal offenses, and therefore resolution of the pending charges would impact the hearing).

Justice EARLS dissenting.

Justice HUDSON joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 276 N.C. App. 377, 2021-NCCOA-98, affirming two judgments entered on 15 July 2020 by Judge R. Gregory Horne in Superior Court, Buncombe County, which revoked defendant's probation. Heard in the Supreme Court on 24 May 2022 in session in the Old Burke County Courthouse in the City of Morganton pursuant to N.C.G.S. § 7A-10(a).

Joshua H. Stein, Attorney General, by Liliana R. Lopez, Assistant Attorney General, for the State-appellee.

Jason Christopher Yoder for defendant-appellant.

MORGAN, Justice.

¶ 1 This Court allowed discretionary review to determine whether the Court of Appeals erred in affirming a trial court's judgments revoking defendant's probation entered over a year after defendant's term of probation had expired. Because the trial court complied with the requirements of N.C.G.S. § 15A-1344(f)(3), it possessed the jurisdiction to revoke defendant's probation after defendant's term of probation had expired and further did not abuse its discretion in determining that good cause existed for doing so after defendant's term of probation had expired. Accordingly, the Court of Appeals decision is affirmed.

I. Facts and Procedural History

¶ 2 Defendant pleaded guilty to possession of a firearm by a felon, resisting a public officer, possession of a stolen motor vehicle, and fleeing to elude arrest on 29 August 2016 and was sentenced by the trial court to a total active term of twenty-two to forty-five months which was suspended in favor of an eighteen-month term of supervised probation. While defendant was still on probation, the Asheville Police Department executed a search warrant on defendant's residence on 18 January 2017 after conducting a series of controlled purchases of narcotics from defendant using a confidential informant. Upon executing the warrant, police recovered marijuana, defendant's identification card which was situated on top of a digital scale, razor blades, a black ski mask, a .380 caliber pistol, and over $1,200 in cash. Of the recovered money, $40.00 had been used in an earlier controlled purchase of narcotics from defendant. On

23 April 2017, defendant was charged with possession of a firearm by a felon, possession of marijuana, possession of drug paraphernalia, and maintaining a dwelling for the purpose of keeping or selling controlled substances. On 9 February 2018 and 12 February 2018, defendant's probation officer served and filed violation reports for each case of probation which alleged that defendant had committed new criminal offenses while on probation and listed the pending charges which had resulted from the execution of the search warrant. Defendant's probation expired on 28 February 2018, more than two weeks after he was served with the probation violation reports.

¶ 3 Defendant filed a motion to suppress the evidence which was seized during the search of his residence. The trial court granted defendant's motion on 22 February 2019, determining that the underlying warrant was too general in that it did not specify which of the two units of the duplex where defendant resided was the focus of the search. The State dismissed the charges against defendant on 17 March 2019. Defendant's pending probation violation reports came on for hearing on 4 April 2019, at which time the State called the detectives who had executed the search warrant. Defendant's probation violation hearing consisted of the detectives' testimony, by which all of the items seized during the execution of the warrant—including the marijuana, firearm, and digital scales—were admitted as evidence that defendant had committed a new criminal offense while on probation. The trial court, finding that defendant had committed a new criminal offense while on probation, revoked defendant's probation. Defendant appealed the trial court's judgments to the Court of Appeals.

¶ 4 The State conceded, and the Court of Appeals agreed, that the trial court had failed to specify which of the criminal offenses committed by defendant would serve as the basis for revocation, and that the trial court had failed to find whether good cause existed to revoke defendant's probation after the probationary period had expired as required by N.C.G.S. § 15A-1344(f)(3). *State v. Geter* (*Geter I*), No. COA19-846, 2020 WL 3251033, at *5 (N.C. Ct. App. June 16, 2020) (unpublished). The Court of Appeals remanded the case for clarification from the trial court as to which criminal offense the trial court had determined that defendant had committed which would serve as the basis for revocation, and further remanded for new proceedings concerning whether good cause existed to revoke defendant's probation after his term of probation had expired. *Geter I*, 2020 WL 3251033, at *5–6.

¶ 5 On 15 July 2020, the trial court conducted a hearing on whether good cause existed to revoke defendant's probation after the expiration

of his term and found that the State had intentionally delayed setting the probation violation report for a hearing as part of the State's normal practice to allow a probationer's pending charges to be resolved prior to the pending probation violation hearing. The resolution of defendant's outstanding charges would have a likely dispositive effect on the alleged probation violations, according to the trial court. The trial court announced the following:

> [W]hile the [c]ourt recognizes that the [c]ourt can proceed with regard to a probation violation hearing alleging pending charges prior to a person's conviction on those underlying offenses, the [c]ourt further acknowledges that in this case the underlying offenses were contested. That a Motion to Suppress was filed, heard, and granted by this [c]ourt.
>
> . . . .
>
> While the State could have proceeded with regard to probation violation before the new offenses alleged were adjudicated, the State did not do so. That the State chose to prosecute the underlying action. Again, the Motion to Suppress was heard at the jury term. . . .
>
> The [c]ourt would find that this does constitute good cause in that if the State — if Mr. Geter had been found not guilty of those offenses, or if for whatever reason the State had opted to dismiss the charges, that it would have had a direct impact on the later hearing of the probation violation.
>
> Again, as reviewed — as shown in the transcript, as well as the knowledge by this [c]ourt having heard the Motion to Suppress, and then argument on the Motion to Suppress, having been granted after probation violation, it is clear to the [c]ourt that the State waited until disposition of the underlying offenses alleged before proceeding with the probation violation. The [c]ourt would find that this would constitute good cause.

The trial court reduced its finding of good cause to new judgments which revoked defendant's probation and announced, "[The] court finds and concludes good cause exists to revoke defendant's probation despite the expiration of his probationary period." The judgments were entered on

15 July 2020 but related back to the original probation violation hearing on 4 April 2019.

¶ 6 Defendant appealed this second set of judgments revoking his probation, arguing before the Court of Appeals that "the 'good cause' found by the trial court failed as a matter of law" to satisfy N.C.G.S. § 15A-1344(f)(3) according to defendant's interpretation of the opinion of the lower appellate court in *State v. Sasek*, 271 N.C. App. 568 (2020). The Court of Appeals affirmed the trial court's second set of judgments revoking defendant's probation. *State v. Geter* (*Geter II*), 276 N.C. App. 377, 2021-NCCOA-98. The Court of Appeals concluded that *Sasek* was inapplicable because the judicial panel in the case vacated the defendant's probation revocation judgments not because there was evidence to suggest that any "good cause" that could be inferred from the record was legally sufficient or insufficient, but specifically because "there was *no* evidence in the record to indicate that good cause existed to justify the untimely revocation." *Id.* ¶ 11 (emphasis added). The trial court in *Sasek* "erred by not making the required finding that good cause existed," *id.* ¶ 12 (emphasis omitted) (quoting *Sasek*, 271 N.C. App. at 576), unlike the trial court in the instant case which, upon remand, provided both a written finding of good cause "supported by the facts in the record" and an oral explanation of the reasoning behind the findings, *id.* ¶ 13. Because the state's jurisprudence and statutory enactments were devoid of any factors or standard to apply in evaluating a finding of good cause, and because the trial court had in fact made the good cause finding required by N.C.G.S. § 15A-1344(f)(3), the Court of Appeals concluded that the trial court had not abused its discretion in revoking defendant's probation despite the "significant and unadvisable" delay between the expiration of defendant's probation and the final probation revocation hearing. *Id.* ¶ 15. Defendant petitioned this Court for discretionary review of the unanimous decision of the Court of Appeals in *Geter II* which we allowed by order on 10 August 2021.

II. Analysis

¶ 7 Defendant first takes issue with the application of an abuse of discretion standard by the Court of Appeals in the lower appellate court's analysis of the trial court's finding of good cause. We agree with defendant that whether a trial court has the authority to revoke a defendant's probation after the defendant's term of probation has expired is a jurisdictional question. *State v. Camp*, 299 N.C. 524, 528 (1980) (holding that "jurisdiction was lost by the lapse of time and the court had no power to enter a revocation judgment" because the trial court had failed to make a finding required by an earlier version of N.C.G.S. § 15A-1344(f));

State v. Bryant, 361 N.C. 100, 103 (2006) ("In the absence of statutorily mandated factual findings, the trial court's jurisdiction to revoke probation after expiration of the probationary period is not preserved."). "We review issues relating to subject matter jurisdiction de novo." *State v. Oates*, 366 N.C. 264, 266 (2012). Therefore, with regard to the statutory authority at issue in this case, a trial court's jurisdiction to revoke a defendant's probation after the expiration of that defendant's probationary term is established

> if all of the following apply:
>
> (1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.
>
> (2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.
>
> (3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.

N.C.G.S. § 15A-1344(f)(1)–(3) (2021). The three enumerated conditions precedent to the trial court's jurisdiction to revoke a defendant's probation after the expiration of the term of probation are separate and distinct from one another.

> Subsection (f)(2) of N.C.G.S. § 15A-1344 makes clear that in order to revoke a defendant's probation following the expiration of his probationary term, the trial court must first make a finding that the defendant did violate a condition of his probation. After making such a finding, trial courts are then required by subsection (f)(3) to make an *additional* finding of "good cause shown and stated" to justify the revocation of probation even though the defendant's probationary term has expired.

State v. Morgan, 372 N.C. 609, 617 (2019).

¶ 8 In *State v. Rankin*, this Court analyzed the provision contained in N.C.G.S. § 15A-805 that a trial court must enter an order compelling the attendance in court of any incarcerated person so long as the movant

produces "good cause *shown*." 312 N.C. 592, 597 (1985) (emphasis added). The *Rankin* defendant had filed a motion to compel the attendance of five witnesses at his trial for first-degree sexual offense one day before the trial was calendared to begin. *Id.* at 595. Without providing the defendant's attorney with an opportunity to show the good cause underlying counsel's request for the attendance of one of the witnesses, the trial court denied defendant's motion "on the grounds that (1) no affidavits were submitted as to why the witness should be brought to court; (2) the witness did not testify at the previous trial; and (3) the witness's presence was requested at a late date." *Id.* at 598. In reversing the trial court's decision to deny the *Rankin* defendant's motion to compel the attendance of his proposed witness, this Court explained:

> Certainly the statute does not *require* that affidavits be submitted to show the "good cause" requirement of the statute. Neither can we find [a] viable reason why a witness must have testified in a previous trial in order to be subject to production as a witness for any other given trial. We do recognize, however, that a trial judge has the duty to supervise and control the course and conduct of a trial, and that in order to discharge that duty he is invested with broad discretionary powers. *Shute v. Fisher*, 270 N.C. 247, 154 S.E.2d 75 (1967).
>
> A late filed motion might delay the course of a trial and invite dilatory tactics by other parties to litigation. Therefore in [the] instant case it was incumbent on defendant to show substantial reasons why his motion to produce and compel the presence of the witness . . . was not filed until the day before the trial was to commence. Our examination of this record discloses, however, that defendant's motion was denied without permitting him to show the "good cause" requirement of the statute or to advance any reasons, if any he had, why the motion was made at the eve of the trial. For this reason, under the particular facts of this case, we hold that defendant was effectively denied his right of compulsory process.

Id. at 598–99.

¶ 9 The "good cause" discussed by this Court in *Rankin* contained within it at least two factors: implicitly, the reason why the attendance of the

witness would be material to the defendant's trial strategy, and explicitly, the reason why the defendant's motion to compel the attendance of the witness was filed only one day prior to the start of trial. In superimposing these factors over the otherwise undefined good cause required to be shown by the statute at issue in *Rankin*, this Court focused on "the particular facts of this case," *id.* at 599. Similarly, in the present case, N.C.G.S. § 15A-1344(f)(3) "wisely makes no attempt to enumerate" what constitutes good cause, instead leaving "it to the judge to determine," *Shankle v. Shankle*, 289 N.C. 473, 483 (1976). Consistent with our determinations in *Rankin* and *Morgan*, the "good cause" contemplated by N.C.G.S. § 15A-1344(f)(3) therefore must be shown by the State, as the proponent of the " 'good cause shown and stated' to justify the revocation of probation even though the defendant's probationary term has expired" and determined by the trial court, pursuant to its "broad discretionary powers." Unfortunately, the dissent fails to appreciate the established soundness of the abuse of discretion standard which the appellate courts have routinely applied to the review of trial courts' "good cause" determinations and would instead prefer a list of parameters to guide and direct such discretionary matters.

¶ 10 N.C.G.S. § 15A-1344(f)(3) also requires that the good cause to revoke a defendant's probation be "stated." Given the proximity and relation of the word "stated" to the aforementioned term "shown" within the language of the statute,

> [w]e are . . . guided in our decision by the canon of statutory construction that a statute may not be interpreted in a manner which would render any of its words superfluous. This Court has repeatedly held that a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage.

Morgan, 372 N.C. at 614 (extraneity omitted). To avoid interpreting the requirement of N.C.G.S. § 15A-1344(f)(3) that good cause be "shown and stated" as imposing a redundant burden on the State, we hold that the good cause found by the trial court must be "stated" on the record, either in open court by the trial court, by a party with the trial court's endorsement, or within the trial court record.

¶ 11 It is undisputed that written probation violation reports were filed with the clerk of court against defendant by the State prior to the

expiration of defendant's term of probation or that the trial court found—as was amply supported by the evidence—that defendant had in fact violated a condition of his probation by, at the least, being in possession of a firearm as a felon while on probation. The trial court, after receiving the "showing" by the State, explicitly found both orally and in writing that "good cause exists to revoke defendant's probation despite the expiration of his probationary period." The trial court went on to satisfy its statutory requirement by both finding good cause and "stating" in open court the basis for its finding of good cause.

¶ 12 The question before this Court, therefore, is whether the "good cause" found by the trial court in this case is legally sufficient to justify the trial court's exercise of its jurisdiction which is established by the strict adherence of the circumstances of this case, as described above, to the enumerated conditions of N.C.G.S. § 15A-1344(f)(3). In other instances where this Court has reviewed a trial court's evaluation of good cause, we have deferred to the trial court's intimate view of the circumstances of each case as the factfinder. *In re S.M.*, 375 N.C. 673, 681 (2020) (holding that a trial court's determination of the existence of "extraordinary circumstances" and "good cause" justifying a continuance in a termination of parental rights matter is reviewed for an abuse of discretion); *State v. Murphy*, 321 N.C. 738, 740–41 (1988) (holding that there was no error in a judgment when the trial court failed to find good cause in a defendant's request to sequester potential jurors during a capital murder trial); *Peebles v. Moore*, 48 N.C. App. 497, 504 (1980), *aff'd as modified*, 302 N.C. 351 (1981) ("What constitutes 'good cause' depends on the circumstances in a particular case, and within the limits of discretion, an inadvertence which is not strictly excusable may constitute good cause . . . ."). Even in the employment context, where our search of the state's jurisprudence has revealed a prevalent use of the phrase "good cause," the existence or dearth of good cause is, absent a statutory standard of review, "a matter for the factfinder . . . to decide." *Intercraft Indus. Corp. v. Morrison*, 305 N.C. 373, 377 (1982). Whether the jurisdictional requirements of N.C.G.S. § 15A-1344(f)(3) are satisfied is a question of law: (1) whether a probation violation report was filed prior to the expiration of the defendant's probation; (2) whether the trial court found that the defendant violated one or more conditions of his or her probation; and (3) whether the trial court found good cause "that the probation should be extended, modified, or revoked." *See* N.C.G.S. § 15A-1344(f)(3). But whether good cause exists, being fact-intensive and dependent on the circumstances which result in the delay of a probation revocation hearing, is a finding of fact delegated to the discretion of the trial court.

¶ 13 What constitutes "good cause shown and stated" is a case-by-case, fact-specific determination which requires a trial court to consider the particular circumstances which mandate that good cause be shown. In probation violation hearing matters governed by N.C.G.S. § 15A-1344(f)(3) and its requirement of the existence of good cause in order for the trial court to be authorized to revoke probation after the period of probation has expired, we also find guidance in this Court's treatment of continuance motions which are to be allowed upon "good cause shown." In *Shankle*, this Court examined a situation in which a group of respondents in an estate action filed a motion to continue the trial after their retained counsel "left the court after the judge made strong remarks about respondents." 289 N.C. at 478 (extraneity omitted). Now without counsel, the respondents in *Shankle* attempted to represent themselves after the trial court denied their joint continuance motion without providing a reason for the denial, which resulted in "obfuscation, judicial frustration, and mounting tensions all around." *Id.* at 479. This Court reviewed the trial court's denial of the continuance motion for an abuse of discretion, while noting that Rule 40(b) of the North Carolina Rules of Civil Procedure provided that continuances "may be granted only for good cause shown and upon such terms and conditions as justice may require." *Id.* at 482 (quoting N.C.G.S. § 1A-1, Rule 40(b)). This Court looked with favor upon the absence of any factors or definitions of "good cause" within the rule, in light of the wide array of reasons which may be asserted by a party wishing to obtain a continuance. This Court explained:

> Considering the myriad circumstances which might be urged as grounds for a continuance[, N.C.G.S. § 1A-1, Rule 40(b)] wisely makes no attempt to enumerate them but leaves it to the judge to determine, in each case, whether "good cause" for a continuance has been shown. Thus, a motion to continue is addressed to the sound discretion of the trial judge, who should determine it as the rights of the parties require under the circumstances. However, this discretion is not unlimited, and must not be exercised absolutely, arbitrarily, or capriciously, but only in accordance with fixed legal principles.
>
> Further, before ruling on a motion to continue the judge should hear the evidence pro and con, consider it judicially and then rule with a view to promoting substantial justice.

Id. at 482–83 (extraneity omitted). We find this logic to be both compelling and appropriate for the case at bar. Considering the vast variety of circumstances which might justify the extension, modification, or revocation of a criminal defendant's probation after the expiration of the defendant's term of probation, N.C.G.S. § 15A-1344(f)(3) does not delineate or describe any of them, but merely prescribes that, in each case, it is up to the trial court to decide whether "good cause" to extend, modify, or revoke a defendant's probation after the expiration of the term of probation has been shown. The trial court's discretion in this matter "must not be exercised absolutely, arbitrarily, or capriciously, but only in accordance with fixed legal principles." *Id.* at 483 (quoting 17 C.J.S. Continuances § 5 (1963)). "In reaching its conclusion the court should consider all the facts in evidence, and not act on its own mental impression or facts outside the record, although . . . it may take into consideration facts within its judicial knowledge." *Id.* (alteration in original) (quoting 17 C.J.S. Continuances § 97). Finally, the trial court's "chief consideration" in determining whether a defendant's probation should be revoked despite the expiration of the term of probation is whether "substantial justice" would be advanced or offended by the post-expiration revocation. *Id.* (quoting 17 C.J.S. Continuances § 97). However, despite this Court's recognition in *Shankle* that a trial court's "sound discretion" to determine good cause from any number of any combination of any series of circumstances in a variety of cases—including probation violation hearings in which actions taken after the expiration of probation are dependent upon the existence of good cause—"is not unlimited, and must not be exercised absolutely, arbitrarily, or capriciously, but only in accordance with fixed legal principles," nonetheless the dissent would prefer to more rigidly define and curtail a trial court's ability to find "good cause" in its discretion.

¶ 14 Applying an abuse of discretion standard to the trial court's finding that good cause existed in this case to revoke defendant's probation over a year after the expiration of defendant's term of probation, we do not conclude that the trial court's decision was arbitrary, capricious, or offended substantial justice. The record in this case demonstrates the manner in which both defendant and the State were benefited by the trial court's determination of the existence of good cause. The probation officer filed probation violation reports against defendant on 9 February 2018 and 12 February 2018—two weeks prior to the expiration of his probation, but ten months after defendant had been criminally charged for the behavior which served as the basis for the State's efforts to revoke defendant's probation. However, on all relevant dates, criminal charges *were* pending against defendant for behavior in which

he allegedly engaged while he was on probation. Defendant's probation expired on 28 February 2018. Defendant filed a motion to suppress the evidence which supported the criminal charges against him almost a year after his probation had expired. The motion was heard and granted on 22 February 2019 by the same trial court which heard both defendant's probation revocation matter and the hearing on remand to determine the existence of good cause. The State dismissed the charges against defendant on 17 March 2019. Less than a month later, the State brought forward the probation violation reports against defendant for hearing on 4 April 2019. Both the State and defendant had the potential benefit of the delay in the occurrence of the probation violation hearing until after the resolution of defendant's new criminal charges as reflected in the trial court's stated rationale for finding good cause:

> [I]f [defendant] had been found not guilty of those offenses, or if for whatever reason the State had opted to dismiss the charges, . . . it would have had a direct impact on the later hearing of the probation violation.
>
> Again, as reviewed — as shown in the transcript, as well as the knowledge by this [c]ourt having heard the Motion to Suppress, and then argument on the Motion to Suppress, having been granted after probation violation, it is clear to the [c]ourt that the State waited until disposition of the underlying offenses alleged before proceeding with the probation violation. The [c]ourt would find that this would constitute good cause.

The fact that the State's dismissal of defendant's underlying charges did not have a "direct impact on the later hearing of the probation violation" is a product of hindsight, not the trial court's weighing of "the rights of the parties." *Shankle*, 289 N.C. at 483 (quoting 17 C.J.S. Continuances § 5). After all, the State dismissed the charges against defendant after it was discovered that the evidence was collected as the result of a search warrant which did not specify which of the two duplex units where defendant resided was the subject of the search, not after the evidence against defendant was presented to a jury. Meanwhile, the State was afforded the opportunity to await the outcome of defendant's trial on the new criminal charges and the potential effect on the probation violation allegations, in the event that defendant was found guilty of the underlying charges.

¶ 15 Defendant further asserts that the Court of Appeals violated the principle of stare decisis and this Court's holding in *In re Civil Penalty*, 324 N.C. 373 (1989), by "fail[ing] to apply two key holdings from its own prior published and binding precedent in *State v. Sasek*." We disagree. The lower appellate court properly concluded that *Sasek* did not apply in the current case because, even if the trial court had made the required finding of good cause in *Sasek*, and the record had contained evidence to support an inferred existence of good cause in that case, the issue of the sufficiency of any good cause which may have existed was not before the Court of Appeals in *Sasek*; therefore, any comment on the issue by the Court of Appeals would constitute dicta and would also, in any event, remain discretionary in its application before this Court. Furthermore, defendant's citation to *Sasek* is ineffectual in light of his argument that *Sasek* stands for the proposition that any "reasonable efforts" undertaken by the State to hold the revocation hearing earlier or before the expiration of his term of probation is a factor to consider in determining whether there is "good cause shown and stated" to revoke his probation after the term had expired. In *Sasek*, the Court of Appeals recalled its observation in *Morgan* that a probation revocation judgment should only be remanded, as opposed to vacated, when "the record contain[s] sufficient evidence to permit the necessary finding of 'reasonable efforts' by the State to have conducted the probation revocation hearing earlier." *Sasek*, 271 N.C. App. at 575 (alteration in original) (quoting *Morgan*, 372 N.C. at 618). The lower appellate court's citation to, and discussion of, this statement from *Morgan* in the Court of Appeals' *Sasek* opinion is misplaced and misleading within the context of reviewing the good cause requirement of N.C.G.S. § 15A-1344(f). In the present case, the dissent has also succumbed to this miscalculated reliance on the concept of "reasonable efforts," while erroneously and curiously claiming that the statute requires a demonstration of *both* reasonable efforts *and* good cause, when N.C.G.S. § 15A-1344(f) doesn't mention "reasonable efforts." The Court in *Morgan*, in referencing the "reasonable efforts" undertaken by the State to conduct the revocation hearing earlier, referred to this Court's decision in *Bryant*. *Morgan*, 372 N.C. at 618 (citing *Bryant*, 361 N.C. at 104). *Bryant*, in turn, analyzed the version of N.C.G.S. § 15A-1344(f) which was existent at the time, and which explicitly required a trial court to find "that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier." 361 N.C. at 102 (emphasis omitted) (quoting N.C.G.S. § 15A-1344(f)(2) (2005)). However, the Legislature unequivocally eliminated the trial court's necessity to consider the State's reasonable efforts to conduct the hearing at an earlier time with the passage of Session Law 2008-129,

which replaced the *one* "reasonable effort" finding earlier required by N.C.G.S. § 15A-1344(f)(2) with *two* findings which presently must be determined by a trial court: N.C.G.S. § 15A-1344(f)(2) requires a finding that the "probationer did violate one or more conditions of probation prior to the expiration of the period of probation" and N.C.G.S. § 15A-1344(f)(3) requires a finding of "good cause shown and stated that the probation should be extended, modified, or revoked." 2008 N.C. Sess. Law 129, § 4; N.C.G.S. § 15A-1344(f) (2021). Therefore, *Morgan* does not stand for the proposition, as argued by defendant, that the reasonable efforts undertaken by the State to hold the probation revocation hearing at an earlier date must be shown to, or found by, the trial court as a prerequisite to the trial court exercising its jurisdiction in extending, modifying, or revoking a defendant's probation after the term of probation has expired.

III. Conclusion

¶ 16 The trial court complied with the provisions of N.C.G.S. § 15A-1344(f) and therefore possessed the jurisdiction to revoke defendant's probation after his term of probation had expired. Specifically, pursuant to N.C.G.S. § 15A-1344(f)(3), the trial court did not abuse its discretion in determining that good cause existed for the revocation of defendant's probation after his term of probation had expired. We therefore affirm the Court of Appeals decision for the reasons stated herein, and the trial court's judgments revoking defendant's probation are given full force and effect.

AFFIRMED.

Justice EARLS dissenting.

¶ 17 The majority here holds that because the trial court "complied with N.C.G.S. § 15A-1344(f)(3)," it has jurisdiction to revoke defendant's probation 399 days after it expired and did not abuse its discretion in finding good cause for the delay. Because I disagree on both points and conclude that the majority's decision provides inadequate guidance to trial courts, I respectfully dissent.

¶ 18 Though trial courts are rightfully afforded a high degree of discretion in making certain fact-intensive determinations, that discretion must be exercised within clear and consistent boundaries in order to safeguard fundamental constitutional principles of due process. These boundaries are particularly important in criminal law, in which a trial court's discretionary rulings—like those involving the revocation of

probation and institution of a term of active incarceration—can directly and severely impact basic personal liberties. *See Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973) (observing that "the loss of liberty entailed [in probation revocation] is a serious deprivation" thus requiring the protections of due process).

¶ 19 Below, the Court of Appeals ruled that there is "no specific set of factors that must be considered in evaluating whether 'good cause' exists [for post-expiration probation revocation] under [N.C.G.S.] § 15A-1344(f)(3)." *State v. Geter*, 267 N.C. App. 377, 2021-NCCOA-98, ¶ 14. In my view, that ruling untethers the trial court's discretion from "fixed legal principles," thereby running afoul of constitutional protections against statutory vagueness and inviting inconsistent applications of the law. *Shankle v. Shankle*, 289 N.C. 473, 483 (1976). Further, it is the proper role of appellate courts to provide lower courts with certain minimum guidance regarding the contours of these constitutional guardrails. While the majority observes that there are *some* general limits on a trial court's discretion, it does not state those limits with sufficient specificity to avoid unconstitutional vagueness and inconsistency in future determinations of "good cause" for probation revocation under N.C.G.S. § 15A-1344(f)(3).

¶ 20 Although the relevant statute plainly gives trial courts significant discretion in making this determination, the legislature could not have given trial courts the kind of virtually unreviewable discretion the majority confers here, nor did it intend to do so. Such discretion will lead to unpredictable application of the "good cause" standard across the state; as a result, defendants will have little notice of what constitutes "good cause" to warrant revocation of probation after their probationary period has expired and no real idea how any given trial court will treat their case.

¶ 21 It is the function of appellate courts to interpret broad legislation that is susceptible to multiple meanings and provide guidance for trial courts tasked with applying statutes in the first instance. *See, e.g.*, *State v. Starr*, 365 N.C. 314, 319 (2011) ("We pause to provide guidance to trial court judges" regarding how to "exercise [their] discretion" in order "to ensure compliance with N.C.G.S. § 15A-1233(a)."); *In re J.F.*, 237 N.C. App. 218, 227 (2014) ("We briefly address this jurisdictional issue to provide guidance to trial courts faced with similar situations in the future."). Here, the text and purpose of N.C.G.S. § 15A-1344(f)(3) demonstrate that there are limits to a trial court's discretion under these circumstances. Trial courts must make express findings of fact demonstrating that there is "good cause" to revoke probation. "Good cause" is not just whatever a trial court thinks reasonable on a given day; "good cause"

necessarily incorporates an assessment of whether the State made reasonable efforts to hold the revocation hearing before the probationary period ended. Moreover, while delaying a probation revocation hearing to allow for the disposition of underlying charges may sometimes be "good cause" for a delay, that is true only when the outcome of those charges has some impact on a trial court's "good cause" determination. The State may not require defendants to wait *years* for their revocation hearings under the guise that the disposition of their new charges will be relevant, then proceed with revocation even though those charges have been dismissed. Under these circumstances, the delay is without purpose and cannot constitute "good cause." Accordingly, I respectfully dissent.

I. Background

¶ 22 Jaquan Stephon Geter began serving eighteen months of supervised probation on 29 August 2016. During his probation, the State charged Mr. Geter with new criminal offenses after a SWAT-team illegally searched Mr. Geter's home and found drug paraphernalia, a pistol with ammunition, and cash, $40 of which had been used to purchase contraband pursuant to the investigation. On 22 February 2019, a trial court determined the evidence the SWAT-team obtained during the search had to be suppressed because they obtained it pursuant to an illegal warrant. The State subsequently dismissed these charges against Mr. Geter.

¶ 23 The State had no obligation to wait until those new charges were disposed before seeking to revoke Mr. Geter's probation. *See*, *e.g.*, *State v. Crompton*, 380 N.C. 220, 2022-NCSC-14, ¶ 11 (noting that the trial court "found that the defendant had violated the condition of his probation to 'commit no criminal offense' " based on its determination that he committed new offenses and charges were pending). Although the State was aware of these new charges—as well as other violations of his probation, such as Mr. Geter's failure to complete his assigned community service hours and his GED—the State did not file probation violation reports immediately. Instead, the State waited 387 days after the alleged criminal conduct to file violation reports and an additional 399 days after Mr. Geter's probation expired to hold his revocation hearing. In total, 806 days elapsed between the alleged criminal conduct and Mr. Geter's probation revocation.

¶ 24 Mr. Geter's probation hearing occurred over a year later on 4 April 2019. At that hearing, the State presented the illegally obtained evidence to support revocation. The trial court revoked Mr. Geter's probation but failed to make a finding of "good cause" for revoking his probation after the expiration of the probationary period. On direct appeal, the Court of

Appeals reversed the trial court's revocation because (1) the trial court had failed to make a finding of "good cause," and (2) it was ambiguous whether the court impermissibly revoked Mr. Geter's probation for a class three misdemeanor. *State v. Geter* (*Geter I*), No. COA19-846, 2020 WL 3251033 (N.C. Ct. App. June 16, 2020).

¶ 25 At his second revocation hearing on 15 July 2020, Mr. Geter argued that because the State could have held the revocation hearing prior to the disposition of the underlying drug charges, the State did not have "good cause" to revoke his probation after the probationary period had expired. The State, although acknowledging that it did have the ability to hold revocation hearings prior to disposition, emphasized that it delays proceedings in "every single case" involving allegations of new criminal conduct. Otherwise, the State argued, "we would be having hearings all the time." Additionally, the State noted that Buncombe County only holds one criminal session per week and probation hearings once every two weeks and that "99 percent of the time, if the underlaying evidence is suppressed or charges dismissed, the [S]tate does not pursue the revocation." The State contended that it "allowed the probation matter to be continued to afford Mr. Geter an opportunity to have his trial." After hearing these arguments, the trial court found that "it is clear to the [c]ourt that the State waited until disposition of the underlying offenses alleged before proceeding with the probation violation. The [c]ourt would find that this would constitute good cause."

¶ 26 Mr. Geter again appealed, arguing that the trial court erred because (1) "the record did not contain evidence the State made reasonable efforts to hold the hearing prior to expiration of probation" and (2) the idea that waiting for underlying criminal offenses to be resolved is "good cause" was expressly rejected by the Court of Appeals in" *State v. Sasek*, 271 N.C. App. 568 (2020). The Court of Appeals affirmed the trial court's revocation order, concluding that "review of caselaw and our General Statutes has revealed no specific set of factors that must be considered in evaluating whether 'good cause' exists under N.C.[G.S.] § 15A-1344(f)(3)." *State v. Geter* (*Geter II*), 276 N.C. App. 377, 2021-NCCOA-98, ¶ 14. According to the Court of Appeals, *Sasek* was inapplicable to Mr. Geter's case because the trial court in his case did make a finding of "good cause." *Id.* ¶ 12. This Court allowed Mr. Geter's petition for discretionary review on 10 August 2021.

II. Standard of Review

¶ 27 "[A]n '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.' " *In re N.D.A.*, 373 N.C. 71, 76 (2019) (quoting *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937)). In contrast to abuse of discretion review, appellate courts reviewing ultimate findings ask whether the trial court's "evidentiary facts reasonably support the trial court's ultimate finding." *State v. Fuller*, 376 N.C. 862, 2021-NCSC-20, ¶ 8 (concluding that a determination of whether a defendant "is a danger to the community" should be reviewed as an "ultimate finding"). But when there is no "rational connection between the basic facts . . . and the ultimate fact," *State v. White*, 300 N.C. 494, 504 (1980) (cleaned up), or the evidentiary findings do not "adequately address" the legal conclusions, *In re N.D.A.*, 373 N.C. at 78, the ultimate fact is not binding on appeal.

III. Analysis

¶ 28 Statutory interpretation begins with the text. N.C.G.S. § 15A-1344(f) enumerates three prerequisites that must be present before a trial court can revoke a defendant's probation after expiration of the probationary period. The statute provides that a court

> may extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:
>
> > (1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.
> >
> > (2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.
> >
> > (3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.

N.C.G.S. § 15A-1344(f) (2021). As the majority notes, this version of the statute omits language appearing in a prior version providing that revocation was permitted if the "State has made reasonable effort to notify the probationer and to conduct the hearing earlier." Act of July 28, 2008, S.L. 2008-129, § 4, 2008 N.C. Sess. Laws 499, 503. That version of the statute read:

> (f) Revocation after Period of Probation. — The court may revoke probation after the expiration of the period of probation if:

> (1) Before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing; and
>
> (2) The court finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier.

N.C.G.S. § 15A-1344(f) (2007). Notably, the commentary to N.C.G.S. § 15A-1344 did not change when the statute was revised: It provides that "probation can be revoked . . . if a violation occurred during the period and if the court was unable to bring the probationer before it in order to revoke at that time." N.C.G.S. § 15A-1344 Official Commentary.

¶ 29 This case raises two important questions regarding how to interpret this provision of the JRA. First, does N.C.G.S. § 15A-1344(f)(3) require the trial court to enter any evidentiary findings in support of its ultimate determination that good cause exists? Second, does N.C.G.S. § 15A-1344(f)(3) require the State to have made "reasonable effort . . . to conduct the hearing earlier" prior to seeking post-expiration revocation, as the previous version of the statute required? *See* N.C.G.S. § 15A-1344(f)(2) (2007). The majority answers no to both of these questions. I disagree.

¶ 30 In my view, the "shown and stated" language of N.C.G.S. § 15A-1344(f)(3) requires both that the State meet its burden that "good cause" exists and that the trial court state the reasons for which "good cause" exists, rather than simply making an express finding. *See* N.C.G.S. § 15A-1344(f)(3) (2021). Furthermore, although the legislature omitted the "reasonable effort" language in the current statute, trial courts must still consider "reasonable effort" by the State to hold the revocation hearing earlier in determining if "good cause" to revoke exists. The "good cause" language subsumes "reasonable effort" and grants trial courts greater, but not boundless, discretion to consider other factors. This interpretation closely follows the text of the statute and the legislative intent of the Justice Reinvestment Act, which was to limit the ability of trial courts to revoke probation after expiration and to restrict spending on incarceration so that the state could instead invest those resources in community programs to decrease crime.

A. The "shown and stated" language of N.C.G.S. § 15A-1344(f)(3) requires trial courts to include findings illustrating why "good cause" exists to revoke probation after expiration.

¶ 31 The majority holds that the trial court's "good cause" determination is reviewed for abuse of discretion. This ignores the nature of the good cause inquiry and the statutory text. The JRA provides that trial courts may revoke probation after the probationary period has expired if "[t]he court finds for good cause shown and stated" that it is appropriate to do so. N.C.G.S. § 15A-1344(f)(3). There are two potential readings of the "shown and stated" language. The first gives meaning to all language in § 15A-1344(f)(3). Revoking probation after expiration requires (1) "[t]he court finds" that the State "show[ed]," and thus met their burden, that "good cause" exists; and (2) the court "state[s]" the reasons supporting its determination that "good cause" exists. This reading gives full effect to the statute.

¶ 32 The second reading, which the majority adopts only requires the trial court to find "good cause" without explaining why good cause exists. This reading renders the prefatory language "[t]he court finds" duplicative with the subsequent "shown and stated" language. To read "[t]he court finds" and "shown and stated" as identical conflicts with the principle that statutes "should not be interpreted in a manner which would render any of its words superfluous." *Coffey*, 336 N.C. at 417. Instead, the State must *show* that good cause exists by meeting its burden of demonstrating good cause at the revocation hearing and the trial court must *state* its explanation by entering findings in support of its ultimate finding that "good cause" exists to revoke after expiration. The statute requires evidentiary findings in support of the ultimate findings of "good cause." Thus, the legislature intended the "shown and stated" language to require trial courts to not only find "good cause" but also to state the reasons why "good cause" exists for revocation.

¶ 33 This Court has previously held that trial courts must make an express finding that "good cause" exists to revoke probation after expiration. *State v. Morgan*, 372 N.C. 609, 613 (2019). A trial court order does not satisfy this requirement simply because evidence exists in the record from which a court may infer "good cause." *Id.* at 616. Instead, we explained that the language of § 15A-1344(f) clearly mandates that the trial court find both that "the probationer did violate one or more conditions of probation" and that there is "good cause shown and stated." *Id.* at 614 (quoting N.C.G.S. § 15A-1344(f) (2017)).

¶ 34 Further, requiring specific findings of fact in "good cause" determinations aligns with the broader purpose of the JRA. The primary goal of the JRA is to "reduce . . . [state] spending on corrections and . . . reinvest the savings in community-based programs" to decrease crime. *State v. Moore*, 370 N.C. 338, 343 (2017) (quoting James M. Markham, *The North Carolina Justice Reinvestment Act* 1 (2012)). Probation revocations account for the largest percentage of North Carolina prison admissions each year. *See* N.C. Dep't of Pub. Safety, Fiscal Year 2019–2020 Annual Statistical Report 11, https://files.nc.gov/ncdps/FY-2019-20-Annual-Statistical-Report.pdf. An interpretation of the act that would allow trial courts to revoke probation whenever they deem fit would be in tension with the JRA's goals. By contrast, interpreting the JRA to require evidentiary findings to support a good cause determination ensures that courts allow post-expiration revocations only in circumstances where they are truly warranted. Interpreting § 15A-1344(f)(3) in this way also ensures an adequate record for appellate review. By contrast, in concluding that a trial court may simply state that "good cause" exists to revoke, the majority introduces a standard that is virtually unreviewable and enables the State to potentially abuse calendaring of revocation hearings at the expense of defendants. The "shown and stated" language in the statute requires trial courts to illustrate why good cause exists, imposing a necessary guardrail protecting against unnecessary revocations after expiration of the probationary period.

B. Trial courts must consider whether the State made "reasonable effort" to conduct the hearing prior to revocation in order to determine if "good cause" exists for post-expiration revocation.

¶ 35 Concluding that trial courts must include findings illustrating why "good cause" exists calls for this Court to give meaning to "good cause." Establishing factors grounded in the interpretation and legislative intent of § 15A-1344(f) will enable trial courts to apply the statute uniformly in a way that provides defendants notice as to what constitutes "good cause." The statute does require the State to show and the trial court to state that the State made "reasonable effort" to hold the hearing earlier. Finally, because the legislature did broaden the statutory language from "reasonable effort" to "good cause," trial courts are also free to consider other relevant factors or scenarios. "Good cause" subsumes, but is not limited to, a "reasonable effort" analysis.

¶ 36 When a trial court fails to make an express finding of "good cause," a reviewing court will vacate an order revoking probation unless the record includes sufficient evidence that may enable a court to conclude

"good cause" exists on remand. *Morgan*, 372 N.C. at 618. And the Court of Appeals concluded in *Sasek* that "the record [must] contain[ ] sufficient evidence to permit the necessary findings of 'reasonable efforts' by the State to have conducted the probation revocation hearing earlier" to warrant remand. 271 N.C. App. at 575 (quoting *Morgan*, 372 N.C. at 618). Although *Sasek* is not binding on this Court, *Sasek* interpreted the latter version of the statute—the one at issue here—and we did not allow further review of that case. At a minimum, *Sasek* indicates that as of 2020, the Court of Appeals believed that the new version of the JRA incorporated its predecessor's requirement that the State undertake "reasonable effort" for a good cause determination to be warranted.

¶ 37 Creating factor tests to guide trial courts in applying the law is often necessary to give effect to criminal statutes in a manner that comports with the rights of criminal defendants and avoids vagueness. In North Carolina, a statute is void for vagueness where "men of common intelligence must necessarily guess at its meaning and differ as to its application." *In re Burrus*, 275 N.C. 517, 531 (1969). Additionally, the language of the statute must provide a defendant with sufficient notice as to what criminal conduct the statute seeks to punish. *State v. Elam*, 302 N.C. 157, 162 (1981).

¶ 38 The Court of Appeals' ruling potentially conflicts with the foundational constitutional principles of due process and equal protection by approving statutory vagueness. If there is "no specific set of factors that must be considered" within a trial court's "good cause" determination, then trial courts enjoy functionally unbridled discretion to make this determination "on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

¶ 39 Indeed, the circumstances here illustrate the potential for inconsistent or arbitrary applications of the "good cause" requirement absent further guidance. The State conceded at the revocation hearing that it made no effort to hold the hearing earlier, instead opting to "wait and see" what happened to the underlying charges. At first glance, this explanation seems reasonable enough: a conviction on the underlying charges would likely *support* the State's case for probation revocation, while a dismissal or acquittal of these charges would weigh *against* probation revocation. The trial court acknowledged this approach when it stated that "it is clear to the [c]ourt that the State waited until disposition of the underlying offenses alleged before proceeding with the probation violation." The trial court likewise relied upon this "wait and see" approach in its "good cause" determination: It found "that this does constitute good

cause in that . . . *if for whatever reason the State had opted to dismiss the charges*, that it would have had a direct impact on the later hearing of the probation violation." (Emphasis added).

¶ 40 But this finding is squarely contradicted by what *actually happened* here: The State *did* dismiss the underlying charges against Mr. Geter, but the dismissal had *no* impact on the later hearing of the probation violation. That is, despite the dismissal of the underlying charges that supposedly influenced the State to "wait and see," the State nevertheless forged ahead with seeking the post-expiration revocation of Geter's probation. Under this "heads I win, tails you lose" framework approved by the majority opinion today, the mere fact of pending underlying charges against a defendant could *always* constitute "good cause," *regardless of the outcome of those charges*. This result is prohibited by the plain language of N.C.G.S. § 15A-1344(f) itself, which enumerates the "good cause" determination required by subsection (f)(3) as a separate and distinct prerequisite from the mere fact "that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation" required by subsection (f)(2). Finally, if, as the majority opinion observes, the State "likely felt confident that the same evidence, deemed excluded at defendant's criminal trial, could very well satisfy the trial court that defendant had committed new criminal offenses while on probation under a less demanding standard," then the State would have absolutely no reason to delay defendant's probation revocation hearing until after the underlying charges were resolved; it could have presented that evidence to the trial court independently of the trial on the underlying charges. Instead, Geter's probation revocation hearing was delayed until 399 days after his probation expired, constituting a "significant and unadvisable [delay] in the administration of justice." *Geter*, 2021-NCCOA-98, ¶ 15.

¶ 41 These inconsistencies illustrate why, contrary to the ruling of the Court of Appeals below, there must be *some* "specific set of factors that must be considered in evaluating whether 'good cause' exists under [N.C.G.S.] § 15A-1344(f)(3)." The responsibility for establishing those factors falls on the shoulders of this Court. While the majority opinion generally acknowledges that a trial court's discretion in this matter must not be exercised arbitrarily but only in accordance with fixed legal principles, it stops short of addressing the Court of Appeals' sweeping ruling and providing the necessary, more specific guidance about what "fixed legal principles" a trial court must consider. In my view, the high stakes of post-expiration probation revocation and the language of N.C.G.S. § 15A-1344(f)(3) require this Court to do so. Indeed, "where a statute is

ambiguous or unclear in its meaning, resort must be had to judicial construction to ascertain the legislative will, and the courts will interpret the language to give effect to the legislative intent." *In re Banks*, 295 N.C. 236, 239 (1978).

¶ 42 As Mr. Geter correctly notes, this Court has established multifactor tests to give meaning to criminal statutes on numerous occasions, thus avoiding vagueness and providing defendants with sufficient notice. Such instances include *State v. Tolley*, 290 N.C. 349, 368 (1976), where we adopted factors to determine if a defendant should be shackled at trial; *State v. Barden*, 356 N.C. 316, 339 (2002), which announced voluntary confession factors; and *State v. Spivey*, 357 N.C. 114, 118 (2003), which established speedy trial factors. By creating factors that trial courts may consider in determining "good cause," we can ensure uniform and clear applications of N.C.G.S. § 15A-1344(f)(3) consistent with all constitutional requirements.

¶ 43 Specifically, the statutory text, structure, purpose, and context, as well as foundational constitutional principles dictate that a trial court engaging in a "good cause" determination under N.C.G.S. § 15A-1344(f)(3) consider within its discretion: (1) the State and the court's ability or inability to hold the probation revocation hearing in a timely manner; (2) the length of the delay between the alleged act warranting probation revocation and the subsequent hearing; and (3) the efforts made by the State or the court to conduct an earlier probation hearing. In my view, requiring consideration of these factors would properly honor the statutory text, purpose, and constitutional limitations while still affording the trial court broad and necessary discretion in making this fact-intensive determination. Indeed, in addition to criminal defendants and the State, trial courts themselves could also benefit from this guidance by gaining statutory and constitutional landmarks to orient their discretionary ruling. Without providing this guidance, and without establishing any "specific set of factors that must be considered," this Court allows trial court discretion to functionally undermine the statute's purpose and foundational constitutional principles.

¶ 44 Establishing a "good cause" requirement that does not mandate finding substantive content such as "reasonable effort" effectively invalidates § 15A-1344(f) for vagueness. Adopting the majority's position that "good cause" must simply be written and neither illustrated nor explained by finding that the State made "reasonable effort" to hold the revocation hearing earlier grants trial courts unreviewable discretion and does not put probationers on notice as to what establishes "good cause." Trial courts' application of the statute may vary widely, effectively

preventing defendants from anticipating what may constitute "good cause" and from building arguments that "good cause" does not exist. Recognizing that the current version of the Justice Reinvestment Act incorporates the "reasonable effort" framework into its "good cause" requirement establishes workable guidelines for trial courts and clarifies the statutory requirements of § 15A-1344(f).

¶ 45 Interpreting "good cause" as subsuming "reasonable effort" aligns with the official commentary to § 15A-1344. The exact language states: "probation can be revoked . . . if a violation occurred during the period and if the court was unable to bring the probationer before it in order to revoke at that time." N.C.G.S. § 15A-1344 Official Commentary. Because the legislature preserved the commentary, we must construe it as applicable to the "good cause" requirement. *See Wing v. Goldman Sachs Tr. Co., N.A.*, 382 N.C. 288, 2022-NCSC-104, ¶ 54 ("When the legislature explicitly instructs the revisor of statutes to print the commentary with the statute, such reliance appears particularly appropriate." (citation omitted)). The clear language of this guidance implies that the trial court should find the State could not bring in the defendant prior to revocation.

¶ 46 The "reasonable effort" factor analysis also makes sense of the Court of Appeals ruling in *Sasek*. Although the opinion is not binding on this Court, it is important because the Court of Appeals concluded that, in order for a reviewing court to remand, it must hold "sufficient" evidence exists in the record "to permit the necessary findings of 'reasonable efforts' by the State to have conducted the probation revocation hearing earlier." *Sasek*, 271 N.C. App. at 575 (quoting *Morgan*, 372 N.C. at 618). Moreover, *Sasek* suggests that the crucial question in determining "good cause" is whether the State made reasonable effort to conduct the hearing earlier. If appellate courts review the record for "reasonable effort" in deciding whether to vacate or remand, trial courts should be required to establish such findings in their order to support "good cause."

¶ 47 "Good cause" must encompass, but is not limited to, the "reasonable effort" analysis. The previous version requires that the court "finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier." Act of July 28, 2008 § 4. Although the majority and the State are correct that the legislature omitted the "reasonable effort" language in the updated statute, this omission cannot grant trial courts unlimited discretion because the legislature also added the "good cause" requirement. Replacing the "reasonable effort" language with "good cause" does widen what trial courts may consider in determining "good cause," but it is still a limit on when trial courts can revoke

after expiration. The legislature intended the statute and the Justice Reinvestment Act to limit the possibility of revocation after expiration, limit the activation of sentences, and thus limit state spending on incarceration. "Good cause" should be read in accordance with this intent as requiring the State to show and for the trial court to state a finding that the State made "reasonable effort" to bring the probationer in earlier.

C. Remand is necessary to determine if delaying Mr. Geter's probation revocation hearing until after the disposition of his underlying criminal charges constitutes "good cause."

¶ 48 Interpreting "good cause" as subsuming "reasonable effort" but leaving room for additional considerations in a trial court's determination enables defendants to still have the option of acquiescing or delaying their probation revocation hearing until the disposition of their underlying charges. However, the disposition of those charges should affect the outcome of the probationary hearing. If a Court finds "good cause" shown and stated because the State and the defendant *both* agreed to wait until the disposition of the underlying charges, that disposition must affect the trial court's exercise of discretion. Otherwise, there is no true "good cause" for delaying the hearing.

¶ 49 Although waiting to proceed with a revocation until after the disposition of underlying charges would ideally limit the number of total revocations, a blanket policy, like that of Buncombe County's, has the potential to harm defendants, such as Mr. Geter, whose underlying charges have been dismissed or acquitted and yet are still the subject of revocation hearings. Simply put, trial courts cannot allow for the delay of probation revocation hearings until after the disposition of underlying charges only to revoke probation despite the dismissal or acquittal of those charges and still rule within the limiting parameters of the "good cause" requirement and the Justice Reinvestment Act.

¶ 50 Our precedents provide some context regarding what constitutes sufficient evidence of "reasonable effort" by the State sufficient for remand to be appropriate. In *Morgan*, this Court was "unable to say from our review of the record that no evidence exists that would allow the trial court on remand to make a finding of 'good cause shown and stated.' " *Morgan*, 372 N.C. at 618. Evidence to support our holding included a notice of revocation hearing with a scheduled date before the expiration period and remarks from the defendant's counsel addressing the defendant's significant mental health issues and inability to comply with terms of probation or appear in court. *Id.* at 611. *Bryant* suggests that neither a "failed scheduling effort alone" nor a defendant's medical condition

causing difficulty in scheduling is sufficient "to support a finding of reasonable efforts." *Bryant*, 361 N.C. at 104. Finally, the Court of Appeals holding in *Sasek* suggests that when the record shows there was a hearing initially scheduled prior to expiration but does not explain why it did not take place, the matter does not warrant remand. *Sasek*, 271 N.C. App. at 576.

¶ 51 Buncombe County's blanket policy of delaying probation revocation hearings until after the disposition of underlying charges alone cannot constitute "good cause." The policy does not demonstrate that the State made "reasonable effort" to hold the hearing earlier. In fact, it supports the notion that the State purposefully wanted to delay the proceeding simply because it was inconvenient to the State to hold it earlier. In the trial transcript, the State noted that it is typical practice to wait until the disposition of underlying charges because if they "tried to hold hearings before probation expired, 'we would be having hearings all the time.' " The State's inability to accommodate probation hearings adequately and fairly in a timely manner cannot, on its own, be held against defendants facing the possibility of revocation after the expiration of the probationary period.

¶ 52 However, in Mr. Geter's case, there is enough evidence in the record that the State made "reasonable effort" to conduct the hearing earlier to warrant remand for the trial court to determine if "good cause" exists. Unlike in *Bryant* and *Sasek*, the State's testimony suggests Mr. Geter acquiesced or potentially agreed for the "probation matter to be continued to afford [him] an opportunity to have his trial." Additionally, there was significant restraint on the State's ability to hold Mr. Geter's revocation hearing earlier, which explains the failed scheduling efforts and further delays: Buncombe County only holds one criminal session per week and probation hearings only once every two weeks. In tandem with Mr. Geter's agreement to delay the revocation hearing, the State's calendaring restrictions support a remand; however, the latter would be likely insufficient alone. *See Bryant*, 361 N.C. at 104 (holding a "failed scheduling effort alone" does not constitute sufficient evidence to warrant remand).

¶ 53 On remand, this case warrants serious consideration of two facts to determine if "good cause" existed to revoke Mr. Geter's probation. First, despite the State's statements that "99 percent of the time, if the underlying evidence is suppressed or charges dismissed, the [S]tate does not pursue the revocation," the State still pursued, and the trial court granted, the revocation of Mr. Geter's probation. The delay to allow Mr. Geter the "opportunity to have his trial" had zero impact on his

revocation hearing and should not constitute "good cause." Second, Mr. Geter had violated other conditions of his parole, such as completing required community service hours and his GED, for which the State could have pursued modification or extension of his probation, yet the State instead pursued revocation on the basis of criminal conduct. The State had every opportunity to extend, modify, or revoke Mr. Geter's probation prior to expiration, yet decided to wait 806 days total to do so.

¶ 54 Ultimately, if the State, with a defendant's agreement, waits to proceed with revocation until after disposition of underlying charges, the disposition should have an impact on the trial court's determination of "good cause." Asking defendants to wait until well after their probationary period expires and then revoking their probation regardless of the fact that their underlying charges have been dismissed or acquitted is "significant and unadvisable in the administration of justice." *Geter II*, ¶ 15.

IV. Conclusion

¶ 55 Requiring trial courts to make express findings of fact that demonstrate why "good cause" exists to revoke probation after expiration will limit such instances of extreme delay. This requirement is consistent with the text of § 15A-1344(f) and the purposes of the Justice Reinvestment Act. The majority errs by failing to enforce the statutory guardrails, such as requiring trial courts to illustrate why "good cause" exists, and to consider the factor of "reasonable effort" by the State to conduct the hearing earlier, which impose a crucial limit on the ability of trial courts to revoke probation after expiration of the probationary period. Because there is evidence in the record of this case to suggest "reasonable effort" by the State exists, this matter should be remanded.

Justice HUDSON joins in this dissenting opinion.

STATE v. ROBINSON

[383 N.C. 512, 2022-NCSC-138]

STATE OF NORTH CAROLINA
v.
KENNETH ANTON ROBINSON

No. 395A21

Filed 16 December 2022

Sentencing—multiple drug trafficking charges—substantial assistance—departure from mandatory minimum—discretionary decision

Pursuant to N.C.G.S. § 90-95(h)(5), a trial court's decision to reduce a sentence for a drug-related conviction below the statutory mandatory minimum for substantial assistance is entirely discretionary, no matter the scope or value of that assistance. Therefore, the trial court did not abuse its discretion or act under a misapprehension of the law when, after consolidating defendant's convictions for two drug trafficking offenses and one offense of possession of a firearm by a felon into a single judgment, it declined to make a downward departure from the statutory minimum even though the court found that defendant had provided substantial assistance in one of the drug trafficking cases.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 279 N.C. App. 643, 2021-NCCOA-533, dismissing defendant's appeal and by writ of certiorari finding no error in a judgment entered on 11 July 2019 by Judge Gregory R. Hayes in Superior Court, Guilford County. Heard in the Supreme Court on 19 September 2022.

Joshua H. Stein, Attorney General, by Nicholas R. Sanders, Assistant Attorney General, for the State-appellee.

Glenn Gerding, Appellate Defender, by Aaron Thomas Johnson, Assistant Appellate Defender, for defendant-appellant.

MORGAN, Justice.

¶ 1 In this appeal, defendant Kenneth Anton Robinson brings forward an argument arising from a dissent in the Court of Appeals regarding

the decision of the trial court to decline defendant's invitation to make a downward adjustment to defendant's sentence in light of the assistance provided by defendant to law enforcement entities regarding their criminal investigations. After reviewing the plain language of the relevant sentencing statutes, the existing precedent of this Court, and the transcript of the sentencing hearing, we conclude that defendant has failed to demonstrate an abuse of discretion by the trial court in declining to reduce defendant's sentence due to defendant's rendition of substantial assistance. Accordingly, we affirm the decision of the Court of Appeals which found no error in defendant's sentencing.

I. Factual background and procedural history

¶ 2 This appeal arises from the parties' respective arguments which focus upon the content and the result of defendant's sentencing hearing; consequently, we present only an abbreviated account of the factual circumstances underlying the case. Defendant was arrested on 16 December 2016 following a search of defendant's home pursuant to a warrant issued upon, *inter alia*, information provided by a confidential informant. Defendant was subsequently indicted on 6 February 2017 on charges of (1) trafficking a controlled substance by possession of at least four grams but less than fourteen grams of heroin in violation of N.C.G.S. § 90-95(h)(4)(a) and (2) possession of a firearm by a felon in violation of N.C.G.S. § 14-415.1. Later, defendant was released from custody but was arrested again on 7 February 2018 and indicted on this date as well on a second charge of trafficking a controlled substance, which alleged possession of at least fourteen grams but less than twenty-eight grams of opium or heroin in violation of N.C.G.S. § 90-95(h)(4)(b). In April 2019, defendant moved to suppress evidence obtained in a search which occurred in December 2016. The motion to suppress was denied, and defendant thereafter pled guilty on 9 July 2019 to all three pending charges pursuant to an agreement with the State.

¶ 3 Upon accepting defendant's pleas of guilty, the trial court also conducted the sentencing phase of the case on 9 July 2019. At sentencing, counsel for defendant contended that defendant had provided "substantial assistance" to law enforcement and that the trial court should employ its discretion provided by N.C.G.S. § 90-95(h)(5) to reduce the sentences otherwise required upon defendant's convictions for violations of N.C.G.S. § 90-95(h)(4). Defense counsel stated:

> Obviously, we are—we're asking for a lot, and there's a lot on the line for [defendant]. He understands that, and I think he's—he's earned the right to

> say to you, Your Honor, you know, we want a finding of substantial assistance, and we want a considerable reduction from what he is facing.
>
> Again, there's no hard-and-fast rules in terms of how we'll define substantial assistance or whether or not, you know, you have to work with every officer that's arrested you. You know, the statute just says if—the sentencing judge may reduce the fine or suspend the prison term imposed on the person and place the person on probation when the person has to the best of their knowledge provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, et cetera. And I would submit to the Court that we have that here.
>
> If Your Honor wants to look at the—you know, the first two busts that came from this information for the first case and then the last one from the last case, break it down however Your Honor is comfortable, I think clearly he has gone above and beyond in terms of comparing what he was charged with and what he's helped the officers to take off the street.

The State did not express a specific position regarding defendant's request for a downward adjustment in sentencing which was based upon his claim of the provision of substantial assistance. The trial court then permitted defendant to personally speak in open court regarding sentencing considerations.

¶ 4 In announcing its sentencing determinations, the trial court first observed that the two trafficking offenses to which defendant had pled guilty carried lengthy mandatory minimum sentences, could "easily run consecutive to each other which amounts up to a great deal of time" in light of defendant's heightened prior record level of Level IV, and required active sentences. The trial court then informed defendant that it was "bothered" by the repeat nature of defendant's drug-related criminal violations:

> THE COURT: . . . I hate to say—you know, I hate to—2014 looks like some kind of minor charges to me, but they are—they look like, you know, some minor drug charges from 2014.

> They popped you pretty good from the 2016 event, and it's clear that there's no doubt that you helped—that you offered—and even [a detective] says you offered substantial assistance for that event. But you didn't do it till later, and I think one of the things that's laying there in my mind is that you—why did you even take that—2018, that was a lot. The way I—I was trying to write down all those bundles and bricks. That's a lot. Right? I mean, I—when you kept talking about bundles and bricks, you're not talking about a little minor amount of heroin. That's a pretty major amount of heroin, right?
>
> [THE STATE]: It totaled up to approximately seventeen grams.
>
> THE COURT: Yeah. Yeah. But I mean, I kept hearing bundles and bricks, and I heard sums of money involved. And that was with these 2016 charges pending.

At this juncture in the sentencing phase, defendant explained to the trial court the reasons for his continued participation in the illegal drug trade despite previous convictions and pending charges.

¶ 5 The trial court then inquired about the previous plea agreement that defendant had been offered:

> THE COURT: Yeah. I think it's only fair—and, at this point, he mentioned—[defendant] mentioned something. Since I'm sitting here with a huge decision on this issue, what was the plea offer?
>
> [THE STATE]: Your Honor, he was offered two attempted traffickings [sic] and the G felony. So, basically, it's the exact same thing you have before you but taken out of the mandatory minimum. He was offered attempted trafficking for the E, attempted trafficking for the F, and the firearm by felon charge [a Class G felony].
>
> THE COURT: And then those would have been sentenced at?
>
> [THE STATE]: Level IV.

> THE COURT: So he was offered to go into the regular sentencing grid?
>
> [THE STATE]: That's correct.
>
> THE COURT: The regular E, F, and G sentencing grid?
>
> [THE STATE]: That's right.
>
> THE COURT: At a prior Record Level IV?
>
> [THE STATE]: That's correct. And any sort of consolidation, anything like that would have been up to the [c]ourt, if a judge would have chosen to consolidate any of it. And, of course, dismissal of all other pending charges.
>
> THE COURT: Yeah. Dismissal of all the other charges. And when was that offered?
>
> . . . .
>
> THE CLERK: It looked like January 31st, 2019, is when Judge Craig signed the order.
>
> THE COURT: Okay.

¶ 6 Ultimately, the trial court agreed with defense counsel that defendant had provided "substantial assistance" but declined the invitation to make a downward deviation from the applicable mandatory minimum sentences and instead elected to recognize defendant's assistance by consolidating, for sentencing purposes, not only the two trafficking by possession convictions, but also the possession of a firearm by a felon conviction. With respect to this development, the sentencing transcript shows the following:

> THE COURT: . . . *There's no doubt in the [c]ourt's mind and based on everybody's testimony that he* deserves credit for substantial—[defendant] *deserves credit for substantial assistance that he provided* to [law enforcement] in the December 16, 2016, case. And he's—*the way that credit is going to be delivered is to, therefore—therefore, consolidate —consolidate all the cases into the February 7th, 2018, event* . . . . The trafficking by possession from December 16th, the possession of the firearm by felon

> from December 16th is all—they're all consolidated into the [2018 case].
>
> . . . .
>
> . . . So on that—that one—that one case, it's a Level II trafficking offense between fourteen and twenty-seven grams of heroin, a Class E felony. *Everything is consolidated into that one offense for—for a mandatory—there was no substantial assistance in that case—for the mandatory sentence in that one Class E offense of 90 to 120 months* in the Department of Corrections. . . .
>
> . . . .
>
> . . . I considered everything. You—*if I gave you consecutive sentences for your Class E, F, and G felonies, you were going to get close to this sentence of this mandatory minimum sentence anyway.* I think it's a—it's a tough sentence, but I go back. It's the chart—it's the sentence that the legislature of North Carolina said should be imposed for this type of offense, giving you credit—basically taking away—I mean, giving—I've consolidated everything with that—with that final offense, for that final number, which is set by statute.
>
> THE DEFENDANT: Twelve to fifteen years?
>
> [DEFENSE COUNSEL]: It's a little bit less than that.
>
> THE COURT: Yeah. It's 90 to 120 months. It is what it is, but it's what the legislature set forth as for the punishment for this—this type of case. I know. It's a very difficult sentence. *It's a difficult sentence to impose. But I don't get to—sometimes I just have to follow what the legislature says, and this is, I think, one of those times.*

(Emphases added).

¶ 7 In conformance with the statements which it made in open court, the trial court, in its judgment entered on 11 July 2019, consolidated the three felony convictions into one judgment and sentenced defendant to

a single active sentence of 90 to 120 months as required under N.C.G.S. § 90-95(h)(4)(b) for the Class E felony of trafficking in opium or heroin by possession arising from the 7 February 2018 charge.

II. Appellate proceedings

¶ 8 Defendant filed a written Notice of Appeal on 17 July 2019, despite the fact that defendant's plea agreement had not indicated that he wished to retain his right to appeal the trial court's denial of defendant's motion to suppress.[1]

¶ 9 In light of this deficiency, defendant's appellate counsel filed a petition for writ of certiorari on 29 December 2020, acknowledging the jurisdictional flaws in defendant's notice of appeal and stating that appellate counsel had "extensively reviewed the trial record and the transcript in this case" but had "not located any meritorious issues to present" on appeal, citing *Anders v. California*, 386 U.S. 738, *reh'g denied*, 388 U.S. 924 (1967). Defendant's appellate counsel also filed a "no-merit" brief pursuant to *Anders* and *State v. Kinch*, 314 N.C. 99 (1985) in which defendant's appellate counsel stated that he had examined the record, statutes, and relevant cases, but was unable to identify any meritorious issues that could support a meaningful argument for relief on appeal. As is customary when an *Anders* brief is filed, appellate counsel for defendant asked the Court of Appeals to examine the record for possible prejudicial error which counsel might have overlooked.

¶ 10 After the Court of Appeals dismissed defendant's appeal due to defendant's failure to comply with N.C.G.S. § 15A-979, the lower appellate court opted to exercise its "discretion to grant defendant's petition for *writ of certiorari* and address the merits of defendant's appeal." *State v. Robinson*, 279 N.C. App. 643, 2021-NCCOA-533, ¶ 9. As to its acceptance of defendant's *Anders* brief, the Court of Appeals determined that defendant's appellate counsel "fully complied with *Anders* and *Kinch*."

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1. While generally a defendant who pleads guilty to criminal charges may not appeal from the resulting conviction, N.C.G.S. § 15A-1444(a1) (2021), a trial court's order denying a motion to suppress evidence may be reviewed upon an appeal from a guilty plea. N.C.G.S. § 15A-979(b) (2021). However, this Court has held that a defendant who wishes to maintain a right to appeal from the denial of a motion to suppress despite pleading guilty after the denial of the motion must either include in the plea transcript a statement reserving the right to appeal the motion to suppress or orally advise the trial court and the prosecutor before the conclusion of plea negotiations that the defendant intends to appeal the denial of the motion to suppress. *State v. Reynolds*, 298 N.C. 380 (1979), *cert. denied*, 446 U.S. 941 (1980). Here, defendant gave no such notification or advisement in the plea agreement or during the plea process.

Id. ¶ 10. The lower appellate court then recognized the matters raised in the *Anders* brief and resolved them in the following manner:

> Defendant's appellate counsel submitted the following legal points: (1) whether the indictments were sufficient to confer jurisdiction upon the trial court; (2) whether the trial court erred in denying the motion to suppress; (3) whether there was a sufficient factual basis for the plea; and (4) whether the trial court erred in sentencing defendant. We agree with defendant's appellate counsel that it is frivolous to argue these issues.

Id. ¶ 11.

¶ 11 In deciding this case and concluding that no error was committed by the trial court, *id.* ¶ 1, the Court of Appeals majority determined that: (1) "the indictments against defendant were legally sufficient and conferred jurisdiction upon the trial court, as they gave defendant sufficient notice of the charges against him," *id.* ¶ 12; (2) "[t]here was competent evidence to support the trial court's denial of defendant's motion to suppress," *id.* ¶ 13; (3) "[t]he transcript reflects the factual basis for the plea was sufficient for each charge in the judgment," *id.* ¶ 14; and (4) "the trial court did not err in sentencing defendant to the mandatory minimum sentence pursuant to the structured sentencing chart," *id.* ¶ 15. The Court of Appeals dissent discerned "multiple issues of arguable merit—the application of [d]efendant's substantial assistance to sentence mitigation under N.C.G.S. § 90-95(h)(5), and whether law enforcement's execution of the search warrant violated the notice requirements of N.C.G.S. § 15A-249." *Id.* ¶ 18 (Murphy, J., dissenting). Thus, the dissent would have "remand[ed] for the appointment of new appellate counsel to provide briefing on these, and any other, issues of potential merit." *Id.*

¶ 12 On the basis of the dissent, defendant gave notice of appeal to this Court pursuant to N.C.G.S. § 7A-30(2), contending that the Court of Appeals majority erred in holding that this appeal involves no issue of arguable merit and claiming that the trial court appeared to misunderstand the scope of its discretion to depart from the prescribed statutory sentence as permitted by N.C.G.S. § 90-95(h)(5) due to the performance of substantial assistance by defendant. Specifically, defendant argued that the trial court had abused its discretion by acting under a misapprehension of law, to wit: an erroneous belief that N.C.G.S. § 90-95(h)(5) only permits a trial court to reduce the statutory mandatory minimum

sentence for trafficking opium or heroin where the trial court determines that the defendant has provided substantial assistance to law enforcement *in the case for which the defendant is then being sentenced*.

¶ 13 A careful review of the transcript of the sentencing hearing reveals no such misunderstanding by the trial court. Therefore, this Court affirms the determination of the Court of Appeals that the trial court did not abuse its discretion in sentencing defendant.

III. Analysis

¶ 14 The General Assembly has enacted a scheme of statutes, commonly referred to as the North Carolina Controlled Substances Act, which, *inter alia*, defines certain drug-related acts which constitute violations of the state's criminal law and sets forth the range of potential punishments for such violations which trial courts may impose. In the present case, defendant was charged with two counts of trafficking opium or heroin by possession—one under subsection 90-95(h)(4)(a) (concerning possession of at least four grams but less than fourteen grams of the controlled substances in question) and the other under subsection 90-95(h)(4)(b) (concerning possession of fourteen grams but less than twenty-eight grams of the controlled substances in question). N.C.G.S. § 90-95(h)(4) (2021). Each of those subsections identifies a minimum term and a maximum term for sentencing purposes. N.C.G.S. § 90-95(h)(4)(a), (b).

¶ 15 In addition to the detailed sentencing ranges presented in N.C.G.S. § 90-95(h)(4), the Legislature has provided an option for a trial court to depart from the specified sentences in certain circumstances:

> . . . . The sentencing judge *may* reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of the person's knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals *if* the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

N.C.G.S. § 90-95(h)(5) (2021) (emphases added). The ability to make a downward departure from the otherwise mandatory minimum sentence as set out in N.C.G.S. § 90-95(h)(5) is entirely discretionary, *see State*

v. Hamad, 92 N.C. App. 282, 289 (1988), *aff'd per curiam*, 325 N.C. 544 (1989), and this discretion by the trial court is exercised at two points in the contemplative process. First, the trial court has the discretion to find that a defendant has rendered "substantial assistance in the identification, arrest, or conviction" of others involved in criminal activity. N.C.G.S. § 90-95(h)(5). Second, in the event that a trial court does determine that "substantial assistance" has been rendered by a defendant, the trial court retains discretion—as evidenced by the Legislature's choice of the phrase "[t]he sentencing judge *may* reduce" as opposed to "*shall* reduce"—to depart from the mandatory minimum sentence which is otherwise applicable to a defendant's conviction or convictions. *See id.* Thus, the plain language of N.C.G.S. § 90-95(h)(5) is clear that a trial court is not required to reduce a sentence *even if the trial court finds that a defendant has provided "substantial assistance."*

¶ 16 A trial court's abuse 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." *State v. Hennis*, 323 N.C. 279, 285 (1988) (citing *State v. Parker*, 315 N.C. 249 (1985)). An abuse of a trial court's discretion also occurs where "a trial judge acts under a misapprehension of the law." *State v. Nunez*, 204 N.C. App. 164, 170 (2010). The " 'accomplices, accessories, co-conspirators, or principals' [referenced in the statute] need not be involved in the case for which the defendant is being sentenced, and . . . [N.C.]G.S. § 90-95(h)(5) therefore permits the trial court to consider [the] defendant's 'substantial assistance' in other cases." *State v. Baldwin*, 66 N.C. App. 156, 158, *aff'd per curiam*, 310 N.C. 623 (1984). In other words, a trial court may choose to reduce a defendant's sentence based upon his provision of substantial assistance in any case, not merely for the substantial assistance which was provided in the case for which the defendant is then being sentenced. It is this circumstance which the Court of Appeals dissent utilizes to suggest that the trial court may have abused its discretion by way of a misapprehension of law. The dissenting view speculated that:

> [T]he trial court may have improperly applied N.C.G.S. § 90-95(h)(5), as the trial court may have believed it could only apply substantial assistance to mitigate sentencing regarding cases on one date, based on the trial court's following statement:
>
>> There's no doubt in the [trial] [c]ourt's mind and based on everybody's testimony that [Defendant] deserves credit for substantial—[Defendant] deserves credit for substantial assistance that he

> > provided . . . in the [*16 December 2016*] case. And he's—the way that credit is going to be delivered is to, therefore—therefore, consolidate—consolidate all the cases into the [7 February 2018] event[.]
> >
> > . . . .
> >
> > Everything is consolidated into that one offense for—for a mandatory—*there was no substantial assistance in that case*—for the mandatory sentence in that one[.]
>
> (Emphases added). It is not clear whether the trial court understood it could apply Defendant's substantial assistance to multiple cases on different dates—specifically, whether the trial court understood it could apply Defendant's substantial assistance regarding the 16 December 2016 offense to both that offense and the 7 February 2018 offense under N.C.G.S. § 90-95(h)(5).

Robinson, ¶ 28 (Murphy, J., dissenting) (alterations in original).

¶ 17 Defendant emphasizes that this excerpt from the sentencing hearing transcript potentially indicates that the trial court labored under a misapprehension of law which was similar to the matter addressed in *Baldwin*. Here, defendant submits that the trial court wrongly believed that it could only recognize defendant for his substantial assistance in the 2016 matter by making a downward adjustment, pursuant to N.C.G.S. § 90-95(h)(5), in the sentence imposed based upon defendant's conviction of his 2016 offense, and that such substantial assistance could not be "carried over" to support a downward departure in the sentence imposed based upon defendant's conviction of his 2018 offense. Defendant buttresses his view of the trial court's surmised confusion about the applicable law here by emphasizing that (1) the trial court "twice used the word 'mandatory' to describe the 90 to 120 month sentence it imposed, even though [defendant]'s assistance to [law enforcement] made such a sentence *discretionary* rather than *mandatory*" and (2) the trial court further explained its sentence of 90 to 120 months as "a very difficult sentence. It's a difficult sentence to impose. *But I don't get to—sometimes I just have to follow what the legislature says, and this is, I think, one of those times.*" Defendant summarizes his appellate argument as follows:

> Under these circumstances—with [defendant]'s assistance bearing fruit far beyond what is typically expected; defense counsel asking for probation; and the State declining to object—the likeliest explanation for the trial court not granting a downward departure for the 2018 charge is that it did not realize it had the option.

¶ 18 In light of this assertion by defendant, we reiterate that N.C.G.S. § 90-95(h)(5) expressly gives discretion to a trial court to determine whether substantial assistance has been provided by a particular defendant. However, even if a trial court determines that substantial assistance has been provided *in any case*, the statute then provides the trial court with the discretionary *option* that "[t]he sentencing judge *may* . . . impose a prison term less than the applicable minimum prison term." N.C.G.S. § 90-95(h)(5) (emphasis added). Ultimately, the statutory provision unequivocally establishes that the trial court is not required to impose a reduced sentence even where a trial court has determined that a defendant provided substantial assistance. Thus, irrespective of the extent or value of defendant's substantial assistance, defendant's requested sentencing results from substantial assistance, or the State's position on the trial court's determination of substantial assistance, the trial court was empowered to determine whether to employ the option set forth in N.C.G.S. § 90-95(h)(5) to reward defendant for his assistance.

¶ 19 Applying this interpretation of the pertinent cited statutes and appellate case law to the instant case, we do not view the sentencing remarks by the trial court as it openly shared its thought process in ruminating about the trial court's options and determinations, as suggesting any misunderstanding by the trial court of the discretion which it retained pursuant to N.C.G.S. § 90-95(h)(5). As reflected by the entirety of the trial court's commentary and the divulgence of the rationale underlying its sentencing choices, it readily appears that the trial court was fully familiar with its given statutory discretion to find that substantial assistance had been provided by defendant in one case and to impose a judgment which was less than the mandatory minimum sentence in light of defendant's substantial assistance, if the trial court desired to do so and in the dearth of any evident error in the record before us. *See State v. Williams*, 274 N.C. 328, 333 (1968) ("An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court.").

¶ 20 The trial court operated within its proper parameters of discretion in determining that defendant had rendered "substantial assistance" in

connection with the 2016 trafficking charge but not with regard to the 2018 charge. Moreover, despite defendant's substantial assistance, the trial court permissibly elected to refrain from implementing a downward departure authorized in N.C.G.S. § 90-95(h)(5) to utilize the concept of substantial assistance to reduce the statutory criminal sentences established in N.C.G.S. § 90-95(4). Nevertheless, the trial court chose to employ its discretion pursuant to a different statute to afford consideration to defendant by consolidating both of defendant's trafficking convictions and a third felony conviction for purposes of sentencing. *See* N.C.G.S. § 15A-1340.15(b) (2021) ("If an offender is convicted of more than one offense at the same time, the court *may* consolidate the offenses for judgment and impose a single judgment for the consolidated offenses." (emphasis added)). This discretionary election by the trial court resulted in a sentence for defendant which might have been longer than defendant requested, but was permissible in the trial court's discretion. Although the trial court was not required to justify or explain its sentencing decisions in this matter, the transcript in this case indicates that the trial court weighed appropriate factors and circumstances in reaching its determinations regarding sentencing.

¶ 21 We agree with the lower appellate court that the acceptance of defendant's no-merit brief was appropriate pursuant to the principles enunciated in *Anders* and in *Kinch*. We further agree that the trial court did not abuse its discretion in its sentencing considerations. Accordingly, the decision of the Court of Appeals finding no error in defendant's sentence is affirmed.

AFFIRMED.

Justice EARLS dissenting.

¶ 22 "[A]n abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction." *Koon v. United States*, 518 U.S. 81, 100 (1996); *see also In re Estate of Skinner*, 370 N.C. 126, 146 (2017) (Morgan, J, dissenting) ("It is well-established in this Court's decisions that a misapprehension of the law is appropriately addressed by remanding the case to the appropriate lower forum in order to apply the correct legal standard." (first citing *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 523 (1990); and then citing *State v. Grundler*, 249 N.C. 399, 402 (1959), *cert. denied*, 362 U.S. 917 (1960))).

¶ 23 "When the exercise of a discretionary power of the court is refused on the ground that the matter is not one in which the court is permitted

to act, the ruling of the court is reviewable." *State v. Ford*, 297 N.C. 28, 30–31, 252 S.E.2d 717, 718 (1979), *quoted in State v. Brogden*, 334 N.C. 39, 46 (1993). Here, there was ample evidence that the trial court mistakenly believed it was prohibited from exercising its discretionary power to grant Mr. Robinson a downward sentencing departure from the mandatory minimum sentence for drug trafficking for his February 2018 offense based on substantial assistance that he provided to law enforcement after his December 2016 offenses. *See* N.C.G.S. § 90-95(h)(5) (2021). I therefore dissent from the majority's conclusion that "the trial court was fully familiar with its given statutory discretion . . . to impose a judgment which was less than the mandatory minimum sentence in light of defendant's substantial assistance." This matter should be remanded to the trial court for re-sentencing.

¶ 24 A criminal defendant's "substantial assistance" can be used to mitigate the sentence for a crime other than the one in which the substantial assistance was provided. *See State v. Baldwin*, 66 N.C. App. 156, 158, *aff'd per curiam*, 310 N.C. 623 (1984). But a review of the record reveals that the trial court was unaware of this flexibility. For example, during sentencing the trial court stated:

> There's no doubt in the Court's mind and based on everybody's testimony that he deserves credit for substantial -- Mr. Robinson deserves credit for substantial assistance that he provided to Detective Jeter in the December 16, 2016, case. And he's -- the way that credit is going to be delivered is to . . . consolidate all the cases into the February 7th, 2018, event . . . everything is consolidated into 18CRS67753. The trafficking by possession from December 16th, the possession of the firearm by felon from December 16th is all -- they're all consolidated into the 18CRS67753.
>
> . . . .
>
> So on that -- that one -- that one case, it's a Level II trafficking offense between fourteen and twenty-seven grams of heroin, a Class E felony. Everything is consolidated into that one offense for -- *for a mandatory -- there was no substantial assistance in that case -- for the mandatory sentence* in that one Class E offense of 90 to 120 months in the Department of Corrections.

(Emphasis added.) In short, to credit Mr. Robinson for his substantial assistance provided directly after the 2016 offenses, the trial court consolidated Mr. Robinson's sentence for the 2016 offenses with his sentence for the 2018 offense. As a result of the consolidated sentences, Mr. Robinson would functionally serve only one sentence for the 2018 offense.

¶ 25 The trial court was free to determine that this was the proper way to credit Mr. Robinson for *both* of his convictions based on the assistance Mr. Robinson provided law enforcement. But throughout this process, the trial court expressed its view that Mr. Robinson "deserve[ed] credit for substantial assistance that he provided . . . in the December 16, 2016 case." Meanwhile, the trial court seemed to believe that it was required to give Mr. Robinson the mandatory sentence for the conviction arising out of his 2018 offense because "there was no substantial assistance in that case." This indicates that the trial court mistakenly believed it could *only* credit Mr. Robinson for his substantial assistance by reducing his sentence for the conviction arising from his 2016 offenses.

¶ 26 The trial court's mistaken interpretation of the law is further demonstrated in an exchange between the trial judge and Mr. Robinson when Mr. Robinson asked the trial court to repeat the sentence that had been handed down. The trial court explained:

> It's 90 to 120 months. It is what it is, but it's what the legislature set forth as for the punishment for this -- this type of case. I know. It's a very difficult sentence. It's a difficult sentence to impose. But I don't get to -- sometimes I just have to follow what the legislature says, and this is, I think, one of those times.

Again, in stating that it had to "follow what the legislature [said]," the trial court appeared to believe itself bound by the mandatory minimum sentences prescribed in N.C.G.S. § 90-95(h)(4)(b).

¶ 27 Whether the trial court was obligated to grant Mr. Robinson a reduced sentence in exchange for providing information to law enforcement is not at issue here. All parties, including Mr. Robinson, recognize this decision is a matter that is purely within the trial court's discretion. The trial court was, however, obligated to *understand* the statutory constraints placed upon it, as well as the correct bounds of the discretion it is afforded. The evidence in the record demonstrates that the trial court did not understand the latter. This is not a matter of assuming error on the part of the trial court but rather reading the transcript fairly and acknowledging the error that occurred.

¶ 28 The ramifications of failing to properly credit Mr. Robinson for the assistance he provided implicate important public policy concerns by threatening law enforcement's crime prevention efforts. "[O]ur criminal justice system could not adequately function without information provided by informants." *United States v. Bernal-Obeso*, 989 F.2d 331, 334 (9th Cir. 1993); *see also* Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. Cin. L. Rev. 645, 655 (2004) (explaining that "[o]ur justice system has become increasingly dependent on criminal informants over the past twenty years"). Informants are particularly indispensable to the prosecution of drug crimes. *See, e.g.*, *Law Enforcement Confidential Informant Practices: Joint Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. & the Subcomm. on the Const., Civ. Rts., & Civ. Liberties of the H. Comm. on the Judiciary*, 110th Cong. 66 (2007) ("Informants are a cornerstone of drug enforcement. It is sometimes said that every drug case involves a snitch." (statement of Alexandra Natapoff, Professor of Law, Loyola Law School)); Natapoff, *Snitching*, 73 U. Cin. L. Rev. at 655 ("[N]early every drug case involves an informant, and drug cases in turn represent a growing proportion of state and federal dockets.").

¶ 29 As Mr. Robinson's counsel explained during sentencing proceedings, one benchmark for assessing the substantial assistance provided is whether that assistance resulted in "get[ting] the same amount [of drugs] off the street that you . . . were caught with." In this case, the results far exceeded that benchmark. The information Mr. Robinson provided led directly to three ounces of heroin, two ounces of cocaine, two firearms, and approximately $18,000 being recovered. That information led officers to other cases, allowing them to ultimately recover four ounces plus twelve kilos of cocaine, over $87,000, two additional firearms, and a motor vehicle. As Officer Jeter testified, sometimes information provided by an informant simply "stops with the next individual, but in this case [law enforcement] kept climbing up the ladder." Officer Jeter recognized that this "ladder" could be "traced back to the initial information that Mr. Robinson provided" and that the last drug bust to which Mr. Robinson's assistance led yielded a substantial amount of illegal narcotics and guns.

¶ 30 Mr. Robinson's case demonstrates the efficacy of using informants to uncover illegal drug operations. But failing to properly credit criminal defendants for the information they provide reduces their incentives to cooperate with law enforcement. There is thus a significant public interest in ensuring that the trial court correctly understood the breadth of

its discretion to reduce not just Mr. Robinson's sentence for his 2016 offenses, but for his 2018 offense as well.

¶ 31 Because the record demonstrates that the trial court did not understand the scope of its discretion, I would reverse and vacate the Court of Appeals' holding that these facts do not give rise to any "arguable issues," *State v. Robinson*, 2021-NCCOA-533, ¶ 16, and remand this case to the trial court for re-sentencing in line with the correct understanding of the trial court's discretion under N.C.G.S. § 90-95(h)(5).

STATE OF NORTH CAROLINA
v.
MADERKIS DEYAWN ROLLINSON

No. 119PA21

Filed 16 December 2022

Constitutional Law—North Carolina—right to jury trial—waiver—statutory requirements

The trial court complied with N.C.G.S. § 15A-1201(d)(1) and did not abuse its discretion in determining that defendant fully understood and appreciated his decision to waive his right to a trial by jury for attaining habitual felon status where the trial court addressed defendant personally ("you can waive your right to a jury trial"), allowed defendant to consult with defense counsel about the waiver, and allowed defense counsel to answer on behalf of defendant; where defendant signed under oath a waiver of jury trial form; and where the trial court had previously conducted a longer colloquy with defendant on the first day of trial regarding his waiver of his right to a jury trial for the underlying drug and assault offenses, at which time defendant himself responded to each of the trial court's questions.

Justice ERVIN dissenting.

Justices HUDSON and EARLS join in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 2021-NCCOA-58, 2021 WL 796545, finding no prejudicial error at trial but finding error in

sentencing and vacating in part a judgment entered on 14 May 2019 by Judge Mark Klass in Superior Court, Iredell County and remanding for a new sentencing hearing. Heard in the Supreme Court on 3 October 2022 in session in the Old Chowan County Courthouse in the Town of Edenton pursuant to N.C.G.S. § 7A-10(a).

Joshua H. Stein, Attorney General, by John W. Congleton, Assistant Attorney General, for the State-appellee.

Glenn Gerding, Appellate Defender, by Brandon Mayes, Assistant Appellate Defender, for defendant-appellant.

Christopher A. Brook for Professor Joseph E. Kennedy, amicus curiae.

BARRINGER, Justice.

¶ 1 In this matter, we consider whether the Court of Appeals erred by concluding that the trial court complied with the procedure implemented in N.C.G.S. § 15A-1201(d)(1) by the legislature for the trial court to consent to defendant's waiver of his right to a jury trial for the status offense of habitual felon. *See State v. Rollinson*, 2021-NCCOA-58, ¶¶ 21–24, 2021 WL 796545. After careful review, we conclude that the Court of Appeals did not err. Therefore, we affirm the Court of Appeals' decision.

¶ 2 The legislature enacted subsection (d) of N.C.G.S. § 15A-1201 after the people of North Carolina voted in the 4 November 2014 general election to amend the North Carolina Constitution to allow persons accused of certain criminal offenses to waive their right to a trial by jury. *See* An Act to Establish Procedure for Waiver of the Right to a Jury Trial in Criminal Cases in Superior Court, S.L. 2015-289, § 1, 2015 N.C. Sess. Laws 1454, 1455; An Act to Amend the Constitution to Provide that a Person Accused of Any Criminal Offense in Superior Court for Which the State Is Not Seeking a Sentence of Death May Waive the Right to Trial by Jury and Instead Be Tried by a Judge, S.L. 2013-300, §§ 1–3, 2013 N.C. Sess. Laws 821, 821–22 (approved at Nov. 4, 2014 general election, eff. Dec. 1, 2014).

¶ 3 Prior to 1 December 2014, the North Carolina Constitution directed that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. I, § 24 (amended 2014). As amended, the first sentence of Article I, Section 24 of the North Carolina Constitution now reads:

> No person shall be convicted of any crime but by the unanimous verdict of a jury in open court, except that a person accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, in writing or on the record in the court *and with the consent of the trial judge*, waive jury trial, subject to procedures prescribed by the General Assembly.

N.C. Const. art. I, § 24 (emphasis added).

¶ 4 Subsection (d) of N.C.G.S. § 15A-1201 addresses "Judicial Consent to Jury Waiver" and provides as follows:

> Upon notice of waiver by the defense pursuant to subsection (c) of this section, the State shall schedule the matter to be heard in open court to determine whether the judge agrees to hear the case without a jury. The decision to grant or deny the defendant's request for a bench trial shall be made by the judge who will actually preside over the trial. Before consenting to a defendant's waiver of the right to a trial by jury, the trial judge shall do all of the following:
>
> (1) Address the defendant personally and determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury.
>
> (2) Determine whether the State objects to the waiver and, if so, why. Consider the arguments presented by both the State and the defendant regarding the defendant's waiver of a jury trial.

N.C.G.S. § 15A-1201(d) (2021).[1]

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1. The legislature in 2015 used different language for subsection (d) of N.C.G.S. § 15A-1201 than for N.C.G.S. § 15A-1242 regarding a criminal defendant's election to represent himself at trial. *Compare* An Act to Establish Procedure for Waiver of the Right to a Jury Trial in Criminal Cases in Superior Court, S.L. 2015-289, § 1, 2015 N.C. Sess. Laws 1454, 1455 *with* N.C.G.S. § 15A-1242 (2021) ("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 . . . ."). Thus, we see no reason to consider or import holdings from this Court regarding N.C.G.S. § 15A-1242 into the construction of subsection (d) of N.C.G.S. § 15A-1201. *See State v. Pruitt*, 322 N.C. 600, 602 (1988) (addressing an alleged violation of N.C.G.S. § 15A-1201 and in its analysis of the statute adding emphasis to "*only after the trial judge makes thorough inquiry and is*

¶ 5 The issue in the matter before us is whether the trial court complied with N.C.G.S. § 15A-1201(d)(1) in allowing defendant's waiver of his right to a jury trial for the status offense of habitual felon. Defendant contends that to "address the defendant personally" and to "address whether defendant understood and appreciates the consequences of his decision to waive the right to trial by jury," N.C.G.S. § 15A-1201(d)(1), defendant himself must respond to the trial court's address. In other words, the trial court cannot satisfy N.C.G.S. § 15A-1201(d)(1) if counsel for a defendant responds on the defendant's behalf. The State disagrees, arguing that the statutory language does not prohibit a defendant from responding through counsel.

¶ 6 Given the plain language of N.C.G.S. § 15A-1201(d)(1), we cannot agree with defendant's reading. The interpretation of a statute, which is a question of law, is reviewed de novo. *E.g.*, *In re Summons Issued to Ernst & Young, LLP*, 363 N.C. 612, 616 (2009).

¶ 7 Subsection (d) of N.C.G.S. § 15A-1201 dictates the trial court's conduct: "Before consenting to a defendant's waiver of the right to a trial by jury, the trial judge *shall* . . . *[a]ddress* the defendant personally and *determine* whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury." N.C.G.S. § 15A-1201(d)(1) (emphases added).

¶ 8 The statute mandates who to address—namely, "the defendant personally"—but it does not mandate *how* to address the defendant. Additionally, the statute does not mandate *how* to "determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury." *Id.* The legislature also did not require the trial judge to *hear personally a response from the defendant* to the trial court's address; the statute only requires the trial court to "[a]ddress the defendant personally." *Id.* The legislature left *how* to address and *how* to determine the answer to its inquiry to the discretion of the trial court.

¶ 9 Nonetheless, that conclusion does not fully resolve the dispute before us. It is well established that where matters are left to the discretion of the trial court, the exercise of that discretion is subject to appellate review. *White v. White*, 312 N.C. 770, 777 (1985). That review, however, "is limited to a determination of whether there was a clear abuse of

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satisfied that the defendant" in its quotation of N.C.G.S. § 15A-1242 (1983)). In addition to involving a different statute, *Pruitt* is factually distinguishable from this case, rendering further discussion of it of little value.

discretion." *Id.* A trial court abuses its discretion "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." *State v. Hennis*, 323 N.C. 279, 285 (1988).

¶ 10 Here, the record supports that the trial court made a reasoned decision and did not abuse its discretion. On the first day of trial, after the assistant district attorney informed the trial court that "the defendant now wishes to elect to have a bench trial instead of a jury trial" and then listed the charges, including habitual felon, the trial court addressed defendant. The trial court began by asking defendant to stand, which he did. Then, the trial court asked defendant: "Do you understand you're charged with the charges [the assistant district attorney] just read to you?"; "Do you understand you have a right to be tried by a jury of your peers?"; and "At this time you wish to waive your right to a jury and have this heard as a bench trial by me?" Defendant answered, "Yes, sir" to each of these questions.[2]

¶ 11 After this colloquy on the record, in which defendant gave notice in open court of his waiver of a jury trial, defendant signed and acknowledged under oath the Waiver of Jury Trial form created for such waivers by the Administrative Office of the Courts.

¶ 12 Given defendant's waiver of his right to a jury trial and his consent thereto, the trial court proceeded with a bench trial, which lasted approximately one day. After the presentation of evidence and arguments by counsel, the trial court found defendant guilty of assault with a deadly weapon on a government official, possession of marijuana up to one-half ounce, possession of marijuana paraphernalia, possession with intent to sell and deliver cocaine, maintaining a vehicle for keeping and selling controlled substances, and felony possession of cocaine.

¶ 13 Then, before the trial court proceeded with the phase of the trial addressing the habitual felon status offense, the following transpired:

> [ASSISTANT DISTRICT ATTORNEY]: Your Honor, at this time the State has also indicted the defendant as an habitual felon. We need to have that—I would contend that he's waived his, the jury trial for both of them. But if you feel like you need to have another colloquy with him about that, we need to have that so we can proceed.

2. In defendant's petition for discretionary review, he did not seek review of the trial court's compliance with N.C.G.S. § 15A-1201(d)(1) for this colloquy.

> [COURT]: I'll do that. At this point in the trial it's a separate trial. The jurors are coming back to hear the habitual felon matter, or you can waive your right to a jury trial and we can proceed.
>
> [DEFENSE COUNSEL]: Just one second, please, your Honor.
>
> [Brief pause]
>
> [DEFENSE COUNSEL]: Judge, may it please the Court, after speaking with my client on an habitual felon hearing, trial, he is not requesting a jury trial on that matter and is comfortable with a bench trial.
>
> [ASSISTANT DISTRICT ATTORNEY]: Your Honor, I'm ready to proceed.
>
> [COURT]: Go ahead.

¶ 14 Defendant also signed and acknowledged under oath another Waiver of Jury Trial form. The signed form in the record depicts the following:

STATE VERSUS

Name Of Defendant

MADERKIS ROLLINSON

WAIVER OF JURY TRIAL

G.S. 15A-1201

ACKNOWLEDGMENT OF RIGHTS AND WAIVER

1. I, the above-named defendant, hereby declare that
   a. I have provided notice of my intent to waive a jury trial in accordance with G.S. 15A-1201(c) by (choose one) ☐ stipulation, ☐ written notice, ☒ notice on the record in open court,
   b. I have been fully informed in open court of the charges against me, the nature of and statutory punishment for each charge, and the nature of the proceedings against me,
   c. I have been advised by the court that I have the right to be tried by a jury of twelve (12) of my peers, that I may participate in the selection of the members of the jury, and that jury verdicts must be unanimous,
   d. I have been advised by the court that if I waive a jury trial, the judge alone will decide my guilt or innocence, and the judge alone will determine any aggravating sentencing factors in my case, and
   e. I fully understand and appreciate the consequences of my decision to waive the right to be tried by a jury.
2. Other: ____________________
3. In light of the foregoing, I, the above-named defendant, freely, voluntarily, and knowingly waive the right to trial by jury.

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME	Date: 05/14/2019
Date: 05/14/2019 — Signature Of Person Authorized To Administer Oaths: [signature] — ☒ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court	Signature Of Defendant: [signature]

¶ 15 Below this section of the form is defendant's counsel's certification. The form shows as follows:

CERTIFICATION BY LAWYER FOR DEFENDANT

I hereby certify that I have fully explained to the defendant the charges against him or her, the nature of and statutory punishment for each charge, and the nature of the proceedings against him or her; the defendant's right to be tried by a jury of twelve (12) of his or her peers, and to participate in the selection of the jury; that jury verdicts must be unanimous; and that if the defendant waives a jury trial, the judge alone will decide the defendant's guilt or innocence, and the judge alone will determine any aggravating sentencing factors in the case.

Date	Name Of Lawyer For Defendant (type or print)	Signature Of Lawyer For Defendant
05/14/2019	JUDY DALTON	[signature]

¶ 16 On the next page of the form, the trial court indicated its consent to the waiver and signed the form. The text reflects as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Following a hearing on this matter, I, the undersigned judge, who will preside over the defendant's trial, after determining whether the State objects to the waiver, and, if so, why, and after considering the arguments presented by both the State and the defendant regarding the defendant's waiver of a jury trial, find the following: *(check all that apply)*

1. The above-named defendant is charged with a criminal offense for which the State is not seeking a sentence of death.
2. The defendant has provided notice of his or her intent to waive a jury trial in accordance with G.S. 15A-1201(c) by *(choose one)* ☐ stipulation. ☐ written notice. ☒ notice on the record in open court.
3. The defendant has been fully informed in open court of the charges against him or her, the nature of and statutory punishment for each charge, and the nature of the proceedings against him or her.
4. The defendant has been advised of his or her right to be tried by a jury of twelve (12) of his or her peers, that he or she may participate in the selection of the members of the jury, and that jury verdicts must be unanimous.
5. The defendant has been advised that if he or she waives a jury trial, the judge alone will decide his or her guilt or innocence, and the judge alone will determine any aggravating sentencing factors in the case.
6. The defendant fully understands and appreciates the consequences of his or her decision to waive the right to trial by jury, and has requested such a waiver, as indicated in the ACKNOWLEDGMENT OF RIGHTS AND WAIVER, above.

☐ 7. Other: ____________________

In light of the foregoing findings of fact, the undersigned judge concludes that the defendant's requested waiver of the right to trial by jury ☐ is ☐ is not appropriate.

ORDER

In light of the foregoing findings of fact and conclusions of law, the undersigned judge hereby orders as follows: *(check one)*

☑ 1. The court consents to the defendant's waiver of the right to trial by jury, and the charge(s) against the defendant shall proceed in accordance with that waiver, and as otherwise required by law.

☐ 2. The court does not consent to the defendant's waiver of the right to trial by jury, and the charge(s) against the defendant shall proceed as required by law.

Date	Name Of Judge (type or print)	Signature Of Judge
05/14/2019	HON. MARK KLASS	[signature]

NOTE: *"Once waiver of a jury trial has been made and consented to by the trial judge pursuant to subsection (d) of [G.S. 15A-1201], the defendant may revoke the waiver one time as of right within 10 business days of the defendant's initial notice pursuant to subsection (c) of [G.S. 15A-1201] if the defendant does so in open court with the State present or in writing to both the State and the judge. In all other circumstances, the defendant may only revoke the waiver of trial by jury upon the trial judge finding the revocation would not cause unreasonable hardship or delay to the State. Once a revocation has been granted pursuant to this subsection, the decision is final and binding." G.S. 15A-1201(e).*

¶ 17 Given the foregoing record, we cannot conclude that the trial court abused its discretion in how it personally addressed defendant or in how it determined that defendant fully understood and appreciated the consequences of his decision to waive the right to trial by jury. As clearly reflected in the transcript, the trial court expressly addressed defendant by saying "*you* can waive *your* right to a jury trial." (Emphases added.) We conclude that this method of personally addressing defendant is reasonable.

¶ 18 Furthermore, the trial court's implicit determination that defendant fully understood and appreciated the consequences of his decision to waive the right to trial by jury was not "manifestly unsupported by reason

or . . . so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285. Defendant's counsel responded to the trial court's address to defendant only after asking for some time and speaking with defendant. Moreover, the day before, the trial court had conducted a longer colloquy to confirm defendant's waiver of his right to a jury trial on the substantive charges against him. Defendant himself, not his counsel, responded and answered each of the trial court's questions that day. Additionally, after each of these colloquies, defendant signed under oath the jury trial waiver form acknowledging his waiver of the right to a jury trial.

¶ 19 In conclusion, we affirm the Court of Appeals' holding that the trial court complied with the procedure dictated by the legislature in N.C.G.S. § 15A-1201(d)(1) for the trial court's consent to defendant's waiver of his right to a jury trial for the habitual felon offense. The trial court personally addressed defendant concerning the waiver of his right to a jury trial. The trial court also did not abuse its discretion in how it addressed defendant or in its determination that defendant fully understood and appreciated the consequences of his waiver. Accordingly, we reject defendant's arguments to the contrary and affirm the Court of Appeals' decision.[3] We remand this case to the Court of Appeals for further remand to the trial court for further proceedings as ordered by the Court of Appeals.

AFFIRMED.

Justice ERVIN dissenting.

¶ 20 I am unable to join my colleagues' decision to uphold the trial court's habitual felon determination in this case given my inability to accept their conclusion that the trial court adequately complied with the applicable statutory provisions before allowing him to waive his constitutional right to trial by jury with respect to the habitual felon allegation. I simply do not believe that the procedures employed in this instance can be squared with the relevant statutory language and am concerned

3. Defendant has not argued that the trial court failed to consent to defendant's waiver of a jury trial as required by the North Carolina Constitution. Thus, we do not opine on constitutional issues not before us. While the State presented evidence of three certified judgments to support habitual felon status and defendant declined to present evidence, we do not address the application of N.C.G.S. § 15A-1443(a) regarding prejudice because we affirm the Court of Appeals' holding that the trial court did not err and complied with N.C.G.S. § 15A-1201(d)(1).

that the Court's decision to uphold the validity of defendant's purported waiver of the fundamental right to trial by jury through the use of such informal procedures creates an unacceptable risk that persons charged with the commission of crimes will be found to have waived that fundamental right without fully understanding the consequences of that decision. As a result, I would hold that defendant is entitled to a new trial with respect to the habitual felon allegation and dissent from my colleagues' decision to the contrary.

¶ 21 In 2014, the people of the state of North Carolina voted to amend the North Carolina Constitution to authorize criminal defendants charged with the commission of noncapital offenses to waive their right to a trial by jury "in writing or on the record in the court and with the consent of the trial judge . . . subject to procedures prescribed by the General Assembly." N.C. Const. art. I, § 24. *See* An Act to Establish Procedure for Waiver of the Right to a Jury Trial in Criminal Cases in Superior Court, S.L. 2015-289, § 1, 2015 N.C. Sess. Laws 1454, 1455; An Act to Amend the Constitution to Provide that a Person Accused of Any Criminal Offense in Superior Court for Which the State Is Not Seeking a Sentence of Death May Waive the Right to Trial by Jury and Instead Be Tried by a Judge, S.L. 2013-300, §§ 1–3, 2013 N.C. Sess. Laws 821, 821–22 (approved at Nov. 4, 2014 general election, eff. Dec. 1, 2014). In the aftermath of the voters' decision to adopt this proposed constitutional amendment, the General Assembly enacted implementing legislation providing that "[a] defendant accused of any criminal offense for which the State is not seeking a sentence of death in superior court may, knowingly and voluntarily, in writing or on the record in the court and with the consent of the trial judge, waive the right to trial by jury," N.C.G.S. § 15A-1201(b) (2019), subject to the condition that,

> [b]efore consenting to a defendant's waiver of the right to a trial by jury, the trial judge shall do all of the following:
>
> (1) Address the defendant personally and determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury.
>
> (2) Determine whether the State objects to the waiver and, if so, why. Consider the arguments presented by both the State and the defendant regarding the defendant's waiver of a jury trial.

N.C.G.S. § 15A-1201(d) (2019). As a result, as the literal statutory language clearly provides, a trial court cannot accept a criminal defendant's waiver of the right to a jury trial in the absence of compliance with the statutory procedures specified in N.C.G.S. § 15A-1201(d)(1).

¶ 22 According to N.C.G.S. § 15A-1201(d)(1), a trial court considering whether to accept a criminal defendant's waiver of the right to trial by jury must do two things. First, the trial court must "[a]ddress the defendant personally," a requirement that my colleagues appear to recognize calls upon the trial court to directly communicate with the defendant. Secondly, the trial court must "determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury," a requirement that appears, at least to me, to mean that the trial court must personally ascertain whether the defendant "understands and appreciates the consequences" of the waiver decision that the trial court is being asked to accept. Although I am inclined to agree with my colleagues that the trial court complied with the first of these two requirements at the beginning of the habitual felon proceeding in the sense that the trial court appears to have initially made a direct statement to defendant, I do not believe that the same thing can be said about the second.

¶ 23 I have difficulty understanding how a trial court can meaningfully determine "whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury," N.C.G.S. § 15A-1201(d)(1), without having the sort of personal, direct communication with the defendant that the Court deems to be unnecessary. Simply put, it appears to me that N.C.G.S. § 15A-1201(d)(1) cannot be understood in any way other than as a requirement that the trial court have a conversation with the defendant in which the trial court informs the defendant of the consequences of waiving his right to a jury trial and makes sure that the defendant understands the import of what he or she is about to do. In the absence of such direct communication between the trial court and the defendant, the trial court cannot know what the defendant does and does not understand and appreciate despite the fact that the relevant statutory language clearly contemplates that the trial court will obtain personal knowledge of the degree to which the defendant understands and appreciates the consequences of a decision to waive his or her right to a jury trial. As a result, N.C.G.S. § 15A-1201(d)(1) must necessarily be construed as requiring that the trial judge, himself or herself, make the determination required by the relevant statutory language and personally obtain the information necessary to do that.

¶ 24 The insufficiency of the process that the trial court utilized in this case is readily apparent when one realizes that, by utilizing a process pursuant to which defendant's trial counsel was allowed to speak with defendant and then inform the trial court that defendant "is not requesting a jury trial," the trial court had no knowledge concerning either what defendant's trial counsel told defendant or what defendant told his trial counsel. As a result, the trial court essentially delegated responsibility for ascertaining whether defendant "fully understands and appreciates the consequences of [his] decision" to defendant's trial counsel. Although I do not wish to be understood as casting aspersions upon defendant's trial counsel, a decision by a defendant's trial counsel that he or she believes that his or her client "fully understands and appreciates the consequences of [his or her] decision to waive the right to trial by jury" cannot be equated to a determination by the trial court to the same effect in the absence of additional actions by the trial court that serve to validate the assertion made by defendant's trial counsel and provide the trial court with the necessary personal knowledge. The trial court in this case had no basis other than acceptance of a representation by defendant's trial counsel that the procedures required by N.C.G.S. § 15A-1201(d)(1) had been effectuated, with that approach being insufficient to ensure that the trial court is personally able to make the determinations required by the relevant statutory language.

¶ 25 In concluding that communication with defendant through his trial counsel was sufficient, the Court emphasizes the absence of any specific statement in the relevant statutory language detailing the manner in which the trial court is required to address the defendant and the manner in which the trial court must determine whether the defendant understands and appreciates the consequences of a decision to waive his or her right to a jury trial and the absence of any statutory language requiring the trial court to "hear personally a response from the defendant to the trial court's address." I am not convinced, however, that the absence of this sort of "belt and suspenders" language allows trial courts to adopt procedures for making the determination required by N.C.G.S. § 15A-1201(d)(1) that fail to ensure that the trial court has personal knowledge that the defendant understands and appreciates the consequences of a decision to waive his or her right to trial by jury. At least to my way of thinking, the fact that the statutory language contained in N.C.G.S. § 15A-1201(d)(1) does not directly state that the trial court must obtain the necessary information by means of a colloquy between the trial judge and the defendant does not excuse the trial court from the necessity for conducting such a colloquy when there is no other way in which the trial judge can realistically obtain the information that is

required to permit him or her to consent to the defendant's request to waive his or her right to a jury trial.

¶ 26 After concluding that the trial court had the discretion to utilize a procedure for making the determination required by N.C.G.S. § 15A-1201(d)(1), the Court points to a number of factors in an attempt to show that the trial court did not abuse its discretion in making the required determination in this case. In support of this assertion, my colleagues point, among other things, to the fact that defendant waived his right to a jury trial prior to the guilt-innocence phase of the trial, the fact that defendant signed a written waiver of his right to a jury trial, and the fact that defendant's trial counsel communicated with defendant about this subject. As an initial matter, it seems to me that, rather than a discretionary determination subject to review on appeal for abuse of discretion, the issue of whether the trial court adequately complied with the provisions of N.C.G.S. § 15A-1201(d)(1) is a question of law subject to de novo review. *In re Adoption of S.D.W.*, 367 N.C. 386, 391 (2014) (stating that, "[w]hen constitutional rights are implicated, the appropriate standard of review is de novo"); *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348 (2001) (stating that "[w]e review constitutional questions de novo"). In addition, the fact that defendant understood and appreciated the consequences of waiving his right to a trial by jury at the guilt-innocence phase of a trial is no substitute for compliance with the requirement of N.C.G.S. § 15A-1201(d)(1) at the beginning of a proceeding held to determine whether defendant had attained habitual felon status given that a habitual felon proceeding is an ancillary proceeding conducted separately from the guilt-innocence portion of a criminal action for the purpose of determining whether the punishment inflicted upon defendant should be enhanced based upon his prior record, *State v. Cheek*, 339 N.C. 725, 727 (1995) (stating that "the habitual felon indictment is necessarily ancillary to the indictment for the substantive felony"), that involves different issues and the making of different legal, factual, and evidentiary judgments as compared to those that have to be made in a proceeding conducted for the purpose of determining a defendant's guilt or innocence. Similarly, the fact that defendant executed a written waiver of his right to a jury trial is simply not a substitute for actual compliance with the relevant statutory requirements. *State v. Sinclair*, 301 N.C. 193, 199 (1980) (stating that "[n]either does the [t]ranscript of [p]lea itself provide a factual basis for the plea"); *State v. Evans*, 153 N.C. App. 313, 315 (2002) (stating that "[t]he execution of a written waiver is no substitute for compliance by the trial court with the statute") (cleaned up); *State v. Wells*, 78 N.C. App. 769, 773 (1986) (stating that "[a] written waiver of counsel

is no substitute for actual compliance by the trial court with [N.C.]G.S. [§] 15A-1242"). Finally, as I have already noted, the fact that defendant's trial counsel spoke with defendant and informed the trial court that defendant did not wish to have a jury trial at the habitual felon phase of the proceeding cannot be equated with compliance with the actual requirement set out in N.C.G.S. § 15A-1201(d)(1), which requires that the trial court, rather than the defendant's counsel, be personally satisfied that the defendant fully understands and appreciates the consequences of a decision to waive his or her right to a trial by jury.

¶ 27 The approach to compliance with N.C.G.S. § 15A-1201(d)(1) that the Court upholds in this case cannot be squared with the manner in which the similar language relating to a waiver of the right to counsel set out in N.C.G.S. § 15A-1242 has consistently been construed by this Court. As we stated more than three decades ago in the waiver of counsel context, "[i]t is the trial court's duty to conduct the inquiry of defendant to ensure that defendant understands the consequences of his decision," *State v. Pruitt*, 322 N.C. 600, 604 (1988), with a trial court not being allowed to assume that a criminal defendant fully understands and appreciates the nature and extent of his or her right to the assistance of counsel, *State v. Bullock*, 316 N.C. 180, 186 (1986) (stating that nothing in the statute governing the waiver of a defendant's right to counsel "makes it inapplicable to defendants who are magistrates, or even attorneys or judges"). For that reason, in the event that a criminal defendant wishes to waive his right to counsel, the trial court is required by N.C.G.S. § 15A-1242 to "conduct an inquiry to ascertain that the defendant's waiver is given with full understanding of his rights," *Bullock*, 316 N.C. at 185, with "a bench conference with counsel [being] insufficient to satisfy the mandate of the statute," *Pruitt*, 322 N.C. at 604;[1] *see also State v. Moore*, 362 N.C. 319, 322 (2008) (noting that "it appears that [the trial court] deferred to defendant's assigned counsel to provide defendant with adequate constitutional safeguards" in granting the defendant a new trial based upon

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1. Although the trial court in his case did, at least initially, make inquiry of defendant before allowing defendant's trial counsel to converse with defendant and then indicate defendant's "comfort" with a bench trial at his habitual felon proceeding, while all of the interactions at issue in *Pruitt* occurred between the trial court and the defendant's trial counsel, there is no material difference between the two cases given that, in both instances, all of the substantive communications relating to the extent to which defendant understood and appreciated the consequences of a decision to waive the right to either a jury trial or to the assistance of counsel occurred between the defendant and his trial counsel rather than between defendant and the trial court and given that the expression of the defendant's decision to forgo the assistance of counsel or a jury trial came in the form of a statement by the defendant's trial counsel.

the trial court's failure to adequately comply with N.C.G.S. § 15A-1242 prior to allowing the defendant to represent himself). As a result of my inability to see why more relaxed procedures should be allowed in the waiver of a jury trial context than in the waiver of counsel context, I am concerned that the Court's decision to allow the use of the procedures employed here in the waiver of jury trial context will bleed over into the waiver of counsel and other contexts where similar procedures have, to this point, been deemed entirely insufficient.[2]

¶ 28 The trial court's failure to comply with N.C.G.S. § 15A-1201(d)(1) before allowing defendant to waive his right to a jury trial with respect to the habitual felon phase of the proceeding resulted in a deprivation of defendant's constitutional right to trial by jury.[3] This Court has consistently

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2. The fact that the language of N.C.G.S. § 15A-1201 differs from the language of N.C.G.S. § 1242 cuts in favor of, rather than against, the argument made in the text in reliance upon N.C.G.S. § 15A-1242. Although N.C.G.S. 15A-1201(d) requires "the trial judge" to comply with N.C.G.S. § 15A-1201(d)(1) (instructing the trial court to "[a]ddress the defendant personally and determine whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury"), N.C.G.S. § 15A-1242 requires that "the trial judge make[ ] thorough inquiry" and be "satisfied that the defendant" has been advised of and understands his or her right to the assistance of counsel, comprehends the effect of a decision to represent himself or herself, and is cognizant of the nature of the charges that have been lodged against him or her and "the range of permissible punishments." In other words, while the language of N.C.G.S. § 15A-1242 requires the trial court to conduct a "thorough inquiry," the language of N.C.G.S. § 15A-1201(d)(1) requires the trial court to "[a]ddress the defendant personally" and make sure that the defendant understands what he or she is proposing to do. Thus, since N.C.G.S. § 15A-1201(d)(1) explicitly requires personal interaction between the trial court and the defendant while N.C.G.S. § 15A-1242, in so many words, does not, it seems to me that the personal contact between the trial court and the defendant that is lacking in this case is more clearly required by N.C.G.S. § 15A-1201(d)(1) than by N.C.G.S. § 15A-1242. As a result, to the extent that the relatively slight difference between the language in which N.C.G.S. § 15A-1201(d)(1) and N.C.G.S. § 15A-1242 are couched suggests that the level of involvement required of the trial court in these two situations can appropriately be different (and I do not, personally, believe that such a difference is contemplated by the relevant statutory language), it seems to me that more direct trial court involvement is required by the literal language of N.C.G.S. § 15A-1201(d)(1) than is required by the literal language of N.C.G.S. §15A-1242.

3. The ultimate issue before us in this case is not whether the trial court failed to consent to defendant's waiver of his right to a trial by jury. Instead, the issue that is before us in this case is whether the trial court properly "determine[d] whether the defendant fully understands and appreciates the consequences of the defendant's decision to waive the right to trial by jury." N.C.G.S. § 15A-1201(d)(1). As a result of the fact that a defendant's waiver of the right to trial by jury must, as a constitutional matter, be obtained "subject to procedures prescribed by the General Assembly," N.C. Const. art. I, § 24, a failure to the part of the trial court to adequately comply with the procedures enunciated in N.C.G.S. § 15A-1201(d)(1) does, in fact, work a constitutional violation. And defendant did, by arguing in his brief that "[t]he Court of Appeals erred by concluding that [defendant] knowingly and voluntarily waived his constitutional right to a jury trial on habitual felon status because the Court of Appeals' conclusion disregards the plain language of N.C.G.S. § 15A-1201(d)(1)

held that "the deprivation of a properly functioning jury may be a constitutional violation," *State v. Hamer*, 377 N.C. 502, 507, 2021-NCSC-67 ¶ 16; *see State v. Lawrence*, 365 N.C. 506, 514 (2012); *State v. Poindexter*, 353 N.C. 440, 444 (2001); *State v. Bunning*, 346 N.C. 253, 257 (1997); *State v. Hudson*, 280 N.C. 74, 80 (1971), which constitutes "error per se," an error which, "[l]ike structural error," "is automatically deemed prejudicial and thus reversible without a showing of prejudice." *Lawrence*, 365 N.C. at 514. Although this Court concluded that "the failure of the trial court to conduct an inquiry pursuant to the procedures set forth in N.C.G.S. § 15A-1201(d) is [solely] a statutory violation," *Hamer*, ¶ 16, I persist in my inability to understand how the violation of a statutory requirement with which the trial court must, according to the relevant constitutional language, comply as a prerequisite for finding the existence of a constitutionally valid waiver of the right to trial by jury can be anything other than a constitutional violation as well.[4] Nonetheless, even if one were to conclude, in accordance with *Hamer*, that a showing of prejudice is required in instances in which a trial court fails to comply with the requirements set out in N.C.G.S. § 15A-1201(d)(1), I am inclined to believe that, on the basis of the facts revealed in the present record, there is "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises," N.C.G.S. § 15A-1443(a) (2019), given the fundamental uncertainty arising from the trial court's failure to ascertain from defendant whether he knowingly and voluntarily waived his right to a trial by jury with respect to the habitual felon phase of the proceeding, the absence of any indication of what defendant's trial counsel advised defendant to do or not to do, the absence of any information concerning the nature and extent of any defenses that defendant might have been able to assert against the habitual felon allegation, and the trial court's repeated assertions that defendant had pleaded guilty to, rather than having been convicted of, having attained habitual felon status.[5]

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and is premised on a fundamentally flawed legal analysis that directly conflicts with this Court's precedent," clearly assert that a constitutionally-prohibited deprivation of his right to a trial by jury had occurred in this case.

4. On the basis of similar logic, this Court has held that a failure to comply with N.C.G.S. § 15A-1242 results in the violation of a defendant's constitutional right to the assistance of counsel even though the language of N.C.G.S. § 15A-1242 has not been incorporated into the constitutional provisions guaranteeing a defendant's right to the assistance of counsel. *Moore*, 362 N.C. at 322 (stating that "[a] trial court's inquiry will satisfy this constitutional requirement if conducted pursuant to N.C.G.S. § 15A-1242").

5. The fact that the State introduced three certified judgments showing that the defendant had been convicted of committing qualifying felony offenses and that the defendant had failed to present evidence cannot be sufficient, standing alone, to preclude a

¶ 29 Thus, for all of these reasons, I would hold that the trial court failed to comply with the requirements of N.C.G.S. § 15A-1201(d)(1) at the time that it allowed defendant to waive his right to trial by jury in connection with the habitual felon stage of this case and that the trial court's error prejudiced defendant. As a result, I respectfully dissent from the Court's decision in this case and would, instead, reverse the Court of Appeals' decision with respect to the waiver issue and remand this case to the Court of Appeals for further remand to the trial court with instructions that defendant be resentenced following a new trial with respect to the habitual felon allegation.

Justices HUDSON and EARLS join in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
MARK BRICHIKOV

No. 41A22

Filed 16 December 2022

Homicide—jury instructions—lesser-included offense—involuntary manslaughter—malice—prejudice analysis

In defendant's murder prosecution for the death of his wife, the trial court erred by declining defendant's request to instruct the jury on the lesser-included offense of involuntary manslaughter because, when viewed in the light most favorable to defendant, the evidence permitted the rational conclusion that he acted with culpable negligence in assaulting his wife and leaving her in their motel room while she suffered a drug overdose or heart attack—but that he acted without malice. The error was prejudicial where the jury's only options were to convict defendant of murder or acquit him, and where the jury asked to review certain evidence that could have supported a finding of involuntary manslaughter.

Justice BERGER dissenting.

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finding of prejudice given that such logic impermissibly conflates the prejudice inquiry with the sufficiency of the evidence inquiry and overlooks the fact that, even in habitual felon proceedings, a jury is still required to make credibility judgments.

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

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 281 N.C. App. 408, 2022-NCCOA-33, vacating a judgment entered on 11 December 2019 by Judge Rebecca W. Holt in Superior Court, Wake County, and holding that defendant was entitled to a new trial. Heard in the Supreme Court on 5 October 2022.

Joshua H. Stein, Attorney General, by Marc X. Sneed, Special Deputy Attorney General, for the State-appellant.

M. Gordon Widenhouse, Jr. for defendant-appellee.

MORGAN, Justice.

¶ 1 The appeal in this homicide case raises the sole issue of whether the trial court committed prejudicial error by declining to deliver defendant's requested jury instruction on involuntary manslaughter. We hold that the evidence, viewed in the light most favorable to defendant, was sufficient to require the trial court to submit defendant's requested instruction to the jury and that this error prejudiced defendant because there was a reasonable possibility that a different result would have been reached if the jury had been so instructed. Accordingly, we affirm the decision of the Court of Appeals, vacating the trial court's judgment and granting defendant a new trial.

I. Procedural and Factual Background

¶ 2 Defendant was indicted by a grand jury for the criminal offense of first-degree murder in connection with the death of his wife, Nadia Brichikov, following her death on 22 April 2018. Defendant pleaded not guilty. A jury trial was held beginning 2 December 2019 before the Honorable Rebecca W. Holt in Superior Court, Wake County. The State elicited evidence through the testimony of fifteen witnesses. Defendant did not testify on his own behalf but did call two witnesses to establish his defense.

¶ 3 The evidence presented at trial tended to show the following: On 21 April 2018, defendant arranged to meet his wife, Mrs. Brichikov, at the Knights Inn motel in Raleigh. The Knights Inn was known by local law enforcement as a bustling location for criminal activity and illicit drug use. Defendant and Mrs. Brichikov both suffered from extensive

histories of drug addiction. Mrs. Brichikov had been a regular user of marijuana, powder cocaine, and crack cocaine since at least the 1990s. Over time, her addiction worsened, and her drug use became an "all the time thing." Although Mrs. Brichikov had tried to end her drug use after having a son with her first husband in 2007, she "just couldn't kick it." Mrs. Brichikov's mother also told detectives that her daughter was addicted to heroin and frequently subject to arrest by law enforcement. Mrs. Brichikov and defendant first met at a session of Narcotics Anonymous or Alcoholics Anonymous. They were married in 2015 and continued to purchase and use drugs together afterward.

¶ 4 Defendant had just been released from the recovery and addiction treatment center known as The Healing Place, and Mrs. Brichikov was recovering from an opioid overdose that she had experienced on the previous day, when defendant arranged to rendezvous with his wife on 21 April 2018. Mrs. Brichikov's overdose required the administration of the medication Narcan to her by emergency medical personnel to revive her after a fall which had led to a significant wound to the back of her head which required staples to close. Mrs. Brichikov had also been recently arrested for possession of methamphetamines and was released from jail on 18 April 2018 after agreeing to act as a confidential police informant. Defendant and his wife exchanged text messages expressing their love for, and promising their fidelity to, one another leading up to their meeting on 21 April 2018. Defendant also urged his wife to avoid using drugs, as he would be "sad to lose" her. Despite promising her loyalty to defendant, however, Mrs. Brichikov had been residing with Clay Trott, a man who provided her with money, rides, and a place to stay in exchange for sexual favors, prior to and immediately following her 20 April 2018 overdose. At trial, Trott identified Mrs. Brichikov as his girlfriend.

¶ 5 On 21 April 2018, defendant and Mrs. Brichikov met in Room 241 at the Knights Inn in Raleigh. Mrs. Brichikov checked into the room at 1:57 p.m. and defendant arrived at the Knights Inn at or around 10:30 p.m. Between 11:14 p.m. and 11:17 p.m., Mrs. Brichikov sent text messages to a contact saved as "Knight1," stating that defendant was "acting stupid," calling defendant a "[s]tupid crackhead," and claiming that she had had to "kick him out of [her] room." Between 3:15 a.m. and 3:17 a.m., Mrs. Brichikov made outgoing cellular telephone calls to contacts saved in her telephone directory as "Royalty Royalty" and "Julio New" which lasted a little over a minute each.

¶ 6 Motel surveillance video footage showed defendant exiting Room 241 at approximately 1:13 a.m. on 22 April 2018, wearing an "orangeish-brown"

hooded sweatshirt and white shorts, and walking toward a nearby Exxon gas station. Video footage from the gas station showed defendant purchasing alcohol there and then approaching the passenger side of a red truck in the parking lot. Detective Kelly Kinney, who reviewed the footage and testified about it at trial, opined that this interaction was an illegal drug transaction. Motel video footage then showed defendant reentering Room 241 at approximately 1:35 a.m. with a black plastic bag in his hand. Defendant exited the motel room again at 3:20 a.m. to go back toward the Exxon gas station, then returned and reentered Room 241 at 3:25 a.m.; the video footage showed Mrs. Brichikov standing at the motel room door and letting defendant back into the room. Between 3:29 a.m. and 3:43 a.m., the same action occurred. Mrs. Brichikov exited the room to smoke a cigarette at 3:34 a.m. and reentered with defendant at 3:43 a.m.

¶ 7 No one left or entered Room 241 again until 4:09 a.m., at which point defendant exited the room for the last time, leaving the door open to reveal Mrs. Brichikov lying on the floor with her arm moving back and forth. Defendant walked upstairs to the next level of the motel and knocked on at least two different motel room doors without receiving a response. Defendant briefly entered Room 341—the room directly above Room 241—before going back downstairs, jumping over a wall, and walking toward the front of the motel and out of the sight of the camera. At this point, defendant was wearing a black long-sleeve shirt and green boxer shorts while carrying an orange-brown hooded sweatshirt with him. Defendant then took his employer's truck, along with two iPad electronic tablets and his employer's credit card, and left for Wilmington, North Carolina. Defendant was later arrested in Wilmington.

¶ 8 At or around 5:00 a.m. on 22 April 2018, law enforcement officers were dispatched to Room 241 at the Knights Inn motel. Officer Gregory Modetz, who testified at trial, responded to the dispatch and arrived to find Mrs. Brichikov lying in the doorway. Her face had been "badly beaten and bloodied"; her tank top and bra had been pulled up to her neck, exposing her chest and abdomen; and she did not appear to be breathing. Officer Modetz summoned members of the fire department to determine if Mrs. Brichikov had a pulse; she did not. Law enforcement officers discovered a glass crack cocaine pipe and twenty-dollar bills in the room. Defendant's wallet containing his identification, permanent resident card, credit card, and Social Security card was recovered on the same table as the crack pipe. A motel ice bucket was found containing loose hypodermic needles, cotton balls, alcohol preparation pads, bandages, two unused Narcan nasal sprays, small metal bowls commonly used for mixing illegal drugs, and long rubber bands commonly used for

injecting intravenous drugs. Two more long rubber bands were found in the motel room's trash can. No weapons were found inside the room.

¶ 9 Agent Tracy Tremlett of the City-County Bureau of Identification (CCBI) testified at trial that she had also examined the room for evidence. She noted the presence of alcohol and white powder residue which appeared to be cocaine. To Agent Tremlett, the scene portrayed a struggle: furniture including the bed, side table, and a sitting chair had been moved, and Mrs. Brichikov's body was "entwined" with a chair. The agent noted smears or wipe marks through the blood stains on the motel room's floor, indicating movement consistent with a struggle. Four of Mrs. Brichikov's teeth had been knocked out. A chemical reagent designed to interact with trace amounts of blood not visible to the naked eye indicated the presence of blood in and around the motel room's sink and on a motel towel and washcloth. CCBI recovered from Room 241 a pair of red-stained white Hype shorts with "MB" written on the waistband and an orange hooded sweatshirt from the bushes outside of the room.

¶ 10 Defendant and the State both retained medical experts to testify. Dr. Craig Nelson, who performed Mrs. Brichikov's autopsy, testified on behalf of the State that the majority of blood on Mrs. Brichikov was on her face, appearing to have emanated from her nose and mouth. Dr. Nelson noted Mrs. Brichikov's stapled laceration of the head, stating that it was consistent with the injuries accompanying her opioid overdose on 20 April 2018. She had slight intracranial bleeding, which had not been found by the CT[1] scan performed on her after her prior overdose. Dr. Nelson also noted numerous blunt force injuries on Mrs. Brichikov's face, neck, torso, and extremities, including fractures of her nose, cheekbones, and jaw. She had lacerations and a massive hematoma on her face, blood inside of her nose and mouth, and numerous absent or broken teeth that had appeared to be in poor dental repair prior to her death. Blood was not found inside of her lungs, esophagus, or stomach. There were bite marks on her torso and numerous marks at various stages of healing on her right arm consistent with intravenous drug use. Her upper chest and abdomen had "dirt-soiled adhesive" residue indicating a recent removal of electrocardiogram pads.

¶ 11 Dr. Nelson's autopsy also revealed atherosclerosis of Mrs. Brichikov's heart, including a narrowing of the middle portion of one of the major arteries of her heart by 80%. Dr. Nelson testified that a narrowing of 75%

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1. "CT" is an abbreviated reference for the term "computerized tomography."

or more is associated with sudden death. He opined that this condition was at least a "component of her death" since "the combination of a hard-working heart in a struggle, as well as that narrow coronary artery, is a setup for the heart to have a sudden irregular beat and stop." Additionally, Mrs. Brichikov's toxicology report revealed the presence of both cocaine and fentanyl, as well as the cocaine metabolites cocaethylene and benzoylecgonine, within her system. Dr. Nelson recognized that this likely played a role in her death as well. The doctor concluded that the totality of the drug use, Mrs. Brichikov's heart disease, and defendant's assault resulted in her death. He was unable to conclude whether she would have died in the absence of any one of these factors.

¶ 12 Dr. Jonathan Privette testified on behalf of defendant, opining that the "most suitable explanation for [Mrs. Brichikov's] immediate cause of death was the drugs that she had in her system, the fentanyl and the cocaine." Dr. Privette testified that, in his experience, Mrs. Brichikov would have survived the facial injuries inflicted by defendant if she had not had fentanyl in her system. Dr. Privette also testified that Mrs. Brichikov's movements on the floor when defendant exited Room 241 for the last time were consistent with a fentanyl overdose, but he could not exclude the possibility that she had suffered a heart attack since such an event could have been triggered by either Mrs. Brichikov's drug use or defendant's assault and would be difficult to detect postmortem. He also concluded that the superficial bruises and contusions on Mrs. Brichikov's neck were consistent with her practice of injecting drugs in that region of her body.

¶ 13 The State called Dr. Dana Copeland to testify in rebuttal. Dr. Copeland agreed with Dr. Nelson that the proximate cause of Mrs. Brichikov's death was blunt force trauma, not drug toxicity; specifically, Dr. Copeland concluded that Mrs. Brichikov died from a trauma-induced heart attack, to which the presence of cocaine and fentanyl in her system as well as her head injury significantly contributed. Dr. Copeland disagreed with Dr. Privette that Mrs. Brichikov's final movements were consistent with an opioid overdose. Finally, Dr. Copeland testified that the bruising on Mrs. Brichikov's neck was consistent with an effort to strangle her and attributed greater significance to her above-average brain weight than either Drs. Nelson or Privette, while concluding that she had suffered a substantial enough intracranial injury from the assault to contribute to her confusion or a likely concussion. All three doctors agreed that, in their experience, the levels of fentanyl and cocaine in Mrs. Brichikov's system were capable of causing death in at least some drug users.

¶ 14 During the jury charge conference after both sides had concluded their respective case presentations, defendant conceded to his assault of Mrs. Brichikov and gave permission to his attorney to admit the assault during closing arguments. However, defense counsel requested that the trial court issue jury instructions on voluntary and involuntary manslaughter. Specifically, defense counsel requested an instruction on involuntary manslaughter under a theory of negligent omission—that Mrs. Brichikov may have died as a result of defendant's negligent failure to render or obtain medical aid for her overdose. After the trial court went through the instruction for second-degree murder with the parties, the trial court verified with defense counsel:

> THE COURT: All right. So this [instruction] does include at the end of the second-degree, "If you do not find the defendant guilty of second-degree murder, you must determine whether the defendant is guilty of involuntary manslaughter," and . . . "First that the defendant acted in a criminally negligent way" is what you're requesting?
>
> [DEFENSE COUNSEL]: Yes, Your Honor.

¶ 15 The North Carolina Pattern Jury Instruction for "Second Degree Murder Where a Deadly Weapon Is Used, Not Including Self-Defense, Covering All Lesser Included Homicide Offenses" contains the following instruction on involuntary manslaughter as a lesser-included offense of second-degree murder:

> Involuntary manslaughter is the unintentional killing of a human being by an unlawful act not amounting to a felony, or by an act done in a criminally negligent way.
>
> For you to find the defendant guilty of involuntary manslaughter, the State must prove two things beyond a reasonable doubt:
>
> First, that the defendant acted a) [unlawfully] (or) b) [in a criminally negligent way]. a) [The defendant's act was unlawful if (*define crime e.g. defendant recklessly discharged a gun, killing the victim*).] b) [Criminal negligence is more than mere carelessness. The defendant's act was criminally negligent, if, judging by reasonable foresight, it was done with such gross recklessness or carelessness as to amount

> to a heedless indifference to the safety and rights of others.]
>
> And Second, the defendant's [unlawful] (or) [criminally negligent] act proximately caused the victim's death.

N.C.P.I.—Crim. 206.30A (2019) (alterations in original).

¶ 16 The trial court instructed the jury on the crimes of first-degree murder and second-degree murder, as well as the possibility of finding the defendant not guilty. The trial court did not issue instructions on the crimes of voluntary manslaughter or involuntary manslaughter. On the charge of second-degree murder, the trial court instructed the jury that:

> Second-degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation. Second-degree murder differs from first-degree murder in that the State need not prove a specific intent to kill, premeditation, deliberation or that the killing was committed in the perpetration of a felony.
>
> In order for you to find the defendant guilty of second-degree murder, the State must prove beyond a reasonable doubt that the defendant acted—let me start over. In order for you to find the defendant guilty of second-degree murder, the State must prove beyond a reasonable doubt that the defendant intentionally and with malice wounded the victim with a deadly weapon thereby proximately causing the victim's death.
>
> If the State proves beyond a reasonable doubt that the defendant intentionally inflicted a wound upon the victim with a deadly weapon that proximately caused the victim's death, you may infer, first, that the killing was unlawful and, second, that it was done with malice, but you are not compelled to do so. You may consider the inferences along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice. If the killing was unlawful and was done with malice, the defendant would be guilty of second-degree murder.

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally and with malice wounded the victim with a deadly weapon and that this proximately caused the victim's death, it would be your duty to return a verdict of guilty of second-degree murder. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

¶ 17 On the issue of malice, the trial court charged the jury that:

> Malice means not only hatred, ill will or spite, as it is ordinarily understood—to be sure, that is malice—but it also means that condition of mind that prompts a person to take the life of another intentionally or to intentionally inflict a wound with a deadly weapon upon another which proximately results in her death, without just cause, excuse or justification.

¶ 18 This language largely conforms with the pattern jury instruction for "Second Degree Murder Where a Deadly Weapon Is Used, Not Including Self-Defense, Covering All Lesser Included Homicide Offenses," which defines malice as:

> [N]ot only hatred, ill will, or spite, as it is ordinarily understood-to be sure, that is malice-but [it also means that condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict serious bodily harm which proximately results in another's death, without just cause, excuse or justification.] [malice also arises when an act which is inherently dangerous to human life is intentionally done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief].

N.C.P.I.—Crim. 206.30A.

¶ 19 Defendant objected, first during the jury charge conference and again prior to the reading of the jury's verdict, to the trial court's failure to submit instructions on voluntary manslaughter and involuntary manslaughter as options to the jury.

¶ 20 At the conclusion of defendant's trial on 11 December 2019, the jury returned a verdict of guilty of second-degree murder after more than

five hours of deliberation. While deliberating, the jury asked to review Mrs. Brichikov's autopsy and toxicology reports, records concerning the duration of defendant's stay at The Healing Place, and Mrs. Brichikov's and defendant's cellular telephone records. During the sentencing phase of defendant's trial, the jury found three aggravating factors: that (1) his offense was especially heinous, atrocious, or cruel; (2) he was in willful violation of a condition of parole or post-release supervision; and (3) he had taken advantage of a position of trust or confidence in order to commit his offense. The trial court sentenced defendant to a minimum term of incarceration of 338 months and a maximum term of 418 months. Defendant appealed to the Court of Appeals, arguing that the trial court had erred by failing to submit to the jury his requested jury instruction on involuntary manslaughter since the jury could have found that he had assaulted his wife in a culpably negligent manner or that his failure to render aid to her was a culpably negligent omission.

¶ 21 In an opinion filed on 18 January 2022, *State v. Brichikov*, 281 N.C. App. 408, 2022-NCCOA-33, a divided panel of the Court of Appeals vacated defendant's conviction and remanded his matter for a new trial. The majority first dispensed of defendant's negligent omission theory since the pattern jury instruction on involuntary manslaughter does not address negligent omissions and thus he would have had to submit his request for the instruction in writing for the trial court's failure to give such an instruction to be considered error. *Brichikov*, ¶ 17; *see also State v. McNeill*, 346 N.C. 233, 240 (1997); *State v. Martin*, 322 N.C. 229, 237 (1988). However, the lower appellate court ultimately held that defendant was entitled to a pattern jury instruction on the lesser-included offense of involuntary manslaughter under a theory of negligent action since the evidence, viewed in the light most favorable to defendant, tended to negate the "malice" element of second-degree murder and because there was a reasonable possibility that a different result would have been reached at trial if this instruction had been given. *Brichikov*, ¶¶ 31, 35.

¶ 22 The dissenting judge of the Court of Appeals panel disagreed that the trial court's failure to render an instruction on involuntary manslaughter amounted to prejudicial error. Specifically, the dissent took an opposing view on the "issue of whether the trial court's refusal to grant defendant's request for a lesser-included instruction on involuntary manslaughter contained in the pattern jury instructions was error" because, from "the jury finding beyond a reasonable doubt that this offense was especially heinous, atrocious, or cruel as an aggravating factor, it appears clear that the verdict would not have been different had the trial

judge given the lesser included involuntary manslaughter instruction." *Brichikov*, ¶ 39 (Carpenter, J., dissenting).

¶ 23 The State filed a timely notice of appeal pursuant to N.C.G.S. § 7A-30(2) based upon the dissent filed in the lower appellate court's consideration of this matter. Since no petitions for discretionary review have been allowed in this matter, we therefore limit our review to those issues raised by the dissent: whether the trial court erred by declining to issue a pattern jury instruction on involuntary manslaughter and whether this error was prejudicial in light of the jury's finding that defendant's offense was "especially heinous, atrocious, or cruel."

II. Analysis

¶ 24 "The jury charge is one of the most critical parts of a criminal trial." *State v. Walston*, 367 N.C. 721, 730 (2014). When a "defendant's request for [an] instruction [is] correct in law and supported by the evidence in the case, the trial court [is] required to give the instruction, at least in substance." *State v. Shaw*, 322 N.C. 797, 804 (1988) (citing *State v. Howard*, 274 N.C. 186, 199 (1968)). For over a century, we have held, specifically, that "when there is evidence tending to support a verdict of guilty of an included crime of lesser degree than that charged," the trial court "must instruct the jury that it is permissible for them to reach such a verdict if it accords with their findings." *State v. Hicks*, 241 N.C. 156, 160 (1954) (citing *State v. Jones*, 79 N.C. 630, 631 (1878) ("It was [defendant's] privilege to have the State's evidence applied to any theory justified by it . . . . This right he demanded in his prayer for instructions which ought to have been given.")).

¶ 25 In order to be granted a new trial for the trial court's failure to instruct the jury on a lesser-included offense, a criminal defendant must demonstrate that there was evidence presented at trial that, viewed in the light most favorable to the defendant, would permit a rational jury to acquit the accused of the greater charge and convict him or her of the lesser offense. Upon reviewing the trial record, we agree that there was sufficient evidence adduced at defendant's trial to permit a rational jury to acquit him of second-degree murder and to convict him of involuntary manslaughter. We further hold that there was a reasonable possibility that the jury would have acquitted defendant of the greater offense and convicted him of the lesser offense in the event that both instructions had been given to the jury. Accordingly, we affirm the decision of the Court of Appeals.

¶ 26 We begin by observing that the dissenting judge at the Court of Appeals wed the dissent's view that the trial court did not commit error

in the present case to the dissent's position that the verdict would not have been different had an instruction on involuntary manslaughter been given by concluding that the dissent "would find no error in the trial court's decision to decline to deliver an instruction to the jury on involuntary manslaughter *because* the jury's verdict would not have been different had the instruction been given." *Brichikov*, ¶ 44 (Carpenter, J., dissenting) (emphasis added). However, since the dissenter on the Court of Appeals panel paid some tribute to the Court of Appeals majority's position on the element of malice and since the analyses for error and prejudice overlap significantly in this area of law, we shall discuss both aspects in turn in order to develop our appreciation for the ultimate issue before us: whether there was a reasonable possibility that the jury might have convicted defendant of involuntary manslaughter as opposed to second-degree murder, if the jury had been instructed on both offenses.

¶ 27 "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561 (2002) (citing *State v. Conaway*, 339 N.C. 487, 514). "It is well settled that a defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternate verdicts. On the other hand, the trial court need not submit lesser degrees of a crime to the jury when the State's evidence is positive as to each and every element of the crime charged *and there is no conflicting evidence relating to any element of the charged crime*." *State v. Drumgold*, 297 N.C. 267, 271 (1979) (extraneity omitted). "The determinative factor is what the State's evidence tends to prove. If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense . . . and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of [the lesser-included offense]." *State v. Strickland*, 307 N.C. 274, 293 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193 (1986).

¶ 28 We exercise review here in order to determine whether the State provided sufficient evidence to fully satisfy its burden of proving each element of second-degree murder beyond a reasonable doubt and if any other evidence tended to negate those elements when viewed in the light most favorable to defendant. Specifically, we focus on the element of malice since involuntary manslaughter is "the unlawful and unintentional killing of another *without malice* which proximately results from

an unlawful act not amounting to a felony nor naturally dangerous to human life, or by an act or omission constituting culpable negligence." *Johnson*, 317 N.C. at 205 (emphasis added). Malice can be shown in at least three ways: (1) actual malice, a "positive concept of express hatred, ill-will or spite"; (2) an act inherently dangerous to human life that is "done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief"; or (3) "that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification." *State v. Reynolds*, 307 N.C. 184, 191 (1982) (extraneity omitted).

¶ 29 First, we note that "an instruction to the jury that the law implies malice and unlawfulness from the intentional use of a deadly weapon proximately resulting in death is not a conclusive irrebuttable presumption." *State v. Holder*, 331 N.C. 462, 487 (1992). "When the killing with a deadly weapon is admitted . . . two presumptions arise: (1) that the killing was unlawful; (2) that it was done with malice; and an unlawful killing with malice is murder in the second degree." *State v. Fisher*, 318 N.C. 512, 525 (1986) (quoting *State v. Gordon*, 241 N.C. 356, 358 (1955)). This presumption is only mandatory, however, in the sense that, the "defendant, to avoid its effect, must produce some evidence raising an issue on the existence of malice and unlawfulness or rely on such evidence as the state may have adduced. *In the presence of evidence raising such issues, the presumption disappears altogether, leaving only a permissible inference which the jury may accept or reject.*" *Reynolds*, 307 N.C. at 190 (emphasis added). Here, the trial court properly instructed the jury that it could, but was not compelled to, infer malice from the fact that defendant intentionally inflicted a wound upon his victim Mrs. Brichikov with a deadly weapon in the form of his hands.

¶ 30 In the alternative, the State contends that defendant's actions were "inherently dangerous and done in [such] a fashion that had no regard for human life or social duty" and thus satisfy the second theory of malice. However, the "distinction between 'recklessness' indicative of murder and 'recklessness' associated with manslaughter is one of degree rather than kind." *State v. Rich*, 351 N.C. 386, 393 (2000) (extraneity omitted). The criminal negligence required to support a charge of involuntary manslaughter "is something more than actionable negligence in the law of torts; it is such recklessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." *State v. Massey*, 271 N.C. 555, 557 (1967) (extraneity omitted). Defendant's acts, viewed in the light most favorable to him, squarely meet the standard for criminal

negligence, but do not conclusively rise to the degree of recklessness evincing an utter disregard for human life or a mind deliberately bent on mischief.

¶ 31 Indeed, the evidence adduced at defendant's trial permits a finding by a jury that he acted intentionally and recklessly in assaulting his wife, but without hatred, an intent to take Mrs. Brichikov's life, or "a mind utterly without regard for human life." *See Reynolds*, 307 N.C. at 191. Specifically, the jury heard testimony and received evidence that tended to show the following: that defendant and Mrs. Brichikov arranged to get together on 21 April 2018 after expressing love, concern, and fidelity for one another; that they consumed alcohol and opioids together over the course of several hours without any apparent violence between them; that something provoked a confrontation between them in the early hours of 22 April 2018; that defendant left the motel room after having assaulted his wife but before she had expired; that Mrs. Brichikov's movements when defendant exited the room for the last time were consistent with a fentanyl overdose; and that her death likely would not have occurred in the absence of her preexisting heart condition and state of intoxication.

¶ 32 Taken together, a rational juror could conclude that defendant had acted with culpable negligence in assaulting his wife and leaving her behind while she suffered a drug overdose or heart attack that was at least partially exacerbated by his actions, but that it was done without malice given the potentially volatile and drug-induced confrontation erupting between them in the twenty-six minutes between 3:43 a.m. and 4:09 a.m. and the unpredictability of Mrs. Brichikov's subsequent death. *See State v. Wilkerson*, 295 N.C. 559, 583 (1978) ("[A] mere assault which proximately results in death, but which does not indicate a total disregard for human life and is committed with no intent to kill or to inflict serious bodily injury, will support, at most, a verdict of involuntary manslaughter."). Because the evidence elicited by defendant was sufficient to support a verdict of involuntary manslaughter as the lesser-included offense of second-degree murder, the trial court erred by declining to issue a jury instruction on that offense.

¶ 33 Failure to submit a requested jury instruction on a lesser-included offense when one is warranted is generally reversible error. *See State v. Price*, 344 N.C. 583, 589 (1996) ("Our law states that when the court improperly fails to submit a lesser included offense of the offense charged, and the jury had only two options in reaching a verdict—guilty of the offense charged and not guilty—then a verdict of guilty of the offense charged is not reliable, and a new trial must be granted."). However, an

error does not require reversal unless it is found to be prejudicial under the harmless error analysis provided by N.C.G.S. § 15A-1443. For an error which does not arise under the Constitution of the United States, a criminal defendant bears the burden of demonstrating a "reasonable possibility" that had the error not been committed, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (2021). This is a non-exacting inquiry that considers, *inter alia*, the strength of the State's evidence supporting defendant's conviction and whether the jury's considerations tended to suggest that it may have been persuaded to adopt a different finding had it been given the excluded instruction. *See State v. Keller*, 374 N.C. 637, 649 (2020).

¶ 34 This Court finds no prejudicial effect for a trial court's failure to submit instructions on voluntary manslaughter or involuntary manslaughter in cases where both first-degree murder and second-degree murder instructions are submitted to the jury and the jury renders a verdict of first-degree murder based on premeditation and deliberation. *Price*, 344 N.C. at 590. However, where a jury convicts a criminal defendant of second-degree murder in the absence of an instruction on a lesser-included offense, appellate courts are *not* permitted to infer that there is no reasonable possibility that the jury would have convicted the defendant of the lesser-included offense on the basis of that conviction, *State v. Thacker*, 281 N.C. 447, 456 (1972). A jury may feel compelled to convict a criminal defendant of *some* offense in light of the gravity of the accused's admitted transgressions, especially in a case such as the one here. *See Keeble v. United States*, 412 U.S. 205, 212 (1973) ("Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction."); *State v. Thomas*, 325 N.C. 583, 599 (1989) (holding that a jury must "be permitted to consider whether [the] defendant was guilty of the lesser-included offense of involuntary manslaughter and not be forced to choose between guilty as charged or not guilty" where "almost all the evidence point[ed] to some criminal culpability on [the] defendant's part"). In the instant case, the jury had no option presented to it other than to either convict defendant of murder or to acquit him. Consequently, the trial court's failure to charge the jury on the crime of involuntary manslaughter cannot be found harmless as a result of the jury's verdict.

¶ 35 Likewise, we decline to infer from the jury's determination of the aggravating factor that defendant's offense was "especially heinous, atrocious, or cruel" that there is no reasonable possibility that it would have convicted him of involuntary manslaughter instead of second-degree

murder had it been instructed as to both offenses. The jury at defendant's trial found that his offense was "especially heinous, atrocious, or cruel" during the sentencing phase of his trial after having convicted him of second-degree murder. The trial court did not elaborate on the meaning or significance of such a finding. The State did not provide any additional evidence to support this finding, instead relying upon the evidence presented at trial establishing Mrs. Brichikov's significant facial injuries and the struggle portrayed by the crime scene. It is not as clear to us, as it was to the dissent at the lower appellate court, how the jury "gave substantially the same consideration to the evidence" in finding the presence of this aggravating factor "that it would have given in the determination of the presence of malice." *Brichikov*, ¶ 42 (Carpenter, J., dissenting).

¶ 36 Indeed, a criminal defendant can be both convicted of involuntary manslaughter *and* have his crime found to have been "especially heinous, atrocious, or cruel." *See, e.g.*, *State v. West*, 103 N.C. App. 1, 11–12 (1991); *State v. Shadrick*, 99 N.C. App. 354, 355–56 (1990). Since, as the Court of Appeals has held, "[i]nvoluntary manslaughter differs from second degree murder only in that malice is present in the latter but not the former," *State v. Allen*, 77 N.C. App. 142, 145 (1985), it necessarily follows that a finding that a criminal defendant committed a homicide offense in an especially heinous, atrocious, or cruel way does not require a finding that he acted with malice in bringing about his victim's death. As such, we do not believe that the jury's finding that defendant acted in an especially heinous, atrocious, or cruel way in the instant case serves as the jury's definite rejection of the evidence tending to undermine his conviction for second-degree murder. Rather, we discern that the jury could have found both that defendant had acted with especial heinousness, atrociousness, or cruelty in assaulting his wife *and* that he lacked malice in causing her subsequent death. We refuse to speculate about any insight the jury's findings at defendant's subsequent sentencing proceeding may give us into what the jury would have or would not have considered persuasive as to the element of malice prior to its rendition of the verdict in defendant's case.

¶ 37 We hold that the trial court's refusal to instruct the jury on the criminal offense of involuntary manslaughter was prejudicial error warranting reversal due to (1) the strength of the evidence tending to undermine the State's contention of malice, and (2) the jury's consideration of various factors, including Mrs. Brichikov's toxicology report and the record of her communications with defendant prior to their meeting on 21 April 2018, suggesting that it may have struggled with its decision to convict

defendant of murder and could have used such evidence to support a finding of involuntary manslaughter instead if the jury had been so instructed. We therefore conclude that there is a reasonable possibility that, had the jury been instructed on involuntary manslaughter, it would have returned a verdict of guilty of involuntary manslaughter rather than a verdict of second-degree murder.

III. Conclusion

¶ 38 In light of our determination that the trial court committed prejudicial error by declining defendant's request to issue a pattern jury instruction on involuntary manslaughter, we affirm the decision of the Court of Appeals, in which it vacated defendant's judgment and determined that defendant was entitled to a new trial.

AFFIRMED.

Justice BERGER dissenting.

¶ 39 The evidence at trial tended to show that Nadia Flores was beaten so badly that her face was "unrecognizable," and officers responding to the scene of her murder could not identify her body through photographs. Defendant admitted that he assaulted Ms. Flores.[1]

¶ 40 The medical examiner who performed the autopsy on Ms. Flores noted that she had "numerous blunt force injuries" and that she had a broken nose, broken zygomatic arches, and a broken jaw. Her injuries were so extensive that "the central portion of her face . . . could shift without moving the rest of the head," and the medical examiner "could feel bone grinding on bone as those fractures, those breaks, shifted against one another." In addition to the multiple broken bones in her face, Ms. Flores had lacerations to her head, a contusion, bruising to her neck, and bite marks on her back.

¶ 41 According to the medical examiner, Ms. Flores's injuries were the result of "substantial force" equivalent to a long-distance fall or car crash. The medical examiner testified that the "cause of death was physical assault, including blunt force injuries" with drug use and a cardiac event as contributing conditions. A forensic pathologist testified that the

1. Ms. Flores was initially identified as Nadia Natasha Brichikov. However, the medical examiner testified that he corrected "the name to Nadia Flores later by comparison of proper information given on the death certificate."

"primary cause" of Ms. Flores's death was "multiple blunt force trauma to face, head and neck" as a result of the assault. Defendant's own expert conceded that the effects of the assault contributed to Ms. Flores's death.

¶ 42 "Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation." *State v. Foust*, 258 N.C. 453, 458, 128 S.E.2d 889, 892 (1963). "An intent to inflict a wound which produces a homicide is an essential element of murder in the second degree." *State v. Williams*, 235 N.C. 752, 753, 71 S.E.2d 138, 139 (1952). "While an intent to kill is not a necessary element of murder in the second degree, that crime does not exist in the absence of some intentional act sufficient to show malice and which proximately causes death." *State v. Snyder*, 311 N.C. 391, 393, 317 S.E.2d 394, 395 (1984).

¶ 43 To the extent there was an error in the jury instructions, the error worked in defendant's favor. The jury should have been instructed that if it determined beyond a reasonable doubt that "defendant intentionally assaulted the deceased with his hands, fists, or feet, *which were then used as deadly weapons*, and that her death was a proximate result of his acts, then the law presumes malice and . . . defendant must be convicted of murder in the second degree." *State v. Lang*, 309 N.C. 512, 526–27, 308 S.E.2d 317, 324–25 (1983). "The effect of the presumption is to impose upon the defendant the burden of going forward with or producing some evidence of a lawful reason for the killing or an absence of malice." *State v. Simpson*, 303 N.C. 439, 451, 279 S.E.2d 542, 550 (1981). When a defendant produces no evidence that the killing was lawful or that it was committed without malice, the jury should be instructed that the defendant must be convicted of second-degree murder. *Lang*, 309 N.C. at 526, 308 S.E.2d at 324.

¶ 44 Both the Court of Appeals and the majority today misconstrue the effect of these mandatory presumptions. Controlling precedent from this Court dictates that once these presumptions arise, a burden is imposed on a criminal defendant to rebut these presumptions. In this case, defendant failed to produce any evidence to overcome these presumptions of unlawfulness and malice. In fact, defendant admitted that he assaulted Ms. Flores, and his own expert confirmed that Ms. Flores's death was nonaccidental and proximately caused by the assault.

¶ 45 Because defendant failed to rebut the mandatory presumption of malice, a properly instructed jury would have been compelled to find that defendant acted with malice if it found that defendant intentionally

assaulted the victim with his hands, which were used as deadly weapons, and that the victim's death was proximately caused by such an assault. The trial court instructed the jury only that an inference of unlawfulness and malice arose. This error by the trial court worked to defendant's advantage in that the jury had to deliberate and decide the issue of malice in the absence of the presumptions referenced above. The majority either inadvertently misses this step in its analysis, or it has implicitly overruled longstanding precedent.

¶ 46 Because "the State's evidence [wa]s positive as to each and every element of [second-degree murder] and there [wa]s no conflicting evidence relating to any element of the charged crime," *State v. Harvey*, 281 N.C. 1, 13–14, 187 S.E.2d 706, 714 (1972), the trial court was not required to instruct the jury on involuntary manslaughter.

¶ 47 Defendant's argument and the majority's discussion of involuntary manslaughter is misplaced. There is no evidence from which defendant was entitled to an instruction on the lesser offense because not only was malice presumptively established and not rebutted, but the evidence did not meet the elements of involuntary manslaughter. *See State v. Wallace*, 309 N.C. 141, 145, 305 S.E.2d 548, 551 (1983).

¶ 48 "Involuntary manslaughter is the unintentional killing of a human being without either express or implied malice (1) by some unlawful act not amounting to a felony or naturally dangerous to human life, or (2) by an act or omission constituting culpable negligence." *State v. Wilkerson*, 295 N.C. 559, 579, 247 S.E.2d 905, 916 (1978). Stated another way, the crime of involuntary manslaughter is committed "[w]here death results unintentionally, . . . from an unlawful act on his part not amounting to a felony, or from a lawful act negligently done." *Foust*, 258 N.C. at 459, 128 S.E.2d at 893 (quoting *State v. Hovis*, 233 N.C. 359, 365, 64 S.E.2d 564, 568 (1951)). "To constitute involuntary manslaughter, the homicide must have been without intention to kill or inflict serious bodily injury, and without either express or implied malice." *Id.*

¶ 49 The majority's focus on malice, though relevant, is not determinative in this case given defendant's intentional and felonious assault upon Ms. Flores.[2] Moreover, the majority's discussion of culpable negligence

2. Although not argued, defendant's assertions, and much of the majority's reasoning, appear to align more appropriately with the offense of voluntary manslaughter committed in a sudden heat of passion. *See State v. Rummage*, 280 N.C. 51, 56, 185 S.E.2d 221, 225 (1971) ("Manslaughter is the unlawful killing of another without malice, and, under given conditions, this crime may be established, though the killing has been both unlawful and intentional." (cleaned up)).

misses the mark because the intentional, felonious assault was not "a lawful act negligently done." *Id*. Defendant's actions here do not satisfy the elements of involuntary manslaughter, and this Court should reverse the Court of Appeals.

¶ 50 I respectfully dissent.

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

STATE OF NORTH CAROLINA
v.
MICHAEL CONNOR LAMP

No. 18A22

Filed 16 December 2022

1. Sexual Offenders—registered offender—statutory reporting requirement—"new address"

Where North Carolina law requires registered sex offenders who change address to report the "new address" pursuant to N.C.G.S. § 14-208.9(a), any address that has not already been reported constitutes a "new address" under the statute. Thus, in a case where a registered sex-offender was homeless, then moved into an apartment, then became homeless again a few days later, he was still required to report his old apartment address as a "new address" even though he no longer lived there.

2. Sexual Offenders—failure to register—misreporting address —insufficient evidence of deceptive intent

Where defendant, a registered sex offender, was charged under N.C.G.S. § 14-208.11(a)(4) with "willfully" misreporting his place of residence "under false pretenses," the trial court erred in denying his motion to dismiss the charge where there was insufficient evidence that defendant intended to deceive the sheriff's office by listing the wrong apartment building number on a change of information form. For one thing, defendant, who was facing eviction from an apartment where he had lived for only a few days, signed the homeless check-in log at the sheriff's office on the same day that he submitted the change of information form reporting his apartment address; therefore, the evidence did not support the State's theory

that defendant listed the wrong apartment address to avoid having to report as a homeless offender. Further, because the change of information form did not have a space to indicate the last effective date for any address, no deceptive intent could be inferred from defendant registering as homeless on the same day that he reported living in an apartment.

Justice BARRINGER dissenting.

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

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 281 N.C. App. 138, 2021-NCCOA-698, finding no reversable error in a judgment entered on 19 December 2019 by Judge Joseph N. Crosswhite in Superior Court, Iredell County. Heard in the Supreme Court on 20 September 2022.

Joshua H. Stein, Attorney General, by Deborah M. Greene, Assistant Attorney General, for the State.

Mark L. Hayes for defendant-appellant.

HUDSON, Justice.

¶ 1 This case is about the sufficiency of evidence indicating intent, as specified in N.C.G.S. § 14-208.11(a)(4). Defendant Michael Connor Lamp, a registered sex offender, is required to report his address to the sheriff of his county of residence. He was charged with submitting incorrect address information to the sheriff "willfully" and "under false pretenses." Defendant moved to dismiss the charges on grounds that the State's evidence was insufficient to show the requisite intent to deceive. Over defendant's objections, the trial court allowed the case to go to the jury, and the jury returned a verdict of guilty of failure to comply with the sex offender registry. Defendant appealed the denial of his motion to dismiss, but a divided Court of Appeals affirmed his conviction. *State v. Lamp*, 281 N.C. App. 138, 2021-NCCOA-698. Before this Court defendant maintains that the State did not introduce sufficient evidence of the requisite intent. We agree. Accordingly, we reverse the decision of the Court of Appeals.

I. Factual and Procedural Background

¶ 2 Defendant, a registered sex offender since his 1999 conviction for a sex offense at age seventeen, is required to report his address to the sheriff of the county where he resides. When a registrant like defendant moves to a different location, the law requires him to report his address change in person at the local sheriff's office within three business days. N.C.G.S. § 14-208.9 (2021). All registrants, including those who have not moved, must also verify their address twice a year by appearing at the sheriff's office in person. *Id.* § 14-208.9A(a) (2021). Iredell County has an additional requirement for homeless registrants: they must appear in person at the sheriff's office every Monday, Wednesday, and Friday to sign a check-in log.

¶ 3 In June 2019, Defendant registered as homeless with the Iredell County Sheriff's Office. On Friday, 21 June 2019, Defendant moved into a friend's apartment. Because he was no longer homeless, he was no longer subject to Iredell County's thrice-weekly homeless check-in policy. Per N.C.G.S. § 14-208.9(a), defendant had three business days to report this address change to the sheriff; however, before visiting the sheriff's office to report his new address, defendant learned that the apartment was under eviction and the sheriff's office was coming to change the locks on the morning of Wednesday, 26 June. In sum, defendant switched from homeless to housed on Friday, 21 June, and then back to homeless again sometime before 10:00 a.m. on Wednesday, 26 June.

¶ 4 Defendant timely reported all these changes in person at the sheriff's office on Tuesday, 25 June 2019. As Detective-Sergeant Dyson testified, when a registrant changes their address they must speak with a deputy in person at the sheriff's office. The deputy provides the needed paperwork for the registrant to fill out. Defendant reported the apartment address as "1010 Foxcroft Ln Building # 604 Apt. # A6 Statesville N.C. 28677." The form provided by the sheriff's office has a space to indicate the first effective date, which defendant listed as Friday, 21 June. But the form does not have a space to indicate a last effective date. Instead, registrants are expected to submit superseding information to indicate that previously reported information is outdated. During that same in-person report at the sheriff's office, defendant did just that by signing the provided homeless check-in log to represent that he did not have a fixed address.

¶ 5 On 26 June 2019, Deputy Cody James attempted to verify the outdated apartment address defendant had provided. Deputy James did not know that defendant had signed the homeless check-in log to indicate that he did not live at the Foxcroft Apartments. Additionally, the deputy

did not go to the address defendant had given—1010 Foxcroft Ln—and instead knocked on the door of a nearby apartment with a similar address: 604 Foxcroft Terrace Apt. A6. Defendant did not answer that door, and Deputy James inferred that defendant did not live there. Deputy James also spoke with the property manager for the apartment complex. The property manager stated that the previous day, Tuesday, 25 June, she knocked on the door to 602 Foxcroft Terrace Apt. A6 and defendant answered. Deputy James then went to and knocked on that door, but no one answered. Deputy James did not try calling defendant's cell phone.

¶ 6 Deputy James then concluded that "Defendant deceptively provided a false address to the sex offender registry and that Defendant was someone who acted as though he did not want to be supervised." As a result, on 27 June 2019, Deputy James swore out a warrant alleging, among other things, that defendant willfully failed to register "by providing false information . . . stating his address was 604 Foxcroft Terrace Apt A6 when he was actually residing [at] 602 Foxcroft Terrace Apt A2." In fact, defendant never submitted either of these two addresses, and Deputy James later admitted at trial that he made a mistake when typing up the warrant. Nevertheless, the warrant was issued, and defendant was arrested on 30 June 2019. The following day, Deputy James returned to the apartment complex to formally take the apartment manager's statement.

¶ 7 At trial, Deputy James testified that he believed defendant did not live at 604 Foxcroft Terrace Apt. A6 because someone other than defendant came to the door and spoke with him. Before Deputy James could describe that conversation, defense counsel immediately objected that those out-of-court statements were hearsay, and the court sustained the objection.

¶ 8 Later, Deputy James testified that he believed defendant was trying to trick him, even though Deputy James never spoke to defendant during the investigation. When asked to elaborate, Deputy James stated, "During the time in which [defendant] was homeless he would have to come in and check in. He would always make his check-ins near 5:00 [p.m.], which led me to believe he didn't wish to be supervised."

¶ 9 The prosecution tried to introduce evidence of defendant's past failures to report address changes to substantiate the State's claim that defendant intended to deceive in this case, but the trial court excluded that evidence.

¶ 10 Defendant moved to dismiss the charges for insufficient evidence. When arguing on the motion to dismiss, the State summarized its evidence on intent as follows:

> In the light most favorable to the State, with regard to the deceit, I think there's evidence that the defendant had previously registered as homeless. It was a requirement that homeless offenders come sign in on Monday, Wednesday, and Friday. That requirement did not exist for someone who had an address. And this defendant I think was in a tough spot because he couldn't say he was homeless because he just talked to this woman who was the manager of the apartment complex and she knew that he was living in that apartment. He knew the Iredell County Sheriff's Office was coming the next day to padlock it. The Iredell County Sheriff's Office handles the eviction. Iredell County Sheriff's Office handles the registry. He knew somebody was going to know that he was living there so he had to come. He couldn't say he was homeless.
>
> He gave an address. He moved from the address where he actually was going to be padlocked the next day so he gave this address of Building 604, Apartment A6. That would buy him some time until he could figure out what he was going to do next, and it wouldn't require him to come in on Monday, Wednesday, and Friday to check in because he wasn't registered as homeless, he actually provided an address. And I think that's circumstances that are sufficient in the light most favorable to the State to show deceit.

The motion to dismiss was denied. Defendant neither testified nor presented any evidence. Defendant renewed his motion to dismiss at the close of all evidence, and the motion was again denied.

¶ 11 After deliberating for some time, the jury asked for clarification on the definition of intent to deceive. The trial court reread the jury instructions and provided the following definition of intent:

> Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proven by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom.

> Thank you, guys. We'll let you return and continue your deliberations.
>
> [Jury exited the courtroom at 5:05 p.m.]
>
> [Jury deliberations continue.]
>
> THE COURT: I don't think that definition of intent clarifies anything. I mean, that is just --
>
> [DEFENSE COUNSEL]: It's a lot of verbiage.
>
> THE COURT: It is.
>
> [THE STATE]: It's a lot of verbiage.

The jury returned a verdict of guilty of failure to comply with the sex offender registry. Defendant then pleaded guilty to attaining habitual felon status. The judgments were consolidated, and defendant was sentenced to a prison term of 101 to 134 months. Defendant gave notice of appeal in open court.

¶ 12 The Court of Appeals held that the trial court properly denied defendant's motion to dismiss. *Lamp*, 2021-NCCOA-698, ¶ 10. The Court of Appeals identified six specific pieces of evidence that, from its viewpoint, allowed for the reasonable inference that defendant willfully misrepresented his address with the intent to deceive the sheriff's office:

> (1) [O]n 25 June 2019, Defendant represented both that he resided at 1010 Foxcroft Lane, Building 604, Apartment A6, and that he was homeless—two things that could not both be true;
>
> (2) [T]hat very same day, Defendant was seen at Building 602, Apartment A6, not Building 604, Apartment A6, where he represented to the Sheriff's Office he resided, suggesting that he did not, in fact, reside in Building 604 despite representing that he did (but which could also tend to show that he resided in neither place, and was homeless on 25 June 2019); and
>
> (3) [O]n 26 June 2019, an occupant of the apartment where Defendant claimed he lived informed a deputy that Defendant did not live there; and

> [(4)] [P]roviding an incorrect address on the forms used by the Sheriff's Office to record and monitor compliance with the requirement to register is a misrepresentation that constitutes circumstantial evidence of deceptive intent[; and]
>
> [(5)] The jury also heard directly from Deputy James that [he] believed the Defendant was trying to trick [him] and avoid supervision by providing an incorrect address[; and]
>
> [(6)] The jury also heard of a potential motive that by providing an address on 25 June 2019, this gave Defendant an excuse from signing the homeless log on 21 June 2019 and 24 June 2019.

Id. ¶¶ 13–14.

¶ 13 Judge Dillon dissented. He would have held that the evidence did not support a reasonable inference of deceptive intent. *Id.* ¶ 17 (Dillon, J., dissenting). Judge Dillon emphasized that "it is not enough for the State to produce evidence showing that Defendant registered a false address or even that he did so *knowingly*." *Id.* ¶ 20. Instead, the State needed to "produce evidence that raises at least 'a reasonable inference' that Defendant acted *willfully*, *under false pretenses*." *Id.* The State's theory of the case was that defendant "misreported to deceive the Sheriff's Office into thinking that he was living in Building 604 indefinitely" so that he could avoid supervision. *Id.* ¶ 24. But, as noted by the dissenting judge, "the State's own evidence offered at trial **<u>conclusively</u>** belies the State's theory." *Id.* ¶ 24. In fact, State's Exhibit 5 "showed that Defendant informed the Sheriff's Office that he no longer lived in any apartment unit by signing the homeless log." *Id.* In sum, Judge Dillon concluded that the evidence in the record did not support the State's theory of the case or any other potential motive to deceive.

¶ 14 Defendant appealed to this Court as a matter of right on the basis of the dissenting opinion.

II. Analysis

¶ 15 Here, defendant contends that the trial court erred in denying his motion to dismiss and presents two general arguments. First, defendant argues that he has been improperly convicted for providing an incorrect *old* address, when the statute only requires providing a *new* address. Second, defendant argues that the State's theory of deceptive intent is not supported by the evidence and, moreover, is patently unreasonable.

We disagree with defendant's first argument but are persuaded by the second. The record here does not contain sufficient evidence of deceptive intent, and the motion to dismiss should have been allowed. Accordingly, we reverse the decision of the Court of Appeals.

A. Standard of Review

¶ 16 "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 (2018) (citations omitted). "In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *Id.* (quoting *State v. Chekanow*, 370 N.C. 488, 492 (2018)). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* (quoting *Chekanow*, 370 N.C. at 492). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *Id.* (quoting *Chekanow*, 370 N.C. at 492). "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *Id.* (quoting *Chekanow*, 370 N.C. at 492). Questions of statutory interpretation are questions of law, and they are also reviewed de novo. *E.g.*, *JVC Enters.*, *LLC v. City of Concord*, 376 N.C. 782, 2021-NCSC-14, ¶ 8.

B. "New Address" Reporting Requirement

¶ 17 **[1]** North Carolina law requires that "[i]f a person required to register changes address, the person shall report in person and provide written notice of the new address." N.C.G.S. § 14-208.9(a). Defendant was charged with violating N.C.G.S. § 14-208.11(a)(4), which declares an individual who "[f]orges or submits under false pretenses the information or verification notices required under this Article" guilty of a Class F felony. *Id.* § 14-208.11(a)(4) (2021).

¶ 18 Defendant argues that "new address" should receive a peculiar construction. Imagine a person moves from address A to address B, their "new" address. But, before they report this change to the sheriff's office within three business days, they move again, to address C. Defendant argues that only address C is a "new" address, and that address B is an "old" address that does not need to be reported. In response, the State argues that addresses B and C are both "new" addresses, and both must be reported.

¶ 19 We are convinced by the State's argument on this point. Read in context, we conclude that the word "new" refers to addresses that have not already been reported to the sheriff. This reading gives meaning to the explicit purpose of the law: "[T]o assist law enforcement agencies' efforts to protect communities." *Id.* § 14-208.5 (2021). Law enforcement is better able to protect communities when it has a complete and accurate record of where a sex offender has lived. We reject defendant's suggested interpretation as inconsistent with this stated purpose because this interpretation would allow sex offenders to submit false or incomplete information about places they have lived while subject to the reporting requirement.

C. Evidence of Deceptive Intent

¶ 20 **[2]** Nevertheless, we agree with defendant that the evidence presented at trial is insufficient to support an inference of deceptive intent. Intent is an essential element of the crime charged, and the State must put on "that amount of relevant evidence necessary to persuade a rational juror" of defendant's criminal intent. *State v. Crockett*, 368 N.C. 717, 720 (2016) (quoting *State v. Hill*, 365 N.C. 273, 275 (2011)). "Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Bell*, 285 N.C. 746, 750 (1974) (citations omitted), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 61–62 (1993). On a motion to dismiss, "[i]f the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances." *State v. Fritsch*, 351 N.C. 373, 379 (2000) (quoting *State v. Barnes*, 334 N.C. 67, 75 (1993)). All evidence is viewed in the light most favorable to the state. *Id.* at 378–79 (citation omitted). However, unreasonable inferences, suspicion, conjecture, and mere speculation do not save a case from a motion to dismiss. *Id.* at 378 (citing *Barnes*, 334 N.C. at 75).

¶ 21 The heightened level of intent required by the statute is no accident. The General Assembly amended the sex offender registration law in 2006 and, among other things, increased the required level of intent so that only "willful" registration violations were criminalized. An Act To Protect North Carolina's Children/Sex Offender Law Changes, S.L. 2006-247, § 8, 2005 N.C. Sess. Laws (Reg. Sess. 2006) 1065, 1070–71 (amending N.C.G.S. § 14-208.11). The word "willful," when used in a criminal statute, "means something more than an intention to do a thing." *State v. Dickens*, 215 N.C. 303, 305 (1939) (quoting *State v. Whitener*, 93 N.C. 590, 592 (1885)). Willfulness requires doing an act "purposely and deliberately in violation of law." *State v. Ramos*, 363 N.C. 352, 355

(2009) (quoting *State v. Arnold*, 264 N.C. 348, 349 (1965) (per curiam)). Additionally, "[f]alse pretense occurs when one makes an untrue representation to another that is calculated and intended to deceive." *State v. Parks*, 147 N.C. App. 485, 489 (2001) (citation omitted).

¶ 22 While our law no longer strictly forbids stacking inferences upon each other, *State v. Childress*, 321 N.C. 226, 232 (1987), in this case the link between the circumstances proved by direct evidence and the inferences drawn from these circumstances stretches too far. We consider each fact relied upon by the Court of Appeals in turn.

¶ 23 First, it is certainly possible for one to have two addresses in the same day. A change of address is not a delayed transformation that kicks in only at the stroke of midnight. *See State v. Worley*, 198 N.C. App. 329, 338 (2009) ("[T]he sex offender registration statutes operate on the premise that everyone does, *at all times*, have an 'address' of some sort, even if it is a homeless shelter, a location under a bridge or some similar place." (emphasis added)). No intent to deceive can be inferred from defendant's representation that he had different addresses in the morning and the evening. This is what any person would say on moving day. Moreover, the sex offender change of information form provided by the sheriff does not have a space to indicate the last effective date for an address. Instead, registrants must indicate that a provided address is outdated by submitting new, superseding information. The forms defendant submitted are consistent with reporting a past address that is still "new" to the sheriff's office.

¶ 24 Second, the fact that defendant was seen in Building 602 once does not give rise to any inference regarding where defendant lived. "[M]ere physical presence at a location is not the same as establishing a residence." *Crockett*, 368 N.C. at 723 (alteration in original) (quoting *State v. Abshire*, 363 N.C. 322, 332 (2009)). The jury must look "[b]eyond mere physical presence" to "activities possibly indicative of a person's place of residence." *Id.* (quoting *Abshire*, 363 N.C. at 332). Here, the apartment manager did testify that she saw defendant in Building 602, but she also testified that she saw him there only once, and that he had no written lease, did not claim to live there, and merely stated that "we'll be out by morning." This evidence is too speculative to establish that defendant lived in Building 602.

¶ 25 Third, the Court of Appeals majority relied on insufficient evidence when it considered that "an occupant of the apartment where Defendant claimed he lived informed a deputy that Defendant did not live there." *Lamp*, 2021-NCCOA-698, ¶ 13. Defendant objected to these statements

at trial and they were never heard by the jury. The only evidence the jury heard was Deputy James's testimony that defendant did not answer the door. But at that point in time, defendant had already informed the sheriff's office that he no longer resided at Foxcroft Apartments and was homeless again. Failing to answer the door at an old address does not support an inference that defendant had never resided at that address. *Cf. Crockett*, 368 N.C. at 723 (noting that mere presence does not indicate residence, suggesting that mere absence does not indicate non-residence).

¶ 26 Fourth, there is no evidence in the record that defendant provided an incorrect address. As discussed above, all the evidence offered by the State as to who lived in Building 604 was excluded and never presented to the jury. All the jury was told is that defendant did not answer the door after his reported move out date. Even if misrepresentations can serve as circumstantial evidence of deceptive intent, there is no evidence in this record that defendant misrepresented his address.

¶ 27 Fifth, Deputy James's testimony does not raise an inference of deceptive intent. Deputy James conceded that he did not know defendant had signed the homeless check-in log on 25 June. Moreover, the deputy testified that he concluded defendant was being deceptive because defendant *completed the check-in process* around 5:00 p.m. each time. Evidence of regular compliance with the law is hardly substantial evidence of a calculated plan to willfully violate the law.

¶ 28 Finally, the State's motive theory is illogical. According to the State, defendant knew that he needed to provide an address, and "couldn't say he was homeless," and so he lied and gave a false address to buy time. But this theory does not add up. First, defendant *said he was homeless* when he signed the homeless check-in log. Second, if defendant really lived in Building 602 and had just been evicted, there would be no apparent reason to lie and say that he lived in Building 604. Reporting an accurate old address would have explained why defendant did not show up for the homeless check-ins on 21 and 24 June. Finally, the fact that defendant signed the homeless check-in log, thus voluntarily assuming the burden of checking in three times a week moving forward, utterly fails to support any inference that he was trying to avoid this burden.

III. Conclusion

¶ 29 Here, even viewed in the light most favorable to the State, the evidence in the record is insufficient to support an inference that defendant willfully provided information under false pretenses. Accordingly, we reverse the Court of Appeals' decision upholding defendant's conviction

for violating N.C.G.S. § 14-208.11(a)(4); without this conviction, there is no substantive offense to support a finding of habitual felon status. We therefore remand this case to the Court of Appeals for further remand to the trial court with instructions to vacate defendant's conviction for failure to comply with the sex offender registry and the resulting judgment entered by the trial court.

REVERSED AND REMANDED.

Justice BARRINGER dissenting.

¶ 30 The issue in this case is whether the State failed to present evidence from which a reasonable inference may be drawn that defendant had the requisite intent to willfully deceive when he gave an incorrect address to the police. When viewing the evidence in the light most favorable to the State, the State presented substantial evidence by which a reasonable jury could conclude that there was sufficient evidence of defendant's guilt. However, the majority applies the wrong standard of review by erroneously reweighing—and manufacturing—their own version of the facts in the light most favorable to defendant and taking the case out of the hands of the jury. Therefore, I respectfully dissent.

I. Background

¶ 31 On 19 April 2001, defendant was convicted of attempted second-degree kidnapping of a minor and was required to register as a sex offender. *See* N.C.G.S. § 14-208.6(1m) (2021); N.C.G.S. § 14-208.6A (2021). Defendant had been registered as a sex offender without address and had previously signed the Sex Offender Without Address Check-In Log (homeless log). He signed the log on 12 June 2019. On 25 June 2019, defendant reported his address as 1010 Foxcroft Lane, Building 604, Apartment A6. The same day, defendant signed the Sex Offender Without Address Check-In Log representing that he did not have an address.

¶ 32 The next day, Deputy Cody James performed a sex-offender compliance check at 1010 Foxcroft Lane, Building 604, Apartment A6. Another man opened the door, and Deputy James did not see anyone else at the apartment. Deputy James then spoke to the apartment manager, who later provided a written statement regarding her previous interactions with defendant. Roughly two months later, a grand jury indicted defendant for submitting under false pretenses the information required by the Sex Offender and Public Protection Registration Program. *See* N.C.G.S. § 14-208.11(a)(4) (2021).

¶ 33 Remarkably, the majority states that Deputy James performed a compliance check at "604 Foxcroft Terrace Apt. A6," rather than the address defendant had provided. Clearly, the record does not support this assertion. Rather, the record reflects that defendant registered his address as "1010 Foxcroft Ln Building # 604 Apt. A6 Statesville N.C. 28677" and Deputy James "attempt[ed] a compliance check regarding the defendant . . . [at] the apartment listed as 1010 Foxcroft, Building 604."

¶ 34 At trial, Deputy James testified as to the events previously described. Deputy James also testified that he believed defendant was trying to trick him and avoid supervision by providing an incorrect address. Deputy James further testified that by providing an address on 25 June 2019, defendant had an excuse from signing the homeless log on 21 June 2019 and 24 June 2019. In addition, the jury heard testimony from the apartment manager, Heidi Daelhouser, who testified that defendant answered the door of Apartment A6, Building 602, on 25 June 2019 when she knocked on the apartment's door. She also testified that defendant did not "have any type of . . . lease agreement with [the] apartments."

¶ 35 The majority implies that defendant was going to be evicted from the apartment. However, the record does not reflect that eviction proceedings began against defendant. Additionally, the majority states that "the fact that defendant was seen in Building 602 once does not give rise to any inference regarding where defendant lived" and that the "evidence is too speculative to establish that defendant lived in Building 602." To be clear, Ms. Daelhouser saw defendant answer the door to the apartment when she knocked. Furthermore, defendant stated, "we'll be out by morning," indicating that he resided at the apartment. This goes beyond "mere presence" and certainly demonstrates "activities possibly indicative of a person's place of residence." *State v. Crockett*, 368 N.C. 717, 723 (2016) (quoting *State v. Abshire*, 363 N.C. 322, 332 (2009)). The majority also claims that defendant was at "a friend's apartment." There is nothing in the record to support this assertion.

¶ 36 At the close of the State's evidence, defendant made a motion to dismiss for insufficient evidence, arguing that "there is not enough evidence that [defendant] wrote that apartment number down to deceive his supervision." The trial court denied the motion, finding that "there is evidence for the jury to consider." Defendant did not present any evidence during his case-in-chief. At the close of all evidence, defendant renewed his motion to dismiss.

II. Standard of Review

¶ 37 The question for a court on a motion to dismiss for insufficient evidence "is whether there is substantial evidence . . . of each essential element of the offense charged, or of a lesser offense included therein." *State v. Powell*, 299 N.C. 95, 98 (1980). "If so, the motion is properly denied." *Id.* Substantial evidence is the same as more than a scintilla of evidence. *Id.* at 99.

> In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy it beyond a reasonable doubt that the defendant is actually guilty.

State v. Barnes, 334 N.C. 67, 75–76 (1993) (cleaned up). "When ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence." *State v. Fritsch*, 351 N.C. 373, 379 (2000).

III. Analysis

¶ 38 Subsection 14-208.11(a) establishes that "[a] person required by this Article to register [with the sex offender registry] who willfully . . . [f]orges or submits under false pretenses the information or verification notices required under this Article" is guilty of a Class F felony. N.C.G.S. § 14-208.11(a).

¶ 39 "Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Bell*, 285 N.C. 746, 750 (1974). Willful intent "implies

committing the offense purposely and designedly in violation of law." *State v. Stephenson*, 218 N.C. 258, 264 (1940). A defendant acts "under false pretenses" when they represent a falsity with the intent to deceive. *State v. Parker*, 354 N.C. 268, 284 (2001). "[T]he false pretense need not come through spoken words, but instead may be by act or conduct." *Id.*

¶ 40 As accurately described by the Court of Appeals, and acknowledged by the majority, the evidence at trial showing intent was as follows:

> (1) on 25 June 2019, [d]efendant represented both that he resided at 1010 Foxcroft Lane, Building 604, Apartment A6, and that he was homeless—two things that could not both be true; (2) that very same day, [d]efendant was seen at Building 602, Apartment A6, not Building 604, Apartment A6, where he represented to the Sheriff's Office he resided, suggesting that he did not, in fact, reside in Building 604 despite representing that he did (but which could also tend to show that he resided in neither place, and was homeless on 25 June 2019); and (3) on 26 June 2019, an occupant of the apartment where [d]efendant claimed he lived informed a deputy that [d]efendant did not live there. . . .
>
> . . . Deputy James [testified] that [he] believed the [d]efendant was trying to trick [him] and avoid supervision by providing an incorrect address. The jury also heard [from Deputy James] of a potential motive that by providing an address on 25 June 2019, this gave [d]efendant an excuse from signing the homeless log on 21 June 2019 and 24 June 2019.

State v. Lamp, 281 N.C. App. 138, 2021-NCCOA-698, ¶¶ 13–14.

¶ 41 Here, the majority improperly invades the province of the jury and painstakingly reweighs each fact presented for the jury's consideration in over three pages of discussion, clearly violating the requisite standard of review. Evidence must be viewed "in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies . . . are for the jury to resolve." *Barnes*, 334 N.C. at 75 (1993) (citing *State v. Benson*, 331 N.C. 537, 544 (1992)).

¶ 42 "If the law is against you, argue the facts." Evidently, if the facts are against you, invent your own. The majority here is inventing their own version of the facts, with absolutely no support in the record. There is no

evidence to support that defendant moved into a "friend's apartment." There is no evidence to support that defendant was being evicted. There is no evidence to support that Deputy James attempted to verify an "outdated" address. There is no evidence to support that "defendant has already informed the sheriff's office that he no longer resided at Foxcroft Apartments and was homeless again" when Deputy James performed a compliance check. Not only is there no evidence to support that Deputy James performed a compliance check on the wrong apartment, *the record and transcript directly contradict this assertion made by the majority*. Yet the majority states these are the facts of the case.

¶ 43 When the evidence in the record is viewed in the light most favorable to the State, a reasonable jury could have inferred, and in fact did infer, that defendant had the requisite intent to willfully submit an incorrect address under false pretenses. The evidence presented by the State is "more than a scintilla" and is sufficient to survive a motion to dismiss. *Powell*, 299 N.C. at 99. Additionally, "[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *Barnes*, 334 N.C. at 75 (quoting *State v. Stone*, 323 N.C. 447, 452 (1988)). Although defendant argued an hypothesis of innocence, the ultimate merits of his hypothesis should be weighed by the jury, as it did during defendant's trial, not reweighed by this Court. *See id.*

¶ 44 Therefore, the trial court did not err by denying the motion to dismiss, and the Court of Appeals did not err by holding that there was no reversible error. Accordingly, I respectfully dissent.

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

STATE OF NORTH CAROLINA
v.
MICHAEL STEVEN ELDER

No. 276A21

Filed 16 December 2022

Kidnapping—first-degree—to facilitate rape—movement after the rape concluded—fatal variance between indictment and evidence

In a prosecution for two counts of first-degree kidnapping, where the evidence showed that defendant entered an elderly woman's home, moved her from the kitchen to her bedroom, raped her, then moved her to a closet inside an adjacent bedroom, took a shower, and fled the scene, the trial court erred in denying defendant's motion to dismiss the kidnapping charge that was based on defendant moving the woman into the adjacent bedroom. A fatal variance existed between the allegation in the indictment that defendant moved the woman to the adjacent bedroom closet "for the purpose of facilitating the commission of" first-degree rape and the evidence showing that the rape had already concluded before defendant moved the woman to that location.

Chief Justice NEWBY dissenting.

Justice BERGER 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, 278 N.C. App. 493, 2021-NCCOA-350, finding no error, in part, and reversing and remanding, in part, judgments entered on 3 April 2019 by Judge Josephine Kerr Davis in Superior Court, Warren County, based upon defendant's convictions for felonious breaking and entering, common law robbery, assault inflicting serious injury, second-degree sexual offense, first-degree rape, and two counts of first-degree kidnapping. Heard in the Supreme Court on 31 August 2022.

Joshua H. Stein, Attorney General, by Benjamin O. Zellinger, Special Deputy Attorney General, for the State-appellant.

Law Offices of Bill Ward & Kirby Smith, P.A., by Kirby H. Smith, III, for defendant-appellee.

ERVIN, Justice.

¶ 1 The issue before the Court in this case is whether the trial court erred by denying defendant's motion to dismiss the second of two first-degree kidnapping charges which rested upon an allegation that defendant had "unlawfully confin[ed], restrain[ed,] and remov[ed] [the victim] from one place to another without her consent" for the purpose of facilitating the commission of a first-degree rape even though the record evidence tended to show that one of the alleged kidnappings had occurred after the commission of the rape had concluded. A majority of the Court of Appeals held, in reliance upon *State v. Morris*, 147 N.C. App. 247 (2001), *aff'd per curiam*, 355 N.C. 488 (2002), that the second of defendant's first-degree kidnapping convictions lacked sufficient record support. *State v. Elder*, 278 N.C. App. 493, 2021-NCCOA-350, ¶¶ 35–37. The dissenting judge, on the other hand, concluded that the second of defendant's first-degree kidnapping convictions should be upheld on the basis of *State v. Hall*, 305 N.C. 77 (1982), *overruled on other grounds by State v. Diaz*, 317 N.C. 545 (1986). *Elder*, ¶¶ 90–94 (Tyson, J., concurring, in part, and dissenting, in part). After careful consideration of the parties' arguments in light of the record and the applicable law, we conclude that the Court of Appeals' decision should be affirmed and remand this case to the Court of Appeals for further remand to Superior Court, Warren County, for further proceedings not inconsistent with this opinion.

I. Factual Background

A. Substantive Facts

¶ 2 On 7 July 2007, A.H.,[1] who was 80 years old and lived alone, was tending to the flower garden in front of her residence when she noticed a light-colored automobile driving slowly past her house. Upon hearing the car turn and begin moving back in her direction, the victim entered her residence and locked the storm door behind her. After the vehicle parked in the driveway, a man carrying a black satchel approached the victim's house and knocked on the door. Although the victim opened the main door to speak with the man, she left the storm door locked. The man offered to demonstrate a rug cleaning product that he claimed to want to sell to her, but the victim informed the man that she was not interested in his proposal. As a result, the man wrote his contact information on a piece of paper, which he presented to the victim for the purpose of making sure that she would be able to get in touch with him if she changed her mind.

1. We will refer to the victim by her initials in order to protect her identity.

¶ 3 When the victim unlocked and opened the screen door in order to retrieve the paper, the man grabbed the victim's wrist, pushed the door open, and entered the house, at which point he demanded to know where the victim kept her money. After the victim told the man that she did not have any money, the man forced the victim into her bedroom, pushed her onto the bed, and began removing her clothes. Although the victim begged the man not to harm her, he forcibly engaged in vaginal intercourse with her before putting his penis into her mouth and attempting to make her perform oral sex upon him.

¶ 4 After sexually assaulting the victim, the man began rifling through the drawers in the victim's dresser while demanding to know "where [the victim] kept her good stuff." At the conclusion of his search for items of value, the man took approximately $450 in cash from one of the victim's pocketbooks along with the victim's food stamps, Medicaid card, and driver's license. Although the victim informed the man that her daughter was on the way, the man replied that he would kill the victim if her daughter arrived before his departure.

¶ 5 After tying the victim up and placing her in her bedroom closet, the victim told the man that she could not breathe. At that point, the man moved the victim to the closet in a smaller, adjacent bedroom and tied her to a chair,[2] told the victim that he was going to take a shower, and warned the victim not to leave the room while he was there. Following the man's departure, the victim could hear water running in the bathroom.

¶ 6 After some period of time had passed, the victim was able to untie herself. Although the victim could still hear the sound of running water, she made her way to the front window of the house, from which she could see that the intruder's automobile had departed. At that point, the victim entered the bathroom and discovered that it was empty despite the fact that the water was continuing to run in the shower.

¶ 7 Upon attempting to telephone her daughter, Linda Carter, the victim reached Ms. Carter's husband, Harry Carter, whom she told that she had been raped and robbed and from whom she pleaded for assistance.

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2. The record contained conflicting testimony concerning whether defendant placed the victim in the second bedroom or in a closet within the second bedroom. Although this discrepancy does not seem to us to have any material impact upon the manner in which the case should be resolved, the fact that the verdict sheet upon which the jury recorded its verdict indicates that the jury convicted defendant of first-degree kidnapping based upon his actions in "moving [A.H.] from the bedroom to bedroom to a closet" leads us to conclude that the jury found beyond a reasonable doubt that defendant placed the victim in a closet in the second bedroom.

When the Carters arrived at the victim's residence a few minutes later, they discovered that the storm door had been partially torn away from the door jam. According to Mr. Carter, the victim was "a nervous wreck," "very upset," and "hysterical," prompting Ms. Carter to call for emergency assistance.

¶ 8 After emergency medical services personnel and officers from the Warren County Sheriff's Office arrived at the victim's residence, the victim was transported to Maria Parham Hospital in Louisburg. Due to the fact that Maria Parham did not have a rape kit and was not staffed by personnel trained to administer one, the victim was transferred to WakeMed Hospital, where she was seen by Sexual Assault Nurse Examiner Cindy Carter. Nurse Carter performed a rape kit examination and delivered the completed rape kit and other items of evidence that had been collected from the victim to Detective Sergeant Ben Jackson of the Warren County Sheriff's Office, with the evidence in question having later been submitted to the State Crime Laboratory for processing. In addition, Sergeant Jackson interviewed the victim before she was transferred to WakeMed, at which point she described the assault that had been committed against her.

¶ 9 Special Agent Russell Holley of the Forensic Serology Unit of the State Crime Laboratory examined samples that had been derived from the rape kit and detected the presence of sperm cells in smears that had been collected from the victim and on a cutting that had been taken from the underwear that the victim had been wearing at the time of the assault. In addition, Forensic Scientist Supervisor Timothy Baize of the State Crime Laboratory detected a DNA mixture on the victim's underwear that was consistent with that of the victim and an unknown male contributor.

¶ 10 At the time of the victim's death on 18 December 2015, the perpetrator of the assault that had been committed against her had not been identified. On 12 April 2016, Sergeant Jackson contacted the Forensic Investigations Division of the New York City Police Department at the suggestion of the State Crime Laboratory. After making contact with the New York City Police Department, Sergeant Jackson sought and obtained a bill of indictment from the Warren County grand jury against Stephen Davis charging him with having assaulted the victim, only to learn later that Mr. Davis had been incarcerated on the date of the assault.[3] After further communications with the New York City Police Department, Sergeant Jackson obtained a search warrant authorizing

3. The charges against Mr. Davis were later dismissed.

the seizure of a DNA sample from defendant. On 18 July 2016, Sergeant Jackson traveled to Winston-Salem, where defendant was living at the time and, along with officers from the Forsyth County Sheriff's Office, executed the search warrant and obtained a DNA sample from defendant. Sergeant Jackson also interviewed defendant, who told Sergeant Jackson that he had not assaulted the victim, that he was not familiar with Warren County, and that he was willing to submit to a polygraph examination in order to prove his innocence.

¶ 11 On 19 July 2016, Sergeant Jackson submitted the DNA sample that had been obtained from defendant to the State Crime Laboratory for comparison with the DNA samples that had been obtained from the rape kit that had been administered to the victim. According to Mr. Baize, "the DNA profile obtained from the sperm fraction of the cutting from the [victim's underwear]" was "consistent with the DNA profile obtained from [defendant]," with the probability that the DNA profile of an unrelated and randomly selected individual would be consistent with the DNA profile that had been obtained from the sperm fraction that had been found on the victim's underwear being "approximately 1 in 10.7 trillion in the Caucasian population, one in 63.0 billion in the African-American population, and one in 312 billion in the Hispanic population."

B. Procedural History

¶ 12 On 17 January 2017, the Warren County grand jury returned bills of indictment charging defendant with felonious breaking and entering, common law robbery, assault with a deadly weapon inflicting serious injury, first-degree sexual offense, first-degree rape, and two counts of first-degree kidnapping. The grand jury alleged with respect to one of the two counts of first-degree kidnapping that defendant had "unlawfully confin[ed], restrain[ed,] and remov[ed] [the victim] from one place to another without her consent" by "moving [the victim] from the kitchen to the back bedroom" and alleged with respect to the second of the two counts of first-degree kidnapping that defendant had "unlawfully confin[ed], restrain[ed,] and remov[ed] [the victim] from one place to another without her consent" by "moving [the victim] from the back bedroom to another bedroom and put[ting] her into a closet." The grand jury alleged that, in both instances, defendant had kidnapped the victim "for the purpose of facilitating the commission of a felony, first[-]degree rape."

¶ 13 The charges against defendant came on for trial before the trial court and a jury at the 27 March 2019 criminal session of Superior Court, Warren County. At the conclusion of the State's evidence and after

declining to present evidence in his own defense, defendant unsuccessfully moved that the charges against him be dismissed for insufficiency of the evidence. On 3 April 2019, the jury returned verdicts convicting defendant of felonious breaking and entering, common law robbery, assault inflicting serious injury, second-degree sexual offense, first-degree rape, and two counts of first-degree kidnapping. After accepting the jury's verdicts, the trial court consolidated defendant's convictions for felonious breaking or entering, second-degree sexual offense, common law robbery, and assault inflicting serious injury for judgment and entered a judgment sentencing defendant to a term of 84 to 110 months imprisonment. In addition, the trial court consolidated defendant's convictions for first-degree rape and two counts of first-degree kidnapping and entered a judgment sentencing defendant to a consecutive term of 240 to 297 months imprisonment. Defendant noted an appeal to the Court of Appeals from the trial court's judgments.

C. Court of Appeals Decision

¶ 14 In seeking relief from the trial court's judgments and related orders before the Court of Appeals, defendant argued, among other things, that the trial court had erred by denying his motions to dismiss the first-degree rape, first-degree kidnapping, and common law robbery charges for insufficiency of the evidence. In support of his contention that the trial court had erred by failing to dismiss the second of the two first-degree kidnapping charges that had been lodged against him, defendant argued that there was "no evidence [that] the second kidnapping was committed for the purpose of facilitating rape."

¶ 15 In rejecting defendant's challenge to the sufficiency of the evidence to support his convictions for first-degree rape, first-degree kidnapping, and common law robbery, the Court of Appeals unanimously held that the record contained sufficient evidence to support defendant's rape and robbery convictions. *State v. Elder*, 278 N.C. 493, 2021-NCCOA-350, ¶¶ 30, 42, 87. On the other hand, a majority of the Court of Appeals concluded that the trial court had erred by denying defendant's motion to dismiss the second of the two first-degree kidnapping charges, holding that, while "an indictment under [N.C.G.S.] § 14-39(a)(2) need not allege the exact type of felony furthered by the restraint or confinement," the State was required to provide that "the felony that is the alleged purpose of the kidnapping must occur after the kidnapping." *Id.* ¶ 34 (quoting *State v. Jordan*, 185 N.C. App. 576, 584 (2007), *disc. rev. denied*, 362 N.C. 241 (2008)). In addition, the majority held that, even though N.C.G.S. § 14-39(a)(2) allows a defendant to be convicted of first-degree kidnapping "where the defendant committed the kidnapping either for

the purpose of facilitating the commission of a felony *or* for the purpose of facilitating flight of any person after the commission of a felony, the State is obliged to prove the allegations made in the indictment." *Id.* ¶ 35 (emphasis in original) (citing *State v. Morris*, 147 N.C. App. 247, 251–53 (2001) (reversing a defendant's first-degree kidnapping conviction in a case in which the State had alleged that the defendant had kidnapped the victim for the purpose of facilitating the commission of a rape where the evidence tended to show that the defendant had kidnapped the victim for the purpose of facilitating his flight *after* committing the rape), *aff'd per curiam*, 355 N.C. 488 (2002)). According to the majority, "*Morris* controls the outcome here" given that, in this case, "the State alleged that [d]efendant committed [the second count of first-degree kidnapping] when he moved [the victim] 'from the back bedroom to another bedroom and put her into a closet[,]' which the parties agree occurred after [d]efendant committed first-degree rape." *Id.* ¶¶ 36–37 (fourth alteration in original). However, the majority continued, "because 'the felony that is the alleged purpose of the kidnapping must occur after the kidnapping,' we must reverse [d]efendant's first-degree kidnapping charge on [the second count.]" *Id.* (first alteration in original) (quoting *Jordan*, 186 N.C. App. at 584). As a result of the fact that both of defendant's first-degree kidnapping convictions had been consolidated for judgment with his first-degree rape conviction, the Court of Appeals remanded that judgment to the trial court for resentencing. *Id.* ¶ 38 (citing *State v. Wortham*, 318 N.C. 669, 674 (1987) (holding that, because "it is probable that a defendant's conviction for two or more offenses influences adversely to him the trial court's judgment on the length of that sentence to be imposed when the offenses are consolidated for judgment," "the better procedure is to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated")).[4]

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4. In addition, the majority held that the trial court had erroneously sentenced defendant for both first-degree rape and the remaining charge of first-degree kidnapping. *Elder*, ¶ 74. In reaching this conclusion, the majority determined that, since kidnapping "is elevated from the second degree to the first when 'the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted,' " *id.*¶ 75 (quoting N.C.G.S. § 14-39(b) (2007)), a defendant "may not be punished for both the first-degree kidnapping and the underlying sexual assault," *id.* (quoting *State v. Daniels*, 189 N.C. App. 705, 709 (2008)). That is the case, the majority explained, because "[N.C.G.S.] § 14-39, [which] defin[es] first-degree kidnapping, reflects the General Assembly's intent that 'a defendant could not be convicted of both first-degree kidnapping and a sexual assault that raised the kidnapping to first degree.' " *Id.* (quoting *State v. Freeland*, 316 N.C. 13, 23 (1986)). Given that the jury had convicted defendant of first-degree kidnapping without specifying whether it found that defendant failed to release the victim in a safe place, that the victim had been seriously injured, or that the victim had

¶ 16 In a separate opinion concurring with the majority's decision, in part, and dissenting from that decision, in part, Judge Tyson expressed disagreement with his colleagues' conclusion that the trial court had erred by failing to dismiss the second of the two first-degree kidnapping charges. *Id.* ¶ 86 (Tyson, J., concurring, in part, and dissenting, in part). In rejecting defendant's contention that he could not have moved the victim from one bedroom to another "for the purpose of facilitating the commission of" first-degree rape when the rape was already over at that point, Judge Tyson reasoned that "[t]he occurrence of all essential elements of a crime does not mean the commission of a crime ceases." *Id.* ¶ 88–89 (citing *State v. Hall*, 305 N.C. 77, 82–83 (1982) (holding that the fact that "the crime was 'complete' does not mean it was completed"), *overruled on other grounds by State v. Diaz*, 317 N.C. 545 (1986)). According to Judge Tyson, defendant's actions in moving the victim to the second bedroom "prevented [the victim] from seeking medical attention, contacting help, or fleeing from [d]efendant"; "continued [the victim's] pain, damage, and trauma from the rape"; and "allowed [d]efendant a chance to shower, instead of needing to immediately flee." *Id.*, ¶ 92. In addition, Judge Tyson contended that "[t]hese additional restraints and asportation 'ma[de] easier' the commission of the rape by allowing [d]efendant a chance to destroy evidence." *Id.* (first alteration in original) (quoting *State v. Kyle*, 333 N.C. 687, 694 (1993)). As a result, Judge Tyson would have held that, when viewed in the light most favorable to the State, "the evidence supports the conclusion that a purpose of the separate kidnapping was to facilitate the rape and the jury could conclude that the kidnapping was part of an ongoing criminal transaction." *Id.* ¶ 93 (citing *State v. Chevallier*, 264 N.C. App. 204, 211 (2019)). The State noted an appeal to this Court based upon Judge Tyson's dissent.[5]

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been sexually assaulted, the majority concluded that it was "required to assume that the jury relied on defendant's commission of the sexual assault in finding him guilty of first-degree kidnapping." *Id.* ¶ 76 (quoting *Daniels*, 189 N.C. App. at 710). As a result, the Court of Appeals held that, when it resentenced defendant, "the trial court may 1) arrest judgment on the first-degree kidnapping conviction and resentence defendant for second-degree kidnapping, or 2) arrest judgment on the first-degree rape conviction and resentence defendant on the first-degree kidnapping conviction." *Id.* ¶ 77 (quoting *Daniels*, 189 N.C. App. at 710). Finally, a majority of the Court of Appeals issued a writ of certiorari authorizing review of defendant's challenge to the trial court's decision to enter a civil judgment against him in the amount of the attorney's fees that had been awarded to his court-appointed trial counsel and held that the trial court had erred by entering that judgment without affording defendant with adequate notice and an opportunity to be heard and remanded the issue to Superior Court, Watauga County, for further proceedings. *Id.* ¶¶ 83–84.

5. Judge Tyson also disagreed with the majority's determinations that defendant had been improperly sentenced for both first-degree kidnapping and first-degree rape and that

II. Analysis

A. Standard of Review

¶ 17 In evaluating the correctness of the trial court's decision concerning a motion to dismiss for insufficiency of the evidence, a reviewing court "need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator," with "substantial evidence" consisting of "that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Winkler*, 368 N.C. 572, 574 (2015) (quoting *State v. Mann*, 355 N.C. 294, 301 (2002)). In the course of making this inquiry, the reviewing court must view the evidence "in the light most favorable to the State," with the State being "entitled to every reasonable intendment and every reasonable inference to be drawn therefrom[.]" *Id.* (quoting *State v. Powell*, 299 N.C. 95, 99 (1980)). As long as the record 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." S*tate v. Golder*, 374 N.C. 238, 250 (2020) (cleaned up). "Whether the State presented substantial evidence of each essential element of the offense is a question of law," so, accordingly, "we review the denial of a motion to dismiss de novo." *State v. Chekanow*, 370 N.C. 488, 492 (2018) (quoting *State v. Crockett*, 368 N.C. 717, 720 (2016)).

B. Summary of Relevant Caselaw

¶ 18 The divergent results reached by the members of the panel at the Court of Appeals ultimately rest upon a disagreement about which of our precedents controls the outcome in this case. As a result, we will begin our analysis by reviewing the relevant precedent.

1. State v. Faircloth

¶ 19 In *State v. Faircloth*, the grand jury charged the defendant with felonious larceny of an automobile, kidnapping, armed robbery, and first-degree rape, having alleged, among other things, that the defendant

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the trial court had erred by entering a civil judgment against defendant in the amount of the fees awarded to defendant's court-appointed counsel. *Elder*, ¶¶ 100, 105 (Tyson, J., concurring, in part, and dissenting, in part). However, given that the State has not brought either of these issues forward for consideration by this Court in its notice of appeal, they are not before us and will not be discussed further in this opinion. *See* N.C. R. App. P. 14(b)(1) (requiring that, "[i]n an appeal which is based upon the existence of a dissenting opinion in the Court of Appeals, the notice of appeal . . . shall state the issue or issues which are the basis of the dissenting opinion and which are to be presented to the Supreme Court for review").

"did feloniously kidnap [the victim] . . . by unlawfully removing her from one place to another [f]or the purpose of facilitating flight following the commission of the felony of rape." 297 N.C. 100, 104, 107 (1979). The evidence presented at trial, however, tended to show that the defendant had forced his way into the victim's vehicle, drove that vehicle to a secluded location, and *then* raped the victim. *Id.* at 102–03. After the jury convicted him of kidnapping, robbery, and rape,[6] the defendant asserted on appeal that "there was no evidence presented in the case at hand tending to show that he confined, restrained, or removed [the victim] from one place to another for the purpose of '*facilitating flight following* the commission of the felony of rape,' " resulting in a "a fatal variance between the indictment and proof." *Id.* at 107 (emphasis added). In agreeing that the defendant's contention had merit, this Court observed that, while the defendant's conviction could have been upheld had he "been tried on an indictment alleging that he restrained or removed [the victim] from one place to another for the purpose of facilitating *the commission of* the felony of rape," "the evidence does not support the charge as laid in the indictment." *Id.* at 108 (emphasis added).

2. *State v. Hall*

¶ 20 In *Hall*, which this Court decided less than three years after it decided *Faircloth*, the defendant and an accomplice robbed a service station attendant at gunpoint, forced the victim into their car, and drove away in order to prevent the victim from calling for assistance. *Hall*, 305 N.C. at 79–80. After driving approximately five miles, the defendant stopped the car and, as the victim was leaving the vehicle, one of the men shot him in the back. *Id.* at 80. The defendant was subsequently charged with robbery with a dangerous weapon, first-degree kidnapping, and felonious assault, with the kidnapping charge resting upon the "asportation of the victim to facilitate the commission of the felony of armed robbery." *Id.* at 79, 82.

¶ 21 In the course of challenging his kidnapping conviction on appeal, the defendant argued that, "since the evidence show[ed] the crime of armed robbery was complete at the time the victim was taken from the service station to" the point at which he was let out of the car, "the kidnapping was for the purpose of facilitating flight, not for the purpose of facilitating armed robbery," meaning that there was a fatal variance between the indictment and the evidence presented at trial. *Id.* at 82. In rejecting the defendant's argument, this Court held that "[t]he purposes

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6. At the close of evidence, the trial court dismissed the felonious automobile larceny charge. *Faircloth*, 297 N.C. at 104.

specified in [N.C.G.S. §] 14-39(a) are not mutually exclusive," so that "[a] single kidnapping may be for the dual purposes of using the victim as a hostage or shield and for facilitating flight, or for the purposes of facilitating the commission of a felony and doing serious bodily harm to the victim." *Id.* Based upon that logic, the Court held that, "[s]o long as the evidence proves the purpose charged in the indictment, the fact that it also shows the kidnapping was effectuated for another purpose enumerated in [N.C.G.S. §] 14-39(a) is immaterial and may be disregarded." *Id.* The Court concluded that the record contained sufficient evidence to show that the defendant had kidnapped the victim "for the purpose of facilitating the armed robbery and also for the purpose of facilitating flight" and, therefore, "the evidence proved the *crime charged* in the indictment." *Id.* (emphasis in original). As a result, we held that, "[a]lthough [the] defendant contends that the crime was 'complete' when [his accomplice] pointed his pistol at [the victim] and attempted to take property by this display of force, the fact that all essential elements of a crime [have] arisen does not mean the crime is no longer being committed," with this Court opining that the fact that the "the crime was 'complete' does not mean it was completed.' " *Id.* (citing *State v. Squire*, 292 N.C. 494 (1977)). Justice Britt, who had authored the Court's opinion in *Faircloth*, dissented from his colleagues' decision in *Hall* on the grounds that he was "unable to reconcile the holding of the majority in this case with our decision in [*Faircloth*]." 305 N.C. at 91 (Britt, J., joined by Branch, C.J., and Exum, J., dissenting, in part).

3. State v. Diaz

¶ 22 Four years later, we decided *Diaz*, in which the defendant had been charged with trafficking in marijuana on an acting in concert theory. 317 N.C. at 546. At that time, the relevant statute provided that "anyone who s[old], manufacture[d], deliver[ed], transport[ed], *or* possesse[d] more than 50 pounds of marijuana" was guilty of a felony. *Id.* at 547 (emphasis added) (citing N.C.G.S. § 90-95(h)(1) (1985)). At the defendant's trial, the trial court instructed the jury that it could convict defendant if it found that he, acting together with the other defendants, "knowingly possessed *or* knowingly transported marijuana[.]" *Id.* at 553 (emphasis added). On appeal, the defendant argued that the trial court had erred by denying his motion to set aside the jury's guilty verdict because "the verdict was ambiguous and lacked the unanimity required" by N.C.G.S. § 15A-1237 and Article I, Section 24 of the North Carolina Constitution. *Id.*

¶ 23 This Court agreed, holding that "a verdict of guilty following submission in the disjunctive of two or more possible crimes to the jury in a single issue is ambiguous and therefore fatally defective." *Id.* (citing

State v. McLamb, 313 N.C. 572, 577 (1985); *State v. Albarty*, 238 N.C. 130, 133 (1953)). According to the Court, the "[s]ale, manufacture, delivery, transportation, and possession of 50 pounds or more of marijuana are separate trafficking offenses for which a defendant may be separately convicted and punished," so that, "[b]y instructing the jury that it could find [the] defendant guilty of trafficking in marijuana if it found that [the] defendant knowingly possessed *or* knowingly transported 10,000 pounds or more of marijuana[,] the trial judge submitted two possible crimes to the jury," with it being impossible to know whether the jury had unanimously found that the defendant knowingly possessed the marijuana, unanimously found that the defendant had knowingly transported the marijuana, or that some jurors had found that the defendant had knowingly possessed the marijuana while other jurors had found that the defendant had knowingly transported it. *Id.* at 554 (emphasis added). As a result, the Court concluded that the trial court's instruction deprived the defendant of his constitutional right not to be convicted of a crime except on the basis of a unanimous jury verdict. *Id.*

¶ 24 The Court cautioned, however, that its decision in *Diaz* "[did] not mean that a simple verdict of guilty based on an indictment and instruction charging crimes in the disjunctive will always be fatally ambiguous." *Id.* Instead, the Court stated that a reviewing court must examine "the verdict, the charge, the initial instructions by the trial judge to the jury[,] . . . and the evidence in a case [that] may remove any ambiguity created by the charge." *Id.* After acknowledging that *Hall* had "reached results at variance with this opinion," the Court stated that, "[i]nsofar as [*Hall*] and other opinions of this Court contain language inconsistent with the holding of this case they are overruled." *Id.* at 555.[7]

7. The parties disagree concerning the extent to which the Court's decision in *Diaz* to overrule *Hall* encompassed the portions of the *Hall* opinion that are relevant to the present case. The State, on the one hand, contends that *Diaz* only overruled *Hall* with respect to the jury unanimity issue that was explicitly addressed in *Hall*, a question that did not include the kidnapping charge, while defendant argues that, in light of *Diaz*, "it would be reversible error to allow [defendant's] conviction on the second count of first-degree kidnapping to stand when the jury may have convicted [defendant] of the second first-degree kidnapping charge for some other purpose than that alleged in the indictment." Our subsequent decisions make clear that the State has the better of this disagreement. *See Kyle*, 333 N.C. at 695 (relying on *Hall* in rejecting the defendant's argument that the kidnapping of the defendant's wife and stepson could not have facilitated the crime of burglary because the burglary was complete upon his entry into the house and noting that *Diaz* had overruled *Hall* "on other grounds"); *State v. Bell*, 351 N.C. 1, 30 (2004) (concluding that, to secure a kidnapping conviction under N.C.G.S. § 14-39(a), "[i]t is not necessary for the State to prove, nor for the jury to find, that a defendant committed a particular act other than that of confining, restraining, or removing the victim" and that, even if the trial court had instructed the jury disjunctively with respect to the various *purposes* which allegedly

4. *State v. Kyle*

¶ 25 In *Kyle*, the defendant, who was armed with a pistol, broke into a mobile home in which his estranged wife and stepson were living. 333 N.C. at 692. After exchanging words with his wife and stepson, the defendant shot his wife in the chest, dragged her outside to her automobile, placed her in the front seat, and ordered his stepson to enter the back seat. *Id.* According to the stepson, the defendant's wife was still alive at that time and calling the defendant's name. *Id.* After driving some distance, the defendant pulled the automobile to the side of the road, shot his wife in the side of the head to "shut [her] up," and, after driving several more miles, pulled over again and dumped her body in a ditch. *Id.* at 692–93. A grand jury returned bills of indictment charging the defendant with the first-degree murder and first-degree kidnapping of his wife, first-degree kidnapping of his stepson, and first-degree burglary, alleging in the kidnapping indictment that the defendant had "confined, restrained and removed [his wife] 'for the purpose of facilitating the commission of the felonies of murder and burglary, and facilitating the flight of [the defendant] following his participation in the commission of the felonies.' " *Id.* at 691, 693.

¶ 26 On appeal from a judgment based upon defendant's conviction as charged, the defendant argued before this Court that the State had presented insufficient evidence "to establish that he restrained or removed [his wife] for either the purpose of burglarizing her home or for the purpose of murdering her." *Id.* at 694. In upholding defendant's kidnapping conviction, this Court began by noting that "[t]he word facilitate has been defined as 'to make easier.' " *Id.* (quoting *Webster's Ninth New Collegiate Dictionary* 444 (1988)). The Court then reasoned that "[r]estraining [his wife] and [stepson] in [his wife's] apartment . . . made the crime of burglary easier by enabling [the] defendant to carry out his felonious intent" of killing her and that, had the defendant "not restrained the victim and had instead allowed her to flee from his presence, he may not have completed his intent to kill her." *Id.* at 695. For that reason, the Court, in reliance upon *Hall*, rejected the defendant's argument that "the burglary was complete upon entry into the house and that the kidnapping could not facilitate this crime." *Id.* Similarly, we noted with respect to the first-degree murder charge that, "after shooting [his wife] in her [home], [the] defendant dragged her and [his stepson] to her car while

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motivated the defendant's actions, the requirement that the jury's verdict be unanimous was not violated despite the possibility that individual jurors might have relied upon different purposes in determining that the defendant should be convicted) (citing *State v. Hartness*, 326 N.C. 561 (1990)).

she was still living" and that, after driving several miles, defendant shot her in the head, evidence that "support[ed] a reasonable inference that [the] defendant removed the victim from her apartment for the purpose of facilitating the commission of murder." *Id.* at 696. As a result, the Court affirmed the defendant's first-degree kidnapping conviction. *Id.*

5. *State v. Morris*

¶ 27 In *Morris*, the defendant, who was a high school student, invited one of his female classmates to visit him at his apartment, called her upstairs, and "began to rub her shoulders and breasts." 147 N.C. App. at 248. When the victim attempted to leave, the defendant "pushed her away from the door" and "punched her in the face," causing her to black out. *Id.* Upon regaining consciousness, the victim discovered that the defendant was on top of her and that she was not wearing shorts or underwear. *Id.* at 248–49. After she began screaming, hitting, and scratching at the defendant in order to get him to stop what he was doing, the defendant hit the victim in the face, causing her to lose consciousness for a second time. *Id.* at 249. The victim woke up the next morning in a storage closet outside the apartment, wearing only a tank top and feeling sore all over her body. *Id.* After a grand jury charged the defendant with second-degree rape and second-degree kidnapping, the jury convicted him of both offenses. *Id.* at 248.

¶ 28 On appeal, a majority of the Court of Appeals held that there was a fatal variance between the allegations of the indictment and the evidence, stating that

> [t]he indictment for second degree kidnapping stated [that the] defendant kidnapped the victim "for the purpose of facilitating the commission of a felony." The indictment made no mention of facilitating defendant's flight following the commission of a felony. At trial, the State again asserted only that the kidnapping facilitated the felony of second degree rape.
>
> . . . .
>
> In the case before us, the evidence presented shows the victim was confined in the apartment living room, she was knocked unconscious, she awoke once to find [the] defendant on top of her and her clothes removed, she was knocked unconscious again, and when she awoke a second time, she was locked in the storage closet outside. The evidence presented

> could possibly show [the] defendant kidnapped the victim for the purpose of facilitating the flight from the commission of a felony; however, this crime was not charged. There is no evidence [that the] defendant removed the victim to the storage closet for the purpose of raping her there. All of the physical evidence of a rape was found inside the apartment. While there was testimony that the victim kicked her way out of the storage closet, there was no evidence of a struggle or a rape inside the storage closet.

Id. at 250–51. In addition, the majority at the Court of Appeals rejected the State's invocation of the continuous transaction doctrine on the grounds that "our Courts have not applied the continuous transaction doctrine to instances involving rape and kidnapping like the situation we have before us" and that, "[w]hile these two acts occurred close in time, they were not inseparable or concurrent actions," with "[a]ll of the elements of the rape [having been] completed before defendant removed the victim to the storage closet." *Id.* at 252.

¶ 29 Finally, the Court of Appeals disagreed with the State's argument that *Kyle* was controlling, reasoning that, "[w]hile there is little question that [the] defendant's actions made his flight from the scene easier and was an attempt to cover up his act, the removal of the victim to the storage closet in no way made defendant's rape of her easier, as all the elements of rape were completed before the removal." *Id.* at 252–53. As a result, the Court of Appeals reversed the defendant's second-degree kidnapping conviction over a dissent. Although Judge Walker dissented on the grounds that he was "unable to reconcile the facts of this case" with those in *Hall*, *id.* at 253 (Walker, J., dissenting), this Court affirmed the Court of Appeals decision by means of a per curiam opinion, *State v. Morris*, 355 N.C. 488 (2002).

C. Second-Degree Kidnapping

¶ 30 In the present appeal, the State asserts that, by relying upon *Morris* and *Jordan*, the Court of Appeals' decision in this case conflicts with this Court's decision in *Hall*. According to the State, "it is not clear that the sexual assaults on [the victim] had ended" at the time that defendant had moved her to the second bedroom and that, "even if they were, *Hall* argues that the crime still is not necessarily over." Arguing consistently with the reasoning that Judge Tyson adopted in his dissent, the State contends that "[d]efendant's actions after the second kidnapping 'continued [the victim's] pain, damage, and trauma from the rape' " and

that defendant's actions in restraining the victim "allowed [d]efendant a chance to potentially destroy evidence by showering [and] escaping, and prolonged the victim's pain, injuries, and trauma," quoting *Elder*, ¶ 92 (Tyson, J. concurring, in part, and dissenting, in part). In addition, the State contends that, "[i]f the second kidnapping . . . in any way 'made easier' the commission of the rape, as the jury found, then [d]efendant facilitated the commission of the rape," citing *Kyle*, 333 N.C. at 693. As a result, the State asserts that, when the evidence is viewed in the light most favorable to the State, it "support[s] a reasonable inference that [defendant] moved [the victim] into the closet to facilitate the commission of her rape."

¶ 31 In the State's view, both *Jordan* and *Morris* are distinguishable from this case in ways that the Court of Appeals failed to appreciate. As an initial matter, the State argues that the defendant in *Jordan* had been charged with burglary, which is "complete once the defendant enters a house," whereas "the end of the commission of [a rape] is far more amorphous and difficult to define." The State also contends that, even if this Court finds that distinction to be unpersuasive, *Jordan* was incorrectly decided in light of *Hall* and *Kyle*. In support of this assertion, the State points to the fact that "the trial court instructed the jury that the confinement, restraint, or removal of the victim had to be for 'the purpose of facilitating [defendant's] commission of committing first-degree rape,' " with the fact that the jury found that this element of the relevant crime existed beyond a reasonable doubt providing further indication that, "in [the] light most favorable to the State, the trial court's decision to deny [d]efendant's motion to dismiss this [count of first-degree kidnapping] was correct." According to the State, "the second kidnapping helped facilitate the commission of rape because it prevented the victim from fleeing or getting help" and that the existence of "other grounds or theories the State could have used in indicting and convicting [defendant] is irrelevant" because "the second kidnapping could satisfy a theory in which the crime was done to facilitate a felony, and in which the crime was done to facilitate flight."

¶ 32 Furthermore, the State argues that the majority at the Court of Appeals erred by relying upon *Morris* even though the Court of Appeals' decision in that case had been affirmed per curiam by this Court, insisting that "the Court of Appeals myopically found [that] 'there is no evidence defendant removed the victim for the purpose of raping her there,' " quoting *Morris*, 147 N.C. App. at 251. In the State's view, this conclusion was "short-sighted" because the "jurors could, as they did in *Morris* and in this matter, find that the facts supported that a second

kidnapping facilitated the commission of a rape" by allowing the defendant to "destroy evidence by showering, prolong the victim's pain and suffering, and evade capture by committing the second kidnapping."

¶ 33 In seeking to persuade us that the Court of Appeals' decision to overturn the second of defendant's first-degree kidnapping convictions on fatal variance grounds should be upheld, defendant begins by noting that "[a] valid kidnapping indictment must allege [that] the defendant unlawfully confined, restrained, or removed a person, for one of the [ten] specific purposes set out in N.C.G.S. § 14-39" and that "the State is restricted at trial to proving the purpose(s) alleged in the indictment." According to defendant, "the State had the burden of proving not only that [he] kidnapped [the victim] by moving her from her back bedroom to the front bedroom closet, but [also] that [he] did so with the specific intent to facilitate his commission of a felony, to wit: first degree rape; as alleged in the State's indictment." In light of the State's failure to make the required evidentiary showing, defendant contends that the majority at the Court of Appeals properly concluded that *Morris* dictated a decision in his favor in this case.

¶ 34 We hold that the evidence adduced at trial does not support the second of the two counts of first-degree kidnapping alleged in the indictment and that the majority did not err in reaching this conclusion. According to the relevant statutory provision, a defendant is guilty of kidnapping if he or she

> unlawfully confine[s], restrain[s], or remove[s] from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person . . . if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or
>
> (2) *Facilitating the commission of any felony* <u>*or*</u> *facilitating flight of any person following the commission of a felony; or*
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or

> (4) Holding such other person in involuntary servitude in violation of [N.C.G.S. §] 14-43.12.
>
> (5) Trafficking another person with the intent that the other person be held in involuntary servitude or sexual servitude in violation of [N.C.G.S. §] 14-43.11.
>
> (6) Subjecting or maintaining such other person for sexual servitude in violation of [N.C.G.S. §] 14-43.13.

N.C.G.S. § 14-39(a) (2021) (emphasis added). A kidnapping is elevated from second-degree kidnapping to first-degree kidnapping in the event that "the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted." N.C.G.S. § 14-39(b).

¶ 35 According to well-established North Carolina law, since "kidnapping is a specific intent crime, the State must prove that the defendant unlawfully confined, restrained, or removed the person for one of the [ten] purposes set out in the statute." *State v. Moore*, 315 N.C. 738, 743 (1986);[8] *accord State v. China*, 370 N.C. 627, 633 (2018); *State v. Prevatte*, 356 N.C. 178, 252 (2002). As a result, an indictment charging a defendant with kidnapping "must allege the purpose or purposes [for the kidnapping] upon which the State intends to rely, and the State is restricted at trial to proving the purposes alleged in the indictment." *Moore*, 315 N.C. at 743; *see also Faircloth*, 297 N.C. at 107 (observing that it "has long been the law of this state that a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment"). Although the indictment "may allege more than one purpose for the kidnapping, the State has to prove only one of the alleged purposes in order to sustain a kidnapping conviction." *Moore*, 315 N.C. at 743.

¶ 36 The indictment returned against defendant in this case for the purpose of charging him with kidnapping alleged that he

> kidnap[ped] [the victim], a person who had attained and [sic] the age of 16 years, by unlawfully confining,

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8. The General Assembly amended N.C.G.S. § 14-39 in 2006 to add human trafficking and sexual servitude to the list of purposes for which a person could "unlawfully confine, restrain, or remove" another person so as to be guilty of kidnapping. *See* Act to Protect North Carolina's Children/Sex Offender Law Changes, S.L. 2006-247, § 20(c), 2006 N.C. Sess. Laws 1065, 1084.

> restraining[,] and removing her from one place to another without her consent and *for the purpose of facilitating the commission of a felony*, *first degree rape*, by moving [the victim] from the back bedroom to another bedroom and put[ting] her into a closet. [The victim] was not released by the defendant and she was forcibly confined to a closet until she freed herself sometime after the defendant left.

(emphasis added.) As a result of the manner in which the kidnapping indictment was written, the State was obligated to prove beyond a reasonable doubt that defendant had moved the victim to the closet in the second bedroom *for the purpose of facilitating the commission of rape*. *See Moore*, 315 N.C. at 743; *see also Morris*, 147 N.C. App. at 253. A careful review of the record reveals, however, that all of the evidence presented at trial, even when taken in the light most favorable to the State, tended to show that defendant did not move the victim "from the back bedroom to another bedroom and put her into a closet" until *after* he had raped her, with nothing that defendant did during that process having made it any easier to have committed the actual rape.[9] As a result, the record does not support the allegation that defendant moved the victim to the closet in the second bedroom *for the purpose of* facilitating the commission of rape. S*ee Jordan*, 186 N.C. App. at 584 (holding that, where an indictment alleges that the defendant kidnapped a victim for the purpose of facilitating the commission of a felony, "the felony that is the alleged purpose of the kidnapping must occur after the kidnapping"); *see also State v. Brooks*, 138 N.C. App. 185, 192 (2000) (holding that, in order for the State to prove that the defendant kidnapped the victim for the purpose of facilitating the commission of assault with a deadly weapon inflicting serious injury, "the evidence at trial must have shown that [the] defendant kidnapped [the victim] *before* he shot her").

¶ 37 The evidence elicited at trial would, of course, support a jury finding that defendant moved the victim to the closet in the second bedroom for the purpose of *facilitating his flight* following the commission of the rape. For example, the evidence tending to show that defendant locked the victim in the bedroom closet and took a shower could support a jury finding that the defendant facilitated his escape from raping the victim

9. N.C.G.S. § 14-27.21(a) provides, in pertinent part, that a defendant "is guilty of first-degree forcible rape if the person engages in vaginal intercourse with another person by force and against the will of the other person" and "[i]nflicts serious personal injury upon the victim or another person."

by destroying any biological evidence of the crime that might have been present on his body and leaving the scene before the victim had had an opportunity to call for help. *See Morris*, 147 N.C. App. at 252–53 (noting that "there is little question" that the defendant's actions in moving the victim from the bedroom in which he had raped her to a storage closet outside the apartment "made his flight from the scene easier and was an attempt to cover up his act"). However, the grand jury simply did not allege that defendant moved the victim from one bedroom to another for the purpose of facilitating his flight following the commission of a felony. *Cf. Faircloth*, 297 N.C. at 108 (holding that, had the indictment alleged that the defendant had "restrained or removed the victim from one place to another for the purpose of facilitating the commission of the felony of rape, the conviction could be upheld," and that, because the evidence contained in the record tended to show that the kidnapping took place *before* the rape, the record did not support the allegation contained in the indictment that the defendant had kidnapped the victim for the purpose of facilitating his *flight from* the commission of a felony).

¶ 38 The facts at issue in this case are virtually indistinguishable from those at issue in *Morris*. In this case, defendant moved the victim to the closet in the second bedroom after having raped her, just as the defendant in *Morris* moved his victim into a storage closet outside the apartment after he had raped her, with "[t]here [being] no evidence defendant removed [the victim] to the [closet in the second bedroom] for the purpose of raping her there." *Morris*, 147 N.C. App. at 251. Similarly, as in *Morris*, the indictment "[makes] no mention of facilitating defendant's flight following the commission of a felony." *Id.* at 250. In addition, the Court of Appeals in *Morris* rejected an argument that had been advanced by the State in that case, in reliance upon *Kyle*, that is very similar to an argument that the State has advanced in this case.

> The State also relies on *State v. Kyle* in arguing that "to facilitate" means "to make easier." Therefore, any act which makes the commission of the felony easier will support a conviction of facilitating the felony. In *Kyle*, the kidnapping made the eventual murder easier because it prevented the victim from escaping. While we agree with this theory of the State's argument and its definition of "to facilitate," the facts in the case before us do not support this theory. While there is little question defendant's actions made his flight from the scene easier and was an attempt to cover up his act, the removal of the victim to the storage closet in

> no way made defendant's rape of her easier, as all the elements of rape were completed before the removal. Again, defendant's actions possibly would support a conviction of second degree kidnapping for the purpose of facilitating his flight from the commission of a rape; however, the State has failed to carry its burden in proving defendant's actions facilitated defendant's commission of the actual rape.

Id. at 252–53 (citation omitted). In the same vein, by placing the victim in the closet in the second bedroom and apparently taking a shower, defendant may have facilitated his escape from or covered up evidence of the commission of the rape. However, we are unable to see how any of these actions made it any easier for defendant to rape the victim.

¶ 39 Apart from contending that the Court of Appeals took a "short-sighted" view in *Morris*, the State has made no attempt to persuade us that it is not controlling in this case, despite the fact that this Court has long held that "[p]er curiam decisions stand upon the same footing as those in which fuller citations of authorities are made and more extended opinions are written." *Bigham v. Foor*, 201 N.C. 548, 549 (1931); *accord Tinajero v. Balfour Beatty Infrastructure, Inc.*, 233 N.C. App. 748, 761 (2014); *Total Renal Care of N.C. v. N.C. Dep't of Health & Hum. Servs.*, 195 N.C. App. 378, 386 (2009); *see also Mote v. White Lake Lumber Co.*, 192 N.C. 460, 465 (1926) (observing that a per curiam opinion "carries all the force of a formal utterance").[10] In addition, Judge Tyson totally failed to make any mention of *Morris* in his dissenting opinion. *See Elder*, ¶¶ 88–94 (Tyson, J., concurring, in part, and dissenting, in part). Instead, both the State and Judge Tyson simply contend that the outcome in this case is controlled by *Hall*. We do not find this argument to be persuasive.

¶ 40 As an initial matter, N.C.G.S. § 14-39(a) delineates ten specific purposes for which a defendant might "unlawfully confine, restrain, or remove" a victim in order to be guilty of kidnapping, with the indictment

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10. The dissenting judge in *Morris* argued, as Judge Tyson has done in this case, that the majority's decision was inconsistent with *Hall*. *Morris*, 147 N.C. App. at 253–54 (2001) (Walker, J., dissenting). For that reason, the issue before this Court in *Morris* was identical to the one that is before us now. *See State v. Alexander*, 380 N.C. 572, 2022-NCSC-26, ¶ 26 (noting that, "when an appeal is taken pursuant to N.C.G.S. § 7A-30(2), the only issues properly before the Court are those on which the dissenting judge in the Court of Appeals based his dissent" (cleaned up)); N.C. R. App. P. 14(b)(1). Our decision to affirm the Court of Appeals' decision in *Morris* per curiam means that we effectively rejected the State's contention that a fact pattern like the one at issue here was controlled by *Hall*. In other words, one can have either *Hall* or *Morris*, but not both.

being required to allege that the defendant acted to effectuate one of these purposes and with the State being required to elicit substantial evidence to that effect in order to obtain the defendant's conviction for kidnapping. *See Moore*, 315 N.C. at 743 (noting that "[t]he indictment in a kidnapping case must allege the purpose or purposes upon which the State intends to rely, and the State is restricted at trial to proving the purposes alleged in the indictment"). As we have already noted, the indictment returned against defendant in this case alleged that defendant kidnapped the victim by "unlawfully confining, restraining[,] and removing her from one place to another without her consent and *for the purpose of facilitating the commission of a felony, first degree rape*," which means that the State was required to prove that defendant moved the victim to the bedroom closet for the purpose of facilitating the commission of a rape. (emphasis added.) For the reasons that we have already provided, the record simply does not support a determination that the movement of the victim from one bedroom to the other did anything to make any easier the commission of the rape, which had already occurred prior to the point in time at which the victim was moved to the closet in the second bedroom. Aside from the fact that an identical argument was rejected in *Morris*, the State has not cited any authority in support of its contention that, unlike a burglary, which is "complete once the defendant enters a house," "the end of the commission of [rape] is far more amorphous and difficult to define."[11] On the contrary, we have clearly held that, "generally rape is not a continuous offense, but each act of intercourse constitutes a distinct and separate offense." *State v. Dudley*, 319 N.C. 656, 659 (1987) (cleaned up); *accord State v. Carter*, 198 N.C. App. 297, 305 (2009); *State v. Sapp*, 190 N.C. App. 698, 704 (2008).

¶ 41 In addition, the State's argument in reliance upon *Hall* simply cannot be squared with the sequence of events that transpired in this case. Although defendant's decision to move the victim to the closet in the second bedroom might have facilitated his ability to escape following the commission of the rape, we are completely unable to see how those actions facilitated the commission of the rape itself, which had already happened by that point. For the same reason, we have difficulty seeing how the defendant's decision to kidnap the victim in *Hall* after having already robbed him served to facilitate the commission of the robbery rather than facilitating the defendant's flight following the robbery, particularly given our observation that the defendant kidnapped the victim

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11. The State apparently overlooks the fact that this Court in *Kyle* specifically rejected the defendant's argument that "the burglary was complete upon entry into the house and that the kidnapping could not facilitate this crime." 333 N.C. at 695.

"so [the victim] couldn't get to a telephone for a while," *Hall*, 305 N.C. at 80. Indeed, the Court in *Hall* did not provide any explanation for how the asportation of the victim helped make the commission of the robbery any easier other than making the conclusory assertion that "[the defendant] kidnapped [the victim] for the purpose of facilitating the armed robbery and also for the purpose of facilitating flight" and the otherwise unsupported contention that "the fact that all essential elements of a crime have arisen does not mean that the crime is no longer being committed" and that the fact that "the crime was 'complete' does not mean it was completed." 305 N.C. at 82–83.

¶ 42 The only authority that this Court cited in support of the last of these propositions was *State v. Squire*, a case in which three defendants were charged with having murdered a state trooper while fleeing from the commission of an armed robbery. 292 N.C. at 500–01. This Court upheld the defendants' convictions for first-degree murder on the basis of the felony murder rule despite the defendants' argument that the robbery had been completed before one of them fatally shot the trooper on the grounds that, "[f]or the purposes of this rule, the underlying felony is not deemed terminated prior to the killing merely because the participants have then proceeded far enough with their activities to permit their conviction of the underlying felony." *Id.* at 511. This holding from *Squire* would come to be known as the "continuous transaction doctrine," pursuant to which "[a] killing is committed in the perpetration or attempted perpetration of another felony when there is no break in the chain of events between the felony and the act causing death, so that the felony and homicide are part of the same series of events, forming one continuous transaction." *State v. Wooten*, 295 N.C. 378, 385–86 (1978). We have applied the continuous transaction doctrine in cases in which the defendant has committed murder and, within the same time frame, also committed another crime such as arson, *see State v. Campbell*, 332 N.C. 116, 120 (1992); armed robbery, *see State v. Olson*, 330 N.C. 557, 566 (1992); sexual offense, *see State v. Thomas*, 329 N.C. 423, 434 (1991); rape, *see State v. Trull*, 349 N.C. 428, 449 (1998); and kidnapping, *see State v. Mann*, 355 N.C. 294, 305 (2002). In addition, this Court has held that evidence is sufficient to convert what would otherwise be a second-degree sexual offense into a first-degree sexual offense in the event that it shows "a series of incidents forming a continuous transaction between [the] defendant's wielding [of a dangerous or deadly weapon] and the sexual assault" even if the defendant was not holding the weapon at the exact moment that the sexual act was committed, *State v. Whittington*, 318 N.C. 114, 119–20 (1986), and that a conviction for robbery with a dangerous weapon can be upheld when "the defendant's

use or threatened use of a dangerous weapon . . . precede[s] or [is] concomitant with the taking, or [is] so joined with it in a continuous transaction by time and circumstance as to be inseparable," *State v. Hope*, 317 N.C. 302, 306 (1986).

¶ 43 On the other hand, as the Court of Appeals recognized in *Morris*, we have not applied the continuous transaction doctrine to circumstances like those presented in that case and the one that is presently before us, *see Morris*, 147 N.C. App. at 252, and are not persuaded that we should do so in circumstances involving similar facts. Although defendant's actions in raping the victim and moving her to the closet in the second bedroom "occurred close in time, they were not inseparable or concurrent actions" given that "[a]ll of the elements of the rape were completed before defendant removed the victim to the [second bedroom] closet." *Id.*; *see also Dudley*, 319 N.C. at 659. In addition, unlike the vast majority of the cases in which the continuous transaction doctrine has been applied, this case does not involve the commission of a homicide. *See Wooten*, 295 N.C. at 385–86. Thus, we hold that the continuous transaction doctrine does not justify a decision to uphold the second of defendant's first-degree kidnapping convictions in this case.

¶ 44 In light of this logic, we conclude that the Court's statement in *Hall* that the fact that "the crime was 'complete' does not mean it was completed" sweeps too broadly, particularly given that the only support provided for that proposition stems from the application of the felony murder rule. *See Squire*, 292 N.C. at 511 (holding that, "[*f*]*or the purposes of this rule*, the underlying felony is not deemed terminated prior to the killing merely because the participants have then proceeded far enough with their activities to permit their conviction of the underlying felony" (emphasis added)). In addition, we are concerned that the Court in *Hall* failed to articulate any kind of limiting principle that can be used to identify the point at which the commission of a crime has been "completed."[12] If the point at which a crime has been committed is not, as the Court in *Hall* seemed to suggest it was not, the point at which all of the essential elements of the crime could be found beyond

12. As a matter of basic grammar, we cannot discern any difference between a "complete" crime and a crime that has been "completed" in light of the fact that "complete" and "completed" are simply two different forms of the same word. *See New Oxford American Dictionary* 355 (3d ed. 2010) (defining "complete" as an adjective meaning "having run its full course; finished: *the restoration of the chapel is complete*," and defining "completed" as a transitive verb meaning "finished making or doing: *he completed his Ph.D. in 1983*"); *Merriam-Webster's Collegiate Dictionary* 254 (11th ed. 2007) (defining both "complete" and "completed" as transitive verbs meaning "to bring to an end" or "to mark the end of").

a reasonable doubt, there does not appear to be any meaningful limitation upon the extent to which acts committed by the defendant following the technical completion of a crime would suffice to support a finding of facilitation of the commission of a rape for purposes of the kidnapping statute. *See State v. Dew*, 379 N.C. 64, 2021-NCSC-124, ¶ 29 (observing that, although "the concept of an assault can be broader than each individual harmful contact, . . . allowing for a separate charge for each non-simultaneous contact would erase any limiting principle and allow the State to charge a defendant for every punch in a fight"). For that reason, we are not persuaded that the statement from *Hall* upon which the State relies in this case provides adequate support for the trial court's decision to allow defendant to be convicted of kidnapping on the grounds that his conduct facilitated the commission of the rape of the victim.

¶ 45 Finally, we conclude that the State's position, and the holding in *Hall* upon which it rests, cannot be squared with the manner in which the kidnapping statute is written. According to the relevant statutory language, a defendant is guilty of kidnapping if he or she unlawfully confines, restrains, or removes the victim from one place to another "for the purpose of . . . [f]acilitating the commission of any felony *or* facilitating flight of any person following the commission of a felony." N.C.G.S. § 14-39(a)(2) (emphasis added). The use of the disjunctive "or" in N.C.G.S. § 14-39(a)(2) plainly indicates that the defendant is subject to the criminal sanction based upon the commission of a kidnapping if his or her acts occurred for the purpose of *either* facilitating the commission of a felony *or* facilitating his or her escape following the commission of a felony. *See Davis v. N.C. Granite Corp.*, 259 N.C. 672, 765 (1963) (holding that, "where a statute contains two clauses which prescribe its applicability, and the clauses are connected by a disjunctive (e.g., 'or'), the application of the statute is not limited to cases falling within both clauses, but will apply to cases falling within either of them" (cleaned up)). An argument that defendant's actions in moving the victim to the closet in the second bedroom after having raped her "made the commission of the rape easier" because it "helped [d]efendant get away with the rape" and "made it easier for [him] to shower and destroy evidence" effectively conflates actions that made it more likely that defendant would avoid apprehension for the rape with the actions necessary to commit the rape itself. In other words, the argument upon which the State relies would, if adopted, effectively eliminate the distinction between the commission of a kidnapping for the purpose of "facilitating the commission of any felony" and the commission of a kidnapping for the purpose of "facilitating flight of any person following the commission of a felony," a result that cannot be squared with the unambiguous statutory language

making facilitation of the commission of a crime and flight from a crime two different bases for finding that the defendant has committed a kidnapping. *See State v. Morgan*, 372 N.C. 609, 614 (2019) (recognizing that "a statute may not be interpreted in a manner which would render any of its words superfluous" (cleaned up)).[13]

¶ 46 As a result, we hold that the portions of our prior decision in *Hall* upon which the State and the dissenting opinion at the Court of Appeals relied are fundamentally inconsistent with *Faircloth* and *Morris* and, therefore, must be overruled. *See Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478–79 (2018) (listing factors that should be considered in the course of deciding whether a prior decision should be overruled, including "the quality of [the prior decision's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision"). For that reason, we hold that, in instances in which the grand jury has alleged that a defendant unlawfully confined, restrained, or removed a victim from one place to another without his or her consent for the purpose of facilitating the commission of a felony, "the felony that is the alleged purpose of the kidnapping must occur after the kidnapping." *Jordan*, 186 N.C. App. at 584; *see also Faircloth*, 297 N.C. at 108; *Morris*, 147 N.C. App. at 253; *Brooks*, 138 N.C. App. at 192.[14] In addition, we hold that, in this case,

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13. Similarly, we are not persuaded by the State's argument that moving the victim to the closet in the second bedroom facilitated the commission of the rape because it "prolong[ed] [her] pain and suffering" and "continued the trauma of the rape." The infliction of physical or emotional pain, while inherent in the commission of the offense, is not an element of rape, nor is a victim's immediate trauma after the rape even sufficient to elevate a particular rape from a second-degree to a first-degree offense. *See State v. Boone*, 307 N.C. 198, 205 (1982) (holding that, in order for mental injury to constitute the "serious personal injury" sufficient to support a conviction for first-degree rape, "ordinarily the mental injury inflicted must be more than the *res gestae* results present in every forcible rape and sexual offense," so that the State must "offer proof that such injury was not only caused by the defendant but that the injury extended for some appreciable time beyond the incidents surrounding the crime itself"), *overruled on other grounds by State v. Richmond*, 347 N.C. 412, 430 (1998).

14. Other than *Kyle*, in which, unlike in *Hall*, the Court attempted to explain how defendant's restraint of the victims facilitated the commission of burglary, the only other case that appears to have followed *Hall* is *State v. Holloway*, an unpublished decision in which the Court of Appeals rejected the defendant's assertion that the State had failed to prove that he had kidnapped the victim "to facilitate the attempted armed robbery" given that the evidence tended to show that the robbery was complete before the defendant placed the victim in his car. No. COA 16-940. 658, 2017 WL 2118712, at *5 (N.C. Ct. App. May 16, 2017) (unpublished). Aside from the fact that *Holloway* is unpublished and lacks any precedential value, it is inconsistent with *Faircloth*, *Morris*, *Jordan*, and *Brooks* and, for that reason, offers minimal support for a decision adhering to *Hall*.

all of the evidence presented at trial, when considered in the light most favorable to the State, tends to show that the felony that defendant allegedly attempted to facilitate by kidnapping the victim occurred *before* defendant moved the victim to the closet in the second bedroom. As a result, there is a fatal variance between the allegation in the indictment that defendant moved the victim to the closet "for the purpose of facilitating the commission of a felony, first degree rape," and the evidence elicited at trial that tended to show that the rape of the victim had been completed prior to the point in time at which the relevant kidnapping allegedly occurred, so that the trial court erred by failing to grant defendant's motion to dismiss the second count of first-degree kidnapping for insufficiency of the evidence. *See State v. Gibson*, 169 N.C. 318, 322 (1915) (holding that a dismissal based upon the existence of a fatal variance between the indictment and the evidence "is based on the assertion, not that there is no *proof* of a crime having been committed, but that there is none which tends to prove the particular offense charged in the bill has been committed" or, "[i]n other words, the proof does not fit the allegation") (emphasis in original).

III. Conclusion

¶ 47 Thus, for the reasons set forth above, we hold that the trial court erred by denying defendant's motion to dismiss the second first-degree kidnapping charge that had been lodged against defendant given that the evidence elicited at trial, when taken in the light most favorable to the State, did not support a finding that defendant had committed the crime alleged in the indictment. As a result, we affirm the decision of the Court of Appeals and remand this case to the Court of Appeals for further remand to the trial court for additional proceedings not inconsistent with this opinion.

AFFIRMED.

Chief Justice NEWBY dissenting.

¶ 48 This case requires us to determine whether the trial court erred when it denied defendant's motion to dismiss a kidnapping charge. This Court affirms a trial court's denial of a motion to dismiss if, when viewed in the light most favorable to the State, there is substantial evidence that the defendant committed each essential element of the charged crime. The essential element at issue in the present case is whether defendant kidnapped the victim for the purpose of facilitating the commission of

rape. Based on our current case law, the record evidence is sufficient to allow a rational juror to conclude that the second kidnapping facilitated the rape. Thus, the trial court's denial of defendant's motion to dismiss should be affirmed. Nevertheless, the majority overrules forty years of precedent to reach its decision to affirm the Court of Appeals' reversal of defendant's conviction. I respectfully dissent.

¶ 49 Defendant broke into the 80-year-old victim's house through the front door and kidnapped the victim by forcibly moving her to a bedroom. Defendant raped the victim in the bedroom and kidnapped her again by moving her to a different bedroom and tying her to a chair. The victim told defendant that her daughter was on the way, and defendant responded that if the victim's daughter arrived while he was still there, he would kill the victim. Defendant barricaded the bedroom door and told the victim that she better not come out until he was finished taking a shower. The victim eventually escaped from the bedroom to find the shower still running, but defendant had already left the house.

¶ 50 Defendant was charged, *inter alia*, with one count of first-degree rape and two counts of first-degree kidnapping. The indictment provides as follows regarding the kidnapping charges:

> II. And the jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above [defendant] unlawfully, willfully and feloniously did
>
> kidnap [the victim], a person who had attained and the age of 16 years, by unlawfully confining, restraining and removing her from one place to another without her consent and for the purpose of facilitating the commission of a felony, first[-]degree rape, by moving [the victim] from the kitchen to the back bedroom. [The victim] was not released by . . . defendant in a safe place and was bruised.
>
> III. And the jurors for the State upon their oath present that on or about the date(s) of offense shown and in the county named above [defendant] unlawfully, willfully and feloniously did
>
> kidnap [the victim], a person who had attained and the age of 16 years, by unlawfully confining, restraining and removing her from one place to another without her consent and for the purpose of facilitating the commission of a felony, first[-]degree rape, by moving

> [the victim] from the back bedroom to another bedroom and put her into a closet. [The victim] was not released by . . . defendant and she was forcibly confined to a closet until she freed herself sometime after . . . defendant left.

Defendant moved to dismiss the second kidnapping charge. The trial court denied defendant's motion, and the jury found defendant guilty on all counts. Defendant appealed.

¶ 51 On appeal the Court of Appeals reasoned that this case's outcome should be controlled by its prior decision in *State v. Morris*, 147 N.C. App. 247, 555 S.E.2d 353 (2001), *aff'd per curiam*, 355 N.C. 488, 562 S.E.2d 421 (2002). *State v. Elder*, 278 N.C. App. 493, 2021-NCCOA-350, ¶ 36 (citing *Morris*, 147 N.C. App. at 248–49, 555 S.E.2d at 353–54 (reversing the defendant's kidnapping conviction when the State alleged that the defendant kidnapped the victim to facilitate a rape, but the evidence tended to show only that the defendant kidnapped the victim to facilitate flight)). The Court of Appeals also cited its prior decision in *State v. Jordan*, 186 N.C. App. 576, 651 S.E.2d 917 (2007), for the proposition that "the felony that is the alleged purpose of the kidnapping must occur after the kidnapping." *Elder*, ¶ 34 (quoting *Jordan*, 186 N.C. App. at 584, 651 S.E.2d at 922). Therefore, according to the Court of Appeals majority, because defendant had already completed the rape when he moved the victim from the first bedroom to the second bedroom, defendant could not have moved the victim for the purpose of facilitating the rape. *Id.* ¶ 32. The Court of Appeals thus reversed defendant's second kidnapping conviction. *Id.*

¶ 52 The dissenting opinion at the Court of Appeals, however, relying on an older, authored opinion from this Court, noted that "[t]he occurrence of all essential elements of a crime does not mean the commission of a crime ceases." *Id.* ¶ 89 (Tyson, J., concurring in part and dissenting in part) (citing *State v. Hall*, 305 N.C. 77, 82–83, 286 S.E.2d 552, 556 (1982), *overruled on other grounds by State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986)). According to the dissenting opinion, the trial court did not err in denying defendant's motion to dismiss the second kidnapping charge because the second kidnapping facilitated the commission of the rape by preventing the victim from contacting help or fleeing, prolonging the victim's pain and trauma, and allowing defendant an opportunity to destroy evidence. *Id.* ¶ 92. As such, the dissenting opinion would have found no error in defendant's second kidnapping conviction. *Id.* ¶ 94. The State appealed to this Court based upon the dissenting opinion at the Court of Appeals.

¶ 53 The task here is to determine whether the trial court erred in denying defendant's motion to dismiss the second kidnapping charge. This Court reviews a trial court's denial of a motion to dismiss de novo. *State v. Blagg*, 377 N.C. 482, 2021-NCSC-66, ¶ 10 (quoting *State v. Golder*, 374 N.C. 238, 250, 839 S.E.2d 782, 790 (2020)). "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." *Id.* (quoting *Golder*, 374 N.C. at 249, 839 S.E.2d at 790). Substantial evidence only requires "more than a scintilla of evidence," *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982), or "the amount necessary to persuade a rational juror to accept a conclusion," *Blagg*, ¶ 10 (quoting *Golder*, 374 N.C. at 249, 839 S.E.2d at 790). "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 *Golder*, 374 N.C. at 249–50, 839 S.E.2d at 790).

¶ 54 At the time of defendant's crimes, kidnapping was defined as follows:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . . .
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony[.]

N.C.G.S. § 14-39 (2021). "Facilitate" simply means to make the commission of the crime easier. *State v. Kyle*, 333 N.C. 687, 694, 430 S.E.2d 412, 415–16 (1993).

¶ 55 "It has long been the law of this state that a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment." *State v. Faircloth*, 297 N.C. 100, 107, 253 S.E.2d 890, 894 (1979). The indictment in the present case stated that defendant committed the second kidnapping "for the purpose of facilitating the commission of a felony, first[-]degree rape, by moving [the victim] from

the back bedroom to another bedroom." Therefore, the relevant question is whether substantial evidence shows that the second kidnapping facilitated, or made easier, the commission of the rape.

¶ 56 The majority contends that a kidnapping cannot facilitate a rape that has already occurred. Our long-standing case law, however, holds that an act can facilitate the commission of a crime even if the act occurs after the elements of the crime have all been met. *See Hall*, 305 N.C. at 82–83, 286 S.E.2d at 556 ("[T]he fact that all essential elements of a crime have arisen does not mean the crime is no longer being committed. That the crime was 'complete' does not mean it was completed."); *Kyle*, 333 N.C. at 694, 430 S.E.2d at 415–16 (noting that an act "facilitate[s]" a crime if it makes the crime "easier").

¶ 57 Forty years ago, this Court decided a similar case. In *Hall* the defendant sought to reverse his kidnapping conviction, arguing that the State failed to prove the theory charged in the indictment—i.e., that the defendant kidnapped the victim for the purpose of facilitating the commission of armed robbery. *Hall*, 305 N.C. at 82, 286 S.E.2d at 555. The defendant contended there was a fatal variance in the indictment because he kidnapped the victim to facilitate his flight rather than the commission of the armed robbery. *Id.* We rejected the defendant's argument and explained that

> [t]he purposes specified in [N.C.]G.S. [§] 14-39(a) are not mutually exclusive. A single kidnapping may be for the dual purposes of using the victim as a hostage or shield and for facilitating flight, or for the purposes of facilitating the commission of a felony and doing serious bodily harm to the victim. So long as the evidence proves the purpose charged in the indictment, the fact that it also shows the kidnapping was effectuated for another purpose enumerated in [N.C.]G.S. [§] 14-39(a) is immaterial and may be disregarded.

Id. Thus, we determined that the defendant kidnapped the victim both for the purpose of facilitating the armed robbery and for the purpose of facilitating flight. *Id.*

¶ 58 The defendant in *Hall* also contended that the kidnapping could not have facilitated the armed robbery because the armed robbery was already complete when the kidnapping occurred. *Id.* We again rejected the defendant's argument and further explained that "the fact that all essential elements of a crime have arisen does not mean the crime is no longer being committed. That the crime was 'complete' does not mean it

was completed." *Id.* at 82–83, 286 S.E.2d at 556. Therefore, we found no error in the defendant's kidnapping conviction. *Id.* at 83, 286 S.E.2d at 556.

¶ 59 Similarly, nearly thirty years ago in *Kyle* the indictment charged that the defendant kidnapped the victim "for the purpose of facilitating the commission of the felonies of murder and burglary, and facilitating the flight of [the defendant] following his participation in the commission of the felonies of burglary and murder." *Kyle*, 333 N.C. at 693, 430 S.E.2d at 415. The defendant argued that the burglary was complete upon his entrance into the house and that the subsequent kidnapping thus could not have facilitated the commission of the burglary. *Id.* at 695, 430 S.E.2d at 416. We rejected the defendant's contention and cited *Hall* for the proposition that "the fact that all the essential elements of a crime have arisen does not mean the crime is no longer being committed. That the crime was 'complete' does not mean it was completed." *Id.* (quoting *Hall*, 305 N.C. at 82–83, 286 S.E.2d at 556).[1] We then provided the following analysis:

> [T]he evidence shows that, once [the] defendant entered the apartment, he waved the gun around and backed [the victim] and her son . . . up against a side wall in the living room. [The d]efendant was standing between the victim and the door to the apartment. Restraining the victim and her son in her apartment in this manner made the crime of burglary easier by enabling [the] defendant to carry out his felonious intent. If [the] defendant had not restrained the victim and had instead allowed her to flee from his presence, he may not have completed his intent to kill her.

Id. Thus, we concluded that the evidence supported a reasonable inference that the defendant kidnapped the victim for the purpose of facilitating his commission of murder and burglary. *Id.* at 696, 430 S.E.2d at 417.

¶ 60 Here there is substantial evidence that the second kidnapping facilitated defendant's commission of the rape, as well as facilitating flight. Just as the kidnapping in *Kyle* "made the crime of burglary easier by enabling [the] defendant to carry out his felonious intent," *Kyle*, 333 N.C. at

1. We recognized in *Kyle* that *Hall* had been overruled on other grounds by *Diaz*, 317 N.C. 545, 346 S.E.2d 488. *See Kyle*, 333 N.C. at 695, 430 S.E.2d at 416. Our decision in *Diaz* did not overrule our determination in *Hall* that "the fact that all the essential elements of a crime have arisen does not mean the crime is no longer being committed." *See id.* (quoting *Hall*, 305 N.C. at 82–83, 286 S.E.2d at 556). In footnote 7, the majority in this case concedes that this is a correct understanding of the case law.

695, 430 S.E.2d at 416, the second kidnapping in the present case made the crime of rape easier by allowing defendant the opportunity to shower and destroy evidence before the victim could seek help. The second kidnapping also prolonged the victim's torment because defendant's use of threat and force continued. Though the elements of rape were already satisfied at the time of the second kidnapping, "the fact that all essential elements of a crime have arisen does not mean the crime is no longer being committed. That the crime was 'complete' does not mean it was completed." *Hall*, 305 N.C. at 82–83, 286 S.E.2d at 556. Therefore, under *Hall* and *Kyle*, the evidence in the present case, viewed in the light most favorable to the State, is sufficient to allow a rational juror to conclude that the second kidnapping facilitated the commission of the rape. The trial court thus did not err in denying defendant's motion to dismiss the second kidnapping charge.

¶ 61 Now the majority overrules this binding precedent of forty years in *Hall* and its progeny. Instead, the majority concludes that our decision here is controlled by a per curiam affirmance of the Court of Appeals' decision in *Morris*.[2] *See Morris*, 355 N.C. 488, 562 S.E.2d 421. The majority relies on a per curiam opinion despite it being well understood that an authored opinion should be given more weight than a per curiam opinion.

¶ 62 Further, the facts in *Morris* are distinguishable from those in the present case. In *Morris* the defendant knocked the victim unconscious and raped her. *Morris*, 147 N.C. App. at 248–49, 555 S.E.2d at 354. The victim awoke during the rape, but the defendant knocked her unconscious again. *Id.* When the victim awoke for the second time, she was locked in a storage closet. *Id.* at 249, 555 S.E.2d at 354. Defendant was charged with second-degree rape and second-degree kidnapping. *Id.* at 248, 555 S.E.2d at 353. The indictment stated that the defendant kidnapped the victim "for the purpose of facilitating the commission of a felony." *Id.* at 250, 555 S.E.2d at 355. The trial court denied the defendant's motion to dismiss the second-degree kidnapping charge, *id.* at 250, 555 S.E.2d at 354, and a jury found the defendant guilty of both charges, *id.* at 248, 555 S.E.2d at 353. The defendant argued to the Court of Appeals that the trial court erred by denying his motion to dismiss because the evidence was insufficient to show he kidnapped the victim for the purpose of facilitating the rape. *Id.* at 250, 555 S.E.2d at 354.

¶ 63 The Court of Appeals agreed with our explanation in *Kyle* that " 'to facilitate' means 'to make easier' " but concluded that the facts before

2. Interestingly, in a different opinion released today, the same majority gives less weight to a per curiam opinion than to an authored opinion. *See Cedarbrook Residential Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 2022-NCSC-120.

it did not support the theory that the kidnapping made the rape easier. *Id.* at 252, 555 S.E.2d at 356 (quoting *Kyle*, 333 N.C. at 694, 430 S.E.2d at 415–16). Specifically, the Court of Appeals reasoned as follows:

> While there is little question [the] defendant's actions made his flight from the scene easier and was an attempt to cover up his act, the removal of the victim to the storage closet in no way made [the] defendant's rape of her easier, as all the elements of rape were completed before the removal. Again, defendant's actions possibly would support a conviction of second[-]degree kidnapping for the purpose of facilitating his flight from the commission of a rape; however, the State has failed to carry its burden in proving [the] defendant's actions facilitated [the] defendant's commission of the actual rape.

Id. at 252–53, 555 S.E.2d at 356. Thus, the Court of Appeals reversed the defendant's kidnapping conviction. *Id.* at 253, 555 S.E.2d at 356. We then issued a per curiam opinion affirming the Court of Appeals' decision. *See Morris*, 355 N.C. 488, 562 S.E.2d 421.

¶ 64 The majority's reliance on our per curiam affirmance in *Morris* to decide the present case is misguided. First, by its very nature, a per curiam affirmance does not articulate any reasoning to support the decision. Further, unlike in *Morris*, the record evidence here, viewed in the light most favorable to the State, shows that the second kidnapping made the rape easier. Specifically, the primary purpose of the second kidnapping was to allow defendant to remain in the victim's house for a longer period in order to destroy evidence. Moreover, defendant tied the victim to a chair and moved her to the second bedroom immediately after raping her and while she was conscious. These facts demonstrate the victim's continued torment and defendant's continued use of threat or force. Because such evidence was lacking in *Morris*, that case is distinguishable and thus should not control the outcome of the present case.

¶ 65 In summary, an act "facilitates" a crime when it makes that crime easier. *See Kyle*, 333 N.C. at 694, 430 S.E.2d at 415–16. Further, our long-standing case law establishes that a subsequent act can make a crime easier because "the fact that all essential elements of a crime have arisen does not mean the crime is no longer being committed. That the crime was 'complete' does not mean it was completed." *Hall*, 305 N.C. at 82–83, 286 S.E.2d at 556. Here defendant kidnapped the victim after raping her so that he could take a shower and destroy evidence. These facts

are sufficient for a rational juror to conclude that the second kidnapping made the rape easier. The trial court thus properly denied defendant's motion to dismiss the second kidnapping charge. To reach its decision to affirm the Court of Appeals' reversal of defendant's conviction, the majority today overrules forty years of precedent. I respectfully dissent.

Justice BERGER joins in this dissenting opinion.

UNITED DAUGHTERS OF THE CONFEDERACY, NORTH CAROLINA DIVISION, INC., AND JAMES B. GORDON CHAPTER #211 OF THE UNITED DAUGHTERS OF THE CONFEDERACY, NORTH CAROLINA DIVISION, INC.

v.

CITY OF WINSTON-SALEM, BY AND THROUGH ALLEN JOINES, MAYOR OF WINSTON-SALEM, NORTH CAROLINA, FORSYTH COUNTY; COUNTY OF FORSYTH, NORTH CAROLINA, BY AND THROUGH DAVID R. PLAYER, CHAIRMAN OF THE BOARD OF COMMISSIONERS; AND WINSTON COURTHOUSE, LLC

No. 21A21

Filed 16 December 2022

1. Jurisdiction—standing—legally enforceable right—removal of Confederate statue—motion to dismiss

In a declaratory judgment action filed after a city and its mayor (defendants) informed an association commemorating Confederate Civil War soldiers (plaintiff) of its plans to remove a Confederate statue from a former county courthouse, the trial court properly dismissed plaintiff's complaint under Civil Procedure Rule 12(b)(1) for lack of standing where plaintiff failed to allege any ownership or contractual interest in the statue, which was located on private property, and therefore failed to allege the infringement of a "legally enforceable right" sufficient to establish standing under North Carolina law (which does not enforce the "injury in fact" test used in federal courts). Further, plaintiff's complaint did not include the requisite factual allegations for establishing taxpayer standing or associational standing, and the mere fact that defendants contacted plaintiff about removing the statue did not automatically confer standing upon plaintiff.

2. Cities and Towns—removal of Confederate statue—challenged by private association—state and federal laws—no merit

In an appeal from the dismissal of a declaratory judgment action, which was filed by an association commemorating Confederate

Civil War soldiers (plaintiff) after a city and its mayor (defendants) communicated plans to remove a Confederate statue from a former county courthouse, the Supreme Court rejected plaintiff's arguments challenging defendants' action under various state and federal laws where: plaintiff raised some of its contentions for the first time on appeal, and therefore those arguments were not properly preserved for appellate review; plaintiff lacked standing to assert its challenges, either because the statutes it relied upon did not create a private right of action or because plaintiff failed to allege that it had a cognizable legal right (such as ownership of the Confederate monument) under those statutes; and where none of the statutes applied to the facts of the case.

3. Civil Procedure—dismissal with prejudice—Rule 12—lack of subject matter jurisdiction—failure to state a claim

In a declaratory judgment action regarding the removal of a Confederate statue from a former county courthouse, the trial court erred in dismissing plaintiff's complaint with prejudice where it did so under both Civil Procedure Rule 12(b)(1)(lack of subject matter jurisdiction) and Civil Procedure Rule 12(b)(6)(failure to state a claim). Dismissal under Rule 12(b)(6) operates as a final adjudication on the merits barring future lawsuits based on the same claims, but dismissal under Rule 12(b)(1) does not; therefore, where the trial court properly dismissed plaintiff's complaint under Rule 12(b)(1) because plaintiff lacked standing to sue, the court's lack of subject matter jurisdiction in the case precluded it from entering a final adjudication on the merits by dismissing the complaint with prejudice under Rule 12(b)(6).

Chief Justice NEWBY concurring in the result only.

Justices BERGER and BARRINGER join in this concurring opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 275 N.C. App. 402 (2020), affirming an order entered on 8 May 2019 by Judge Eric C. Morgan in Superior Court, Forsyth County, granting defendants' motions to dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Heard in the Supreme Court on 29 August 2022.

James A. Davis for plaintiff-appellants.

Anargiros N. Kontos, Deputy City Attorney, and Angela I. Carmon, City Attorney, for defendant-appellee City of Winston-Salem.

B. Gordon Watkins III, County Attorney, for defendant-appellee Forsyth County.

Allman Spry Davis Leggett & Crumpler, P.A., by Jodi D. Hildebran; and Nelson Mullins Riley & Scarborough LLP, by Lorin J. Lapidus, for defendant-appellee Winston Courthouse, LLC.

Mark Dorosin and Elizabeth Haddix for Chatham for All, North Carolina Commission on Racial & Ethnic Disparities in the Criminal Justice System, Dr. Joyce Blackwell, Dr. Phillip A. Clay, Algin Holloway, Patrice High, Edith A. Hubbard, Walter Jackson, Bradley Johnson, Philip McAlpin, Angelia Euba McKoy, Henry Clay McKoy, Lisa V. Moore, Moses G. Parker, Melvin L. Watt, Melvin L. Williams, Camille Z. Roddy, and Jimmy Barnes, amici curiae.

Matthew R. Joyner and H. Edward Phillips for Sons of Confederate Veterans, amicus curiae.

ERVIN, Justice.

¶ 1 In this case, plaintiff United Daughters of the Confederacy, North Carolina Division, Inc., challenges a decision made by defendant City of Winston-Salem to remove a Confederate monument from the grounds of the former Forsyth County Courthouse.[1] Although the courthouse and surrounding real property was originally owned by defendant Forsyth County, the County had sold the property to defendant Winston Courthouse, LLC, a private entity that had converted the courthouse building into private residential apartments, prior to the monument's removal. The trial court granted defendants' motions to dismiss for lack of subject matter jurisdiction pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1), and failure to state a claim upon which relief could be granted pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), and the Court of Appeals affirmed the dismissal order in a non-unanimous decision. The issue before this Court on appeal is whether the facts alleged in plaintiff's amended

1. On 1 May 2019, following the trial court's hearing concerning defendants' dismissal motions, plaintiff James B. Gordon Chapter # 211 of the United Daughters of the Confederacy filed a notice of voluntary dismissal without prejudice. In light of that fact, the term "plaintiff" as used throughout the remainder of this opinion should be understood as referring to the United Daughters of the Confederacy, North Carolina Division, Inc.

complaint were sufficient to establish that plaintiff had standing to challenge the City's action. After careful consideration of the record in light of the applicable law, we hold that, even though plaintiff lacks standing to proceed in this case, the trial court erred in dismissing the amended complaint with prejudice. As a result, we affirm the decision of the Court of Appeals, in part; reverse that decision, in part; and remand this case to Superior Court, Forsyth County, for further proceedings not inconsistent with this opinion.

I. Factual Background

A. Substantive Facts

¶ 2 Plaintiff is a nonprofit corporation organized under the laws of the State of North Carolina, having first registered with the Secretary of State in 1992. According to the allegations contained in plaintiff's amended complaint, in 1903 the James B. Gordon Chapter #211 of the United Daughters of the Confederacy "began a movement to place a Confederate monument in Court House Square in Winston, North Carolina." In its complaint, plaintiff alleges that the local chapter had approved a proposed design for the monument, initiated plans "to obtain a monument at a cost of no more than $3,000.00," and launched a fund-raising campaign to raise money for the monument's construction.

¶ 3 Plaintiff further alleges that, "on or about March 1, 1905, the Forsyth County Board of County Commissioners issued an order granting to the Plaintiff, formerly known as the Daughters of the Confederacy, permission to erect a memorial to the fallen soldiers of the Confederacy . . . upon property of the County of Forsyth."[2] In addition, the complaint alleges that, "on or about October 4, 1905, a ceremony sanctioned by the Board of County Commissioners was conducted during which the Confederate Monument was dedicated." Finally, the amended complaint alleges that, sometime around March 2012, while acting "on behalf of the County of Forsyth, North Carolina," Ashley Neville and John Salmon of Ashley Neville, LLC, nominated the old Forsyth County Courthouse for placement on the National Register of Historic Places, with that nomination having been accepted "[o]n or about April 23, 2013[.]" Plaintiff never makes any claim to own the monument or to have any sort of contractual or property interest in it.

¶ 4 On 18 March 2014, the County executed a general warranty deed conveying the old Forsyth County Courthouse and the surrounding real

2. The complaint does not clearly indicate whether the reference to "plaintiff" in this part of the amended complaint refers to the statewide organization or the local chapter.

property to Winston Courthouse, a private real estate developer, by means of a deed that expressly excluded from the sale "a plaque mounted inside the building, time capsule currently buried inside the building, and public monuments located outside of the building on the land" and provided that Winston Courthouse "agrees to execute necessary easements (in form and content that are reasonably acceptable to both parties) to allow [the County] continued access to maintain and/or remove these items from the land at the expense of [the County]." Subsequently, Winston Courthouse converted the old courthouse building into private residential apartments, with the building having been exclusively used for residential purposes since April 2015. Plaintiff has not alleged or shown that any of the easements contemplated by the deed were ever executed or recorded.

¶ 5 On 18 August 2017, shortly after an outbreak of violence in Charlottesville, Virginia, related to the proposed removal of a statue of Robert E. Lee, the monument was vandalized, with the word "Shame" having been spray painted upon it. According to Assistant City Manager Damon Dequenne, local law enforcement officers subsequently received complaints from a resident of the Winston Courthouse apartments who was "upset about armed guards patrolling the [monument]" after this incident. On 20 August 2017, local law enforcement officers identified "eight (8) concerned citizens standing guard near the [monument]."

¶ 6 In September 2017, Winston-Salem Mayor Allen Joines contacted Salem Cemetery and proposed that the monument be relocated to the cemetery, a proposition that the Salem Cemetery Board considered and approved on 24 October 2017. On 25 December 2018, the monument was vandalized a second time, with the words "Cowards & Traitors" having been spray-painted on it. According to Mr. Dequenne, this incident "raised concerns that someone might try to topple the [monument] in a manner similar to that in Chapel Hill and other cities" and that "any efforts to topple the [monument] might result in injury to persons on the sidewalk as well as private property."

¶ 7 On 31 December 2018, City Attorney Angela Carmon sent a letter to plaintiff's president and registered agent and to Winston Courthouse's management regarding the recent acts of vandalism at the monument.[3] According to Ms. Carmon, the events in question had "invoke[d] significant concern about the safety of the [monument] and the potential for confrontation, breaches of the peace[,] and other nuisance type conduct similar to that endured by other cities," with the City not being "in a

3. Ms. Carmon's letter was also addressed to a representative of the local chapter.

position to provide constant security checks necessary for the protection of the [monument] and to mitigate the recuring acts of vandalism." In addition, Ms. Carmon stated that the monument "does not appear" to be "publicly owned" and that "[c]laims of ownership of the [monument] have come from the United Daughters of the Confederacy." In light of existing "concerns for overall public safety and protection of the [monument]," Ms. Carmon "direct[ed] [plaintiff] to remove and relocate by January 31st the [monument] from its present location to a more secure location where the same can be protected from vandals and others looking to create a Charlottesville type incident in Winston-Salem," noting that a "[f]ailure to comply with this direction may result in the [C]ity seeking a court order for the removal and relocation of the [monument] to preserve the same and to address public safety concerns[.]" On 8 January 2019, counsel for Winston Courthouse sent a letter to plaintiff's representatives stating that "the recent controversy, press reports, and references to potential violence have raised serious concerns for some of [Winston Courthouse's] residents" and that, "in order to protect the residents and the [p]roperty," Winston Courthouse "cannot allow the [monument] to remain on the [p]roperty."

¶ 8 At the public comment portion of the 7 January 2019 Winston-Salem City Council meeting, several City residents spoke in favor of removing or relocating the monument. On 13 January 2019, protests occurred near the monument during which people expressed both support for and opposition to the monument's continued presence in its current location. According to Assistant City Manager Dequenne, the Winston-Salem Police Department "planned and executed a riot and emergency type operation using ninety-three (93) officers who expended in excess of four-hundred and sixty-five (465) man hours . . . in an effort to protect the [monument] and the public." In addition, Mr. Dequenne noted that the police department's bike patrol had continued to actively monitor the monument following the initial act of vandalism that occurred in 2017. Additional City residents voiced strong support for the removal of the monument during the public comment portion of the 22 January 2019 City Council meeting, with some speakers having suggested that the monument should be destroyed rather than relocated.

¶ 9 On 25 January 2019, counsel for plaintiff hand-delivered a letter to defendants in which it requested a 60-day extension of the deadline for the removal of monument.[4] On 30 January 2019, Mr. Dequenne issued

4. Although the 25 January 2019 letter is not included in the record, other portions of the record suggest that the letter advanced many of the same legal arguments regarding the monument upon which plaintiff has relied before this Court.

a notice declaring that the monument was a public nuisance in accordance with N.C.G.S. § 160A-93 and Winston-Salem City Code § 62-3(b) on the grounds that "the continued presence of the [monument] at its current location is detrimental to the safety and longevity of the [monument] and prejudicial to public safety." In support of this determination, Mr. Dequenne pointed to "all that has occurred with Confederate Statues over the past sixteen months," including (1) "the toppling of the [Silent Sam] statue in August 2018 in Chapel Hill"; (2) "the December 2018 vandalism [of the monument] in Winston-Salem"; (3) "the expressions of concern regarding citizen safety both in 2017 and 2018"; (4) "the protest events here in Winston-Salem"; (5) "comments made at the Winston-Salem City Council's public comment periods"; (6) "calls for destruction of the [monument]"; and (7) "the potential for toppling the same," all of which caused him to conclude that "the potential for harm to the [monument] and citizens was legitimate and the potential for harm looming."

¶ 10 On the same day, City Attorney Carmon denied plaintiff's request for additional time to remove the monument on the grounds that "the totality of the circumstances suggests that [plaintiff's] request is made in an effort to cause an unnecessary delay in action by the City," with plaintiff having been "made aware of the City's public-safety related concerns regarding the [monument] more than sixteen (16) months ago." As a result, despite the existence of uncertainty about the ownership of the monument, the City indicated that it would, in accordance with the earlier public nuisance declaration, summarily remove the monument from the old courthouse property without seeking a court order. Winston Courthouse agreed to cooperate with the City's efforts to remove the monument.

¶ 11 On 12 March 2019, the City had the monument removed from the old courthouse property and placed in storage, where it would remain until it could be moved to the Salem Cemetery. At that time, the City informed plaintiff that it was "more than willing to make the [monument] available to [plaintiff if] it wish[ed] to retrieve the [monument] from storage" and that it would pay for the monument's relocation, at no cost to plaintiff, "upon property [where] [plaintiff] has clear written permission to place the [monument], provided the location is not prejudicial to public safety."

B. Procedural History

¶ 12 On 31 January 2019, plaintiff filed a complaint against the City and the County in which it sought the issuance of a temporary restraining order and preliminary injunction enjoining defendants "from taking affirmative action to remove or relocate the [monument] prior to a full

adjudication of the respective rights and obligations of the Parties[.]" On 6 February 2019, plaintiff filed an amended complaint in which it added the local chapter as a party plaintiff and Winston Courthouse as a party defendant and sought the entry of a declaratory judgment to determine (1) "the Parties' respective rights, duties, privileges, obligations, liabilities, [and] immunities with regard to the [monument]" and (2) "[w]hether the City of Winston-Salem [has] misapplied [N.C.G.S. §] 160A-193 and City Ordinance 62-3(b) in declaring [that] the [monument] constitutes [a] Public Nuisance," as well as the issuance of a preliminary injunction precluding the relocation of the monument pending resolution of its request for a declaratory judgment. After a hearing held on 31 January 2019, Judge Stanley L. Allen entered an order on 25 February 2019 in which he denied plaintiff's request for the entry of a temporary restraining order.[5]

¶ 13 On 8 March 2019, defendants filed separate motions to dismiss the amended complaint for lack of subject matter jurisdiction pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1), and failure to state a claim upon which relief can be granted pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), in which they argued, among other things, that plaintiff lacked standing to challenge the City's decision to remove the monument. On 20 March 2019, plaintiff filed a second amended motion for the issuance of a preliminary injunction in which it alleged that the City had acted unlawfully and in violation of plaintiff's due process rights by removing the monument prior to a determination concerning the merits of defendants' dismissal motion and sought the entry of an order requiring the City to return the monument to the courthouse property. In an affidavit filed in response to plaintiff's motion, Winston Courthouse's manager asserted that Winston Courthouse would be "irreparably harmed" if the monument were to be returned to the old courthouse property on the grounds that the restoration of the monument would result in an unlawful entry upon Winston Courthouse's private property, force Winston Courthouse to incur additional security and legal expenses, and endanger the safety of its residents.

¶ 14 After a hearing held on 29 April 2019, the trial court entered an order on 8 May 2019 granting defendants' dismissal motions. In support of this determination, the trial court noted that plaintiff "has never alleged that it owns the [monument] or that there was ever any contract, lease, or

5. Although Winston Courthouse was not named as a party defendant in the original complaint, the order notes that its attorney appeared at the hearing and argued that the motion should be denied.

other agreement between [plaintiff] and another entity requiring that the [monument] stay in its location on the land of [Winston Courthouse]." The trial court rejected plaintiff's contention that it had standing to maintain the present action because "a specific requirement for membership in [p]laintiff organizations is establishing that one is a lineal descendant of [a Confederate soldier]." In light of the fact that plaintiff "has not alleged that it owns the [monument], has not alleged that it has any contractual or other legally enforceable right in the [monument], and has not demonstrated a legally protected interest that would be invaded by Defendants' actions," the trial court concluded that plaintiff had failed to establish standing. The trial court further concluded that plaintiff "has not established that there is any injury in fact that is either concrete or particularized to this specific plaintiff." As a result, for all of these reasons, the trial court concluded that it lacked subject matter jurisdiction over this case and that plaintiff had failed to state a claim upon which relief could be granted and dismissed plaintiff's amended complaint with prejudice. Plaintiff noted an appeal to the Court of Appeals from the trial court's order.

C. Court of Appeals Decision

¶ 15 In seeking relief from the trial court's order before the Court of Appeals, plaintiff argued that the trial court had erred by dismissing its complaint for lack of standing given that it "has an abiding and cognizable legal interest in the [monument] because [plaintiff] is a legacy organization which raised the money necessary to design, build, and place the monument on [the old courthouse property]" and that it "was clearly and specifically threatened with adverse consequences if it failed or refused to remove the [m]onument." In addition, plaintiff argued that, because the trial court had dismissed the amended complaint for lack of subject matter jurisdiction, it had erred by dismissing the amended complaint with, rather than without, prejudice. In plaintiff's view, "[a] court cannot dismiss a complaint with prejudice if it has held that it lacks jurisdiction over the proceeding," citing *Cline v. Teich for Cline*, 92 N.C. App. 257, 264 (1988) (vacating an order dismissing the plaintiff's complaint for failure to state a claim upon which relief could be granted because "the district court lacked subject matter jurisdiction over the present case" and, for that reason, "had no authority to consider whether the [c]omplaint failed to state a claim.").

¶ 16 A divided panel of the Court of Appeals affirmed the trial court's order, with the majority agreeing with the trial court that plaintiff had failed to establish the standing needed to assert the claims alleged in the amended complaint and concluding that dismissal of the

amended complaint with prejudice was proper. *United Daughters of the Confederacy v. City of Winston-Salem*, 275 N.C. App. 402 (2020). In upholding the trial court's decision to dismiss plaintiff's amended complaint with prejudice, the Court of Appeals concluded that, "even assuming *arguendo* that it was improper to dismiss the complaint with prejudice on the basis of Rule 12(b)(1), it was not improper to do so on the basis of Rule 12(b)(6), which operates as an adjudication on the merits." *Id.* at 406. In view of the fact that the trial court dismissed plaintiff's amended complaint based upon both Rule 12(b)(1) *and* Rule 12(b)(6), the Court of Appeals concluded that "the trial court did not err in dismissing the complaint with prejudice pursuant to Rule 12(b)(6), and that any error in doing so pursuant to Rule 12(b)(1) was rendered harmless as a result." *Id.*

¶ 17 The Court of Appeals began its discussion of the standing issue by explaining that, in order to show standing, "a plaintiff must demonstrate three things: injury in fact, a concrete and actual invasion of a legally protected interest; the traceability of the injury to a defendant's actions; and the probability that the injury can be redressed by a favorable decision." *Id.* at 407 (citing *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114 (2002)). For that reason, the Court of Appeals held that "[t]he mere filing of a declaratory judgment" action "is not sufficient, on its own, to grant a plaintiff standing." *Id.* (citing *Beachcomber Prop., LLC v. Station One, Inc.*, 169 N.C. App. 820, 824 (2005)). Instead, the Court of Appeals held that, in order "to pursue a declaratory judgment as to its rights in the [monument], plaintiff had to show, at the very least, that it possessed some rights in the [monument]—a legally protected interest invaded by defendants' conduct." *Id.* As a result of the fact that, "aside from acknowledging their role in funding the erection of the [monument] over a century ago," plaintiffs had alleged no ownership rights or other legal interest in the monument, *id.* at 408, the Court of Appeals concluded that, since plaintiff had failed to allege an "injury in fact," the trial court had not erred by dismissing plaintiff's complaint with prejudice pursuant to Rule 12(b)(6), *id.*

¶ 18 In dissenting from his colleagues' decision to affirm the trial court's dismissal order, Judge Tyson stated that he would have concluded that plaintiff had standing to pursue the claims asserted in the amended complaint for the purposes of obtaining relief from what he viewed as the "pre-emptive and unlawful actions of the City of Winston-Salem." *Id.* at 409 (Tyson, J., dissenting). According to Judge Tyson, "[t]he pleadings assert and the record raises factual disputes over who currently owns the [monument]," with plaintiff not being required "to claim sole ownership

to possess standing in this declaratory judgment action." *Id.* at 412. In Judge Tyson's view, plaintiff had standing to seek the entry of the requested declaratory judgment because the amended complaint "clearly assert[ed] and 'involve[d] an actual controversy between the parties,' " *id.* at 413 (quoting *Goldston v. State*, 361 N.C. 26, 30 (2006)), and because plaintiff, "[a]s an association of [c]hapters and members," had associational standing to pursue its claim against defendants, *id.* at 414 (citing *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 130 (1990) (holding that an association has standing to file an action on behalf of its individual members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit" (quoting *Hunt v. Wash. State Apple Advertising Comm.*, 432 U.S. 333, 343 (1977)).[6] Judge Tyson believed that plaintiff's members had standing to seek relief from the City's actions because "[i]t is undisputed that the [monument] was paid for and erected by [plaintiff's] members and [c]hapter," that plaintiff's participation in this litigation was "directly related to the stated non-profit and charitable goals of the organization," and that the "claim asserted and the relief requested does not require the participation of the individual members or [c]hapters[.]" *Id.*

¶ 19 In addition, Judge Tyson asserted that, "[a]s a veteran's memorial and a war grave for those who did not return home and [an object] listed on the National Register [of Historic Places], the [monument] is arguably protected from injury or destruction by the 'Veterans Memorial Preservation and Recognition Act of 2003.' " *Id.* at 415 (citing 18 U.S.C. § 1369 (2018) (imposing criminal penalties upon anyone who destroys or attempts to destroy a monument "commemorating the service of any person or persons in the armed forces of the United States" that is located on federally owned or controlled land.)). According to Judge Tyson, a "veteran" for purposes of the Veterans Memorial Preservation and Recognition Act includes individuals who "served for ninety days or more in the active military or [naval] service during the Civil War," *id.* (quoting 38 U.S.C. § 1501), with the Secretary of the Army being directed "to furnish, when requested, appropriate Government headstones or markers at the expense of the United States for the unmarked graves"

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6. Judge Tyson also appeared to suggest that plaintiff might have standing to maintain the present action pursuant to the decision of the Court of Appeals in *Fuller v. Easley*, 145 N.C. App. 391, 395 (2001) (holding that a plaintiff "may have standing to bring a taxpayer action, not as an individual taxpayer, but on behalf of a public agency or political subdivision, if the proper authorities neglected or refused to act") (cleaned up)).

of various persons, including "Soldiers of the Union and Confederate Armies of the Civil War," *id.* (quoting 24 U.S. § 279(a) (repealed 1 September 1973)).

¶ 20 Judge Tyson further contended that the monument was also protected by N.C.G.S. § 100-2.1, which provides, subject to certain exceptions, that "a monument, memorial, or work of art owned by the State may not be removed, relocated, or altered in any way without the approval of the North Carolina Historical Commission," N.C.G.S. § 100-2.1(a) (2021)), and restricts the removal or relocation of an "object of remembrance located on public property," § 100-2.1(b). According to Judge Tyson, plaintiffs "are seeking a declaratory judgment, restraining order, and injunction to enforce the statute, consistent with their threshold ownership of and role in securing and erecting the [monument] and the specific goals expressed in their charter," with it being necessary to satisfy these restrictions "*prior to* any efforts [that] are commenced to alter or remove the [monument]" if it "is determined to be owned by the State . . . or is located on State-owned property." *Id.* at 416 (emphasis in original).

¶ 21 Judge Tyson further asserted that, even though N.C.G.S. § 160A-193 "grants statutory authority to a municipality to act when a building or structure constitutes an imminent danger to public health or safety," before taking action "the municipality must comply with federal and state laws and give required notice, a hearing, and ample opportunity to make the structure safe." *Id.* (citing *Monroe v. City of New Bern*, 158 N.C. App. 275 (2003)). Judge Tyson claimed the City "would [have acted] *ultra vires* to purport to declare a [m]emorial and war grave dedicated to dead and wounded veterans of that county, whether owned by Forsyth County or [plaintiffs] or the State to be a public nuisance"; that the City had "no lawful basis to declare the [monument] to be a public nuisance or to pre-emptively demand then unilaterally remove it from a property listed on the National Register of Historic Places without prior permission or agreement"; and that the City could have only removed the monument "after compliance with the applicable federal and state statutes." *Id.* at 416–17 (citing 18 U.S.C. § 1369; 36 C.F.R. § 60.15; N.C.G.S. § 100-2.1). As a result, Judge Tyson concluded that plaintiff's request for a declaratory judgment "invokes subject matter jurisdiction and states standing and claims for relief to survive [d]efendants' motions to dismiss." *Id.* at 417.

¶ 22 Finally, Judge Tyson contended that the City had "inexplicitly [sic] and unlawfully sought to declare the [monument] to dead and wounded veterans from Forsyth County to be a public nuisance, used taxpayer funds to dismantle and remove the [monument], and sought to relocate the [monument] to the Salem Cemetery without the agreement of the

owners and in violation of federal and state law." *Id.* at 418. After noting that "[t]emporary removal is permitted by agreement with the owner when required to preserve the [monument], which must be re-erected within ninety (90) days thereafter," *id.* (citing N.C.G.S. § 100-2.1(b)), Judge Tyson asserted that this statutory provision had no application to the present case because defendants had made "no allegations of action to physically damage the [monument]" or "assert[ed] any agreement with [plaintiff], the State, or any other potential owner to dismantle, remove, or relocate the [monument]," *id.* In Judge Tyson's view, the majority's decision "[did] not address, explain, distinguish[,] nor refute any of the rules, precedents, laws, and statutes that are plead at the trial court, cited on appeal, and as controlling law, are clearly applicable to the facts and record," and that the trial court's decision to dismiss plaintiff's amended complaint with prejudice had been erroneous. *Id.* at 419. Plaintiff noted an appeal to this Court from the Court of Appeals' decision based upon Judge Tyson's dissent.

II. Analysis

A. Standard of Review

¶ 23 This Court reviews a trial court's decision to grant or deny a motion to dismiss for lack of standing using a de novo standard of view, under which it "view[s] the allegations as true and the supporting record in the light most favorable to the non-moving party," *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644 (2008), with this being the applicable standard of review regardless of whether the complaint is dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) or for failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6), *see Harris v. Matthews*, 361 N.C. 265, 271 (2007) (dismissal under Rule 12(b)(1)); *New Hanover Cnty. Bd. of Ed. v. Stein*, 380 N.C. 94, 2022-NCSC-9, ¶ 21 (dismissal under Rule 12(b)(6)). An appellate court considering a challenge to a trial court's decision to grant or deny a motion to dismiss for lack of subject matter jurisdiction may consider information outside the scope of the pleadings in addition to the allegations set out in the complaint. *See Harris*, 361 N.C. at 271. A complaint is properly dismissed pursuant to Rule 12(b)(6) "(1) when the complaint on its face reveals that no law supports [the] plaintiff's claim; (2) when the complaint reveals on its face the absence of fact[s] sufficient to make a [ ] claim; [or] (3) when some fact disclosed in the complaint necessarily defeats [the] plaintiff's claim." *Intersal, Inc. v. Hamilton*, 373 N.C. 89, 98 (2019) (quoting *Oates v. Jagg, Inc.*, 314 N.C. 276, 278 (1985)).

¶ 24 This Court reviews decisions of the Court of Appeals for errors of law. N.C. R. App. P. 16(a); *see also State v. Melton*, 371 N.C. 750, 756 (2018). In the event that the sole basis for a party's appeal of right is a dissent in the Court of Appeals, the Court's review is "limited to consideration of those issues that are (1) specifically set out in the dissenting opinion as the basis for that dissent, (2) stated in the notice of appeal, and (3) properly presented in the new briefs[.]" N.C. R. App. P. 16(b); *see also C.C. Walker Grading & Hauling, Inc. v. S.R.F. Mgmt. Corp.*, 311 N.C. 170, 175 (1984)).

B. Standing

¶ 25 **[1]** A plaintiff must establish standing in order to assert a claim for relief. *Willowmere Cmty. Ass'n, Inc. v. City of Charlotte*, 370 N.C. 553, 561 (2018); *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 164 (2001). "As a general matter, the North Carolina Constitution confers standing on those who suffer harm." *Mangum*, 362 N.C. at 642 (citing N.C. Const. art. I, § 18 (providing that "[a]ll courts shall be open" and "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law[.]")). As we have previously explained,

> "[t]he 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' "

Stanley v. Dep't of Conservation and Dev., 284 N.C. 15, 28 (1973) (quoting *Flast v. Cohen* 392 U.S. 83, 99 (1968) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))). Prior to our decision in *Committee to Elect Dan Forest v. Employee Political Action Committee*, 376 N.C. 558, 2021-NCSC-6, the Court of Appeals had consistently held that North Carolina's standing requirements were identical to those enforced in the federal courts, so that a plaintiff was required to show that he or she had suffered

> "(1) [an] 'injury in fact'—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) [that] the injury is fairly traceable to the challenged action of the defendant; and (3) [that] it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

Neuse River Found., 155 N.C. App. at 114, (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). In *Committee to Elect Dan Forest*, however, we held that, since the North Carolina Constitution does not contain the same "case-or-controversy" provision that appears in the United States Constitution, it does not require the existence of an "injury-in-fact" to establish standing. *Comm. to Elect Dan Forest*, ¶ 85. Instead, we held that, "[w]hen a person alleges the infringement of a legal right directly under a cause of action at common law, a statute, or the North Carolina Constitution . . . the legal injury itself gives rise to standing." *Id.*[7]

¶ 26 Admittedly, neither the trial court nor the Court of Appeals had the benefit of our decision in *Committee to Elect Dan Forest* at the time that they addressed the standing issue that is before us in this case. In light of that decision, to the extent that the lower courts relied upon plaintiff's failure to allege an "injury-in-fact" in determining that plaintiff lacked standing, any such determination constituted error. On the other hand, this analytical flaw in the reasoning adopted by the trial court and the Court of Appeals does not change the fact that plaintiff has failed to establish standing in this case, so that the decisions of the trial court and the Court of Appeals with respect to the standing issue should be affirmed. *See Eways v. Governor's Island*, 326 N.C. 552, 554 (1990) (holding that, "[w]here a trial court has reached the correct result, the judgment will not be disturbed on appeal where a different reason is assigned to the decision").

¶ 27 In its brief, plaintiff advances a number of arguments, some of which it has asserted for the first time before this Court, in support of its contention that it has standing to pursue the claims asserted in the amended complaint. Although plaintiff has, in some instances, conflated its standing-related arguments with its arguments regarding the legally and conceptually distinct issue of whether the City's actions were authorized under the various state and federal laws cited by plaintiff, we will attempt to address each of its standing-related arguments in turn for the

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7. We did note that, "in directly attacking the *validity of a statute under the constitution*, a party must show they have suffered a 'direct injury.' " *Comm. to Elect Dan Forest*, ¶ 82 (quoting *State ex rel. Summerell v. Carolina-Virginia Racing Ass'n*, 239 N.C. 591, 594 (1954)) (emphasis added). Although amicus Chatham for All, et al., argues that N.C.G.S. § 100-2.1 is unconstitutional as applied to Confederate monuments generally, no *party* in this case has attacked the validity of N.C.G.S. § 100-2.1 or any other statute. As a result, we need not address whether plaintiff has sustained the sort of "direct injury" needed to support a challenge to the validity of a statutory provision enacted by the General Assembly.

purpose of determining whether plaintiff has made the necessary showing of standing.

¶ 28 As an initial matter, plaintiff argues that, "to challenge a statute, municipal ordinance, policy, or action, a plaintiff need only demonstrate that it has been 'injuriously affected' by the enactment or policy or action," quoting *Goldston*, 361 N.C. at 35. In apparent reliance upon the law of taxpayer standing, *see id.* at 31–32, plaintiff contends that "[c]itizens and taxpayers have the right to seek equitable and declaratory relief when governing authorities are preparing to put property dedicated to the public to an unauthorized use," citing *Wishart v. Lumberton*, 254, N.C. 94, 96 (1961). For that reason, plaintiff asserts that "[a] citizen, [acting] in his own behalf and that of all other taxpayers[,] may maintain a suit seeking to enjoin the governing body of a municipal corporation from transcending their lawful powers or violating their legal duties in any mode which will injuriously affect the taxpayers," citing *Merrimon v. S. Paving & Const. Co.*, 142 N.C. 539, 545 (1906). In plaintiff's view,

> although a declaratory judgment action must involve an actual controversy between the parties, plaintiffs are not required to allege or prove that a traditional cause of action exists against defendants in order to establish an actual controversy. A declaratory judgment should issue (1) when it will serve a useful purpose in clarifying and settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding.

quoting *Goldston*, 361 N.C. at 33 (2006) (cleaned up). In view of the fact that the amended complaint "patently assert[s] and 'involve[s] an actual controversy between the parties,' " specifically a dispute over who owns the monument, plaintiff argues that it "does not have to claim sole ownership of the [monument] to possess standing in this declaratory judgment action."

¶ 29 Secondly, plaintiff claims to be entitled to claim associational standing because "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit," quoting *River Birch Assocs.*, 326 N.C. at 130. According to plaintiff, "individual members of [its] organization who live in Forsyth County would have standing to sue in their own right as taxpayers," citing

Charles Stores v. Tucker, 263 N.C. 710, 717 (1965); *Fuller*, 145 N.C. App. at 395–96), with the fact that it is a nonprofit corporation in good standing in North Carolina and the fact that its "purposes include 'historical, benevolent, memorial, educational and patriotic programs' " sufficing to "clearly and equivocally give[ ] it an articulated interest in the status and preservation of objects of remembrance such as the [m]onument." As a result, plaintiff contends that the "fundamental premises" upon which it was founded "establish that its very existence is germane to the issues raised in this litigation" and that "a thorough presentation and inquiry into the relevant evidence and the applicable law does not require the active participation of [its] individual members[.]"

¶ 30 Thirdly, plaintiff contends that "the [amended] complaint alleges colorable claims that [its] members and its affiliated chapter were responsible for funding and erecting the [monument]," that "no governmental expenditures were involved in the enterprise," and that "[the County] is the owner of the monument." After conceding that any of its members who might have been involved in erecting the monument are no longer alive, plaintiff contends that, "as an incorporated entity which has affiliated chapters made up of qualifying members, [it] has a perpetual existence for so long as it otherwise complies with the laws of the State of North Carolina," so that it "necessarily follows" that it "has succeeded to the interests of those deceased members of an affiliated chapter who were responsible for designing, funding, and erecting the [monument] in the first place." Plaintiff argues that "the [amended] complaint specifically alleges that the monument had its origins in the efforts of [p]laintiff and its subsidiary local chapter to design, fund, and erect the [monument]," that this allegation "is facially sufficient to state a particularized interest in the [monument]," and that the trial court erred by concluding that it lacked standing to maintain the present declaratory judgment action.

¶ 31 Finally, plaintiff claims that it "did not start this fight" and that it had, instead, been "clearly and specifically threatened with adverse consequences by the City of Winston-Salem if it failed or refused to remove the [monument]." According to plaintiff, "[t]o deny that [it] does not have the right to defend itself in a court of law when it was the recipient of a clear and unequivocal attack would be to subvert accepted and well-established concepts of due process and equal protection under law." Plaintiff asserts that, while it "does not have to claim sole ownership to possess standing in this declaratory judgment action," the City has "repeatedly asserted that [p]laintiff owned the [monument] in its demands and in other communications sent to [p]laintiff, while the other

[d]efendants assert that ownership of the [monument] is unknown." As a result, plaintiff contends that "[t]his action squarely raises the question of the ownership of the [monument]," and that "it is only logical to find that standing exists if an individual or entity is alleged to own an item of property as has been the case with allegations made concerning [p]laintiff and its alleged ownership of the [monument]."

¶ 32 Plaintiff's arguments rest upon a fundamental misunderstanding of the law of standing. In essence, plaintiff appears to believe that by simply filing a declaratory action and asserting that there was an "actual controversy between the parties" relating to the identity of the monument's owner, it has made a sufficient showing to establish standing. *See Goldston*, 361 N.C. at 33. However, as the majority of the Court of Appeals observed, "[t]he mere filing of a declaratory judgment is not sufficient, on its own, to grant a plaintiff standing," *United Daughters of the Confederacy*, 275 N.C. App. at 407 (citing *Beachcomber Prop.*, 169 N.C. App. at 824), with it being necessary for a party to establish standing as a prerequisite for the assertion of a declaratory judgment claim, *Goldston*, 361 N.C. at 33 (holding that plaintiffs had established taxpayer standing before "consider[ing] the form of *relief* sought by plaintiffs, who [had] filed a declaratory judgment action") (emphasis added); *see also Taylor v. City of Raleigh*, 290 N.C. 608, 620 (1976) (holding that the validity of a zoning ordinance could be challenged through a declaratory judgment action only after determining that the plaintiff had established standing). In other words, plaintiff is still required to demonstrate that it has sustained a legal or factual injury arising from defendants' actions as a prerequisite for maintaining the present declaratory judgment action. *See Goldston*, 361 N.C. at 35 (noting that "[o]nly those persons may call into question the validity of a statute who have been *injuriously affected* thereby in their persons, property, or constitutional rights.") (quoting *Piedmont Canteen Serv., Inc. v. Johnson*, 256 N.C. 155, 166 (1962) (emphasis added in *Goldston*)); *Comm. to Elect Dan Forest*, ¶ 85 (holding that "[t]he North Carolina Constitution confers standing to sue in our courts on those who suffer *the infringement of a legal right*") (emphasis added).

¶ 33 A careful analysis of the amended complaint satisfies us that plaintiff has failed to identify any legal right conferred by the common law, state or federal statute, or the state or federal constitutions of which they have been deprived by defendants' conduct. For example, plaintiff has not claimed any proprietary or contractual interest in the monument that would support its contention that the removal of the monument constituted an "unlawful seizure" in violation of the Fourth Amendment or an

"unlawful[depriv[ation] of property without due process of law" in violation of the Fifth Amendment. Without asserting ownership over a piece of property, plaintiff cannot claim that the property was the subject of an unlawful seizure or deprivation. *See Maines v. City of Greensboro*, 300 N.C. 126, 134 (1980) (noting that "[a]t the threshold of any procedural due process claim is the question of whether the complainant has a liberty or property interest, determinable with reference to state law, that is protectible under the due process guaranty" (citing *Bishop v. Wood*, 426 U.S. 341 (1976); *Presnell v. Pell*, 298 N.C. 715 (1979)). A number of plaintiff's other allegations, including its assertion that the City's actions "infringe[d] upon the freedom of speech of the [plaintiff] and the citizens of the County," that these actions "violate[d] the right of equal protection pursuant to the [Fourteenth] Amendment," and that "[p]laintiff will be irreparably harmed if [d]efendants take affirmative action to remove or relocate the [monument] prior to a full adjudication of the respective rights and obligations of the [p]arties," are nothing more than conclusory statements devoid of any factual or legal support. *See Krawiec v. Manly*, 370 N.C. 602, 610 (2018) (holding that "a complaint that makes general allegations in sweeping and conclusory statements, without specifically identifying the trade secrets allegedly misappropriated, is insufficient to state a claim for misappropriation of trade secrets" (cleaned up)).

¶ 34 Although the amended complaint claims that the local chapter was involved in raising funds to erect the monument and that it received permission from the County to place the monument outside the old county courthouse building in 1905, plaintiff does not allege that the local chapter or any of its members retained an ownership interest in the monument or had executed a contract with the County providing that the monument would remain upon the old courthouse property in perpetuity. As a result, even construing plaintiff's allegations concerning the funding for and erection of the monument as true, the mere fact that the local chapter "funded and erected the [monument]" does not suffice to establish standing in the absence of an affirmative claim to have some sort of proprietary or contractual interest in the monument. This is particularly true given that the plaintiff's allegations that the City's actions violated various state and federal laws, which we address in further detail below, assume that the *County*, rather than plaintiff, owns the monument.

¶ 35 In addition, our taxpayer standing jurisprudence makes it clear that, "where a plaintiff undertakes to bring a taxpayer's suit on behalf of a public agency or political subdivision, his complaint must disclose that he is a taxpayer of the agency [or] subdivision," *Branch v. Bd. of Ed. of*

Robeson Cnty., 233 N.C. 623, 626 (1951) (citing *Hughes v. Teaster*, 203 N.C. 651 (1932)); *see also Fuller*, 145 N.C. App. at 395–96, and "allege facts sufficient to establish" either that "there has been a demand on and a refusal by the proper authorities to institute proceedings for the protection of the interests of the public agency or political subdivision" or that "a demand on such authorities would be useless." *Id.* Although plaintiff has included such assertions in its brief before this Court, no such allegations appear in the amended complaint. *See Davis v. Rigsby*, 261 N.C. 684, 686 (1964) (noting that "[a] party is bound by his pleadings and, unless withdrawn, amended, or otherwise altered, the allegations contained in all pleadings ordinarily are conclusive against the pleader").[8] Instead, the amended complaint alleges that plaintiff is a nonprofit (and, therefore, non-taxpaying) corporation, *see DiCesare v. Charlotte-Mecklenburg Hosp. Auth.*, 376 N.C. 63, 70 (2020) (holding, in the context of a motion for judgment on the pleadings, that the movant must show that the complaint "fails to allege facts sufficient to state a cause of action *or admits facts which constitute a complete legal bar thereto*" (emphasis added) (citation omitted)), and it does not allege that any of its members pay taxes to either the City or the County. In addition, plaintiff has never alleged that it has brought this action "on behalf of" the City or the County, *Branch*, 233 N.C. at 626, or accused public officials of "misuse or misappropriation of public funds," *Goldston*, 361 N.C. at 33. As a result, plaintiff's amended complaint simply does not make a valid claim of taxpayer standing in the manner required by this Court's precedent.

¶ 36 In the same vein, we hold that the amended complaint fails to allege sufficient facts necessary to establish associational standing. Although plaintiff argues that it is a "legacy organization whose purposes include 'historical, benevolent, memorial, educational and patriotic programs;' " that its charter "clearly and [un]equivocally gives it an articulated interest in the status and preservation of objects of remembrance such as the [m]onument;" that it "has succeeded to the interests of those deceased members of an affiliated chapter who were responsible for designing, funding, and erecting the [monument];" and that it has "a specific requirement for membership . . . that one is a lineal descendant of an individual who served in the government or the armed forces of the Confederacy," none of these factual allegations are raised in the amended complaint.

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8. In addition, given that plaintiff did not advance this argument before the Court of Appeals, it is not permitted do so for the first time before this Court. *See Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309 (2001) (noting the longstanding rule that "issues and theories of a case not raised below will not be considered on appeal;" *see also* N.C. R. App. P. 10(a) (providing that issues not raised in a party's brief are deemed abandoned).

In addition, the amended complaint does not identify any of plaintiff's individual members or describe how the legal rights of any of plaintiff's individual members have been violated. As a result, the amended complaint fails to allege facts sufficient to show that "the interests [plaintiff] seeks to protect are germane to the organization's purpose" or that its members "would otherwise have standing to sue in their own right." *River Birch Assocs.*, 326 N.C. at 130.

¶ 37 In addition, we are simply not persuaded that the purpose for which plaintiff was organized, standing alone, suffices to provide it with standing to maintain the present action. Aside from the fact that plaintiff has cited no authority to support its position, similar arguments have consistently been rejected by both the federal courts and our Court of Appeals. *See, e.g.*, *Gardner v. Mutz*, 360 F. Supp. 3d 1269, 1276 (M.D. Fla. 2019) (concluding that, even though the plaintiffs claimed "genealogical relationships and membership in associations for particular historical and cultural foci," they "cannot base their standing on their preferences for the preservation of Confederate memorials" because such preferences "are not sufficiently particularized, but are general, public-interest grievances, and vindicating the public interest is the function of the legislative and executive branches, not the judicial branch" (cleaned up)), *vacated, in part, on other grounds*, 962 F.3d 1329 (11th Cir. 2020); *McMahon v. Fenves*, 323 F. Supp. 3d 874, 880 (W.D. Tex. 2018) (observing that the plaintiffs "may be more deeply attached to the values embodied by the Confederate monuments than the average student rushing to class or the mall, but their identities as descendants of Confederate veterans do not transform an abstract ideological interest in preserving the Confederate legacy into a particularized injury"); *Soc'y for Hist. Pres. of Twentysixth N.C. Troops, Inc. v. City of Asheville*, 282 N.C. App. 701, 2022-NCCOA-218, ¶¶ 26–27 (concluding that that neither a purported violation of N.C.G.S. § 100-2.1 nor the plaintiff's status as "a legacy organization which was responsible for" the restoration of a monument that was subsequently removed by the City of Asheville sufficed to "establish a legal injury suffered by [the] plaintiff sufficient to establish standing");[9] *Hist. Pres. Action Comm. v. Reidsville*, No. COA12-1386, 2013 WL 6096749, at *5 (N.C. Ct. App. Nov. 19, 2013) (unpublished) (concluding that the plaintiffs' claim that they "derived a particular aesthetic enjoyment from the [Confederate] monument and are injured by its removal" was insufficient to support a claim of standing).

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9. The decision in *Twentysixth North Carolina Troops* is particularly noteworthy because the Court of Appeals' analysis, unlike the earlier decision in this case, rested upon this Court's decision in *Committee to Elect Dan Forest*.

¶ 38 Finally, plaintiff's assertion that it has standing because it "[has] the right to defend itself in a court of law when it was the recipient of a clear and unequivocal attack" finds no support in the law or the facts of this case. Neither the allegations contained in the amended complaint nor the evidence contained in the record support plaintiff's contention that it was "clearly and specifically threatened with adverse consequences by the City of Winston-Salem if it failed or refused to remove the [monument]." Instead, the amended complaint simply alleges that the City had "caused a letter to be sent to [plaintiff] stating that it had until January 31st, 2019 to remove [the monument]." The letter itself, a copy of which appears in the record on appeal and the authenticity of which has not been questioned by any party, acknowledges that "[c]laims of ownership of the [monument] have come from the United Daughters of the Confederacy," directs plaintiff "to remove and relocate" the monument by 31 January 2019, and warns that "[f]ailure to comply with this directive may result in the [C]ity seeking a court order for the removal and relocation of the [monument] to preserve the same and to address public safety concerns[.]" Although the letter does suggest that the City intended to utilize some sort of judicial process to facilitate the monument's removal in the event that plaintiff failed to remove it voluntarily, neither the letter nor the amended complaint contains any threat that the City intended to institute legal action directly against plaintiff.

¶ 39 In addition, even if one takes the allegations contained in the amended complaint as true, the mere fact that the City sent plaintiff a letter in which it set a deadline for the removal of the monument does not automatically confer standing upon plaintiff, particularly given the absence of any allegation that plaintiff has any proprietary or contractual interest in the monument. As the trial court correctly observed, plaintiff, as the party that initiated the lawsuit, has "the burden of proving that standing exists." *Chávez v. Wadlington*, 261 N.C. App. 541, 544 (2018) (quoting *Myers v. Baldwin*, 205 N.C. App. 696, 698 (2010)).[10] Thus, for all these reasons, we hold that the amended complaint even "when liberally construed," *Wells Fargo Ins. Servs. USA, Inc. v. Link*, 372 N.C. 260, 266 (2019), fails to allege "the infringement of a legal right directly under a cause of action at common law, a statute, or the North Carolina Constitution" sufficient to give plaintiff standing to challenge the City's actions in removing the monument from the old courthouse property, *Comm. to Elect Dan Forest*, ¶ 85.

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10. In the event that the City had brought suit against plaintiff for the purpose of forcing it to remove the monument, plaintiff would, of course been entitled to defend itself, with the City, rather than plaintiff, having been required to show that it had standing to seek the requested relief from plaintiff.

C. State Law Claims

¶ 40 **[2]** In addition, plaintiff argues that the City violated numerous provisions of state law by relocating the monument, with each of these claims appearing to rest upon the premise that the County owns the monument. A careful analysis of each of these claims in light of the allegations set out in the amended complaint satisfies us that plaintiff lacks standing to bring a claim under these statutes, that many of plaintiff's contentions are not properly before the Court, and that, in any event, plaintiff's arguments under these statutes lack sufficient legal support.

1. N.C.G.S. § 100-2.1 (Protection of Monuments)

¶ 41 As an initial matter, plaintiff argues that the City "denied plaintiff due process of law and violated [N.C.G.S.] § 100-2.1" by removing the monument from the old courthouse property. N.C.G.S. § 100-2.1 ("Protection of monuments, memorials, and works of art") provides as follows:

> (a) Approval Required.–Except as otherwise provided in subsection (b) of this section, a monument, memorial, or work of art owned by the State may not be removed, relocated, or altered in any way without the approval of the North Carolina Historical Commission.
>
> (b) Limitations on Removal.--An object of remembrance located on public property may not be permanently removed and may only be relocated, whether temporarily or permanently, under the circumstances listed in this subsection and subject to the limitations in this subsection. An object of remembrance that is temporarily relocated shall be returned to its original location within 90 days of completion of the project that required its temporary removal. An object of remembrance that is permanently relocated shall be relocated to a site of similar prominence, honor, visibility, availability, and access that are within the boundaries of the jurisdiction from which it was relocated. An object of remembrance may not be relocated to a museum, cemetery, or mausoleum unless it was originally placed at such a location. As used in this section, the term "object of remembrance" means a monument, memorial, plaque, statue, marker, or display of a permanent character that commemorates an event, a person, or military service that is part of North Carolina's history. The circumstances under

> which an object of remembrance may be relocated are either of the following:
>
> > (1) When appropriate measures are required by the State or a political subdivision of the State to preserve the object.
> >
> > (2) When necessary for construction, renovation, or reconfiguration of buildings, open spaces, parking, or transportation projects.
>
> (c) Exceptions.--This section does not apply to the following:
>
> > (1) Highway markers set up by the Board of Transportation in cooperation with the Department of Environmental Quality and the Department of Natural and Cultural Resources as provided by Chapter 197 of the Public Laws of 1935.
> >
> > (2) An object of remembrance owned by a private party that is located on public property and that is the subject of a legal agreement between the private party and the State or a political subdivision of the State governing the removal or relocation of the object.
> >
> > (3) An object of remembrance for which a building inspector or similar official has determined poses a threat to public safety because of an unsafe or dangerous condition.

N.C.G.S. § 100-2.1. According to plaintiff, N.C.G.S. § 100-2.1 "applies to the controversy between the [p]arties on the basis that the [monument] is patently an object of remembrance located on public property," with plaintiff having made "facially sufficient allegations tending to establish a colorable right of ownership of the [monument] in Forsyth County." In addition, plaintiff appears to argue that N.C.G.S. § 100-2.1 gives plaintiff standing to challenge the monument's removal.

¶ 42 As support for its argument that the County owns the monument, plaintiff directs our attention to language appearing in the contract of sale and the deed transferring ownership of the old courthouse property from the County to Winston Courthouse "tend[ing] to establish that [the] County owns the [monument] and that it specifically and intentionally

reserved easements for the purpose of maintaining the [monument.]" Secondly, plaintiff notes that the amended complaint "alleges that members of its local chapter raised the funds necessary to design, build, and install the [monument] from private sources," that the local chapter "dedicated the [monument] to Forsyth County and its citizens," and that "the historical record establishes that the Forsyth County Commissioners expressly permitted the [monument] to be placed on land which the County owned[.]" According to plaintiff, "[s]uch allegations are patently sufficient to invoke the provisions of [N.C.G.S.] § 100-2.1 as a basis for adjudicating the rights and responsibilities of the respective parties to this dispute."

¶ 43 According to plaintiff, "[d]edication is a form of transfer, either formal or informal, in which one grants rights to the public in their property," citing *Spaugh v. Charlotte*, 239 N.C. 149 (1954). Plaintiff asserts that the amended complaint "alleges sufficient facts from which one could reasonably conclude that it was intended for the [monument] to be dedicated to public use and that the governing body of Forsyth County accepted such dedication on behalf of the citizens of the county." Arguing in reliance upon the deed transferring the old courthouse property to Winston Courthouse, plaintiff argues that "[i]t is patently nonsensical for [the] County to reserve easement rights with regard to the [monument] . . . for purposes of maintenance and repair if it did not in fact own the [monument]" and "the plot[ ] of land upon which [the monument was] situated."

¶ 44 Plaintiff then argues that, upon its placement on the courthouse property, the monument became a "fixture" attached to real property and that its status did not change when the County sold the property to Winston Courthouse, given that "[c]hattels of a heavy and permanent character, even though not imbedded or physically fastened to the land, but merely placed on the land and held in place by their own weight, such as a monument, are real fixtures," citing Webster's Real Estate Law in North Carolina § 2-1 (5th ed. 1999); *Snedeker v. Waring*, 12 N.Y. 170 (1854) (holding that a three-ton statue of George Washington that rested on a stone foundation without having been otherwise attached to the land constituted a "fixture" that was "part of the realty")).[11] In this case, plaintiff claims, the monument was "erected and placed upon

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11. Although plaintiff raised this argument before the Court of Appeals, neither the majority nor the dissenting opinions addressed it. Even so, in light of our belief that it involves a purely legal issue and the fact that the law in this area is clear, we elect to address this contention rather than remanding the case to the Court of Appeals for further proceedings.

[the courthouse property] with the express assent of the Forsyth County Commission" and "has become part of the realty[.]"

¶ 45 Plaintiff further argues that, in order for N.C.G.S. § 100-2.1(b) to apply, the object in question must be (1) an "object of remembrance" and (2) situated on public property. Plaintiff claims that the monument meets the first of these two criteria because "it is a monument of a permanent character that commemorates those who were killed in the Confederate armed forces during the Civil [War], a seminal event in the history of North Carolina." According to plaintiff, "[t]here is a factual dispute concerning whether the [monument] is situated on public property." In plaintiff's view, the monument *is* located on public property because (1) the monument was dedicated to the public and accepted by the County; (2) it was situated on real property belonging to the County; and (3) that the County reserved easements in the deed conveying the courthouse to Winston Courthouse, which plaintiff believes "is evidence tending to show that the [monument] continued to be situated on public property."

¶ 46 We are not persuaded by any of plaintiff's arguments. As an initial matter, plaintiff has completely failed to explain how the City's actions "denied plaintiff due process of law." In order to establish a due process violation, a plaintiff must identify a cognizable legal right of which it was allegedly deprived by the City's actions. *See State v. Thompson*, 349 N.C. 483, 491 (1998) (discussing the differences between substantive and procedural due process, both of which serve to protect a party's legal rights). Even if N.C.G.S. § 100-2.1 applies in the set of circumstances that is before us in this case, we are unable to conclude that it confers any legal rights upon plaintiff sufficient to give rise to any sort of due process claim or other valid legal claim.

¶ 47 "[A] statute may authorize a private right of action either explicitly or implicitly, though typically, a statute allows for a private cause of action only where the legislature has expressly provided a private cause of action within the statute." *Sykes v. Health Network Solutions, Inc.*, 372 N.C. 326, 338 (2019) (cleaned up); *see also Comm. to Elect Dan Forest*, ¶ 68–69 (acknowledging the General Assembly's "power to create causes of action and permit a plaintiff to recover in the absence of a traditional injury"). As a result, in the event that "the legislature exercises its power to create a cause of action under a statute," "the plaintiff has standing to vindicate the legal right *so long as he is in the class of persons on whom the statute confers a cause of action*." *Comm. to Elect Dan Forest*, ¶ 82 (emphasis added). Although this Court has not addressed the circumstances in which a statute *implicitly* authorizes a private cause of action, the Court of Appeals has concluded that "an implicit right of a

cause of action exists when a statute requires action from a party, and that party has failed to comply with the statutory mandate." *Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 195 N.C. App. 348, 355 (2009) (citing *Lea v. Grier*, 156 N.C. App. 503, 508–09 (2003)).

¶ 48 We are unable to identify anything in N.C.G.S. § 100-2.1, particularly when read in conjunction with the allegations of the amended complaint, that explicitly authorizes the assertion of a private cause of action for the purpose of enforcing that statutory provision.[12] The absence of explicit language authorizing the assertion of a private right of action based on N.C.G.S. § 100-2.1 stands in stark contrast to the statute at issue in *Committee to Elect Dan Forest*, which specifically authorized a candidate for elected office who had complied with the relevant campaign finance laws to sue an opposing candidate or candidate committee for an alleged violation of those same laws. *See Comm. to Elect Dan Forest*, ¶ 6 (citing N.C.G.S. § 163-278.39A(f) (now repealed)). In addition, even assuming, without deciding, that the Court of Appeals has correctly identified the circumstances under which a statute implicitly authorizes a private right of action in *Sugar Creek Charter School*, nothing in N.C.G.S. § 100-2.1 "requires action from a party" with which "that party has failed to comply[.]" 195 N.C. App. at 356. Instead, N.C.G.S. § 100-2.1 *prohibits* the removal or relocation of certain specified objects that are owned by the State or located on public property. Finally, even if N.C.G.S. § 100-2.1 could be interpreted to implicitly authorize the assertion of a private right of action, nothing in the relevant statutory language or the allegations contained in the amended complaint suggests that plaintiff would be "in the class of persons on which the statute confers the right[.]" *Comm. to Elect Dan Forest*, ¶ 67; *see also Charles Stores*, 263 N.C. at 717 (holding that "[o]nly one who is in immediate danger of sustaining a direct injury from legislative action may assail the validity of such action," and that it "is not sufficient that he has merely a general interest common to all members of the public").

¶ 49 In addition, we further conclude that, even if plaintiff is entitled to assert a private right of action to enforce N.C.G.S. § 100-2.1, that statutory provision has no application to the facts that are before us in this case in light of the allegations contained in the amended complaint. As an initial matter, it is undisputed that, prior to its removal, the monument

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12. After recognizing that the statute "is not self-executing in that no enforcement mechanism is provided under its terms," plaintiff simply asserts that "the statute is a clear and unequivocal expression of public policy by the General Assembly." A mere expression of legislative policy, without more, is not sufficient to support the recognition of a right on the part of any particular party to assert a private right of action.

stood on property that had been privately owned by Winston Courthouse since 2014.[13] Although plaintiff has advanced a number of arguments in an attempt to avoid the consequences of this undisputed fact, none of them have any merit. For example, the fact that the deed transferring the old courthouse property to Winston Courthouse contained an exclusion relating to the monument and contemplated the reservation of an easement for the monument's maintenance does not, as plaintiff asserts, establish that the County owns the monument,[14] given that a party cannot transfer title to property in which it lacks any sort of ownership interest. 63C Am. Jur. 2d Property § 43. In the event that the County did not own the monument, its exclusion from the conveyance could simply have reflected the County's recognition that it could not warrant title to that piece of property, *see Culbreth v. Britt Corp.*, 231 N.C. 76, 80 (1949) (defining a warranty of title as "an agreement of the warrantor to make good by compensation in money any loss directly caused by the failure of the title which his deed purports to convey"), and nothing in the amended complaint refutes this assumption. As a result, the mere exclusion of an item of personal property from a conveyance of real property is not tantamount to an affirmative claim of ownership over the excluded property.

¶ 50 Although its "fixture-related" argument is not entirely clear to us, plaintiff appears to be contending that, because the monument was "dedicated to public use" at the time that it was placed on the old courthouse

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13. N.C.G.S. § 100-2.1 had an effective date of 23 July 2015, which was more than a year after the County conveyed the old courthouse property to Winston Courthouse. Nothing in the relevant statutory language suggests that N.C.G.S. § 100-2.1 was intended to have any sort of retroactive application to transactions that had occurred prior to the statute's effective date. *See* Cultural History Artifact Management and Patriotism Act of 2015, S.L. 2015-170, § 3(c), 2015 N.C. Sess. Laws 435, 437. "It is a well-established rule of construction in North Carolina that a statute is presumed to have prospective effect only and should not be construed to have a retroactive application unless such an intent is clearly expressed or arises by necessary implication from the terms of the legislation." *State v. Green*, 350 N.C. 400, 404 (1999).

14. As we have already noted, even though the deed transferring the old courthouse property from the County to Winston Courthouse contemplates that Winston Courthouse would execute certain easements in favor of the County, the record contains no indication that any such easements were ever executed or recorded. "An express easement must be in writing pursuant to the Statute of Frauds and be sufficiently certain to permit the identification and location of the easement with reasonable certainty." *Singleton v. Haywood Elec. Membership Corp.*, 151 N.C. App. 197, 202 (2002). As a result, a mere agreement to create an easement in the future does not suffice to actually create such an easement, *see id.* at 203 (holding that the plaintiff's contractual obligation to furnish "all necessary easements and rights-of-way" to the defendant did not, by itself, create an easement), and there is no contention in the amended complaint that any sort of implied easement exists or even could exist in this situation.

property, it became part of the "real property belonging in fee simple to Forsyth County." Although the general rule in this jurisdiction is that "whatever is attached to the land is understood to be part of the realty," "[w]hether a thing attached to the land be a fixture or chattel personal, depends upon the agreement of the parties, express or implied." *Lee-Moore Oil Co. v. Cleary*, 295 N.C. 417, 419 (1978) (quoting *Feimster v. Johnson*, 64 N.C. 259, 260–61 (1870)). In this case, however, there is no allegation in the amended complaint nor any evidence in the record regarding the intent of either plaintiff, its local chapter, or the County with respect to the issue of whether the monument became "part of the realty" at the time of its installation. Instead, the amended complaint alleges that the County granted plaintiff "*permission* to erect a memorial." As we stated in *Lee-Moore Oil*, "[a] building, or other fixture which is ordinarily part of the realty, is held to be personal property when placed on the land of another by contract or consent of the owner." *Id.* at 420 (quoting *Feimster*, 64 N.C. at 261).[15]

¶ 51 Alternatively, plaintiff may be contending that, in the event that the real property upon which a fixture is located is conveyed to another party and the fixture is excluded from the conveyance, the real property beneath the fixture is excluded from the transfer as well. For example, plaintiff argues in its brief that "the reservation of easements by the County in its deed conveying the old courthouse for the purpose of maintaining monuments and plaques on [the courthouse property] is evidence tending to show that the [monument] continued to be situated on public property." However, plaintiff cites no authority in support of this novel proposition, which cannot be found in any of this Court's precedent, and nothing in the amended complaint serves to justify adoption of plaintiff's apparent position. *Cf. Bond v. Coke*, 71 N.C. 97, 100 (1874) (holding that "personal chattels which have been fixtures are incorporated in, and are, a part of the land as much so as a house or tree, until an actual severance and therefore, a deed conveying the land *without*

15. Although the amended complaint alleges that the monument "was dedicated" during a ceremony in 1905, it does not explain what plaintiff means by "dedicated." In its brief, plaintiff claims, in reliance upon *Spaugh*, that what occurred in 1905 constituted a "dedication" for "public use." However, *Spaugh* defined "dedication" as "the intentional appropriation *of land* by the owner to some public use." 239 N.C. at 159 (emphasis added). Even if *Spaugh* applies to both personal and real property, we have held that, "[w]here property is dedicated or set apart without restriction merely for public uses, the municipal authorities may determine for what use it is appropriate and shall be used, and, if not irrevocably dedicated or appropriated by them to any particular public use, its use may be changed as the public convenience and necessities require." *Wishart*, 254 N.C. at 96 (quoting 64 C.J.S. Mun. Corp. § 1818).

excepting therein the fixtures, has legal effect of passing the [chattels], which are part and parcel of the land") (emphasis added). In the event that we were to accept plaintiff's argument as valid, we would necessarily also have to hold that, when a landowner grants timber rights to another, the grantee gains title not only to the tree but also to the discrete pieces of land upon which the tree is located. *Cf.*, *e.g.*, *Hornthal v. Howcott*, 154 N.C. 228 (1911). Such a result would be completely inconsistent with long-standing principles of North Carolina property law.

¶ 52 The facts at issue in this case are similar to those that were before the Court of Appeals in *National Advertising Co. v. North Carolina Department of Transportation*, in which an advertising company, acting in accordance with a five-year lease, erected a billboard upon real property that it did not own. 124 N.C. App. 620, 622–23 (1996). After purchasing the property upon which the billboard was located, the North Carolina Department of Transportation sent a letter to the advertising company in which it requested that the billboard be removed at the Department's expense. *Id.* After the Department removed the sign following the advertising company's refusal to do so, the advertising company sought damages on the basis of an inverse condemnation claim. *Id.* at 623. As a result of the fact that no lease agreement relating to the billboard had ever been recorded, the Court of Appeals held that the advertising company did not have any interest in the underlying real property, that the advertising company had no right to insist that the billboard remain on the property, and that, since the billboard was "abandoned property," the Department had every right to remove the billboard from its property without paying compensation to the advertising company. *Id.* at 624–25. In the same vein, we conclude that, in the event that plaintiff remained the owner of the monument and that the County had granted permission to place the monument upon the old courthouse property, the monument had become abandoned property following the transfer of the old courthouse property to Winston Courthouse, and that Winston Courthouse, as a subsequent owner, was entitled to have the monument removed. For all these reasons, we hold that, based on the facts alleged in the amended complaint and contained in the record that is before us, the monument was not "located on public property," and N.C.G.S. § 100-2.1(b) has no application to this case.

¶ 53 Similarly, we are not persuaded that N.C.G.S. § 100-2.1(a) has any bearing upon the proper resolution of this case given the absence of any allegation in the amended complaint that the monument is "owned by the State." Although "counties and their respective boards of county commissioners are 'creatures of the General Assembly and serve as

agents and instrumentalities of State government,' " *Silver v. Halifax Cnty. Bd. of Comm'rs*, 371 N.C. 855, 866 (2018) (quoting *Stephenson v. Bartlett*, 355 N.C. 354, 364 (2002)), the General Assembly has specifically authorized counties to independently acquire, maintain, and dispose of real or personal property, *see* N.C.G.S. §§ 153A-158, 169, 176; *see also Davis v. Forsyth Cnty.*, 117 N.C. App. 725, 727 (1995) (concluding that the county was a "person" for purposes of the cartway statute because "counties are established as legal entities and are empowered by law to acquire land") (citing N.C.G.S. § 153A-158). Similarly, the North Carolina Constitution authorizes counties and municipalities to own property independently of the State. *See* N.C. Const. art. V, § 2 (providing that "[p]roperty belonging to the State, counties, and municipalities shall be exempt from taxation"). As a result, even if the County owns the monument, that fact would not convert the monument into State property subject to N.C.G.S. § 100-2.1(a). As a result, for all of these reasons, N.C.G.S. § 100-2.1 has no bearing upon the proper resolution of this case.

2. N.C.G.S. Chapter 116B (Unclaimed Property)

¶ 54 Secondly, plaintiff argues that the City violated N.C.G.S. §§ 116B-2,[16] B-56, and B-59 by removing the monument from the old courthouse property "without first giving notice and complying with procedures required by such statutes with regard to abandoned or unclaimed property whose owner cannot be ascertained." In plaintiff's view, "[t]he gist of [its] claim for a declaratory judgment is the initial determination of ownership of the [monument,]" with N.C.G.S. § 116B-51 *et seq.*, having enunciated "comprehensive guidelines and procedures to be employed in order to ascertain ownership of the property alleged to be abandoned or unclaimed, and for the transfer of such property to the State." According to plaintiff, "[i]f the [monument] were deemed to be abandoned or unclaimed, it would escheat to the State," at which point "the State would then be subject itself for the manner in which it exercised possession of the [monument] under [N.C.G.S. § 100-2.1]." Plaintiff asserts that neither the City nor the County "has made any effort to invoke the provisions of Chapter 116B in order to ascertain whether the [monument] has been abandoned or unclaimed" and have, instead, "unilaterally undertaken to decide who owns the [monument], who is responsible for it, and what will be done with it." In plaintiff's view, "due process of law requires more than the blatant assertion of the right to decide a question on the part of a governmental unit without giving interested parties meaningful notice and opportunity to be heard."

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16. Recodified at N.C.G.S. § 116B-2.2 (2021).

¶ 55 As an initial matter, we note that plaintiff did not present this "abandoned property" argument to the Court of Appeals or include any allegations supporting it in the amended complaint, but instead it was advanced for the first time in Judge Tyson's dissent. Aside from the fact that "issues and theories of a case not raised below will not be considered on appeal," *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309 (2001); *see also* N.C. R. App. P. 10(a), arguments raised by a dissenting judge at the Court of Appeals on his or her own motion cannot serve as a basis for an appeal to this Court either, *see M.E. v. T.J.*, 380 N.C. 539, 2022-NCSC-23, ¶ 65; *see also Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402 (2005) (per curiam) (noting that "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant"). In addition, even if plaintiff's "abandoned property" argument was otherwise properly before us, we note that plaintiff's amended complaint does not assert a claim under the Unclaimed Property Act and, instead, demonstrates that no such claim could be sustained.

¶ 56 The Unclaimed Property Act defines "property" as

> (i) money or tangible personal property held by a holder that is *physically located in a safe deposit box or other safekeeping depository held by a financial institution* within this State or (ii) a fixed and certain interest in *intangible property or money* that is held, issued, or owed in the course of a holder's business, or by a government, governmental subdivision, agency, or instrumentality, and all income or increments therefrom.

N.C.G.S. § 116B-52(11) (emphasis added). In light of this definition, the monument as described in the amended complaint simply cannot qualify as abandoned property that has escheated to the State. In addition, nothing in the amended complaint suggests that plaintiff is within the class of persons entitled to notice before the monument would escheat to the State. The statute provides that the "apparent owner" of abandoned property is entitled to at least 60 days' notice before the holder of the property reports the property abandoned to the State Treasurer, N.C.G.S. §§ 116B-59–60, with "apparent owner" being defined as "a person whose name appears on the records of a holder as the person entitled to property held, issued, or owing by the holder," N.C.G.S. § 116B-52(1). As a result, since plaintiff has not claimed any proprietary or contractual interest in the monument or otherwise alleged facts that would qualify it as the "apparent owner" of the monument, it has failed to establish a claim for relief under the Unclaimed Property Act.

3. N.C.G.S. § 160A-193 (Abatement of Nuisances)

¶ 57 Thirdly, plaintiff asserts that the City violated N.C.G.S. § 160A-193 by declaring the monument to be a public nuisance and removing it without providing plaintiff with the required statutory notice, an opportunity to be heard, and a reasonable opportunity to make the monument safe. In view of the fact that N.C.G.S. § 160A-193 provides, in pertinent part, that "[a] city shall have the authority to summarily remove, abate, or remedy everything in the city limits, or within one mile thereof, that is dangerous or prejudicial to the public health or public safety," N.C.G.S. § 160A-193(a), plaintiff contends that "the authority of a city to act under this statutory grant of authority [without notice] is expressly limited to those situations in which a building or other structure constitutes an imminent danger to the public health or safety, creating an emergency necessitating the structure's immediate demolition," and that "cities may not summarily demolish structures merely because it is quicker and easier to do so than providing the owners notice and an opportunity to be heard," citing *Monroe*, 158 N.C. App. at 278 (2003)). According to plaintiff, even though the City "has alleged in public statements that the [monument] presented a danger to public safety, there is no evidence that such is the case."

¶ 58 In addition, plaintiff contends that, "[i]f a city wishes to destroy a structure that does not pose an imminent threat to the public, then the city must follow the procedures required by [N.C.G.S.] §§ 160A-441 through 160A-450," citing *Newton v. City of Winston-Salem*, 92 N.C. App. 446, 449 (1988), which require the City to "provid[e] the owner with notice, a hearing, and a reasonable opportunity to bring his or her dwelling into conformity with the housing code," citing N.C.G.S. § 160A-443. In plaintiff's view, the City "has unlawfully sought to use its statutory authority to abate nuisances which pose a threat to public health and safety by making claims which are patently bogus even under its own court filings in order to avoid the reach and limitation of [N.C.G.S. § 100-2.1]." Plaintiff contends that, if it were determined to be the owner of the monument, "it would necessarily follow that [p]laintiff has standing to defend the placement of the [monument] on [the courthouse property], as well as to invoke the arguments that the [monument] does not constitute a public nuisance under [N.C.G.S.] § 160A-193."

¶ 59 A careful review of the record and the allegations contained in the amended complaint satisfies us that plaintiff lacks standing to challenge the City's determination that the monument had become a public nuisance. N.C.G.S. § 160A-193(a) authorizes a city to "summarily remove, abate, or remedy everything in the city limits . . . that is dangerous or

prejudicial to the public health or public safety." In *Monroe*, a case upon which plaintiff places substantial reliance, the Court of Appeals concluded that N.C.G.S. § 160A-193 authorizes a city "to summarily demolish a building only if the building constitutes an imminent danger to the public health or safety, creating an emergency necessitating the building's immediate demolition," 158 N.C. App. at 278. Otherwise, the city must comply with the procedures set forth in Chapter 160A, Article 19 (now Chapter 160D, Article 12),[17] including the requirement that it provide notice and an opportunity to be heard to the *owner*. *Id.*; *see also Newton*, 92 N.C. App. at 451–52 (holding that the city had failed to give the *owner* actual notice of its intent to demolish his property, in violation of the statutory notice requirements) (emphasis added).

¶ 60 N.C.G.S. § 160D-1203, which governs the demolition of a "dwelling" that is deemed to be "unfit for human habitation," provides that

> [w]henever a petition is filed with the public officer by a public authority or by at least five residents of the jurisdiction charging that any dwelling is unfit for human habitation or when it appears to the public officer that any dwelling is unfit for human habitation, the public officer shall, if a preliminary investigation discloses a basis for such charges, issue and cause to be served *upon the owner of and parties in interest in such dwellings* a complaint stating the charges in that respect and containing a notice that an administrative hearing will be held before the public officer, or the officer's designated agent, at a place within the county in which the property is located.

N.C.G.S. § 160D-1203(2) (emphasis added). An "owner" for purposes of N.C.G.S. § 160D-1203(2) is "the holder of the title in fee simple and every mortgagee of record," while "parties in interest" is defined as "[a]ll individuals, associations, and corporations that have an interest of record in a dwelling and any that are in possession of a dwelling." N.C.G.S.

17. Although Chapter 160A, Article 19 (N.C.G.S. §§ 160A-441 *et seq.*) was repealed and substantively recodified in Chapter 160D, Article 12 (N.C.G.S. § 160D-1201 *et seq.*), the provisions upon which plaintiff relies are virtually unchanged. *See* An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State, S.L. 2019-111, 2019 N.C. Sess. Law 424. In light of this fact and the fact that the new statute is retroactively applicable, *see* An Act to Complete the Consolidation of Land-Use Provisions into One Chapter of the General Statutes, S.L. 2020-25, https://www.ncleg.gov/EnactedLegislation/SessionLaws/PDF/2019-2020/SL2020-25.pdf, we cite to the current statutory provisions in the text of this opinion.

§ 160D-1202(1)–(2). In view of the fact that plaintiff did not allege in the amended complaint that it had any proprietary or contractual interest in the monument or that it has an "interest of record" or is "in possession of" the monument, plaintiff is simply not a member of the class of persons entitled to notice and an opportunity to be heard under N.C.G.S § 160D-1203(2). In addition, N.C.G.S. § 160D-1201 *et seq.* only applies to "dwellings," which is defined as "[a]ny building, structure, manufactured home, or mobile home, or part thereof, *used and occupied for human habitation or intended to be so used*[.]" N.C.G.S. §§ 160D-102(15), -1201(a) (emphasis added). Given that plaintiff has failed to allege facts pursuant to which the monument would qualify as a "dwelling" as defined above, its removal is not subject to N.C.G.S. § 160D-1201 *et seq.* As a result, plaintiff's challenges to the City's nuisance declaration are without merit.

D. Federal Law Claims

¶ 61 In addition, plaintiff has advanced a number of arguments in reliance upon federal law in an apparent attempt to demonstrate that the amended complaint sufficiently alleged that the County owns the monument and that the City acted unlawfully in removing it. First, plaintiff asserts that the old courthouse was listed on the National Register of Historic Places in 2013 at the recommendation of the County and the North Carolina Department of Cultural and Natural Resources, and that this is significant because 54 U.S.C. § 302105(a) provides that the property owner must be given the opportunity to concur in or object to the property's inclusion on the National Register before that property can be listed there. Plaintiff further asserts that "the evidence would show that the [monument] was not excluded from the application or from the designation" and that the County had failed to explain how it "could initiate and fund the process for [the] designation of [the courthouse] as a National Historic Landmark without owning the property in the first place[.]"

¶ 62 Secondly, plaintiff argues that, "[a]s a veteran's memorial and a war grave for those who did not return home and listed on the National Register, the [monument] is arguably protected from injury or destruction by the 'Veterans' Memorial Preservation and Recognition Act of 2003,' " citing 18 U.S.C. § 1369 (2018), and asserts that, "[u]nder Federal law, the term 'veteran' is defined to include persons who 'served for ninety days or more in the active military or nav[a]l service during the Civil War,' " citing 38 U.S.C. § 1501 (2018). In plaintiff's view, the City "ha[d] no lawful basis to declare the [monument] to be a public nuisance or to pre-emptively demand and then unilaterally remove it from a property listed on the National Register of Historic Places without prior

permission or agreement," nor may it do so without complying with the applicable state and federal laws, citing 18 U.S.C. § 1369 (2018); 36 C.F.R. § 60.15; N.C.G.S. § 100-2.1(b). We are not persuaded by any of these arguments.

¶ 63 As an initial matter, we note that, like its arguments relating to the Unclaimed Property Act, plaintiff failed to assert any claim in reliance upon the Unclaimed Property Act in the amended complaint or present any argument in reliance upon that statute to the trial court or the Court of Appeals and, instead, simply adopted this argument from Judge Tyson's dissent. For that reason, this argument is not properly before the Court. *See Westminster Homes*, 354 N.C. at 309; *M.E.*, ¶ 65; *Viar*, 359 N.C. at 402; N.C. R. App. P. 10(a). In addition, when considered in light of the record and the allegations contained in the amended complaint, plaintiffs' arguments are completely devoid of merit. A careful reading of the relevant statutory provisions demonstrates that none of the federal statutes or regulations upon which plaintiff now relies creates a private cause of action authorizing plaintiff to enforce them. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975) (observing that "the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief"); *Spokeo*, *Inc. v. Robins*, 578 U.S. 330, 341 (2016) (concluding that, even though Congress has the authority to create legal rights by statute, that "does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right").[18] As a result, plaintiff does not have the right to assert a claim against defendants on the basis of any of the statutory provisions mentioned in the dissent.

¶ 64 Aside from this fundamental procedural defect in its argument, plaintiff has failed to explain how the placement of the old courthouse property on the National Register of Historic Places had the effect of precluding the removal or relocation of the monument. In the event that plaintiff is seeking to invoke the National Historic Preservation Act, P.L. 89-665, now codified at 54 U.S.C. 300101 *et seq.*, the only potentially relevant provision is 54 U.S.C. § 306108, which requires federal agencies, "prior to the approval of the expenditure of any Federal funds on [any Federal or federally assisted] undertaking or prior to the issuance of any

18. Unlike claims brought under state law, which do not require a showing of "injury in fact," *Committee to Elect Dan Forest*, ¶ 85, claims brought under federal law are subject to a traditional "injury-in-fact" requirement, *Lujan*, 504 U.S. at 560.

license, [to] take into account the effect of the undertaking on any historic property." According to well-established federal law, the statutorily required review process "applies by its terms only to *federally funded* or *federally licensed* undertakings." *Nat'l Min. Ass'n v. Fowler*, 324 F.3d 752, 760 (D.C. Cir. 2003) (quoting *Sheridan Hist. Ass'n v. Christopher*, 49 F.3d 750, 755 (1995)) (emphasis in *Sheridan*). In *Monumental Task Committee, Inc. v. Foxx*, a federal district court concluded, on facts similar to those at issue here, that, unless efforts by the City of New Orleans to remove a controversial monument were "either federally funded or federally licensed, [§ 306108] does not apply." 240 F. Supp. 3d 487, 496 (E.D. La. 2017). As a result of the fact that plaintiff "[has] not [alleged or] argued, let alone presented any evidence, that removal of the [monument] [was] federally funded, permitted, approved, or licensed," "[§ 306108] is inapplicable to the removal of the [monument]." *Id*. Plaintiff also argues that the City was required to comply with 36 C.F.R. § 60.15, but that regulation governs only how properties are removed from the National Register and says nothing about what happens when the property itself is relocated or even demolished altogether.

¶ 65 Finally, plaintiff's contention that the monument is a "memorial and war grave" that is "protected from injury" or destruction under 18 U.S.C. § 1369 lacks merit given that the relevant statutory provision only applies to a "structure, plaque, statue, or other monument" that "is located *on property owned by, or under the jurisdiction of, the Federal Government*." 18 U.S.C. § 1369(b)(2) (emphasis added). Aside from the fact that plaintiff has not alleged, and the record does not otherwise reflect any basis for concluding, that the monument is located on federal land, 18 U.S.C. § 1369 is a criminal statute, and "[p]rivate citizens have no standing to institute a federal criminal prosecution and no power to enforce a criminal statute." *Monumental Task Comm., Inc. v. Foxx*, 157 F. Supp. 3d 573, 592 (E.D. La. 2016) (cleaned up); *see also Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (holding that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another").[19] As a result, none of plaintiff's arguments in reliance upon various provisions of federal law provide any basis for a determination that plaintiff has the right to maintain the present action against defendants.

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19. Although plaintiff directs our attention to 24 U.S.C. § 279, which authorized the Secretary of the Army to furnish headstones for unmarked graves, including those of soldiers who served in the Union and Confederate armies, that statute was repealed in 1973. *See* Pub. L. 93-43, § 7(a)(1), (5), (7). In addition, the effect of this provision upon the viability of plaintiff's claims is, at best, unclear.

E. Dismissal with Prejudice

¶ 66 **[3]** Finally, plaintiff argues that the trial court erred by dismissing its amended complaint with prejudice after ruling that plaintiff lacked standing to maintain a declaratory judgment action regarding ownership of the monument. In plaintiff's view, "[a] dismissal for want of jurisdiction under Rule 12(b)(1) does not constitute an adjudication on the merits of the case" and "is without prejudice to a plaintiff's ability to bring a second action which is factually and legally sufficient to establish jurisdiction in the court before which the second action is brought," citing Restatement (Second) of Judgments § 19 (1982). In addition, plaintiff argues that "[a] personal judgment for the defendant for lack of jurisdiction, although valid and final, does not bar another action by the plaintiff on the same claim," citing Restatement (Second) of Judgments § 20 (1982)); *Cline*, 92 N.C. App. at 257. As a result, plaintiff concludes that "[a] court cannot make its order an adjudication on the merits" and dismiss the claim with prejudice "if it lacks the power to decide the merits of the case in the first place."

¶ 67 A review of the relevant precedent discloses that both this Court and the Court of Appeals have held that the absence of standing can be raised in a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). *See, e.g.*, *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337 (2000); *Teague v. Bayer AG*, 195 N.C. App. 18, 22 (2009). On the other hand, we have also consistently recognized that standing is a "necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Willomere Cmty. Ass'n*, 370 N.C. at 561 (citations and quotation marks omitted); *see also Thomas v. Oxendine*, 280 N.C. App. 526, 2021-NCCOA-661, ¶ 18 (observing that "[s]tanding is required to confer subject matter jurisdiction") (citing *Wellons v. White*, 229 N.C. App. 164, 176 (2013)); *Apple v. Commercial Courier Exp., Inc.*, 168 N.C. App. 175, 177 (2005) (noting that, "[i]f a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim"). In addition, our earlier decisions indicating that the absence of standing can be asserted by means of a motion to dismiss for failure to state a claim for which relief can be granted pursuant to Rule 12(b)(6) appear to rest upon the notion, which we have recently rejected, that standing for purposes of North Carolina law requires the allegation of an "injury in fact." *See Comm. to Elect Dan Forest*, ¶ 66 (observing that, "in a common law action where actual injury is a necessary element of the claim, such as negligence, the proper disposition for failure to allege actual injury or damages is not dismissal for lack of standing, but dismissal for failure to state a claim upon which relief can be granted").

¶ 68 "Although the practical consequence of dismissal of a complaint under Rule 12(b)(6) or 12(b)(1) is the same—the case is dismissed—the legal effect is quite different." *Cline*, 92 N.C. App. at 263. In the event that a complaint is dismissed for failure to state a claim, that decision constitutes a final judgment on the merits for res judicata purposes and bars the plaintiff from maintaining another action on the basis of this same claim. Rest. (Second) of Judgments § 19 cmt. d. (1982); *Clancy v. Onslow Cnty.*, 151 N.C. App. 269, 272 (2002) (noting that "it is well settled in this State that a dismissal under Rule 12(b)(6) operates as an adjudication on the merits unless the court specifies that the dismissal is without prejudice" (cleaned up)). On the other hand, when a complaint is dismissed for lack of subject matter jurisdiction, that decision does *not* result in a final judgment on the merits and does not bar further action by the plaintiff on the same claim. Rest. (Second) of Judgments § 20 cmt. e.; *Street v. Smart Corp.*, 157 N.C. App. 303, 305 (2003) (observing that "a dismissal under [Rule 12]b(1) is not on the merits and thus not given res judicata effect" (cleaned up)).

¶ 69 In this case, the trial court dismissed the amended complaint on the basis of a determination that, since plaintiff lacked standing, it lacked jurisdiction over the subject matter of plaintiff's claims. For the reasons set forth above, the trial court correctly concluded that plaintiff had failed to allege the infringement of a "legally enforceable right" sufficient to establish standing for purposes of North Carolina law. *See Comm. to Elect Dan Forest*, ¶ 85. Thus, since the trial court lacked subject matter jurisdiction over plaintiff's claims, the amended complaint was properly dismissed pursuant to Rule 12(b)(1). N.C.G.S. § 1A-1, Rule 12(b)(1); *Catawba Cnty. ex rel. Rackley v. Loggins*, 370 N.C. 83, 87 (2017). In view of the fact that the trial lacked jurisdiction over the subject matter of plaintiff's claims, the trial court erred by also dismissing the amended complaint for failure to state a claim for which relief could be granted pursuant to Rule 12(b)(6), *see Flowers v. Blackbeard Sailing Club, Ltd.*, 115 N.C. App. 349, 353 (1994) (vacating that portion of the trial court's order dismissing the plaintiff's complaint with prejudice after affirming the trial court's dismissal decision based on lack of subject matter jurisdiction), *disc. rev. improvidently allowed*, 340 N.C. 357 (1995), with the Court of Appeals having erred as well by affirming the trial court's decision with respect to that issue. As a result, we vacate the portion of the trial court's order dismissing the amended complaint with prejudice and remand this case to Superior Court, Forsyth County, with instructions to dismiss the amended complaint *without*, rather than with, prejudice.

III. Conclusion

¶ 70 Thus, we reaffirm our longstanding rule that a plaintiff must establish standing to bring an action pursuant to the Declaratory Judgment Act. *See Goldston*, at 361 N.C. at 33. As this Court held long ago, the Declaratory Judgment Act "does not license litigants to fish in judicial ponds for legal advice." *Lide v. Mears*, 231 N.C. 111, 117 (1949). For the reasons set forth above, we hold that the trial court did not err by dismissing the amended complaint for lack of standing. On the other hand, we further hold that the trial court erred by dismissing the amended complaint with, rather than without, prejudice. As a result, we affirm the Court of Appeals' decision, in part; reverse the Court of Appeals' decision, in part; and remand this case to Superior Court, Forsyth County, for further proceedings not inconsistent with this opinion.

AFFIRMED, IN PART; REVERSED, IN PART; AND REMANDED.

Chief Justice NEWBY concurring in the result only.

¶ 71 Plaintiff United Daughters of the Confederacy, North Carolina Division, Inc., filed an amended complaint on 6 February 2019 against the City of Winston-Salem (the City), the County of Forsyth (the County), and Winston Courthouse, LLC challenging the City's decision to remove a monument from Courthouse Square in Winston-Salem, North Carolina. In its amended complaint, plaintiff alleges that it is a nonprofit corporation organized under the laws of North Carolina, it is authorized to do business in the state, and it maintains its principal place of business in Wake County, North Carolina. Plaintiff describes its organization in the amended complaint solely with this language and does not identify who is involved in its organization or indicate where its members reside.[1]

¶ 72 In its amended complaint, plaintiff alleges that the City declared the monument a public nuisance and planned to move the monument from Courthouse Square. Plaintiff alleges that the removal process proposed by the City violates various rights of plaintiff, including freedom of speech, due process, and equal protection and constitutes an unlawful seizure. Plaintiff also claims the City's actions "violate . . . [N.C.G.S.] Chapter 100, Section 100, *et seq.*, the Protection of

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1. Plaintiff does identify its local chapter, the James B. Gordon Chapter #211, which is based out of Winston-Salem, North Carolina, in its amended complaint. The local chapter, however, filed a notice of voluntary dismissal from the present case on 1 May 2019, prior to entry of the trial court's order, and is not a party to this appeal.

Monuments, Memorial[s,] and Works of Art Act" and infringe upon the rights, duties, privileges, obligations, liabilities, and immunities of the County and the United States Department of the Interior.

¶ 73 In its amended complaint, plaintiff asks for a declaratory judgment to determine the parties' rights, duties, privileges, obligations, liabilities, and immunities with respect to the monument. Plaintiff also requests a declaratory judgment to determine whether the City misapplied N.C.G.S. § 160A-193 and City Ordinance 62-3(b) in declaring the monument a public nuisance. Additionally, plaintiff seeks a preliminary injunction enjoining defendants from altering, removing, or causing damage to the monument prior to a decision in the case. Because the City has since removed the monument from Courthouse Square, however, only plaintiff's request for a declaratory judgment remains.

¶ 74 The task here is to determine whether the allegations in plaintiff's amended complaint are sufficient to establish standing to seek a declaratory judgment. Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction, *Taylor v. City of Raleigh*, 290 N.C. 608, 620–21, 227 S.E.2d 576, 583–84 (1976), and standing is required to seek a declaratory judgment, *see Goldston v. State*, 361 N.C. 26, 33, 637 S.E.2d 876, 881 (2006) (holding that the plaintiffs established standing before "consider[ing] the form of relief sought by [the] plaintiffs, who [had] filed a declaratory judgment action"). "The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation[s] of issues upon which the court so largely depends for illumination of difficult constitutional questions.' " *Willowmere Cmty. Ass'n v. City of Charlotte*, 370 N.C. 553, 556–57, 809 S.E.2d 558, 561 (2018) (alteration in original) (quoting *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973)). "Until a party has a real and vested interest in the subject matter of a lawsuit, an action will not lie." *Pierson v. Buyher*, 330 N.C. 182, 186, 409 S.E.2d 903, 906 (1991).

¶ 75 Here the allegations of plaintiff's amended complaint fail to establish standing. Although plaintiff identifies itself as a nonprofit corporation doing business in North Carolina, plaintiff fails to allege who comprises its organization and where its members live. Plaintiff does not identify any individual members of its organization in its amended complaint or allege the requirements for membership. Further, there is no indication in the amended complaint that any members of plaintiff's organization reside in Winston-Salem or Forsyth County. Without more information regarding the membership of the organization and where its members

reside, plaintiff has failed to demonstrate that its organization or its members have any interest in the monument that is the subject of this case. Moreover, because plaintiff failed to include sufficient allegations in its amended complaint regarding its membership and organizational structure, plaintiff cannot establish taxpayer standing or associational standing. *See Branch v. Bd. of Educ.*, 233 N.C. 623, 626, 65 S.E.2d 124, 126 (1951) ("[W]here a plaintiff undertakes to bring a taxpayer's suit . . . , his complaint must disclose that he is a taxpayer of the [political] subdivision."); *see also River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990) (holding that a litigant may bring suit on an associational standing theory if "its members would otherwise have standing to sue in their own right" (quoting *Hunt v. Wash. State Apple Advert. Comm.*, 432 U.S. 333, 343 (1977))). Further, plaintiff does not allege ownership or a legal interest in the monument.

¶ 76 Thus, the bare allegations set forth in plaintiff's amended complaint are insufficient to establish standing. *See Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 2021-NCSC-6, ¶ 82 (requiring "a person [to] allege[ ] the infringement of a legal right . . . [for] the legal injury itself [to] give[ ] rise to standing"). As such, the Court lacks subject matter jurisdiction over plaintiff's claims. Because there is no subject matter jurisdiction over plaintiff's claims, dismissal of plaintiff's amended complaint without prejudice is proper. Therefore, I agree with the majority that the proper disposition is dismissal without prejudice. Accordingly, I concur in the result only.

Justices BERGER and BARRINGER join in this concurring opinion.

WEST v. HOYLE'S TIRE & AXLE, LLC

[383 N.C. 654, 2022-NCSC-144]

SHARON CASH WEST, wife of Keith West (decedent), JESSICA WEST HAYES, adult daughter of Keith West (decedent), RAYMOND WEST, adult son of Keith West (decedent), and SHANNON STOCKS
v.
HOYLE'S TIRE & AXLE, LLC, employer, and
TRAVELERS INDEMNITY COMPANY, carrier

No. 180PA21

Filed 16 December 2022

Workers' Compensation—death benefits—beneficiaries—dependency status—unmarried partner—claim properly dismissed

The Industrial Commission properly dismissed a claim for death benefits that was filed by decedent's alleged cohabitating fiancee who, because she lacked a legally recognized relationship with the deceased, did not qualify as a dependent pursuant to N.C.G.S. § 97-39.

Justice HUDSON dissenting.

Justice EARLS joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 277 N.C. App. 196, 2021-NCCOA-151, affirming an order entered on 8 November 2019 by the North Carolina Industrial Commission dismissing plaintiff's claim for death benefits. Heard in the Supreme Court on 3 October 2022.

Mast, Johnson, Trimyer, Wright, Booker & Van Patten, P.A., by Charles D. Mast and Caroline V. Parrish; and The Sumwalt Group, by Vernon Sumwalt, for plaintiff-appellant Shannon Stocks.

Hemmings & Stevens, P.L.L.C., by Kelly A. Stevens, for plaintiff-appellee Jessica West Hayes.

Amy S. Berry for plaintiff-appellee Sharon West.

D. Randall Cloninger for plaintiff-appellee Raymond West.

Teague Campbell Dennis & Gorham, L.L.P., by Luke A. West and Kyla K. Block, for defendants-appellees.

NEWBY, Chief Justice.

¶ 1 The task here is to determine whether an individual who lacks a legal relationship with a deceased employee can be a dependent entitled to file a claim for death benefits under N.C.G.S. § 97-39 of the North Carolina Workers' Compensation Act (the Act). This Court addressed this precise issue in *Fields v. Hollowell & Hollowell*, 238 N.C. 614, 78 S.E.2d 740 (1953), and declined to judicially extend the scope of N.C.G.S. § 97-39 to include individuals who lack a specified legal relationship. Applying the Act and this Court's precedent, plaintiff Stocks is not a dependent of the deceased employee because she lacks a legally recognized relationship and thus cannot file a claim for death benefits. Therefore, we affirm the Industrial Commission's dismissal of plaintiff Stocks's claim.

¶ 2 Keith West (decedent) died on 12 February 2018 from injuries sustained in a work-related accident at Hoyle's Tire & Axle, LLC (defendant-employer). Defendants admitted compensability for death benefits. Plaintiff Jessica West Hayes, decedent's daughter, plaintiff Raymond West, decedent's son, plaintiff Sharon Cash West, decedent's estranged wife, and plaintiff Shannon Stocks, decedent's alleged, cohabitating fiancée, all filed claims for death benefits under the Act.

¶ 3 Defendants requested a hearing before the North Carolina Industrial Commission to determine the proper beneficiaries in the death benefits claim. Plaintiffs Hayes, West, and Cash West (collectively, plaintiff family members) moved to dismiss plaintiff Stocks's claim for death benefits. The motion to dismiss alleged that plaintiff Stocks did not have standing to assert a claim for benefits under N.C.G.S. § 97-39 because she was not a legally recognized dependent of decedent.

¶ 4 In an order entered after a hearing held on 6 February 2019, the Deputy Commissioner granted plaintiff family members' motion to dismiss plaintiff Stocks's claim for benefits and directed plaintiff family members to submit a consent order. The consent order divided decedent's death benefits equally among decedent's son, daughter, and wife. Plaintiff Stocks appealed the order to the Full Commission. While the appeal was pending, defendants paid the death benefits to plaintiff family members pursuant to the consent order. Defendants filed a motion asking to be dismissed from the lawsuit because they paid the death benefits in good faith. The Full Commission denied defendants' motion to dismiss and concluded that defendants did not act in good faith when they paid the death benefits to plaintiff family members knowing that plaintiff Stocks's appeal was still pending.

¶ 5 The Full Commission further concluded, however, that based on this Court's decision in *Fields*, "[p]laintiff Stocks currently cannot possibly be a factual dependent of [d]ecedent[ ]." *See Fields*, 238 N.C. at 618, 78 S.E.2d at 743 (holding that "a woman living in cohabitation with a man, to whom she is not married, is not within the purview of the term 'in all other cases[ ]' " under N.C.G.S. § 97-39 and thus does not qualify as a dependent). Accordingly, the Full Commission dismissed plaintiff Stocks's claim for death benefits.

¶ 6 Plaintiff Stocks appealed the Full Commission's order to the Court of Appeals. The Court of Appeals unanimously affirmed the Full Commission's order and held that this Court's decision in *Fields* "specifically disposes of [p]laintiff Stocks'[s] argument she could be entitled to death benefits." *West v. Hoyle's Tire & Axle, LLC*, 277 N.C. App. 196, 2021-NCCOA-151, ¶ 23.

¶ 7 This Court allowed plaintiff Stocks's petition for discretionary review to consider (1) whether *Fields* conflicts with N.C.G.S. § 97-39 and thereby denies plaintiff due process and equal protection of the law, and (2) whether plaintiff Stocks has standing under N.C.G.S. § 97-39 to present factual evidence of her dependency upon decedent. Essentially, plaintiff Stocks seeks to have this Court declare that she could be a dependent eligible to share in the allocation of decedent's death benefits.

¶ 8 This Court reviews decisions of the North Carolina Industrial Commission to determine "whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008). We review conclusions of law de novo. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011).

¶ 9 "The purpose of the Act . . . is not only to provide a swift and certain remedy to an injured workman, but also to insure a limited and determinate liability for employers." *Barnhardt v. Yellow Cab Co.*, 266 N.C. 419, 427, 146 S.E.2d 479, 484 (1966), *overruled on other grounds by Derebery v. Pitt Cnty. Fire Marshall*, 318 N.C. 192, 347 S.E.2d 814 (1986).

¶ 10 In order "to insure a limited and determinate liability for employers," *id.*, the Act provides a process by which certain dependents of deceased employees can file a claim for death benefits. To properly allocate death benefits, N.C.G.S. § 97-39 is part of a series of statutes that classify certain individuals according to their legal level of dependency. *See* N.C.G.S. §§ 97-37 to -40 (2021). It states in relevant part:

> A widow, a widower and/or a child shall be conclusively presumed to be wholly dependent for support upon the deceased employee. *In all other cases* questions of dependency, in whole or in part shall be determined in accordance with the facts as the facts may be at the time of the accident, but no allowance shall be made for any payment made in lieu of board and lodging or services, and no compensation shall be allowed unless the dependency existed for a period of three months or more prior to the accident.

N.C.G.S. § 97-39 (emphasis added). Thus, widows, widowers, and children are presumed wholly dependent as a matter of law, while "[i]n all other cases" certain other persons may be allowed to prove dependency upon the deceased employee at the time of the accident. On its face, the statute is unclear regarding the scope of dependents "[i]n all other cases." Our statutory construction is primarily guided by our long-standing precedent.

¶ 11 Nearly seventy years ago, this Court interpreted the ambiguous "[i]n all other cases" language in *Fields*. The Court considered whether a woman with whom the deceased employee lived for at least three years, though never married, could claim compensation as a dependent under N.C.G.S. § 97-39. *Fields*, 238 N.C. at 616, 78 S.E.2d at 741. The deceased employee "furnish[ed] the home, food and clothing, medical and dental services, and [the woman] perform[ed] the usual duties of a wife." *Id.* The Court did not find persuasive the woman's argument that a person becomes a dependent when the deceased employee "voluntarily assumes the support of [that] person, who looks to and relies upon him for the necessities of life." *Id.* at 618, 78 S.E.2d at 743. Instead, the Court concluded that the statute did not provide for a woman who possessed no legal claims against the deceased employee to seek compensation as a dependent. *Id.* at 620, 78 S.E.2d at 744.

¶ 12 Significantly, the Court held that the "[i]n all other cases" provision of N.C.G.S. § 97-39 does not encompass someone not having a legal relationship with the deceased employee. *Id.* at 618, 78 S.E.2d at 743. Thus, the Court did not recognize a relationship of a "cohabitating" person as one entitled to file a claim for death benefits under the Act. *Id.* The Court reasoned that the Act "specifically defines [in N.C.G.S. § 97-2] who are meant by the terms[ ] child, grandchild, brother, sister, parent, widow and widower" for determining dependency. *Id.* This recognition is important because "these persons [specifically identified in N.C.G.S. § 97-2] are only those to whom the deceased employee is under legal or moral

obligation to support." *Id.* Thus, dependency under N.C.G.S. § 97-39 requires a legal relationship between the decedent and the person asserting dependency.

¶ 13 Relying on *Fields*, this Court similarly considered the absence of a legally recognized relationship in *Wilson v. Utah Construction Co.*, 243 N.C. 96, 89 S.E.2d 864 (1955). There the Court declined to extend dependency status to the decedent's common law wife and her children. *Id.* at 99, 89 S.E.2d at 867. The decedent lived with a woman and her three children. *Id.* at 97, 89 S.E.2d at 866. He was not the biological father, but he voluntarily supported the children with necessities of life. *Id.* Because the decedent "was not under any legal obligation" to care for the children, and "his act in maintaining the children was purely voluntary," the Court held that the woman and her children did not qualify as dependents under N.C.G.S. § 97-39. *Id.* at 99, 89 S.E.2d at 867. Thus, *Wilson* adds further analysis to section 97-39. A relationship in which the deceased employee's support of an individual was purely voluntary is insufficient for that individual to file a claim for death benefits.

¶ 14 This Court reached a different outcome but for the same reason in *Shealy v. Associated Transport, Inc.*, 252 N.C. 738, 114 S.E.2d 702 (1960). In that case, the decedent's 85-year-old mother, who was wholly dependent on decedent for many years, and decedent's husband both filed claims for death benefits under the Act. *Id.* at 738–39, 114 S.E.2d at 703. This Court held that the Commission correctly found the mother was wholly dependent on decedent for several years and affirmed the Commission's award of death benefits to both the mother and the husband. *Id.* at 743, 114 S.E.2d at 706. It reasoned that the decedent "had the legal duty to support [the mother]," and the relationship between the mother and decedent was "not too remote and comes within the general purview of the Act." *Id.* In other words, there was a legal relationship between the decedent and her mother that was not purely voluntary. As such, the mother shared equally with the decedent's husband in the death benefits. *Id.* at 739, 114 S.E.2d at 703.

¶ 15 Accordingly, based on this Court's long-standing precedent, a person is a dependent under the Act when he or she is in a legally recognized relationship with the employee involving more than purely voluntary support.

¶ 16 The facts in the current case are fundamentally identical to the facts in *Fields*. Like the plaintiff in *Fields*, plaintiff Stocks does not claim to be decedent's common law wife or widow. Rather, she alleges that she was his fiancée at the time of the accident and was partially dependent upon him. In other words, plaintiff Stocks argues that she qualifies as a dependent under the "[i]n all other cases" provision of N.C.G.S. § 97-39.

Plaintiff Stocks alleges decedent voluntarily supported her. Decedent was not, however, under a legal or moral obligation to do so because the two were not in a legally recognized relationship. Therefore, applying this Court's precedent, plaintiff Stocks is not a dependent because she lacks a legal relationship with decedent sufficient to fall within the scope of N.C.G.S. § 97-39. Because she is not a statutorily recognized dependent, she cannot file a claim for death benefits under the Act.

¶ 17 Plaintiff Stocks requests this Court to overturn our long-standing precedent in *Fields* and its progeny, alleging that our holding in *Fields* is "the product of impermissible judicial legislation" and concerns a matter that should be left for the General Assembly to decide. Significantly, the General Assembly has decided this issue. In the nearly seventy years following the *Fields* decision, the General Assembly has not amended the statute. If the General Assembly disagreed with this Court's interpretation of N.C.G.S. § 97-39 in *Fields*, it would have amended the statute to clarify what it intended by the phrase "[i]n all other cases" and who is a potential dependent under the Act.

¶ 18 The principle of stare decisis directs this Court to adhere to its long-established precedent to provide consistency and uniformity in the law. *See Bulova Watch Co., Inc. v. Brand Distrib. of N. Wilkesboro, Inc.*, 285 N.C. 467, 472, 206 S.E.2d 141, 145 (1974); *see also Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Com'rs*, 363 N.C. 500, 512, 681 S.E.2d 278, 286–87 (2009) (Newby, J., concurring) (concurring with the majority based on the principle of stare decisis despite "strong reservations" regarding the result). Thus, we give proper deference to long-standing judicial decisions indicating legislative acquiescence. Imparting a different interpretation of the statute in accordance with "changing times" would result in the Court essentially engaging in "impermissible judicial legislation."

¶ 19 Because plaintiff Stocks lacks a legal relationship with decedent sufficient to qualify as a dependent under N.C.G.S. § 97-39, she cannot file a claim for death benefits. Therefore, the Industrial Commission correctly dismissed plaintiff Stocks's claim for death benefits.

AFFIRMED.

Justice HUDSON dissenting.

¶ 20 The majority today contends that N.C.G.S. § 97-39 of the North Carolina Workers' Compensation Act (the Act) is ambiguous regarding

the scope of dependents "[i]n all other cases." Its opinion relies on this Court's decision in *Fields v. Hollowell & Hollowell*, 238 N.C. 614 (1953), and two other cases to guide its statutory construction, concluding that a person is a dependent under the Act only when he or she is in a legally recognized relationship with the employee involving more than purely voluntary support. Under this interpretation, the majority reads certain provisions out of N.C.G.S. §§ 97-38 and -39 ("any person," "[i]n all other cases," and "shall be determined in accordance with the facts") and ignores certain definitions in N.C.G.S. § 97-2 ("widow" and "child") to conclude that a cohabitating person unrelated to the employee by marriage or blood, such as Ms. Stocks, could not be a dependent. In so doing, the majority turns this case on its head, substantially undermining the legislature's careful construction of a systematic method of determining benefits and beneficiaries in cases of this kind. Accordingly, I respectfully dissent.

I. Historical Background

¶ 21 In 1929, our General Assembly enacted the state's first Workers' Compensation Act to address the growing problem of workplace injuries and deaths in an increasingly industrialized society. At its core, workers' compensation is a compromise between the employer and employee: employers purchase insurance to compensate employees who suffer a workplace injury or death, and employees forfeit their common law right to sue their employer for personal injury or death by accident. *See* N.C.G.S. §§ 97-9 and -10.1 (2021). Our courts have unequivocally held that fault has no place in the scheme, unless the employee's injury or death was occasioned by his intoxication or willful intention to injure himself or another. *Hartley v. N.C. Prison Dep't*, 258 N.C. 287, 290 (1962); *see also* N.C.G.S. § 97-12 (2021).

¶ 22 Upon a workplace injury or death, employees or their dependents may file a claim with the North Carolina Industrial Commission for limited benefits prescribed in detail by the Act, including lost wages, medical expenses, and death benefits. Importantly, the Industrial Commission exercises limited jurisdiction; it "has no jurisdiction except that conferred upon it by statute." *Bryant v. Dougherty*, 267 N.C. 545, 548 (1966). Thus, it performs the narrow function of executing the text of the Act and administering the benefits thereunder.

II. Factual and Procedural Background

¶ 23 Here, more than one claimant alleged entitlement to benefits as a result of the death of Mr. West, from his admittedly work-related injury.

The record shows that Jessica West Hayes (Mr. West's adult daughter), Raymond West (Mr. West's adult son), Sharon Cash West (Mr. West's alleged widow), and Ms. Stocks (Mr. West's alleged cohabitating fiancée) all filed claims for death benefits under the Act. The employer then filed a request for a hearing "to determine the proper beneficiaries in this claim."

¶ 24 The Deputy Commissioner dismissed Ms. Stocks's claim for benefits and directed the other claimants to file a consent order. The consent order divided Mr. West's death benefits equally among Mr. West's daughter, son, and alleged widow.

¶ 25 Ms. Stocks appealed to the Full Commission. Although no evidentiary hearing had been held to determine Ms. Stocks's claim of dependency, and although the Commission refused to hear evidence to determine this or if Sharon West was in fact the widow, the Full Commission affirmed the dismissal of Ms. Stocks's claim. In addition, the Full Commission noted in its order that neither of the adult children nor the alleged widow were conclusively presumed wholly dependent upon Mr. West.

¶ 26 Ms. Stocks appealed the Full Commission's order to the Court of Appeals, which affirmed the Full Commission's order. Now, the majority affirms the decision of the Court of Appeals.

III. Analysis

¶ 27 This Court reviews the Industrial Commission's conclusions of law de novo. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496 (2004).

¶ 28 When a court engages in statutory interpretation, the principal goal

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

Lenox, Inc. v. Tolson, 353 N.C. 659, 664 (2001) (cleaned up).

¶ 29 In workers' compensation cases, "the Industrial Commission and the courts [must] construe the [Act] liberally in favor of the injured work[er]. The Act should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow, and strict interpretation." *Cates v. Hunt Constr. Co.*, 267 N.C. 560, 563 (1966) (cleaned up).

¶ 30 I disagree with the majority that the phrase "[i]n all other cases" in N.C.G.S. § 97-39 and the phrase "any person partially dependent" in N.C.G.S. § 97-38(2) are ambiguous. In my view, both passages unequivocally refer to all claims in which there is no whole dependent, like the one here. As the text plainly reads, "A widow, a widower and/or a child shall be conclusively presumed to be wholly dependent for support upon the deceased employee. *In all other cases* questions of dependency, in whole or in part shall be determined in accordance with the facts." N.C.G.S. § 97-39 (2021) (emphasis added).

¶ 31 Importantly, the Act provides different types of benefits for those wholly dependent (a widow, widower, or child, as defined in N.C.G.S. § 97-2(12), (14), and (15)), and those who are not ("[i]n all other cases" under N.C.G.S. § 97-39). Whole dependents are entitled to receive the entire compensation benefit payable, to the exclusion of all others. N.C.G.S. § 97-38(1) (2021). Widows or widowers may also receive lifetime benefits in the event of disability of the employee. N.C.G.S. § 97-38. Partial dependents receive less generous benefits. They receive benefits on a weekly basis and only in the "the same proportion of the weekly compensation provided for a whole dependent as the amount annually contributed by the deceased employee to the support of such partial dependent bears to the annual earnings of the deceased at the time of the accident." N.C.G.S. § 97-38(2).

¶ 32 Moreover, if the partial dependent is not legally defined as "next of kin" under N.C.G.S. § 97-40 (primarily blood relatives), the nonrelative partial dependent has an even further limit on available benefits compared to the "next of kin" partial dependent. N.C.G.S. § 97-38(3). Only "next of kin" partial dependents may elect to receive the commuted value of the amount provided for whole dependents instead of the proportionate weekly payments provided for partial dependents. N.C.G.S. § 97-38(3).

¶ 33 This carefully constructed, tiered system of benefits evidences the legislature's intent to take into account the policy of prioritizing dependents according to the strength of the connection to the employee, while specifically providing a limited but proportionate benefit for "any person partially dependent for support upon the earnings of the deceased employee at the time of the accident." N.C.G.S. § 97-38(2). Nowhere does the statute exclude individuals who lack a "legally recognized relationship with the employee involving more than purely voluntary support" from filing claims for death benefits. As it did in *Fields*, the Court today overlooks this tiered system of benefits and sharply departs from the legislature's intent.

¶ 34 The majority today reasons that if the legislature disagreed with how the *Fields* Court interpretated N.C.G.S. § 97-39, it would have simply amended the statute to clarify what it intended by the phrase "[i]n all other cases." In my view, no clarification is needed when the section of the statute is unambiguous like the one at issue here. It is unclear how the legislature could have amended or could now amend the statute's text to make it any plainer, as the word "all" excludes no one. Moreover, this argument does not, in itself, refute the argument that *Fields* erroneously interpreted N.C.G.S. § 97-39.

¶ 35 Finally, the majority today reaffirms the application of moral and policy considerations in its interpretation of the Act, noting that the *Fields* Court concluded that dependents under the Act are "only those to whom the deceased employee is under legal or moral obligation to support," and that it would be against "the sound public policy" of the Act to allow a woman who possessed no legal claims against the deceased employee to seek compensation as a dependent. *See Fields*, 238 N.C. at 618, 620.

¶ 36 The *Fields* Court took such considerations even further, holding that "to sustain the so-called marriage in this case would . . . be alien to the customs and ideas of our people, and would shock their sense of propriety and decency." *Fields*, 238 N.C. at 620. "[I]t would place ordained matrimony on the same level with common lasciviousness." *Id.* At the time of the *Fields* decision, and as noted in the opinion in that case, unmarried cohabitation was a misdemeanor criminal offense. *Id.* at 617. While the statute criminalizing unmarried cohabitation has not been repealed, N.C.G.S. § 14-184 was ruled unconstitutional in superior court in 2006 and remains unused by the State.[1] Moreover, nowhere in the Act are these moral and policy considerations presented or implied; if they were to be considered, such consideration would fall within the province of the legislature, not the courts. The *Fields* Court apparently wrote these considerations into the statute, undermining the legislature's specific and deliberate choice of words.

¶ 37 This Court has unequivocally held that the Commission exercises limited jurisdiction as an administrative agency of the state and that it may not exceed those bounds. *Heavner v. Lincolnton*, 202 N.C. 400, 402 (1932). When it does exceed those bounds, this Court will not shy from holding the Commission's action to be without effect. *See, e.g.*, *Mehaffey v. Burger King*, 367 N.C. 120, 120–21 (2013) (reversing the Industrial

1. *See Hobbs v. Smith*, No. 05 CVS 267, 2006 WL 3103008 (N.C. Super. Ct. Aug. 25, 2006).

Commission's opinion and award because the Commission exceeded its authority when its Medical Fee Schedule was not authorized by the legislature). The power thus granted to the Commission is to exercise the authority vested in it by the legislature. This power has never and will never confer the sweeping authority possessed by courts of general jurisdiction to assess moral failings in matters of equity.

¶ 38 For the foregoing reasons, I conclude that both the *Fields* Court and the majority today have erroneously interpreted the "[i]n all other cases" provision of N.C.G.S. § 97-39. The plain language of the Act manifestly allows for claimants who were partially dependent on support from the earnings of the deceased employee at the time of the accident, based upon evidence of the facts at the time of the employee's death.

¶ 39 I would therefore overrule *Fields* and remand this case to the Commission to determine if Ms. Stocks qualifies as a partial dependent upon a factual showing based on the evidence, pursuant to N.C.G.S. § 97-39, for the proportionate benefits provided in N.C.G.S. § 97-38(2).

¶ 40 Accordingly, I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

HANIA H. WILLIAMS as Executor and Administrator of the Estate of PATRICK WILLIAMS
v.
MARCHELLE ISYK ALLEN, P.A., NILES ANTHONY RAINS, M.D., BRONWYN LOUIS YOUNG, II, M.D., EMERGENCY MEDICINE PHYSICIANS OF MECKLENBURG COUNTY, PLLC d/b/a US ACUTE CARE SOLUTIONS, LLC., C. PETER CHANG, M.D., CHARLOTTE RADIOLOGY, P.A., and THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY d/b/a CAROLINAS HEALTHCARE SYSTEM or ATRIUM HEALTH

No. 339A21

Filed 16 December 2022

Discovery—medical review privilege—statutory elements—findings of fact—no request by parties

An interlocutory order compelling discovery in a wrongful death action, over defendants' argument that the requested document was protected by the medical review privilege (N.C.G.S. § 90-21.22A), was not required by Civil Procedure Rule 52 to contain findings of fact regarding the statutory elements of the medical review privilege where no party specifically requested findings of fact.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 278 N.C. App. 790, 2021-NCCOA-410, remanding an order entered on 24 March 2020 by Judge Forrest Bridges in Superior Court, Mecklenburg County. Heard in the Supreme Court on 10 May 2022.

Knott & Boyle, PLLC, by W. Ellis Boyle and Joe Thomas Knott III, for plaintiff-appellant.

Dickie, McCamey & Chilcote, P.C., by John T. Holden, for defendant-appellees Marchelle Allen, P.A., and Emergency Medicine Physicians of Mecklenburg County, PLLC.

MORGAN, Justice.

¶ 1 In this appeal, we are called upon to determine whether a trial court erred in failing to make specific findings of fact as part of an order compelling discovery pursuant to Rule 37 of the North Carolina Rules of Civil Procedure. Based upon our determination that no party specifically requested that the trial court make findings of fact to support its ruling on this interlocutory motion, we conclude that the trial court was not required pursuant to Rule 52 of the Rules of Civil Procedure to make such findings and thus the trial court's order was proper and sufficient.

I. Factual background and procedural history

¶ 2 This matter arises from the death of Patrick Williams (Williams) following his visits to and encounters with various of the named defendants from which he sought medical care. On 6 May 2016, Williams experienced worsening pain in his back, stomach, and hip. Eventually, Williams's wife, plaintiff Hania H. Williams, took Williams to Piedmont Urgent Care-Baxter in Fort Mill, South Carolina, but upon their arrival Williams was unable to get out of the car. Williams's medical condition was not evaluated by any healthcare provider at Piedmont Urgent Care-Baxter, but staff of that facility called 911 for assistance for Williams. Emergency Medical Services personnel responded to the urgent care location and transported Williams by ambulance to the emergency department at Carolinas Medical Center Pineville (CMC-Pineville) hospital just before 4:00 p.m.

¶ 3 In the emergency department of CMC-Pineville, defendant Dr. Bronwyn Louis Young II ordered 7.5 mg of oral hydrocodone and 600 mg of ibuprofen for Williams. At about 4:50 p.m., defendant Marchelle

Isyk Allen, a physician's assistant affiliated with defendant Emergency Medicine Physicians of Mecklenburg County, PLLC (EMP), evaluated Williams and reported that Williams was experiencing increasing lower back pain radiating down his left leg. Allen ordered 4 mg of morphine, 10 mg of Decadron, 10 mg of Flexeril, 4 mg of Zofran, and an x-ray of Williams's spine. Defendant Dr. C. Peter Chang read Williams's x-ray and reported, "no acute osseous abnormality," but he observed "unusual linear calcifications . . . to the right and left of the lumbar spine along the retroperitoneum likely vascular in nature." Allen did not order further diagnostic tests for Williams but did prescribe Flexeril and hydrocodone. Williams was then discharged from CMC-Pineville with instructions to schedule an office visit with an orthopedic practice "within 2–4 days." Dr. Niles Anthony Rains signed the record of the treatment provided by Allen to Williams on 7 May 2016 at 6:36 a.m.

¶ 4 Although Williams took the prescribed hydrocodone every six hours upon his return home, his previous pain persisted, and he additionally developed abdominal pains. Williams returned to the emergency department of CMC-Pineville on 7 May 2016 at 9:56 p.m., presenting with low blood pressure as well as severe abdominal pain. Rains ordered a CT angiogram of Williams's chest, abdomen, and pelvis, which revealed a ruptured abdominal aortic aneurism measuring 12 centimeters by 9.7 centimeters. Rains contacted the emergency department of Carolinas Medical Center Main (CMC-Main) in Charlotte for immediate surgical repair of the ruptured aneurism. Williams was transferred to CMC-Main by helicopter, but the surgery was unsuccessful in saving Williams's life. Williams was pronounced dead at 3:24 a.m. on 8 May 2016. On 9 May 2016, Rains informed Allen of Williams's death and of plaintiff's 7 May 2016 statement to emergency department staff at CMC-Pineville that if anything should happen to Williams, plaintiff would be filing a claim against the personnel who treated him during his 6 May 2016 visit. Rains then instructed Allen to memorialize her interactions with and treatment of Williams on an electronic form provided by her EMP group employer. This electronic report was later designated "Document B" during discovery in the lawsuit which ensued as a result of Williams's death.

¶ 5 Plaintiff, Williams's widow, as executor and administrator of Williams's estate, brought this action for wrongful death on 2 May 2018, and plaintiff also asserted a claim for loss of consortium resulting from Williams's death. During discovery, plaintiff submitted interrogatories to defendants, including Allen, and sought the production of documents relating to any investigation by defendants related to Williams's treatment and death and any information related to defendants' interactions with

and their care provided to Williams. In her responses to interrogatories 16, 19, 20, 21, and 22, and the corresponding requests for production—which concerned any written record Allen made about her treatment of Williams and any thoughts she had about the treatment she provided to him in May 2016—Allen raised no objection for privilege. Allen further claimed that she had never participated in any investigation or peer review process with EMP. Defendants did lodge a series of generic objections to interrogatories 4, 12, and 13, and the corresponding requests for production, referring to North Carolina's statutorily defined peer review privilege for certain medical care providers, N.C.G.S. § 90-21.22A (2021), as well as to attorney-client privilege and attorney work product doctrine.

¶ 6 On 11 July 2019, a few days before her deposition was set to occur and more than four months after she submitted her written discovery responses, Allen produced a privilege log designating a four-page document identified as being written on 10 May 2016 for which Allen claimed privilege based on: "Work Product; and Prepared by the Defendants in anticipation of litigation, peer review." Upon learning of Allen's privilege log identifying the document, plaintiff cancelled Allen's scheduled deposition to pursue production of the document belatedly recognized as being withheld under a claim of privilege or protection. In a motion to compel pursuant to Rule 37(a) that was filed on 17 July 2019, plaintiff sought the production of the document characterized as typed notes Allen had created on 10 May 2016, as identified in the privilege log produced on 11 July 2019. *See* N.C.G.S. § 1A-1, Rule 37(a) (2021).

¶ 7 At a hearing on the motion to compel on 29 August 2019, plaintiff asserted that Allen had withheld the document at issue and failed to make any privilege assertion. Defendants in turn argued that the document at issue was being withheld on the basis of the work product, attorney-client, and peer review privileges, noting that it was created by Allen at the direction of Rains and for the risk management department, with a copy retained by Allen on her computer. No argument was made asserting medical review committee privilege as set forth in N.C.G.S. § 90-21.22A in connection to the four-page document created by Allen. The trial court announced during the hearing that "Allen has failed to persuade the [c]ourt that the document is protected by the work product privilege such that the [c]ourt would allow the Motion to Compel for discovery of that document."[1]

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1. The trial court entered an order granting plaintiff's Motion to Compel on 15 November 2019.

¶ 8 On 21 November 2019, plaintiff filed a second Rule 37 motion in which she alleged, *inter alia*, the following: On 17 September 2019, defendants produced a three-page document created by Allen which was purportedly the document which was the subject of the 29 August 2019 hearing. However, during Allen's deposition on 30 October 2019, Allen explained that the document produced was actually a diary entry that she created for her own use and that she had never submitted the document to EMP or any other risk management department. For this reason, it was apparent to plaintiff that the document produced would never have been the proper subject of any type of privilege assertion. Allen further acknowledged that she had submitted an entirely separate report to EMP's risk management department through the company's website. The report to EMP's risk management department—Document B—was never produced during discovery. Plaintiff asked the trial court to compel defendants to comply with the existing discovery order in addition to requesting that sanctions be ordered against defendants. In response, defendants filed a memorandum of law in opposition to plaintiff's second motion to compel in which they acknowledged that Document B had not been produced in discovery, explained that counsel for defendants had been unaware of the existence of Document B at the time of the hearing on 29 August 2019, and asserted a claim of medical review committee privilege pursuant to N.C.G.S. § 90-21.22A.

¶ 9 A hearing on the second motion to compel was held on 31 January 2020. After hearing from the parties, reviewing the affidavits, and conducting an in-camera review of the disputed second document, the trial court granted the motion but ordered that the subject document be kept under seal pending appeal. The trial court denied plaintiff's motion for sanctions and awarded no fees or sanctions. A written order was filed by the trial court on 24 March 2020. Defendants appealed to the North Carolina Court of Appeals.

II. The Court of Appeals proceeding

¶ 10 In the Court of Appeals, defendants argued that the trial court erred in granting plaintiff's motion to compel because the trial court failed to make appropriate findings of fact and conclusions of law that would allow meaningful appellate review and that error occurred because Document B was shielded from discovery by the medical review committee privilege. After observing that interlocutory orders compelling the discovery of documents over an assertion of protection by the medical review committee privilege affect a substantial right and are immediately reviewable on appeal, *Williams v. Marchelle Isyk Allen, P.A.*, 278 N.C. App. 790, 2021-NCCOA-410, ¶ 17 (citing *Hammond v. Saini*, 229

N.C. App. 359, 362 (2013), *aff'd as modified*, 367 N.C. 607 (2014)), the Court of Appeals addressed defendants' argument that the trial court erred by granting plaintiff's motion to enforce its previous motion to compel production in light of Allen's invocation of the statutory privilege, *Williams*, ¶¶ 20–24. In order "to encourage candor and objectivity in the internal workings of medical review committees," *Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 83 (1986), the General Assembly has determined that

> [t]he proceedings of a medical review . . . committee, the records and materials it produces, and the materials it considers shall be confidential and not considered public records . . . and shall not be subject to discovery or introduction into evidence in any civil action against a provider of health care services who directly provides services and is licensed under this Chapter.

N.C.G.S. § 90-21.22A(c). The statute defines a "medical review committee" as "[a] committee *composed of health care providers licensed under this Chapter* that is *formed for the purpose of evaluating the quality of*, cost of, or necessity for *health care services*, including provider credentialing." N.C.G.S. § 90-21.22A(a)(1) (emphases added). In their appeal, defendants—who, as the parties asserting the claimed privilege, bore the burden of establishing its applicability—argued that the trial court had failed to make findings of fact and conclusions of law, specifically regarding whether the committee in this matter was composed of "health care providers licensed under this Chapter" and was "formed for the purpose of evaluating the quality of, cost of, or necessity for health care services, including provider credentialing," N.C.G.S. § 90-21.22A(a)(1), (c).

¶ 11 In the view of the majority of the Court of Appeals panel, defendants had appropriately requested, pursuant to Rule 52 of the Rules of Civil Procedure, additional specific findings of fact and conclusions of law concerning the statutory elements set forth in N.C.G.S. § 90-21.22A, and the trial court erred when it failed to comply with defendants' request. On that basis, the majority remanded this case to the trial court in order for it "to . . . enter factual findings and conclusions [of law] consistent with the requirements of N.C.[G.S.] § 90-21.22A." *Williams*, ¶ 25. Thus, the majority in the lower appellate court did not reach the merits of defendants' privilege argument.

¶ 12 The dissenting judge in the lower appellate court first stated that he would have dismissed the appeal on the basis that the Court of Appeals

was unable to meaningfully review the matter because defendants failed to include the disputed document—the notes regarding Allen's interactions with and treatment of Williams that were prepared by Allen after her discussion with Rains—in the record on appeal, even if under seal. *Id.* ¶ 26 (Murphy, J., dissenting); *see* N.C. R. App. P. 9(a)(1)(e), (a)(1)(j), (c)(4). Alternatively, the dissenting judge opined that, if the Court of Appeals elected to reach the merits of defendants' appeal, he believed it should affirm the trial court's order based on the dissenting judge's belief that defendants (1) had not satisfied their burden of production in asserting the medical review committee privilege provided by N.C.G.S. § 90-21.22A, and (2) did not make a clear request for the trial court to make findings of fact in accordance with Rule 52 at the hearing on 31 January 2020, and accordingly, the trial court was under no obligation to make such factual findings. *Id.* ¶¶ 40, 45 (Murphy, J., dissenting). On 7 September 2021, plaintiff timely filed a notice of appeal in this Court based upon the dissent in the Court of Appeals pursuant to N.C.G.S. § 7A-30(2).

III. Analysis

¶ 13 Oral argument before this Court took place on 10 May 2022. Plaintiff argued that the dissent in the Court of Appeals was correct on all three of the bases upon which that judge would have resolved the matter in plaintiff's favor: first, that defendants failed to preserve any arguments for appeal by failing to include a copy of Document B in the record on appeal; second, that defendants failed to satisfy the strict statutory burden of proof for claiming medical review committee privilege under N.C.G.S. § 90-21.22A; and third, that because defendants did not specifically request that the trial court make findings of fact pursuant to Rule 52, the trial court did not err in failing to do so. We consider only the third point raised by plaintiff and addressed by the dissenting judge—that the trial court failed to make the required findings of fact.

¶ 14 Upon our considerations of the arguments of the parties, along with a careful review of the transcript from the 31 January 2020 trial court hearing, we agree with the position of the dissenting judge in the Court of Appeals that defendants did not specifically request findings of fact regarding the statutory elements set forth in N.C.G.S. § 90-21.22A and that in the absence of such a specific request by defendants, the trial court was not required to make any findings of fact in resolving plaintiff's motion to compel. We reach this result through an examination of the clear provisions of Rule 52 as confirmed by well-established precedent.

¶ 15 In civil cases, whether a trial court *must* make findings of fact in a particular proceeding is always determined by statute or rule. In certain

specific types of actions, a statute may explicitly require that a trial court make particular findings of fact. For example, "[i]n any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, *shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.*" N.C.G.S. § 50-13.5(i) (2021) (emphasis added); *see also* N.C.G.S. § 45-21.16(d) (2021) (noting the specific findings which must be made by a clerk of court when a mortgagee or trustee wishes to exercise a power of sale); N.C.G.S. § 97-84 (2021) (providing that disputes under the Workers' Compensation Act "shall be decided and *findings of fact issued* based upon the preponderance of the evidence in view of the entire record" (emphasis added)). In contrast, N.C.G.S. § 90-21.22A has no such requirement for any particular findings of fact to be made by a trial court, a circumstance which is unsurprising given that this statute is largely definitional, with provisions explaining what persons and materials are shielded from discovery. *See* N.C.G.S. § 90-21.22A.

¶ 16 In other circumstances, a statute may give the parties the *option* of requesting findings of fact from the trial court. In an action for support of a minor child, for instance, "*upon request of any party, the [trial c]ourt shall hear evidence, and from the evidence, find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support.*" N.C.G.S. § 50-13.4(c) (2021) (emphasis added).

¶ 17 Here, the Court of Appeals majority and defendants focus on Rule 52 of the Rules of Civil Procedure as the applicable basis for concluding that the trial court erred in failing to make findings of fact. Certainly, a trial court acting as the finder of fact in a bench trial is required to "find the facts specially and state separately its conclusions of law [before] direct[ing] the *entry of the appropriate judgment.*" N.C.G.S. § 1A-1, Rule 52(a)(1) (emphasis added). The decision appealed by defendants in this matter is not a final judgment but rather an interlocutory order compelling discovery, as the Court of Appeals majority correctly observed in its opinion. *Williams*, ¶ 14. Pursuant to Rule 52, "[f]indings of fact and conclusions of law are necessary *on decisions of any motion* or order ex mero motu *only when requested by a party* and as provided by Rule 41(b)." N.C.G.S. § 1A-1, Rule 52(a)(2) (emphases added). The majority of the lower appellate court panel determined that "[d]efendants' counsel correctly sought clarification of the ruling and requested the trial court to make specific findings and conclusions," *Williams*, ¶ 23, but that

nevertheless "the trial court declined to rule about whether the medical review committee privilege applied or not," *Williams*, ¶ 22.

¶ 18 Our review of the 31 January 2020 hearing transcript leads us to disagree with the majority's view on the former point: defendants *did not* specifically request findings of fact. After hearing from the parties on the various issues before it, the trial court announced its intended ruling regarding the motion to compel the production of the disputed document in open court:

> THE COURT: . . . I'm going to direct that that document be provided to . . . plaintiff. Now, at this time, I'll retain it under seal (clears throat) in the file . . . .
>
> [DEFENSE COUNSEL]: Well, Your Honor, *that's what I wanted to clarify* because as you know the, uh, legitimate and bona fide assertion of a privilege, even is — is not an interlocutory appeal. So, I just need — *if the [c]ourt can clarify* and perhaps this can be worked out, *whether you are ruling the privilege was waived, the privilege doesn't apply, the privilege is — is somehow defeated so that we can establish the parameters of the argument* for [the] Court of Appeals —
>
> THE COURT: Uh-huh.
>
> [DEFENSE COUNSEL]: — if that should be the case.

The above-quoted language is specifically identified by defendants as evidence of defendants' explicit request for factual findings on the trial court's privilege ruling, but this request is unavailing to defendants' position because the determination of whether the medical review committee privilege created by N.C.G.S. § 90-21.22A was "waived" or "defeated" or "doesn't apply" is a legal conclusion which may be based upon findings of fact rather than themselves being findings of fact.

> As a general rule, however, any determination requiring the exercise of judgment, *see Plott v. Plott*, 313 N.C. 63, 74 . . . (1985), or the application of legal principles, *see Quick v. Quick*, 305 N.C. 446, 452 . . . (1982), is more properly classified a conclusion of law. Any determination reached through "logical reasoning from the evidentiary facts" is more properly classified a finding of fact. *Quick*, 305 N.C. at 452

> . . . (quoting *Woodard v. Mordecai*, 234 N.C. 463, 472 . . . (1951)).

In re Helms, 127 N.C. App. 505, 510 (1997); *see also Finding of Fact*, Black's Law Dictionary (6th ed. 1990) (defining "findings of fact" as "[d]eterminations from the evidence of a case . . . concerning facts averred by one party and denied by another"); *Conclusion of Law*, Black's Law Dictionary (6th ed. 1990) (defining "conclusions of law" as "[f]inding[s] by [a] court as determined through [the] application of rules of law"). Whether a privilege such as that at issue in this matter applies or has been waived is a legal conclusion which is in turn based upon a trial court's evaluation of the evidence presented by the parties.

¶ 19 Looking at the continuation of the exchange between counsel for the parties and the trial court buttresses our view that findings of fact were not requested by defendants:

> [PLAINTIFF'S COUNSEL]: Your Honor, not to object, but it may help if the question is posed as, "Are you granting the [m]otion for 37(b) to enforce an existing order?"
>
> THE COURT: Yes, yes.
>
> [DEFENSE COUNSEL]: So, you'll — so, if that — so, the [c]ourt's order, as I understand it is that the [medical] review [committee] privilege that was identified in the original privilege log was the subject of the or — of the argument before Judge Ervin [at the 29 August 2019 hearing] is overruled and it is — the privilege is (inaudible) as to this document, that you have found?
>
> . . . . [discussion about the "diary" entry created by Allen versus Document B]
>
> THE COURT: I'm not saying it's the same document. I'm saying that [Document B] was responsive to the request for discovery that were [sic] before Judge Ervin at that time. So, that in response to those discovery requests, this document should have been identified and if a privilege was claimed, it should've been asserted as to this particular document.
>
> [DEFENSE COUNSEL]: Okay. Because today we've had a lot of arguments about the nature —

we've had arguments about the nature of the committee that reviewed it in the system and all that. I just want to know if that's going to be part of the issue that's going to be taken into — that could be potentially taken up. I don't know. I assume my client is going to want to . . . protect their — their medical review committee and that's not casting (inaudible) on anyone in this room —

THE COURT: I know.

[DEFENSE COUNSEL]: — I'm just saying, I assume that's going to be their position.

THE COURT: Sure.

[DEFENSE COUNSEL]: So, it needs to be as — as clear as we can get it. So, you know, I don't know if [plaintiff's counsel] and I can go back and forth and find something that would — that would satisfy, Your Honor.

THE COURT: Yeah. Why don't — y'all work on the order and I'll take a look at what you draft, and we'll go from there. . . .

. . . .

[DEFENSE COUNSEL]: Is it your position it's the same doc- because he was looking at a document and he ordered it to be produced and we produced it —

THE COURT: Yeah.

[DEFENSE COUNSEL]: — and now we're being told that we didn't comply with his order by producing a different document. So, that's what I'm trying to figure out how to — how to craft this. I understand the [c]ourt's ruling, *I just want to put it in a box where I can explain it.*

THE COURT: Yeah, I don't know that I can answer that question until I can see each version of the proposed orders.

. . . .

THE COURT: All right. Anything else we need to address?

[DEFENSE COUNSEL]: No.

While defense counsel noted that "arguments about the nature of the committee" had been presented, he did not request findings of fact on that question but instead focused on properly framing the issue to potentially be presented upon an appeal and on how to explain the trial court's ruling, either to defendants or to the Court of Appeals. Further, read in context, the primary confusion expressed by defense counsel appears to have concerned the ruling resulting from the 31 January 2020 hearing on Document B as it might relate to the trial court's previous ruling regarding the diary entry. Or, in the words of the dissenting judge on the Court of Appeals panel:

> This exchange demonstrates that Defense Counsel sought clarification pertaining to the trial court's ruling on the privilege to "establish the parameters of the argument" for an appeal, and stated that he "[understood] the [c]ourt's ruling," but wanted "to put it in a box where [he could] explain it." When the trial court declined to answer Defense Counsel's questions at the time, and asked if anything else needed to be addressed, Defense Counsel replied "[n]o." Based on this exchange, it is apparent that [d]efendants only requested detailed conclusions of law, but made no specific request for the trial court to make findings of fact in accordance with Rule 52, and accordingly, the trial court was under no obligation to make such findings.

Williams, ¶ 45 (Murphy, J., dissenting) (first through fourth alterations in original). We agree, and accordingly, we reverse the decision of the Court of Appeals, leaving the trial court's order compelling discovery in effect, and remand to the Court of Appeals for further remand to the trial court.

REVERSED AND REMANDED.

Chief Justice NEWBY and Justice ERVIN did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. JONATHAN DANIEL ORE	From N.C. Court of Appeals 21-693 From Davidson 20CRS50976 21CRS681

No. 214P22

ORDER

This matter is before this Court on defendant's appeal from a unanimous decision of the Court of Appeals, in which two judges concurred by separate opinions. The lead opinion of the Court of Appeals held that the Court of Appeals is "without [statutory] authority to review, either by right or by certiorari, the trial court's modification of defendant's probation." *State v. Ore*, 2022-NCCOA-380, ¶ 14 (quoting *State v. Edgerson*, 164 N.C. App. 712, 714, 596 S.E.2d 351, 353 (2004)). Because this holding conflicts with this Court's opinions in *State v. Stubbs*, 368 N.C. 40, 770 S.E.2d 74 (2015), *State v. Thomsen*, 369 N.C. 22, 789 S.E.2d 639 (2016), *State v. Ledbetter*, 371 N.C. 192, 814 S.E.2d 39 (2018), and *State v. Killette*, 2022-NCSC-80, that portion of the Court of Appeals' opinion is vacated. Similarly, the portion of *Edgerson* relied on by the lead opinion is overruled. The concurring opinions in the Court of Appeals, which cite to this Court's cases above and state that the Court of Appeals "ha[s] the authority to review this issue by certiorari," *Ore*, 2022-NCCOA-380, ¶ 52, accurately reflect the law. Accordingly, this case is remanded to the Court of Appeals for reconsideration of defendant's petition for writ of certiorari to review the trial court's modification of probation, consistent with this order. The portion of the Court of Appeals' decision reviewing the trial court's order holding defendant in contempt remains undisturbed.

By order of the Court in Conference, this the 13th day of December 2022.

/s/ Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of December 2022.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STONER v. STONER

[383 N.C. 677 (2022)]

TIFFANY MONIQUE STONER v. AJAMU HAMINDI STONER	From N.C. Court of Appeals 21-467 From Mecklenburg 17CVD1839

No. 234P22

ORDER

Plaintiff's Petition for Writ of Certiorari to Review Order of the North Carolina Court of Appeals is decided as follows: plaintiff's certiorari petition is allowed for the limited purpose of vacating the order entered in this case by the Court of Appeals on 7 July 2020 that dismissed plaintiff's appeal from the Order for Alimony and Attorney's Fees entered by Judge Jena P. Culler on 16 December 2019 and the Order Declaring December 2017 Order Permanent Custody and Child Support Order entered by Judge Jena P. Culler on 22 January 2022 and remanding this case to the Court of Appeals with instructions to consider plaintiff's challenges to the two orders in question on the merits in accordance with N.C.G.S. § 50-19.1 (2021) (allowing interlocutory appeals from final orders finally addressing claims for absolute divorce, divorce from bed and board, the validity of a premarital agreement [ ], child custody, child support, alimony, or equitable distribution," with "[a] party [ ] not forfeit[ing] the right to appeal under this section if the party fails to immediately appeal from an order or judgment described in this section").

By order of the Court in Conference, this the 13th day of December 2022.

/s/ Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of December 2022.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

Disposition of Petitions for Discretionary Review Under G.S. 7A-31

16 December 2022

6P05-3	State v. Jose Luis Garza	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County (COA03-1330) 2. Def's Pro Se Petition for Writ of Habeas Corpus	1. Denied **11/28/2022** 2. Denied **11/28/2022**
21A21	United Daughters of the Confederacy, NC Division, Inc. v. City of Winston-Salem, et al.	Plt's Motion to Strike Memorandum of Additional Authority Dated September 1, 2022	Denied
30P11-2	State v. Brian Keith Perry	1. Def's Petition for Writ of Certiorari to Review Order of the COA (COAP21-176) 2. Def's Motion to Amend Petition for Writ of Certiorari	1. Dismissed 2. Allowed
37P22	Rural Empowerment Association for Community Help, et al. v. State of N.C., et al.	1. Plts' Notice of Appeal Based Upon a Constitutional Question (COA21-175) 2. Plts' PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
48P22	State v. Stanley Marcus Draughon and Phyllis Ann Mull	Def's (Stanley Marcus Draughon) Pro Se PDR Under N.C.G.S. § 7A-31 (COA21-177)	Denied
49P22	Steven Prentice v. North Carolina Department of Public Safety	1. Plt's Pro Se Motion for Appeal (COA21-805) 2. Plt's Pro Se Motion for Certification for Transfer	1. Dismissed as moot 2. Dismissed as moot
50P22-2	State v. Juan Carlos Rodriguez-Garcia	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Iredell 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
51P21-2	State v. William P. Sherrill	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Iredell County 2. Def's Pro Se Motion to Withdraw Petition for Writ of Certiorari	1. --- 2. Allowed

Disposition of Petitions for Discretionary Review Under G.S. 7A-31

16 December 2022

55P22	Alexander, et al. v. North Carolina State Board of Elections, et al.	1. Plts' Motion for Temporary Stay (COA21-77) 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. Plts' Motion to Amend PDR, Notice of Appeal, and Response to Motion to Dismiss	1. Allowed **02/23/2022** Dissolved 2. Denied 3. --- 4. Denied 5. Allowed 6. Dismissed as moot
64A22	Howard, et al. v. IOMAXIS, LLC, et al.	Def's (IOMAXIS, LLC) Motion to Amend the Record on Appeal	Denied
65P22-3	State v. Donovan M. Williams	1. Def's Pro Se Motion for PDR (COAP22-243) 2. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA	1. Denied 2. Denied
71P20-2	State v. Brandon Scott Goins	Def's Pro Se Motion for PDR (COA19-288)	Denied
74A22	Guy M. Turner Incorporated, Plaintiff v. KLO Acquisition LLC, separately and doing business as KL Outdoor LLC, Defendant and JPMorgan Chase Bank, N.A., Garnishee	1. Plt's Notice of Appeal Based Upon a Dissent (COA21-118) 2. Plt's PDR as to Additional Issues 3. Plt's Motion to Dismiss Appeal and PDR	1. --- 2. Dismissed as moot 3. Allowed
81P22	Andrea Parks, Justin Magestro, Dion M. Magestro, and Leah Magestro v. Peggy L. Johnson and Leah Magestro, in her capacity as Administrator CTA of the Estate of Frank Nino Magestro	Def's (Peggy L. Johnson) PDR Under N.C.G.S. § 7A-31 (COA21-51)	Denied

Disposition of Petitions for Discretionary Review Under G.S. 7A-31

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84P22	Neil Thomas, Employee v. Century Employer Organization, LLC, PEO and the Coastal Group, Inc., PEO-Client, Employer and Alleged General Employer; North Carolina Insurance Guaranty Association for Insolvent Insurer Guarantee Insurance Company; and Atlantic Corporation of Wilmington, Inc., Alleged Special Employer, and Sentry Casualty Company, Carrier for Atlantic Corporation of Wilmington, Inc.	Def's (North Carolina Insurance Guaranty Association) PDR Under N.C.G.S. § 7A-31 (COA21-399)	Denied
96P22	Maximino Vizcaino, Employee v. American Emerald Transportation Services, Inc., et al.	1. Defs' (Watkins and Shepard Trucking, Inc. and Arch Insurance Company) PDR Under N.C.G.S. § 7A-31 (COA21-299) 2. Statutory Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
99PA19-2	Gwendolyn Dianette Walker, Widow of Robert Lee Walker, Deceased Employee v. K&W Cafeterias, Employer, Liberty Mutual Insurance Company, Carrier	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA21-335) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
99P22	In the Matter of D.C-F	Respondent's PDR Under N.C.G.S. § 7A-31 (COA21-343)	Denied
123P22	The Society for the Historical Preservation of the Twenty-Sixth North Carolina Troops, Inc. v. City of Asheville, North Carolina, and Buncombe County, North Carolina	1. Plt's Motion for Temporary Stay (COA21-429) 2. Plt's Petition for Writ of Supersedeas 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/22/2022** 2. Allowed 3. Allowed

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124P22	State v. Richard Henry Jordan, Jr.	1. State's Motion for Temporary Stay (COA21-91) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/21/2022** 2. Allowed 3. Allowed
127P21-2	TAC Stafford, LLC, a North Carolina Limited Liability Company v. Town of Mooresville, a North Carolina Body Politic and Corporate	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-229) 2. Plt's Conditional PDR Under G.S. 7A-31	1. Denied 2. Dismissed as moot
128P22-2	Leilei Zhang v. Preston K. Sutton, III	1. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-79) 2. Plt's Pro Se Motion to Submit Additional Documents 3. Plt's Pro Se PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Dismiss Appeal 5. Def's Motion to Strike 6. Plt's Pro Se Motion to Dismiss Motion to Dismiss Appeal	1. Dismissed *ex mero motu* 2. Denied 3. Denied 4. Dismissed as moot 5. Dismissed as moot 6. Dismissed as moot
129P04-6	State v. Carl E. Lyons	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County 2. Def's Pro Se Motion to Appoint Counsel 3. Def's Pro Se Petition for Writ of Habeas Corpus	1. Dismissed 2. Dismissed as moot 3. Denied **07/22/2022**
145P22	State v. Rochein Fuquan Jordan	1. Def's Motion for Temporary Stay (COA21-469) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/11/2022** Dissolved 2. Denied 3. Denied

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158P21	State v. Darius O'Bryan Abel and James Michael Robinson	1. Def's (James Michael Robinson) PDR Under N.C.G.S. § 7A-31 (COA20-174) 2. Def's (Darius O'Bryan Abel) Notice of Appeal Based Upon a Constitutional Question 3. Def's (Darius O'Bryan Abel) PDR Under N.C.G.S. § 7A-31 4. State's Motion to Dismiss Appeal 5. Def's (Darius O'Bryan Abel) Motion to Strike Portion of State's Response	1. Denied 2. --- 3. Denied 4. Allowed 5. Dismissed as moot
158P22	State v. James M. Cromartie	Def's Petition for Writ of Certiorari to Review Order of Superior Court, Sampson County	Dismissed
160P22	State v. Rocky Kurt Williamson	Def's PDR Under N.C.G.S. § 7A-31 (COA16-631)	Denied
161P22	Sanjay Kumar, M.D. v. Howard Kurtz and the Law Firm of Kurtz and Blum	Plt's Pro Se Motion for Appeal Petition to Quash Dismissal Order	Dismissed
162P22	Southeast Caissons, LLC v. Choate Construction Company, Choate Construction Group, LLC, and Falcon Engineering, Inc.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA21-223) 2. Def's (Falcon Engineering, Inc.) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
171P22	Bear Wallow Springs at Lake Toxaway Property Owners Association v. Lake Toxaway Community Association, f/k/a Lake Toxaway Property Owners Association, Inc.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA21-94) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Amend Response to PDR 4. Def's Motion to Strike Response to Conditional PDR	1. Denied 2. Dismissed as moot 3. Dismissed as moot 4. Dismissed as moot
174P18-3	State v. Robert H. Johnson	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Watauga County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot

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174P22	State v. Marquis Julius Graham	Def's PDR Under N.C.G.S. § 7A-31 (COA21-99)	Denied
185P22	Theodore Pittman v. Ricky McCrae Wilkins, Roosevelt T. Wilkins, Jr., Marjorie Wilkins, Mary Wilkins-Fox, Samuel M. Wilkins, and Veronica Smith	Plt's PDR Under N.C.G.S. § 7A-31 (COA21-492)	Denied
190P22	Matthew Mitchell, Kaila Mitchell, Franklin Garland, Betty Garland, James Garland, Isabel Garland, Rick Summers, Myra Gwin-Summers, Julian Hall, Benita Wicker Hall, Justin Mitchell, Gerald Scarlett, Brandon Sneed, Angela Sneed, Joshua Ham, Dustin Williams, David Barlow, and Rhonda Barlow v. Orange County, Orange County Board of Commissioners, and Terra Equity, Inc.	Plts' PDR Under N.C.G.S. § 7A-31 (COA21-394)	Denied
192P22	Ann Herring Fox, individually and on behalf of the P.G. Fox, Jr. Revocable Trust and Russell Lee Stephenson, III on behalf of the P.G. Fox, Jr. Revocable Trust v. Sarah Wesley Fox and Craig B. Wheaton, individually, and in their representa-tive capacities as Trustees of the P.G. Fox, Jr. Revocable Trust; and Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P.	1. Defs' (Sarah Wesley Fox and Craig B. Wheaton) PDR Under N.C.G.S. § 7A-31 (COA21-534) 2. Plt's (Ann Herring Fox) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot

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195A19-2	State v. Chad Cameron Copley	1. Def's Notice of Appeal Based Upon a Dissent (COA18-895-2) 2. Def's PDR as to Additional Issues	1. --- 2. Allowed
196P18-2	State v. Ricky Staton	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Halifax County	Dismissed
200PA21	In the Matter of J.M., N.M.	Petitioner and Guardian ad Litem's Motion to Amend Record on Appeal	Denied
207P22	Ricky Dean, Administrator of the Estate of Olivia Darlene Flores v. Ravon Walser Rousseau	Plt's PDR Under N.C.G.S. § 7A-31 (COA21-518)	Denied
208P22	State v. Melvin Ray Woolard, Jr.	1. State's Motion for Temporary Stay (COAP22-156) 2. State's Petition for Writ of Supersedeas 3. State's Petition for Writ of Certiorari to Review Order of COA 4. State's Petition for Writ of Certiorari to Review Order of District Court, Beaufort County	1. Allowed **07/08/2022** 2. Allowed 3. Denied 4. Allowed
211P22	State v. Scottie Jo Hunter	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-73) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Dismissed 3. Allowed
212P22-1	Andrew C. Davis v. North Carolina Board of Governors, University of North Carolina at Chapel Hill	1. Plt's Pro Se Motion for Jury Trial and 6 Billion Dollars 2. Plt's Pro Se Motion for Jury Trial and 10 Million Dollars 3. Plt's Pro Se Petition for Writ of Certiorari 4. Plt's Pro Se Motion to Appoint Counsel 5. Plt's Pro Se Motion to Dismiss Cases	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Allowed
212P22-2	Davis v. NC Board of Governors, et al.	Plt's Pro Se Petition for Writ of Certiorari	Denied
213P22	State v. Jamaal Gittens	Def's Pro Se Petition for Writ of Certiorari to Review Decision of District Court, Cabarrus County	Dismissed

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214P22	State v. Jonathan Daniel Ore	1. Def's PDR Under N.C.G.S. § 7A-31 (COA21-693) 2. State's Motion to Deem Response Timely Filed	1. Special Order 2. Allowed
216A21	In the Matter of L.Z.S.	1. Guardian ad Litem's Motion to Dismiss Appeal 2. Petitioner's Motion to Dismiss Appeal	1. Dismissed as moot 2. Dismissed as moot
216P22	State v. Travis Christopher Hahn	Def's PDR Under N.C.G.S. § 7A-31 (COA21-190)	Denied
222P22	In re Randolph	Former Co-Guardian's PDR Under N.C.G.S. § 7A-31 (COA21-803)	Denied
223P22	K&S Res., LLC v. Gilmore	Plt's PDR Under N.C.G.S. § 7A-31 (COA21-484)	Denied **Ervin, J., recused**
226P22	State v. Khakim Harvey and Kyle Lavar McNeil	Def's (Khakim Harvey) PDR Under N.C.G.S. § 7A-31 (COA21-203)	Denied
228P22	State v. Nicodemus Wright	Def's PDR Under N.C.G.S. § 7A-31 (COA20-250)	Denied
231P21	C.E. Williams, III and wife, Margaret W. Williams, R. Michael James and wife, Katherine H. James, Strawn Cathcart and wife, Susan S. Cathcart, Mark B. Mahoney and wife, Noelle S. Mahoney, Plaintiffs v. Michael Reardon and wife, Karyn Reardon, Defendants and Jeffrey S. Alvino and wife, Kristina C. Alvino, et al., Necessary Party Defendants	1. Plts' and Necessary Party Defs' PDR Under N.C.G.S. § 7A-31 (COA20-450) 2. Plts' and Necessary Party Defs' Motion to Amend PDR	1. Denied 2. Allowed **02/17/2022**
232P22	Norment v. Rabon, et al.	Defs' (Robert Gary Rabon, James Miklosko, and Advantage Lending, LLC) Petition for Writ of Certiorari to Review Orders of the North Carolina Business Court	Denied

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234P22	Stoner v. Stoner	Plt's Petition for Writ of Certiorari to Review Order of the COA (COA21-467)	Special Order
236P22	State v. Louis Everette McLean	Def's Petition for Writ of Certiorari to Review Order of Superior Court, Wake County	Denied **Ervin, J., recused**
240P03-2	Estate of Louis Dalenko v. Wake County Department of Human Services, Thomas W. Hogan, Susan Harmon, and Lou A. Newman	1. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-158) 2. Plt's Pro Se Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31 3. Def's (Lou A. Newman) Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
249PA19-2	Ashe County, North Carolina v. Ashe County Planning Board and Appalachian Materials, LLC	1. Petitioner's Motion to Dismiss Appeal (COA18-253-2) 2. Petitioner's Conditional Motion to Withdraw Appeal 3. Respondent's (Appalachian Materials, LLC) Petition for Writ of Certiorari to Review Decision of the COA 4. Blue Ridge Environmental Defense League and its Chapter Protect Our Fresh Air's Motion for Leave to File Amicus Brief	1. 2. 3. 4. Allowed **11/16/2022** **Berger, J., recused**
257P22	Tracie Setzer v. Monarch Projects LLC d/b/a Mainstay Suites, Moli Khad, individually, and Kavan Patel, individually	Def's (Moli Shah) PDR Under N.C.G.S. § 7A-31 (COA21-623)	Denied
261A18-3	North Carolina State Conference of the National Association for the Advancement of Colored People v. Tim Moore, in his official capacity, Philip Berger, in his official capacity	Plt's Petition for Writ of Mandamus	Dismissed as moot **11/17/2022**
264P22	State v. Steven Ray Rouse	Def's PDR Under N.C.G.S. § 7A-31 (COA21-580)	Denied

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272P22	William C. Scott v. State of North Carolina United States of America - N.C.D.H.H.S. Forsyth County Courthouse, Granville County Courthouse - Central Regional Hospital	1. Petitioner's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Forsyth County 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
276A22	State v. Troy Logan Pickens	1. Def's Notice of Appeal Based Upon a Dissent (COA20-515) 2. State's PDR Under N.C.G.S. § 7A-31	1. --- 2. Allowed
277P22	Melva Lois Banks Gray, as Administratrix of the Estate of Steven Philip Wilson v. Eastern Carolina Medical Services, PLLC, et al.	Defs' PDR Under N.C.G.S. § 7A-31 (COA20-898)	Allowed
281P06-10	Teague v. DOT	1. Plt's Pro Se Emergency Petition for Writ of Certiorari to Review Order of N.C. Office of Administrative Hearings 2. Plt's Pro Se Motion for Jury Trial	1. Dismissed 2. Dismissed
285P22-2	State v. Charles Edward Bender	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP22-395)	Dismissed
287P22	State v. John Michael McNeil	Def's PDR Under N.C.G.S. § 7A-31 (COA21-629)	Denied
288A21-2	In the Matter of J.C.J. & J.R.J.	1. Respondent-Mother's Motion for Temporary Stay 2. Respondent-Mother's Petition for Writ of Supersedeas	1. Denied **12/13/2022** 2. Denied **12/13/2022**
288P22	State v. Jessica Brandy Hinnant	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's Petition for Writ of Certiorari to Review Order of COA	1. Denied **09/26/2022** 2. Denied 3. Denied

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291P22	R.E.M. Construction, Inc., Plaintiff v. Cleveland Construction, Inc., MHG Asheville TR, LLC; Asheville Arras Residences, LLC, and Federal Insurance Company, Defendants and United States Surety Company, Intervenor	Def's (Cleveland Construction, Inc.) PDR Under N.C.G.S. § 7A-31 (COA21-781)	Denied
297PA16-3	In the Matter of the Adoption of C.H.M., a Minor Child	1. Petitioners' Motion for Temporary Stay (COA21-196)	1. Allowed **07/07/2021** Dissolved **12/07/2022**
		2. Petitioners' Petition for Writ of Supersedeas	2. Dismissed as moot **12/07/2022**
		3. Respondent-Father's Motion to File Under Seal	3. Allowed **07/09/2021**
		4. Respondent-Father's Motion to Take Judicial Notice	4. Allowed **07/09/2021**
		5. Respondent-Father's Motion for Extension of Time to File Response to Petition for Writ of Supersedeas	5. Allowed **07/19/2021**
		6. Petitioners' Motion to Take Judicial Notice	6. Dismissed as moot **12/07/2022**
		7. Respondent-Father's Notice of Appeal Based Upon a Dissent	7. ---
		8. Respondent-Father's Amended Notice of Appeal Based Upon a Dissent	8. ---
		9. Respondent-Father's Notice of Appeal in the Alternative Based Upon a Constitutional Question	9. Dismissed as moot **12/07/2022**
		10. Respondent-Father's Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31	10. Denied **06/15/2022**
		11. Respondent-Father's Motion to Clarify Briefing Timeline	11. Special Order **06/15/2022**
		12. Respondent-Father's Motion to Amend Record on Appeal	12. Denied **11/02/2022**
		13. Petitioners' Motion to Strike	13. Dismissed as moot **12/07/2022**
		14. Respondent-Father's Motion for Leave to Withdraw Appeal	14. Allowed **12/07/2022**

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297PA18	State v. Antwaun Kyral Sims	1. Def's Petition for Writ of Mandamus (COA17-45) 2. Def's Petition for Writ of Mandamus	1. Dismissed as moot **11/08/2022** 2. Denied **11/08/2022**
298P22	Lisa Biggs, Individually and as Administrator, Estate of Kelwin Biggs v. Daryl Brooks, Nathaniel Brooks, Sr., Kyle Ollis, Individually, and Boulevard Pre-Owned, Inc.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA21-653) 2. Plt's Motion to Amend PDR 3. Plt's Amended PDR Under N.C.G.S. 7A-31 4. Def's (Boulevard Pre-Owned, Inc.) Motion for Sanctions 5. Def's (Boulevard Pre-Owned, Inc.) Motion in the Alternative to Strike 6. Plt's Motion for Temporary Stay 7. Plt's Petition for Writ of Supersedeas 8. Plt's Petition for Writ of Certiorari to Review Decision of the COA	1. Dismissed as moot 2. Allowed **09/28/2022** 3. Denied 4. Dismissed as moot 5. Dismissed as moot 6. Denied **10/27/2022** 7. Denied 8. Denied
299P21	Lori H. Postal v. Daniel A. Kayser, et al.	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA20-623) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Amend PDR	1. Denied 2. Dismissed as moot 3. Allowed
300P22	State v. Antonio Goncalves	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA21-801)	Denied
301P22	In re M.T. & K.T.	1. Respondent-Mother's Motion for Temporary Stay (COA21-755) 2. Respondent-Mother's Petition for Writ of Supersedeas 3. Respondent-Mother's PDR Under N.C.G.S. § 7A-31	1. Denied **11/03/2022** 2. Denied **11/03/2022** 3. Denied **11/03/2022**
302P22	State v. Dametri O. Dale	1. Def's Pro Se Petition for Writ of Mandamus 2. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA 3. Def's Pro Se Motion to Waive Fees and Proceed as Indigent	1. Denied 2. Dismissed 3. Allowed

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304P22	Taiming Zhang v. Andrew Joseph Bonomolo	1. Plt's Pro Se Motion for Petition for Review 2. Plt's Pro Se Motion for Preliminary Issues 3. Plt's Pro Se Motion to Waive All Fees 4. Plt's Pro Se Motion for Expedition	1. Denied 2. Dismissed as moot 3. Allowed 4. Dismissed as moot
308P22	State v. Mason Troy Nickelson	Def's PDR Under N.C.G.S. § 7A-31 (COA21-699)	Denied
309P22	State v. Walter D. Giese	1. State's Petition for Writ of Certiorari to Review Order of Superior Court, Onslow County 2. State's Petition in the Alternative for Writ of Certiorari to Review Order of the COA	1. Allowed 2. Dismissed as moot
310P22	State v. Ray Marshall Lawson, Sr.	Def's PDR Under N.C.G.S. § 7A-31 (COA21-698)	Denied
317P19-2	In re Entzminger	1. Respondent's Motion for Temporary Stay (COA21-525) 2. Respondent's Petition for Writ of Supersedeas 3. Respondent's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/07/2022** Dissolved 2. Denied 3. Denied
317P22	State v. Joseph Ngigi Kariuki	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-11)	Denied
320P22	State v. Aljariek Freeman	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-218)	Denied
323P11-2	State v. Ricky Dean Norman	1. Def's Pro Se Motion for Notice of Appeal (COAP20-348) 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Petition in the Alternative for Writ of Certiorari to Review Order of the COA 4. Def's Pro Se Motion for Petition for Consideration 5. Def's Pro Se Motion for Amended PDR	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed 4. Dismissed 5. Allowed

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323P22	Jason Logue v. Chessica Logue and Chessica A. Logue, DDS, PA	Def's (Chessica Logue) PDR Under N.C.G.S. § 7A-31 (COA21-485)	Denied **Berger, J., recused**
324P21	State v. Mark Stevens	Def's Pro Se Motion and Request for Dismissal	Dismissed
325P22	State v. Lester Barnett	Def's Pro Se Motion for Notice of Appeal (COAP22-454)	Dismissed
326P22	State v. Robert Merritt	1. Def's Pro Se Motion to Withdraw Plea 2. Def's Pro Se Motion for Reconciliation	1. Dismissed 2. Dismissed
327P22	Lawing v. Miller, et al.	1. Plts' Motion for Temporary Stay (COA22-99) 2. Plts' Petition for Writ of Supersedeas 3. Plts' PDR Under N.C.G.S. § 7A-31	1. Allowed **11/04/2022** Dissolved 2. Denied 3. Denied
328P22	Scott Waters v. William Pumphrey	1. Def's Motion for Temporary Stay (COA20-816) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/07/2022** 2. 3.
329P22	State v. Aaron Brett Harrison	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA21-788)	Dismissed
336P22	West Virginia Department of Health and Human Resources, Bureau of Child Support Enforcement v. Charlene D. Cliborne and William D. Woolens	Petitioner's (William D. Woolens) Pro Se Motion for Review	Denied
337P22	State v. Rachel Doreen Strickland	Def's Petition for Writ of Certiorari to Review Order of the COA (COA22-380)	Denied
338P22	State v. Stephen Leslie Russell	Def's Pro Se Motion for Appeal (COAP22-541)	Dismissed

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341P12-9	In re Donald Durrant Farrow	1. Petitioner's Pro Se Petition for Writ of Mandamus 2. Petitioner's Pro Se Motion for Judicial Review 3. Petitioner's Pro Se Motion to Enforce Stipulation Federal Rules of Evidence	1. Denied 2. Dismissed 3. Dismissed **Ervin, J., recused** **Berger, J., recused**
341P22	Belletete v. Estate of Lucien B. Belletete, et al.	1. Plt's Pro Se Motion for Immediate Stay and Revoke All Superior Court Orders (COAP22-303) 2. Plt's Pro Se Motion for Discretionary Review 3. Plt's Pro Se Motion for Writ of Centauri 4. Plt's Pro Se Motion for Transfer to Another County 5. Plt's Pro Se Motion to Provide and Assign a State Official or State DA or Federal DA to Investigate	1. Dismissed **11/22/2022** 2. Dismissed **11/28/2022** 3. Denied **11/22/2022** 4. Dismissed **11/22/2022** 5. Dismissed **11/22/2022**
342PA19-2	Holmes, et al. v. Moore, et al.	1.Plts' Motion to Dismiss Plt Brendon Jaden Peay 2. Plaintiff's Motion to Admit Andrew J. Ehrlich, Jane B. O'Brien, and Paul D. Brachman Pro Hac Vice	1. Allowed 2. Allowed **03/25/2022**
344P21	State v. Larry Fritsche	1. Def's PDR Prior to Determination by COA (COA21-473) 2. State's Motion to Dismiss Appeal 3. Def's Notice of Appeal Based Upon a Constitutional Question 4. Def's PDR Under N.C.G.S. § 7A-31 5. State's Motion to Dismiss Appeal	1. Dismissed as moot 2. Dismissed as moot 3. --- 4. Allowed as to Issues I and II 5. Allowed
348P22	State v. Charles Francis Graham	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Durham County 2. Def's Pro Se Motion to Appoint Counsel	1. Denied 2. Dismissed as moot

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349P22	State v. Nathan Gabriel McBryde	1. Def's Motion for Temporary Stay (COA22-122) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. Def's Motion for Leave to File Amended Record on Appeal	1. Allowed **12/06/2022** 2. 3. 4.
357P21	Momen Waly v. Soha Alkamary	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA19-1054) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Strike Belated Response to PDR	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as moot
357P22	State v. Fonz Shepard	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **12/08/2022**
360P22	State v. Wesley Nathaniel Truesdale	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **12/09/2022**
364P22	State v. Scott Allen Haughey	1. Def's Pro Se Petition for Writ of Habeas Corpus 2. Def's Pro Se Motion to Waive Fees	1. Denied **12/12/2022** 2. Dismissed as moot **12/12/2022**
368P21	Ardeal Roseboro v. Winston-Salem Forsyth Co. School Board of Education	Plt's Pro Se Motion to Investigate Allegations of Multifarious Violations	Dismissed
371P21	Lauren Osborne, by and through her Guardian, Michelle Ann Powell and Michelle Ann Powell v. Yadkin Valley Economic Development District Incorporated; Stokes County Board of Education; Stokes County Schools; Sonya M. Cox; Patricia M. Messick; Rebecca Boles; William Hart; Jamie Yontz; Brad Lankford; Ronnie Mendenhall; Jeff Cockerham	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA20-485) 2. Def's (Stokes County Board of Education) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot

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373A00-3	State v. Lionel Lewis Rogers	Def's Pro Se Motion to Furnish the Appellate Record Without Charge	Denied
381P21	Nicole J. Blanchard v. David M. Blanchard	1. Def's PDR Under N.C.G.S. § 7A-31 (COA19-866) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
383P20-2	Derek Hendricks v. N.C. Dept. of Justice, et al.	1. Petitioner's Pro Se Motion for Notice of Appeal 2. Petitioner's Pro Se Motion for Notice of Motions	1. Dismissed 2. Dismissed
406PA18-2	State v. Cory Dion Bennett	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-1027-2) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed **Berger, J., recused**
409P21	In the Matter of A.S.	Respondent's PDR Under N.C.G.S. § 7A-31 (COA21-149)	Denied
413PA21	Harper, et al. v. Hall, et al.	1. Legislative-Defs' Motion to Dismiss Appeal 2. Harper and North Carolina League of Conservation Voters Plts' Motion for Summary Affirmance 3. Plts' (N.C. League of Conservation Voters, Inc., et al.) Motion to Withdraw Zachary Charles Schauf as Counsel	1. Denied 2. Denied 3. Allowed **11/17/2022**
428P18-3	State v. Raymond Dakim Harris Joiner	1. Def's Pro Se Motion to Proceed *In Forma Pauperis* 2. Def's Pro Se Motion for Immediate Release 3. Def's Pro Se Motion to Dismiss for Lack of Subject Matter Jurisdiction 4. Def's Pro Se Motion for Hearing for Default Judgment	1. Allowed 2. Dismissed 3. Dismissed 4. Dismissed
485PA19	State v. Cashaun K. Harvin	State's Motion for Summary Denial of Motion for Appropriate Relief	Denied **10/27/2021**

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

16 DECEMBER 2022

499P05-2	Peden General Contractors, Inc. v. Carol Dalenko (f/k/a Bennett), d/b/a Brighton Stables	1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-74) 2. Def's Pro Se Motion to Consolidate Appeals 3. Plt's Motion to Dismiss Appeal	1. --- 2. Dismissed 3. Allowed
499P20-3	In re Noori	1. Respondent's Pro Se Motion for Stay of Execution in the Trial Court 2. Respondent's Pro Se Petition for Rehearing	1. Denied **11/23/2022** 2. Denied **11/23/2022**
529A20	Theodore Justice v. Deacon Jones Automotive of Clinton, LLC; Deacon Jones Auto Park, Inc.; and Bobby Kenneth Jones, III	1. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA20-76) 2. Def's Motion to Dismiss Appeal	1. --- 2. Allowed **Berger, J., recused**
580P05-27	In re David Lee Smith	1. Def's Pro Se Motion to Reconsider Petition for Writ of Mandamus 2. Def's Pro Se Motion to Liberally Construe Petition for Writ of Mandamus 3. Def's Pro Se Motion for PDR 4. Def's Pro Se Motion for Emergency Application for Sentence Consolidation 5. Def's Pro Se Emergency Petition for Writ of Mandamus 6. Def's Pro Se Emergency Motion for New Fair Resentencing Hearing 7. Def's Pro Se Emergency Motion for New Fair Resentencing Hearing 8. Def's Pro Se Emergency Petition for Writ of Mandamus 9. Def's Pro Se Emergency Petition for Writ of Mandamus 10. Def's Pro Se Emergency Petition for Writ of Mandamus 11. Def's Pro Se Emergency Petition for Writ of Mandamus 12. Def's Pro Se Emergency Petition for Writ of Mandamus 13. Def's Pro Se Emergency Petition for Writ of Mandamus	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Denied 6. Dismissed 7. Dismissed 8. Denied 9. Denied 10. Denied 11. Denied 12. Denied 13. Denied **Ervin, J., recused**

Disposition of Petitions for Discretionary Review Under G.S. 7A-31

16 December 2022

629P01-10	State v. John Edward Butler	1. Def's Pro Se Motion to Appeal Petition for Writ of Habeas Corpus and New Discovery Motion	1. Denied **11/02/2022**
		2. Def's Pro Se Motion to Appeal Petition for Writ of Certiorari, Motion for Post-Conviction DNA Testing, All Other DNA Motions, and Motion AOC-G-108 Petition to Sue as Indigent	2. Dismissed **11/02/2022**
		3. Def's Pro Se Petition for Writ of Mandamus	3. Denied **11/02/2022**
		4. Def's Pro Se Petition for Writ of Mandamus	4. Denied **11/02/2022**
		5. Def's Pro Se Motion to Appeal Certiorari	5. Dismissed **11/02/2022**
		6. Def's Pro Se Motion for Certiorari	6. Dismissed
		7. Def's Pro Se Motion to Resolve and Exhaust State Remedy	7. Dismissed

APPENDIX

CLIENT SECURITY FUND

IN RE CLIENT SECURITY FUND OF THE NORTH CAROLINA STATE BAR	)))	ORDER

This matter coming on to be considered before the Supreme Court of North Carolina in conference duly assembled on the 13th day of December 2022, upon request of the North Carolina State Bar Council, and it appearing from information submitted by the Board of Trustees of the Client Security Fund and the Council of the North Carolina State Bar that the annual assessment of active members of the North Carolina State Bar in support of the Client Security Fund is not needed in the year 2023;

Now, therefore, the continuing order entered by the Court on 16 November 2006, which imposed an annual assessment for the Client Security Fund of $25 per active member for the year 2007 and was, by the terms of the order, to continue in effect from year to year, is hereby suspended, for the year 2023 only, and no assessment is ordered for the year 2023.

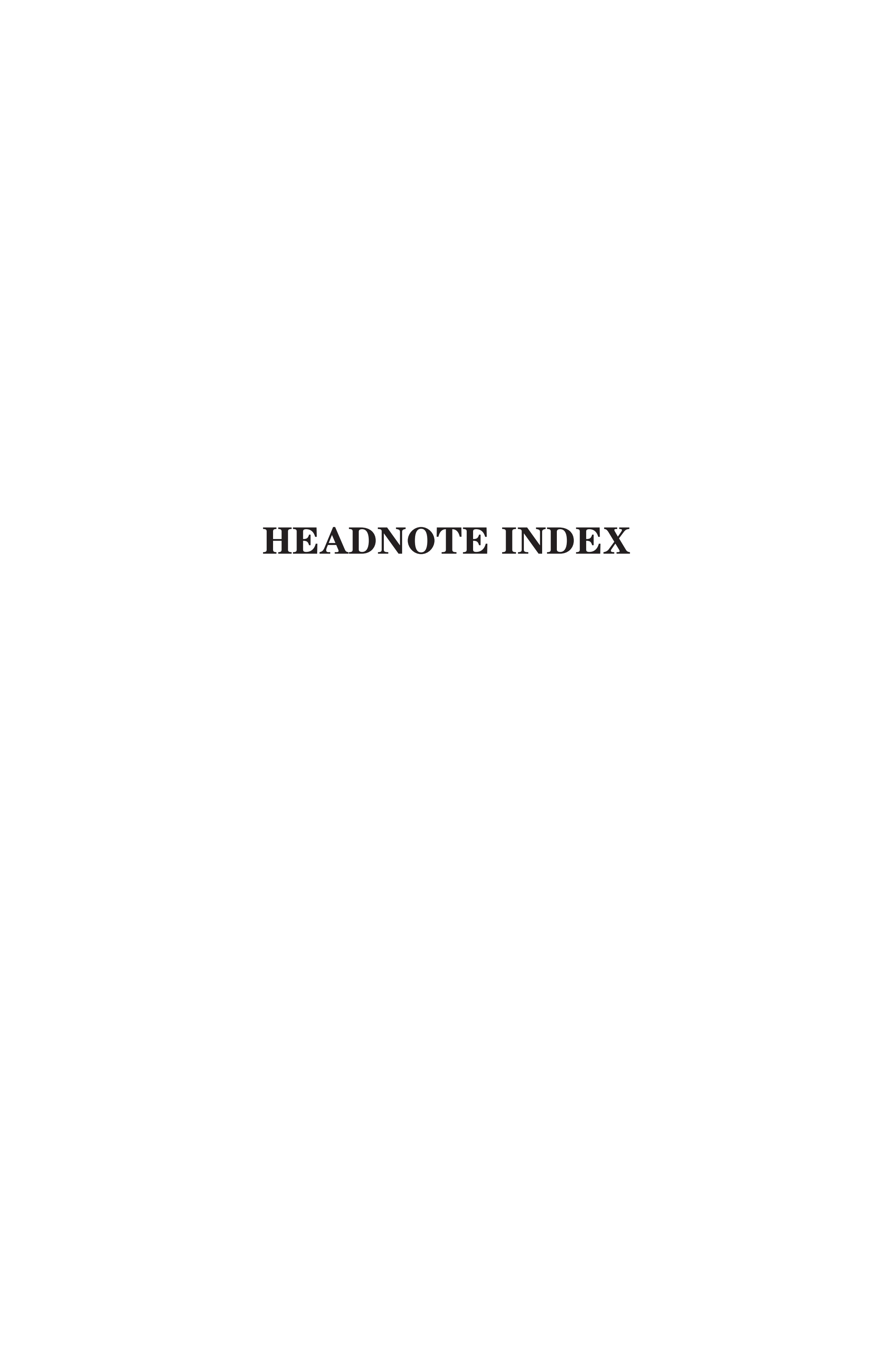
By order of the Court in Conference, this the 13th day of December 2022.

/s/ Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 13th day of December 2022.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court



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APPEAL AND ERROR

Motion to dismiss own appeal—denied—legislative redistricting plans—constitutionality—applicability to future elections—In a case involving legislative redistricting plans, where legislative defendants appealed to the Supreme Court from the trial court's ruling regarding the constitutionality of remedial redistricting maps, but then filed a motion to dismiss their own appeal on the basis that the election to which the remedial maps primarily applied had already taken place, the Supreme Court denied the motion—after noting that it had been filed just after legislative defendants' petition for certiorari to the United States Supreme Court was granted—in order to resolve an issue of great significance to the jurisprudence of this state. **Harper v. Hall, 89.**

Preservation of issues—no opportunity to object—trial court acting on own motion—incorporation of report into findings—Respondent's challenge to the trial court's incorporation of a non-testifying physician's examination report into the findings of facts in its involuntary commitment order was preserved for appeal because the trial court acted on its own motion without informing the parties and respondent had no opportunity to object. **In re R.S.H., 334.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Parental right to counsel—motion to withdraw—lack of notice to parent—no forfeiture of right—The trial court in a neglect case erred by allowing respondent-father's counsel to withdraw at a permanency planning hearing—in which respondent-father had a statutory right to counsel—and by subsequently eliminating reunification as a permanent plan in respondent-father's absence, where the record reflected no notice to respondent-father that his counsel intended to withdraw and no inquiry by the trial court into the basis for his counsel's motion to withdraw. Although respondent-father had consistently failed throughout the case to appear at prior hearings and to communicate with his counsel, this failure was not so "egregious, dilatory, or abusive" as to constitute a forfeiture of his right to counsel. **In re L.Z.S., 309.**

Permanency planning order—eliminating reunification—achievement of revised permanent plan—required factual findings—In a permanency planning matter involving a neglected child, the trial court did not err by eliminating reunification with the juvenile as a permanent plan, where the court entered a permanency planning order changing the primary permanent plan from custody with a relative to custody with a "court-approved caretaker" (in this case, the juvenile's grandparents by marriage), found that the revised primary plan had been achieved through entry of the order, and made the required written findings pursuant to N.C.G.S. §§ 7B-906.1(d)(3) and 7B-906.2(b) that reunification efforts clearly would be inconsistent with the juvenile's health or safety. **In re K.P., 292.**

Permanency planning—custody to non-relatives—verification—The trial court in a neglect case properly verified under N.C.G.S. § 7B-906.1(j) that the juvenile's court-approved caretakers (in this case, the juvenile's grandparents by marriage) understood the legal significance of the juvenile's placement with them and that they possessed adequate resources to care appropriately for him. Although the court did not enter any specific findings regarding the verification process, the record showed that the court considered reliable evidence, including testimony from the grandfather and from a social worker in the case, that the grandparents were willing to accept legal custody of the juvenile, had discussed the possibility of custody with the department of social services, and had adequately cared for the juvenile for seven months without any financial difficulty. **In re K.P., 292.**

CITIES AND TOWNS

Removal of Confederate statue—challenged by private association—state and federal laws—no merit—In an appeal from the dismissal of a declaratory judgment action, which was filed by an association commemorating Confederate Civil War soldiers (plaintiff) after a city and its mayor (defendants) communicated plans to remove a Confederate statue from a former county courthouse, the Supreme Court rejected plaintiff's arguments challenging defendants' action under various state and federal laws where: plaintiff raised some of its contentions for the first time on appeal, and therefore those arguments were not properly preserved for appellate review; plaintiff lacked standing to assert its challenges, either because the statutes it relied upon did not create a private right of action or because plaintiff failed to allege that it had a cognizable legal right (such as ownership of the Confederate monument) under those statutes; and where none of the statutes applied to the facts of the case. **United Daughters of the Confederacy, N.C. Div. v. City of Winston-Salem, 612.**

CIVIL PROCEDURE

Dismissal with prejudice—Rule 12—lack of subject matter jurisdiction—failure to state a claim—In a declaratory judgment action regarding the removal of a Confederate statue from a former county courthouse, the trial court erred in dismissing plaintiff's complaint with prejudice where it did so under both Civil Procedure Rule 12(b)(1)(lack of subject matter jurisdiction) and Civil Procedure Rule 12(b)(6) (failure to state a claim). Dismissal under Rule 12(b)(6) operates as a final adjudication on the merits barring future lawsuits based on the same claims, but dismissal under Rule 12(b)(1) does not; therefore, where the trial court properly dismissed plaintiff's complaint under Rule 12(b)(1) because plaintiff lacked standing to sue, the court's lack of subject matter jurisdiction in the case precluded it from entering a final adjudication on the merits by dismissing the complaint with prejudice under Rule 12(b)(6). **United Daughters of the Confederacy, N.C. Div. v. City of Winston-Salem, 612.**

CONSTITUTIONAL LAW

North Carolina—right to jury trial—waiver—statutory requirements—The trial court complied with N.C.G.S. § 15A-1201(d)(1) and did not abuse its discretion in determining that defendant fully understood and appreciated his decision to waive his right to a trial by jury for attaining habitual felon status where the trial court addressed defendant personally ("you can waive your right to a jury trial"), allowed defendant to consult with defense counsel about the waiver, and allowed defense counsel to answer on behalf of defendant; where defendant signed under oath a waiver of jury trial form; and where the trial court had previously conducted a longer colloquy with defendant on the first day of trial regarding his waiver of his right to a jury trial for the underlying drug and assault offenses, at which time defendant himself responded to each of the trial court's questions. **State v. Rollinson, 528.**

Right to an impartial tribunal—involuntary commitment—no counsel present for the State—trial court questioning witnesses—For the reasons stated in *In re J.R.*, 383 N.C. 273 (2022), the Supreme Court affirmed the Court of Appeals' decision that the trial court in an involuntary commitment hearing did not deprive respondent of his due process right to an impartial tribunal where counsel for the State did not appear at the hearing and the trial court questioned the witnesses.

CONSTITUTIONAL LAW—Continued

Nothing about the manner in which the trial court conducted the hearing tended to cast doubt upon its impartiality; rather, the court simply presided over the hearing, asking questions to increase understanding of the case and illuminate relevant facts to determine whether respondent required continued involuntary commitment. **In re C.G., 224.**

CRIMINAL LAW

Right to appointed counsel—forfeiture—egregious misconduct—relinquishing attorneys—support in record—In defendant's prosecution for attempting to purchase a firearm in violation of a domestic violence protective order, the trial court erred by concluding that defendant had forfeited her right to appointed counsel by engaging in egregious misconduct intended to delay her criminal proceedings. Although the trial court found that defendant had filed four waiver of counsel forms, relinquished five different court-appointed attorneys, filed multiple pro se motions to continue to obtain private counsel, and finally sought to have counsel appointed for her for the sixth time, nothing in the record permitted the conclusion that defendant was engaging in egregious misconduct intended to delay her case; rather, the delays in moving the case to trial appeared attributable to the State or to the usual occurrences that are common in criminal proceedings. **State v. Atwell, 437.**

DISCOVERY

Medical review privilege—statutory elements—findings of fact—no request by parties—An interlocutory order compelling discovery in a wrongful death action, over defendants' argument that the requested document was protected by the medical review privilege (N.C.G.S. § 90-21.22A), was not required by Civil Procedure Rule 52 to contain findings of fact regarding the statutory elements of the medical review privilege where no party specifically requested findings of fact. **Williams v. Allen, 664.**

ELECTIONS

Legislative redistricting—constitutional compliance—whether fundamental right to substantially equal voting power is protected—The Supreme Court reaffirmed the constitutional standard articulated in *Harper v. Hall*, 380 N.C. 317 (2022), that, in order for redistricting maps to satisfy constitutional requirements, they must uphold voters' fundamental rights to vote on equal terms and to have substantially equal voting power. Assessment of evidence under this standard requires a broad consideration of constitutionality rather than a narrow focus on any particular statistical datapoints. **Harper v. Hall, 89.**

Legislative redistricting—remedial congressional plan—lacking constitutional compliance—remedy—The trial court's determination that the legislature's proposed remedial congressional redistricting plan (RCP) did not meet the constitutional standard of protecting voters' fundamental rights to vote on equal terms and to substantially equal voting power—and therefore failed strict scrutiny—was supported by the court's findings of fact, which were in turn supported by competent evidence regarding the plan's partisan asymmetry. The trial court's adoption of the appointed Special Masters' proposed modified RCP was an appropriate remedy pursuant to N.C.G.S. § 120-2.4(a1), and the court's determination that the modified RCP satisfied the constitutional standard was supported by its findings of fact and competent evidence. **Harper v. Hall, 89.**

ELECTIONS—Continued

Legislative redistricting—remedial plans—equal protection challenge—threshold constitutional standard—In a legislative redistricting case in which, after remand, the trial court approved the legislature's proposed remedial house redistricting plan (RHP), an equal protection challenge to that plan—on the grounds that the plan would lead to vote dilution for Black voters—had no merit because the trial court's determination that the RHP satisfied the constitutional standard of upholding voters' fundamental right to vote on equal terms—which involved equal protection principles—was supported by the court's findings of fact, which were in turn supported by competent evidence, including that the legislature conducted a racially polarized voting analysis which demonstrated that the remedial plan was constitutionally sufficient. **Harper v. Hall, 89.**

Legislative redistricting—remedial state house plan—satisfaction of constitutional standards—The trial court's approval of the legislature's proposed remedial state house redistricting plan (RHP)—after determining that the RHP complied with constitutional standards by protecting voters' fundamental rights to vote on equal terms and to substantially equal voting power and was therefore presumptively constitutional—was supported by the court's unchallenged findings of fact, which were in turn supported by competent evidence. **Harper v. Hall, 89.**

Legislative redistricting—remedial state senate plan—lacking compliance with constitutional standards—remand required—The Supreme Court reversed the trial court's order approving the legislature's proposed remedial state senate redistricting plan (RSP) where certain of the trial court's findings were not supported by competent evidence and other findings served to undermine, rather than support, the trial court's conclusion that the RSP was presumptively constitutional. The matter was remanded to the trial court to oversee the creation of a modified RSP that satisfies the constitutional standard regarding partisan symmetry. **Harper v. Hall, 89.**

Legislative redistricting—special masters and advisors—denial of motion to disqualify—abuse of discretion analysis—After the Supreme Court determined that redistricting maps constituted illegal partisan gerrymanders and remanded to the trial court to oversee the redrawing of those maps, and after the trial court appointed special masters to assist it in evaluating the legislature's proposed remedial maps, the trial court did not abuse its discretion when it denied the legislative defendants' motion to disqualify two of the special masters' advisors, who had a limited role in shaping the special masters' recommendations and whose ex parte communications with the special masters were due to expediency and involved only publicly available information. **Harper v. Hall, 89.**

EVIDENCE

Vouching for credibility of witness—description of police questioning technique—plain error analysis—In defendant's prosecution for the murder of his next-door neighbor, the challenged portion of a police officer's testimony was inadmissible where the officer described statements made by the victim's wife and engaged in an extensive discussion of a questioning technique that he utilized to determine whether the wife was telling the truth, thereby impermissibly vouching for the wife's credibility. The unobjected-to error did not rise to the level of plain error, however, given the strength of the State's case against defendant. **State v. Caballero, 464.**

HOMICIDE

Jury instructions—lesser-included offense—involuntary manslaughter—malice—prejudice analysis—In defendant's murder prosecution for the death of his wife, the trial court erred by declining defendant's request to instruct the jury on the lesser-included offense of involuntary manslaughter because, when viewed in the light most favorable to defendant, the evidence permitted the rational conclusion that he acted with culpable negligence in assaulting his wife and leaving her in their motel room while she suffered a drug overdose or heart attack—but that he acted without malice. The error was prejudicial where the jury's only options were to convict defendant of murder or acquit him, and where the jury asked to review certain evidence that could have supported a finding of involuntary manslaughter. **State v. Brichikov, 543.**

INSURANCE

Product liability—multiple insurers—defense and indemnification costs—allocation—pro rata—In a declaratory judgment action to determine the duties and obligations of multiple insurers—from whom a chemical company purchased standard-form product liability policies—for product liability claims related to benzene-containing products, the proper allocation of the costs of defense and indemnification was pro rata rather than an "all sums" approach where the policies at issue limited coverage to injuries resulting from occurrences that took place during the policy period—in this case, actual exposure to the defective product—and this determination was not affected by the policies that contained non-cumulation and continuing coverage provisions. **Radiator Specialty Co. v. Arrowood Indem. Co., 387.**

Product liability—multiple insurers—trigger of coverage—"bodily injury"—period of benzene exposure—In a declaratory judgment action to determine the duties and obligations of multiple insurers—from whom a chemical company purchased standard-form product liability policies—for product liability claims related to benzene-containing products, claimants experienced "bodily injury" caused by an "occurrence" pursuant to the insurance policies, thereby triggering insurance coverage, during their period of actual exposure to the defective product and not when a cognizable injury-in-fact became known. **Radiator Specialty Co. v. Arrowood Indem. Co., 387.**

Product liability—multiple insurers—umbrella policy—duty to defend—exhaustion of limits—horizontal versus vertical exhaustion—In a declaratory judgment action to determine the duties and obligations of multiple insurers—from whom a chemical company purchased standard-form product liability policies—for product liability claims related to benzene-containing products, one insurer's duty to defend another insurer under an umbrella policy was triggered by vertical and not horizontal exhaustion according to the terms of the policy, such that the duty to defend arose when there was no other valid and collectible policy available to cover damages from benzene exposure during a concurrent policy period. **Radiator Specialty Co. v. Arrowood Indem. Co., 387.**

JURISDICTION

Standing—legally enforceable right—removal of Confederate statue—motion to dismiss—In a declaratory judgment action filed after a city and its mayor (defendants) informed an association commemorating Confederate Civil War

JURISDICTION—Continued

soldiers (plaintiff) of its plans to remove a Confederate statue from a former county courthouse, the trial court properly dismissed plaintiff's complaint under Civil Procedure Rule 12(b)(1) for lack of standing where plaintiff failed to allege any ownership or contractual interest in the statue, which was located on private property, and therefore failed to allege the infringement of a "legally enforceable right" sufficient to establish standing under North Carolina law (which does not enforce the "injury in fact" test used in federal courts). Further, plaintiff's complaint did not include the requisite factual allegations for establishing taxpayer standing or associational standing, and the mere fact that defendants contacted plaintiff about removing the statue did not automatically confer standing upon plaintiff. **United Daughters of the Confederacy, N.C. Div. v. City of Winston-Salem, 612.**

KIDNAPPING

First-degree—to facilitate rape—movement after the rape concluded—fatal variance between indictment and evidence—In a prosecution for two counts of first-degree kidnapping, where the evidence showed that defendant entered an elderly woman's home, moved her from the kitchen to her bedroom, raped her, then moved her to a closet inside an adjacent bedroom, took a shower, and fled the scene, the trial court erred in denying defendant's motion to dismiss the kidnapping charge that was based on defendant moving the woman into the adjacent bedroom. A fatal variance existed between the allegation in the indictment that defendant moved the woman to the adjacent bedroom closet "for the purpose of facilitating the commission of" first-degree rape and the evidence showing that the rape had already concluded before defendant moved the woman to that location. **State v. Elder, 578.**

MENTAL ILLNESS

Involuntary commitment—danger to self—insufficiency of findings to support conclusion—An involuntary commitment order was reversed where the trial court's findings of fact—including that respondent suffered from schizoaffective disorder, hallucinations, and disorganized thoughts; was noncompliant with medications when outside the hospital; was unable to sufficiently tend to his dental and nourishment needs; and lived with a physically abusive roommate—failed to support its conclusion that respondent posed a danger to himself. Although the court's findings regarding respondent's symptoms demonstrated that respondent was mentally ill (a required conclusion under N.C.G.S. § 122C-268(j) to support involuntary commitment), these findings, without more, were insufficient to establish that respondent faced a reasonable probability of future physical debilitation absent involuntary commitment (which, pursuant to N.C.G.S. § 122C-3(11)a, is one definition of "dangerous to self," which is also a conclusion required under section 122C-268(j)). **In re C.G., 224.**

Involuntary commitment—private facility—no counsel for petitioner—trial court questioning witnesses—due process—In a bench trial on an involuntary commitment petition filed by a private medical facility, for the reasons stated in *In re J.R.*, 383 N.C. 273 (2022), respondent's due process right to an impartial tribunal was not violated when the trial court proceeded with the hearing even though the petitioning physician was not represented by counsel. **In re R.S.H., 334.**

Involuntary commitment—private facility—no counsel for petitioner—trial court questioning witnesses—due process—In a bench trial on an involuntary commitment petition filed by a private medical facility, respondent's due process

MENTAL ILLNESS—Continued

right to an impartial tribunal was not violated when the trial court, in the absence of counsel for the petitioning physician, called witnesses and elicited testimony. The trial court did not take on the role of prosecutor but rather merely asked neutral and clarifying questions of witnesses based upon the contents of the petition. **In re J.R., 273.**

Involuntary commitment—right to confront witnesses—non-testifying physician's report—prejudice analysis—In an involuntary commitment matter, although the trial court violated respondent's right to confront witnesses by incorporating a non-testifying physician's report into its findings of fact after the hearing concluded, the error was not prejudicial because the trial court's remaining findings were supported by a testifying physician's testimony, and those findings supported the trial court's conclusion that respondent was dangerous to herself. **In re R.S.H., 334.**

POLICE OFFICERS

Body camera recordings—release to city council members—motion to modify restrictions—arbitrary ruling—Where the trial court abused its discretion by summarily denying a city's motion to modify restrictions that the court had previously placed on the city council's use and discussion of police body camera recordings from a particular incident of arrest, the order was vacated and the matter remanded for a new hearing. The trial court's denial was arbitrary because the court failed to provide any factual basis to support its decision, and there was no competent evidence in the record which would have supported a finding that the restrictions did not constitute a substantial impediment to the council members' discharge of their duties. **In re Custodial Law Enf't Recording, 261.**

PROBATION AND PAROLE

Revocation—probationary period expired—required finding of good cause—jurisdiction—The trial court had jurisdiction to revoke defendant's probation where it complied with N.C.G.S. § 15A-1344(f)(3) by making an oral and written finding that good cause existed to do so. Further, the court did not abuse its discretion in finding good cause to revoke defendant's probation over a year after the probationary period had expired, where the court also found that defendant had incurred new criminal charges during his probation and that the State had intentionally delayed his probation violation hearing to allow defendant's pending charges to be resolved first (the violation reports alleged that defendant had committed new criminal offenses, and therefore resolution of the pending charges would impact the hearing). **State v. Geter, 484.**

REAL PROPERTY

Real Property Marketable Title Act—exception under section 47B-3(13)—covenants restricting property to residential use—In a declaratory judgment action regarding residential subdivision lots subject to a set of nine covenants recorded in the 1950s, where the first of the covenants restricted the lots to residential use only while the remaining covenants governed the number, size, location, and type of structures or activities permitted on each lot, only the first covenant survived under N.C.G.S. § 47B-3(13)'s exception to the Real Property Marketable Title Act. Although the nine covenants provided for a general or uniform scheme of

REAL PROPERTY—Continued

development, by the plain language of section 47B-3(13) only the covenant restricting the lots to residential use was shielded from extinguishment by the Act. **C Invs. 2, LLC v. Auger, 1.**

SENTENCING

Multiple drug trafficking charges—substantial assistance—departure from mandatory minimum—discretionary decision—Pursuant to N.C.G.S. § 90-95(h)(5), a trial court's decision to reduce a sentence for a drug-related conviction below the statutory mandatory minimum for substantial assistance is entirely discretionary, no matter the scope or value of that assistance. Therefore, the trial court did not abuse its discretion or act under a misapprehension of the law when, after consolidating defendant's convictions for two drug trafficking offenses and one offense of possession of a firearm by a felon into a single judgment, it declined to make a downward departure from the statutory minimum even though the court found that defendant had provided substantial assistance in one of the drug trafficking cases. **State v. Robinson, 512.**

SEXUAL OFFENDERS

Failure to register—misreporting address—insufficient evidence of deceptive intent—Where defendant, a registered sex offender, was charged under N.C.G.S. § 14-208.11(a)(4) with "willfully" misreporting his place of residence "under false pretenses," the trial court erred in denying his motion to dismiss the charge where there was insufficient evidence that defendant intended to deceive the sheriff's office by listing the wrong apartment building number on a change of information form. For one thing, defendant, who was facing eviction from an apartment where he had lived for only a few days, signed the homeless check-in log at the sheriff's office on the same day that he submitted the change of information form reporting his apartment address; therefore, the evidence did not support the State's theory that defendant listed the wrong apartment address to avoid having to report as a homeless offender. Further, because the change of information form did not have a space to indicate the last effective date for any address, no deceptive intent could be inferred from defendant registering as homeless on the same day that he reported living in an apartment. **State v. Lamp, 562.**

Registered offender—statutory reporting requirement—"new address"— Where North Carolina law requires registered sex offenders who change address to report the "new address" pursuant to N.C.G.S. § 14-208.9(a), any address that has not already been reported constitutes a "new address" under the statute. Thus, in a case where a registered sex-offender was homeless, then moved into an apartment, then became homeless again a few days later, he was still required to report his old apartment address as a "new address" even though he no longer lived there. **State v. Lamp, 562.**

TAXATION

Sales tax—imposed on purchase of out-of-state goods—goods received by North Carolina purchasers—The assessment of a sales tax by the Department of Revenue on the sales of printed materials that were produced by plaintiff, an out-of-state company—and that were purchased by and shipped to North Carolina customers—did not violate the Commerce Clause or the Due Process Clause of the U.S.

TAXATION—Continued

Constitution. The factual circumstances were not governed by *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944), but by subsequent decisions *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), which implicitly overruled *Dilworth* in relevant aspects. Plaintiff's sales were subject to taxation because its activities had a substantial nexus with North Carolina; the sales tax was imposed in accordance with North Carolina's sourcing statute; and the tax was fairly apportioned, nondiscriminatory, and sufficiently related to state-provided taxpayer services. **Quad Graphics, Inc. v. N.C. Dep't of Revenue, 356.**

TORT CLAIMS ACT

State agency—regulatory action—adult care home—The claims of an adult care home and its owner (plaintiffs) against the N.C. Department of Health and Human Services (defendant) seeking damages pursuant to the State Tort Claims Act for defendant's allegedly negligent inspection of and regulatory action against the adult care home were barred because the State Tort Claims Act did not waive the state's sovereign immunity for "negligent regulation" and, by its plain language, the Act did not apply because private persons do not exercise regulatory power. Furthermore, plaintiffs' claims should have been dismissed for the additional reason that plaintiffs failed to state a claim for negligence, as state regulators do not owe a duty of care to regulated entities. **Cedarbrook Residential Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs., 31.**

WORKERS' COMPENSATION

Death benefits—beneficiaries—dependency status—unmarried partner—claim properly dismissed—The Industrial Commission properly dismissed a claim for death benefits that was filed by decedent's alleged cohabitating fiancée who, because she lacked a legally recognized relationship with the deceased, did not qualify as a dependent pursuant to N.C.G.S. § 97-39. **West v. Hoyle's Tire & Axle, LLC, 654.**

Death benefits—timeliness of claim—jurisdiction established by prior workers' compensation claim—The Industrial Commission had jurisdiction to hear a widow's claim for death benefits that she filed nearly three years after the death of her husband (a state university employee) because her husband had timely filed a workers' compensation claim regarding his workplace injury ten days before his death. The husband's filing constituted "a claim" for purposes of meeting the two-year filing deadline set forth in N.C.G.S. § 97-24(a) and, therefore, sufficiently met the statute's condition precedent to invoke the Commission's jurisdiction over that claim and the subsequent death benefits claim related to the same injury. Based on the statute's plain language and legislative history, separate and distinct filings for workers' compensation and death benefits were not required to establish the Commission's jurisdiction. **McAuley v. N.C. A&T State Univ., 343.**